

Contemporary Legal and Economic Issues II

Editors
Ivana Barković and Mira Lulić

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Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, Croatia

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Ivana Barković and Mira Lulić



Josip Juraj Strossmayer University of Osijek
Faculty of Law Osijek, Croatia

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Editors' Word

The book "Contemporary Legal and Economic Issues II" represents an international forum on major legal and economic problems confronting a contemporary society. It is organized in relatively rare format of a short monograph based on a set of 17 scientific papers (10 in the field of law and 7 in the field of economics), which is an advantageous way to construct a promising framework, to offer some scientific and practical comments and to arouse readers' interest in the overall approach, without having to carry the burden of the necessity to strive for completeness or detail. Contributions to the book are made by 22 authors and co-authors coming from Croatia, Ghana, Iceland, Japan, Malaysia, Mexico, Pakistan, Poland, Romania, Russia, and UAE who are providing an international perspective to various economic and legal issues, whereby economic and legal principles are applied to real problems. The authors are students and professors who individually or as a joint effort contributed an article that deals with legal or economic issues often proving in their texts that law and economics are two scientific fields that are in many cases highly inter-related.

The book promotes scientific writing as the primary tool of academics and scholars to disseminate thoughts, ideas, research results and boldly present them to the professional and lay public for discussion, praises and critiques; it promotes cooperation between students and professors, i.e. mentorship, which is rewarding for both students and their professors by uniting them in a joint effort to produce a work where each invests effort, knowledge and enthusiasm to the best of their potential and benefits from the synergy effect; it promotes international cooperation between individuals and institutions taking part in this project pointing out that the distances in geography no longer represent an obstacle in establishing and developing the international cooperation and making the world of science truly global; it proves through topics covered that nearly all issues, in this case related to the law and economics, have left the strict realm of purely domestic jurisdiction. The book is intended as teaching and learning material in particular courses since it offers a reflection of current topics dealt in the fields of law and economics, as well as it can be very instructive text for wider audience who find legal and economic issues challenging.

A lot of effort has been invested in this book by authors, editors and reviewers and thus we hope that it will be beneficial to its intended audience.

Ivana Barković and Mira Lulić

In Osijek, 20th July 2009

COLONIAL-POST COLONIAL ANTECEDENTS OF MINORITY RIGHTS ISSUES IN AFRICA

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Abstract

This paper contends that a comprehensive analysis of minority rights in the African context is located in the continent's brush with colonialism which found active support in the liberal/conservative approach to international law. At the time of independence, African leaders had the opportunity to reverse these trends, particularly as they sought to create tension within the existing international legal framework and to chart a new path for international law that foregrounds the interests of developing countries. Yet, Africa rather sought to perpetuate the policies of homogenisation, modernisation and evolution embedded in liberalism which in turn led to marginalisation, discrimination and disenfranchisement of minority groups. It is the position of the paper that unless these colonial-postcolonial antecedents are properly exposed, minority rights in Africa would not be effectively contextualised and addressed.

Keywords: *international law, minority rights, colonialism, postcolonialism*

I. Minority rights?

The protection of minority rights remains one of the major concerns to international law.¹ Yet like any category of rights, the content of minority rights

¹ See. A Phillips & A. Rosas (eds.) *Universal Minority Rights* (Abo Akademi University Institute of Human Rights and Minority Rights Group, London, 1995); P. Thornberry, *International Law*

is not easily ascertained.² Their scope and nature are usually subject to lengthy academic debates simply because the values that go to the foundation of their definition are seriously contested. Typically, the contest is manifested in both factual and normative contexts.³ But the debates are healthy as they are nurtured and encouraged by the intrinsic value of protecting a “minority” from the rough or careless hands or policies of a deemed majority or dominant group.⁴ Besides, we can discern some epistemological considerations from some of these discourses pointing to what these rights entail.⁵ Speaking therefore of minority rights whether in morality or in law, Leslie Green⁶ reminds us of two critical considerations.

First, minority rights are coterminous with the rights that people have regardless of their position as a minority. Such rights do not flow from the conception that the person belongs to or is a member of any social group. But they are individuated interests inasmuch as the individual’s stake in these goods is itself sufficiently important to warrant holding others duty-bound.⁷ It is reasonable to suppose that this version of conceiving a minority rights is in great similitude with the soft natural law conception of rights which sought, in part, to predicate the protection of rights on an all-encompassing dignity of mankind.⁸ Dignity is dignity everywhere, and one must not gain a protection because s/he belongs

and the Rights of Minorities (Clarendon Press, Oxford, 1991) and Alcidia Moucheboeuf, *Minority Rights Jurisprudence Digest* (Strasbourg: Council of Europe Pub., 2006). (A project supported by the German Ministry of Foreign Affairs, conducted under the supervision of Marc Weller)

² P. Thornberry, *International Law and the Rights of Minorities* at p.164

³ Deschênes J. “Qu’est-ce qu’une Minorité”. (1986) *Les Cahiers de Droit*: 255-291 at p.289

⁴ see Ibrahima Kane, *Protecting the rights of minorities in Africa : a guide for human rights activists and civil society organizations* (London: Minority Rights Group International, 2008). protecting minority rights is also important because we are in a century of human rights in general. See Bobbio, N., *The Age of Rights* (Cambridge: Polity, 1996); Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80 *The Canadian Bar Review* 699 and Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, (Chicago: University of Chicago Press, 1998.)

⁵ Nazila Ghanea & Alexandra Xanthaki, (eds.) *Minorities, Peoples, and Self-Determination : Essays in Honour of Patrick Thornberry* (Leiden ; Boston : Martinus Nijhoff Publishers, 2005).

⁶ Leslie Green, ‘Internal Minorities and their Rights’ in Will Kymlicka ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995)

⁷ *Ibid* at p.259

⁸ For a classic treatment on these philosophical school on rights see Fuller, L.L., *The Morality of Law*, (New Haven: Yale University Press, 1969), Ronald, Dworkin M., *Taking Rights Seriously*, (London: Duckworth, 1977), Joseph, Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) chapter III; Fennis J., *Natural Law and Natural Rights*,(Oxford: Oxford University Press, 1980); Jack Donnelly, *Universal Human Rights: In Theory and Practice*,(Cornell University Press, 2003), Orend, Brian, *Human Rights: Concept and Context*, (Peterborough: Broadview Press, 2002), Maurice, Cranston, *What are Human Rights*, (New York: Taplinger Publishing, 1973) and Freeman, Michael, “The Philosophical Foundations of Human Rights” (1994) 16 *Human Rights Quarterly* 491

to a particular social group. Aside the dignity argument, it can easily sit in with claims of non-discrimination and equal treatment of individuals in a given state. The pervasive campaigns against apartheid exemplify this, and so is the stinging force of a number of international legal instruments.⁹

However, the first consideration as noted above is contrasted with the second one. It is the view of Green Leslie that in this version, the enjoyment of minority rights is contingent upon being a member of a certain minority group. Thus the necessary ingredient in the definition of the right is group membership. Its foundational grounds are collective goods – benefits to such rights are assignable to only a class. Perhaps, the compelling rationale for such exclusive definition and entitlements is to preserve and protect certain group interests like cultural survival and flourishing, language and religion in each of their peculiar significant sense.¹⁰ In addition, it seeks to assert some modicum of freedom from political institutions¹¹ and to allow a meaningful existence and development of such groups in accordance with their distinctive characteristics.¹²

It is nevertheless not simple to conclude that Leslie's two-tier approach to defining minority rights is unproblematic. The difficulty lies in the presumption of Leslies that one knows exactly what the concept "minority" is all about. It is no doubt true that one cannot, without a hitch accept the given definition of "minority rights" without understanding the normative content of minority. Understandably, a few expositions are apt. In the *Constitutional Law and Minorities (Minority Rights Group, No. 36)* Clare Palley succinctly stated that a minority is "any racial, tribal, linguistic, religious, caste or nationality group within a nation state and which is not in control of the political machinery of that state."¹³ Clare's definition seems as a restatement and in congruence with the composition of the modern state. It is necessarily the case that every country is made up of groups of people usually tied together by reason of racial, linguistic, cultural or religious or a combination of these. Some of such groups are in some special circumstance a minority. For example, a group could be religious or linguistic or generally a cultural minority.

