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Miscellanea Iuris Gentium is a journal devoted to the problems of theory and the practical application of Public International Law. We also would 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 (printed and on the disk formatted in Word Program) 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 biographical data, including the current affiliations.

The materials sent will not be returned to the authors. The author will be notified in 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 20 pieces of the MIG Yearbook including his or her printed article.

From the Editor

After a few years' break, we present to the readers the third issue of *Miscellanea Iuris Gentium*. Andrzej Zdebski's idea of publishing a series of academic papers, only two of which have appeared in print up until now (in 1990 and in 1991), was put into practice in the Jagiellonian University Chair of Public International Law, headed by professor Stanisław Nahlik and subsequently by professor Gwidon Rysiak. In this way the current issue of *Miscellanea* is the continuation of the series started 10 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 as well as their collaborators. In the meantime, many of the junior authors have obtained professorships. We would also like to continue this good tradition.

Besides papers devoted to the theory and practice of international public law, we intend to publish materials relating to the history of teaching public international law at Polish and foreign universities, as well as biograms of renowned scholars specializing in the law of nations. The present issue of *Miscellanea* appears on the 600th anniversary of the Cracow University restoration. It is an excellent opportunity to remind the readers about the silhouette and academic achievement of Stanislas of Skarbimierz, one of the most outstanding representatives of the 15th century Cracow school of *ius gentium* and at the same time, the first rector of the restored Cracow University.

K.L.

ARTICLES

MISCELLANEA IURIS GENTIUM No. 3-4/2000-2001
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PROTECTION OF HUMAN RIGHTS AND DIGNITY OF THE HUMAN BEING IN THE CONTEXT OF THE APPLICATION OF BIOLOGY AND MEDICINE – FROM THE NUREMBERG CODE OF CONDUCT TO THE EUROPEAN CONVENTION

by

Kazimierz Lankosz*

The freedom of scientific research is regarded as the fundamental value of a democratic society, a condition of progress and our adaptation to the changing environment. Generally speaking, academic research comprises all activities and procedures undertaken in order to broaden human knowledge and use it in a practical way. The right to freedom of academic research is clearly guaranteed in some constitutions of European states[1].

In binding documents of international law, such a right[2] is expressed in Article 15 of *the International Covenant of Economic, Social and Cultural Rights*[3]. The State Parties to the Covenant undertake to respect the freedom indispensable for scientific research.[4]

The right to conduct academic research should be implemented without any limitations on behalf of the state authorities whereby the state should

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[1] *Cf. e.g.* Article 73 of the *Constitution of the Polish Republic* of 1997 (Legal Journal: Dz.U. 1997, Nr 78, poz. 483).

[2] ..."*the right of everyone*... (6) *to enjoy the benefits of scientific progress and its applications*".

[3] 993 U.N.T.S. 3.

[4] Art. 15, para 3 of the *Covenant*.

define the directions and ways of conducting research as well as define the goals of research. Yet, the scientists are not entitled to conduct research and experiments which could lead to an infringement of the rights and interests of other people.

In 1946, the American Military Tribunal in Nuremberg issued a verdict whereby twenty Nazi medical doctors had been found guilty of genocide; seven of them had been sentenced to death! The trial revealed that the Nazi doctors conducted numerous experiments and pseudo-scientific practices in which human beings had been treated like "guinea-pigs". The Nuremberg trials triggered off an international ethical debate on the limits of scientific research, and this in turn led to the first ever formulation of an international set of ethical principles to be followed by researchers and scientists in their work. The so called *Nuremberg Code of Conduct* consists of 10 ethical principles formulated in the sentence of the Tribunal of 19th August 1947 and concerning the above-mentioned trial of the Nazi doctors. The above principles are still regarded as the most fundamental set of precepts relating to scientific research. The Code constitutes a foundation on which future international legislative acts, concerning among others the ethics of scientific research as well as medical ethics, will be built.

The foremost of these are the fundamental documents formulating human rights and the obligations of states as regards their protection. *The Universal Declaration of Human Rights* [5] which was passed by the United Nations General Assembly, states in Article 3 that "*Everyone has the right of life, liberty and security of person*", whereas the *International Covenant of Civil and Political Rights* of 1966 [6] states in its article 6, paragraph 1: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*", adding in article 7: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*". The above general principles, have now become a part of the universal, customary international law, similarly to other principles such as e.g. the principle of non-discrimination which are of importance from the point of view of our current deliberations.

[5] G.A. Res. 217 A (III) G.A.O. R. 3rd Sess., Part I.
[6] 999 U.N.T.S. 171.

The Nuremberg code was not a binding international act. Yet, it paved the way to various treaties and helped to crystallize the universal customary law. A similar role was played by the *Helsinki Declaration*, which contained a set of recommendations for physicians conducting bio-medical experiments on human subjects [7]. The above Declaration contains a more detailed and exhaustive presentation of the principles which should be followed by physicians while conducting scientific research. Above all, the declaration establishes priorities to be followed by researchers in their work; it states that research on human subjects should be carried out exclusively for therapeutic and diagnostic purposes, so as to enable one to better understand the origin of diseases and the nature of pathological changes[8]. It is very important to distinguish clearly between medical studies which have a prophylactic or therapeutic aim for the patient, and studies that are purely scientific in character and have no immediate effect on the subject of the experiment. Conducting experiments on human subjects must be preceded by exhaustive studies on animals; one should take into consideration the risk which such experiments involve as well as the relationship between potential benefits and losses, which may be the outcome of the experiment.

The consistent use of the expression "human subject" in the above Declaration, does not mean that the subject of the experiments must necessarily be a living human being; that is why, the above principles could equally well be applied to the human embryo which undeniably contains within itself a human potential. Article 6 speaks about the right of the subject undergoing a scientific experiment to retain his/her integrity and inviolability[9].

After the passing of the *Helsinki Declaration*, several international organizations set about the task of implementing its ethical principles into life. A number of bio-ethical committees had been set up which dealt with the specific problems of ethical implications of genetics as well as research on the embryos.

[7] *Declaration of Helsinki, Recommendations Guiding Physicians in Biomedical Research Involving Human Subjects*, adopted by 18th World Medical Assembly (Helsinki, June 1964), amended by the 29th World Medical Assembly (Tokyo, October 1975), the World Medical Assembly (Venice, October, 1983), and the 41st World Medical Assembly (Hong Kong 1989).
[8] *Declaration of Helsinki*, Preamble.
[9] "*The right of the research subject to safeguard his or her integrity must always be respected. Every precaution should be taken to respect the privacy of the subject and to minimise the impact of the study on the subject's physical and mental integrity and on the personality of the subject*".

The most advanced research is being conducted in the European Union and under the auspices of the Council of Europe. Due to a wider forum of public debate within the Council of Europe (its membership extends to 41 states, while only 15 states make up the EU) as well as its main objective, which is the protection of human rights (and bio-ethics certainly touches upon the most sensitive issue of human integrity, as being discussed here about research on the human genetic code and introducing changes in the course of the earliest stages of human development), it exerts the biggest impact on the development of universal awareness of the international community as regards the benefits and dangers connected with the dynamic development of medicine and biotechnology. In the course of the many years of its activity, the Council of Europe has prepared numerous documents which have marked out the boundaries of the so far unlimited freedom of scientists, in the form of recommendations and resolutions. The system protecting human rights in democratic Europe is based on the *European Convention on Human Rights and Fundamental Freedoms*[10] worked out by the Council. It is the most complex system of protection of human rights which has so far been created in the world. It seems that in the recent years some of the rights which are being protected by the Convention may be violated by the development of genetic engineering.

In their recommendations and resolutions, the organs of the Council of Europe have often expressed the need for creating new guarantees concerning the rights endangered by the development of biomedicine suggesting that they be included in the *European Convention on Human Rights*. In Recommendation 934 (1982)[11] of the Parliamentary Assembly, an appeal was made to make a record of the right to genetic inheritance which could not be artificially violated, except for situations when it is fully in accord with human rights (e.g. when such changes are carried out for therapeutic purposes).

Moreover at the Ministerial Conference on Human Rights which was held in Vienna in 1985 under the auspices of the Council of Europe, the connection between the development of science and medicine and human rights, was emphasized yet again. In the resolution *On human rights and progress in the field of medicine and biochemistry* (Resolution No 3)[12],

[10] 213 U.N.T.S. 221.

[11] *Recommendation 934 (1982) on genetic engineering* . Assembly debate on 26 January 1982, Texts of Council of Europe on biomedical matters. Doc. CDBI/INF (97) 5, p. 13.

[12] *Resolution No 3 on human rights and scientific progress in the fields of biology, medicine, and biochemistry*, European Ministerial Conference on Human Rights, Vienna 19-20 March 1985.

taking into consideration that the development in the field of biology, medicine and biochemistry relating to the techniques of artificial procreation, experiments on human beings, genetic diagnostics, transplantation of organs, modifications of the genetic code and treatment of mental diseases may bring undeniable benefits to the human species, but may also involve the risk of violating the rights and freedoms of both the individual and the entire society and being convinced of the need for an evaluation of such developments from the point of view of protection of the above rights, the ministers of member states confirmed yet again the fundamental value of the principle of human dignity and emphasized the importance of international debate devoted to this issue. Thanks to this, the Council of Europe became a pioneer in the sphere of promotion of the principles of bioethics as well as in preparing the necessary legal instruments delineating the limits of scientific freedom.

Another important event was the acceptance of the above *Recommendation concerning genetic engineering* [13] by the Parliamentary Assembly of the Council of Europe in the year 1982. In this document the Parliamentary Assembly of the Council of Europe establishes that the freedom of scientific research – the fundamental value of the contemporary society and a necessary condition of its adaptation to the changing world, involves both obligations and responsibilities, particularly with regard to health and public safety, on behalf of those who carry out scientific research. The parliamentarians also accepted other principles concerning genetic engineering. They assumed that the latter must have clearly defined boundaries, whereas no research can be conducted without an earlier informed and voluntary consent of the patient, while in the case of embryos or human foetuses, it is the parents or curators that need to give their consent. Progress in the field of science and medicine should be monitored all the time, while the principles of bioethics should be continually updated. In view of such vast and complex problems, there arose an urgent need for creating an institution or a committee within the Council of Europe which would focus its attention on the issues of modern medicine and their implications on the human rights.

The Steering Committee on Bioethics, which had been called to life by the Council's Committee of Ministers, initially as an *ad hoc* group and subsequently as a permanent Committee (CDBI), has been responsible for the intergovernmental activity of the Council of Europe in the field of bioethics

[13] See ref. 11.

since the year 1985. The activity of the Committee has led to the acceptance of a series of recommendations by the Committee of Ministers as well as to the adoption of the first international legal instrument i.e. a 1997 *Convention on Human Rights, Biology and Medicine (Biomedical Convention)*. The Committee is made up of representatives of all member states. Among members of the Committee there are specialists in the fields of biology, medicine, law and ethics. Specialists from the above-mentioned fields from Australia, Canada, Japan, the United States as well as from various international organizations: WHO, OECD, UNESCO and others, have been invited to take part in the Committee proceedings as observers.

The next milestone in the work of the Council of Europe was the acceptance by the Parliamentary Assembly in 1986 of the *Recommendation concerning the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes* [14]. In the above document the Parliamentary Assembly distinguished three major principles which characterize the attitude of the Council of Europe towards research on the human embryo. According to the first principle, the potential benefits which flow from advances in the medical science and bioethics, must be subjected to a thorough analysis and evaluation, so as to decide when and in what circumstances one may take advantage of them, in order to limit the use of technological achievements to those which are desirable and ethically acceptable. Thus, the Assembly opted out for setting limits to scientific research and procedures. Secondly, as regards the issue which is of fundamental significance to research on the embryo, i.e. the issue of protection of the life of an embryo and the scope of this protection, one finds the following statement in the recommendation:

"From the moment of fertilization of the egg cell, the human life constitutes a continuum and it is not possible to distinguish precisely the first phases of its development; that is why, it is necessary to introduce a definition of the biological status of the embryo". [15]

The next principle is the consequence of the above assumption. In accordance with this principle, the human embryo and foetus must in all circumstances be treated with due respect and therefore the use of human

[14] *Recommendation 1046 (1986) on use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes*. Assembly debate on 19 and 24 Sept. 1986.
[15] *Ibidem*.

organs and tissue must be regulated by precisely defined laws and limited to strictly therapeutic ends which cannot be attained by other means.

Representing the above view, the Parliamentary Assembly summoned the governments of the member states to limit the use of human embryos and tissue to strictly therapeutic ends and to undertaking legislative initiatives aiming at regulating the above problems in accordance with the principles of the above recommendation. The Recommendation in question further mentions the techniques which should be banned by law. Among them, one finds: the creation of an embryo by means of *in vitro* fertilization for strictly scientific purposes and in order to carry our experiments; practices leading to deviations such as the creation of half-animals and half-people; placing the human embryo inside an animal; creating an embryo from the reproductive material coming from more than one donor of the male reproductive cells; creating embryos from the genetic material of people representing the same sex; manipulating the sex of the embryos for other than therapeutic ends; carrying out experiments on living embryos, regardless of whether they are capable of further development or not; preserving the embryos *in vitro* longer than 14 days.

In point B of the Recommendation, one finds the first mention of the need to create an international legal instrument devoted to bioethics which would also be open to non-member states of the Council of Europe.

The list of recommendations of the Parliamentary Assembly of the Council of Europe regarding the issues discussed here closes with Recommendation No 1100 of 1989 which raises the issue of the human embryo and foetus in relation to scientific research[16].

The parliamentarians once again appealed to the governments of the member states to attempt to introduce suitable legal norms and regulations both in the national and international legislative systems; they expressed a view that one should introduce such legislation in the interest of progress, harmony, freedom and social justice in all those situations where there arise ethical and social conflicts, in this case connected with the development of science and technology; such conflicts may become a blessing or else a pitfall for mankind which will entrap our social values. The parliamentarians also expressed the need to define the legal status of the human embryo and confirmed once again referring to Recommendation No 1046 that the human

[16] *Recommendation 1100 (1989) on the use of human embryos and foetuses in scientific research*. Assembly debate on 2 Feb. 1989.

life is an indivisible process which has its beginning at the moment of fertilization and regardless of the different names which are used with reference to the human embryo, it always has the same individual genetic potential that makes it a human individual.

Being aware of the role played by this organization, the Parliamentary Assembly of the Council of Europe instigated the governments of its members states to support and develop public debate on bioethics and undertake immediate steps to create multidisciplinary bodies whose task would be to examine the practices of artificial procreation in the aspect of protection of human rights and ethical values.

An enclosure to the Recommendation contains detailed instructions on the way of conducting research and experiments on the human reproductive cells, embryos, the human foetus and the removal of human organs and tissues.

The above presented recommendations of the Parliamentary Assembly of the Council of Europe are not binding for the member states. Nevertheless, they constitute the outcome of many years of debate at the forum of the Parliamentary Assembly which is after all composed of delegations of members of national parliaments, that is people who exert an impact on the legislative policy of European states. The need for incorporating all of the above issues in a single legal act in the form of a treaty which would give it a totally different dimension, had been stressed on many an occasion. An explicit recommendation to prepare a framework convention, which would also be open to accession to non-member states and that would establish common standards of protection of the human being in the context of the development of the biomedical science[17], had been voiced clearly in a resolution on bioethics at a conference of European ministers of justice in Istanbul in 1990.

In answer to the Resolution made at the ministerial conference which stressed that one cannot permit a situation in which the rights of an individual would be endangered by the development of technology and called for the drawing up of a framework convention, the Committee of Ministers recommended to the Committee of Experts on Bioethics (CDBI) that a draft version of such a document should be drawn up. In March 1991, the

[17] The first mention of the need to create such an international document was made in Recommendation 1046 (1986): "*...and prepare, on the basis of the points mentioned in sub-paragraphs 14.A. II to VII, a European convention or any other suitable legal instrument which would also be open to accession by non-member countries of the Council of Europe*", Texts, *op.cit*.p.20.

Parliamentary Assembly received a Report on the progress of work on the biomedical convention. On the basis of the above report, the Parliamentary Assembly accepted Recommendation 1160 on the preparations to the biomedical convention. The recommendation in question specifically mentioned the creation of a framework convention concerning the protection of human rights with respect to the uses of biology and medicine as well as additional protocols relating specifically to the issues of: transplantation of organs, genetics, scientific research (including research on the embryos) and confidentiality of genetic data. In March 1992 a working group was selected whose task was to prepare a preliminary draft of the convention. Representatives of the Parliamentary Assembly as well as the Committee on Legal Affairs and Human Rights took part in the work on the convention.

The first draft version of the convention became the subject of public debate and was submitted for approval by the Parliamentary Assembly in July 1994. Having taken into consideration the views of the public as well as several other opinions expressed in connection with the draft project, the final version of the convention was submitted to the Parliamentary Assembly of the Council of Europe in July 1996. The Convention was adopted by the Committee of Ministers on 19th November 1996. It was open for signature in Oviedo, Spain on 4th April 1997 and entered into force on 1 December 1999[18].

The text of the Convention is the effect of many years of discussions and debates both at the national and international level. The development of biology and medicine has brought about new revolutionary methods of human procreation and new possibilities of exerting an impact on the quality of life and health at the earliest stages of human development i.e. medical interference in the human embryos and genes. Side by side with the developments in biology and medicine, there appear ethical dilemmas connected with the uses of science. Bioethics is a relatively new and multidisciplinary branch of knowledge, whereas the biomedical dilemmas are being perceived with great caution by public opinion. Nonetheless, many of the achievements of contemporary medicine have become a true blessing to millions of people and that is why, one cannot arbitrarily reject the new medical techniques.

Democratic societies need above all comprehensive information and many-sided presentation of the problems which are created by modern science and medicine. The next stage is the formulation of a catalog of ethical and legal

[18] E.T.S. 164.

norms concerning procedures connected with the new achievements in the sphere of biotechnology. Politicians and legislative bodies should take upon themselves the responsibility and obligation to define the rules of conduct in disciplines which are extremely complex and controversial. Physicians and scientists cannot be limited in their activity exclusively by their own conscience, as this activity extends to all people and may effectively infringe upon their rights.

Taking into consideration all of the above circumstances a *Biomedical Convention* has been drawn up. By principle, it is to be a framework convention providing minimal ethical and legal standards connected with the applications of biology and medicine and their consequences for man and his dignity. The Convention lays great stress on the equilibrium between respect for the individual and the prospective achievements in the sphere of biomedicine. The fascination with growth and development should be supplemented with a sober glance at the obtained results and their real value. It must also be accompanied by an awareness that technological progress sometimes becomes the most important aim of our research.

The activities of science and medicine which exert a direct influence on man are connected with two kinds of rights: the first is the right of the individual to life and to respect for his dignity as well as protection of all fundamental and inviolable rights which are connected with this dignity; the second, is the right to deriving benefits from progress in science as a part of human heritage.

The principles contained in the Convention protect these rights and preserve harmony so as not to impede the development of science on the one hand, and on the other, bear in mind the issue of not violating the rights of the individual. Beginning with the preamble the resolutions of the Convention take into consideration the real progress in medicine and biology and at the same time emphasize the need for using it exclusively for the benefit of present and future generations. This is reflected on three planes:

- firstly, on the plane of protection of the individual's rights. For the individual must be protected against the threat of using the achievements of science in the wrong way. Many of the articles of the Convention reflect the authors' intention to emphasize the privileged position of the individual: protection against illegal violation of the human body, a ban on using the human body or its various organs in order to obtain a profit, restrictions on the use of genetic tests etc.

- secondly, on the social plane. The field of biomedicine is indeed a special plane where more than anywhere else the individual should be regarded as

a part of an organism, that is the entire society. If one has to make a choice which is connected with the applications of scientific progress, it must be based on a conscious and premeditated decision and social consent. That is why, the Convention recognizes the importance of public debate and devotes so much attention to it.

Yet, the above interests are not equal in weight: they involve a certain hierarchy pointing out to the prevalence of the interest of the individual over the exclusive interest of science and society at large. The adjective "exclusive" means that one cannot ignore these interests but one has to regard them as second in importance, following the interests of the individual.

- the third and last plane refers to the human species. Many of the recent achievements have been based on genetics. Progress in the discipline of knowledge specializing in genetic structure increases both the possibilities of human intervention and of influencing our genetic make-up. Yet one cannot underestimate the risk which is connected with this constantly broadening area of knowledge. It is no longer the individual or the society that are at risk, but the entire human species. The Convention contains legal guarantees offering protection to the identity of the human individual. It is due to this that the Convention introduces a ban on the intervention into the human genome. Such interventions, if not restricted to somatic therapy, could have serious consequences for future generations.

The entire Convention is inspired by the principle of the primacy of the human individual and all of its resolutions should be interpreted in this light.

The goal of the Convention, as defined by Article 1, is to guarantee the fundamental rights and freedoms to every person, and particularly the right to individual integrity with relation to the uses of biology and medicine.

The Convention does not define the term "every person" and "human individual". In view of the lack of unanimity among the member states of the Council of Europe as to the definition of these terms, it was decided that the above expressions should be interpreted in accordance with the internal law of the individual member states. Attention was drawn to the fact that the *European Convention on Human Rights* does not define the above terms either. Yet, the Convention is unanimous as to the fact that human dignity should be respected from the moment of conception.

In subsequent articles, the Convention refers to such issues as: high professional standards of medical doctors; equal access to medical care; patient's informed consent to medical intervention; protection of persons who

do not have the capacity of informed consent and are subjected to medical examinations and experiments, and special protection of patients with mental disabilities; the right to privacy and obtaining information relating to one's condition; the ban on using the human body for commercial ends; procedures connected with obtaining human organs for transplantation purposes; the freedom of scientific research and the limitations imposed by the fundamental human rights; the ban on creating human embryos exclusively for the purpose of scientific research.

The final provisions (Chapter VIII) impose on the state-parties of the Convention the obligation to ensure suitable legal protection which would prevent any violation of the principles contained in the Convention. Moreover, they state that a person who has suffered unjustified injury due to a medical intervention, has a legitimate right to compensation on conditions which are precisely defined by the law.

The principles contained in the Convention are to constitute a minimum of requirements which must not be further limited [19]. The provisions mentioned in the Convention must not be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention (Art. 27).

Article 15 of the Convention defines a general principle concerning scientific research. It states that: "*Scientific research in the field of biology and medicine shall be carried out freely, subject to the provisions of this Convention and other legal provisions ensuring the protection of the human being*".

[19] Article 26 of the Convention contains a general principle which forbids any limitation in the execution of rights guaranteed by the Convention. The second sentence in the above article enumerates all possible exceptions to the above principle. The exceptions in question are: to protect the interests of the community (public safety, public health, order and counteracting crime) as well as the rights and freedoms of other people. Yet, the above arguments cannot justify any drastic violation or deviation from the rights guaranteed by the Convention. If any limitations are to be permitted, they must be defined by the law and recognised as necessary in a democratic society for the protection of communal interests. Point 2 of the above article enumerates laws which are not subject to any limitations. Among the latter, one finds: a ban on discrimination (Art.11), a ban prohibiting any intervention on the human genome (Art. 13), a ban prohibiting selection due to sex in connection with the use of techniques resorting to methods of artificial procreation (Art.14), protection of individuals subjected to scientific research (Art.16), protection of persons incapable of giving their informed consent to such examinations (Art.17), the principles governing the process of obtaining organs, tissues and human cells for transplantation purposes (Art.19, 20), a ban prohibiting the commercial use of parts of the human body (Art.21).

The freedom of scientific research is due not only to man's right to knowledge, but also to considerable benefits which such research may bring in the sphere of health. Yet, the above freedom is not absolute. In the sphere of medical research, it is limited by fundamental human rights, which are defined explicitly in the provisions of this Convention. In connection with this, one should draw attention to the fact that Art. 1 of the Convention defines its goal as the protection of human dignity and identity and guaranteeing to every person without discrimination, respect for his/her integrity as well as the other basic freedoms. Scientific research must respect the above principles. That is why, such tremendous importance is being attached to the appointment of ethical commissions whose main task is to define the ethical problems connected with practices associated with genetics and experiments in this field[20]. Another indispensable condition for conducting scientific research is informed consent of the patient, and in the case of research on the human embryo, the consent of parents or donors of the reproductive cells.

The provisions contained in Articles 16 and 17 refer to the protection of persons undergoing research, both those who are and those who are not able to personally consent to such research. Naturally, in the latter case, the requirements are far more stringent. Research on the human embryo are the subject-matter of provisions contained in a separate article (18).

The debate which had led to the drawing up of the *Biomedical Convention* allowed us to understand that it is necessary to take into consideration two contradictory requirements: the freedom of science and protection of the human person against the abuses due to unlimited freedom of scientific research. Some of the provisions contained in the Convention will not require any changes. Specifically, this concerns those provisions which refer to the earlier conventions and guarantee the fundamental human rights. Yet, there are other provisions whose formulation was the subject of numerous discussions and had caused many difficulties in reaching an agreement as regards their content. The provisions in question take into account the present condition of scientific

[20] In Art.14 of the Convention one finds the following requirement: "*Research on a person may be undertaken if all the following conditions are met: (...) iii) the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multidisciplinary review of its ethical acceptability*".

knowledge. Yet one cannot rule out the possibility that even those provisions will have to be altered, in connection with the development of science which cannot be foreseen at a given moment. However, the development of science can in no circumstances invalidate or weaken the force of the former provisions.

The most controversial issues in the course of the work on the Convention were the problems connected with research on the human embryos. In some countries, such research is being carried out and suitable legislation exists which marks out the limits of its permissibility. This branch of medicine develops very quickly and that is why, the Convention in its Art. 18.2 introduces a total ban on the creation of human embryos only for research purposes. Although not all member states of the Council of Europe are ready to accept it. Differences in internal legislative systems of individual states as well as different attitudes to certain issues, were also the reason why some problems had not been taken into consideration in the content of the Convention. Such was the situation in the case of regulations relating to the use of genetic information for purposes other than health protection. Although there is a consensus as regards the general principle, yet no agreement has been reached over the issue of its actual formulation. As the text of the provision was not formulated in a way which would satisfy all parties involved, there is no provision in the Convention which would forbid the use of genetic data in areas other than health care (e.g. social insurance, employment agencies), in spite of the fact that all parties recognize the importance of the regulation introducing a ban on the undesirable use of genetic data[21].

Many provisions contained in the Convention seem to have a general and rather laconic character, leaving the more concrete legal regulations to the internal legislation of individual countries. This is largely due to the divergences between the individual European states and the care which they take in undertaking obligations concerning legal regulations relating to many controversial issues. Yet, it is worth emphasizing at this point that the Convention has a general character while one of the legislative techniques often resorted to in the course of drawing up such similar legal instruments, is the preparation of additional protocols, which expand on the specific issues raised in the text of the Convention. In 1998, an *Additional protocol on the prohibition of cloning human beings* was opened for signature. Among others, a special

[21] *Human Rights and Medicine. A Council of Europe Convention*, Editorial, European Journal of Health Law, 1996, Vol. 3 No 1, p. 203.

working team was selected within the CDBI whose task was to prepare a draft version of an additional protocol concerning the issue of legal protection of the human embryo.

The problems of bioethics and medical ethics are very controversial and are solved in different ways even in countries belonging to the Council of Europe, that is those which are culturally very similar. All the more reason why one should appreciate the efforts of the Council of Europe which have led to the passing of the first international agreement that has associated quite closely the issue of the uses of biology and medicine with the rights of man and the dignity of the human being. The Convention entered into force on 1st December 1999, yet it is binding only in relations between 6 countries (Denmark, Greece, San Marino, Slovakia, Slovenia and Spain) which have ratified it. However, it is worth drawing attention to the fact that a relatively big number of states have signed the Convention (23) and the processes of ratification are in progress. This augurs well for the future of the convention. It is a similar situation with the *Additional protocol concerning the prohibition of cloning human beings* which was signed by 25 states and although it has not yet entered into force (it was ratified by 4 countries, while 5 ratifications including 4 member states are needed for it to enter into force) yet one may suppose that it too will shortly become a binding act of international law.

In the course of the last half a century, immense progress has been made in the sphere of biology and medicine. Yet, progress has also been made in the sphere of legal protection against the negative consequences of biomedical experiments and procedures: from the legally non-binding Nuremberg Code to the biomedical convention and the relevant regulations in the internal legislation of many countries.

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THE DISTINCTION BETWEEN RESERVATIONS AND INTERPRETATIVE DECLARATIONS

by

Miguel Angel Martín López*

In point 1.2 of its draft Directive on reservations to international treaties, approved on its first reading, the International Law Commission defines interpretative declarations as: "*...unilateral statements, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions*"[1]. The International Law Commission does not take account of the title given to the unilateral statement by the author. As with reservations, the Commission adopts the view that the name given to the statement is irrelevant. This is logical in light of the fact that, as has been stated repeatedly, some statements presented by their authors as interpretative can be *de facto* reservations. For this reason there is always the concern that reservations may masquerade under an interpretative cloak. This is so particularly where reservations have been prohibited by the treaty.

As is stated in point 1.3 of the above draft Directive[2], the classification of a unilateral statement as a reservation or an interpretative declaration depends entirely upon an analysis of its purported legal effect. Therefore, in light of the definition of "reservation" given in Article 2, paragraph 1 d) of the Vienna Conventions of 1969 and 1986 on the law of treaties, one must establish whether the statement is intended to exclude or modify the legal effects of certain provisions of the treaty. If this is the case, the statement, regardless of whether it is described by its author as interpretative, will be deemed a reservation. The contrary is also true. A unilateral statement must be considered interpretative if it is intended merely to clarify or determine the meaning or scope of one or more provisions of the treaty, even where the statement is described as a reservation.

The problem lies in establishing what is meant by "intending to exclude or modify the legal effects of certain provisions of the treaty". One might take the view that the term relates simply to the subjective intention of the party making the unilateral statement, irrespective of the results produced by the application of the statement in question. This is the construction put forward by the International Law Commission in its commentary on the above draft Directive. It states that, "in accordance with the very spirit of the definition of reservations, they may be distinguished from other unilateral declarations made with regard to a treaty by the legal effect *aimed* at by the declarant, *i.e.* by its *intention* (inevitably subjective)"[3]. According to this view a statement, described as interpretative by its author, should be considered a reservation if the author's intention was to modify or exclude one or more of the legal effects of the treaty, regardless of whether the statement actually achieved that end. The aim would be, in fact, to establish whether the State or international organization in question had used the title for the purpose of concealing its true intention of issuing a reservation.

However, there is another approach whereby the subjective intention of the author of the statement is disregarded and only the actual effect of the application of the unilateral statement is considered. This was the view held by Special Rapporteur Alain Pellet in his Third Report on Reservations to Treaties: "while Article 2, paragraph 1 d) of the 1969 and 1986 Vienna Conventions defines the term reservation as a unilateral declaration by means of which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of the treaty, the actual criterion has its basis in the effective result of the declaration"[4].

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[1] *Report of the International Law Commission on the work of its fifty-first session*, 3rd May-23rd July 1999, A/54/10, p. 179.

[2] Said point states expressly that: "The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce" (*Report of the International.... op. cit.*, p. 180).

[3] *Report of the international...op. cit.*, p. 205.

[4] A/CN. 4/491/Add. 4, *Third Report on Reservations to Treaties by Mr Alain Pellet, Special Rapporteur*, 2nd July 1998, p. 39.

The International Law Commission's commentary on the draft Articles on the Law of Treaties 1966 supports this view. It should be remembered that the Commission had made it clear that statements which *prima facie* were not intended by the author to be reservations could nonetheless be such if their application resulted in the modification or exclusion of one or more of the legal effects of the treaty. The reasoning of the Commission leaves no room for doubt: "such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted"[5].

This view does away with any subjective element and requires merely an analysis of objective effects. Thus professor Pellet states that in order to classify a unilateral statement as a reservation one need only answer one simple question: "Does the declaration have the effect of excluding or modifying the legal effect of the provisions of the treaty? If the answer to this (objective) question is affirmative, one need go no further, the declaration is a reservation"[6].

This view certainly appears to be more logical, avoiding as it does subjective, and potentially abusive, constructions. It is important to bear in mind that if we take into account only the subjective intention of the issuing State to specify and clarify, unilateral statements would per force have to be classified as interpretative declarations irrespective of the content introduced by the author. The situation could then arise where a State, not intending to modify or exclude the legal effects of a treaty, issues a unilateral statement which does in fact modify or exclude said effects. Clearly, then, the subjective approach could potentially result in States being permitted to introduce any content whatsoever into their unilateral statements. Furthermore, the unusual situation would then arise where similar, or even identical, statements could be at once reservations or interpretative declarations, depending only upon the stated intention of their author.

The present International Law Commission appears to favour the objective criterion for distinguishing between reservations and interpretative declarations. Paraphrasing professor Pellet, it states in its commentary on the draft Directive that, "in determining the legal nature of a statement formulated in connection with the treaty, the decisive criterion lies in the effective result that implementing

[5] Yearbook of the International Law Commission, 1966, vol. II, p. 189-190.
[6] A CN. 4 491. Add. 4, *Third Report...op. cit.*, p. 40.

the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provision, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or the scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration" .

Once this stance is adopted, the subjective intention of the author naturally becomes meaningless. However, surprisingly, the International Law Commission, in spite of its stated view, continues to give considerable weight to the subjective criterion. That much is evident in the method adopted by the Commission, in point 1.3.1. of the draft Directive, for distinguishing, in specific cases, between reservations and interpretative declarations. This is to be regretted as it can only be a source of confusion.

According to the Commission, "to determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers"[8]. In view of the objective criterion laid out above, such an interpretation would have the object of analysing the practical effects of applying the statement. However, the Commission states that in such an interpretation, "due regard shall be given to the intention of the State or international organization concerned at the time the statement was formulated"[9]. Equally, and as an aid to said interpretation, the Commission states that, "the phrasing or name given to a unilateral statement provides an indication of the purported legal effect"[10].

The aim of such an interpretative process would apparently be to establish whether the author of the statement wishes or not to exclude or modify the legal effects of the provisions of the treaty. This is complicated by the fact that, as stated by the Commission itself, "States and international organizations seldom explain their intention, even taking pains at times to disguise them"[11]. Is this not, however, to embrace a subjective criterion?

Furthermore, where reservations are forbidden by the treaty, this subjective interpretation would serve simply to establish that the State in question had

[7] *Report of the International...op. cit.*, p. 224.
[8] *Ibidem*
[9] *Ibidem*
[10] *Ibidem*, p. 229.
[11] *Ibidem*, p. 223.

behaved illegally in violating the prohibition on reservations. It is a well-settled principle in international law that there is no presumption of bad faith. Therefore, unless the contrary is proved, declarations should be allowed to preserve the title of interpretative, if that is the title given to them by their author. These arguments are expressly stated by the International Law Commission in point 1.3.3. of the draft Directive: "when a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author"[12].

Nonetheless, the objective view preferred by this article aims not to establish whether the State or international organization wishes to evade the prohibition on reservations laid down by the treaty. It is possible, after all, that the State in question wishes merely to specify or clarify the content of the treaty, but that the practical effect of the statement is to modify or exclude that content. In such cases it is preferable to avoid any reference to subjective intention, and so avoid also accusing the issuing State of acting in bad faith.

One must then regret the International Law Commission's position that the subjective intention of the author should be taken into account, when to do so might lead to a reversal of the objective criterion to distinguish between reservations and interpretative declarations, established by Alain Pellet and implicitly recognised by the International Law Commission itself.

Nonetheless, the author's subjective intention may have an important part to play in determining the legal consequences of issuing reservations prohibited by the treaty. If it is clear that the author would not have accepted the treaty without the inclusion of the terms of the prohibited reservation, that State's consent to be a party to the treaty becomes void. However, if the State's overriding intention was to accept the treaty, the finding that a statement was in fact a reservation would not void the consent and the State would remain bound by the whole treaty, including those terms which the reservation sought to exclude or modify[13].

[12] *Ibidem*, p. 235.

[13] The International Law Commission's concern that there should be a presumption that statements presented as interpretative, in regard to treaties that prohibit reservations, are not reservations, aims to avoid situations in which a party's consent to be bound by a treaty might become void. Thus the Commission, taking the view expressed by professor Greig, stated that, "this would comply with the presumption that a State would intend to perform an act permitted rather than one prohibited by the treaty and protect that State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached" (*Report of the International...op. cit., p. 235*; and D.W. Greig, *Reservations: Equity as a balancing factor?*, Australian Year Book of International Law, 1995, vol. 14, p. 25). However, from our point of view it is a mistake to consider that in order to avoid such a result it is necessary to classify a statement as interpretative.