Yet Clare seems, arguably, to suggest that a mere empirical identification of such a group must not be understood to constitute a satisfactory definition of minority as to warrant some special recognition and protection. The central force

⁹ See for example Article 1 of UN Charter, Article of UN Declaration of Human Rights, Article 2(1) of International Covenant on Civil and Political Rights etc.

¹⁰ See Will Kymlicka ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995).

¹¹ Matthias Koenig & Paul de Guchteneire, 'Political governance of cultural diversity' in Matthias Koenig and Paul de Guchteneire (etd.) *Democracy and Human Rights in Multicultural Societies* (Aldershot, England ; Burlington, VT : Ashgate ; Paris : UNESCO, 2007).

¹² *Infra* at p.326

¹³ Clare Palley, *Constitutional Law and Minorities (Minority Rights Group, No. 36)* at p.2-3

in his claim sought to ground minority in that group which does not control the political machinery of the state. Though this assertion points to some defining elements of the concept minority, it remains deeply problematic. First of all, Clare appears to discount the fact that a group could be defined by ethnic, religious, linguistic or cultural characteristics and is numerically smaller to the rest of population yet in control of the political machinery of the state. An apt example is the Afrikaners in apartheid South Africa. It is difficult to sustain the view that such people are not a minority in the sense of their linguistic characteristic *vis-a-vis* the entire population. It is even stickier when such a group exhibit some strong sense of mutual solidarity with the view to preserving the cultural values of the group. Thus Palley Clare ignores the subjective feelings of the people.

In one of the recent seminal treatments of the subject, K. Henrad offered a similar but more refined workable definition. He saw a minority as “a group numerically smaller than the rest of the population of the state. The members of this non-dominant group have ethnic, religious or linguistic characteristics different from those of the rest of the population and show, even implicitly, a sense of mutual solidarity focused on the preservation of their culture, traditions, religion or language.”¹⁴ Such view was also unequivocally echoed in the opinion of the *UN Sub-commission on the Prevention of Discrimination and Protection of Minorities*, which saw the term minority to include only those: “non-dominant groups in a population, which possesses and wish to preserve stable, ethnic, religious or linguistic traditions or characteristics, markedly different from those of the rest of the population”. Henrad, like the *UN Subcommission* and unlike Palley Clare avoided the explicit allusion to the control of political machinery of the state but embraced the requirement of non-dominance. A reference to the non-dominance requirement does not ‘necessarily imply being subordinate or oppressed, it merely denotes that the group concerned is not dominant.’¹⁵ But this is also vague. It does not show whether the focus is on political dominance as alluded to by Henrad or numerical dominance. Nor does it recognise some existential vulnerability of the group as grounds for protection. A more biting critique of this definition is offered by Fawcett¹⁶ who claims that it ignores the position of a minority status being imposed on a group. He convincingly illustrates this with the idea of colonial exploitation of ethnic or religious divisions and arbitrary drawing of boundaries which tend to create involuntary minorities. As a cure to this deficiency, Fawcett proposes that a minority be seen as “a group in a country which possesses, and has a common will - however conditioned – to

¹⁴ Henrad, K. 2000. *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*. (London: Kluwer, 2000) at p. 48

¹⁵ Henrad K, Language Rights and Minorities in South Africa *International Journal on Multicultural Societies (IJMS)* Vol. 3, No. 2, 2001 78-98 at p.79

¹⁶ James Fawcett, *International Protection of Minorities Report No. 41* (Minority Group Rights)

preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious or a combination of them, and which characterise it as a group”¹⁷

The leverage in these extrapolations, however problematic, leads to some common understanding, perhaps of the concept of minority. Although it is important to record the essence of features like language, ethnicity and religion in defining minority, it is not to be discarded that the non-dominance and group vulnerability have higher stakes. An identifiable ethnic or linguistic group which has shown a mutual solidarity or common will to protect and preserve its cultural values, and is in a numerical non-dominant position qualifies as a minority. The non-dominant requirement is particularly relevant in plural societies where there is no clear cut majority population.¹⁸ While numerical non-dominance is to be considered, the rationale for a special protection also implicitly beckons to vulnerability as a feature. Thus a numerical minority with a lot of political clout does not need any special protection, but the one without, does need special protection.¹⁹ This does not necessarily mean that the one with the power cannot, in the narrow sense, legitimately claim protection for its distinct cultural, linguistic or ethnic identity or values.²⁰ That can be done provided it does not come at the expense of denying a special protection to the group without meaningful access to the state political institutions or the decision-making process.²¹

1.1. The Framework of Minority Rights Protection and Self-Determination in the United Nations: Context, Scope, Principles and Limitation

The ratification of the UN Charter in 1945 has presumably established an effective regulatory mechanism for maintaining and promoting international peace and security. Arguably, it carries the value of a world’s constitution with the normative purpose of achieving international peace and security. Yet, the Charter has not been generous in its relevant provisions with minority rights protection or people’s right to self-determination. There are rarely or have been scantily a few provisions beckoning to self-determination. Only once was such a notion suggested within the context of ‘friendly relations among states’. It remains speculative, albeit some attempts to suggest a reason for such abysmal consideration of the concept of people’s rights to self-determination. It has been

¹⁷ Ibid at p.4. note also that those were the features of a communal group as offered by the Permanent Court of International Justice in *Greco-Bulgarian Communities Case (1930) PCIJ* – B17 at 21.

¹⁸ Henrad K, Language Rights and Minorities in South Africa supra at p.79

¹⁹ See Ramaga, P.V. 1992. “Relativity of the Minority Concept” *Human Rights Quarterly*: 104-119.

²⁰ See Capotorti, F. *Study on the Rights of Persons belonging to Ethnic, Religious or Linguistic Minorities*. (New York: United Nations, 1991)

²¹ See Capotorti, F. “Protection of Minorities under Multinational Agreements on Human Rights”. (1976) *Italian Yearbook on International Law*: 3-32.

argued by Cassese, concurred in by Steven Roach, that the principal reason perhaps for the exclusion of people's right to self-determination lies in the idea that self-determination was not considered to have a value independent of its use as an instrument of peace.²² Without an independent instrumentalist value in achieving world peace, the conception of people's right to self-determination was thus blunted. Besides, self-determination was reduced to a consideration of a right to people under the burden of colonial rule or imperialism to be free.²³ Its scope was thus limited to a notion of freedom from an external force. Embedded in this position as observed by Stephen Roach are the high tensions "between the right to self-determination and State Sovereignty", and "minority rights protection and authoritarian rule".²⁴

Despite this paucity in recognition of self-determination by the UN Charter, the much-touted Universal Declaration on Human Rights as a universal moral code for human rights has not sufficiently addressed the issue either. Like the Charter, the Declaration only recorded once in its text the notion of people's right to self-determination. This is even more or less derivative than explicit, as tenuously contained within the frame of "Everyone has the right to nationality..."²⁵ The oddity of this situation can hardly be reconciled with the extensive discussions that went on by the drafters of the Declaration as whether "people's rights to self-determination be encoded into the Declaration".²⁶ The scope of the debates was regrettably narrow: it only considers the question of harsh conditions of colonialism as the fundamental predicate. This led to head-on collision between the Soviet bloc and the Western bloc at the First Committee of the General Assembly.²⁷

The principal tenets of the Western world's position included preference for civil and political rights and recognition of self-determination as a principle, not a

²² Cassese A. *Self-Determination of Peoples* (Cambridge University Press, 1995) p.42 and Steven C. Roach, *International Journal on Minority and Group Rights* (2004) vol. 11 411-432 at 418

²³ for more in-depth analysis see Shukri, Muhammad Aziz, *The concept of self-determination in the United Nations* (Damascus, Al Jadidah Press, 1965), Steven Hillebrink, *The Right to Self-Determination and Post-colonial Governance : The Case of the Netherlands Antilles and Aruba* (The Hague ; Cambridge : T.M.C. Asser Press, 2008) and David Steadman B. *Aboriginal Self-Determination under International Law : Reconciling Distinct Historical Rights with existing International Law Models* (Kingston, Ont. : 1993).

²⁴ Ibid

²⁵ See Universal Declaration on Human Rights, Article 3, and Article 15(1) (2)

²⁶ Ibid at pp.418-9

²⁷ United Nations, Universal Declaration of Human Rights adopted and proclaimed by United Nations General Assembly resolution 217A(III) of 10 December 1948, United Nations General Assembly Official Records, Third Session, A/RES/3/217 (1948)

right²⁸ and also in the context of internal self-determination only.²⁹ It was argued for the British delegation that the version of self-determination as advocated by the Soviet bloc was not “justiciable...political right”³⁰. The Belgium delegation did not consider self-determination ripe and conceptually clear as to warrant its elevation into international treaty. For this position, it was contended that self-determination was “too nebulous and vague”.³¹ This represents a gloom fate for the incorporation of peoples right to self-determination into international treaty. This was anchored by a more pervasive contention that self-determination is an indirect route to undermining “the principle of territorial integrity and the non-discriminatory character of individual rights”.³² Western States understandably feared their sovereign control over their colonies could radically be undermined with the recognition of self-determination.³³

It should sharply be noted that the Socialist bloc aggressively opposed the West’s position. In fact, it argued for economic, social and cultural rights to be given prominence over civil and political rights; as well as, for recognition of self-determination as a right. While calling for both external and internal forms of self-determination, the Soviet bloc pressed the General Assembly for a specific version of self-determination, a version which viewed self-determination as a right of ‘national groups’³⁴. The contention for specificities was resurrected and forcefully pressed in a more narrow sense, by the soviet bloc in 1952 at a meeting of the Third Committee of the General Assembly, when self-determination was deemed ripe to be encoded into international law. It was proposed to the Human Rights Commission that people’s right to self-determination be understood within the context of “dependent territories.”³⁵

Regardless of these sharp disagreements, self-determination as a universal right was incorporated into the Article 1 of the ICCPR. It proclaimed “all peoples” rights to self-determination, which includes the right to determine their political status and freely pursue their economic, social and cultural development. It also

²⁸ *Ibid*, 297.

²⁹ That is the Wilsonian notion of self-determination. See, eg., Anthony Whelman, “Wilsonian Self-Determination and the Versailles Settlement”, (January 1994) Vol 43 (1) *International and Comparative Law Quarterly*; and, Michla Pomerance, “The United States and Self-Determination: Perspectives on the Wilsonian Conception, (Jan 1976) Vol 70(1), *American Journal of International Law*, 19.

³⁰ The British Statement of 2 July 1955. UN Doc., A/291/add. 1 10th Session, 1955.

³¹ *Ibid*

³² Steven C. Roach, *International Journal on Minority and Group Rights* supra at p420

³³ R Emerson, *From Empire to Nation: the Rise of Self-Assertion of Asian and African Peoples* (Boston, Beacon Press, 1962) p.388

³⁴ Quoted in J. MacLaurin, *The United Nations and Power Politics* (New York, Harper and Brothers Publishers, 1959) P.86

³⁵ Cassese A. *Self-Determination of Peoples at 48-49*

guaranteed peoples right to freely dispose of their natural wealth and resources. Nonetheless, the Human Rights Committee denied that this right belongs to minorities *per se*, albeit the conceptual difficulty in sustaining a distinction between “peoples” and “minorities”. Besides, self-determination was to be applied solely to colonialised peoples. Such a narrow definition was to be preserved by The Declaration on Granting Independence to Colonial Countries and Peoples, 1960 (UN General Assembly resolution 1514). The focus of this declaration was to recognise the appalling nature of conditions of people under colonial rule and their right to freedom. It was indeed unclear whether the formal death of colonialism could constitute sufficient grounds for a reinterpretation of this reductionist conception of self-determination.³⁶

Article 27 of ICCPR, however, created a better legal protection of minorities, as it proclaimed that ‘in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language’. The Human Rights Committee in the case of *Lubicon Lake Band v. Canada*³⁷ which relates to indigenous claims endorsed the view that individuals in a group who are similarly affected by an act can submit a communication. In addition, the right of minorities to manifest their thought, conscience, and religion in public or private through worship, observance, practice, and teaching is provided for in Article 18 (also affirmed in General Comment No. 22). This has been anchored by Article 19 which protects freedom of opinion and expression, a power to minorities to communicate in their own language and includes “freedom to seek, receive and impart information and ideas of all kinds”³⁸

There are also articles in the ICESCR of particular interest to minorities. Fundamental among them are: articles 13, 14 and 15. They guarantee the rights to a cultural life and the liberty of “individuals and bodies” to establish and direct educational institutions, as long as these institutions conform to whatever minimum standards may be established by the State.

In fact, the much wider definition given to racial discrimination by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) makes an important source of minority rights protection. Racial discrimination is seen as “any distinction, exclusion, restriction or preference

³⁶ Steven C. Roach, International Journal on Minority and Group Rights at p.421

³⁷ 167/1984. UN Doc. A/45/40, Vol. II

³⁸ For further information of interest to minorities see the Human Rights Committee’s contribution to the preparatory process of the Durban World Conference against Racism (document A/CONF.189/PC.2/14) and jurisprudence arising from the consideration of individual cases (namely Communications Nos. 197/1985, 196/1985, 167/1984, 511/1992, and 694/1996).

based on race, colour, descent, *or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (emphasis added). The inclusion of “national or ethnic origin” saves ICERD from a mistaken belief that it deals only with typical cases of racial discrimination. Article 5 affirms this as some rights are guaranteed without reference to racial discrimination. They include the right to participate in public affairs and have equal access to public service and freedom of opinion and expression.