This was the principle applied by the European Court of Human Rights in the *Belilos Case*, where it decided that a statement defined as interpretative by Switzerland was in fact a reservation prohibited by the European Convention on Fundamental Human Rights and Liberties 1950[14]. The Court expressly stated that, "The declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration"[15]. So, as stated by professor Bourguignon, "in the *Belilos Case*, did the Swiss Government regard the interpretative declaration an essential condition of its agreement to be bound by the European Convention? Clearly not. The Court of Human Rights correctly found that the declaration was severable from the Swiss acceptance of the Convention: that Switzerland's overriding intention was to accept the obligations of the European Convention"[16]. Clearly, this question is quite separate from the distinction between reservations and interpretative declarations, as it relates to the legal consequences of issuing reservations prohibited by the treaty.

Establishing a clear line which distinguishes the clarification of a treaty or its provision from their exclusion or modification is a difficult business, but one must bear in mind that the interpretation of international treaties is not solely subjective. The interpretation of international treaties, as codified in the law of treaties, is subject to the so-called general rule of interpretation

[14] Nevertheless it might be thought that the Court was wrong in stating that, "The Court recognises that it is necessary to ascertain the original intention of those who drafted the declaration", especially in view of the fact that it also stated that, "in order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content" (*Belilos case*, European Court of Human Rights, 29th April 1989, Series A, vol. 132, paragraphs 48-49).

[15] *Belilos Case*, European Court of Human Rights, 29th April 1989, Series A, vol. 132, paragraph 60.

[16] H.J. Bourguignon, *The Belilos Case: New light on Reservations to Multilateral Treaties*, Virginia Journal of International Law, 1989, vol. 29, p. 382.

contained in Article 31 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

It is well established that this rule requires that all treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Therefore a declaration can only be termed interpretative if its author is subject to these conditions, for, as professor Ioan Voicu has said, "si une déclaration interpretative ne prétend pas modifier l'effet juridique de certaines dispositions du traité ŕ l'égard de son auteur, elle sera régie par la régle générale d'interpretation adoptée par la Commission du droit international"[17].

On the other hand a reservation would arise where the author had not abided by the conditions laid down by the general rule. It should be remembered that the commentary of the International Law Commission on the 1966 draft Articles on the Law of Treaties stated clearly that, "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty"[18]. It must surely be the case that all interpretation, which goes beyond the stated limitations, must involve a modification of the provisions in question. Therefore, the general rule of interpretation must be the, unavoidably objective, criterion which establishes that difficult line between interpretative declarations and reservations.

[17] I. Voicu *De l'interpretation authentique des traités internationaux*, Paris, 1968, p. 189.
[18] Yearbook of the International Law Commission, 1966, vol. II, p. 219.

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THE *(UN)*SUSTAINABILITY OF THE CONCEPT OF INTERNATIONAL SERVITUDE WITH RESPECT TO MILITARY BASES

by

Ivica Kinder*

The establishment of peaceful military bases on foreign territory is a crucial element in states' defence and foreign policy strategies and a hallmark of contemporary international relations. The concept itself implies the use of part of the territory of another state which nominally retains jurisdiction over the area. However, that state's authority is to some extent restricted by the presence and activity of the foreign armed forces (the most powerful expression of state authority).

The essential indicator of the international legal status of foreign military bases is the attitude of the sending state towards the sovereignty of the receiving state, and the central legal issue is the role of international treaties and their continued authority where sovereignty over the military base area is transferred. Provisions of international treaties on military bases lead some legal commentators to classify such treaties as international military servitudes, which significantly restrict the territorial authority of the receiving authority, and to view related problems in that light; others prefer to see them more as a matter of the interstate relations in personam.

In this article the author analyses the provisions of a number of international treaties, referring to numerous legal writings and accessible documents. His analysis suggests that international treaties may function as the basis for establishing interstate relations in personam.

INTRODUCTION

The establishment of military bases on foreign territory was quite uncommon before the Second World War[1]. This practice grew in the aftermath

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[1] F. A.Vali, *Servitudes of International Law*, London, 1958, p. 208.

of the Second World War, in the context of post-war international relations, and in particular, the conflicting geostrategic (Cold War) interests of the United States (US) and the Soviet Union. Certain states also attempted to protect themselves from outside attacks and to preserve their internal sovereignty by sustaining foreign military forces on their territory. One should also mention that there are military bases that draw on the tradition of colonial times, so that the military presence of the former colonial powers can sometimes be considered a form of neo-colonialism. For these reasons, the establishment and maintenance of peaceful military bases on foreign territory is an important aspect of contemporary international relations, and some states and international organisations have developed wide networks of military bases[2]. Nowadays, notwithstanding numerous withdrawals in the contemporary world, there is still a very strong tendency to maintain military bases abroad. Such bases are a distinctive element in the defence strategy and foreign policy of states, both bilaterally and multilaterally.

International law does not explicitly forbid states to establish military bases abroad, but the consent of the receiving state is required as *conditio sine qua non* of the validity of international treaties on military bases. In addition, many states insist on the ratification of such international treaties by their own legislative authorities[3].

The establishment of a military base involves the lease of part of the receiving state's territory which nominally remains under that state's territorial jurisdiction. However, in practice, the receiving state's authority is to some extent restricted by the presence, movements and activities of foreign military forces. Some legal commentators even mention the potential danger that such forces will be employed to the detriment of the government and the population of the receiving state – for instance, against neighbouring states, thereby preventing the receiving state from exercising its authority in the domains of domestic and international affairs. This caution very accurately reflects the social, economic and political circumstances that have often accompanied the establishment of military bases in recent times. Philippine legal commentators express a particularly negative attitude towards actual agreements on foreign military bases[4].

The aim of this paper is to provide an in-depth analysis of international treaties on military bases, as well as of the legal nature of the rights and duties created under such treaties. The content and character of these rights and duties determine the survival potential of treaties, not only in case the receiving state's government changes but also in case of the transfer of sovereignty over the military base area.

SOVEREIGNTY OVER THE BASE AREA

Sovereignty is of crucial importance for a state's position in the international community, and is a pivotal element in its relations with other states. It is manifested in various ways, such as the exercise of jurisdiction in criminal and civil cases, local administration, taxation, legislation and the exercise of police functions on its own territory[5]. Accepting foreign military forces as an actual representative of the other state's authority is in itself, notwithstanding their legal status, a restriction of territorial sovereignty. Namely, when foreign military forces occupy a certain area on the basis of an international treaty on the establishment of military bases, this will necessarily restrict the sovereignty of the receiving state, for the territory in question cannot tolerate the simultaneous rule of both, without the restrictions imposed on one of the sides involved. Therefore, the main indicator of the international legal status of the foreign military bases is their attitude towards the sovereignty of the receiving state.

International treaties on military bases sometimes contain a so called sovereignty clause. The legal status of members of the foreign military forces is as official representatives of their state; they are granted certain rights and privileges, i. e. immunity from the sovereignty of the receiving state. Because of such status the main goal of a so called sovereignty clause is that neither

[2] The greatest number of American military installations in Europe are part of the NATO common defense system. Kidron and Smith's research, done in 1982, identified the existence of approximately 3000 foreign military bases and similar installations, located in 58 states. Bases in 30 states belonged to the US while bases in 12 states belonged to the Soviet Union. Campbell claimed that the US owned a total number of 359 bases and about 1200 similar installations in other states in 1983.

[3] J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, Dordrecht, 1992, p. 16.

[4] The Philippine president, Ferdinand Marcos, used to point out the fact that the obligations stated in the base agreement with the US of America of 1947, became *"a question of life and death to the Filipino people"*.

[5] R. R. Angangco, J. P. M. Lotilla, *The 1979 Amendments to the Military Bases Agreement of 1947: Still a Question of Sovereignty*, Philippine Law Journal, vol. 53, 1978, p. 472-491.

the foreign military forces nor the existence of their facilities interferes with the sovereignty of the receiving state. Such provisions, for example, can be found in article 2 of the Agreement between Denmark and the US, pursuant to the North Atlantic Treaty, concerning the defence of Greenland of 27 April 1951[4], in an exchange of notes constituting an agreement concerning Dhahran airfield between Saudi Arabia and the US of 18 June 1951[5], and in article 3 of the Defence Agreement between the US and Spain of 26 September.[6] The true purpose of such provisions is to 'sweep under the carpet' unavoidable breaches of the sovereignty of the receiving state by the foreign military forces, which are a result of the recognition of their rights and duties, and their immunity from jurisdiction of the receiving state.

The texts of international treaties on military bases and their practical application show that the acquired rights of the sending state sometimes significantly restrict the jurisdiction of the receiving state over the base area. It was often conceived in the past that the area where foreign armed forces are stationed should be given special status within the state it belongs to. Other legal commentators find this approach unacceptable, referring to it as a fiction of extraterritorialism.

One example of the wide scope of rights the sending state may acquire are the American military bases in the Panama Canal area before the conclusion of the Panama Canal Treaty, on 7 September 1977. Areas on which the bases were located were called *'sovereign zones'* of the US, and the degree of American jurisdiction there practically amounted to annexation[7].

[4] *"Without prejudice to the sovereignty of the Kingdom of Denmark over such defense area and the natural right of the competent Danish authorities to free movement everywhere in Greenland, the Government of the* US *of America ... shall be entitled...".* Text of the *Agreement* in: United Nations Treaty Series *(UNTS)*, vol. 94.

[5] *"The complete authority and sovereignty inside and outside of Dhahran Airfield is the absolute right of the Saudi Arabian Government and it will make arrangements for guarding and maintaining the safety of the airport." (article 12 paragraph a).* Text of the *Notes (with annex)* in: UNTS, vol. 102.

[6] *"The areas which, by virtue of this Agreement, are prepared for joint utilization will remain under Spanish flag and command...".* Text of the *Agreement* in: UNTS, vol. 207.

[7] Pursuant to provisions of the Hay-Varilla Convention for the construction of the Canal, of 18 November 1903, a zone was established for the construction and protection of the water passage. It was 5 miles wide on each side with respect to the central line of the Canal. The US was granted jurisdiction as if it was the sovereign of the territory. When Panama and the US entered the General Treaty, of March 1936, on common measures for the protection of the Canal zone, the rights of the US remained the same as in Hay-Varilla Convention of 1903,

Similarly, based on the Agreement of 1903 for the Lease to the US of Lands in Cuba for Coaling and Naval stations, concluded on 16 February 1903, Cuba only formally retained its jurisdiction over the territory of Guantanamo and Bahia Honda, which were put out to lease, and the American side gained special rights within the leased area. It acquired complete jurisdiction and control over the area which was again recognised by the Treaty of Friendship between the two states of 29 May 1934[8]. Similar legal status was granted American bases in the British transatlantic regions. Article 1 of the Agreement of 27 March 1941, concluded between the US and Great Britain, provides that the US will have "all the rights, power and authority"[9] over the leased area. Identical status is granted to the British military bases Akrotiri and Dhekelia in Cyprus, since they are not leased areas but "sovereign base areas."

Lord's account of negotiations prior to the conclusion of the Agreement between the US and Spain on Friendship, Defence and Cooperation of 2 July 1982 reveals how states felt about the establishment of foreign military bases on their soil: during negotiations, the Spanish delegation wanted to take the initiative by preparing and presenting drafts of the entire treaty, including the basic treaty, supplementary agreements, and annexes, thus attempting to achieve "complete control over U. S. bases in Spain"[10].

Today, it is generally held that the establishment of military bases does not transfer sovereignty from the receiving state, i. e. that the area in question remains a part of its territory, although the authority to exercise its sovereignty is actually restricted by the presence and activities of foreign military forces. It is Woodliffe's opinion that international treaties on military bases, while

so that the American military bases were founded accordingly. Text of *Panama Canal Treaty (with annex, agreed minute, related letter, and reservations and understandings made by the* US*)* of 1977 in: UNTS, vol. 1280.

[8] E. Van Bogaert, *The Lease of Territory in International Law*, Miscellanea W. J Ganshof van der Meersch (Studia ab discipulis amicisque in honorem egregii professoris edita), vol. 1, 1972, p. 315-327.

[9] Exchange of Notes of 2 September 1940 whose content is elaborated by the agreement signed 27 March 1941 in London. Text of the Notes in: League of Nations Treaty Series *(LNTS)*, vol. 203. Text of the Agreement in: LNTS, vol. 204. The mentioned areas were Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad and British Guyana.

[10] Cited from D. Druckman, *Negotiating Military Base-Rights with Spain, The Philippines, and Greece: Lessons Learned*, Center for Conflict analysis and resolution – Occasional Paper 2, Fairfax, 1990, p. 22.

they constitute a derogation from or restriction of the receiving state's sovereignty, do not thereby effect a cession of its territory or create other "proprietary rights" for the beneficiary state, unless there is clear evidence to the contrary. Woodliffe thinks this presumption is founded in the exceptionally rare practice of introducing into contemporary treaties express provisions regarding the sovereignty of the receiving state over the base area. He stresses that the crucial question in each particular case is whether the right to station military forces, to utilise the bases and to maintain jurisdiction results from the consent of the receiving state or exists independently.[13] Starting from the assumption of the sovereign equality of states, as the basic legal principle of the international community, Woodliffe thinks that such contracts, although they have the effect of reducing the receiving state's sovereignty, nonetheless constitute an exercise of sovereignty and not its renunciation, and that parties to such international treaties should settle their mutual rights and obligations from positions of complete equality and interdependence.[14]

The Permanent Court of International Justice has carefully considered the nature of international treaties which grant certain rights to one state on territory belonging to another state, concluding that international treaties which undermine state sovereignty are valid by the sheer fact that the conclusion of international treaties is an exercise of state sovereignty.[15]

Both Angangco and Lotilla claim that the conclusion of international treaties constitutes an exercise of state sovereignty, but they stress that a problem arises when a treaty's provisions undermine state sovereignty, as is the case with the establishment of foreign military bases on domestic territory under the exclusive jurisdiction of the sending state. Unlike legal experts who think such contracts can transfer jurisdiction without transferring sovereignty over the area in question, Angangco and Lotilla start from the assumption that jurisdiction and sovereignty are inseparable. They think that obligations assumed in this way undermine state sovereignty, i. e. that transferring jurisdiction entails a loss of an important component of state sovereignty, leaving behind a "hollow shell deprived of substance".[16] They claim that there is a contradiction in the theory that a state may agree to divest itself of certain aspects of its sovereignty and yet remain sovereign, because sovereignty is

[13] J. Woodliffe, *op.cit.*, p. 113.
[14] *Ibidem*, p. 67.
[15] See: Publications of the Permanent Court of International Justice, Series A, number 1, p. 25.
[16] R. R. Angangco, J. P. M. Lotilla, *op. cit.*, p. 477.

indivisible and absolute. That is, a sovereign state cannot divest itself of any attribute of sovereignty without losing its sovereignty at the same time.[17]

It is Mondragon's opinion that the attribute of sovereignty belongs solely to the state which has full control over every inch of its territory and over all affairs within that territory. In other words, if the state does not have full control over the whole of its territory, as in case of foreign military bases, then certainly that state is not sovereign.[18] One should suppose that the opinions of Philippine legal commentators have their inner logic, but when we take a closer look at the provisions of international treaties, which e.g. grant punitive jurisdiction over the foreign military forces to the sending state, we cannot support the statement that these treaties constitute a transfer of sovereignty. Namely, where sovereignty is transferred, the treaty should determine cession of part of the state territory. In that case there would be no point in talking about receiving state and sending state, and the new territorial authorities would independently establish norms regulating relationships in the area in question. One should accept in advance that, as international relations such as those described above are important for national and international defence systems, certain restrictions of states' territorial sovereignty will necessarily arise.

Another factor, however, is that the equality of states is an important principle in international relations. The economic, political and military power of individual states sometimes practically undermines the concept of state sovereignty; a typical example is when a newly independent state, by virtue of an international treaty concluded simultaneously or immediately after it gained independence, grants its former colonial rulers the right to establish military bases, regardless of whether these existed prior to independence or are newly established. The question of sovereignty, therefore, cannot be considered only from the legal point of view. The principles of contemporary international law stress the importance of effective and not only formal sovereignty—that is, relations between states must not be characterised by a formal and legal equality which masks the political, military or technological dependence of one state on another. Such relations are deemed by Angangco and Lotilla neo-colonial relations, which are considered unacceptable from

[17] *Ibidem*
[18] L. Mondragon, *The Grounds under International Law for the Abrogation of the Philippine US Military Bases Agreement*, Philippine Law Journal, vol. 52 – number 4, 1977, p. 466-485.

the point of view of international law because they violate the principles of sovereign equality of states, self-determination of peoples and non-intervention in the internal affairs of other states.[19]

Non-aligned States were the most fervent proponents of the idea that international treaties on military bases often result from economic and political pressure which the newly independent state is incapable of resisting, and, moreover, that in extreme cases, the conclusion of such treaties even represents the *quid pro quo* for a grant of independence.[20] The Philippines, after its newly gained independence in July 1946, in a situation of total economic and military dependence, concluded an agreement concerning military bases with the US as early as 14 March 1947. These circumstances enabled the American side to utilise military bases for many different purposes.[21] Therefore, Ty points out that the American-Philippine agreement significantly undermines the rights of the Philippines to equality and self-determination and the principle of non-interference in internal affairs.[22] As for the Philippines, one should point out that at the moment the Philippines gained its independence, American military bases were already located there. The question arises whether the Philippines ever possessed sovereignty over these areas so long designated for American military bases.

Nevertheless, 7 January 1979 Amendments to the Agreement concerning military bases of 1947 officially recognised the sovereignty of the Philippines over the military bases and placed each of these bases under the authority of a Philippine commander. At the same time, the US retained certain rights, including "...use of certain facilities and areas within the bases and areas within the bases and ... effective command and control over such facilities and over US personnel, employees, equipment and material".[23] Similarly, it was determined that "consistent with its rights and obligations under the 1947 Agreement, the US shall be assured unhampered military operations involving its forces in the Philippines..." Despite such introduction of the sovereignty clause, Angangco and Lotilla think that the rights and powers of the US over the bases have in no way been diminished, but rather even reaffirmed and buttressed by virtue of

[19] R. R. Angangco, J. P. M. Lotilla, *op. cit.*, p. 478.
[20] J. Woodliffe, *op. cit.*, p. 69.
[21] Text of the *Agreement (with annexes and exchange of notes)* in: UNTS, vol. 43.
[22] R.R. Ty, *Foreign Military Bases and Rights of the Filipino People Recognized under the Principles of International Law*, Quezon City,1989, p. 6.
[23] Cited from R. R. Angangco, J. P. M. Lotilla, *op. cit.*, p. 483.

the 1979 Amendments. They point to the "attached implementing arrangements with annexes and accompanying maps" which have not been released for public dissemination, thus leaving open the question of the true depth of "effective command and control" that the US exercises, i. e. the true sovereignty of the Philippines over the base areas. The further argument is found in the fact that no formal changes have been made with regards to jurisdiction, nor amendments explicitly provided for rent to Philippines.[24]

The so called doctrine of unequal treaties was not addressed in the provisions of the Vienna Convention on the Law of Treaties of 1969; it is treated exclusively in the Declaration on the prohibition of military, political and economic coercion in the conclusion of treaties, which was adopted at the same conference, imposing a political but not a legally binding requirement.[25] Nevertheless, Mondragon points out that the American-Philippine Agreement violates the principles of sovereign equality of states, self-determination of peoples and non-intervention in the internal affairs of other states, all peremptory norms of general international law *(jus cogens)*. He adds that, based on the article 53 of the Vienna Convention on the Law of Treaties,[26] this agreement is void.

As for military bases established under the authority of regional or international defence organisations whose basic goal is collective defence, some commentators claim that such bases are not a matter of abandoning sovereignty, but rather a matter of states' mutual obligations to accept the stationing of the foreign military forces for the sake of the collective defence.[27]

[24] *Ibidem*, p. 484.
[25] Text of the *Convention* in: International Legal Materials *(ILM)*, vol. 8, 1969, p. 679-735. Convention entered into force on 27 January 1980. Declaration on the prohibition of military, political and economic coercion in the conclusion of treaties solemnly condemns the threat or use of pressure in any form, whether military, political or economic, by any state in order to coerce another state to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of states and freedom of consent. United Nations (UN) Secretary General is asked to draw the attention of states and the principle authorities of the UN towards the Declaration so that it would gain as much publicity as possible.
[26] Article 53 of the *Convention*: *"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*
[27] J. Woodliffe, *op. cit.*, p. 122.

THE LEGAL NATURE OF RIGHTS AND DUTIES CREATED UNDER BASE AGREEMENTS

Rights and obligations acquired through international treaties on military bases are, according to a general doctrine, classified as lease and servitude rights. However, some new perspectives on this question have recently emerged.

The lease of a territory implies a legal relationship in which one state grants the other certain rights on part of its territory – most often the right to control, occupy or administer over that part, and the other state in turn promises to pay a certain amount of money or to fulfil certain other obligations for the benefit of the population of the leased area.[28] In the 19th century, it was not uncommon, as it has become in this century, to lease foreign territory for the purpose of establishing military, navy or air bases.[29] From the end of the 19th and beginning of the 20th century, up until the beginning of the First World War, China concluded quite a number of treaties with the leading European states on the lease of parts of its territory. For example, by virtue of the Treaty of Shantung of March 6, 1898, China transferred certain rights to Germany in Kiaochow Bay, while at the same time retaining its sovereignty over the area, and Germany acquired the right to establish its military bases and trade enterprises there for 99 years.[30] By virtue of the Chinese-British Treaty of June 1, 1898, Great Britain acquired the right to lease the Bay of Wei-hai-wei for 25 years and to establish military fortifications there, station troops and take all necessary defensive measures. China and Great Britain agreed that Chinese authorities would continue to exercise jurisdiction, except when it was inconsistent with naval and military requirements.[31]

During the mid fifties, Flory stressed that military leases for the establishment of military bases after the Second World War became quite rare, and that lease is not a common term in international treaties on military bases.[32] At the beginning of the seventies, Van Bogaert stressed that international treaties on the lease of areas for the establishment of military bases, to a certain extent, had been replaced by other kinds of international treaties. That is, their importance was generally diminished, although in the past they had been a subtle conventional formula covering a great variety of political situations and purposes.[33] Later on, Brownlie pointed out that older leases were often barely distinguishable from outright cession or annexation of territory, since they quite often preceded the real cession, so that the legal framework was only symbolically present. More recent leases, according to Brownlie, have a different character. Namely, the term "lease" signifies the granting of rights for the exclusive use of part of a territory while the receiving state retains sovereignty over the area in question and the other state has the right of "conceding enjoyment of the liberties of the territorial sovereign."[34] In this sense, Brownlie argues, it would be more convenient to characterise the rights of the beneficiary state as the granting of " territorial privilege by concession", similar to "contractual license", than as a "proprietary interest in land".[35] Druckman suggests that in modern times it is usually weaker parties that try to conclude international agreements on military bases, by insisting on payments in the form of rent rather than military or other kind of assistance.[36]

As one of the most frequently cited examples of international leases for military purposes Woodliffe mentions the agreement between US and Cuba, regarding the areas of Guantanamo and Bahia Honda, concluded on 16 February 1903, which, among other things, states: *"While on the one hand the* US *recognises the continuance of the ultimate sovereignty of...Cuba over the...areas of land and water, on the other ...Cuba consents that during the period of the occupation by the* US *of the said areas...the* US *shall exercise complete jurisdiction and control over and within the said areas."*[37] In return, America is obliged to pay Cuba an annual sum of money of $2000, which exemplifies the rights and obligations from the treaty on lease.[38] What is interesting, however, is Reid's 1930s analysis of the text of the Agreement; although characterising it as a lease of the Guantanamo and Bahia Honda areas, she pointed out that the US acquired special rights there

[28] E. Van Bogaert, *op. cit.*, p. 318.
[29] J. Woodliffe, *op. cit.*, p. 114.
[30] E. Van Bogaert, *op. cit.*, p. 319.
[31] *Ibidem*, p. 320.
[32] M. Flory, *Les Bases Militaires a L'Etranger*, Annuaire francais de Droit international, vol. I., 1955, p. 3-30.
[33] E. Van Bogaert, *op. cit.*, p. 326.
[34] I. Brownlie, *Principles of Public International Law*, London, 1990, p. 373.
[35] *Ibidem*, p. 374.
[36] D. Druckman, *op. cit.*, p. 5.
[37] Cited from J. Woodliffe, *op. cit.*, p. 115.
[38] E. Van Bogaert, *op. cit.*,

such that the arrangement could be referred to as international servitude.[37] In practice, Cuba and the US have always maintained that theirs is a treaty on the lease of areas, in which the rights of the US are limited.[40]

The US Department of State referred to the quoted provision during negotiations on the Panama Canal Treaty of 1977, defending the position that it is clearly established in international law that one state may grant another state the right to exercise exclusive governmental powers within portions of its territory without losing its sovereignty over that territory.[41] Similarly, the State Department referred to the Lend-Lease Agreement (or Destroyer Deal) concluded between the US and Great Britain on 27 March 1941, whereby Great Britain, in return for 50 American destroyers, allowed the US to establish naval and air bases on its territory, along with facilities for entering, operating and protecting these bases. The US also acquired "all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control."[42]

US courts on several occasions have been required to consider the legal nature of rights which the US gained on the basis of the 1941 agreement with Great Britain. In each particular case, the crucial question was whether the leased areas, within the meaning of US statutes, represent "territories or possessions of the US" or a "foreign country".[43] In Connell et al. vs. Vermilya Brown Co., the US Supreme Court held that the leased area in Bermuda was not a "territory of the US in the political sense of the term", but that the "the terms of the lease warranted the conclusion that Congress had power to lay down regulations concerning the conditions of employment of US citizens in the leased area."[44] Later on, the Ministry of Foreign Affairs severely criticised this decision, claiming among other things that it could harm relations with other states in which the US already possessed bases or intended to establish them in the future.[45] In Spelar vs. US, the Supreme Court departed from its earlier approach. With the purpose of clarifying the term "foreign country" in a US statute, the Court held that US did not have sovereignty over the air base at Harmon Field in Newfoundland, stating that it was not acquainted with a more appropriate term than "foreign country" to refer to an area under the sovereignty of another state.[46]

As an example of the lease of foreign territory, Van Bogaert mentions the treaty between the US and Liberia for the establishment of military bases, concluded on 31 March 1942, by virtue of which Liberia promised to grant the US the possibility of establishing military bases during the Second World War and for a period of six months after the end of the war. The US promised Liberia assistance with army equipment and training as well as all necessary help with the construction of roads, etc.[47] According to the Van Bogaert, an agreement between Denmark and the US for the defence of Greenland, of 9 April 1941, on the basis of which the US were authorised to occupy Greenland "for such a period of time as may be necessary for the protection of the area and the American Continent", while the US supplied Denmark with all necessities for the civilian population and its security.[48]

The provisions of international treaties on military bases leads some legal commentators to conclude that the issue arises from international military servitudes, which significantly restrict the territorial authority of the receiving state. Where one state leases a part of its territory to another state for the relatively permanent stationing and keeping of the military forces, the relations established between the two are of a territorial [*in rem*] and not a personal [*in personam*] nature." Similar to Reid's opinion in connection with the lease of the area of Guantanamo and Bahia Honda, Vali characterises the establishment of military bases on foreign territory as a form of international servitudes; he mentions the Treaty of Peace, concluded on 21 March 1940 between the Soviet Union and Finland after the so called "Winter War", whereby Finland granted the Soviet Union the lease of the Hango Peninsula and its surrounding waters "for the establishment of a naval base for defending the Gulf of Finland from aggression" for a period of 30 years and the annual payment of 8 million Finnish marks.[49] Although many legal commentators deny the value of the concept of servitudes in international law, certain writers

[37] Cited from H.D. Reid, *International Servitudes in Law and Practice*, Chicago, 1932, p. 193. "*The Republic of Cuba hereby releases to the US, for the time required for purposes of coaling and naval stations ... areas of land and waters ... located on the Island of Cuba ... 1. Guantanamo ... 2. in northwestern Cuba ... Bahia Honda.*"

[40] E. Van Bogaert, *op. cit.*, p. 193.

[41] J. Woodliffe, *op. cit.*, p. 325.

[42] *Ibidem*, p. 116.

[43] *Ibidem*

[44] *Ibidem*

[45] *Ibidem*

[46] *Ibidem*

[47] Cited from E. Van Bogaert, *op. cit.*, p. 325.

[48] Text of the *Agreement* in: LNTS, vol. 204.

[49] Cited from F.A. Vali, *op. cit.*, p. 249.

agree that this concept captures the essential legal nature of rights and obligations created by international treaties on military bases. Van Bogaert, for instance, thinks that not all treaties concerning military bases are to be characterised as leases, leaving open the possibility that they are rather international servitudes.[50]

As far as the general term 'international servitudes' is concerned, Reid thinks the whole concept describes the legal relationship between two or more states whereby one of them must have jurisdiction over the area where servitude exists, and the law which constitutes the content of the servitude has to be of permanent validity; that is, it should be a legal relationship which is more permanent than an ordinary contractual relationship. According to Reid, it is the permanence of the relationship which tips the balance when determining whether a certain situation is a concrete case of servitude or just a contractual obligation whose continuance depends on the validity of the treaty ratione temporis. In other words, servitude requires that the legal relationship established by the treaty not end automatically with the annulment of that treaty. Finally, international servitude also requires the existence of a right *in rem*, i. e. the right which is related to the territory of one or more than one state in order to be used for the benefit of other state(s).[51]

Oppenheim conceptualises international servitude as the restriction of the territorial authority of a state on the basis of an international treaty; part of the territory of the state in a limited sense serves the purposes or interests of another state.[52]

Vali defines servitude in international law as a permanent legal relationship constituted by an international treaty, whereby two or more states are authorised to exercise certain rights on part of another state's territory – or, put differently, a relationship whereby a state is obliged not to exercise its rights in part of its own territory, because of the specific purposes or interests relating to that area.[53]

Pointing out that the function and scope of international servitudes in international law are highly controversial, Andrassy, Bakotic and Vukas claim that servitudes apply to interstate relationships whereby one state has, in comparison with the other, a certain right, localised to a part of the territory of

[50] E. Van Bogaert, *op. cit.*, p. 325.
[51] H.D. Reid, *op. cit.*, p. 21.
[52] *Ibidem*, p. 25.
[53] F.A. Vali, *op. cit.*, p. 3009.

the other state which is therefore permanently, or while the agreement is in effect, legally bound to the first state.[54] The main characteristic of the international servitude is its specific legal nature: it is not by itself transferable to another state. That is, it can be transferred to a third state only if that state acquires the areas under servitude.[55]

Rumpf holds that military bases on foreign territory should be considered state servitude, since they are "an exceptional restriction made by treaty on the territorial supremacy of a state...by which a part of its territory is in a limited way made to serve a certain purpose or interest of another state".[56] According to Rumpf, what distinguishes a servitude from an ordinary restriction on territorial supremacy imposed by treaty is that the instrument creating a servitude purports to attach it legally to the territory of the grantor state.[57]

O'Connell even claims that the object is to ensure that the servitude will exist independently of either changes of sovereignty over the territory – including the extinction of the grantor state's personality – or the continuance in force of the treaty.[58]

Nevertheless, the majority of proponents of the concept of servitudes (as a way of understanding military base agreements) emphasise the similarity between international treaties on military bases and treaties on alliance. For this reason, they claim that the rights created in such treaties, even when viewed as rights *in rem*, cannot survive if the grantor state loses sovereignty over the area in question.[59] However, even the classification of those rights and obligations established by international treaties on military bases as restricted rights *in re aliena* provokes serious debate. Critics of this approach, such as Schwarzenberger, point out that it is not clear what advantages a state could expect from the restriction of its right *in re*.[60] On a related point, Van Bogaert claims that international servitudes are characterised by a lack of obligations on the part of the beneficiary state, aside from the obligation to provide military assistance in case of foreign aggression against the grantor state; to support his

[54] J. Andrassy, B. Bakotić, B.Vukas, *Međunarodno pravo 1*, Zagreb, 1995, p. 277.
[55] *Ibidem*, p. 278.
[56] H. Rumpf, *Military Bases on Foreign Territory* in: Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, vol. 3, 1982, p. 260-266.
[57] *Ibidem*, p. 265.
[58] D.P. O'Connell, *International Law*, London, 1965, p. 361.
[59] J. Woodliffe, *op. cit.*, p. 118.
[60] *Ibidem*

argument, he cites the agreement between the Philippines and the US of 14 March 1947.[61] Woodliffe argues that it is not effective to classify such rights as servitudes, or as a complete restriction of territorial sovereignty, since such a classification does not affect the obligation of all parties to realise the agreement in good faith.[62] Schwarzenberger stresses the importance of "the common intention of the contracting parties" as a criterion which will determine whether the respective rights of states remain unaffected by an outbreak of war between the contracting parties, whether they take precedence over duties of neutrality that might arise for the grantor state in the event of war between the beneficiary state and a third state, and whether reliance on the doctrine of *rebus sic stantibus* is excluded.[63] Woodliffe also argues that the exact meaning of the rights created is a question of treaty interpretation, thus finding the concept of permanent rights or absolute rights, i. e. international servitudes, irrelevant.[64]

According to Oppenheim, the most dubious utilisation of the concept of servitude is the assumption that "rights inherent in the object with which they are connected – rights *in rem* ... remain valid and may be exercised however the ownership of the territory to which they apply may change".[65] Schwarzenberger criticises the idea that certain duties may be attached to part of a state's territory. He objects that this idea suggests that international law "enables individual states (not only) to pose as law makers for others against their will" but also "to dispose of the freedom of other sovereign states" [66]

Esgain stresses that a comprehensive review of state practice and international judicial decisions relating to the concept of military servitudes, published in 1965, concludes that "the concept of international servitudes is fictional and that the instability and nature of international society negate the possibility of their creation in international law." In this review, examination of bilateral foreign base agreements between 1940 and 1962, without exception, revealed that the parties created political rights and duties of a purely personal character. Esgain sees evidence for this conclusion in the manner

[61] E. Van Bogaert, *op. cit.*, p. 325, for the text of the *Agreement* see footnote 21.
[62] J. Woodliffe, *op. cit.*, p. 118.
[63] *Ibidem*
[64] *Ibidem*
[65] *Ibidem*
[66] *Ibidem*

in which mutual defence purposes were specified and in clauses concerning duration and denunciation.[67]

The animosity of legal commentators towards the concept of servitude stems partly from the difficulties involved in transferring duties from international treaties on military bases to third states gaining sovereignty over former territory of the receiving state. According to Schwarzenberger and Brownlie, these difficulties are primarily related to international legal rules on the succession of states, as concerns international treaties, and to rules about the legal effect of international treaties on non-party third states. These rules eliminate the automatism on which the concept of servitudes is based, since all duties of the third state must be based on its consent.[68]

Namely, according to the general rules of international law, and pursuant to the state's basic right to sovereignty, an international treaty create rights and duties only for the original parties; without the third state's consent, it cannot by bound by the treaty.[69] That rule is codified in the Vienna Convention on the Law of Treaties of 1969.[70] The Convention provides different regulations concerning the duties and rights of the third state. In order for an international treaty to create an obligation for a third state, parties to the contract must have expressed such intention and the third state must have declared in written form that it accepts the obligation. Once the obligation is created, it can only be abolished with the consent of parties to the treaty and of the legally bound third state. As for rights granted the third state, the Convention also requires the expressed intention of parties to the treaty. The consent of the beneficiary state is implied unless proven differently, and need not be formally expressed.

Regardless of what is said about the general rules of international law, whereby international treaties do not create rights and duties for third states, there are some cases where third states are authorised and legally bound by international treaties to which they are not a party – e.g. cases of cession of a certain area, international servitudes, etc. – because every treaty whereby a state cedes certain rights to another state is reflected in relations with third states.[71] One also should bear in mind article 38 of the Convention, which

[67] *Ibidem*
[68] *Ibidem*, p. 119.
[69] J. Andrassy, B. Bakotić, B.Vukas, *op. cit.*, p. 262.
[70] Article 34 of the *Convention*: *"A treaty does not create either obligations or rights for a third State without its consent."* For the text of the *Convention* see footnote 25.
[71] J. Andrassy, *Medunarodno pravo*, Zagreb, 1987, p. 338.

states: "Nothing in articles 34 to 37 precludes a rule, set forth in a treaty, from becoming binding upon a third State as a customary rule of international law, recognised as such."