1.2. A Double Conception: The External and Internal Right to Self-Determination and Minority Rights

The external character of self-determination reflects the intrinsic need for colonised peoples to exercise their right to rid themselves of the yoke of colonialism, imperialism and foreign domination. It was the dominant force as the arsenal of nationalists’ sustained agitations for the overthrow of imperialism. In its most aggressive sense, colonialism was not only deemed illegitimate and iniquitous, but counterproductive to the colonised.³⁹ Having been fortified by this conception, especially, in the latter part of the 1950s, many African countries uncompromisingly prosecuted the agenda of their independence.

Nonetheless, directly converse to this conception is the internal understanding of self-determination. In the African context, it was to offer the new independent states the right to opt for socialism and to encourage centralised rule.⁴⁰ For the Eastern European states, having already opted for socialism, self-determination had been achieved a third element of the concept emerged: the next stage for exercising that right meant the right to be free from any undue interference by other states.⁴¹ This occasioned some conceptual difficulties. For instance, it remains a burning normative question as to how a brute conception and adherence to principle of non-interference fosters the protection of minority rights in a sovereign State. Thus, since internal self-determination unabashedly supports the adoption of socio-economic programs for the larger interest, broadly defined, at the expense of under-represented minority groups, it provokes serious concerns for the interest of those neglected groups. It does not appear as though the evil of colonialism which the external conception sought to cast away was effectively banished from the people. It was no use replacing external evil with an internal evil. However, it must be conceded that this position comfortably sits in with the more formalist understanding of self-determination as provided for in Article 1(3) of the ICCPR.

³⁹ See Franz Fanon, *The Wretched of the Earth* (New York, Grove Weiderfield, Press, 1963).

⁴⁰ Cassese, *supra* note 47 at 302.

⁴¹ *Ibid* (Cassese).

1.3. *The Stakes of OAU and the Minority Rights Agenda: Brief Historical Analysis*

The Organisation of African Unity (OAU) was formed in Addis Ababa on 25 May 1963.⁴² Quiet ironically, though African leaders had campaigned, agitated for, and aroused the mass of the people to fight for independence on the platform of rights and freedom, soon after independence, they “began to divorce human rights from their respective constitutions and, eventually, even from the speeches and writings that gave birth to African socialism.”⁴³ As noted above, freedom only meant national freedom (from colonialism), not individual freedoms.

This approach amply reflected in the Charter of the OAU. The Charter centred on unity, non-interference and liberation. Human rights was never a priority, mentioned only once in the Preamble⁴⁴ and in Article 2(e) of the Charter.⁴⁵ Even in these contexts, the idea of human rights was seen simply as a functionalist tool for the sake of promoting peaceful and positive international cooperation.⁴⁶

The Charter’s purposes were set out in Article II as follows:

- a. To promote the unity and solidarity of the African States;
- b. To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
- c. To defend their sovereignty, their territorial integrity and independence;
- d. To eradicate all forms of colonialism from Africa; and
- e. To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

And, in Article III, in pursuit of the purposes stated in Article 2, Member-States of the OAU affirmed their adherence to the principles of,

1. The sovereign equality of all Member States.
2. Non-interference in the internal affairs of States.
3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.
4. Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.

⁴² On this day, 32 newly independent African leaders and representatives signed the Charter. 22 other states joined with time upon their attainment of independence, with South Africa as the youngest member who joined the club in 1994.

⁴³ El Obaid and Appiagyei-Atua, “Human Rights in Africa: A New Perspective on linking the Past to the Present.” (1996) Vol. 41 No.4 *McGill Law Journal*, 819 at 824.

⁴⁴ Paragraph 8 of the Preamble to the OAU Charter.

⁴⁵ That is, to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

⁴⁶ See arguments for and against the place of human rights in El Obaid and Appiagyei-Atua, *supra* note

5. Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States.
6. Absolute dedication to the total emancipation of the African territories which are still dependent.
7. Affirmation of a policy of non-alignment with regard to all blocs.

The attitude of OAU towards human rights reflected in the general position of the Socialist bloc and the less industrialised world at the UN in contributing to the development of human rights norms through the UN system. Antonio Cassese⁴⁷ has identified three stages in which three ‘doctrines’ of human rights, dominated by the Western states led by the United States,⁴⁸ the Socialist states under the control of the then Soviet Union⁴⁹ and then the Developing world evolved at the UN.⁵⁰ With the exception of the last brand, the first two were considered above.

The principles of Socialist idea of self-determination as noted above were whole-heartedly embraced by African states and reflected in Article 2 on the purposes of the OAU. First, the cornerstone of the OAU was to eradicate all forms of colonialism from Africa. Dr. Kwame Nkrumah, the first President of the Republic of Ghana and the leader of the Casablanca group,⁵¹ at Ghana’s independence parade held on the old Polo grounds in Accra remarked, that “The independence of Ghana is meaningless unless it is linked to the total liberation of the African continent.” The second step, the adoption of socialist principles and the socialist mode of development was reflected in the development of the concept of African Socialism. Though the OAU Charter did not directly espouse and endorse a particular ideology, almost all African countries adopted different blends of African Socialism:

There is the lyrical, existentialist and *négritude* socialism of Leopold Sedar Senghor ...; the positive socialism of Kwame Nkrumah ...; the African socialism of Kenyatta and Mboya ...; the co-operative and democratic socialism of Gamal Abdel Nasser ...; the theoretical and pragmatic socialism of Julius Nyerere ...; the dynamic socialism of Sékou Touré ...; the realistic socialism of

⁴⁷ A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986).

⁴⁸ The period demarcated by Cassese is between 1945 and 1950s, culminating in the UDHR. *Ibid*, 297.

⁴⁹ From 1960 to the mid-1970s. *Ibid*, 301.

⁵⁰ From mid-1970s onwards.

⁵¹ The group that called for an immediate formation of a United States of Africa, as opposed to the Monrovia group that called for gradual integration of African states, or the formation of a loose African union.

Modibo Keita ...; the revolutionary socialism of Massamba-Débat ... Others speak of socialism on the Yugoslav or the Israeli pattern.⁵²

African Socialism, though not set in a particular fashion, served as the hand-maiden for the OAU. Among the basic tenets it espoused from the political perspective was the centralisation of power in the head of state, a one-party or no-party system of government, absence of political dissident, absence of elections or periodic elections or where one is held only the head of state stood as the candidate, etc. It should be observed that such normative political practices and values adhered to in the immediate post-colonial period very much resembles what is termed socialist “internationalism.” This represents the view that smaller nationalities have no any rights to independence.⁵³ They were arguably expected to assimilate to one great nation without entitlements or the benefits of any minority rights.⁵⁴ The exemplification of such hostility to the notion of minority rights lays in socialists’ rigorous commitment to internationalism. A persuasive articulation of such devotion is found in *The Communist Manifesto*, as Marx’s observed that the proletariat have no nationality as they are world workers, an idea reminiscent of an advocacy for world citizenship. This seeks to shelve or better still, pulverise the basic notion of tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community.