Where one state's territory is acquired by another state, there is no rule of international law to regulate general succession with respect to existing legal relations of the predecessor state. Also, regardless of the fact that the Vienna Convention on Succession of States in Respect of Treaties of 1978 states that it "applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations" (article 6), there are very few general rules applying to succession: the transfer of state authority within a territory, even if not constitutional, does not constitute succession. There can be no succession in the event of wartime occupation. As for the rights and duties associated with the territory as such, according to the principle *nemo plus juris transferre pottest quam ipse habet*, successor states, as a rule, acquire the territory as it existed in the predecessor state, even with possible restrictions. If not specified otherwise, the acquired territory is legally treated according to international treaties made by the successor state and not by the predecessor state.[72] Therefore, succession of states is for now being arranged mostly by international treaties and not by international customary law.

The general rule whereby, unless specified otherwise, the successor state is not automatically bound by the treaties of the predecessor state, and whereby treaties made by the successor state also cover the acquired region, is based upon the principle that international treaties are binding only for parties. However, this principle of non-transferability is limited by the need for partial continuity, in the interest of legal security in the international community, and also by the need of succesor state to apply the international treaties of the predecessor state, in the interest of its immediate and complete participation in international relations.[73]

The need for continuity in the validity of international treaties is particularly expressed with so called radicalised agreements, which are automatically binding for the successor state, unless arranged differently. This arrangement appears in treaties which are closely connected with the territory itself, and

[72] Text of the Convention in: ILM, vol. 17, 1978, p. 1488-1517. Convention entered into force on 6 November 1996.

[73] J. Andrassy, B. Bakotić, B.Vukas, *op. cit.*, p. 267.

which are often referred to as localised or territorial agreements, since it is by virtue of their existence that territorial regimes are established.[74] In this sense, the Vienna Convention on Succession of States in Respect of Treaties of 1978 determines that succession of states does not influence boundaries established by the treaty or obligations and rights established by the treaty and relating to the regime of a boundary. This provision, however, does not apply to treaty provisions for the establishment of foreign military bases on the territory to which the succession of States applies.[75]

In contrast to the examples mentioned above, where continuity is a starting point, the Convention for succession as far as newly independent states are concerned is closer to the principle of *tabula rasa*.[76] This category of states is treated specially, on the assumption that they cannot be legally bound by agreements concluded by a colonial master in which their interests were not a priority, and also because newly independent states cannot begin to exist without being party of any treaty.

Two international treaties on military bases, designed as instances of military servitude, best illustrate how the Convention on Succession of States in Respect of Treaties affects this area of international law. The first example are the naval and air bases in the British transatlantic territories leased by Great Britain to the US, under the agreement of the 27 July 1941.[77] The US

[74] *Ibidem*, p. 268.

[75] For the text of the *Convention* see footnote 72. Article 12 of the *Convention*:
"1. A succession of States does not as such affect: a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question; b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.
2. A succession of States does not as such affect: a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for a benefit of a group of States or of all States and considered as attaching to that territory; b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.
3. The provisions of the present article do not apply to treaty obligations of the predecessor State, providing for the establishment of foreign military bases on the territory to which the succession of states relates."

[76] Article 16 of the *Convention*: *"A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."*

[77] For the text of the *Agreement* see footnote 11.

stated that if these states gained independence, retention of the military base areas would depend on their consent. In this sense, the US and Great Britain agreed with representatives of these areas, who proposed at a constitutional conference prior to the announcement of independence that, following their independence, they should be granted the general right to conclude agreements and the opportunity to decide for themselves whether to allow foreign military bases on their territory. After independence, the US and the newly established federations concluded a number of agreements on the continuity of a limited number of leases. After the subsequent abolition of the federation, agreements were also concluded between the US and the individual newly created states.[78] The consensual nature of the transferral of rights created under the agreement of 1941 is, according to Woodliffe, clear evidence of their "personal" character.[79]

American military bases in Morocco are another example. On the basis of the unpublished agreement concluded on 22 December 1950 between the US Ambassador in Paris and the French Foreign Minister, the US was authorised to establish five military bases in Morocco, which at the time, pursuant to the Treaty of Fez of 1912, was still a French Protectorate.[80] Article 2 of the Treaty of Fez conferred on France, as the protecting power, responsibility for the internal and external security of the protected state, as well as for conducting the territory's international relations. This responsibility implied the authority to conclude treaties on Morocco's behalf.[81] Although, according to the position of the French government, the Treatment of Fez authorised France to conclude the above-mentioned agreement with the US, soon after the conclusion of the agreement, the Sultan of Morocco addressed a note to the French Government concerning the exclusion of Morocco from the process of concluding the agreement.[82]

After the abolition of the Treaty of Fez, in March 1956, prior to the independence of Morocco in June 1956, France and Morocco concluded an agreement whereby Morocco "inherited obligations arising out of international treaties concluded by France on behalf of Morocco and out of such international instruments relating to Morocco as have not given rise to observations on its part."[83] The French Government officially expressed the view that the agreement with the US had been concluded in its own name, and that it did not "survive" the transfer of sovereignty to Morocco, which removed any question of its inclusion in the agreement on the continuity of Morocco's international legal obligations.[84] By the end of 1957, the US formally recognised the sovereignty of Morocco over the base areas, but it also started negotiations with Morocco with the intention to continue them. However, negotiations resulted in the withdrawal of US military forces on December 31, 1963.[85]

Both examples given above reveal the lack of firm arguments in favour of the doctrine of military servitudes, since rights and obligations stemming from international agreements on military bases, although territorially determined, did not "survive" the transfer of sovereignty over the areas. The fact is that the sending states never intended otherwise. One should conclude that the issue was a matter of inter-state relations of an exclusively "personal" character.

In commentary on the draft text of the Vienna Convention on Succession of States in Respect of Treaties, the US objected to a provision explicitly excluding foreign military base agreements from the general principle of the continuity of international agreements. The US stated that, among other matters, such a provision was in fact unnecessary.[86] This argument strongly supports the position that international agreements on military bases do not create rights and obligations relative to state territory, analogous to the private legal concept of servitudes. The International Law Commission, in its commentary on the draft text of the Convention on the Law of Treaties, also referred to the practice of the US in the above mentioned examples, to support their position that military base agreements are personal and political in character, and that the bases can only survive the transfer of sovereignty on the basis of an international treaty concluded between the successor state and the third state concerned.[87]

Brownlie, Florie and Rousseau are modern legal commentators who have closely analysed the legal nature of the rights and obligations imposed by international treaties. Brownlie treats the temporary presence of foreign military forces and lease of military, naval, or air bases during peacetime as examples

[78] J. Woodliffe, *op. cit.*, p. 119.
[79] *Ibidem*
[80] M. Flory, *op. cit.*, p. 14.
[81] Cited from J. Woodliffe, *op. cit.*,, p. 119.
[82] *Ibidem*, p. 120.
[83] *Ibidem*
[84] *Ibidem*
[85] *Ibidem*
[86] *Ibidem*, p. 121.
[87] *Ibidem*

of the "territorial privilege by concession".[88] Stressing that such privileges result from a concession, he wants to show that they are derived from the international treaty, i. e. from the *ad hoc* consent of the receiving state, and by no means from the rules of the customary law.[89] To describe the legal nature of the rights and obligations acquired through modern international agreements on military bases, Brownlie also uses the term "contractual license", since the treaty requires that the receiving state recognise another state's right to exclusive use of part of its territory, whereby the foreign state is granted various rights with respect to territorial jurisdiction without acquiring sovereignty over the area in question.[90]

Flory uses the term "grant" to describe the US's rights following its 28 February1952 agreement with Japan.[91] Analysing the use of the term "grant" in the 1947 agreement between the US and the Philippines concerning military bases, in reference to the rights of the US, Angangco and Lotilla claimed that the term signified "a conveyance" or "the instrument of such conveyance", i. e. "a present or gift"; they expressed the fear that this signified that the Philippines did not possess sovereignty over the base areas.[92] Possibly to avoid such an interpretation, the authors suggested that the 1947 agreement be considered as a mere lease agreement, although, as they themselves admitted, it did not oblige the US to pay rent. They considered it a lease in the practical sense, seen in the light of the Military Assistance Agreement concluded by the same states on 21 March 1947, which imposed on the US an obligation to grant the Philippine armed forces various forms of aid[93]. When, in 1953, the US Attorney General, Herbert Brownell Jr., stated that the US had title and ownership over naval and military bases in the Philippines, the Philippine senator Claro M. Recto stressed that the term "granting", pursuant to the Preamble of the Bases Agreement, refers exclusively to the right "to use" the areas in question; this assumption was subsequently confirmed by the US.[94]

[88] I. Brownlie, *op. cit.*, p. 144.
[89] *Ibidem*, p. 367.
[90] *Ibidem*, p. 374.
[91] M. Flory, *op. cit.*, p. 6. Text of the *Agreement* in: UNTS, vol. 208.
[92] R.R. Angangco, J.P.M. Lotilla, *op. cit.*, p. 480. For text of the Agreement see footnote 21.
[93] *Ibidem*, p. 481.
[94] J.R. Coquia, *The Legal Aspects of the* US *Mutual Defense Agreements*, *Foreign Relations Journal*, vol. IV. number 1, 1989, p. 86-114. The Vice-President of the US, Richard Nixon, on the occasion of the official visit to the Philippines on 3 July confirmed the fact that the sovereignty over the American military base areas belongs to the Philippines.

Rousseau thinks that the notion of the sending state's territorial competence should be assessed on a scale between the maximum of sovereignty and the minimum which can be called "les competences territorial limitees". According to Rousseau, the examples for such competences can be found in the establishment of the military, air and naval bases as an answer to the strategic needs of the great powers.[95] According to him, international agreements on the stationing of the foreign military forces in "strategic bases" contain a few common legal characteristics. First of all, the receiving state does not confer on the sending state the right to exercise territorial sovereignty, only the right to use certain logistic facilities for a limited period of time. There is no option for any kind of division of territorial competencies between the two states. The sending state simply has various powers related to operating its military forces on a territory that remains subject to the sovereignty of the receiving state.[96]

CONCLUSION

Today it is generally assumed that the establishment of foreign military bases does not entail a transfer of sovereignty, although, in practice, the presence and the activities of the foreign military forces hamper the receiving state in exercising its sovereignty. The receiving state grants the sending state only the right to use certain areas and objects, without any division of territorial competencies between those states; the sending state acquires only those powers concerning the functioning of its military forces on the territory which remains under the sovereignty of the receiving state. It is another question, however, whether one can talk of the true equality of states in the context of the international community, since the economic, political and military power of individual states sometimes practically undermines the concept of state sovereignty and equality.

Rights and obligations created by international treaties on military bases are classified as lease and servitude rights. However, more recently some new points of view have emerged. In the past, international agreements on the lease of military base areas were suitable formulas for the establishment of inter-state relations. Today they are gradually being replaced by other kinds

[95] Cited from J. Woodliffe, *op. cit.*, p. 122.
[96] *Ibidem*

of international treaties. It has become common practice for sending states to help receiving states militarily and otherwise.

Conceiving of international treaties on military bases as an instance of international servitude would imply that the legal relationships they create outlive the treaties themselves. The Vienna Convention on the Succession of States in Respect of Treaties contains explicit provisions which exclude the possibility of servitudes based on international treaties, although preserving the theoretical possibility that servitudes could be created on the basis of international customary law. Neither the legal science nor the practice of the world's leading military powers supports the concept of servitudes. It is therefore obvious that military base agreements can be characterised as creating international legal obligations *in personam* in one specific field of international relations, and that concrete evaluation of each individual treaty is possible only through an analysis that takes into account the totality of relations between state parties.

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STRUCTURAL ADJUSTMENT CLAUSE – THE AIMS, ORIGIN, CONSTRUCTION AND EVOLUTION. THE COMPARISON WITH OTHER SAFEGUARD MEASURES IN THE FTA TREATIES

by

Pawel Czubik*

This article concerns a possible measure that can be taken by the parties of some regional trade agreements (RTA) – mainly free trade area (FTA)[1] treaties, which have a specific construction and are used either to protect industrial development or to resolve sociological problems tied to the transformation of national economies. The structure of this measure has been transformed since its first appearance in the regional free trade treaties. It appears that in the 70s this measure was abandoned in economic relations between parties of regional arrangements. However, recently this measure has been revived between parties of regional free trade systems. This change stems from the recent liberalisation of markets in Central and Eastern Europe countries (CEECs), one consequence of which has been a proliferation of free trade agreements between these countries and better developed Western economies. The aim of the structural adjustment clause (SAC), popularly called the restructuring clause, was to protect the industry of only CEE countries during the structural changes of their economies. The restructuring clause has been revived at a moment when regional trade which is realised in free and preferential trade areas and customs unions decisively dominates over trade which is based on the most favoured nations clause realised in a multilateral GATT/WTO trade system. The regional trade systems have accepted a number of legal solutions practised in GATT/WTO. Both types of systems have safeguard measures

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[1] This is why in this article the abbreviation FTA is widely used. The problems with the application of safeguard measures characteristic of the FTA are similar to those of other trade integration arrangements (customs union or preferential trade areas).

which are very similar in construction. This fact could stand for their identical use. In fact, as a practical effect of free trade pressure, these clauses have started to be used in a discriminatory manner against the MFN (most favoured nation) partners and in the interests of RTA partners. In the face of this wide practice, the structural adjustment clause creates a very specific measure - one that appears only in the regional arrangement's law systems and is used only to weaken the competition between RTA countries. Apart from the selective use described above, some countries have begun to apply measures in quasi non-selective manner by treating all RTA partners identically (also in case of multiple membership in many RTAs).

1. INTRODUCTION

The principal aim of the juridical construction described in this article is to promote the industrial development of national sectors undergoing transformation and facing difficult problems in countries participating in the RTA. The clause has a social nature in that – the temporary protection of some sectors may help solve the imperfections of the national economy by allowing additional time before permitting foreign competition to enter the domestic market without customs tariffs. In some cases the clause resembling the typical SAC can have a much broader scope, which also means the assistance by the industrialisation processes. In some free trade areas the SAC acts as the determinant of the transitional period in which the aim of free trade should be reached. This concerns the FTA treaties signed between the well developed parties, which are rather resistant to foreign competition. They can decide, while negotiating the agreement, the total reduction of customs duties immediately when the agreement enters into force. In this case the SAC permits these countries to return to duties for a limited time, only when the situation accounts for their usage[2].

2. THE SAC AND GATT/WTO – THE ORIGIN OF THE CLAUSE

The structural adjustment clause used in FTA treaties cannot be considered to originate directly from a GATT basic text. The article XVIII of the General Agreement provides that the protective measures affecting imports can be taken

[2] In such a case the SAC is sometimes the sole element differentiating the level of treatment of both parties. If there are small differences in development (which creates the reason for including a SAC in the FTA treaty) and the FTA agreements are based on full reciprocity and symmetry, the possibility of the SAC's application forms the only difference between the rights of the parties. For example Free Trade Agreements between EFTA States and Estonia or Latvia are completely reciprocal with one exception: Estonia or Latvia are allowed to introduce SAC.

by the parties to implement programmes and policies of economic development designed to raise the general standard of living of their people[3]. In addition, the GATT/WTO party can maintain the sufficient flexibility within its tariff structure in order to grant the tariff protection required for the establishment of a particular industry[4] with a view to raising the general standard of livings of its people[5]. However, one cannot presume the homology of SAC's origin with this GATT measure[6]. The regulations of SAC's application in RTAs and its practical usage unequivocally excludes such conjecture. If not[7], according to the GATT Art. XVIII regulations only countries, which cannot ensure a minimum standard of living and are still at an early stage of development would have the right to protect their economy through a SAC. In practice the SAC is applied (in the majority of cases) in the relations between developed countries in FTAs. Moreover, the SAC being used in RTAs' forum is not applied in compliance with the rules of Art. XVIII. The procedure provided in this article is not exercised in the selective use of SAC on the regional plane. Furthermore, as a rule the GATT law system does not allow the selective exercising of safeguard measures assisting to establish or develop a new industry.

Taking this into consideration, the restructuring clause seems to be grounds for applying an autonomous measure, open exclusively to RTA parties. In fact

[3] *Cf.* Art. XVIII: 2. GATT. This rule is very unclear as tone how these measures are justified. Justification is described "in so far as they facilitate the attainment of the objective (of GATT)". The protective measure and the aims of GATT are at variance. Their consistency can be exclusively perceived in only a far-reaching perspective. This is why the Art. XVIII: 3. provides that there may be circumstances in which no measure consistent with the provisions included in clause 2 is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people. Special procedures were introduced to deal with these cases.

[4] The cited expression was linked in GATT with the possibility of quantitative restrictions' usage for balance-of-payments reasons. *See* Art. XXVIII: 2. GATT *in fine*.

[5] *Cf.* Art. XXVIII: 7.

[6] *Cf.* U. Kumar, *Trade Liberalisation and Payments Arrangements under the PTA Treaty: An Experiment in Collective Self Reliance*, Journal of World Trade, vol. 23, no. 5, Oct. 1989, page 105.

[7] It is interesting, that the sole case, in which the relation SAC Art. XVIII GATT was mentioned, took place in the time of examination of EEC Treaty of Rome. In spite of the lack of SAC's regulation in the Treaty of Rome, the Art. XVIII GATT concerning governmental assistance to economic development was given to the parties of GATT as an example that the list précised in Art. XXIV:8(b) was not exhaustive (!?). See *Guide to GATT Law and Practice. Analytical Index*, vol.2, page 823, Geneva, WTO, 1995.

the NAFTA is a unique among the possibilities to exercise protective measures in Art. 72 As. They are mainly modelled after GATT WTO legal solutions in their construction and partially in their application. The early practice of GATT parties has not indicated the clear relationship between the regional arrangements, which are permissible on account of Art. XXIV GATT, and the multilateral trade system. In Art. XXIV there are no strict rules concerning the measures that can be taken in customs union (CU) or FTA. For example, the possibility to exercise the measures for protection purposes towards increased import (Art. XIX GATT) and security exceptions (Art. XXI GATT) was not incorporated into the text of Art. XXIV: 5(a)(b) and XXIV: 8 (6). At the same time there are in the mentioned article the regulations concerning the balance-of-payments difficulties and general exceptions (Art. XX). Therefore, perhaps the precise GATT list of safeguard measures in Art. XXIV was deliberately omitted. The present list of Art. XXIV: 8 cannot be understood as exhaustive but rather only illustrative[5]. The question is, however, how far the regional trade systems can act autonomously and whether they can provide safeguard or protective actions not provided by the multilateral GATT WTO system. The structural adjustment clause explicitly indicates that these systems hold a great amount of autonomy. Trade relations between countries appear to be more natural in regions which are connected by free trade than those relations practiced in the multilateral GATT WTO trade system with its most favoured nation (MFN) clause.

3. THE CLAUSE IN REGIONAL TRADE AGREEMENTS

a) The story of usage

As mentioned in the introduction, the clauses of protective measures intended for industrialisation and development reasons, which occur in regional trade agreements may have a very simple form or be rather complicated. The clause – autonomous in form in relation to the GATT rules – provides for

[5] *Systemic Issues Related to "Other Regulations of Commerce"*, Committee on Regional Trade Agreements, document WT/REG/W/17, 31st October 1997, page 3.

[6] *Ibid.*, in *Revision* – WT/REG/W/17/Rev.1, 5th February 1998, page 3. It seems to be an accident that the approachable safeguard measures precised in Art. XXIV do not raise big problems connected with their non-selective application. The measures however non-precised in Art. XXIV are those of selective application in practice, in accordance or not with their theoretical foundations.

customs protection for development and other reasons without strict regulation of its procedure and can be found in many regional trade agreements. E.g. such this regulation occurs in many preferential agreements concluded between the European Economic Community and developing countries[7]. Its form in some of these cases – most of which are no longer in force, was quite unclear in that safeguard measures' clauses in many of mentioned agreements were mixed up. The customs duties could be used in the same way due to the balance-of-payments problems, protection of state budget or development and industrialisation[8]. There was no clear and separate way to distinguish the reason for the use of development and industrialisation measures, no separate and individual procedure in such a case. A somewhat similar simple construction of this kind of measure occurs also in some (also valid) FTA treaties between other parties of GATT WTO system[9].

Along described regulations stricter rules were developed in other agreements, concerning the use of protective measures to eliminate the industrial or development defect. Such regulations occurred in agreements between developed countries which were not on the same level of development. Only a less developed country has the right to use such regulations which provide limited protective measures of strictly limited duration in order to help solve problems tied with industrial growth or to rebuild a specified branch of the national economy. The first time it was placed for

[7] Such clause was found e.g. in Art. 7 of *Agreement Establishing an Association between the EEC and the Republic of Tunisia* (GATT L/3226, notified to GATT parties on 22nd Sept. 1969), and also in Art. 7 of a similar agreement concluded with the Kingdom of Morocco (GATT L/3227, 22nd Sept. 1969).

[8] *Cf.* e.g. Art. 3.2 of the Convention Yaoundé I (*Convention of Association between the EEC and the African and Malagasy States Associated with that Community*, GATT L/2160, 7th April 1964), Art. 7.2 of the Convention Yaoundé II (GATT L/3283, 10th Dec. 1969) or Art. 3.2 of the Convention Arusha II (*Agreement Establishing an Association between the EEC and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya*, GATT L/3369, 13th March 1970). The possibility to apply such measures was open to the Afro-Malagasy States only. The measures applied in accordance with Conventions Yaoundé II and Arusha II were to be used not only as the customs duties but also in the form of quantitative restrictions – quotas. System of Lomé Conventions succeeded to a similar not very concrete mechanism.

[9] *See* e.g. Art. 8 of the invalid now (replaced by the 1983 *Australia – New Zealand Closer Economic Relations Trade Agreement* – so-called ANZCERTA, GATT L/5475, 10th May 1983) *New Zealand – Australia Free-Trade Agreement* (GATT L/2485, 1st Nov. 1965) or Art. 10 of the *Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea* – so-called PATCRA (GATT L/4451, 20th Dec. 1976).

such construction to the agreement between the EEC and Greece[13], then the SAC became the part of EEC's agreements concluded with better developed Euro-Mediterranean partners in 70s. This structure was not used in the FTA Agreements with EFTA partners.

The revival of the SAC has taken place in the EEC and EFTA states' agreements with Central and Eastern Europe Countries (CEECs) after their political liberation from non-market economy in years 1989-1991. Up until this time the possibility to use SAC was unilateral. Only the worse developed partner had the right to use the SAC. In the agreements between the CEECs however, which began their existence after the crowding of the preferential trade ties with Western European space, the possibility to apply the structural adjustment duties characterises the everyone among the parties of the agreement.

b) The present structure

As mentioned above the SACs in FTAs can be open for only one party of an agreement or for all parties. Irrespective of that, the structure of the SAC and rules of its usage are identical. The application of measures which are taken as a realisation of the SAC can only be exceptional and of limited duration. They may be taken solely in form of increased custom duties. It is impermissible to take these measures in the form of a quota or import prohibition. These measures only concern infant industries or certain sector undergoing restructuring or facing serious difficulties. In particular the use of a protective measure is justifiable when these difficulties produce important social problems (*e.g.* a threat of structural unemployment).

The applicable custom duties on imports, which were introduced by these measures in the country, that applies the SAC to products originating in its FTA partner (against the import from which the restructuring measures are used), may not exceed 25 per cent *ad valorem* and shall maintain the element of preference for products originating in FTA partner. In accordance with this rule the restructuring custom duties theoretically could be quite

[13] *See* Art. 18 of the *Agreement Setting up an Association between the EEC and Greece* (GATT/L/1601, 7th Dec. 1961) – a chosen integration form was in this case a customs union. Later quite similar regulations are found in Art. 5 of Annex II to an *Agreement Establishing an Association between Malta and the EEC* (GATT/L/3512, 24th March 1971) and Art. 12 of *Additional Protocol to the Agreement establishing an Association between EEC and Turkey* (GATT/L/3554, 15th Oct. 1971).

high and could build a very protective element in common free trade. The 25% of customs duties is a great percentage of most European countries' customs tariffs. The further regulations in FTAs weaken, however, the possibility to apply these measures in such great proportion. The first rule limiting the size of restructuring customs duties is the obligation to maintain the element of preference in imports. This means that the total customs duty (SAC duties inclusive) for the product originating in the FTA party has to be lower than the duties for the analogical product originating in the MFN country. Interestingly, these measures are alone among protective and safeguard provisions in FTA treaties, in case of which the obligation of maintaining the more preferential treatment (in spite of taken measures) is explicitly précised in the treaties. This unequivocal regulation arises from the autonomous origin of SAC, which is independent of similar GATT rules. The SAC, which occurs in the FTA treaty, can be applied only against FTA parties, and in no case against GATT/WTO partners, because, as mentioned earlier, in the GATT/WTO system no such measure exists. In case of other safeguard measures the possibility of their parallel application against GATT/WTO parties does not mean the acceptance of the rules in the treaty, requiring the maintaining of the element of preference in applied protective customs duties. Against the same country as a party of FTA the safeguard measure can be taken to the preference margin's value and as a GATT/WTO party over this margin.

The total value of the imported products subject to the SAC's measures may not exceed 15 per cent of the total imports of industrial products from the FTA partner, against which the measures have been taken, during the last year for which statistics are available. This rule explicitly limits the scope of products for which the structural adjustment clause measures are applied at the same moment.

The safeguard measure should act as a temporary limited efficient method to solve a problem and not as a permanent protection of a weak sector. Rules such as this are usually found in FTA treaties. These measures may be applied ordinarily for a period not exceeding five years[14], unless a longer duration is

[14] In the first FTAs of CEECs' region it was a principle to limit their duration to a maximum 5 years (cf. e.g. Art. 22.4 of the *Agreement between the EFTA States and the Czech and Slovak Federal Republic*, GATT/L/7041, 3rd July 1992). Later, when the CEECs became more resistant to the influx of foreign products, they started to limit this period to 4, 3 and even 2 years (e.g. Art. 21 of *Agreement on Free Trade and Trade-Related Matters between the EC, EAEC and ECSC, and the Republic of Estonia, of the Other Part* , WT/REG8, 12th July 1995). In some

authorised by the Joint Committee[17]. In this case, at the latest, they must cease to apply at the expiration of the transitional period[18]. The described measures cannot function as a hard protective element in free trade (see further restrictions of their usage below). Usually, at the very latest, the structural adjustment duties should be eliminated after the transitional period of agreement.

No such measures can be introduced in respect of a product, if more than several years (usually three years[19]) have elapsed since the elimination of all duties and quantitative restrictions, charges or measures having an equivalent effect concerning that product. This regulation is very important for the whole construction of the SAC. As a result, the possibility of applying such measures diminishes from year to year proportionally to the increase of the reciprocal liberalisation's level.

The procedure of SAC's application does not entitle the party to automatic action. The reason to protect the industry by SAC is not very urgent as opposed to, for example, some emergency actions of Art. XIX GATT and similar FTAs' rules or antidumping actions. The party applying the SAC should inform the Joint Committee of any exceptional measures it intends to take and, at the request of the afflicted FTA partner – country, consultation should be held in the Joint Committee on such measures and the sectors to which they apply. The consultations should be finished before these measures are introduced.

agreements (rather exceptionally e.g. Art. 28.4 of *Agreement between the Republic of Croatia and the Republic of Slovenia*, WT REG55, 27th January 1999) the possibility to apply the measures was limited only to the whole transitional period of agreement (which could be long or short).

[17] In all FTA treaties signed between European partners, there is a quasi – organ (administering a process of forming and functioning of an area) – this is a so-called Joint Committee. In fact it has no supranational rights over the area, and composes only the forum of meeting of the parties' representatives.

[18] In few treaties the SAC usage is possible over the transitional period. This may happen with Joint Committee approval. *Cf.* e.g. Art. 27.4. of *Free Trade Agreement between Republic of Poland and Republic of Turkey* (WT REG107 1, 19th July 2000).

There occur also the regulations of more than 3 years i.e. 5 years (e.g. Art. 28.5 of *Agreement between the Republic of Turkey and Romania*, WT REG59, 18th May 1998) or less i.e. 2 years (e.g. Art. 30.5 of *Free Trade Agreement between the Republic of Estonia and the Republic of Slovenia*, WT REG37, 7th March 1997). In some FTA treaties this element is unregulated (e.g. Art. 20 of *Interim Agreement between the EFTA States and the Palestine Liberation Organisation for the Benefit of the Palestinian Authority*, WT REG79, 21st Sept. 1999).

When taking such measures, the applying country should provide the Joint Committee with a schedule for the elimination of the customs duties introduced under the SAC. This schedule should provide for a phasing out of these duties starting, at the latest, two years (usually[20]) after their introduction at equal annual rates. This regulation means the further guarantees of a rapid rebuilding of a natural status between the parties i.e. the free trade. The Joint Committee may however decide on a different schedule.

Although the customs duties imposed as a realisation of SAC could be considered as a significant threat for a realisation of free trade in compliance with the FTA agreement, the structure of the SAC and its usage's procedure easily prevents such a danger. The clause is constructed in a manner hindering its application with every further year of regional liberalisation. Generally its usage is limited to the transitional period of agreement (before the full common free trade in area is reached).

4. THE SAC AND OTHER PROTECTIVE MEASURES IN REGIONAL TRADE AGREEMENTS – A THEORY AND PRACTICE OF APPLICATION

The countries which are parties in FTA agreements have to their disposal a number of protective measures appropriated for application in definite cases. In general all such measures in international economic law can be divided into two groups. The first group is composed of measures discriminating against the import from the country which causes economic problems within the state. They are applied in relation to a concrete state, which is, acting in full consciousness, responsible for the present matter at issue. Such safeguard measures are e.g. antidumping and countervailing duties. In the case of these measures there is no problem concerning their application against one or more trade partner. In its nature it is to be used in a selective manner – solely against a party causing the damage. There are more problems connected with the

[18] Of very rare occurrence there are the regulations in FTAs with a shorter time-limit (e.g. one year after application – Art. 30.6 of *Free Trade Agreement between the Republic of Estonia and the Republic of Slovenia*, WT REG37, 7th March 1997), or without such regulations providing that the concerned country shall provide the Joint Committee with a schedule for the elimination of restructuring customs duties – the Joint Committee may decide on a different schedule (e.g. Art. 15.6 of *Free Trade Agreement between Turkey and Estonia*, WT REG70, 23rd March 1999). Unknown is an example with more then 3 years time-limit.

application of a second group of protective measures, a part of which is the discrimination against a product notwithstanding its country of origin. Parties apply such measures either for the reason of protecting a national economy from a harmful import or to guarantee by means of safeguard clauses the specified state goals. A safeguard clause against excessive import (modelled after GATT/WTO safeguard clause – Art. XIX and *Agreement on safeguard measures GATT 94*) belongs to the first subgroup, and e.g. a balance-of-payment safeguard measure and the structural adjustment clause as well belong to the second. In the legal system of GATT/WTO, an application of these measures should usually be non-selective. Theoretically in a FTA internal and external relation the application of such measures should be non-selective as well. There should be no distinction between the manner of treatment of states from FTA system or multilateral GATT/WTO system[19]. The practice has completely distorted the interpretation of application of non-selective safeguard measures.

In the above considerations were omitted measures, which can be applied as a realisation of GATT Art. XX (General Exceptions – moral, health etc.) and Art. XXI (Security Exceptions). Such measures in the same form occur in the classic FTA treaty. They can be used in a form of an import/export prohibition (unlike the other safeguard measures applied in the form of customs duties or quotas). They also generate a partial problem concerning their application. In the instance of Art. XXI the situation is clearer, it is undeniable, that any state can protect its sovereignty and an international peace by all means. The import/export restrictions can discriminate states which are political enemies (e.g. trade in weapon, ammunition etc.) and do not have to discriminate its allies. However the manner of application of these measures is therefore selective. The measures from Art. XX are more complex. The Art. XX explicitly provides that "*such measures are not applied in a manner which would constitute a means or arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*". An entirely discriminative application of general exceptions is unacceptable. The state applying such measures cannot discriminate against the other state, but only against the condition of trade in concrete goods. The application should be non-selective, this approximates the measures to the second group.

[19] Even though such distinction would arise, it should equalize the level of treatment of FTA and non-FTA partners, being in fact more discriminatory for FTA parties.

The measures selective in their manner of usage, do not produce any questions concerning their application in the FTA forum. They are usually applied in the same way against concrete FTA or non-FTA WTO trade partner. As mentioned above, the application's practice of non-selective measures is entirely different than theoretical foundations. The practice was born *praeter* or even *contra legem* in order to privilege the FTA and CU regional trade partners. The practical application of theoretically non-selective measures evolves to discrimination in the regional partners' favour. This practice is very distinct in a case of a safeguard clause against excessive import (précised in Art. XIX GATT and after this Article modelled in FTA treaties)[20]. Notwithstanding the fact that it is rather easy to determinate the country of origin of a product imported in excessive quantities, and that the responsible party is usually an FTA partner[21], the practice of applying measures against importers from WTO members, and not FTA partners, has become widely accepted[22]. The GATT/WTO has practically accepted *de facto* as a whole-formed situation relevant to application of Art. XIX by the FTA parties. All *de iure* continues to be unchanged. Even the modifications made to Art. XIX by the *Agreement on safeguard measures GATT 94* have introduced absolutely nothing new about the selectivity of those measures[23].

Interestingly, the selective use of measures has taken place several times in the case of other theoretically non-selective measures. These cases were

[20] E. Piontek, *European Integration and International Law of Economic Interdependence*, Recueil des cours Academy of International Law, vol. 236 (1992-V), pp. 32-36.

[21] Within the Committee on Regional Trade Agreements in WTO, it has been claimed that "*when necessity called for emergency action, usually the cause of problem came from the partners* [of FTAs] *rather than third parties, because the partners had preferential* [or even zero] *tariff rates. It thus seemed odd that the FTA partners could bee excluded from the emergency action when there was some injury*" *Annotated List of Systemic Issues*, document WT/REG/W/16, 26th May 1997, page 10.

[22] See E. Piontek, *op.cit.*, *see* also *e.g.* cases presented in *Guide...*, vol. 2, pages 838-840. Especially interesting is a case of 1991 Austrian (at that time the member of EFTA) action concerning the application of quotas to global imports of certain types of cement, except for imports from EFTA and European Communities member states. Austria stated that it had exempted these imports on the basis of EFTA Stockholm Convention and its association agreement with EC (other legal systems unapproachable to GATT countries). The other Austrian statement was that since Art. XIX GATT was not mentioned in the list of Art. XXIV:8(b), measures taken under this Article might be not applied to other members of a FTA.

[23] *Cf.* footnote 1 in the cited Agreement, *in fine*.

rather sporadic and they do not forecast the new turning-point of practice in international economic law[24].

Comparing the SAC with other safeguard measures in FTA, first, it appears that its selective usage is obvious. Second, the selectivity of SAC only discriminates against parties of FTAs, in the case of the above mentioned safeguard measures the situation is different. This clause is characteristic of FTAs' systems. It can act only against the parties of agreements in which such clause occurs and in no way against GATT WTO parties. This is why it is only measure which is really protective in classical FTA's system. The internal regulation of SAC as already described does not allow strengthening this protection.

The selectivity of SAC's usage against only FTA partners generates the further problem of its usage on a different level against different partners of one or more FTA. In fact there is no prevailing practice of restructuring measures' application in such cases. From one point of view the justice requires the application of this clause in an identical assessment for all parties of FTAs, in which this state interested in the usage of this clause is a party, on the condition that these FTA agreements provide SAC. Fairness, however, requires the application of the identical total value of duties (with these having its origin in SAC) to all products form FTAs partners – such an idea ensures the same level of protection (against products of preferential origin) for restructured sector. The difference between both mentioned conceptions is for example clear to see when a process of two FTAs' formation is differently advanced. The use of the first conception means a different level of total customs duty, which is put to practical use for different FTAs partners. The use of the second one means a different assessment of restructuring applied duties. In practice, both indicated solutions are applied. There is a lack even of a common acceptable rule of the SAC application against all FTAs partners. In some agreements, the regulation of this problem started recently to appear through binding the usage of restructuring clause with its usage in other FTAs of a country[25]. The present-day application of SAC is the resultant of more economic necessity than legal rules. Maybe it is a corect solution that this clause which provides the temporary protection of infant and undeveloped industries should have an utilitarian character.