Nevertheless, such connotation of socialist internationalism does not suggest an abandonment of the principle of territorial integrity of each state. African leaders enshrined in the OAU Charter, the purpose of “defend[ing] their sovereignty, their territorial integrity and independence;” affirmed by the principle to promote “[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”⁵⁵ These two references summed up the OAU’s stance to promote and defend with uncompromising rigidity, the *uti possidetis* principle.⁵⁶ However, the interpretation of self-determination in the OAU framework was radically at variance with the content of article 1 of ICCPR. Consistently, self-determination was viewed as a right strictly reserved for colonial peoples. Therefore, any claim, however well-founded to session in postcolonial States violates the principle of territorial integrity. It seems in this context, quite an ambivalent position as on one hand, there is a recognised right for the colonial peoples to be free, and on other it “upholds the principle of

⁵² Kanza, *Evolution and Revolution in Africa* (London: Rex Collings, 1971) at 101.

⁵³ Will Kymlicka ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995) at p.5

⁵⁴ *ibid*

⁵⁵ Article III (3)

⁵⁶ This was affirmed in the 1964 OAU Cairo Declaration on Border Disputes Among African States which sought to legitimise national borders inherited from colonialism. See AHG/Res. 16(I)

State sovereignty at the expense of minority rights”.⁵⁷ The Biafra session dispute in Nigeria illustrates this. Nigeria absolute territorial sovereignty was rigorously successfully defended at the expense of disenchanting, non-colonial peoples.

Cassese theorised that an essential stage in the evolution of human rights at the UN belonged to the developing world. The main tenets of their approach mirrored the position of the Socialist ‘doctrine.’ They included laying responsibility for rights abuse on the unjust international economic order and calling for alteration in the system to ensure effective rights exercise;⁵⁸ singling out exceptional cases of countries such as apartheid in South Africa and racial discrimination in the then Rhodesia and Zionism in Israel; preference for resolutions, instead of treaties;⁵⁹ defiance toward civil and political rights and preference for economic, social and cultural rights for three main reasons: political, economic⁶⁰ and cultural.⁶¹ Politically, the reason was that

To fully recognize the importance of this category of rights could undermine or weaken the authority of the government in such countries. Developing nations are often torn by conflict between different groups and factions and in some cases even by tribal wars. Their principal aim, at least in this post-colonial period, must be to strengthen the authority of the State and not to favour centrifugal tendencies which could benefit from full recognition of the rights and freedoms of the individual.⁶²

In pursuit of the developing world doctrine, less industrialised states concentrated their efforts in the formulation of a number of international human rights instruments through the General Assembly.⁶³ Interestingly, two of them

⁵⁷ Steven C. Roach, *supra* at p.421

⁵⁸ Refer to the New International Economic Order (NIEO); also, the preamble and article in African Charter

⁵⁹ Cassese, *supra* note 47 at 308, 309.

⁶⁰ This called for a strong government to get the economy off the ground.

⁶¹ On the grounds that the Western form of democracy is foreign to the African culture.

⁶² Cassese, *supra* note 47 at 307

⁶³ These include, the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the International Convention on the Elimination of all Forms of Racial Discrimination (1965), Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect, and Understanding between Peoples (1965), Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), Declaration on Principles of International Law Concerning the Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN (GA Res. 2625 (XXV), 24 October 1970, Convention on the Suppression and Punishment of the Crime of Apartheid (1973), Declaration on the Protection of All Persons against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (1975), and the Declaration on the Utilisation of Scientific and Technical Progress in the Interest of Peace and Benefit of Humanity (1975), and quite recently, the Declaration on the Right to Development (1994).

touched on self-determination: the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on Principles of International Law Concerning the Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN.⁶⁴ Both affirmed unanimously that “any attempt aimed at the practical or total disruption of the national unity and the territorial integrity of a State or country or at its political independence is incompatible with the purpose and principles of the Charter.”⁶⁵

The evolution of the limitation of the principle of self-determination to states at the UN level and the strict adherence to the principle of *uti possidetis* by African states confirms the fact that African states considered indigenous rights or minority rights as a non-issue. Thus, self-determination was seen a political, but not a human rights, issue. For that reason, African states did not consider the suppression of minority rights interests in their own backyard as an affront to the tenets of the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD).⁶⁶ Ironically, African states were among those states that championed the drafting of the CERD.⁶⁷ And so far, Guinea Bissau seems to be the only African country that has not ratified the Convention.⁶⁸ The usual argument was that all the citizens were indigenous people.⁶⁹ In other words, African states adhered only to self-determination in the context of decolonisation. After that, the concept ceased to apply.

II. Minority Rights Problems: The Colonial-Postcolonial Antecedents

II.1. *The Influence of Liberal Political Thought*

A critical analysis of the situation of indigenous and minority rights issues in Africa can be traced to the colonial policy of amalgamation of ethnic groups to form a nation-state without regard to the ethnic composition, the type of political and socio-economic system each tribe had, past history of conflict and reconciliation, etc.⁷⁰ The strategic germ propelling the colonial contempt for

⁶⁴ (GA Res. 2625 (XXV), 24 October 1970)

⁶⁵ See eg., para 6 of the former Declaration and Preamble to the latter.

⁶⁶ The Convention was adopted by the General Assembly of the United Nations in resolution 2106 (XX) 2 of 21 December 1965. It came into force in January 1969, in accordance with article 19 of the Convention.

⁶⁷ A. Cassese, *supra* note 47. The main reason was perhaps to use the Convention as a medium to highlight the injustices of the Apartheid system and to fight against it.

⁶⁸ See Office of the UN High Commissioner for Human Rights website: www.ohchr.org/english/countries/ratification/2.htm

⁶⁹ See African Commission, *Indigenous Peoples in Africa: The Forgotten Peoples?* (2006) at 11.

⁷⁰ For example, the Asante Kingdom of Ghana, during the early parts of British rule, had as its vassal states, the Denkyira, Assin, Akyem, Elmina and Adanse tribes. J. C. Degraft-Johnson, *African Glory* (Black Classic Press, 1986).

minority rights in part lies in the notion of liberal individualism in Western liberal political thought.⁷¹ According to van Dyke⁷², one of the pioneers in the study of minority (ethnic) rights, the traditional liberal approach to political life ignores or takes for granted the ineluctable feeling of the citizens to live as a distinctive group sharing a common language (and perhaps other values), and as in the opinion of Will Kymlicka⁷³, a desire to live together even in a state. A penetrating though, avoidable effect of such an attitude, as forcefully argued by van Dyke is the privileging of individualism and overt disregard to the group basis of political life.⁷⁴ Arbitrary drawing of boundaries with stern focus on individualistic conceptions of political life and rights were part of conscious policies of colonialism in Africa. Group basis of political life was treated with disdain and many ethnic groups suffered identity problems in the end. This serves to sustain and at all cost, exacerbate injustices suffered by the minority cultures. Liberal political thought, at least in its undiluted 19th Century fashion, thus represents a clear case of “an ethnocentric denigration of smaller cultures.”⁷⁵

⁷¹ Western liberal perspective has become a major influence in the development of human rights in international law. Anaya captures this with the assertion that it “acknowledges the rights of the individual on the one hand and the sovereignty of the total social collective one on the other, but it is not alive to the rich variety of the intermediate or alternative associational groupings actually found in human cultures, nor is it prepared to ascribe to such groupings any rights not reducible either to the liberties of the citizen or to the prerogatives of the state” Anaya, *The Rights of the Indigenous peoples and the International Law in Historical and Contemporary Perspective*, 1989 *Harvard Indian Law Symposium* 191, 198.

⁷² van Dyke V. The Individual, The State and Ethnic Communities in Political Theory, *World Politics* 29, 343-369

⁷³ See Will Kymlicka ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995)

⁷⁴ Dyke V. The Individual, The State and Ethnic Communities in Political Theory, at p.351

⁷⁵ *ibid* at p.355. This position is amply supported in the relevant literature. For J S Mill “Experience proves that it is possible for one nationality to merge and be absorbed in another: and when it was originally more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feeling of a highly civilised and cultivated people – to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship...than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman or the Scottish Highlander as members of the British nation”. Mill ‘Considerations on Representative Government (1861) in *Utilitarianism, On Liberty, Considerations on Representative Government*, ed. H. B. Acton, (J. M. Dent and Sons, London, 1972) at p.395. From this quotation, Mill appears to glorify the idea of civilising people by absorption into one great nation. Separate cultural entities and smaller nationalities seem to be a counter to attaining such a goal. However, Mill’s position might comfortably be contrasted with Engels as he stated: “There is no country in Europe which does not have in some corner or other one or several fragments of peoples, the remnants of a former population that was suppressed and held in bondage by the nation which later became the main vehicle for historical development. These relics of the nations, history, as Hegel expressed it, this ethnic trash always become fanatical standard bearers of counterrevolution and remain so until their complete extirpation or loss of their national character

11.2. *The Colonial Policy of Assimilation, Amalgamation and Modernisation*

In Africa, the colonial policy of *mission civilisatrice* and modernization which rested on the principle of ‘helping the savages’ to attain modernization meant the disruption of the lifestyle of ethnic groups whose ways of life were as nomads, hunters and food gatherers.⁷⁶ Such a policy particularly mirrors a brute force aimed at engendering and solemnising an imposed sense of “collective freedom”. This has been fostered by its avowed “one civilised nation” contention which showed near absolute contempt for the value of distinct “cultural membership”. It denies people of an open and free utility to their discrete cultural resources in determining the value of their lives and imposes what is termed an “unchosen circumstances of life.”⁷⁷ The recent case of the ‘stolen generation’ underscored in Australia amply exemplified the apparent extremes of such a position. The Australian authorities, for a period of 60 years, systematically enforced a resettlement policy which led to a good number of aboriginal children sent to white families for a supposed civilised upbringing. The normalization of such a practice obfuscated the roots of the unique cultural life of the aboriginals.⁷⁸ The desire and the ability of the social groups to live as distinguishable entities thus disappear by an unconcealed prosecution of an “amalgamationist” agenda. Within this context, not only was an aspiration for a reasonable recognition of a meaningful cultural autonomy marginalised, but viewed with a great deal of suspicion. High priority placed on the “one civilised nation” instrumentalist argument served to undermine legitimate feelings of separate social groups whose recognition could have helped advance the optimal utilisation of their distinct cultural resources. Thus, an effective legitimisation, accommodation

just as their existence in general itself is a protest against a great historical revolution. Such in Scotland are the Gaels...Such in France are the Bretons...Such in Spain are the Basques”. Engels, *Hungary and Panslavism* (1849)

⁷⁶ For insightful academic commentary on this see L.H. Gann and P. Duignan, *Burden of Empire: An Appraisal of Western Colonialism in African South of the Sahara* (London: Pall Mall, 1968); David K. Fieldhouse, “The Economic Exploitation of Africa: Some British and French Comparisons,” in P. Gifford and W. Lewis, eds., *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, Conn.: Yale University Press, 1971) Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L'Ouverture Publications, 1978); J.D. Anderson, *West and East Africa in the Nineteenth Century* (London: Heinemann, 1972).

⁷⁷ Leslie Green, ‘Internal Minorities and their Rights’ in Will Kymlicka ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995) at p. 257

⁷⁸ Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (New York: Routledge, 2008) p.273. See also Edwards, C, & Read P. *The Lost Children Thirteen Australians Taken from their Aboriginal Families Tell of the Struggle to Find their Natural Parents*(London: Doubleday 1992), Perera, S, and Pugliese, J. Wogface, anglo-drag, Contested aboriginalities: making and unmaking identities in Australia, *Social Identities* (1998) 4, 39-72

and incorporation of ethnic diversity in the general structure of society was weakened.⁷⁹

By way of criticism, Jan Berting writes:

It is evident that the universalism on which the [industrialist] model is based contrasts with the cultural and social diversity of the world in which the industrial – and postindustrial – development take place. According to the logic of this model, all of the social institutions and cultural differences that hamper the logic of industrial development are doomed. Social and cultural differences between nations, regions, and peoples continue to exist only as long as they not stand in the way of progress or when they contribute to a nation's specific advantage, for example when traditional values help to discipline the workforce and to comply with the exigencies of organization change.⁸⁰

In support of Berting's contention, one can refer to John Locke's theory on acquisition of land if it is *terra nullius*⁸¹ or vacant and discovered.⁸² However, due to the tenuous nature of this principle, the concept was modified to include the situation where people might be living on the land but have no organised political or social system.

As well, Locke's theory of property justified suppression of minority rights or created conditions for the subjugation of minority rights interests. The theory, based on acquisition of property through the mixing of one's labour with the soil, that is cultivation of land, did recognise and therefore eliminated to the sidelines the hunters, food-gatherers and nomads.⁸³ These were considered, according to international law of that period, as not politically and socially organised and therefore not fit to be considered as a people or their land was fit to be conquered and colonised.⁸⁴ They were sidelined because they were not considered economically attractive to colonialism.

⁷⁹ Simon B. & Anne L. *International Journal on Multicultural Societies (IJMS)*, Vol. 5, No. 2, 2003: 119 -134 at p.119

⁸⁰ Jan Berting, "Technological Impacts on Human Rights: Models of Development, Science and Technology, and Human Rights," in C.G. Weeramantry, ed., *The Impact of Technology on Human Rights: Global Case-Studies* (Tokyo: United Nations University Press, 1993), 24.

⁸¹ Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Aldershot, UK: Ashgate, 2003); also, stopstop

⁸² See the famous Australian case of *Mabo and Others (2) v. Queensland* (1992) 175 CLR 1, [1992] HCA 23 in which the concept of *terra nullius* was overturned as no longer applicable in international law.

⁸³ Joel Ngugi, "The Decolonization - Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa," (2002) Vol. 20 *Wisconsin International Law Journal* 297 at 310.