5. SAC IN FREE TRADE AREAS, IN WHICH POLAND IS A PARTY

Poland in now a party to 9 agreements leading to the formation of free trade areas or forming such areas (association agreement with EC, agreement with EFTA countries, membership in CEFTA, agreements with Lithuania, Israel, Latvia, Faeroe Island, Estonia, Turkey). Although formally the process of forming a free trade area has been completed only in four cases[26], practically, between Poland and most of its FTA partners free trade of industrial goods exists (in the meaning of the "Substantially All the Trade" requirement in Art. XXIV GATT). All these agreements consist among other things of SAC regulations. In the association agreement with EC, the free trade agreement with EFTA States and the free trade agreement with Faeroe Island[27], only Poland is entitled to use the SAC. In remaining agreements, the SAC is bilaterally applicable.

However Poland does not apply the SAC too broadly. Sometimes it is used to equalize the level of protection[28]. The restructuring duties imposed on steel products led to political manoeuvring between Poland and the European Communities, which was ultimately resolved by changing the customs tariff level.

[24] See e.g. the Canadian answer to the statement of the members of Working Party on Canada-USA FTA (*Guide*..., vol. 2, page 823) concerning an application of measures for short supply or conservation purposes (Art. XX GATT) with exception of the FTA partner, or the case (*Guide*..., vol. 1, page 596) concerning the EEC regulation permitting to use of the term "sherry" (argued as with accordance with Art. XX(d) GATT) to describe certain liqueur wines of Cyprus and not of other non-member countries of EEC (Cyprus is a party of agreement leading to form a CU with Community). A selective usage of measures for a balance of payment purposes was to meet practically only in case of EC in favour of its internal relations. Now this clear deviation from the rule is almost of no importance, because of the progressive unification of most of EC national currencies.

[25] Such a regulation is provided in Art. 5 of *the Record of Understanding to Agreement between the Republic of Hungary and the State of Israel* (WT/REG54, 25th March 1998). The use of SAC by the party is possible only when it is applied simultaneously to the import from EC.

[26] Formally on 1st January 2001: CEFTA, FTAs: Poland – Lithuania, Poland – Latvia and Poland – Israel are the first four formatted free trade areas in which Poland is a party. Because of expiry of the transitional period, the SAC measures can not be used in these cases.

[27] In the agreement: Poland – Faeroe Island, the SAC is regulated in an abbreviated form, which is unusual in this kind of treaty.

[28] E.g. the restructuring duties were applied to increase customs duties imposed on cars imported from CEFTA original members, in order to equalize these with duties originally imposed on cars from new CEFTA parties.

6. CONCLUSIONS

There are no strict rules concerning the use of SAC in international law and to date no recognised practice has been born. The main reason can be attributed to the break of practice. The clause has begun to be applied generally in a denser network of free trade relations in recent years after the CEECs' régime transformation. The development of preferential free trade relations has led to a warping of most favoured trade even in the application of safeguard measures.

In the model FTA treaty there are some measures which can function as protective ones. In the practice arising in FTAs (not taking into account of typical selective measures, indicated in a first group above as e.g. antidumping), there is no such measure but only the structural adjustment clause.

The SAC in its present regulation and manner of usage is not a very protective measure. Its regulations only allow temporary possibilities of its application. The practice of application, that is becoming more and more broadly accepted, only allows its use when simultaneously applied to imports from other FTAs partners.

The SAC is an FTA treaty's element of great weight in a free trade reception process. Its temporary protection of national sectors that are undeveloped or related to surviving social problems plays a significant part in creating economies resistant to foreign competition in the presence of regional free trade.

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EUROPEAN COMMUNITIES AS SUBJECTS OF INTERNATIONAL LAW

by

Paweł Filipek*

INTRODUCTION

In the realm of the legal system, the issue of legal status has a primary character, that is to say, it has to be addressed in most of the cases dealing with more particular issues concerning the subject of law. The legal status of a subject determines its existence within the legal system. Only after answering the primary and original question of the subject's existence, may we follow with the consideration of its legal content, hence, indicating norms and legal institutions connected with the subject.

While determining international legal status, international law defines international personality. That personality can be seen as the most advanced status. Not every participant of international relations is endowed with international personality. It can be maintained that the attribute of personality in international relations is rare. Alongside the international personality, the international legal status of a subject expresses itself also through its external competence, which is determined by its own law of the subject (its founding acts, internal laws) that do not always have the label of "*international law*."

The notion of legal personality plays a very important role in every branch of law, maybe even the key-role. The same applies to the field of international law despite the fact that there is no legal norm of international law that defines the range of its subjects. Witnessing the lack of such a norm, the doctrine and

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jurisprudence of international law are to fill the gap and indicate these subjects. In other words, when there is no legal definition of an international law subject, i.e. the definition contained in an international legal act, a juridical or lawyers' definition has to be created. Leaving such a task, among others, to doctrine, results in the existence of various opinions, sometimes divergent and irreconcilable, and leads to everlasting discussions and uncertainty as to the range of international law subjects.

Almost up to half of the 20th century only states were considered as subjects of international law. The notion of international personality was clearly linked to the notion of sovereignty and only states were sovereign, in their territories.[1] Nowadays, not only states and international (intergovernmental) organisations are classified as subjects of international law, but also, under certain conditions, national liberation movements, belligerents, and insurgents. In some cases and to a certain extent, international personality can be attributed also to component parts of compounded (federal) states.[2] The issue of an individual's personality is disputable in international law.

The European Communities as new subjects of international law appeared on the international scene in the fifties and during subsequent decades evolved to its present condition. They owe their present shape to many significant modifications introduced by the member states to European Communities' founding treaties, and especially to the Maastricht Treaty, that created a new form of international co-operation – the European Union, and to the recent Treaty of Amsterdam.

All three Communities are intergovernmental organisations, and thus, are subjects of international law. The notion "*European Communities*" still constitutes a general category described by their features and including more than one subject. To deal individually with these subjects, we should characterise them by name and discuss the status of the European Coal and Steel Community (ECSC), the status of the Euratom Community and finally the status of the European Community (EC) itself. It is no wonder, however, that the European Community is the most important one and most of its characteristics, as a subject of international law, is true and valid for the two other Communities.

[1] With the exception of the Holy See, which kept its personality even from 1870 till 1929, when it had no territory, or other exceptional cases, like the Sovereign Order of Malta.

[2] The parties of the Dayton Agreement of 21 November 1995 (signed on 14 December 1995 in Paris) are: Republic of Bosnia and Herzegovina, Federal Republic of Yugoslavia and Republic of Croatia. However, the parties to an Annex to that Agreement (Annex 7 on refugees and internally displaces persons) are the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and so called Republika Srpska, which means that the Republic of Bosnia and Herzegovina concluded an agreement with its component parts. The Dayton Agreement and its Annex 7 have to be treated as two different international agreements, since their parties are different. That solution is highly unusual, as normally an annex to an agreement constitutes its integral part.

PERSONALITY OF INTERNATIONAL ORGANISATIONS

International personality carries both legal capacity – the possibility of having international rights and obligations, and capacity for legal action – the possibility of acquiring new, previously non-existing rights and obligations, modifying or cancelling the existing ones, together with the possibility to defend its own rights. In simplified words, international personality can be treated as legal capacity sensu largo that combines both legal capacity sensu stricto and related to it capacity for action. This simplification is justified and can easily be accepted on account of the fact that in the vast majority of cases the existence of international legal capacity is inseparably connected with the existence of capacity for legal action. The exceptions to that rule are not numerous and may appear despite the fact that a certain subject of international law is endowed with international capacity, for example, when its capacity for legal action is limited to the benefit of another subject which acts on behalf of the former, e.g. in the situation of dependant states.

After the First World War, the discussion on international personality of the League of Nations emerged. The argument against such personality which seemed to be prevailing, expressed itself in the conviction that the League of Nations, as every international organisation, lacked the fundamental element forming a basis for states' powers, namely, the territory and sovereignty. In general international practice at that time, the League of Nations was not considered as a subject of international law. Nevertheless, in fact, it enjoyed certain attributes of international personality.[3]

[3] The League of Nations enjoyed certain competences towards the Free City of Danzig and the Saar region. Moreover, permanent delegations of some states acted at the League of Nations' seat, see H. Latkiewicz, *Zagadnienia podmiotowości prawnomiędzynarodowej EWG*, Warszawa 1979, p. 32-34 and the bibliography there quoted. The international personality of the League of Nations was recognised by Swiss government in a *modus operandi* of 1926, see K. Kocot, *Organizacje międzynarodowe. Systematyczny zarys zagadnień prawa międzynarodowego*, Wrocław-Warszawa-Kraków-Gdańsk 1971, p. 157.

The inception of the United Nations after the Second World War brought back to life the discussion on the personality of international organisations. This time, however, the discussion resulted, practically, in common recognition of international organisations as subjects of international law. In this context, the advisory opinion of the International Court of Justice has special significance in the famous Bernadotte case. From that Court's opinion it follows that, in order to enable the Organisation to carry out it functions and meet the aims embodied in the UN Charter, the United Nations have to be qualified as an "*international person*" which means "[...] *it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims*."[4] Although the opinion of the ICJ concerned only the United Nations, it is recognised that the rules presented by the Court apply also to other international intergovernmental organisations.

Using the term "*international person*" for describing an international organisation, the Court tried to underline the distinct character of international organisations in relation to states and noted that international persons are not states. A contrario, states are not international persons, states are original (primary) subjects of international law, states are full subjects, that is to say, they possess the entirety of powers in accordance with the sovereignty principle. The personality of states is objective in the sense that it is not dependent on the will or recognition of any other subjects of international law. It can be even argued, the objective character of states' personality means, their personality is anterior to international law, whereas, an international organisation can acquire international personality only within the already existing international law, that is, first and foremost, on the basis of an agreement governed by international law.

In the formulation of the International Court of Justice, the notion "*international person*" was to underline the secondary character of personality of international organisations. That kind of personality is limited and derived from states' will. States resign from a portion of their powers to the benefit of an organisation. Therefore, the personality of an international organisation is limited by the borders of states' will and also limited by the aims and functions attributed to the organisation. Thus, an international organisation may enjoy its powers only within the scope of states' will and its goals and functions.[5]

Personality of states originates from their sovereignty based on the territory. In that sense, international personality of states is original and self-dependent – not dependent on extra-state factors. International organisations, on the contrary, are non-territorial subjects and cannot derive their personality from the sovereignty principle. Instead, they have to fulfil certain conditions to be qualified as subjects of international law.

– Since an international organisation is a non-original creature, it has to derive its personality from the personality of other international law subjects. Therefore, it has to take form of "an association" created by other subjects, usually by states.[6]

– An international organisation has to be created on grounds of an international law constitutional act, usually an international agreement. The constitutional act of an organisation guarantees that international law is applicable to the organisation, and the organisation is required to act in compliance with that law.

– An international organisation should have organs at its own disposal, through which it acts and expresses its will. Those organs do not possess its own international personality, they act on behalf of and to the benefit of the organisation and the organisation is internationally responsible for their action or omission to act. Organs should be stable and effective so as to enable the organisation to maintain international relations, which proves the durable character of the organisation.

[4] ICJ Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949.

[5] Certain confusion of the notions "*international person*" and "*subject of international law*" follows from the opinion of the International Court of Justice. The Court itself defined an international person as a subject of international law. Furthermore, we speak of "*international personality*" of "*subjects of international law*", though we could use the term "*international subjectivity*". Even more confusion is caused by some authors who apply the terms "*person*" and "*subject*" inversely. R. Fried notes: "[*s*]*ome writers use the term international legal person only for states, and for all other participants in international law they use the term subjects*.", R. Fried, *The Relations between the EC and International Organizations. Legal Theory and Practice*, Amsterdam 1995, p. 9. See also H. Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* , 1966, p. 22-24. Then, many authors do not consider as justified the maintenance of the distinction between "*international persons*" and "*subjects of international law*", since it appears, we deal here with one and the same institution of international law – the international personality which, naturally, differs depending on the kind of subjects.

[6] It may happen that an international organisation is a member of another international organisation, like the European Community is a member of the World Trade Organisation.

– An organisation should be assigned its own aims, for the accomplishment of which it should be equipped with own competences. The distinction between powers of the organisation and powers of its members ought to be clear enough to single out a certain sphere of activity within which the organisation can act on its own behalf.

– Alongside the above mentioned prerequisites, the will of members to furnish the organisation with international personality appears to be at least as important a factor as the other ones, at the same time being linked to each and every of them. Without the will to transmit personality, there can exist no organisation as a new subject of international law. The will can be ascertained either expressly or in an implicit manner (implied will.) The will can be implied insofar as an organisation is endowed with such tasks and competences whose accomplishment requires the existence of international personality.

THE EUROPEAN COMMUNITIES AS SUBJECTS OF LAW

All three European Communities are intergovernmental organisations. Each of them enjoys international personality distinct from the personality of the two other Communities and, at the same time, distinct from the personality of the member states. All three Communities meet the conditions for having international personality. They were created by other subjects of international law (member states) on the basis of international agreements governed by international law (founding treaties.) The Communities have their own institutions through which they act and express their will (first and foremost, the European Commission and the Council of the European Union), finally, Communities were also furnished with its own goals and competences.

The founding members conferred international personality on the Communities in the establishing treaties. In the Treaty of Rome and two Paris Treaties we can find expressions pronounced identically: "*The Community shall have legal personality*."[7] According to the common opinion, this formulation means conferment on the Communities of both internal legal personality in member states and international personality.[8] A regulation

[7] Art. 6 ECSC Treaty, Art. 281 EC Treaty, Art. 184 Euratom Treaty.

[8] Nowadays, international personality of the European Communities is commonly recognised by the doctrine of international and European law. However, during the first decades of Communities' existence, some opinions appeared that contested international personality of the Communities, either entirely (esp. some representatives of the Soviet doctrine) or creating

expressly referring to international personality can be found in the treaty establishing the ECSC.[9] A similar expression does not exist in the next two founding treaties that created two subsequent Communities. However, in the body of their texts more detailed provisions can be found referring to some of the attributes of international personality, like *e.g.* a general competence to conclude international agreements[10] or such competence in certain cases,[11] or power to establish and maintain relations with international organisations.[12] Those provisions prove that, despite the lack of an expressed stipulation to this effect, the member states did intend to furnish, and in fact furnished, the European Communities with the necessary level of international personality.

Furthermore, the conferment of international personality can be interpreted from the way, the issue of personality is dealt with in the treaties. From the editorial point of view, the above mentioned general provision on personality comes first in the treaties,[13] then, all three founding treaties regulate internal capacity of the Communities in the member states. The latter regulation takes its place in the very next text unit of the treaties.[14] We may, therefore, support the following view, seeing that internal personality is regulated separately, *a contrario*, general provisions granting personality to the Communities, refer, first and foremost, to international personality.[15] This manner of interpretation fills "*editorial gaps*" in the treaties. However, it is hard to resist the feeling that the states consciously, and not by editorial mistake, omitted the expressed stipulation of international personality of the EC and Euratom, since such stipulation was made in the previous treaty establishing the ECSC. Yet still, it does not mean, the states did not wish to accord international personality to the EC and Euratom, since they envisaged the competences that require the possession of international personality. We may suspect, governments could have felt certain anxiety of forming subjects, esp. the EC having the broadest

concurring theories, like e.g. the theory of Communities as "*common organs*" of member states (see e.g. A. Całus, *Rechtspersönlichkeit der Europäischen Gemeinschaften*, Saarbrücken 1960.)

[9] "*In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives*", Art. 6 ECSC Treaty.

[10] Art. 101 Euratom Treaty.

[11] Art. 133, Art. 310 EC Treaty.

[12] Articles 302-304 EC Treaty, Articles 199-201 Euratom Treaty.

[13] See above fn. 7.

[14] Art. 6 ECSC Treaty, Art. 282 EC Treaty, Art. 185 Euratom Treaty.

[15] Comp. *EG-Vertrag.Komentar (zu dem Vertrag zur Gründung der Europäischen Gemeinschaften)*, ed. by C.O. Lenz, Köln-Basel-Wien 1994, p. 1298.

aims and functions, with too strong a position on the international level *vis a vis* the states, if they expressly stated that those Communities are endowed with international personality. The fear, if existed, was unjustified insofar as they are international law requirements that decide on international personality, and international law, for the time being, recognises only the functional personality of international organisations, that means, international personality is granted within the limits of the organisation's purposes and competences.

International personality as a manifestation of the international legal status of the European Communities has been recognised by the European Court of Justice in its case-law. Already in the early sixties the Court touched the issues of Communities' status, although it did not include an express referral to international personality while noting that "*the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields.*"[16] It is with all likelihood, the Court thought about international personality, yet not giving it its name. Next, the Court more bravely made a clearer statement that the Community has "*its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane.*"[17] In the Court's view, the roots for such status can be found in self-limitation of states in their sovereignty and transfer of powers for the benefit of the Communities.[18] However, the European Court of Justice, being an internal court of the Communities, itself cannot confer international personality on the Communities, it can only "*recognise*" or "*declare*" earlier conferment. Its opinion in this matter, even given in the form of a judgement, cannot be binding for extra-Community subjects like third states and international organisations, and it has only auxiliary significance for determining and elucidation of Communities' genuine status.

FUNCTIONAL LIMITATION OF COMMUNITIES' PERSONALITY

Describing the European Communities' personality means as much as marking out its limits. In this respect, indicating limitations of that personality

[16] Case 22/62 [1962], *Van Gend and Loos*.
[17] Case 6/64 [1964], *Flaminio Costa v. ENEL*, point 3.
[18] ECJ developed that position, *i.a.*, in case 22/70 [1970], *ERTA*.

is of great importance. Simply, as those limitations stand all factors which cause that the personality does not comprise the entirety of powers usually linked to the personality. Those limitations should have international legal character, since they are projected to bring about effects in international law.

As was already stated above, primary and thereby full subjects of international law are states, while international organisations, being secondary subjects that derive their personality from the personality of their member states, are limited in their personality. Those limitations are of a functional nature, that is to say, international organisations may use the powers stemming from international personality in the range of their functions, in other words, as far as they carry out the tasks attributed to them, in order to fulfil objectives for which they were created. The previously quoted advisory opinion of the ICJ in the *Bernadotte case* provides the arguments in favour of this statement.[19] Similarly, the International Law Commission appeals to the functional limitation in the preamble of the second Vienna Convention on the Law of Treaties.[20]

The organisations' goals, functions and competences and, at the same time, the limitations of their personality, usually are embodied in the first parts of their constitutive acts – founding treaties. The European Communities are not exceptional here. A clear reference to functional limitations we can find in the ECSC Treaty.[21] It appears from it, again, that international capacity of this Community is limited by the organisation's functions and objectives. Compliance with this requirement acquires the rank of a *conditio sine qua non* in order to recognise a Community action as falling within the scope of international personality that was conferred on it. Only an action that meets the condition can be considered as being in conformity with international law and having effects in the international legal order.

[19] "*Whereas a state possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity as [an international organisation] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice*", ICJ Advisory Opinion, *Reparation ... op.cit.*
[20] "*[I]nternational organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes* ", Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, concluded at Vienna on 21 March 1986, not yet in force.
[21] Art. 6 ECSC Treaty.

Treaties establishing the European Community and Euratom do not contain provisions on the functional limitation of Communities' legal capacity. It is comprehensible, taking into account that those treaties do not regulate the issue of international personality in an express manner. However, it is the case-law of the European Court of Justice that refers to functional limitation and marks out the borderline of the EC's external competence basing it on Community tasks and purposes.[22]

The rule of the functional limitation of international organisations' personality appears to be an established principle of international law. In an obvious manner it results from the way by which an international organisation acquires its personality, that is, the way of creating a secondary and derivative personality of an organisation for the need to carry out delegated powers. In consequence, international personality cannot be assigned to an international organisation outside the scope of its functions and objectives.

Despite the existence of functional limitation, the international personality of the Communities, and esp. of the European Community that enjoys the most extensive competences is designed in relatively broad terms. Making use of its personality, the European Community has still a wide area of manoeuvre on the international scene.

OTHER FORMS OF LIMITATIONS OF PERSONALITY

Time limits

Initial time limits, i.e. the beginning of the existence of Communities' international personality are the dates of entry into force of the founding treaties. For the Coal and Steel Community it is 25 July 1952,[23] and for the two other Communities – 1 January 1958.[24]

Terminal time limits, i.e. the end of the existence of Communities' international personality is not determined in case of European Community and Euratom Community, once the treaties establishing them were concluded for an unlimited period.[25] In the case of ECSC, the nearest time limit expires

[22] See, *i.a.*, case 22/70 [1970] *Commission v. Council (ERTA)*, opinion 1/76 [1976] *Draft agreement establishing a European Laying-Up Fund for Inland Waterway Vessel* and cases 3,4 and 6/76 [1976] *Cornellis Kramer and others*.

[23] The ECSC Treaty was concluded on 18 April 1951

[24] Rome Treaties were concluded on 25 March 1957

[25] Art. 312 EC Treaty, Art. 208 Euratom Treaty

on 25 July 2002, as the Paris Treaty was concluded for 50 years.[26] We may assume, the situation will be clarified enough in advance.[27]

As was said, the EC and Euratom treaties were concluded for an unlimited period. Even so, it cannot be stated definitely that those treaties will not terminate at any moment. It is true, the founding treaties do not contain any provisions on withdrawal from the organisation. Nevertheless, one can argue that member states preserved that right which is rooted in their sovereignty. Thus, while transferring some powers to the Communities, states did not renounce the right to withdraw from founding treaties.

Territorial limitations

International personality of the Communities is unlimited in the sense that it does not depend on the recognition by third states. On the other hand, we have to be aware that the European Communities may enjoy its international personality and exercise the rights and fulfil obligations on an international level, only with regard to the territories of member states,[28] and in that sense, their personality is territorially limited.

Sub-ordination clauses

They constitute a *sui generis* form of limiting the European Communities' legal capacity. They occur in some multilateral international agreements and subject the participation of the Community, or in broader terms, of international organisations, in such agreements, to foregoing the acceptance of the agreement by one, several or all members states of the organisation. A subordination clause, for example, can be found in the UN Convention on the Law of the Sea of 1982. The clause stipulates that in order for the organisation to sign and then ratify[29] the Convention, most of its member states must have done so beforehand.

[26] Art. 97 ECSC Treaty

[27] Several solutions can be taken into consideration. Prolongation of the treaty force seems to be the easiest way, but not the only one. In 1991 the European Commission suggested that before the termination of the ECSC Treaty it would be accommodated into the EC Treaty.

[28] Some of the territories of some member states are excluded from EC jurisdiction, *e.g.* the Greenland.

[29] Annex IX to the Convention uses the terms: "*formal confirmation*" and "*accession*".

Non-recognition

It is not a limitation having an international law character, but simply a practical one, seeing that the recognition itself is not a condition for having international personality. Both recognition and non-recognition can be expressed either in an explicit or implicit way. In the case of the European Communities, the most common or maybe even the exclusive method of recognition is the implied recognition through establishing diplomatic relations.[30] In contrary to that, before June 1988, the Soviet Union and the communist countries made clear statements on the non-recognition of the European Economic Community. They used to take place, particularly, at multilateral conferences, when the Soviet Union representatives used to announce that their own and simultaneous EEC participation at a conference in no way means the recognition of the latter. Only in June 1988, the EEC and the then existing Council of Mutual Economic Assistance agreed on launching official relations with each other, which was followed by the establishment of bilateral diplomatic relations between the EEC and USRR satellite states, including Poland, in August and September 1988.

The lack of recognition of the Communities may cause certain difficulties linked to the inability of establishing, within the scope of Communities' powers, the relations, esp. the treaty ones, with the states refusing recognition. From the viewpoint of such states, all the competences that in fact were delegated by members to the organisations, still rest upon the member states. Then, if there is a need to regulate, with a third state that refuses recognition, a certain sphere of mutual relations which fall within the scope of the external competence of the Communities, neither Communities themselves nor their member states may act. Member states cannot act due to the fact that they have already transferred the power to the organisations. The organisations cannot act on account of the fact that they are not even able to establish relations with that state.

[30] Up to 1990 none of the states recognised the European Communities in an express way, see *Oxford Encyclopaedia of European Community Law*, Volume I *Institutional Law*, Oxford 1990, p. 355. The author of the article does not possess any information indicating that such recognition took place after 1990. In December 1996, there were 164 diplomatic missions accredited at the Communities, [on the basis of a unpublished paper of the European Commission]. See also *Corps diplomatique, accrédite auprès des Communautés européennes et représentations auprès de la Commission*; Luxembourg 1995.

INTERNATIONAL PERSONALITY AND EXTERNAL COMPETENCE

The notions "*international personality*" and "*external competence*" are not identical. There exist substantial differences between them, which force us to look at them separately. To acquire international rights and obligations both international personality and external competence are needed. It is very important to underline that the personality is defined exclusively from the point of view of international law, and in that sense has extra-communitarian origin and character.[31] It means, Community law cannot confer international personality on its own. The mere provision on legal capacity that we find in the establishing treaties is not enough. The Communities are subjects of international law due to satisfying the criteria of personality. The Communities do not have impact on the existence of such prerequisites. They have impact only on meeting them. It is self-evident that in the case of international organisations, prerequisites are primary to personality. In other words, the existence of international personality is subjected to the fulfilment of the previously given conditions.

In contrary to international personality, the external competence is modelled by the legal norms of the Communities, both norms of primary and secondary sources of Community law. The member states of the Communities indicated competence in the founding treaties, thus transmitting some of their powers to the benefit of the organisations. Additionally, to some extent, the competence can be derived from the law-making of the Communities themselves, namely, from the activities of Communities' institutions, and in particular, by the case-law of the European Court of Justice.[32] By all appearances, it seems paradoxical

[31] Tammes notes that "*[t]he capacity of an organization could not be provided for by the internal law of the organization itself (...) In all legal systems capacity was conferred by an outside source. A legal entity could never invest itself with general capacity (...)*", see *Yearbook of the International Law Commission*, 1974, Vol. 1, p. 136, quoted by P. Lachman, *International Legal Personality of the EC: Capacity and Competence*, Legal Issues of European Integration 1984/1, p. 7.

[32] As Philippe Manin writes "*[i]n the EEC, the scope of the orgnization's power to conclude international agreements is not only determined by the provisions of the founding treaty. It is also – and perhaps primarily – based on the Court's, interpretation of the treaty as a whole and in particular of certain of its provisions.*", see P. Manin, *The European Community and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*, Common Market Law Review 24, 1987, p. 465

to say that the external competence is the exclusive domain of internal Community regulation. This time, however, it is international law that stands aloof and does not participate in the regulation of the external competence or only takes part in this process indirectly by "*lending for use*" one of its instruments – an international agreement that can be used as a form of making regulations concerning external competence.

Significant differences between international personality and external competence can be revealed in respect of the legal consequences of an act of international law issued at the lack of either international legal capacity or external competence. On the one hand, when there is a lack of legal capacity, the act (usually a treaty) is invalid *ex tunc*, that is to say, it does not bring about projected consequences since the very moment it was enacted. On the other hand, if an international act was concluded at the existence of international capacity while there was a lack of external competence, the act is not, prima facie, invalid, but defective and unsound. In such a case, we may argue that this defectiveness should not touch a third state's action in good faith. The act should not be annulled without the knowledge of and consultations with the third party, or in stronger words, without its consent.

CONCLUSION

The European Communities are unquestioned subjects of international law. Their personality is, however, limited by their powers and objectives. Still, the members states of the organisations are their ultimate governors and in the end it depends on their will, to which extent and in what manner the organisations function. Nevertheless, despite the existing limitations, the international practice of the European Union indicates that the Communities were left enough room for comprehensive activities. International practice also discloses that the European Communities gain an increasingly stronger position on the international scene.

The possession of international personality and a relatively wide scope of external competence are the starting point of Communities' external relations. Using their powers the Communities are active in the treaty-making process and maintaining international relations.

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THE EUROPEAN UNION APPROACH TO THE CONCEPT OF TEMPORARY PROTECTION OF DISPLACED PERSONS

by

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1. In the beginning of the 1990s European countries faced the problem of a mass influx of people fleeing the region of conflict as the result of the war in the Balkans. It was necessary to apply relevant measures to provide protection to those people. However, due to the character of this situation, the established measures of granting protection to asylum-seekers provided by the 1951 Geneva Convention[1] and the 1967 New York Protocol relating to the Status of Refugees[2] proved to be inadequate. There emerged a necessity to apply measures which would fill the gap between the principle of *non-refoulement*, binding under international law, and the discretionary character of asylum.[3] The need to grant protection simultaneously and effectively to a large amount of people made it necessary to suspend individual refugee status determination and apply group determination. People fleeing the region of conflict often could not be recognised as refugees in the meaning of Art. 1A of the 1951 Geneva Convention. This issue is closely related, though – it must be emphasised – not limited to the problem of the inadequacy of the conventional definition and the issue of its broadening and providing subsidiary protection. Moreover, the emerged situation demanded the solution of a rather provisional character aimed at returning

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[1] 189 UNTS 150.
[2] 606 UNTS 267.
[3] *Cf.* ECRE, *Position on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, London 1997, para. 9.

people under protection to their regions of origin when the reasons which forced them to leave no longer existed. Here, the temporary character of the protection is in the interest of particular states affected by the burden of granting protection to often considerable numbers of people, but also in the interest of the displaced people who may be vitally interested in returning to the regions they had to flee. The mentioned issues as well as others, related for instance to the extent of rights guaranteed to those under protection, were required to be regulated in a complex manner. This resulted in an attempt to develop throughout the nineties a specific subsidiary regime of protection in Europe, known as the temporary protection regime.

However, it must be remembered that temporary protection has a much longer tradition and the phenomenon of mass influxes of people seeking protection, caused by various circumstances, was typical for many parts of the world. Consequently, the issue of granting protection to people in a situation of mass influx was also in the scope of interest of the United Nations High Commissioner for Refugees (UNHCR).[4] In Europe, however, the situation was different. First, mass influxes were not an existing problem yet. Second, the political circumstances favoured solutions of a durable character because refugees from the Eastern block could not return to their countries of origin in the foreseeable future. Third, contrary to the situation in Africa and Latin America, no regional instruments were elaborated in Europe completing 1951 Geneva Convention and extending its refugee definition. All this resulted in the fact that the European states, confronted with mass flow of people from the conflict in Yugoslavia and the call of UNHCR for granting them temporary protection, proved to be to a high extent unprepared for taking adequate measures under such circumstances.

The Western European states, which were bearing the main burden of granting protection to those fleeing the regions of war in Yugoslavia, began adopting their legal regulations to provide legal bases for adequate and necessary actions.[5] The undertaken actions were, therefore, unilateral and

[4] In this regard see, e.g., V. Vevstad, *Refugee Protection: A European Challenge*, Oslo 1998, p. 194; see also D. Luca, *Questioning Temporary Protection*, International Journal of Refugee Law 1994, Vol. 6, No. 4, p. 535.

[5] As an example, for a detailed study of developments in Swedish law in this regard see J.W. Dacyl, *Protection Seekers from Bosnia and Herzegovina and the Shaping of the Swedish Model of Time-Limited Protection*, International Journal of Refugee Law 1999, Vol. 11, No. 1, p. 155 *et seq.*; see also M. Kjaerum, *Temporary Protection in Europe in the 1990s*, International Journal of Refugee Law 1994, Vol. 6, No. 3, p. 450 *et seq.*

inharmonious, which led to the emergence of domestic temporary protection regimes in particular states. As a result, the regimes were seriously diversified. In addition, the actual burden borne by some states, especially Germany, was also diversified to high extent. This was reflected by a huge disproportion in numbers of people admitted in particular states.

The lack of harmonised reaction is worth noting especially because the end of the 80s marks the beginning of the harmonisation process of immigration and asylum policy within the European Union (hereafter: the EU). It resulted, among other things, in adopting rules which determined the state responsible for examining the asylum applications lodged in one of the Member States within the framework of the 1990 Dublin Convention, as well as in the institutionalisation of the intergovernmental co-operation on immigration and asylum in the framework of third pillar, introduced by provisions of the Maastricht Treaty. The issues of immigration and asylum were recognised in Art. K1 of the Maastricht Treaty as the matters of common interest. Taking this under consideration, as well as the EU enlargement of 1995, the elaboration within the EU of a common harmonised approach to the problem of temporary protection seemed to be evident. The specific position of the EU which makes it the most relevant forum to deal with the problem of temporary protection in a harmonised manner by elaborating common standards and promoting co-operation of European states in this respect, was acknowledged by non-governmental organisations[6] as well as the Council of Europe.[7] Yet, the actions undertaken within the EU in this respect were rather modest. Because a broader compromise was not achieved, especially due to controversies concerning burden sharing, the measures were limited to two non-legally binding and officially unpublished documents adopted by the ministers responsible for immigration: the Resolution on people displaced by the conflict in former Yugoslavia adopted in London in 1992 and the Resolution on certain common guidelines as regards admission of particularly vulnerable groups of distressed persons from the former Yugoslavia adopted in Copenhagen in 1993.[8] Generally, the documents were aimed at promoting some concrete solutions of immediate problems and as such were

[6] See, e.g., ECRE, *op. cit.*, para. 5.

[7] Recommendation 1348 (1997) on the Temporary Protection of Persons Forced to Flee Their Countries adopted by the Parliamentary Assembly of the Council of Europe on 07.11.1997.

[8] For more details see J.W. Dacyl, *International Responses to Refugee Flow from Former Yugoslavia*, in: *Temporary Protection - Problems and Prospects*, 22 Report of Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund 1996, p. 30.

rather irrelevant for the elaboration of a general and harmonised framework of common approach to the issue of temporary protection.[9]

2. It was only in 1994 that the European Commission announced, in its Communication to the Council and the European Parliament, an elaboration of a harmonised temporary protection regime which would be based on past experience and guarantee minimal standards of protection.[10] In the following year, on 25 September, the Council adopted the Resolution on burden sharing with regard to the admission of displaced persons on a temporary basis (hereafter: the 1995 Resolution)[11] and subsequently supplemented its provisions with the Decision on an alert and emergency procedure for burden sharing with regard to the admission and residence of displaced persons on a temporary basis adopted on 4 March 1996 (hereafter: the 1996 Decision).[12]

Both admitted documents were focused on the issue of burden sharing. It indicates, significantly, that this issue was the actual reason for seeking a harmonised regime of temporary protection. Similarly, the disproportion in burden sharing of admitting an increasing number of asylum-seekers in the second half of the eighties was one of most important reasons of the European Communities Member States' involvement in the immigration and asylum matters on the regional level. Elimination of the disproportion, as well as other phenomena like those known as the asylum shopping problem or the refugees in orbit problem, were only possible in the context of one harmonised asylum policy. Again, the undertaken policy of harmonisation, this time related to the question of temporary protection, was aimed at the elimination of phenomena considered negative for Member States, and did not acknowledge the fact that granting international protection to people in need is based on human rights and humanitarian reasons and as such should be as independent from particular interests of certain states as possible.[13]

The 1995 Resolution and the 1996 Decision, focused on the Member States' common response to the problem of burden sharing in the situation of mass

[9] K. Kerber, *Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States*, International Journal of Refugee Law 1997, Vol. 9, No. 3, p. 454.

[10] European Commission, *Communication to the Council and the European Parliament*, 23.02.1994, COM (94) 23 final, p. 25.

[11] OJ C 262, 07.10.1995.

[12] OJ L 63, 13.03.1996.

[13] *Cf.* R. Bank, *The Emergent EU Policy on Asylum and Refugees: The New Framework Set by the Treaty of Amsterdam: A Landmark or a Standstill?*, Nordic Journal of International Law 1999, No. 68, p. 14.

influx, constituted the first attempt to create general, harmonised regulations of temporary protection. This attempt may hardly be assessed as successful. The adopted documents did not create legal obligations due to either their character (as for the resolution) or to the provisions' construction (as for the decision). They imprecisely determined the scope of the adopted provisions' application to the people in need of international protection covering only the situation of armed conflict and civil war.[14] The procedure, introduced by the 1996 Decision, of determining whether an emergency situation exists connected with mass influx and whether actions aimed at burden sharing should be taken was based on the possibility only to convene, on the initiative of the Presidency, a Member State or the Commission, the Co-ordinating Committee. Furthermore, the criteria of burden sharing were also set down imprecisely. Specifically, it did not determine whether burden sharing should be primarily in the form of a financial contribution or that of a distribution of people already under temporary protection within the EU. The European Council on Refugees and Exiles (ECRE) pointed out the deficiencies of the other solution. It suggested that, in the case of applying this form of burden sharing, it should take place only shortly after arrival and be based on the principles of voluntariness and the respect for the family links of the people concerned.[15] The documents focused on the question of burden sharing and as such did not refer to the harmonised rules of admission, return, and the scope of guaranteed rights. Paragraph 4 of the 1995 Resolution stated expressively that "*[t]he detailed arrangements for admitting displaced persons shall be decided on by each Member State.*" It has been also noted that, especially in the context of the possible application of the burden sharing form based on redistribution, the prior harmonisation of temporary protection rules and its scope is highly desirable.[16]

3. Nevertheless there was still no comprehensive regulation of the temporary protection issue within the EU. Not earlier than 20 March 1997, the Commission submitted the Proposal for a Joint Action concerning temporary protection of displaced persons and, subsequently, on 24 June 1998 its amended version (hereafter: the proposed joint action).[17] If the proposed joint action

[14] For a precise analysis of the documents' legal status and their scope of application see K. Kerber, *op. cit.*, p. 455 *et seq.*

[15] ECRE, *Comments on the 1995 Burden-Sharing Resolution and Decision Adopted by the Council of the European Union*, London 1996, para. 3.

[16] *Ibidem*, para. 4.

[17] OJ C 106, 04.04.1997 and OJ C 268, 27.08.1998 respectively.

had been adopted it would have been binding for Member States under international law. The proposed joint action was based on the minimal standards approach. Particular states would have been free to provide more favourable guaranties to those under temporary protection in their domestic regulations. Another significant feature of the proposed joint action approach was that it considered the question of temporary protection an issue separate from the subsidiary protection for *de facto* refugees.[18]

The proposed joint action's objective was to create a temporary protection regime which would have been adequate in emergency situations and offered the relevant framework for a prompt and co-ordinated reaction of member States. According to the document, an emergency situation took place in the case of a mass influx of persons in need of international protection. Mass influx, here, had the meaning of *'the arrival within the Union of a significant number of persons who claim to be in international protection or strong probability that such a situation may soon arise'* (art. 1(c)). The term *'a significant number of persons'* was imprecise and must have been determined discretionarily.

Persons in need of international protection were defined in the proposed Art. 1(b) as *'[...] any third country national or stateless person who has left his or her country of residence and whose safe return under humane conditions is impossible in view of the situation prevailing in that country [...].'* Furthermore, certain groups were specified as examples, including those who had fled regions affected by armed conflict and persistent violence, those under serious risk to exposure to systematic or widespread human rights abuses and all those who, for other reasons specific to their personal situation, were presumed to be in need of international protection. Thus, an open clause was adopted which allowed for an elastic approach to the different causes of mass flows of people. The state of being in need of international protection was decisive here. Therefore, in conformity with the Commission's intention, the scope of application constructed in such a manner covered also conventional refugees. However, the proposed joint action did not cover those who had

[18] Such an approach was in conformity with the previous Council Resolution Laying Down Priorities for Co-operation in the Field of Justice and Home Affairs for the Period 1 July 1996 to 30 June 1998, OJ C 319, 26.10.1996; V. Vevstad, *op. cit.*, p. 202 *et seq.*; the author noted that consistent upholding of the distinction might result in adding to two established categories of refugees, namely convention refugees and *de facto* refugees, the third category of emergency refugees.

been granted temporary protection on the basis of domestic regulations prior to its entering into force, as well as those comprised in the exclusion clause provided in the proposed Art. 11.[19]

The Council determined the specific groups covered by the temporary protection regime in certain emergency situations. It was obliged to consider *'[...] whether adequate protection can be found in the region of origin'* (the proposed Art. 3.1), a rule which met with sharp criticism. The decision establishing the temporary protection regime was made by a qualified majority in the Council. The qualified majority applied also to the Council decisions on revision or termination of the established regime.

The question of temporary protection duration is one of the most important aspects of this institution. The temporary, provisional character of this protection form, with all its implications, belongs to its constituting features. The institution of temporary protection is a supplementary link between the *non-refoulement* principle and a durable solution[20] and as such should be subject to time limitation after which it would be possible either to safely return to the place of origin, or to be granted protection of a more durable character. According to the ECRE the maximum time scope of temporary protection should not exceed two years. This period has been estimated as sufficient to deal with causes of a mass influx of people.[21] The proposed joint action went in the same direction; however, it provided a limitation of the temporary protection time scope to a longer period than the suggested two years. It was for the Council to determine its duration in a decision on establishing of the temporary protection regime. However, according to the proposed Art. 10, the suspension of an applicant's examination for refugee status in the meaning of the 1951 Geneva Convention could not exceed five years and extend no longer than until the Council's decision was made on the termination of the temporary protection regime.

[19] The exclusion clause was constructed in a quite broad manner. It covered those who have: " *committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments [...]; committed a serious non-political crime outside the country of refuge prior to his or her arrival on the territory of one of the member States; been guilty of acts contrary to the purposes and principles of the United Nations [...]*". However, as the proposed article stated further, a Member State might also refuse to grant temporary protection when there were *'reasonable grounds'* to consider a person dangerous to the security of that Member State, as well as to those who had been convicted with a final judgement of a especially serious crime and were considered dangerous to the community.

[20] M. Kjaerum, *op. cit.*, p. 445.

[21] ECRE, *Position on Temporary Protection*, para. 17

The monitoring of the circumstances' development was also provided. Every year and at least six months before termination of the temporary protection regime, the Commission was obliged to submit to the European Parliament and to the Council a report on the situation development and on the application of the regime in particular Member States. On the basis of such a report the Council was obliged, at least three months before termination of the regime, to make a decision either on the regime revision or on the return, if it proved to be, in circumstances concerned, safe and under humane conditions. Priority must have been given to the voluntarily return. According to the proposed Art. 13, if after five years since establishing of the temporary protection regime the Council had not made a decision on its termination, the Member States *'[...] should examine whether long-term measures should be introduced for beneficiaries of temporary protection.'* This provision might have raised criticism as it was imprecise and did not provide a clear procedure in a particular situation.

The proposed joint action guaranteed also the minimal scope of rights granted to people under temporary protection. Domestic regimes of temporary protection in particular states were most significantly diversified in this context. The people under temporary protection were often denied essential rights especially concerning the question of family reunification and that of work permission. However, it should be noted that the minimal standards approach could not lead to the elimination of the mentioned diversities.

The proposed Art. 6 obliged Member States to provide a residence authorisation to people granted temporary protection. As far as the question of family reunification was concerned, the minimal standard guaranteed by the proposal to the beneficiaries of temporary protection included the right to family reunification *'with respect to their spouses and their minor and dependent children'* as provided by the proposed Art. 7.1. According to paragraph 2, the absence of documents proving family links should not have been in itself an impediment. The proposed joint action also provided permission to engage in a gainful activity and equalises the position concerning remuneration, social security and working conditions of those under temporary protection with those recognised as conventional refugees (the proposed Art. 8). Taking up a gainful activity might be taken into account while ensuring the guaranteed necessary means of subsistence and adequate medical care. Furthermore, member States were to ensure that people under temporary protection had access to public education on the same bases as the conventional

refugees. In regards to accommodation, Member States were obliged to ensure conditions similar to those provided for conventional refugees. However, throughout the first year of the temporary protection regime provisional measures were admitted (the proposed Art. 9).

In fact, the proposed joint action did not refer to the problem of sharing the burdens of granting temporary protection among the Member States. It was only the proposed Art. 6 which stated somehow generally that, on the basis of a report submitted by the Commission, *'[...] the Council shall examine how best to assist Member States which have been particularly affected by the mass influx of persons in need of international protection.'* However, the problem of burden sharing was dealt with in another draft document: the proposed joint action concerning solidarity in the admission and residence of beneficiaries of the temporary protection of displaced persons, submitted by the Commission on 26 June 1998 (hereafter: the proposed joint action on burden sharing).[22] These two proposed joint actions, which were to enter into force simultaneously, provided a comprehensive and coherent approach to the harmonised temporary protection regime within the EU. It was stated in the preamble of the proposed joint action on burden sharing that it was to be based primarily on the mechanism of financial support. However, distribution of those granted temporary protection was not excluded as a subsidiary mechanism which would be possible only either before or on their arrival in the EU.

According to the proposed procedure, in the situation of the temporary protection regime adoption, the Council might, acting on the initiative of a Member State or of the Commission, decide unanimously on the measures supporting those Member States which were especially affected by burdens of granting temporary protection. Such decisions were to be taken after having sought the opinion of the UNHCR (the proposed Art. 2). According to further provisions, the main measure of supporting Member States consisted in covering certain financial costs connected with granting protection by particular Member States from the Community budget (the proposed Art.3). However, a decision taken by the Council might provide a subsidiary measure of distributing the people under temporary protection among Member States. Such distribution might take place only before or on arrival in the EU (the proposed Art. 4). The proposed joint action on burden sharing also included the need to inform

[22] OJ C 268, 27.08.1998.

the European Parliament forthwith about the implementing measures adopted and their publication in the Official Journal once adopted (the proposed Art. 5).

The two proposed joint actions, despite some deficiencies, provided a comprehensive and coherent model of the temporary protection regime, which would have enabled Member States to take adequate common steps in emergency situations of a mass influx of people in need of international protection. They would have undoubtedly contributed to harmonisation of domestic regulations of Member States in this regard. As such they were received positively by independent experts.[23] However, Member States could not reach an agreement as to the unanimous adoption of the documents in the Council. Disagreement concerning the question of burden sharing was certainly a significant factor here. Thus, in the context of the immigration and asylum policies new legal framework, introduced by the Treaty of Amsterdam (hereafter: the TA), the documents were not adopted in the proposed form.

4. Confronted with the refugee crisis in Kosovo during the first half of 1999 and the mass influx of people from this region seeking protection, the EU Member States proved again to be unprepared to respond adequately and harmoniously. The undertaken attempts of harmonisation were of an *ad hoc* character and pertained mainly to practical issues.[24]

The failure to introduce a harmonised approach to the problem of temporary protection within the EU should be perceived in a more general context of immigration and asylum policies' harmonisation within the ineffective framework provided by the Maastricht Treaty. The new framework established by the TA, which entered into force on 1 May 1999, seems, at least to some extent, to offer opportunities to change this situation.[25]

[23] See, *e.g.*, ECRE, *Comments on the Proposal of the European Commission Concerning Temporary Protection of Displaced Persons*, London 1997.

[24] See Joint Action establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum-seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo, adopted by the Council on 26.04.1999.

[25] For a detailed critique of the Maastricht framework in the light of changes introduced by the Amsterdam Treaty see R. Bank, *op. cit.*, p. 3 *et seq.*; see also A. Weber, *Möglichkeiten und Grenzen europäischer Asylrechtsharmonisierung vor und nach Amsterdam*, Zeitschrift für Ausländerrecht und Ausländerpolitik 1998, Heft 4, p. 147 *et seq.* and A. Zimmermann, *Der Vertrag von Amsterdam und das deutsche Asylrecht*, Neue Zeitschrift für Verwaltungsrecht 1998, Heft 5, p. 450 *et seq.*

The TA introduced to the EC Treaty a new Title IV (ex Title IIIa) "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons." Thus, these issues were placed in the Community framework with its established, legally binding measures: directives and regulations. However, some aspects of inter-governmental co-operation have not been abandoned. According to the Art. 67 of the EC Treaty, the Council, throughout the five-year period since the TA entered into force, makes decisions unanimously on the initiative of the Commission or of a Member State and only with consultative role of the European Parliament. After having been shifted to the first pillar, the immigration and asylum matters are also placed in the scope of the jurisdiction of the European Court of Justice. By virtue of provisions of the Title IV of the EC Treaty, the Council is obliged, *'[i]n order to establish progressively an area of freedom, security and justice [...]'*, to adopt within a five-year period since the TA entered into force, relevant measures which ensure the free movement of persons including the issues of external borders, immigration and asylum. All these changes provided by the TA should contribute to better effectiveness of the immigration and asylum policies. However, the limitations which are effects of concessions in favour of the opponents of full communitarisation of the immigration and asylum policies, as well as their limited scope of application within the EU as a result of opting-out protocols, cannot be forgotten.

As far as the question of temporary protection is concerned, the Council was obliged in Art. 63.2(a) of the EC Treaty to adopt within the mentioned five-year period *'minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin'*. As it was critically pointed out, the situation of a mass influx of people is not referred to here; however, it does not exclude the possibility of such desired specification in a particular measure adopted.[26] In the context of temporary protection, it is also very important that the Council was obliged to adopt measures *'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'* (Art. 63.2(b) of the EC Treaty). Yet, this question is excluded from the obligation to be regulated within the five-year period.

According to Art. 64.1 of the EC Treaty the provisions of the Title IV do not affect the rights of Member States to adopt adequate measures with regard

[26] ECRE, *Guarding Standards – Shaping the Agenda*, London 1999, p. 15.

to maintenance of law and order and the safeguarding of the internal security. Without prejudice to this rule, according to Art. 64.2 of the EC Treaty, the Council acting on initiative of the Commission may, in the situation of mass influx of third countries' nationals to certain Member States, decide by a qualified majority on *'provisional measures of duration not exceeding six months for the benefit of the Member States concerned.'* As it was aptly noted, the Art. 64.2 *'can best be understood as enabling the EU to continue with ad hoc responses until such a time as more coherent and permanent temporary protection and responsibility sharing system arrangements are adopted. Such emergency action is the understandable prerogative of Member States but should be implemented without sacrifice of democratic transparency and accountability. It is also vital that such action does not violate States' obligations under international refugee and human rights law.'* [27]

The character of the EU policies on immigration and asylum after the TA entered into force will be shaped in the actual application of new legal framework. The Council and the Commission Plan of Action of 3 December 1998,[28] which determines the schedule of adoption according to the provisions of the TA, certain questions of the freedom, security and justice area, as well as the declarations of a special meeting of the European Council in Tampere on 15 and 16 October 1999, seem to prove that harmonisation of immigration and asylum policies within the EU will be treated with priority. The first particular proposals of the Commission, which are of more liberal character seem also to be cause for cautious optimism.[29]

5. In paragraph 37 of the above mentioned Plan of Action it has been stated that the adequate measures concerning the issue of temporary protection and the question of promoting fair burden sharing should be adopted as soon as possible. The Commission, relying on the solutions adopted in the proposed joined actions, which was in conformity with the postulates of independent experts,[30] started working on legal measures which would be compatible with

[27] *Ibidem*, p. 16.
[28] OJ 19, 23.01.1999.
[29] See, e.g., the Commission's Proposal for a Council Directive on the right to family reunification, COM (1999) 638 final; for details see M. Kowalski, *Evolution of the European Approach to Refugee Family Reunification*, in: J.W. Dacyl, Ch. Westin (eds.), *Challenges of Diversity Accomodation*, Stockholm 2001, forthcoming.
[30] ECRE, *Guarding Standards*, p. 16.

the new legal framework introduced by the TA. As a result, in June 2000 the Commission presented a proposed directive concerning the minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.[31] It is thus an attempt to regulate the whole issue of temporary protection with one act which encompasses both the standards shaping this form of protection and the problem of burden sharing.

As it is the case with the proposed joint action concerning temporary protection, the proposed directive is based on an approach which postulates the ensurance of minimal protection guarantees while leaving open to the particular member states the possibility of offering a more favourable range of protection. Although Art. 63.2(a) of the EC Treaty does not refer the question of temporary protection to the situation of a mass influx of people, such specification has been formulated in the proposed directive. Temporary protection is here (the proposed Art. 2(a)) defined as a measure of exceptional character which is applicable in the case of a mass influx of displaced persons seeking protection, where there is a risk that the existing asylum procedures may be insufficient. A mass influx of people is defined in the directive as *'[...] arrival in the European Union of a large number of displaced persons from a third country who are unable to return to their country of origin, who come from a specific country or geographical area.'* Therefore, as in the proposed joint action where the expression *'significant number of persons'* has been used, this issue is of a discretionary character and is always determined by the Council in a decision on introducing temporary protection in the Member States. But, it is conspicuous that a mass influx of persons, as formulated in the proposed joint action, involved *expressis verbis* also a strong probability that such situation may soon arise.

Displaced persons who might be given temporary protection are, according to the Art. 2(c) of the proposed directive, third country nationals or stateless persons who, having left their country of origin, are unable to return to it in safe and humane conditions due to the situation in this country. Those persons may also, as the proposed directive states literally, fall within the scope of the definition included in Art. 1A of the 1951 Geneva Convention. As in the proposed joint action, an open clause has been used here which allows for

[31] COM (2000) 303 final.

flexibility in giving temporary protection to the persons in need. Additionally, as in the proposed joint action, an example has been given of people who have left an area of armed conflict or endemic violence and of those who are exposed to systematic or generalised violation of their human rights. Yet the determining of the particular categories of persons encompassed by temporary protection in a specific case of a mass influx of people is made in the Council's decision on introducing temporary protection in the Member States (the proposed Art. 5.1). The States have right to extend temporary protection in a given situation to further categories of persons coming from the same countries and displaced for the same reasons as the groups referred to in the Council's decision. In the case of such extension the Member States are obliged to notify the Council and the Commission immediately (the proposed Art. 7).

The proposed directive applies only to persons who will be given temporary protection after it entered into force (the proposed Art. 3.4). As for the exclusion clause formulated in the proposed Art. 29, it includes persons regarded as dangerous to the national security of a Member State, persons as to whom there are serious reasons for believing that they have committed a war crime or a crime against humanity and those as to whom it is found, during consideration of the asylum application, that the exclusion clause of Art. 1F of the 1951 Geneva Convention applies. The range of the exclusion clause thus formulated is indeed narrower than in the proposed joint action. The fact that the conditions of applying the exclusion clause are clearly stated in Art. 29.2 should be assessed as very positive: all reasons for exclusion of a given person from temporary protection must be based exclusively on this person's personal conduct, and the decision taken in this respect must be based on the principle of proportionality and the person concerned must be entitled to seek redress in the courts of the given Member State.

As it has been mentioned above, according to the proposed Art. 5, the Council makes, on a proposal from the Commission and by qualified majority, the decision on introducing temporary protection if it acknowledges that there has been a mass influx of persons seeking protection. The Council's decision is based inter alia on the information received from the Member States, the Commission, the UNHCR and other organisations. The Council introduces temporary protection in all Member States. In its decision the Council establishes also the particular categories of people to whom the protection applies and the date on which the protection will take effect. The Council does not determine, therefore, the length of the period of protection, as it

was provided in the proposed joint action, but only the initial date of its implementation. The duration of temporary protection has been established for a period of one year with a possibility of two automatic prolongations by six months each (the proposed Art. 4) and it may not exceed two years in total, after which the period the protection comes to an end as provided in Art. 6.1(a). Yet, if the Council finds that the situation in the areas of origin of the people given temporary protection allows for a safe and humane return without any risk of violation of human rights, it can, on a proposal from the Commission, make a decision to terminate the protection. The Commission is obliged to examine any request by a Member State concerning the introduction or termination of temporary protection. The European Parliament is always to be informed about such decisions.

The duration limitation of temporary protection to the period of maximum two years is to be assessed very positively. The maximal period of two years is in accordance with the above mentioned postulates of independent experts. Such a time limitation makes temporary protection a truly exceptional measure. It must be also emphasised in this context that the proposed directive guarantees to the persons under temporary protection an access to the procedure of seeking refugee status. Access to this procedure may be suspended, but only until the end of temporary protection, i.e., for a maximum of two years (the proposed Art.16). The criteria for determining which Member State is responsible for considering the asylum application are applied here (the proposed Art.17). It is worth reiterating that the proposed joint action allowed for a suspension of the access to the asylum procedure for the period of five years. According to further provisions of the proposed directive, if a person whose application for refugee status has been refused is eligible for temporary protection, the Member States are obliged to include this person in this form of protection for the remaining period of the protection scheme (the proposed Art.18.2).

When the duration of temporary protection comes to an end, relevant normal law on entry and sojourn of foreign nationals in the territory of the Member States is to be applied according to the proposed Art. 19. The proposed Art. 20 provides that Member States are obliged to consider the compelling humanitarian grounds on which the return of a person in question to the area of origin may, in a given situation, be impossible or unrealistic. Thus the relevant regulations concerning the subsidiary protection forms of asylum-seekers may also by applied here. As for the return to the areas of origin, the Member

States are obliged to make the voluntary return as easy as possible, even when the person is still enjoying temporary protection, which includes the possibility to ensure visits in the area of origin in order to assess the actual situation (the proposed Art. 21). After the temporary protection ends, the Member States are obliged to undertake relevant measures concerning the further stay of persons of special needs, e.g., those in need of specialised medical treatment, so as to ensure that the treatment is not interrupted in spite of the fact that the temporary protection has ended. The Member States must ensure further residence of families with minor children who attend school in a receiving state, so as to allow them to complete the current school term (the proposed Art. 22).

In comparison with the proposed joint action, the scope of minimal rights guaranteed to persons benefiting from temporary protection in the proposed directive, is similar but, with regard to some issues, substantially broader. The proposed directive obliges the Member States to provide the persons benefiting from temporary protection with relevant residence permits valid for the entire period of protection, as well as to provide them, if necessary, with visas, including transit visas. The issuing of such documents is to be free of charge and the formalities should be reduced to a minimum, as it is stated in the proposed Art. 8. The proposed Art. 9 provides further that the persons enjoying temporary protection must be provided with a document informing about the conditions of being included in the protection. The document is to be written clearly, in the official language or languages of the country of origin and the receiving country. The proposed joint action did not impose such an obligation on the state authorities and it should be acknowledged as a very desirable improvement. The past experience shows that persons enjoying temporary protection in given countries were often unaware of their rights, and the role of their informer was being assumed, as far as possible, by non-governmental organisations.

As it is the case in the proposed joint action, the proposed directive ensures the right of the persons enjoying temporary protection to work on equal terms with conventional refugees (the proposed Art. 10).

The proposed Art. 11 obliges the Member States to ensure that persons benefiting from temporary protection have access to suitable accommodation (contrary to the proposed joint action, there is no mention here of any provisional period), medical treatment, including the persons in particularly difficult situations, and means of subsistence.

The proposed directive provides also broader access to education than the proposed joint action. Minors who enjoy temporary protection have access to education on equal terms with the host country's nationals, which might however be limited to state education system. As for adults benefiting from temporary protection, the proposed Art. 12 ensures their access to general education, as well as to vocational training, further training or retraining.

The proposed Art. 13 concerns the right to family reunification, the scope of which is much broader than in the proposed joint action where reunification was limited solely to the spouse and minor or dependent children. The fact that the proposed directive reaches much further corresponds to the liberal provisions of the already mentioned proposed directive concerning the right to family reunification, which was presented by the Commission in December 1999. The Member States are obliged to ensure that the person covered by temporary protection is reunited with the following members of his or her family: the spouse or unmarried partner in a stable relationship if the legislation of the receiving state treats unmarried couples in the same way as married ones (this does not exclude the possibility of reuniting partners of the same sex); their children (also the adopted ones, those born out of wedlock or those of earlier marriages) provided that they are unmarried and dependent, whether minor or not; and other family members on condition that they are dependent on the person covered by protection, have had especially traumatic experiences or require special medical treatment because of their health.

The application for reunification is to be lodged by the person benefiting from temporary protection in the receiving state. Reunification must be agreed upon by all persons involved. The absence of documents certifying family relationship cannot in itself constitute an obstacle to family reunification. In such situation, all other facts and circumstances that testify the existence of such ties must be considered. The application for reunification must be examined as quickly as possible and any negative decision must be open to legal challenge in the receiving country. The family members united with the person covered by temporary protection are provided with residence permits within the current framework of temporary protection.

Also, members of a family who have been given temporary protection in various Member States are entitled to the right of family reunification. In such a case, the reunification takes place in the state chosen by the persons involved. The application for reunification is to be lodged in that state of choice.

Family reunification may be applied for during the entire period of temporary protection except for the last two months prior to the end of the maximum period of two years. This limitation may cause certain doubts, especially considering the fact that if, after the end of the maximum period of temporary protection, the situation in the region of origin still does not allow for a safe and humane return, it may be necessary, in order to fulfil the Member States' obligations in this respect, to provide such persons with protection of a more stable character.

Special attention must be devoted to unaccompanied minors who should immediately be given appropriate representation and their exceptionally difficult situation should be recognised in that they are placed together with their adult relatives, with a foster-family or in reception centres or other accommodation proper for minors (the proposed Art. 14).

According to the proposed Art. 15, the scope of minimal rights guaranteed to persons under temporary protection is to be ensured without discrimination based on sex, age, race, ethnic origin, nationality, religion, convictions, handicap or sexual orientation.

As for the provisions of the proposed directive concerning the issue of sharing the burden connected with granting temporary protection, they are compatible with the Council Decision establishing a European Refugee Found, which was presented by the Commission in December 1999, and subsequently adopted by the Council in September 2000. The Decision aims at introducing an approach to the problem of financing the common asylum policy, which would be integrated and based on solidarity. According to the proposed Art. 24 of the directive, the measures it provides for are to be financed from the European Refugee Fund.

With regard to the number of persons particular Member States are able to receive in the framework of temporary protection, the proposed Art. 25.1 provides that every state is to indicate, in a declaration attached to the Council's decision on introducing temporary protection, its capacity to receive a number of people or explain the reasons for not being able to do so. After the decision on introducing temporary protection has been adopted, the states may inform about extending their capacity to receive persons covered by temporary protection. The proposed Art. 25.2 obliges the states to ensure that the persons who are to be received in each particular state agree to be received there. In the explanatory memorandum to the proposed directive the Commission defined this solution as based on the principle of 'double

voluntary action'. On the one hand, this emphasises that the states undertake the obligation to receive a given number of persons voluntarily and, on the other hand, excludes the possibility of enforced displacement of persons through forcing them to agree on being received in a particular Member State.

The proposed directive includes also a possibility to transfer persons already covered by temporary protection between Member States which have to co-operate with each other in this respect. The distribution begins on a request by the state from which the transfer of persons is to take place. The remaining states are obliged to inform the requesting state about the possibility to receive the transferees. The persons to be transferred have to agree on it, in order to undertake a transfer, the Member States are obliged to provide the persons to be transferred with a special document whose model is set out in the Annex to the proposed directive (the proposed Art. 26). The proposed Art. 27 emphasises that the adopted principles concerning receiving of persons covered by temporary protection cannot infringe the Member States' obligations regarding *non-refoulement*.

The proposed directive is aimed at the Member States. According to the proposed Art. 32, the Member States are obliged to adapt their legislation to the provisions of the proposed directive until 31 December 2002.

In conclusion, it is to be observed that the proposed directive appears to be a logical part of the emerging common refugee system in the EU framework elaborated on the basis of the TA. The proposed directive constitutes a coherent and comprehensive approach to the issue of giving temporary protection as an exceptional and time-limited measure which in the situation of a mass influx of refugees is complementary to the other forms of granting protection to people in need of international protection. The guaranteed minimal standards of such protection are of liberal character and seem to be in agreement with the Member States' obligations concerning the protection of human rights with special regard to the 1951 Geneva Convention and the 1950 European Convention on Human Rights.

The proposed directive is based on the experience of the proposed joint actions concerning temporary protection and burden sharing, which were never adopted in spite of long-lasting negotiations. It must be emphasised that, according to the postulates of independent experts, the flaws of those previous proposals have been eliminated. The maximum two-year duration of the protection has been clearly formulated. The Council's obligation to consider giving protection in the area of origin, included in the proposed joint action on

temporary protection, has been abandoned. The scope of the family reunification right has been considerably broadened and the scope of the exclusion clause has been limited.

It has to be remembered that the discussed principles are still merely proposals. The regulation of the issue of temporary protection proposed in the joint actions, which on the whole has been favourably estimated, has not been accepted by the Member States and, as a result, it contributed to the inharmonious response of the states to the crisis in Kosovo. The main obstacle to reach an agreement was the issue of burden sharing. It remains open whether the Member States, according to the procedure set out in Art. 67.1, will unanimously accept the proposals concerning this problem included in the proposed directive. It also remains open whether the implementing of these provisions, in a situation of crisis connected with a mass influx of people seeking protection, will prove effective. While emphasising the advantages of the common asylum policy introduced by the TA, connected with the proposed regulations concerning temporary protection, it must be reiterated inter alia that, according to relevant opting out protocols, the United Kingdom, Ireland and Denmark remain outside the common asylum policy.

Yet, the proposed directive is undoubtedly an important and positive step towards elaborating a liberal common system of refugee protection in the EU.

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SECURITY COMPANIES – THE MERCENARIES OF TODAY?

by

Piotr Pawlikowski*

INTRODUCTION

The escalation of the armed conflicts (both international and internal), that took place in the world during the 1990s, caused the request for the well-equipped and trained military professionals, which are ready to support sides of the conflicts. A common feature of those professionals is that they are non-nationals to the supported state. Some of them are ready to fight without asking for reasons, for financial gain only, but some of them take part in the hostilities for religious or idealistic reasons. The classification presented below provides the most characteristic features of activity of some groups of those professionals.

The first type are those combatants which fulfil the traditional view of mercenaries as non-nationals who fight for financial gain.[1] Such mercenaries were hired by all sides of the civil war in former Yugoslavia (1992–1995) and they were also fighting against Russian forces in the conflict in Chechnya (1994–1996). Many African and European, e.g. French or Serbian, mercenaries were used by Zairean president Mobutu Sese Seko to fight the opposition movement of Laurent Kabila in 1997.[2] They fall under the jurisdiction of domestic or international law as mercenaries.

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[1] M.-F. Major, *Mercenaries and International Law*, Georgia Journal of International and Comparative Law, vol. 22, 1992, No. 1, p. 107.

[2] D. Shearer, *Private Armies and Military Intervention*, Adelphi Paper, 1998, page 22 and: *Report on Mercenaries presented to Human Rights Commission*, submitted by the UN Commission on

Another type are religiously motivated warriors, currently represented by mujahidin from the Islamic countries (Turkey, Iran, Pakistan, Saudi Arabia, Kuwait etc.), which are always ready to support Islamic fighters all over the world. They participated in the Bosnia and Herzegovina forces during the Yugoslav civil war.[3]

We cannot omit a large group of international volunteers that are fighting not for financial or religious reasons, but engage in foreign wars for ideological or political reasons. This group was also represented in the Yugoslavian and Chechnyan conflicts.

All those three groups have historical roots and were earlier represented in the history of the armed conflicts.

But the 1990s brought the new form of the participation of the military professionals in the armed conflicts. On the military and political scene appeared "security companies", which provide military training and security services in return for money or mining and energy concessions.[4] Those firms have internal structures similar to those of business corporations and they are bound by the terms of a business contract.

The question, which we will try to answer in this article, is whether those security companies may be considered mercenaries.

I. SECURITY COMPANIES

The activity of the private security companies has increased with the end of the Cold War. Reductions of the expenses for national regular forces, an inability to secure internal peace and order by some states and an inability of the international organisation to provide international peace, especially in the face of the growing amount of the civil wars, created a good base for the security companies development. Those companies have filled the gap in the international market created by the increasing reluctance of Western governments and multilateral organisations to intervene directly in the civil conflicts. Providing military assistance, security companies offer services that were previously reserved for the governments.[5]

Private, international security companies provide a wide spectrum of military and security services. The services they offer usually include military training and equipment supplying, but official direct involvement in ongoing conflicts is less possible. As those companies are usually formed by retired military officers, they have strong personal and professional links to the governments and militaries of their home states. They also often work for their home or foreign governments. Some of them form large corporations with extensive economic interests.[6]

Worth noting are three security companies that seem to be the most successful in their activity: RPA-based Executive Outcomes; UK-based Sandline International and USA-based Military Professional Resources Incorporated.

1. Executive Outcomes

Executive Outcomes (EO) provides services in special armoured warfare training, military advice, battle strategies, logistical support, confidential „advisory" training, clandestine warfare, combat air patrol, equipment capabilities, medical aid, sniper training, and special forces. The firm claims to be active outside of Africa, having aided drug-enforcement agencies, international mining companies and Southeast Asian governments.

EO was established in 1989, as a wholly owned and registered South African company.[7] The company was founded by Eben Barlow, a retired South African intelligence officer. Barlow was the Chief Executive Officer until mid-1997, when he was replaced by Nick Van Den Bergh, a former member of the Parachute Brigade. EO's employees, except for some specialists (e.g. Ukrainian pilots), are former soldiers of the apartheid-era South African Defence Force.[8] EO does not keep a permanent standing force,

Human Rights Special Rapporteur, Mr. Enrique Bernales Ballesteros, HR/CN/764, 14 March 1997, (hereinafter: *Mercenaries Report of 14 March 1997*).

[3] *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, submitted by the UN Commission on Human Rights Special Rapporteur, Mr. Enrique Bernales Ballesteros, U.N. Doc.E CN.4 1996 27, 17 January 1996, (hereinafter: *Mercenaries Report of 17 January 1996*).

[4] Term "*security companies*" was used by the Special Rappourter of the UN Commission On Human Rights in *Mercenaries Report of 14 March 1997*. This term will be also used in this article.

[5] D. Shearer, *op. cit.*, p. 24-34.

[6] J. C. Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, Standford Journal of International Law, vol. 34, No. 1, 1998 Winter, p. 76.

[7] Executive Outcomes official web site: http://www.eo.com.

[8] They mainly come from the Reconnaissance Commandos, Parachute Brigade and the 32nd Battalion of the South African Defence Force, which included Angolan and Namibian soldiers, see: D. Shearer, *op. cit.*, p. 40.

but it can call on over 2.000 veterans. About three-quarters of them are black Africans, especially Angolans, but officers are mostly white.[9]

There are suggestions about the close EO relationship with two groups of companies: Strategic Resources Corporation (SRC) and Branch-Heritage Group (BHG). SRC rallies more than 20 South Africa based companies specialising in a broad range of activities, such as gold and diamond mining, air transport, hospital construction and computer software. BHG is a group of mining and exploration companies active in Africa. EO itself owns 32 companies with specialisation varying from computer software to gold mining.[10]

Angola

In 1993 EO was hired by oil companies (Gulf Chevron, Sonangol, Heritage Oil & Gas etc.) to regain their oil installations in the Soyo oil centre, Angola, that was controlled by UNITA. EO was paid for this operation approximately $30 million dollars for a few months' work.[11] In March 1993, 50 EO soldiers, supported by two Angolan battalions, launched the Soyo oil installations and retook it after a week of fighting. Although they were retaken by UNITA a few weeks after EO's withdrawal, the success of this operation convinced the Angolan government (controlled by MPLA) to offer EO further contracts.

By the mid-1993 UNITA had taken control over more than 70% of Angola. Between mid-1993 and late 1994, EO trained about 5,000 Angolan government troops from Angolan Armed Forces (16th Brigade) and approximately 30 pilots. The contract, which included supplies of weapon and equipment (incl. planes and helicopters) was renewed twice (in September 1994 and in 1995), and finally ended in January 1996.[12] The total cost of the EO services was about $60 million dollars.[13] EO workers were involved not only in Angola's forces training, but also in direct combat conducting military operations.[14] According to EO, there were never more than 500 men in Angola at any one time.

[9] D. Shearer, *op. cit.*, p. 41.

[10] D. Isenberg, *Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms*. The report was published on the Center for Defense Information official Website: http: www.cdi.org, November 1997.

[11] *Ibidem*

[12] D. Shearer, *op. cit.*, p. 46

[13] D. Isenberg, *op. cit.*

[14] In the defensive strikes EO workers suffered about 20 casualties *Cf.* J. C. Zarate, *op. cit.*, p. 94-95.