⁸⁴ Cole Mallard *Africa's Indigenous San People - A History of Resisting Colonization 25 May 2006* Washington, DC www.voanews.com/english/archive/2006-05/2006-05-25-voa18.cfm

This view of property was used as the basis for denial of title to aboriginal peoples. For example, in the case of *Johnson v. M'Intosh*, the plaintiffs claimed the land made under two grants, purporting to be made in 1773 and 1775 by the chiefs of the Illinois and the Piankeshaw nations. The issue was whether this title can be recognised in the Courts of the United States. In the course of delivering his judgment which was a negative response to the issue before the court, then Chief Justice Marshall noted:

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them ... It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.⁸⁵

The result was disempowerment, disenfranchisement and isolation of a section of the new nation-state simply on the grounds that their way of life did not correspond or conform to the Western connotation of modernization and development. In the end, at the time of independence, indigenous peoples were left in a vulnerable position due to the inability of the colonial system to absorb them into the market economy.⁸⁶

Though there are basic elements that African peoples share in common, the fact remains that there were significant differences among the various ethnic/tribal groupings. For example, Potholm identifies eight different types of political systems in Africa.⁸⁷ This reality was not recognised when it came to carving up colonial territories among the imperial powers. Thus was Lord Salisbury right in saying, “[W]e have been engaged in drawing lines on maps where no white man’s foot ever trod; we have been giving away mountains and rivers and lakes to each

⁸⁵ *Johnson v. M'Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823) at 589.

⁸⁶ Ngugi, *supra* note 83 at 326.

⁸⁷ They include the Band type; the Classical Segmented system, the Universalistic Segmented system, the Ritually Stratified Segmented system; the Autonomous Village Group, the Pyramidal or Federated Monarchy, the Associational Monarchy, and the Centralised Monarchy.

other, only hindered by the small impediment that we have never known where the rivers and lakes and mountains were.”⁸⁸

In pre-colonial times, due to certain shared identities and characteristics, some ethnic societies were able to amalgamate, and develop into new collectivities with new and/or emerging identities. In some cases too, cultural identity did not matter. It was a just question of life and death that dictated a fusion of one state to the other, for example, to escape from oppression under a tyrannical authority. This is what Busia refers to as fission and fusion.⁸⁹ Therefore, the colonialist policy of amalgamation/incorporation of ethnic groups from varying and diverse backgrounds, to be followed by assimilation⁹⁰ or integration⁹¹ seriously set the tone for ethnic clashes, domination and suppression of the weaker entities and denial of respect for minority rights in Africa. Placing together so many ethnic groups identified with varied forms of organisational structures and means of subsistence without first putting in place the necessary arrangements and mechanisms that will constructively recognise, protect and promote their difference was a recipe for disaster.

III. The Ghanaian context

The lack of success in these processes resulted in the expression of ethnic agitations. Several examples abound in Africa.⁹² The Ghanaian example may suffice for this exercise. Due to the fact that the main resources for colonial exploitation were located in the southern part of the then Gold Coast, British colonial policy created artificial centres of commercial and agricultural activity around these areas and left the less resourced territories undeveloped. Apart from being a money-saving venture, one principal reason for such a policy was to trigger migration from the poorly resourced areas to the other in order to obtain cheap labour needed to harness these resources. In fact, in some cases, forced migration was used.⁹³ Thus, the Northern territories were largely left

⁸⁸ Lord Salisbury's oft-quoted remarks made in 1890 relating to the scramble for Africa: www.norton.com/college/history/worlds/ch8/gcd.htm.

⁸⁹ K. A. Busia, *The Position of the Chief in the Modern Political System of the Ashanti* (London: Frank Cass and Company Limited, 1968).

⁹⁰ The colonial policy adopted by the British.

⁹¹ The French colonial policy.

⁹² With respect to the case of Nigeria, for example, see K. Appiagyei-Atua, "State Sovereignty v. Self-Determination: A Critique of the African Commission Decision in the Ogoni Case," in Joshua Castellino and Niamh Walsh, eds, *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2004), 301.

⁹³ Execution of such policies in West Africa and other places, in some cases, resulted in famine, tribal uprising, military conscription, etc. Bill Ong Hing, "Symposium: Immigration Policies: Messages Of Exclusion To African Americans * (1994) Vol. 37 *Howard Law Journal*, 237 at 249.

unattended.⁹⁴ In the south, gold, diamonds, bauxite, manganese, silver and other minerals were found, in addition to being the cocoa-belt which for years made Ghana the largest cocoa producer in the world. This situation brought about accelerated incidental development for the South. Thus, initially it was only the southern part of present-day that was included under direct British rule until 1902 when the Northern territory was added, to be followed by the Asantes in 1903.⁹⁵

The preferential treatment that the Southern states, minus Asantes, enjoyed resulted in, eg., the inclusion of three representatives from the “Europeanized communities of Accra, Cape Coast, and Sekondi” to be on the colonial Legislative Council.⁹⁶ The formation of the Fante Confederacy and its agitation for independence from British rule bespeaks this fact.⁹⁷ This was to be followed by the Asantes through the National Liberation Movement (NLM).⁹⁸

On the other hand, it would take time for the development of educated elite among the disadvantaged groups. Most remained uneducated, unskilled and semi-skilled and therefore occupied low-status jobs. As they developed, they perceived that their disadvantaged situation was related to the absence of a collective ethnic power base which thus galvanized them to form ethnic associations. They in

⁹⁴ The French developed a similar policy of developing Cote d’Ivoire to the neglect of Burkina Faso (then Upper Volta), Niger, Mali, when it formed the *Afrique occidentale française*. It forced labour flow from Upper Volta to Cote D’Ivoire in the 1930s about 22,000 which later swelled to 150,000 during World War II. Naturally, the Ivoriens later agitated against the use of their money to develop places such as Senegal.

⁹⁵ For reasons of effective resistance by the Asantes against British colonial rule, Asante territory was not included until it was brought under control following the exile of its king, King Prempeh to the Seychelles Islands in 1897. Joseph E. Harris, *Africans and their History* (Penguin, USA, 2nd revised edition, 1998). A. Adu Boahen *et al*, *Topics in West African History*, (Addison-Wesley, 1987).

⁹⁶ This body, however, was only advisory. Legislative power remained in the Governor.

⁹⁷ Chiefs were very prominent in the agitation against colonial rule. Protests against British rule and the treatment given to chiefs came to a head in 1865 when John Aggrey was elected King of Cape Coast. Shortly after his enthronement he clashed with the British by objecting to appeals against the decisions of his court being sent to the British court. He went on to criticize Governor George Maclean for usurping his powers. He sent a delegation of two (Marin and Carr) to England to give evidence before the Select Committee in 1865. In 1866, he sent a petition to Governor Conran in which he expressed his opposition in very strong terms. He noted: “The time has now come for me to record a solemn protest against the perpetual annoyance and insults that you persistently and perseveringly continue to practise on me in my capacity as legally constituted king of Cape Coast” Webster, Boahen and Tidy, *The Growth of African Civilization Series* (London: Longman, 1980), 160). King Aggrey petitioned the Colonial Secretary. The responses of colonial officers to such agitations were often swift and devastating. The challenge to the governor’s authority infuriated him to the extent that he had King Aggrey arrested and declared him deposed, and deported him to Sierra Leone. K. Bofo-Arthur, “Chieftaincy and Politics in Ghana since 1982,” *West Africa Review* (2001) ISSN: 1525-4488 www.westafricareview.com/war/vol3.1/bofo.htm

⁹⁸ See Albert Adu Boahen *African Perspectives of Colonialism* (Baltimore 1987), and *Ghana: Evolution and Change in the 19th and 20th Centuries* (London 1975).

turn became a forum for political interest organization that won the appeal of politicians. The end result is the perpetuation of the strategy of efficiency of ethnicity in making claims on the resources of the modern state.