EO involvement forced Jonas Savimbi (the leader of UNITA) to sign the Lusaka Protocol in November 1994 which finally ended the three-year civil war in Angola. Under the United States and other foreign governments' pressure, EO was forced to leave Angola in January 1996.[15]

Sierra Leone

Sierra Leone's government in March 1995 hired EO in order to defeat the rebels of the Revolutionary United Front (RUF) and establish internal order.[16]

The RUF, led by Captain Foday Sankoh, had waged since 1991, a campaign of terror against the people and foreign workers in Sierra Leone. The Republic of Sierra Leone Military Forces (RSLMF – about 3.000 poorly trained soldiers) even supported by the Economic Community of the West African States' Military Monitoring Group forces (ECOMOG – troops comprised soldiers of Nigeria, Ghana and Guinea) was not strong enough to defeat the rebels. The first security company hired by the Sierra Leone government was the Gurkha Security Guards Ltd., based on Jersey Island, that had to train SL soldiers in anti-guerrillas combats. The Company's employees came to Sierra Leone in February 1995, but soon had to withdraw.[17]

At the time when the first EO troops arrived in May 1995, Sierra Leone was in total chaos and the rebel groups were about 20 kilometres from the capital city – Freetown. The RUF also took control over the Sierra Leone titanium oxide mine and bauxite mine that together accounted for about 60 per cent of the country's official export earnings.

In return for the EO services, the government agreed to pay $60 million dollars and offered diamond mining concessions.[18] According to the contract, EO provided limited basic training, intelligence information, combat assistance and quickly restructured and retrained the government troops. There were about 250 EO men in Sierra Leone and about 80 per cent of them were

[15] Over 100 security companies operate in Angola after EO's departure, guarding companies (esp. gas, oil and mining companies), embassies and international organisations working there. See: D. Shearer, *op. cit.*, p. 48.

[16] The ruling military council - The National Provisional Ruling Council (NPRC) of Captain Valentine Strasser had come to power in a coup d'etat in 1992. See: D. Shearer, *op. cit.*, p. 49.

[17] J.C. Zarate, , *op. cit.*, p. 95 and D. Shearer, op. cit., p. 49.

[18] D. Isenberg, *op. cit.*

black.[19] In five major offensives conducted between April 1995 and January 1996, EO employees supported by the RSLMF troops, and in some cases by Nigerians, forced the RUF rebels to retreat and within ten months secured peace in Sierra Leone. It enabled Sierra Leone to hold parliamentary and presidential elections in February and March 1996 and in December 1996 the parties to the conflict signed the peace agreement. After the elections EO declared that it would protect the new elected, legitimate government and the president (Ahmed Tejan Kabbah) against any coup attempt.

It is worth noting that EO also conducted humanitarian work in Sierra Leone. Working closely with international aid agencies and government officials, EO tried to return the child-soldiers from both sides to civilian life. It also co-ordinated and assisted the return of the civilians to their homes and provided security, logistics, and intelligence to international humanitarian groups.[20] According to some observers EO restored order and democracy to Sierra Leone.[21]

The peace and security provided by EO has not remained and soon after the EO troops departure in February 1997, the military coup overthrew the elected government and the chaos, robberies and murders took place again.

In order to protect mining companies operating in Sierra Leone, EO created a small subsidiary company, Lifeguard Security, that hired about 100 of the EO employees presented in Sierra Leone. Lifeguard Security also provides security services to the United Nations operations across the country and guards UN offices and residences in Freetown.[22]

EO proclaims that it works only for official businesses and legitimate governments, or at least those recognised by the United Nations, and not for rogue regimes without national support and legitimacy like Mobutu Sese Seko regime in Zaire.[23] According to Eeben Barlow, the company worked for governments of approximately 12 countries, about 70 per cent of which

[19] D. Isenberg, *op. cit.*. According to Special Rapporteur EO provided Sierra Leone with about 500 mercenaries, see: *Mercenaries Report of 17 January 1996, op. cit.*

[20] J.C. Zarate, , *op. cit.*, p. 97.

[21] John Leigh, the Sierra Leone envoy to Washington, said, "*The government of Sierra Leone believes EO can do a better job [providing security] than the Sierra Leone army.*" See: K. Whitelaw, *Have gun, will prop up regime*, *U.S. News & World Report*, January 20, 1997, Vol. 122, No. 2, p. 46.

[22] A. Duffy, *SA mercenaries working for the UN*, Electronic Mail & Guardian, Johannesburg, South Africa, 17 July 1998.

[23] E. Rubin, *An Army of One's Own. In Africa, Nations Hire a Corporation to Wage War*, Harper's, January 29, 1997, p. 24. Some observers stated that EO helped Mobutu to

are African.[24] EO also claims to have relations with 30 governments. The company has good connections in Botswana, Zambia, Ethiopia, Namibia, Lesotho and especially South Africa. It is reportedly also present in the Persian Gulf area, Bahrain, Qatar or Yemen and possibly advised the Indonesian Government on how to rescue hostages held by rebels in 1996.[25]

2. Sandline International

Sandline International was created in the mid-1990s in Great Britain by present Chief Executive Timothy Spicer, a former senior U.N. peacekeeper in Bosnia and British Colonel, and is owned by a company called Adson Holdings.[26] The company is actually registered in the Bahamas.

SI describes itself as "a Private Military Company (PMC) which specialises in problem solution and the provision of associated consulting services" and it offers "governments and other legitimate organisations specialist military expertise." SI officials say that the Company complies with international rules (especially the Geneva Convention) and works only for "internationally recognised governments, international institutions such as the UN and internationally recognised and supported liberation movements."[27]

The company provides military services in training, strategy and support similar to that of EO, but specializes in internal conflicts. Sandline offers advisory strategic planning, operational research and analysis, and project development; training in basic and advanced multi-service, special operations, intelligence, electronic warfare, and de-mining operations; medical services, water purification, road and bridge building, and disaster relief; hostage negotiation and integration of warring factions; Defense and Police forces restructuring; Counter-Narcotic, Counter-Terrorist, and Counter-Proliferation training; maritime support operations; Combat Support and Combat Service support in hostile environments.[28]

suppress Laurent Kabila's rebellion in Zaire in early 1997, but the EO denied its involvement and confirmed only that there might be some of its former employees, see J.C. Zarate, *op. cit.*, p. 101.

[24] A. Johnson, *Broker of war and death*, Electronic Mail & Guardian, February 28, 1997.

[25] D. Isenberg, *op. cit.*

[26] According to J.C. Zarate Sandline International is a subsidiary of Executive Outcomes, see: J.C. Zarate, *op. cit.*, p. 98.

[27] Sandline International official website: http://www.sandline.com.

[28] *Ibidem*

In February 1997, SI signed a $36 million dollar contract with the Prime Minister Sir Julius Chan government of Papua New Guinea.[29] According to this contract, the Company was to train and equip the soldiers of the Papua New Guinea Defense Force (PNGDF). In fact, the main task of the SI employees was to suppress a nine-year armed independence movement of the secessionist Bougainville Revolutionary Army (BRA) in Bougainville – the island with one of the biggest copper lodes in the world.

The Sandline contract faced international criticism, especially from Australia (PNG's former colonial master), but also from its own military and the PNG society. The opposition of the PNGDF commander, Brigadier-General Jerry Singirok, who refused to work with the SI employees, and mass social protests, forced Chan to cancel the contract. By March 21, all 70 SI workers, who already had arrived in PNG, were airlifted from the country and on 26 March 1997 Prime Minister Julius Chan resigned.

The judicial inquiry commission concerning the contract between Sandline International and the PNG government decided that the contract was legitimate and SI actions had complied with all the terms of the contract.[30]

3. Military Professional Resources Incorporated

Headquartered in the United States, Virginia company was created in 1987 by eight former U.S. senior military officers. MPRI is controlled by a 14-member Board of Directors and a group of corporate officers.[31] MPRI has over 400 employees and among them former high-ranking U.S. military officers and draws its workforce from a database of more than 6.000 former military professionals.

MPRI offers basic military training, equipment, force design and management, professional development, organisational and operational assistance, quick reaction military contractual support and democracy transition assistance programs for the military forces of emerging republics.

The company has very strong relations with the U.S. governmental departments and agencies and, according to MPRI, operates only in the areas approved by the U.S. State Department.[32] Almost 90 percent of MPRI's clients are based in the United States. These include: Department of State, Office of the Secretary of Defense and the U.S. Army.[33]

MPRI has signed several international military contracts with the United States government for missions abroad and with the foreign governments directly. In February 1992, (on the contract with the Department of State) the company provided humanitarian supplies and equipment to the countries of the former Soviet Union, and also worked with Taiwanese and Swedish armed forces.[34] Reportedly, after the departure of Executive Outcomes in January 1996, MPRI negotiated a contract with the Angolan government to train Angolan Army and police forces, but the firm denies any involvement in that country.[35] In 1996, the firm negotiated with the Sri Lankan government a contract to train special commando unit against the "Tamil Tigers", but finally the government withdrew from negotiations.[36]

Activity in the former Yugoslavia

Controversial is the fact, that when MPRI appeared in the Balkans, with the U.S. government approval, the war, waged by the former Yugoslavia countries, still continued.

In mid-1994, the company provided 45 personnel to guard the Serbian-Bosnian border to enforce the embargo on supplying the Bosnian Serbs with arms and fuel.

Within the Democracy Transition Assistance Program (DTAP), on the contract signed in September 1994 with the government of the Republic of Croatia and approved by the U.S. government, 15 MPRI employees were to

[29] J.C. Zarate, *op. cit.*, p. 97.

[30] D. Isenberg, *op. cit.*

[31] The Board contains an Executive Committee composed of four directors who can independently act for the Board on all but major financial decisions. Chairman of the Board and the Chairman of the Executive Committee is retired Major General Vernon B. Lewis, Jr. President and Chief Executive Officer of MPRI and Chairman of the Executive Committee is retired General Carl E. Vuono. The Board is also subdivided into Committees on finance, ethics and quality control, business development, and public relations and political affairs. See MPRI official Website: http://www.mpri.com.

[32] *Ibidem*

[33] Other clients are: Advanced Research Projects Agency, The U.S. National Defense University, Office of the Joint Chiefs of Staff, U.S. Army War College, Headquarters Department of the Army Deputy Chief of Staff for Operations and Plans, Headquarters Department of the Army Deputy Chief of Staff for Logistics. See: D. Isenberg, *op. cit.*

[34] *Ibidem*

[35] D. Shearer, *op. cit.*, p. 62.

[36] J.C. Zarate, *op. cit.*, p. 111.

retrain and reorganise the Croatian army into the democratic Western-oriented professional troops. The company also advised the Croatian government how to construct a civilian-controlled army and organise new structures of the Croatia's Ministry of Defence.[37] The U.S. State Department approved that contract on condition that MPRI did not provide tactical training or otherwise violate the 1991 United Nations Security Council arms embargo on Yugoslavia (e.g. by direct military assistance). According to that condition, very controversial was the alleged company's involvement in the preparation and conduction of the "Operation Storm" in August 1995, in which Croat forces, within a week, recaptured the Serb-held Krajina region. The Croat troops during the offensive used typical U.S. army style attack (e.g. integrated air, artillery and infantry movements, and the use of the modern techniques to destroy Serbian command and control networks). MPRI, supported by the Croatia and the U.S. government, denies any involvement in the offensive operations and violation of the arms embargo. [38]

According to the Dayton Accords of November 1995, the Bosnian army, comprised of Muslims and Croats, was to be trained and equipped to defend Bosnian Federation from the Serbs.[39] In May 1996, the Bosnia-Herzegovina government, with the U.S. State Department's assistance, chose MPRI to reconstruct, integrate and build up the Federation Armed Forces (FAF) in the "Train and Equip" program monitored by the U.S. State Department and controlled by the Federation government.[40] On the contract signed on 16 July 1996, worth about $50 million dollars, 185 MPRI employees worked to

[37] D. Shearer, *op. cit.*, p. 58.

[38] It is worth noting that when Croatia hired MPRI in September 1994, the Serbs occupied about 30% of the Croatian territory. Soon after the company began the Croatian forces training, the Croats succeeded in regaining their territory. In May 1995, the Croats retook areas held by Croatian Serbs south-west of Zagreb and then recaptured the western Slavonia region. By November 1995, the Croatians had recaptured almost all of their territory and had come to occupy about 20% of Bosnia. See: J.C. Zarate, *op. cit.*, p. 106-108.

[39] *General Framework Agreement for Peace in Bosnia and Herzegovina*, signed on 21 November 1995.

[40] Other competing firms were Science Applications International Corporation of San Diego, CA and BDM International Inc. of McLean, VA., see: J.C. Zarate, *op. cit.*, p. 109. The „*Train and Equip*" program received $103 million dollars worth of surplus U.S. military equipment and financial aid from a number of Islamic countries (such as Brunei, Kuwait, Malaysia, Saudi Arabia, and the United Arab Emirates) totalling $140 million dollars. See: D. Isenberg, *op. cit.* and D. Shearer, *op. cit.*, p. 60-61.

reconstruct the Bosnian troops into a modern, professional fighting forces in compliance with the NATO standards. According to the contract, the company is limited to train the FAF in defence tactics only.

The main purpose of the "Train and Equip" program is to secure peace in Bosnia-Herzegovina by strengthening the Muslim-Croat troops to balance the Bosnian Serb forces when the international troops are removed from this country. The opponents of this program warn that the strengthening of the FAF may renew violence in this region. The modernised, trained and well supplied Bosnian army may try to recapture territory lost to the Bosnian Serbs in 1995 and break down the provisions of the 1995 Dayton Accords.[41]

Supporting the "Train and Equip" program, "The United States used MPRI as a political and military tool in promoting its clear interest in Bosnia"[42]. According to the contract, the company is accountable to the Bosnia-Herzegovina government only and not to the U.S. State Department. But, in fact, MPRI activity in the Balkans (both in Croatia and in Bosnia-Herzegovina) is a part of the US policy.

MPRI, as well as the other U.S. security companies, in order to work for foreign governments must obtain special license (official approval) from the U.S. State Department. Thanks to such companies activity, the U.S. government and Pentagon may realise the U.S. foreign policy without the approval or even knowledge of Congress or the American public. There is also no need of the U.S. forces direct involvement in the conflict and the U.S. official participation can always be denied in any case of the complication. Moreover, such companies services are usually cheaper than the U.S. or international troops activity, because they are founded by the government that hire the company.[43]

II. INTERNATIONAL NORMS REGARDING MERCENARIES

Since the events during the 1960s in Africa, that started a new period in the mercenarism history, the international community has tried to undertake effective steps to prohibit mercenaries' activity, especially in the Third World[44].

[41] D. Isenberg, *op. cit.*

[42] J.C. Zarate, *op. cit.*, p. 106-108.

[43] D. Shearer, *op. cit.*, p. 62 and J.C. Zarate, *op. cit.*, p. 112.

[44] For the first time mercenaries took part in the fights in the African post-colonial countries during the civil war in the Belgian Congo (1960-1965). By 1977 (Additional Protocol I) they

But still there is not any act in force, approved by all (or even most) of the States, that would establish a legal definition of mercenary activity and resolve all the problems concerned with the mercenaries in the present times.

1. Legal provisions

We will consider two instruments of the international law, that refer to mercenaries: Article 47 of the Additional Protocol I of the Geneva Conventions and the International Convention Against The Recruitment, Use, Financing and Training of Mercenaries of 1989.[45]

According to Article 47 (paragraph 2) of the Protocol I, a mercenary is any person who:

a) is specifically recruited locally or abroad in order to fight in an armed conflict;

b) does, in fact, take direct part in the hostilities;

c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

were also involved *inter alia* in the civil wars in Nigeria (1967-1970) and Angola (from 1975), and in the failed coup attempt in Benin (1977).

[45] *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) of 8 June 1977", UN Document A/32/144, Annex I (1977); *International Convention Against The Recruitment, Use, Financing and Training of Mercenaries*, 11 December 1989, GA Res. 44/34, 44 UN GAOR Supp. no. 306, UN Document A/44/49 (1989).

Worth noting are also provisions of the Organisation of African Unity (OAU) *Convention for the Elimination of Mercenarism in Africa* of 1977 (OAU Doc. CM/817 (XXIX) Annex II Rev. 3, 1977) that entered into force in 1985. Those provisions are limited to the States members of the OAU only. According to Article 1 of the *Convention: Under the present Convention a "mercenary" is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrols or links himself willingly to a person, group or organisation whose aim is:*

(a) *to overthrow by force or arms or by any other means the government of that Member State of the Organization of African Unity;*

(b) *to undermine the independence, territorial integrity or normal working of the institutions of the said State;*

(c) *to block by any means the activities of any liberation movement recognized by the Organization of African Unity.*

d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

e) is not a member of the armed forces of a party to the conflict; and

f) has not been sent by a state which is not a party to the conflict on official duty as a member of the armed forces.

Article 47 provides the most widely accepted definition of the term "mercenary" to date. This definition however, prepared under the pressure of the events that happened in the African states in the 1960s and 1970s, is not adjusted to the activity of the employees of the private security companies.

Under the sub-paragraph a), "a mercenary" must be recruited in order to fight in the particular armed conflict. In many companies the employees are contracted for a long period of time. But in same cases, the companies that do not keep a permanent standing force (like Executive Outcomes) recruit the personnel (e.g. with special qualifications – like pilots) for a specific operation from their database. Furthermore, the subject of the contract between the security company and the contractor is never the direct combat in the armed conflict, the most common are training of government troops or providing security services.[46]

"A mercenary" should take a direct part in the hostilities (sub-paragraph b). This condition helps many security companies to prove that their workers, employed as military advisers and instructors or technical experts, are not mercenaries.

The definition contains in the sub-paragraph c) a psychological element, which is very difficult to prove. The fact is that not only employees of the security firms are motivated by the "desire for private gain", but also a majority of the professional soldiers serve for money. Another problem is that this "material compensation" must be much higher than the compensation of the soldiers of the armed forces of the party to the conflict.[47]

[46] There may be also other subjects. The EO's original contract with the Angolan government involved the recapture and protection of the oil installations of Sonagol Company in Soyo. According to the official statement, the Sandline International workers were contracted by the Papua-New Guinea government to restore copper mining in Bougainville. See: J.C. Zarate, *op. cit.*, p. 94.

[47] Worth noting is the salary that security companies' workers earn. Salaries of EO personnel range from $2000 - $13.000 per month depending on the experience. Specialists, such as pilots receive about $7.000. EO also provides life insurance for its workers. See: D. Isenberg, *op. cit.*

The definition introduces also an element of the traditional definition of "the mercenary". One must be of a different nationality than the contractor. Sub-paragraph d) excludes from the category of mercenaries nationals of a party to the conflict and residents of territory controlled by a party to the conflict.

Sub-paragraph e) provides that a member of the armed forces of a party to the conflict is not "a mercenary". Therefore, the personnel of the security company, by enlisting in those armed forces for which they work, cannot be considered mercenaries. To avoid this requirement, EO workers were integrated into the Sierra Leone troops.[48]

Under the provision of sub-paragraph f), it can be argued, that the security firm, which operates abroad with the approval of its home state (e.g. through a licensing procedure), is "sent by a state which is not a party to the conflict on official duty" and that company employees are members of that state's armed forces[49]. The U.S. company MPRI, which may work for foreign governments with the U.S. State Department approval only, seem to be one of the hidden tools of the U.S. foreign politics.

Article 47 defines "the mercenary" but in fact, it does not provide any sanctions for a person, who fulfils all those conditions and, generally, does not proscribe the mercenary activity. The only sanction for mercenaries provides paragraph 1 of Article 47, which denies the mercenaries the right to be treated as the legal combatants or as the prisoners of war.[50] According to this rule mercenaries have no right to combatant status and can be tried as common criminals.

Provisions of the Article 47 apply to the international conflicts or national-liberation movements (defined as struggles against colonial rule) only and this definition does not refer to a civil war. And the fact is that security companies are active mainly during the civil wars (EO in Angola and Sierra Leone, SI in Papua-New Guinea).

The security companies workers' activities do not fulfil conjunctive provisions of the definition of mercenaries of Article 47. For this reason, they are not mercenaries in the light of the valid rules of the public international law against the mercenaries. Moreover, their activities are not prohibited by the recognised international law.

[48] J.C. Zarate, *op. cit.*, p. 124.
[49] *Ibidem*, p. 124
[50] Article 47 (1): *„A mercenary shall not have the right to be a combatant or a prisoner of war."* Additional Protocol I of the Geneva Conventions of 12 August 1949, 8 June 1977.

International Convention Against The Recruitment, Use, Financing and Training of Mercenaries of 1989 provides a wider definition of "the mercenary" than Article 47. The mercenary is not only the person which fulfils provisions that are similar to those described by the Article 47, but also any person who is specially recruited to overthrow a Government or otherwise undermine the constitutional order or territorial integrity of a State. The recruitment, use, financing and training of mercenaries are offences under the Convention and the states are required to prevent them.

International Convention has not entered into force yet.[51] But the fact is that some of those states, which ratified this Convention (Angola, Congo and Nigeria), have hired security companies and Ukraine is a major supplier of pilots for EO.[52]

2. Activity of the Special Rappourter of the UN Commission on Human Rights

In the reports on the use of mercenaries, submitted to the UN Commission On Human Rights, the Special Rappourter Enrique Bernales Ballesteros tries to convince the international community, that security companies workers should be considered mercenaries and that their activity should be banned, as a mercenary activity.

According to Mr Ballesteros "mercenary activities in Africa are increasingly taking form of security companies, which provide military training and security services in return for money and mining and energy concessions".[53] As an example he mentions, "Executive Outcomes, a legally registered company which illustrated the new form of mercenary activity".[54]

As the reports consider, the conditions for the establishment of the security companies were created not only by the lacks of international law regarding mercenaries, which is incomplete and uncertain, but also by the gaps in the

[51] To enter into force the International Convention should be ratified or acceded by 22 States. As far it was ratified by: Azerbaijan, Barbados, Belarus, Cameroon, Croatia, Cyprus, Georgia, Italy, Maldives, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan, and signed by: Angola, Congo, Germany, Morocco, Nigeria, Poland, Romania, Yugoslavia and Zaire.
[52] J.C. Zarate, *op. cit.*, p. 133.
[53] *Mercenaries Report of 14 March 1997*, op. cit.
[54] *Ibidem*

national legislation. Using the legal vacuum or loophole, on the base of the tendency to the universal privatisation, those companies "offer contracts freely to people, who want to work as mercenaries".[55]

Special Rappourter does not accept the right of the States to provide the internal security using the foreign security company services, as this function is reserved for the State official institutions.[56] The Rappourter also does not recognise the difference between the current security firms' workers and the mercenaries that were active in the post-colonial African countries in the 1960s and 1970s and that the law created to hinder the use of those mercenaries does not apply to the security companies of the 1990s.[57]

According to the reports, the presence of the companies' workers in armed conflicts tends to make them "longer lasting, more serious and bloodier."[58] As one of the ways to prevent the mercenary activities of the security companies, Mr Ballesteros considers the withdrawal of the approval of the governments for those companies activities and making them illegal. At least, those companies should be strictly controlled.[59]

III. SOME ASPECTS OF THE SECURITY COMPANIES ACTIVITIES

As it was mentioned, current international law regarding mercenaries does not apply to security companies. They do not fall within the definition of mercenaries and their activities are not banned by international norms. The

[55] *"In these cases, the legal loophole is that the law guarantees that the market may operate freely and the people may be recruited freely"*. See *Mercenaries Report of 17 January 1996*, op. cit.

[56] *"Responsibility for a country's internal order and security are peremptory obligations which a State fulfils through its police and armed forces"*. See *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, submitted by the UN Commission on Human Rights Special Rapporteur, Mr. Enrique Bernales Ballesteros, U.N. Doc.E/CN.4/1997/24, 20 February 1997, (hereinafter: *Mercenaries Report of 20 February 1997*).

[57] J.C. Zarate, *op. cit.*, p. 119.

[58] *Mercenaries Report of 17 January 1996, op. cit.*

[59] *"To prevent mercenary activities, States Should consider, inter alia, the possibility of withdrawing the operating licenses and permits of entities that have hired mercenaries to engage in illegal activities, ..., declaring illegal and closing down organizations that under various guises freely promote and offer training and contracts to mercenaries"* and *"International security companies should be subject to particularly close scrutiny"*. See *Mercenaries Report of 17 January 1996, op. cit.*

question is, if the activity of those companies should be totally prohibited or maybe they should be left without any legal regulation, as a mean of the free market.

According to the Special Rappourter, mercenary activity in all its forms, including security companies, should be absolutely banned by the international law.[60] The Rappourter says, that the activity of the companies' workers, as well as the other mercenaries, "is linked to the bloodiest aspects of a conflict and to crimes against human rights. Moreover, the financial considerations and desire for illicit gain through looting which are associated with their participation may be decisive in prolonging the conflict. The mercenary's interest lies not in peace and reconciliation, but in war, since that is his business and his livelihood."[61]

The practice of some States demonstrates that State may outlaw or condemn activities of the mercenaries recognised by the international law and at the same time it may accept the activity of the legally registered security companies.[62] This attitude comes from the idea of state sovereignty and the right of states to self-defense. According to the UN Charter, the attacked State may defend itself in any possible way until the Security Council has taken suitable measures.[63] This right also applies to the internal conflict, when the armed rebellion is supported by the foreign power. On this base, if the state cannot defend itself with the regular state forces, it may use the services provided by the private military professionals. From this point of view, the government of Sierra Leone was legitimated to contract Executive Outcomes workers to defeat the RUF troops supported by Libya and Liberia and restore internal order. That approach to the security companies activity in Africa is accepted even by the Organisation of African Unity (OAU), which was fighting with any mean of the presence of the mercenaries in the post-colonial African states. In general, internationally recognised states represented by the legitimate regime, may use security companies, as a legal mean, to repel external

[60] J.C. Zarate, *op. cit.*, p. 145. *„(...) no matter how they are used or what form they take to acquire some semblance of legitimacy, mercenary activities are a threat to the self-determination of peoples and obstacle to the enjoyment of human rights by peoples who have to endure their presence."* See *Mercenaries Report of 20 February 1997, op. cit.*

[61] *Mercenaries Report of 17 January 1996, op. cit.*

[62] Despite the prosecution of the mercenaries active in Angola during the civil war in the 1970s, Angolan government hired Executive Outcomes in 1993 to defeat UNITA troops.

[63] U.N. Charter, art. 51

aggression or to restore internal order. In that case security companies "represent quasi-state actors in the international arena, which takes them outside the mercenary concerns of the international community."[64] On this basis those companies are not mercenaries.

As it was mentioned, the Special Rappourter does not accept the right of the States to defend itself and provide the internal order using the foreign security companies.

One of the main reasons to prohibit the security companies activities, for those who object to them, is the lack of accountability, both to the state of the company origin and the state, which hires the company. The main danger connected with it is the possibility of the human rights abuses committed by the companies' workers.

It seems that we cannot say about the total "lack of accountability". The security companies are legal, registered entities acting on the provisions of the national regulations and are answerable to their shareholders. In many cases their best, long-term clients are the governments of the home states in which they are registered. The legality of their activities and the co-operation with the home governments provide usually special licensing procedures that must be applied to every company contract with the foreign government.[65]

The economic provisions make the security companies remain loyal to their employing governments. Fulfilling the contract in every point, the company is recognised by the contracting state and also in the international market as the reliable firm and the solid contractor. On that basis the valid contract may be renewed, the company may be required to provide other services (including the firms co-operating with the company) or the company may be hired by another state.[66] It is also important, that as long as the contract is not fulfilled, the government will not deliver the settled fee.

With respect to the international community, the contracting state would not accept the violation of the human rights committed by the hired security company. Those abuses would not also be accepted by other non-military corporate firms connected with the security company. Because of that and on the grounds of the economic reasons mentioned above, security companies, as the apolitical outsiders, who are impartial and not engaged emotionally in the conflict, are not likely to commit human rights violations.

The way of the companies' activities is forced not only by the political and economic provisions, but also by the international and domestic attention from the press, non-governmental organisations and the public opinion. And all those pressures taken together create a kind of security companies' accountability.

Security companies, as the profit-making entities, try to ensure in the best way their economic interests. They develop into corporations controlling multiple-service companies. Many of them are connected with the energy, oil and mining companies. For their activities, security companies may be paid with the mining concessions that are then used by the mining companies associated in the corporate web.[67] The dangerous economic influence gained by the security companies over the contracting States, as the negative aspect of those companies activities, was noticed by the Special Rappourter of the UN Commission on Human Rights, Mr Enrique Bernales Ballesteros. He warns, that "companies of this kind, which marked security internationally, may acquire a significant, if not hegemonic, presence in the economic life of the country in which they operate" and he calls this situation "neo-colonialism of the twenty first century".[68]

IV. SECURITY COMPANIES AND THE INTERNATIONAL COMMUNITY

Leading security companies declare that they work only for legitimate or internationally recognised governments or at least internationally recognised and supported liberation movements.[69] That is why EO has rejected, in the past, proposals from Sudanese rebels and Algerian religious factions.

As some of them claim, they would also like to work for the international community and institutions such as the United Nations or the Organisation

[64] J.C. Zarate, *op. cit.*, p. 145.

[65] U.S. security companies (e.g. MPRI), must obtain special license (official approval) from the U.S. State Department in order to work for foreign governments.

[66] On the grounds of the successful results of the Executive Outcomes activity in Angola, the government of Sierra Leone hired the company in March 1995 to provide internal order. Worth noting is the position of the US-based Vinell Corporation, which for more than 20 years train the Saudi Arabian National Guard See: Ken Silverstein, *Privatising War: How affairs of state are outsourced to corporations beyond public control*, The Nation, July 28, 1997 and Vinnel Corporation official web site: http://www.vinnel.com.

[67] There has been speculation that Executive Outcomes was paid in diamond concessions in Kono area for its services in Sierra Leone. Those concessions were used by Branch Energy, the company of the Branch-Heritage Group, which is closely tied with EO. See: D. Shearer, *op. cit.*, p. 44

[68] *Mercenaries Report of 20 February 1997*, *op. cit.*

[69] D. Shearer, *op. cit.*, p. 20, and Sandline International official web site.

of African Unity.[70] Security companies might fulfil an important role in the peacekeeping and peacemaking forces, that cannot be provided by the official UN forces consisting of the State-members troops. The events that took place in Somalia or Rwanda prove that the UN or OAU forces are unable to carry out the humanitarian or peace operation on their own.[71] The fact is that the private security companies seem to be not only more efficient than the international forces, but also their activities are cheaper than the international operations. The total cost of the EO's successful operations in Angola (between mid-1993 and the beginning of 1996) was about $60 million dollars, while the inefficient UN peacekeeping forces' presence cost over $1 million dollars a day for two years.[72] That all leads to the idea of the international permanent reaction forces consisting of the well-trained and equipped professionals.

The private security companies efficiency was undoubtedly seen in the successful operations conducted by EO in Angola and Sierra Leone. The company's military intervention played an instrumental role in providing security to the countries seized with the total chaos and disorder of the civil war. Its involvement forced opposition movements (UNITA in Angola and RUF in Sierra Leone) to negotiations and to sign the peace agreements. The Lusaka Protocol of November 1994 finally ended the three-year civil war in Angola. In Sierra Leone EO enabled the nation to hold in March 1996 the first presidential elections in 23 years.[73] In Sierra Leone the company not only stopped the violence and human rights abuses but also worked closely with international aid agencies and government officials in restoring the internal peace and security.[74]

[70] D. Isenberg, *op. cit.* The US companies, with the US government approval, worked in the past for international community. In 1994, the MPRI provided 45 employees to guard the Serbian-Bosnian border to enforce the UN embargo on supplying the Bosnian Serbs with the arms and fuel. The American soldiers on the international observer mission monitoring the Serb pull-out from Kosovo, Albania were replaced by the Virginia-based company DynCorp employees in 1998. See: *US using mercenary firm to screen Kosovo pullout, bares report*, Indian Express, Sunday, November 1, 1998.

[71] "*The UN relies on member states to supply its soldiers, and no country wishes to place its best troops in harm's way merely to defend the refugees or foreign land.(...) Interventions are often much too little, much too late and much too poorly executed.*" See: J. Blank, *Want peacekeepers with spine? Hire the world's fiercest mercenaries*, U.S. News & World Report, December 30, 1996, Vol. 121, No. 26, p. 42.

[72] D. Isenberg, *op. cit.*

[73] *Ibidem*

[74] J.C. Zarate, *op. cit.*, p. 97.

The security companies activities, however, are temporary means and do not solve the underlying problems that caused the conflicts. The companies, hired strictly for their military services, cannot secure total stability and peace that would last even after their departure (usually forced by the international opinion). In May 1997, just six months after the signing of the peace agreement and fourth months after EO's departure, a military coup overthrew the new civilian government of Sierra Leone.[75] The truth is that co-operation between the security companies and international organizations would help to avoid such situations.

CONCLUSION

Some observers characterise security companies as sophisticated mercenaries.[76] Indeed, security companies, that take direct military participation in the armed conflicts, fulfil the provisions of the customary definition of mercenaries as foreigners fighting for financial motivation. And from that point of view security companies may be considered mercenaries. But as long as the current international law regarding mercenaries does not apply to the security companies, they cannot be regarded as internationally recognised mercenaries and their activities cannot be banned by the international norms.

There is no point in the total prohibition of the private security companies activity. Those companies, utilised in the proper way, may be efficient tools in the hands of the international community. On the basis of a well-prepared national and international regulation, security companies would act especially as the internationally supported peace-enforcement forces. Their activities must be strictly controlled and they must be totally accountable. Proper state and international licensing procedures and registers of the companies, settled contracts and their subjects, contractors etc. might secure control and accountability of those companies. Their impartiality should be secured with high enough wages that would, however, be cheaper than the costs of the unsuccessfully conducted international peacekeeping operations. Such firms should also be required to comply with the recognised human rights instruments – Geneva Protocols, international humanitarian law and rules of war.

[75] D. Shearer, *op. cit.*, p. 67.

[76] E. Rubin, *op. cit.*, p. 44.

As Executive Outcomes officials say: "It is therefore foreseen that future peacekeeping or refugee operations will be conducted more and more by companies such as EO. EO sees itself as a major role player in these developments die to its previous experience and track record in such type operations. The major advantage of making use of companies such as EO is one of impartiality. (...) The employees of EO are loyal to the company and not to any part involved in the conflict. International Organisations will have no need to keep a large manpower and capital intensive force available as this can be provided by companies such as EO. In short, a company such as EO will be able to provide a professional, cost effective force to carry out a totally unbiased peacekeeping/conflict resolution service throughout the world."[7]

[7] Executive Outcomes official web site.

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RIGHT TO BE RIGHT? SANCTIONS AGAINST AUSTRIA – SOME LEGAL ASPECTS

by

Dominika Piwowarczyk*

Ironically enough, despite all the concepts of integration and the often-cited idea of a solidarity deeply rooted in the European tradition and in co-operation linking democratic countries of the old continent probably more closely than ever before, supposed to form a firm basis for mutual understanding and tolerance, the age-old dispute between law and morality started all over again.

Democracy in Western Europe, sometimes reduced to the mechanism of democratic elections and the rule of the majority, has not always been a success. If democracy is seen as an opportunity for every generation to redefine its own standards at a given time,[1] it must be acknowledged that different democratic choices may cause significant changes in those states concerned. Invoking the trinity of political democracy, human rights and the rule of law, 14 member states who share the same political values imposed a limited bilateral boycott of Vienna for having respected the will of the parliamentary majority.

The Austrian political scene seems to be quite stable. In 1970 a socialist minority government under Bruno Kreisky, the first Austrian chancellor of Jewish descent, was formed with the support of the Freedom Party (FPÖ)

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[1] B. Geremek, *Building Cooperation among Democracies*, Speech given on February 10, 2000, Freedom House, Washington

headed by Friedrich Peter, an ex-SS member. One year later, the Socialist Party (SPÖ) gained an absolute majority in the Parliament and formed SPÖ – governments under Bruno Kreisky who ruled until 1983. From 1983 to 1986, SPÖ and FPÖ, headed by Norbert Steger, formed a coalition government under chancellor Fred Sinowatz. When Mr. Haider became head of the FPÖ in 1986, SPÖ ended the coalition and formed a new one with the People's Party (ÖVP). For more than a decade, the socialist-conservative coalition governed in Austria quite successfully, at least in economic and social terms, since the republic continued to be a welfare state and its GDP per capita made it a net contributor to the European Union after accession.

After Austria's four-month political vacuum, following the general election on October 3, 1999, the moderate conservative People's Party struck a deal allowing the far-right Freedom Party into power.

In the 1999 election, Jörg Haider and his liberal – or, as its opponents call it, xenophobic and nationalist – Freedom Party emerged in second-place after the People's Party, having obtained 27% of the popular vote. Since Mr. Haider was already known as a dangerous right-wing populist or a new breed of politician promising to stop immigration, ensure job security and work miracles for society, the European Union expressed deep concern over this electoral result. When the Social Democratic Party, as it is now called, still the biggest party in Austria (over 33%), broke off talks with its former coalition partner, the People's Party, the European Union was alarmed at the prospects of the Freedom Party of Mr. Haider entering the Austrian government.

On January 31, 2000 the Portuguese Prime Minister, Antonio Guterres, issued a 3-point declaration in the name of 14 member states of the European Union threatening Austria with serious consequences should Mr. Haider's party enter the Austrian government. The heads of state or government of the other 14 EU-member countries declared their resolution not to promote or accept any official, high-level, bilateral contacts with an Austrian Government that includes the FPÖ, to refrain from supporting Austrian candidates for posts in international organisations and to receive the Austrian ambassadors in the EU capitals only on a technical level[2]. On February 1, 2000 the Freedom Party and the People's Party announced the formation of a coalition government. On the same day the European Commission joined the view of the 14 member states, emphasising the necessity of monitoring the Austrian internal situation and ensuring the observance of human rights and of the values and principles enumerated in the Treaties. At the same time, the Commission stated that at this stage the functioning of the European institutions was not endangered and that it would maintain its working relations with the Austrian authorities.

This declaration, some say, challenged the international principle of non-interference in internal affairs of states; by invoking a moral right to interfere, it questioned the legitimacy of a government composed of democratically elected parties[3].

The European Parliament[4] passed a declaration equating the People's Party's coalition with the Freedom Party to a legitimisation of the extreme right in Europe. It called for support of activities combating rising Austrian xenophobia and racism, and also, if necessary, for preparation of the action laid down in article 7 of the Amsterdam Treaty. Austria, politically isolated, argued that the European principle of solidarity had been violated. The Commission and the European Parliament, however, maintained that the declaration by the 14 heads of state and government and by the European Parliament were merely political declarations. The EU-14 member states cited what they called Austrian racism and xenophobia as the reason for their joint action, and used this leitmotiv to sanction Austria. Many questions do remain unanswered.

The reaction of EU member states to the political ascendancy of Austrian racists, as they were named, leaves a lot to be desired. Some argued that this reaction hid ulterior motives of self interest or had more to do with states' internal political situations and the fear of "Haiders" in other EU-countries, all of which might influence elections and the overall political situation in these countries.[5] That the introduction of sanctions was recommended mainly by France confirms France's pretence to a lead political role in Europe. The situation worsened after Haider began to address French President Jacques Chirac and the Belgian government using not only disrespectful but also very offensive terms, which made the "14" issue the declaration even sooner.

[2] Statement from the Portuguese Presidency of the European Union on behalf of XIV Member States, January 31, 2000, http://www.Portugal.ue-2000.pt/uk/news/execute

[3] Commission Statement on Austria, http://europa.eu.int/rapid/start/cgi/gu

[4] With the majority of 406 votes against 53, 60 abstained.

[5] *E.g.* France, Belgium, Spain, Denmark.

The declaration by the Commission and the European Parliament expressed the political will of these institutions. The declaration by the 14 member states, its legal basis and its influence on the working of the EU institutions seem to be more controversial still. Since the Presidency of the European Union can only act on behalf of all member states, Portugal acting in the official capacity as Presidency of the European Council and of the Council of the European Union, had no right to issue a declaration without consulting all EU-member states[6]. From a very formal point of view, this declaration should be regarded as a declaration issued by one of the member states, confirmed or shared by the other 13 member states. Portugal was not able to act on behalf of the Union since the representative of Austria had not been consulted. Moreover, positions or actions of the Council should be based on the articles of the Treaty.

Portugal also could not have been speaking on behalf of the Union because bilateral relations and not those at the level of the Union were downscaled, and the Union has no right to interfere with bilateral relations. Since the two first sanctions concern only bilateral relations, the sanctions remain fully acceptable. But bilateral and multilateral EU-affairs are difficult to separate at times (e. g. bilateral meetings preparing EU-decisions).

Given the Commission's duty to guard the provisions and values set forth in the Treaties, the Commission's worries about Austria's rightist inclination, expressed by the President of the Commission, are within the Commission's capacity, particularly as Romano Prodi admitted later doing "business as usual" with Austria.

One scenario of the consequences of the sanctions, fortunately improbable, is the following: Austrian participation in the Union's decisions might paralyse the functioning of the Union, not to mention halt the enlargement process, since these decisions require unanimity. In a very direct, efficient way, Austria may use the sanctions to stop negotiations, if its representatives are not invited to take part in the meetings. Less directly, if the economic situation in Austria worsens as a result of sanctions (and its effects on tourism), and the Austrian contribution to the Union decreases, the EU budget may not allow for enlargement in the near future, as previously declared by the Union.

[6] W. Hummer, W. Obwexer, *Österreich unter "EU-Quarantäne" Rechtsfragen der Einflussnahme auf die Regierungsbildung eines Mitgliedstaates*, p. 3.

In fact, the opposite scenario is more probable: namely, that Austria will try to hasten the negotiation process, wisely understanding that a blockade of negotiations would, in the eyes of some, only confirm the appropriateness of the sanctions imposed. As Austrian politicians declared, Austria will continue its pro-accession approach. Similarly, Austria probably will not hinder the institutional reforms of the Union. The Austrian coalition, however, might be used as an excuse by other member states of the Union to hinder enlargement and reforms.[7]

The joint agreement of the "14," issued before the coalition was formed between the Freedom and the People's Parties, was meant to prevent the coalition from happening. The hasty "sanctioning" decision was made for the sake of consistency with earlier actions, to protect the political credibility of the 14 member states. Now the problem is how to proceed further. As often happens in such cases, the "Austrian" sanctions do not specify any clear conditions to be met for their removal. Some politicians promised to bring them to an end after a year, as if time could solve the problem. Others conditioned lifting sanctions upon Haider's resigning and/or the Freedom Party's leaving the coalition government. Some underline the necessity of a change in the character of the party. All demands demonstrated either ignorance of the relevant Austrian legal provisions or a lack of confidence in the Austrian judiciary. The Austrian Constitution, as a matter of fact, does not allow racist or xenophobic parties to act on Austrian territory; such parties are explicitly outlawed. This means that the sanctions introduced by the Union were of a purely speculative nature.

The principles enshrined in the European Convention on the Elimination of all Forms of Racial Discrimination, ratified by Austria, are directly applicable in Austrian courts. The same applies to the principles enshrined in article 6 of the Amsterdam Treaty. These principles are the same as the Austrian ones, which have to be compatible with the Austrian constitutional order. As such, any law passed by the Austrian Parliament that might constitute a violation of the constitution and of constitutionally guaranteed rights can be brought before the constitutional court. Likewise, any minister can be brought before the constitutional court to examine whether his behaviour is compatible with the law. If not, a sort of impeachment procedure can be initiated. Since the Constitutional Court guarantees the observance of the principles of article 6

[7] *E.g.* France did not mention the EU enlargement on its list of priorities during its presidency.

of the Amsterdam Treaty, and since Austria itself has a mechanism in place to control the work of the new government, what was the purpose of imposing sanctions?

Austrian constitutional law does not explicitly forbid any party. Therefore the establishment of political parties is allowed as long as they do not violate the constitution. If the statute of a political party is in violation of the constitution, it cannot constitute a party, and the formation of the party is null and void.[8] Even if it is not explicitly laid down that the election of a national-socialist party is forbidden, if the party's program violates constitutional norms, this party is forbidden to take part in elections. So if only one of the Freedom Party's aims contradicted the constitution, it could not have been founded legally. If the Freedom Party were a racist party, it would violate the constitution[9] and as such it would not exist. It is therefore quite clear that law and order remained preserved in Austria, and that the imposition of the sanctions was not triggered by an illicit action of the Freedom Party or its illicit origin.

The declaration of Lisbon has political consequences, and is based not on a legal underpinning but on an ethical one. In the understanding of international law, the declaration is rather an agreement between the 14 heads of state or government, which they regard as politically binding and which should be interpreted according to international law and not according to the law of the European Union.

The sanctions and particularly Haider's resignation from the post of head of FPÖ divided the representatives of the member states. While some, like the Italian Minister of Foreign Affairs Lamberto Dini, favored changing their policy towards Austria to reflect their disapproval of the new government, others, like his Finish homologue Erkki Tuomioja, did not wish to follow the policy created by France and Belgium, and still others saw such changes as an equivocal electoral tactic.

Regan elaborates yet another opinion, in a study produced by the Irish Institute of European Affairs. According to him, the decision of the "14" should be recognised as illicit and contradictory to the basic principles of democracy, right to fair trial (to be heard) and fair and equal treatment.

[8] L. Adamovich, President of the Austrian Constitutional Court, *Massnahmen der EU-14*, Speech given before the French Senate on April 26, 2000

[9] Because of the Bundesverfassungsgesetz (legal promulgation bulletin of the Republic of Austria) of July 3, 1973 on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination

He accused the countries of interfering in internal affairs and the democratic process, and argued that the declarations were a far cry from what is accepted in the European Union legal framework. According to him, there are only two possible ways of interpreting the declaration: either to recognise the decision as one taken by the Council of the European Union, and therefore as contradictory to law, or as a decision by the "14", and therefore to make the Commission bring the case concerning member states' violation of the rudimentary principles before the court, since matters between member states should be solved according to European law. He mentioned the decision of the European Court of Justice according to which member states are not authorised to settle their problems outside of the European legal framework, if *aquis communautaire* provides for the regulation in question. Articles 6 and 7 of the Amsterdam Treaty specify those measures that can be taken against a member state that is violating the law.[10]

According to article 6 of the Amsterdam Treaty, member states are obliged to observe the principles of liberty, democracy, human rights, fundamental freedoms, the rule of law and other principles common to member states. If a member state violates one of these principles, according to article 7 of the Amsterdam Treaty, sanctions may be imposed. Sanctions may be imposed by the Council, in a meeting composed of the Heads of State or Government, voting unanimously in favour of a proposal made by one third of the member states, or by the Commission, after obtaining the assent of the European Parliament, acting by a two-thirds majority of the votes cast, representing a majority of its members.[11] The article 7 procedure requires a discussion on how to treat the member state in question. An imposition of sanctions must be preceded by a statement from the Council declaring the existence of a serious and persistent breach by a member state of principles mentioned in article 6 (1). At the time the sanctions were introduced, no violation of the principles of article 6 was cited. Also, a certain amount of time must pass to confirm that a given breach is persistent in nature. Once-in-a-while-breaches do not fall under article 6. How is it possible to commit a persistent breach, if sanctions take effect the very moment a government is sworn in? Moreover, the government of the accused state has a right to submit its response; this also did not take place. Only once such a statement has been made can the Council,

[10] W. Bohm, *Irische Studie belegt: Sanktionen sind illegal*, Die Presse, 05.04.2000.

[11] *I. e.* 314 votes.

by qualified majority, decide to suspend certain rights, derived from the treaty, of the member state in question, including the voting rights of the representative of the government of that member state in the Council. But the Council is not authorised to suspend voting rights when unanimity among member states is required, as in the case of enlargement or of stopping the conference. In response to the situation which led to the imposition of sanctions, the Council, acting by a qualified majority, may decide to vary or to revoke measures taken previously under article 7(2).

The 14 member states will decide on the interpretation of the sanctions. It goes without saying that attempts to discriminate against Austria will constitute a violation of European law.

The issue of the *"tour de capitales"* performed by the presidency before the summit meeting seems quite problematic: certain informal or *ad hoc* meetings of the European Council, as they are not provided for by the Treaty, also can be interpreted as "bilateral." They are considered to be integral parts of the decision-making process of the Union as it currently functions. Since they informally contribute to the preparation of official meetings, they in practice influence the decision-making process. The suspension of Austria's participation in unofficial meetings violates the non-discriminatory provisions shared by the member states of the Union. Practically, It constitutes a breach of the loyalty principle enshrined in article 10 of the Amsterdam Treaty concerning the first pillar and article 11 (2) of the Amsterdam Treaty concerning the second pillar.[12]

Member states' withholding of support for Austrian candidates seeking positions in international organisations if such a person otherwise would merit such support, may violate the non-discrimination provisions in article 12 (1) of the Amsterdam Treaty.

Austria's options for redress remain limited. Austria can take the 14 member states to court only based on their violation of the loyalty principle, but a favourable finding will not entail any consequences as they are not provided for under article 10. What remains is the possibility of Austria's claiming its right to participate in the decision-making process, and the vague possible Austrian influence in the political decisions taken by the European fora, but still the official ones. There is no possibility to claim the right to participation in unofficial meetings. If so it might be considered as a breach of

[12] R. Kujawa, *Sankcje 14-ki wobec Austrii – wybrane aspekty prawne*, Biuletyn Ambasady RP w Wiedniu.

the procedural provisions. Most probably Austria will refraining from bringing the case before the court just to appease the public opinion and to convince the 14 member states of the mistake they committed. Austrians seeking positions in international organisations and refused support by the Union on the basis of their nationality can demand that the decision be considered a violation of the non-discrimination principle and be declared null and void[13].

Article 21(1) provides that every citizen of the union may apply to the Ombudsman against a Council decision, however, only if the Council's decision was taken in a way inappropriate to the framework of the first and third pillars.

The sanctions continue to be observed. Most probably, they will be covertly suspended to allow participants not to lose face, which leaves the issue even more unresolved.

Post scriptum

7 months later the sanctions were lifted after the promulgation of the report *"the 14"* had commissioned from a committee of three wise men under the presidency of a former president of Finland, Mr Martti Ahtisaari. The report found the Austrian government *"committed to common European values"*. According to the further statements the members of the right-wing party however *"exploited xenophobic sentiments in campaigns (...) by and large worked according to the government's commitments"*.

Ironically enough, the committee suggested the creation of the mechanism to *"monitor and evaluate the commitment of individual member states with respect to common European values"*.

[13] Article 12 (1) of the Amsterdam Treaty.

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JURIDICAL REMEDIES AVAILABLE AGAINST MEMBER STATES IN BREACH OF THEIR COMMUNITY OBLIGATIONS UNDER THE EC TREATY – SOME REMARKS

by

Katarzyna Zajas*

INTRODUCTION

One of the main features of the international legal system is the lack of compulsory jurisdiction, in the sense that the state must consent to bring the case against it before an international court or arbitration tribunal. This is a consequence of the decentralised nature of the international legal system, where the rule of self-help still plays a dominant role. The situation looks different as far as the competencies of the Court of Justice of the European Communities (hereinafter referred to as ECJ) are concerned. The ECJ is the main juridical body of the European Communities, which ensures that in the interpretation and application of the founding Treaties, the law is observed. As far as the institutional aspect of the ECJ is concerned it must be described as an international court – court of international organisations. It was created by the Treaties establishing the European Coal and Steel Community, the European Economic Community and the European Energy Community[1]. Each of the above-mentioned Treaties set up its own court, but on the same day that the EEC Treaty and the Euratom Treaty were signed, Member States signed the Convention on Certain Institutions Common to the European Communities, which replaced those three courts with one, common for three communities[2].

The Court of Justice like other courts of international organisations, can act only within the limits of power conferred upon it by the Treaties. However, the said power can be distinguished in many ways from other international jurisdictions: first and foremost its jurisdiction is much more extensive than that of other international courts or arbitration tribunals as regards to the form of action, types of decision available to it and the parties to the case.[3] This article examines some aspects of so called international competencies of the Court of Justice, namely direct infringement actions against Member States under the EC Treaty.[4] They are worth some attention, due to their novelty in comparison with traditional international juridical remedies against States. First, the procedures under Article 169 and 170 will be described.[5] Then the special

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[1] For the sake of brevity, referred to hereafter, respectively as the ECSC Treaty, the EEC Treaty or EC Treaty (Article G (1) of the Maastricht Treaty on the European Union of February 7, 1992 replaced the term "*European Economic Community*" by the term "*European Community*".) and the Euratom Treaty.

[2] According to Article 3 of this Convention the jurisdiction conferred on the ECJ by the EEC Treaty and the Euratom Treaty "*...shall be exercised by a single Court of Justice...*". Article 4 of the same Convention provides for that, upon taking its duties, the single Court of Justice shall take the place of the Court established by ECSC Treaty.

[3] When it deals with actions against Member States and cases concerning the interpretation and application of the EC Treaty, it acts like an international court. Its jurisdiction is like that of constitutional courts when it ensures the conformity of acts of the European Institutions with the EC Treaty, which in the case 294/83 "Les Verts" was called "*the Constitutional Charter*", when it adjudicates on disputes relating to the division of competencies between the Community and the Member States and when it arbitrates conflicts between the European Institutions. 3 Finally, when it considers the action for annulment brought by individuals, when it rules on disputes relating to compensation for damages provided for in the second paragraph of Article 215 and Article 178 and when it adjudicates on disputes between the Community and its servants, it acts as an administrative court. It should be stressed that the ECJ exercises also jurisdiction provided for in number of agreements, among which the most important are: the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters signed in Brussels on 27.09.1968, the Convention on the law applicable to contractual obligations signed in Rome on 19.06.1980 and the Agreement on a European Economic Area signed on 02.05.1992 .

[4] Although actions against Member States are provided for under all founding Treaties, this article will focus solely on the ECJ jurisdiction under the EC Treaty, since in practice it turned out to be of the greatest significance.

[5] The Amsterdam Treaty amending the EC Treaty has changed the numeration of articles (e.g. Article 169 is numbered 226, Article 170 – 227 and Article 171 – 228) but in this paper I will stick with the old one which is more commonly known.

procedures under Articles 93, 100 and 225 will be mentioned. Finally, the outcome of the ECJ judgments under those procedures will be considered. Essentially, I will focus on the most characteristic feature of the these proceedings, features which make these procedures workable ones and distinguishes them from similar actions under classical international law.

GENERAL REMARKS

Proceedings under Articles 169 and 170 of the EC Treaty are general actions which may be brought to the ECJ against Member States to establish that they have infringed their community obligations. In addition to these, the EC Treaty provides for some more expeditious infringement procedures like those under Article 93 or Article 225. Just to mention, since it is not a subject of this paper, apart from those direct actions against Member States, the EC Treaty provides for unique under international law, possibility of private parties to control the compatibility of Member States' behaviour with Community law, through the procedure under Article 177 of the EC Treaty.[4]

Article 169 and 170 constitute two alternative procedures. Under the former it is the Commission which is empowered to bring an action, while the later gives the same right to Member States. Although they are two distinct procedures, they have many common features. Firstly, both of them enable any Member State to be held responsible for its breach of the provision of the EC Treaty and Community acts issued in accordance with the EC Treaty.[5] Secondly, both the Commission and Member States may bring an action against another Member State without having to show a direct legal interest apart from the general interest in the observance of Community law.[6] In several cases, Member States have pled the lack of locus standi of the Commission (a Member State), but every time the ECJ roundly rejected that argument.[7] Thirdly, for both the Commission and a complaining Member State to initiate a suit, there is no necessity to prove that their interest or the interest of the Community has been affected or harmed by the breach.The wording of both Article 169 and 170 indicates that the only condition which must be fulfiled to start proceeding is a Member State failure to observe Community obligations. No additional elements like the interest prejudiced are required.[8] Fourthly, in contrast with general principles of international law, they are both of compulsory character in the sense that if a Member State (the Commission) wants to hold another Member State responsible for the breach of community obligations, it can use only the Article 170 (169) procedure.[9] Another characteristic feature of the said procedures is the ECJ exclusive jurisdiction over those disputes. This means that no other dispute settlements are available to Member States in this regard, as well as self-help.[10] Sixthly, under both of these procedures the Commission plays a key role. Finally, it is worth mentioning that under any of those procedures the theory of interdependence of obligations in international law may be claimed as an excuse for a default. In other words, the very fact that the interest of the Member State accused of the breach of its obligations was affected by other party (other Member State or Community institution) failure to observe Community law can not serve as an exuse.[11] A Member State also may not plead internal circumstances in order to justify a failure to comply with its obligations.[12]

[4] In short, Article 177 provides for that in any case pending before a national court in which the question of Community law is raised, the national court may and in some instances be obliged to refer the matter to the ECJ. However, the main purpose of these proceedings is to ensure uniform application and interpretation of Community law in all Member States, but in practice it turned out to be quite an effective mean of securing rights claimed under Community law and thus forcing Member States to change their law as to be in accordance with Community provisions.

[5] Both of these articles mention "*obligations under this Treaty (...)*" which always have been interpreted as obligations arising directly from the Treaty and those arising from acts of Community institutions.

[6] Article 169 and 170 merely state that "*If the Commission (A Member State) considers that a Member State has failed to fulfil an obligation under this Treaty (...)*" no additional premises are required to start an action.

[7] See e.g. Case 176 73 Re French Merchant Seamen where the ECJ said, that "*The Commission in the exercise of the powers which it has under Article 155 and 169 of the Treaty does not have to show the existence of a legal interest, since in the general interest of the Community its function is to ensure that the provisions of the treaty are applied by the Member States and to note the existence of any failure to fulfil the obligation deriving therefrom with the view to bring it to an end.*" Similar opinion the ECJ expressed in the case 422 92.

[8] Ch. Gray, *Juridical remedies in international law*, Oxford 1987, p. 130-131.

[9] See, respectively Article 227, 182 and 226 the EC Treaty.

[10] See article 219 and ECJ opinion 1 91 on the European Economic Area Agreement.

[11] See, e.g. Case 90 and 91 63 Commission v Belgium and Luxembourg, where the governments have raised the argument that they had to lay their own protective import duties, since the Council had delayed the setting up of a common organisation for dairy products. In their opinion, the Council's default was an excuse for their breach. The ECJ rejected this plea as having no place in the community law.

[12] See e.g. Case 39 88 Commission v Ireland 1990 ECR I-4271.

ARTICLE 169 PROCEDURE

Article 169 provides:

"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission the later may bring the matter before the Court of Justice."

Generally speaking, the procedure can be divided into two separate phases. The first one takes place before the Commission, constituting a kind of compulsory pre-litigation, administrative procedure. In practice, before the formal procedure is started the Commission writes a letter to the State concerned, in which it warns the State of its breach and invites the State's comments. As Brown and Kenedy state, in two cases out of three it settles the matter.[15] If it does not bring the satisfactory solution, the Commission may take the first formal step – invite the State concerned to submit its observations on the alleged breach. If the Commission considers the State's explanations or its undertakings as unsatisfactory, it may issue a reasoned opinion to define the subject-matter of the dispute, measures necessary for the State to undertake in order to be in accordance with the Treaty and the deadline for compliance[16]. If the State does not comply with the opinion, within the prescribed period of time, then the Commission may make a written application[17] and bring the matter before the ECJ, thus starting the second phase of the procedure. It should be mentioned that the State's compliance with its obligation after the deadline has passed does not prevent the Commission from bringing the matter to the Court. The Commission may then withdraw such action, however it is not entirely the Commission's decision. The ECJ retains an interest to continue the case since its judgment may be of

[15] L.N. Brown, T. Kenedy, *The Court of Justice of the European Communities*, London 1994, p. 108.

[16] See the second paragraph of Article 169.

[17] The contest and formal requirement of that application is regulated by Article 19 of the Protocol on the Statute of the Court of Justice of EEC Treaty and Article 38(1) (c) of the rules of procedure. They require that an application shall indicate specific complaints on which the ECJ is asked to rule.

substantive interest as the basis of the Member State's responsibility for the damages suffered by other Member States, Community or private parties as a result of the said Member State's default.[18] The Court of Justice has two possibilities – to rule on the merits of the case or dismiss it as inadmissible.

The most distinguished feature of this procedure is the Commission's participation. Undoubtedly the Commission plays a central role under that procedure. This an important significance, since the Commission is an institution independent of Member States, which is to act as a guardian of the Treaty having on mind the general interest of the Community.[19] The Commission's importance under this procedure is showed in different aspects of its functioning. First and foremost, its affords and steps taken during that stage of the proceeding often resolve the dispute. Each year the Commission starts more than one thousand proceedings. However, only a small percentage of them are referred to the ECJ, which is clear evidence that the pre-litigation procedure before the Commission turned out to be a good procedural solution, which made the whole procedure quite an effective instrument against the defaulting Member States.[20] On the other hand, its principal role follows from the competencies it enjoys under this procedure. According to academic writing[21] and established case law[22], it is for the Commission to decide whether or not to deploy the procedure. The discretion it enjoys in this regard makes it impossible for the third parties to challenge that decision. In the case Star Fruit v Commission, the ECJ stated that:

"However, it is clear from the scheme of Article 169 of the Treaty that the Commission is no bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right of individuals to require that institution to adopt specific provision. (...) In the event that the State does not comply with the opinion within the period allowed that institution in any event has the right but

[18] Such opinion was expressed by the ECJ in the case 39/72 Commission v Italy 1973 ECR 101.

[19] Article 155 expressly states that: *"In order to ensure the proper functioning and the development of common market, the Commission shall ensure that the provision of this Treaty and the measures taken by the institutions pursuant to the Treaty will be allowed (...)."*

[20] Quoted after R. Bieber, Case C-52/90, Commission v. Kingdom of Denmark, [1992], I-2187 and Case C 362/90, Commission v. Italian Republic, [1992], I-2353, CMLRev., 1993, No 30 p. 1197.

[21] See R. Bieber, *op. cit.*, p. 1197 and A. Arnull, *The European Union and its Court of Justice*, p. 23.

[22] See, for example, Case 415/85 Commission v Ireland [1988] ECR 3097, Case 191/95 Commission v Germany, Case 247/87 Star Fruit v Commission [1989] ECR 291.

not a duty to apply to the Court of Justice for a declaration that the alleged breach of obligation has occurred." [23]

The Court of Justice expressed a similar opinion in the case, Commission v Germany.[24] In other words, the Commission decides on its own whether to start the proceeding, when to start it or whether to bring the matter before the Court. Also the Commission's motives in commencing proceedings are not relevant.[25] The extent of the Commission's discretion in this regard can be perfectly illustrated by the case, Commission v Germany.[26] The Commission brought the action against Germany for failure to comply with various Council directives on waste. At the time when the proceeding took place, the Community had changed its policy in that field along the same line as that followed by the German legislation. Germany pleaded that the action should be dismissed since it had lost much of its purpose. The Court of Justice also showed its astonishment that the action was brought after so much time since the Directive was issued, however it did not agree with Germany that it was a good enough reason to dismiss the case. On the contrary, the ECJ ruled that the Commission had the right to decide on its own, when it should start the proceeding and that there was no law, which would enable the ECJ to review that discretion. [27]

Also the rules of internal procedure the Commission should follow in deciding whether to bring proceedings, to large extent, are left to the Commission's discretion. Thus, in the case Commission v Germany[28] it was argued that the proceeding was inadmissible because the reasoned opinion

[23] Case C-247 87 Star Fruit v Commission [1989] ECR 291, par. 11 and 12.
[24] Case C-191 95 Commission v Germany ,[1998] ECR.
[25] See Case 415 85 Commission v Ireland [1988] ECR 3097. In the case Ireland pleaded an inadmissibility of the application because in its opinion there was a political motive behind the Commission's application to the Court and such a motive was not a proper basis for an action pursuant to Article 169 of the EEC Treaty. In response, the ECJ stated that *"That argument cannot be upheld. In the context of the balance of powers between the institutions laid down in the Treaty, it is not for the Court to consider what objectives are pursued in an action brought under Article 169 of the Treaty. Its role is to decide whether or not the Member State in question has failed to fulfil its obligations as alleged (...) an action against a member State for failure to fulfil its obligations, the bringing of which is a matter for the Commission in its entire discretion, is objective in nature."*
[26] See Case 422 92 Commission v Germany [1995] ECR I-1097.
[27] *Ibidem*, par. 17.
[28] Case 191 95 [1998] ECR 291.

and the application to the Court was made by a single Commissioner instead of the Commission acting as a college. The Commission defended that the factual and legal background of the case were available to the Commissioners when they were making the decision to issue the reasoned opinion and to commence the action before the ECJ. However, the number of proceedings did not allow the whole Commission to decide on the wording and the form of the reasoned opinion and the application to the Court. The ECJ agreed with that explanation and stated that such procedure was in full respect with the principle of collegiate responsibility of the Commission and as a result it considered the action as admissible.[29]

The wide range of the Commission's prerogatives in the first phase of the procedure is a consequence of the very character of this stage. Efforts the Commission undertakes during that phase resemble more political management and diplomatic means of solving international disputes than juridical ones.[30] This however should not mean that the Commission is not obliged to follow procedural requirements laid down by Article 169. The wild discretion and flexibility of working methods end when a case reaches the ECJ. There were many cases where the ECJ dismissed the Commission's application because of non-observance of the formal requirement, especially during the pre-litigation procedure and because of the the alleged infringement in the application was not identical with that in the reasoned opinion. The case, Commission v Kingdom of Denmark, and the case, Commission v Italian Republic, are good examples.[31] In the first of the above-mentioned cases the Commission alleged that Denmark had erroneously applied the Directive 83/82 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another. In its reasoned opinion, the Commission merely cited two cases which were brought before the Danish court as an example of the false interpretation of the above-mentioned directive. No justification of the alleged violation of the obligation to co-operate was mentioned. Also the application to the Court did not include the details of legal and factual aspects of the case and within the section dealing with points of law, only the reference to some provisions of the above-mentioned Directive, several judgments of the ECJ and some articles of

[29] A. Arnull, *op. cit.*, p. 23.
[30] J. Garstka, *Rozstrzyganie sporów w Unii Europejskiej*, Łódź 1998, p.65.
[31] Respectively C52 90, [1992] ECR, I-2187 and C 362 90, [1992] ECR I-2352.

the EC Treaty were made. The ECJ dismissed the application. It pointed out that the correct application of the Article 169 requires the Commission to indicate in its reasoned opinion the precise complaints on which the Court was supposed to rule and at least a summary of the aspects of law and facts on which those complaints are based. The same applies to the written application.[32] Both the reasoned opinion and the application in the present case did not fulfilled those conditions, the Court stated. What is more important, it refused to examine the Commission's objection that Denmark had failed ti fulfile the obligation to co-operate, since for the first time it was mentioned only during the written proceeding. No such argument was raised in the reasoned opinion.[33]

The Commission's application in the second of the above-mentioned cases was also dismissed because of Commission's procedural infringements but were of a different nature. As in the previous case, the implementation of Community law was in dispute, this time the Council Directive 77/62 on co-ordination procedures for the award of public supply contracts. The Commission argued that the offer for the supply of several products, among others, fresh beef made in 1988 by the Local Healthy Authority of Genoa, was in breach with Article 23 of the 77/62 Directive as far as the requirements for tendering the supply were concerned. The ECJ followed the opinion of the Advocate General Lenz and declared the case as inadmissible because the effects of the supply contract made, as a result of the offer in question, became exhausted in their entirety before the Commission's second opinion was issued and the subseqùent notices for tender *in* 1990 and 1991 no longer contained the disputed conditions.[34]

Those cases clearly show that the Court of Justice from the beginning has been trying to preserve the balance on the one hand between the effectiveness of that procedure and on the other the formal requirement provided for in Article 169.

[32] The paragraph 17 of the jugdment states: "*With the reference to the admissibility of the application, it should be noted that (...) the Commission must indicate, in any application made under Article 169 of the Treaty, the specific complains on which the Court is asked to rule and, at the very least, in summary form the legal and factual particulars on which those complains are based.*"

[33] In the explanation of its standpoint, the ECJ states that: "*Since the object of the Article 169 procedure was determined by the pre-litigation procedure and by the same arguments and pleas, the alleged violation could not be examined by the Court.*"

[34] Case 362/90 [1992] ECR I-2353, p. 11 and 18.

ARTICLE 170 PROCEDURE

As it was mentioned above, this procedure enables a Member State to bring another Member State before the ECJ, if it considers the later is in breach with its community obligations.[35]

Like Article 169 procedure that divides the proceeding into separate phases, the first one is of a compulsory character and takes place before the Commission. Article 170 expressly states that:

"*(...) Before a Member State brings an action against Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.*"

When the Commission receives such a complaint, it must deliver a reasoned opinion, as under Article 169. Most of what has been said about the Commission role and competencies, formal requirements and the contest of the Commission's opinion under Article 169 procedure, applies to that proceeding. However, in contrast, according to Article 169 procedure, the lack of a reasoned opinion is not an obstacle to bring a matter before the ECJ. Namely, if the Commission does not deliver the opinion within the prescribed period of three months – the complaining State may bring the defaulting State before the ECJ. Also in the case that the Commission does not find the alleged infringement, the State may bring it before the Court of Justice.

Article 170 procedure, in contrast with that under Article 169, is not used very often. This is readily understandable, since every direct confrontation between Member States touch the tender nerve of national sovereignty and is better avoided by leaving it to the Commission to initiate any suit.[36] Actually, only one case to date has proceeded to judgment. This is the case, France v United Kingdom, which the United Kingdom was declared to be in breach of

[35] Article 170 provides for "*A Member States which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice. Before a Member State brings an action against Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observation on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.*"

[36] H. Schermers, D. Waelbroed, *op. cit.*, p.114.

its treaty obligations by adopting national measures governing the minimum size of mesh for fishing nets used in its territorial waters.[37]

PROCEDURES UNDER ARTICLES 93, 100A(4) AND 225

Apart from the above described general infringement procedures, the EC Treaty provides for three exceptional proceedings in the case of a Member State's failure to fulfil its obligations, namely procedures under Articles 93, 100a(4) and 225. All of these proceedings dispense with the Commission delivering a reasoned opinion concerning what undoubtedly makes them more expeditious procedures than the ones provided for in Articles 169 and 170. These exceptional procedures have been created in order to resolve disputes concerning matters in which time is important and any State's breach of its obligations mentioned in these Articles require a quick reaction. Thus, Article 93 deals with a State aid to industry, Article 100a(4) concerns improper use of the right to opt out from harmonising measures adopted for the establishment or functioning of the internal market. Finally, Article 225 deals with disputes about improper use of powers provided for in Articles 223 and 224 of the EC Treaty.

Article 93 procedure is the one most often in use. It enables the Commission to take some measures against a Member State which aid, in the opinion of the Commission, distorts or threatens to distort competition within the common market. In such a situation the Commission shall first give the notice to the State in question to submit its comments. Only then the Commission may decide that the State concerned shall abolish or alter such aid within the prescribed time-limit, while stating a detailed reasoning on which its decision is based.[38] That decision is a binding act in the sense that the State is obliged to follow its provision and that the State may challenge it before the Court of Justice under Article 173. If the Member State concerned does not comply within the period laid down in the decision, the Commission or any interested Member State may bring a reluctant State directly before the ECJ. As follows from above, the main difference between the procedure under Article 93 and that under Article 169 is the fact that under the former the Commission issues a binding decision, while under the

[37] Case 141 78 [1979] ECR 2923.

[38] See Case 41 93, France v Commission [1994] ECR I-1829. The Court stressed in this case that such detailed reasoning is needed to enable the Court to rule on a case.

later merely an opinion.[39] The requirement to bring the reluctant State before the Court of Justice in order to force it to improve its conduct is the same under both articles.

Another exceptional infringement proceeding is the Article 100a(4) procedure, which was added to the Treaty by the Single European Act in connection with the completion of the single market. Article 100 of this Act provided a qualified majority voting in the Council on the measures which are connected with the establishment or functioning of the internal market. But at the same time the said Article , gave certain Member States the right to opt out from such harmonising measures on grounds of major needs, specified in Article 36, the protection of environment or working environment. If a State wants to use that possibility of opting out and stick with its national regulations on matters which normally belongs to hrmonising measures it must first notify those national provisions to the Commission. The Commission's task is to verify whether those provisions are in accordance with the Treaty. When the Commission finds that the provisions are not a mean of arbitrary discrimination and do not put restriction on the trade between Member States, it shall issue a positive decision if not a negative one. That decision, like the one under Article 93, has a binding force and may be challenged under Article 173. If the State concerned makes improper use of the right to opt out the Commission and another Member State may refer the case to the Court of Justice under Article 100a(4).

Finally, Article 225 procedure enables the Commission and every Member State to bring a case directly to the Court of Justice against the State which has made improper use of the powers provided for in Article 223 and 224 of the EC Treaty. Those Articles deal with the common provision on the production and trade of arms and military equipment. They also provide for the possibility of a Member State to opt out from such common policy in order to protect its national safety. Again in these proceedings, Member States and the Commission avoid the time consuming pre-litigation procedure, which is indispensable under both Article 169 and 170 of the Treaty.

[39] In this regard, that procedure resembles the procedure under Article 88 of the ESCS Treaty where the Commission gives a binding decision. However, in contrast with Article 93 procedure, in the procedure under Article 88 the Commission does not have to siege the ECJ with the matter to force the reluctant member State to comply with the decision, since the decision under Article 88 has its own sanction.

EFFECTS OF JUDGMENTS

Although it does not follow directly from the wording of the EC Treaty, it is indisputable that the Court of Justice judgments under all of the above-mentioned procedures are only declaratory. This view is represented by most academic writers.[40] Also the practice shows that the ECJ restrains itself from stating that a Member State has or has not failed to fulfil its Community obligations. Any attempts to convince the ECJ that it should go further and award damages in favour of those whose interest has been affected by the infringement, annul the offending nationals measures or issue orders, has failed. It has never even made any attempt to declare that there is an obligation by a Member State to take certain measures. In the case France v United Kingdom, Advocate General expressly stated that in his view the Court's ruling under Article 170 is of a purely declarator character.[41] The ECJ, actually, has never directly pronounced on this matter. However, in certain cases it has made some indications that it is of the same opinion. Thus, in the case Humblet v Belgium, concerning the Member State's breach of the provisions of Protocol on privileges and immunities of the ECSC the ECJ stated that:

"The Court's jurisdiction to rule on any dispute relating to the application of the protocol on the privileges and immunities of the ECSC does not enable it to interfere directly in the legislation or administration of the Member State. Therefore the Court cannot on its own authority, annul or repeal laws of a Member Sate or administrative measures adopted by its authorities. (...) Article 171 of the EEC Treaty and Article 143 of the EAEC Treaty which merely attach declaratory effect to the decisions of the Court in cases of failure to comply with the Treaties, albeit obliging the Member States to take the necessary measures to comply with the judgment."[42]

In the case, La Procureur de la Republique v Waterkeyn, the ECJ again made some suggestions of a declaratory nature in its rulings in cases against Member States, stating that such rulings could not directly give rights to individuals under national law.[43]

[40] For example, A. Arnul, *op. cit.*, p.29, D. Lasok, *op. cit.*, p. 123, Ch. Gray, *op. cit.* p.122.
[41] Case 141/78 [1979] ECR 2923.
[42] Case 6/60 [1960] ECR 559, par. 2.
[43] It said that *"(...) If the Court finds in proceedings under Article 169 t 170 of the Treaty that a Member State's legislation is incompatible with the obligation which it has under the Treaty,*

The opinion of a declaratory nature of the ECJ judgment under Articles 169–170 and their equivalents to a large extent is assumed from Article 171, which deals with the execution of the said judgment. Paragraph 1 of that Article when providing for that *"If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty (...)"* indirectly indicates the context of the ECJ ruling under Article 169, 170 and their equivalents, the context which restrains the statement of whether the State's conduct in question constitutes the alleged breach or not. The same Article indicates that the ECJ judgment does not have executory force, since essentially, it is left to the defaulting Member State to comply with its Treaty obligations.[44] Such interpretation of Article 171, can be found in some of the Court's cases. Thus, in the case La Procureur de la Republigue v Waterkeyn, the ECJ said that:

"All the institutions of the Member States which the Court finds to have failed to fulfil an obligation under the Treaty must in accordance with Article 171 of the Treaty, ensure within the fields covered by their respective powers that judgments of the Court re complied with. If the judgment declares that certain legislative provisions of a Member State are contrary to the treaty the authorities exercising legislative power are than under the duty to amend the provisions in question so as to make them conform with the requirement of Community law. For their part the courts of the Member State concerned have an obligation to ensure when performing their duties that the Court's judgment is compiled with."[45]

The cited ruling also indicates that the Member State, which has been found by the ECJ to be in breach of its obligations, is not absolutely free when choosing the manner in which it complies with those obligations. The Court of Justice suggested that when it agreed with the Commission that the State in question had infringed its obligations, there was no doubt that the State should remove (change) the acts, indicated by the Commission in its reasoned opinion and its application as

the courts of that State are bound by virtue However, it should be understand that where the Court has found that a Member State has failed to comply with a provision of Community law having direct effect in the national legal orders the rights occurring to individuals derive not from judgment finding that the State has failed to fulfil its obligations but from the actual provisions of Community law." Case 314/81 [1982] ECR 4337, par. 14.
[44] The first paragraph of Article 171 provides for: *" 1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice."*
[45] Case 314/81 [1982] ECR 4337, par. 13 and 14.

those which had given the rise to the breach, in order to improve its behaviour. The fact that the ECJ judgment in infringement proceedings is only declaratory and that in those proceedings the ECJ has no possibility to award damages or to make national measures repealed of or to require rights for individuals does not mean that the proceedings have only political dimension. It should be remembered that the Court's ruling on those matters might establish a basis responsibility of a Member State to another Member State, to the Community or to an individual.[46] Having such ECJ judgment other Member State or individuals affected by the Member State infringement of Community provisons may succesfuly held the said State liable for demages in others proceedings under Community or national law.

As far as the execution of the ECJ rulings in infringement proceedings is concerned, Article 171(2) provides that if a State has failed to comply with the judgment, the Commission may start a proceeding against it issuing a reasoned opinion as under Article 169 and 170. If the State does not comply with that opinion within the prescribed period of time, the Commission may bring the case to the ECJ to declare that the State concerned has breached its obligations. The reluctance of a State to comply with a judgment gives also the right to start Article 170 procedure.[47] It should be noted, here, that in the original text of the Treaty there were no sanctions for no-compliance with the Court' rulings (the only sanction was the threat of a further proceeding pursuant to the above-mentioned Article 171 (2) – which can hardly be called a sanction). The situation changed when the Maastricht Treaty came into force. That Treaty added to Article 171 the possibility to impose financial sanctions on Member States, which fail to comply with the ECJ rulings against them. The Court of Justice

[46] The ECJ expressed that opinion among others, in Case 39/72 Premiums for reducing Dairy Production [1973] ECR 101.

[47] The second paragraph of Article 171 provides for: "*2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving the State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgments within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In doing so it shall specify the amount of the lump sum or penalty payment to be paid by the Member state concerned which it considers appropriate in the circumstances. If the Court of Justice finds . that the Member State concerned has not compiled with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to article 170.*"

can exercise that power only on application by the Commission, which is obliged to specify the amount of that sanction, it considers appropriate, when pleading to use such a sanction.[48] This means that when a Member State brings an action against another Member State under Article 170, the possibility of imposing financial sanction in such a proceeding is excluded. This possibility undoubtedly reinforces the whole system of juridical remedies against Member State; however, the ECJ ruling in Case Francovich and Others, to some extent, diminished its importance. In that case, the Court of Justice stated that there was a principle inherent in the system of the EC Treaty, in which Member States that breached their Treaty obligations were liable to compensate the individual who suffered loss as a result.[49] This principle compensates for the shortcomings of the infringement actions against Member States following from the declaratory nature of the ECJ judgment.

It is worth mentioning that the Court of Justice's resistance to go further than just stating the alleged State's breach of Community obligations has occurred or not, contrast with the International Court of Justice's attitude. The International Court of Justice, for a long time, has been of the opinion that when instruments confer on its jurisdiction over disputes concerning the interpretation and application of treaties, they shall be understood as giving it jurisdiction to award damages. [50]

CONCLUSIONS

As follows from the above, direct infringement actions against Member States of the European Community provided for under the EC Treaty represent a distinct departure from the basic principles of international law. In the first place, it should be stressed that the purpose of the said actions is slightly different than the purpose of infringement proceedings before the International Court of

[48] The Commission has issued special guidance on the application of Article 171 called, "*Memorandum on Applying Article 171 of the EC Treaty*", which was published in OJ 1996 C 242/6 and in addition to it, "*Method of Calculating the Penalty Payments Provided for Pursuant to Article 171 of the EC Treaty*", published in OJ 1997 C63/2.

[49] Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357, par. 5.

[50] This view was represented, *e.g.*, in the case Germany v Ireland and Wimbledon. Also the Permanent Court of International Justice in the case, Chorzów Factory, assumed that it had the power to award damages when it had found the State to be in breach of international law, in spite of the lack of an expressed provision in this regard. See, Ch. Gray, *op. cit.*, p. 60-64.

Justice. Articles 169, 170 and their equivalents are designed to secure compliance with Community law rather than to prevent injury to Member States. That is why, neither the Commission nor a Member State has to show what harm it (or the Community) has suffered as a result of the defaulting Member State's breach of its Community obligations, while under the international law this is one of the essential premises, which has to be proven to win the case. Secondly, the EC Treaty confers upon the Court of Justice obligatory jurisdiction to rule on disputes between Member States concerning the application and interpretation of the Treaty, while under traditional international law the enforcement of treaties' obligations is rather a matter to be settled amongst the Contracting Parties themselves and the Parties are free to choose dispute resolution mechanisms. Thirdly, the ECJ jurisdiction over the above-mentioned disputes is exclusive: Member States are not allowed to resort to any other method of dispute settlement than that expressly stated in the EC Treaty. In this regard, they are also not allowed to resort to any unilateral countermeasures provided for in international law. Fourthly, in contrast with infringement proceedings before the International Court of Justice, in infringement actions, the Commission (respectively a Member State) does not have to prove it has a particular legal interest in bringing a case against a Member State. Such an interest derives from the Treaty itself.[51] Another characteristic feature of infringement actions under the EC Treaty is the fact that they can be brought not only by States, but also by the Commission, the body independent of Member States. Normally, solely States are empowered to bring such actions before international courts. Sixthly, the EC Treaty provides for, unknown under international law, the possibility of imposing on the reluctant Member State, a lump sum or penalty payment. Finally, unlike judgments of the International Court of Justice in contentious cases, the ECJ judgment in infringement proceedings is of a purely declaratory nature, no award of damages is possible for those whose interest has suffered by the State's breach of its obligations. All the above-mentioned unique features of infringement proceedings under the EC Treaty and they innovations together with the preliminary ruling procedure let the Communities to build workable and quite efficient system of legal remedies against Member States' breaches of Community Law.

[51] The question of *locus standi* of complaining States before the international court is often risen and every time that State has to prove its interest in bringing the case – *e.g.* The Wimbledon case, PCIJ Series A o 1.

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STANISLAS OF SKARBIMIERZ

by

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Stanislas of Skarbimierz, from Latin *Stanislas de Scarbimiria,* (born circa 1360, died in 1431) was born in a townsmen's family in a place which is currently called Skalbmierz. A Cracow canon and professor of the law faculty, which at that time consisted almost exclusively of canons, became (in the year 1400) the first rector of the restored Cracow Academy. He was re-elected to this post in the year 1413. Stanislas of Skarbimierz was the author of several hundred sapiential sermons (*sermones sapientiales*) devoted to the problems of faith and morality, whose copies have been preserved until the present day. Three of the above sermons deserve special attention in the context of studies of the medieval Polish doctrine *ius gentium*. The sermons in question are: *Sermo, quod sapientia sit armis belicis praeponenda* and *Consilia contra astrologum Henricum Bohemum,* in which reverting back to the teachings of St. Thomas Aquinas, Stanislas presented the possible dangers to the state and the actions one should undertake to remove them. Among others, he also emphasised the universal and absolute power of the natural law.

Undoubtedly, the most interesting and most fully researched sermon is *De bellis iustis* (On Just Wars – as one is able to read in one of the manuscripts). Another manuscript bears the title *De bello iusto et iniusto* (On Just and Unjust War). Most probably, the latter sermon dates back to around 1410 (or, which is less likely, to around 1414) and belongs to the so-called university sermons that constituted one of three fundamental forms of teaching at medieval universities (*legere, disputare et praedicare*). Such sermons were addressed not so much to the faithful taking part in the service, but to university students and

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professors, and often to members of the royal court, the magnates, and knights as well as the clergy. In contemporary times, their counterpart would most likely be an academic dissertation, article or published academic paper.

De bellis iustis was translated into Polish, subjected to academic analysis and saved from oblivion by Ludwik Ehrlich. The most complete and exhaustive analysis of the above sermon is to be found in Ehrlich's paper *Polski wykład prawa wojny XV wieku* ("A Fifteenth Century Polish Exposition of the Law of War"), Warsaw 1955. The sermon constituted one of 106 sapiential sermons, which had been copied on numerous occasions and was edited by Ehrlich on the basis of 6 manuscripts that have been preserved intact until the present-day. B. Chmielowska, for the second time, published *de bellis iustis*, together with other sapiential sermons of Stanislas of Skarbimierz. Subsequent research carried out by historians specialising in medieval studies as well as authors focusing on the topic of the Polish school of *ius gentium* in the late Middle Ages, seem to confirm the conclusions which had been reached by Ehrlich. According to the latter, the sermon, *De bellis iustis*, should take its due place in the science of the law of nations and its history, and above all in the history of Polish medieval legal thought.

The sermon, *De bellis iustis*, is a well-constructed, logical and erudite treatise; it is either one of the earliest or possibly the earliest Polish legal treatise. At the same time, the sermon of Stanislas of Skarbimierz is the earliest existing treatise in world literature devoted exclusively to the legal problems connected with a public war. Ehrlich also emphasises that as regards its academic level, the sermon is in no way inferior to the universally known, though later similar publications in world literature.

The author of the sermon discusses a wide range of problems comprising, among others: the rights and obligations of those who declare war, the issue of the admissibility of war, the conditions which need to be fulfilled for a war to be regarded as a just one, the legal consequences of a just war (among others, the admissibility of killing one's enemies, the problems of war spoils, the extent of permissible damages), the legal consequences of an unjust war (among others, the issue of responsibility and compensation), the problem of who may declare war, the issue of self-defence, the problem of whether and in what circumstances one may take advantage of the assistance of pagans, as well as the issue of the rights and obligations of the subjects, the obligation of investigating whether a war is a just one and the extent of this obligation, the issue of the duty to participate in the war, the problem of obedience, and the right to war spoils and plunder.

The sermon commences with a summons addressed to the world leaders not to engage in a war without a justifiable cause, whereas it ends with an appeal for the love of peace. It is permeated with the spirit of peace. The starting point for Stanislas is man, who should not be permitted to fight without a justifiable cause. The above ban is extended by the author to the violations of public peace. The only type of war, which is admissible, is a just war whose conditions are defined by Stanislas after Raymond of Penyafort. Stanislas emphasises the inadmissibility of personal involvement in the war activities of the clergy, the necessity to obtain authorisation to conduct war activities, as well as the necessity of undergoing conciliatory procedures, if the opponent agrees to it.

Having discussed the consequences of the above principles and particularly the right to war spoils in a just war, the admissibility of killing and its limitations, Stanislas goes on to present counter arguments to those views that seem to reject the admissibility of a just war. The problem of self-defence plays an important role in the sermon of Stanislas of Skarbimierz. Another problem, which is widely discussed by Stanislas, is the issue of punishing the unjust Christians with the help of the pagans. The author permits the use of pagan help in a just war against Christians. He argues in favour of taking advantage of such assistance, on the basis of nine assumptions; in connection with the last one, he concludes that the pagans have a right to create their own state and that neither the pope, nor the Christians are in a position to deny them this right. The only exception that Stanislaw makes applies to the defence of the Holy Land. According to the divine and natural law which are common to all people "the pagans may have states and land", for as is written by Pope Innocent IV whom Stanislas quotes, "they were created not only for the faithful, but for every rational being". Consequently, says Stanislas in situations when pagans are invaded by Christians without a just cause, they conduct a just war against Christians in order to recover their lands and property.

Stanislas' merit consists not only in the presentation of original and immensely progressive views for his times. His sermon contains some excellent arguments, which are presented in a way that testifies to the author's great erudition. Stanislas often quotes from Decretum Gratiani, the Decretals of Gregory IX, *Liber Sextus*, *Clementinae*, *Summa casuum* by Raymond of Penyafort, the glosses of Guillaume of Rennes, *Summa* by St. Thomas Aquinas, the famous *Apparatus* by Pope Innocent IV, and also *Margarita Decreti* by the Pole Martin (Martinus Polonus) and in a single instance from *corpus iuris civilis*. The content of

the sermon, *De bellis iustis*, bears testimony to the fact that Stanislas also consulted the works of famous 14th century jurists, such as: Oldradus, Ioannes Andreae, Joannes of Lignano or Hostiensis. Yet, there are no direct quotations from the above works in Stanislas' sermon. On the other hand, there are numerous direct quotations from the various books of the Old Testament. Many of the biblical citations, similarly as quotations from the works of St. Augustine were taken from the *Decretum Gratiani*, as well as from *Summa* by St. Thomas and *Summa* by Raymond of Penyafort.

The sermon, *De bellis iustis*, was written in a specific political situation, in the midst of growing tensions between Poland and the Teutonic Knights and in the face of an imminent war with the Teutonic Order. In spite of the fact that the sermon was closely linked to the current political situation, in no place does Stanislas bring up the issue of Poland and its king, or that of the Teutonic Order, Poland's enemies and allies. He points out according to what principles one should assess whether a war is a just one and in connection with this he emphasises the admissibility of pagan help provided it is offered to one in a just war against an invader. It was a view which remained in accord with the current political situation in Poland, for as one learns from an anonymous contemporary treatise *Revocatur*, the issue of whether the Polish king may take advantage of the assistance offered by the heretics and pagans in the struggle with other Christians, was being questioned by the contemporaries.

One may formulate a thesis that the sermon was written at a time when Poland was threatened with war or else conducted a war and intended to take advantage of the assistance offered by the pagans in the struggle against the Teutonic Order. From the account given by Długosz, we know that a dozen or so days before the battle of Grunwald, on the territory of the Płock diocese, Jakub Kurdwanowski, a local ordinary, illustrious jurist and graduate of the university of Bologna, had preached a sermon to the Polish troops. In his sermon, he tried to convince the audience that the war fought by the Polish king against the Teutonic Knights would be a just one. These and other circumstances would seem to indicate that the sermon, *De bellis iustis*, in which Stanislas tried to prove that making use of the assistance of pagans was justified, was written around this time, that is in the first half of the year 1410 or else 1414. A comparison of the sermon, *De bellis iustis*, with the best known treatises of the time, points to the originality of Stanislas of Skarbimierz's views and even the superiority of his discourse over the treatises written by such renowned jurists as Joannes of Lignano, Henry de Goricum, Martin of Lodi (Laudensis), and John Lopez (Lupus)

of Segovia. In his lectures, a Spanish Dominican Francisco de Vitoria, one of the most enlightened minds of the times, a renowned jurist and professor of theology at the university of Salamanca, expressed views similar to those, which Stanislas of Skarbimierz put across, in his sermon over a hundred years earlier. According to Ehrlich, Vitoria's lecture *On the Indians, or on the Law of War made by the Spaniards on the Barbarians, the Second Relectio*, which was congruent with the hypotheses put forward by Stanislas of Skarbimierz in his sermon, had most probably been of service to Gentilis as well as Grotius, when the latter was working on his epoch-making work, *De iure belli ac pacis libri tres*.

There is no evidence supporting the view that the sermon by Stanislas of Skarbimierz was widely known outside Poland. It is not even known whether Paulus Vladimiri, who had lived and operated at the same time at the Cracow Academy, had knowledge of the sermon. The views of Vladimiri do not seem to differ substantially from those of Stanislas; on the contrary, they seem to take up and develop the thoughts and conclusions reached by the author of the sermon, *De bellis iustis*. The reason why the views and opinions of Stanislas of Skarbimierz had encountered a limited response among the world academic circles may be that the sermon was written at the time when print had not yet been known, but also it may have been due to the actual purport of the sermon: topical at the time when it was written, but somewhat outdated several years later when the Teutonic Order had lost its significance and was no longer the high point of interest to the scholars and diplomats at European courts. Ludwik Ehrlich had only partially brought the thought of Stanislas of Skarbimierz back to the contemporaries from total oblivion. Undoubtedly, the views and opinions of the author of *De bellis iustis* as well as his lifetime work deserve a more meaningful place in the history of international law.

There are no credible sources testifying to a wider public activity of Stanislas of Skarbimierz. The truthfulness of Długosz's remark that Stanislas had participated in the negotiations with the Czechs in the year 1431 is being questioned by Ehrlich who points to the fact that at that time Stanislas of Skarbimierz had already been dead. Whereas it is a fact that in connection with the attempt to crown Witold by the Roman king Sigismund in the year 1430, the professors of the Cracow Academy had drawn up their first legal adjudication, the so-called *consilium*. Among the authors of the above adjudication was Stanislas of Skarbimierz. The authors of the *consilium* proved to be the supporters of the curial theory in accordance with which the right to grant the royal crown belonged exclusively to the Pope. Also in the above

opinion, Stanislas of Skarbimierz had shown consistency in his views and an understanding of the Polish vital interests*.

Bibliography

· Chmielowska B., *Les nations de loi naturelle et de loi positive chez Stanislas de Skarbimierz (vers 1360-1431)*, „Miscellanea Mediaevalia" 12 (1980);
· Czartoryski P., *Polska doktryna narodów* (The Polish Doctrine of Nations), [in:] *Historia nauki polskiej*, vol. 1, Wrocław 1970
· Domański J., *Stanisław ze Skarbimierza* (Stanislas of Skarbimierz), [in:] 700 lat myśli polskiej, Warsaw 1978
· Ehrlich L., *Paweł Włodkowic i Stanisław ze Skarbimierza* (Paul Władimiri and Stanislas of Skarbimierz), Warsaw 1954
· Ehrlich L., *Polski wykład prawa wojny XV wieku. Kazanie Stanisława ze Skarbimierza De bellis iustis (A Fifteenth Century Polish Exposition of the Law of War. The Sermon of Stanislas of Skarbimierz De bellis iustis)*, Warsaw 1955
· Fijałek J., *Studia do dziejów Uniwersytetu Krakowskiego i jego wydziału teologicznego w XV w.* (A Contribution to the History of the Cracow University and its Theological Faculty in the 15th century) „*Rozprawy AU Wydziału Filologicznego*", 29 (1899)
· *Historia dyplomacji polskiej*, (History of Polish Diplomacy), Vol. I, ed. M. Biskup (part III, chapter II, Z.H. Nowak), Warsaw 1982
· Korolec J.B., *Filozofia moralna* (Moral Philosophy) [in:] *Dzieje filozofii średniowiecznej w Polsce*, vol. 7, Wrocław 1980
· Morawski K., *Historia Uniwersytetu Jagiellońskiego* (History of the Jagiellonian University), vol. 1, Cracow 1900
· Rebeta J., *Komentarz Pawła z Worczyna do Etyki Nikomachejskiej* (Paul of Worczyn's Commentary to Nicomachean Ethics), Wrocław 1970
· Rechowicz M., *Po założeniu Wydziału Teologicznego w Krakowie* (Following the Foundation of the Theological Faculty in Cracow), [in:] *Dzieje teologii katolickiej w Polsce*, Lublin 1974
· Seńko W., *Z badań nad historią myśli społeczno-politycznej w Polsce w XV wieku*, (From the Research on the History of the 15th c. Polish Socio-Political Thought) [in:] *Filozofia polska XV wieku*, Warsaw 1972
· Świeżawski S., *U źródeł nowożytnej etyki* (At the Source of Modern Ethics), Cracow 1987
· Wielgus S., *Polska średniowieczna doktryna ius gentium* (Polish Medieval Doctrine *Ius Gentium*), Lublin 1966
· Zawadzki R. M., *Spuścizna pisarska Stanisława ze Skarbimierza. Studium źródłoznawcze* (The Writings of Stanislas of Skarbimierz. A Study of Source Materials), Cracow 1979
· Zawodzińska C., *Pisma Stanisława ze Skarbimierza pierwszego rektora Uniwersytetu Jagiellońskiego w kodeksach Biblioteki Jagiellońskiej* (The Writings of Stanislas of Skarbimierz, the first rector of the Jagiellonian University in the codexes of the Jagiellonian Library), „Roczniki Biblioteczne" 3-4 (1960)

* The Polish version of the text (with minor alterations) appeared in: *Złota Księga Wydziału Prawa i Administracji* (The Golden Book of the Faculty of Law and Administration), ed. J. Stelmach and W. Uruszczak, published by the Jagiellonian University, Cracow 2000, p. 51-56.

Stanislas of Skarbimierz
(circa 1360-1431)

A plaque presenting the bust of Stanislas of Skarbimierz. The author Pius Weloński, sculpture in bronze, 1899 (on the circumference an inscription: *Skarbimirovius I us Rector Univers. Jagiellon. MCD-MCM*). Property of the museum of Jagiellonian University.

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JAGIELLONIAN UNIVERSITY CRACOW

THE HISTORY OF TEACHING OF PUBLIC INTERNATIONAL LAW AT THE UNIVERSITY OF ECONOMICS IN CRACOW OVER 75 YEARS OF ITS EXISTANCE

by

Marian Banach*

The teaching of international law at the University of Economics in Cracow has a long and rich history.

In the years 1927–1931, when the College of Trade existed (1925–1937), Michał Rostworowski, professor of the Jagiellonian University and later a judge of the Hague Permanent Court of International Justice, lectured on international law in the second year of studies.

When the College of Trade became the Academy of Trade (beginning in September 1938), Zygmunt Sarna, cofounder and later the rector of the Academy of Trade in Cracow, delivered lectures on international law (the second year of studies) as well as on sea and consular law. Professor Z. Sarna became an assistant professor in the Department of Law at the Jagiellonian University in 1928 on the basis of a dissertation *An Outline of Consular Law with Particular Regard to Poland's Relations* (Cracow 1928). Starting *in* the academic year 1929/30, Prof. Z. Sarna had lectures in the Department of Law at the Jagiellonian University on the law of nations that consisted of two parts: law of peace and law of war. He also lectured in the Cracow Academy of Trade at the same time. Prof. Z. Sarna published among others such works as: *An Outline of Consular Law* (Cracow 1928), a monograph *Public International Sea Law During Peace and War*, part I

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Cracow 1932 and a dissertation *Coastal Waters* (Legal Magazine, V.30,1936). He also published several textbooks dealing with law of war and law of peace.

Julian Makowski, professor of the Main School of Trade in Warsaw who specialized in law of nations, delivered lectures on political law in the second year in the Academy of Trade before the Second World War.

After the Second World War, Prof. Z. Sarna resumed his lectures both in the Department of Law at the Jagiellonian University (law of nations) and in the Academy of Trade (consular law, sea law). He also published a monograph just after the war *The Sea Authority of Consuls*, edited in 1945 by the Academy of Trade in Cracow. Prof. Z. Sarna was chosen as rector of the Academy of Trade in Cracow several times: 1946/47, 1947/48 and in June 1948. He worked only in the Cracow Academy of Trade at that time. (He was granted a leave from the Jagiellonian University).

The Academy of Trade was transformed into a state Higher School of Economics on 1 October, 1950. The agreement was concluded with Prof. Z. Sarna in November 1950 and he was employed as a contract professor. Since the end of the war, he was the head of the Chair of Organization of Trade which became the Chair of Organization and Technology of Trade in 1950. He was no longer the head on 1 October 1951 and he could not lecture, either, but he resumed his lectures after 1956. He delivered lectures mainly on foreign trade in which he also addressed consular and sea law. Prof. Sarna's title of "full professor" was returned to him in 1957. In 1958, when the Chair of Foreign Trade was established in the Higher School of Economics, he became its head. Prof. Z. Sarna retired on 1 October 1960, but he continued to conduct an M.A. seminar on foreign trade from 1961 to 1965 as well as to publish course – books on foreign trade.

Henryk Mościcki, another professor of the Jagiellonian University, lectured in the Academy of Trade on the history of diplomacy in the years 1945–1949. From 1960 to 1972, neither public international law nor related subjects that had been previously lectured by such professors as: M. Rostworowski, Z. Sarna, J. Makowski and H. Mościcki, were taught in the Higher School of Economics in Cracow.

Continuing the pre-war traditions of the Academy of Trade as well as the traditions of the years just after the Second World War, Prof. Marian Iwanejko introduced lectures on public international law into the curriculum of the Higher School of Economics.

Professor Marian Iwanejko came from the Jagiellonian University to the Higher School of Economics on 1 October, 1972. He was the Head of the Chair of International Economic Organizations in the interdepartmental Institute of International Socio-Economic Relations that was set up in March 1972. The Chair was soon transformed into the Chair of International Law and International Economic Organizations. The new name of the Chair fully reflected didactic needs and academic interests of its Head – Prof. M. Iwanejko, and his co-workers: Janusz Sukiennik, Kazimierz Lankosz, Andrzej Dacyl, Marian Banach, Zofia Kulka (Szafrańska). Lectures on public international law were conducted in the second year of studies. Thanks to Prof. Iwanejko's oratory, his lectures were very popular among the students. Although the lectures were delivered in the Department of International Economic Relations (later the Department of Economics and Organization of Foreign Trade), the students from other departments of the Higher School of Economics also attended them.

Prof. M. Iwanejko is the author of such works as: (during his work in the Higher School of Economics) the monograph *Spory międzynarodowe* (International Disputes, PWN, Warsaw 1974) and the co-author of the monograph *UNCTAD – jej rola w kształtowaniu nowego międzynarodowego ładu ekonomicznego* (UNCTAD – Its Role in Shaping New International Economic Deal), edited by the University of Toruń, Toruń 1983, together with J. Białocerkiewicz. (For the detailed academic output of Prof. M. Iwanejko see: *Current Problems of International Law in the Contemporary World*. A Commemorative Book in Honour of Prof. M. Iwanejko, published by the University of Economics in Cracow, Cracow 1995). The premature death of Prof. M. Iwanejko during his creative prime in 1978 was an irreparable loss.

After the death of Prof. M. Iwanejko, lectures on public international law were continued by his co-workers who defended their doctoral dissertations and obtained *veniam legendi* in the meantime: Dr Kazimierz Lankosz, Dr Marian Banach, Dr Zofia Szafrańska.

Lectures on related subjects were also conducted: on international economic organizations, international economic agreements and the legal aspects of international enterprises (the latter were already started by Prof. M. Iwanejko). These lectures were delivered by the research workers from the Chair of International Law and International Economic Organizations that was transformed into the Independent Chair of International and Comparative

Law in 1993. Dr Zbigniew Rudnicki from the Chair of European Studies at the University of Economics also gives lectures on *Diplomatic protocol*. Having completed his post-doctoral dissertation at the Faculty of Law and Administration of the Jagiellonian University in the year 1987, Dr. Kazimierz Lankosz was nominated assistant professor and in the year 1992, he became the head of the Chair of International and Comparative Law (which following the death of Prof. Iwanejko, had been headed by Prof. Dr. Jerzy Mikułowski-Pomorski). In the year 1994, Assistant Prof. K. Lankosz was promoted to the post of Associate Professor of the University of Economics. In the same year, he commenced work at the post of Associate Professor in the Chair of International Public Law of the Jagiellonian University, which he has been in charge of since the year 1995. In recent years, Prof. K. Lankosz has conducted lectures on public international law for the second year of studies in the Faculty of Economics (in the Department of International Economic and Political Relations he conducted lectures on such subjects as: foreign trade, European studies, international management, international relations). Prof. K. Lankosz is the author of the monograph *Interpretacja statutów organizacji międzynarodowych* (Interpretation of statutes of International Organizations), published by the University of Economics in Cracow, Cracow 1985, and of numerous publications on the law of treaties, international organizations (both inter- and nongovernmental), the law of outer space and the legal questions relating to the EU Enlargement to incorporate Central and Eastern European states.

The workers of the Chair: Dr Zofia Szafrańska and Dr Marian Banach deliver lectures on: comparative civil and trade law, private international law, international economic organizations, international finance law, transport and international forwarding, the legal aspects of environmental protection in Europe, law and institutions of the European Union, adjustment of Polish law to the legal order of the European Union and thus they deal with international law aspects. The workers of the Chair are the authors of a collection of documents for teaching public international law: *Wybrane zagadnienia prawa międzynarodowego. Wybór dokumentów* (Selected Problems of International Law. A Choice of Documents) by M. Banach, K. Lankosz, Z. Szafrańska published by the University of Economics in Cracow, Cracow 1981, and *Międzynarodowe organizacje gospodarcze. Część I. Organizacje systemu ONZ. Wybór dokumentów* (International Economic Organizations. Part I. Organizations of the United Nations. A Choice of

Documents) edited by J. Mikułowski Pomorski and compiled by M. Banach, K. Lankosz, Z. Szafrańska published by the University of Economics in Cracow (Cracow 1983). Dr. M. Banach is the author of a methodology guide to *Transport and International Forwarding* published by the University of Economics in Cracow (Cracow 1993). Prof. K. Lankosz wrote a guide to *Comparative Civil and Trade Law* published by the University of Economics in Cracow (Cracow 1986). A collection of cases on public international law appeared under his supervision and it was published by Kantor Wydawniczy Zakamycze (Cracow 1997).

The following books and articles were used in writing this review:

- Z. Sarna, *Morskie uprawnienia konsulów*, Wydawnictwo Akademii Handlowej w Krakowie, Kraków 1945 (tamże niektóre pozycje prof. Z. Sarny).
- *Akademia Ekonomiczna w Krakowie w ubiegłym półwieczu 1925–1975*, pod red. S. Bollanda i Z. Żabińskiego, Wydawnictwo Akademii Ekonomicznej w Krakowie, Kraków 1975.
- *Sarna Zygmunt Jan (1890–1974)*, red. J.M. Małecki, w: Polski Słownik Biograficzny, wyd. PAN, Instytut Historii, Warszawa–Kraków 1994, t. XXXV, s. 198–200 (tamże pełny wykaz prac prof. Z. Sarny).
- K. Lankosz, *Słowo wstępne*, w: *Aktualne problemy prawa międzynarodowego we współczesnym świecie. Księga pamiątkowa poświęcona pamięci Profesora Mariana Iwanejko*, Wydawnictwo Akademii Ekonomicznej w Krakowie, Kraków 1995.
- Instytut Międzynarodowych Stosunków Społeczno-ekonomicznych. Opr. M. Banach, w: *Akademia Ekonomiczna w Krakowie w okresie organizacji instytutowej 1969–1992*, praca zbiorowa pod red. J.M. Małeckiego, Wydawnictwo Akademii Ekonomicznej w Krakowie, Kraków 1997.

Jagiellonian University

Cracovia totius Poloniae urbs celeberrima – Cracow, Poland's most glorious city – one of the oldest and most beautiful cities of Central Europe, acknowledged by UNESCO as a treasure of the human heritage, throughout centuries has grown to be a symbol of Polish tradition, culture and national identity. Located at the crossroads of important European routes from West to East and from South to North, the city throve in the Middle Ages leaving impressive traces of its splendour and wealth: the Old Town with the largest mediaeval market square in Europe, the beautiful Renaissance Wawel Royal Castle and the famous Jagiellonian University. The University – *Alma Mater Cracoviensis* – was founded by King Casimir the Great in 1364 under the name of Cracow Academy. Due to its restoration in 1400 by King Ladislaus Jagiello and his wife Jadwiga it bears its benefactors' name – Jagiellonian University.

Integrated with Cracow, its people and fate, the University rendered the city a centre of learning and science, culture and art, a centre of thought that was famous across the whole of Europe. *Plus ratio quam vis* – Reason (means) more than force – reads the motto of the University. The University has always attracted students from all over the world. Among its most illustrious students were Nicolaus Copernicus (1491-95) and Pope John Paul II (1938-39, 1942-46). For over 600 years the city of Cracow has owed its significance and very special atmosphere to its University.*

They lecture on the international law at the Jagiellonian University since the early 15th century. The separate Chair of International Law (called then "the Chair of Law of Nations") exists since 1748.

* From: http://www.uj.edu.pl/uj-guide/index.en.html

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