Later, provincial councils were set up in the three territories that formed the Gold Coast. The Asantes were not allowed to have representation on the Legislative Council until 1946. Yet, it still felt aggrieved, among others, on other grounds: the imbalance and inequity against them in terms of nationwide developmental indicators, compared with eg., the Greater Accra region, was though higher than the Northern territories but lower than most of the southern regions.

Other factors are summed up by Rothchild thus:

The basis for a sense of ethnoclass economic grievances lay in the dissatisfactions that the Ashanti cocoa farmers had over distributional issues – in particular, the price paid for cocoa, the determination of loans, and the distribution of scholarships.⁹⁹

The “mentality of resource envy within the ethnoclass of the ethnoregional movement,” led the NLM and the Asanteman Council to pass a resolution calling for the secession of Ashanti and Northern Territories from the Gold Coast. A compromise solution was the setting up of regional assemblies. However, this moved was opposed by President Nkrumah who, according to Rothchild, saw federalism as “tainted with tribalism and weak leadership.”¹⁰⁰

The compromise solution for the national assemblies did not sit well with him either. As a result, the first thing he did upon assuming office following independence was to abrogate the national assemblies. Thus, like the Nigerian situation, the limited autonomy that was reserved to be exercised, directly or indirectly, through the cosmetic arrangements put in place by the departing colonialists were eliminated.¹⁰¹ The colonial policies which laid the foundation for the development of ethnic politics were hugely and unashamedly exploited by nationalist leaders at the time of independence to suppress other groups.

With foresight, Namdi Azikiwe, another prominent Nigerian politician, argued for the need for African leaders to uphold and respect and promote human rights principles as a pragmatic tool to the attainment of the nation-state. He contended, *inter alia*, that the homogeneity associated with tribal affiliation

⁹⁹ Lost Opportunity at Conflict-resolution During Independence Negotiations for Gold Coast/Ghana: Issues, Actors Re-examined. R. Y. Adu-Asare www.AfricaNewscast.com. In giving introduction to a conference in Washington, DC, Friday, April 12, on “The Impact of Colonial Bargaining on Intergroup Relations in Africa,” April 25, 2002.

¹⁰⁰ Rothchild, *supra* note

¹⁰¹ See K. Appiagyei-Atua, “State Sovereignty v. Self-Determination: A Critique of the African Commission Decision in the Ogoni Case,” in Joshua Castellino and Niamh Walsh, eds, *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2004), 301.

could be broken through if African governments were to emphasise and guarantee respect for human rights and fundamental freedoms. This would enable people to seek solace in the constitution and the state, instead of their ethnic groupings:

I deduce from this the following position: that human beings will attach less importance to their racial, linguistic and cultural origins, so long as their individual liberties are insulated from tyranny and their group attachment is insured from want, provided that the environment in which they live is conducive to human happiness.¹⁰²

However, this suggestion was sidelined. But the truth is that in crisis of poverty, ethnicity becomes a medium of withdrawal from the state either for survival or as a means of protest. In both situations, people are prevented from breaking away from their ethnic identities for fear of losing the only protection they have against the predatory and suppressive arm of the state. In light of the aforesaid, it can be concluded that colonialism amply serves as the source and cause of the heightening of tribal tensions and a major contributory factor to tribalism, and the emergence of minority groups in Africa. One can mention in this regard the development of “zongos”¹⁰³ and “Kru towns.”¹⁰⁴

Nonetheless, African leaders did not make any efforts to reverse this trend or stem the tide of growing tribalism. Rather, they thought it expedient to perpetuate the colonial policy to homogenize peoples of Africa that reflect a rich cultural, linguistic and religious diversity. Consequently, any attempt at bringing attention to the discrimination or neglect of a particular tribe or region in a country was considered a deliberate attempt to fan the flames of tribalism and disintegrate the state. At the same time, however, African leaders sought to engage in tribal politics by sidelining prominent members who played significant roles in the fight for independence.

In short, Africa aligned itself with the international discourse to transform or complete the transformation of traditional African societies. Two conversion attempts are at play here: that of the international ‘system’ to incorporate the emerging African state into the mainstream of international law but as satellites and the other by the African State to subsume the indigenous peoples into the national ‘mainstream.’ The result is “deep-seated tensions that remain unresolved

¹⁰² Nnamdi Azikiwe, “Tribalism: A Pragmatic Instrument for National Unity,” in J. Ayo Langley, *Ideologies of Liberation in Black Africa 1856-1970* (London: Rex Collings, 1979) 458 at 468.

¹⁰³ A derogatory term for describing slums that developed at the periphery of towns and cities in Southern Ghana and mainly inhabited by people from the northern parts of Ghana.

¹⁰⁴ ‘Kru’ is a corrupted form of ‘Creole’. Kru towns are similar to zongos and were inhabited mainly by Creoles from Liberians.

[... and] obscured by a rhetoric of homogenisation, modernization, evolution and development.”¹⁰⁵

The use, misuse and abuse of international law to support and justify subjugation of minority rights interests and tacitly endorse tribalism is overwhelming. Mention has already been made of the rigid application of the *uti possidetis* principle. One can also refer to misapplication and abuse of the concept of non-interference to shield each State from blame for violations of human rights.

Umozurike writes:

[Non-interference in the internal affairs of members has been used as a shield] not so much to protect their legitimate states’ right as to fend off international concern for gross abuses of human rights in some African states.¹⁰⁶

He cites the former President of Guinea, Sékou Touré as saying that the OAU was not created as “a tribunal which could sit in judgement on any member state’s internal affairs.”¹⁰⁷ The effect of this situation was the creation of a culture of rights abuse in African countries where violations were taken as given; and where, through the ideology of African socialism, the people came to accept the fact that human rights was a foreign concept which did not matter to their well-being and development. The implementation of the principle of non-interference led to the suppression of rights of all forms.¹⁰⁸

IV. Conclusion

Without knowledge of the past, one cannot understand the present and chart a path towards attaining a successful future. Efforts and attempts have been made by African states in recent times, through such instruments as the OAU Convention on the Status of Refugees,¹⁰⁹ the African Charter on Human and Peoples’ Rights, the African Union Constitutive Act¹¹⁰ and New Economic Partnership for Africa’s Development (NEPAD).¹¹¹ The African Commission on

¹⁰⁵ Ngugi, *supra* note 83 at 304.

¹⁰⁶ U.O. Umozurike, *The African Charter on Human and Peoples’ Rights*, (Kluwer Law International, Dordrecht, 1997), at 93.

¹⁰⁷ *Ibid.* cf. (1979) *African Research Bulletin* (Political, Social and Cultural Series), 5329B.

¹⁰⁸ See U.O. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972); and, “The Domestic Jurisdiction Clause in the OAU Charter,” in (1979) Vol. 78 *African Affairs*, 179.

¹⁰⁹ Convention Governing Specific Aspects of Refugee Problems in Africa. Adopted in Addis Ababa, September 1969 and came into force in June 1974.

¹¹⁰ Adopted July 2000, came into force May 2001.

¹¹¹ The NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia. It is meant to develop values and monitor their implementation within the framework of the African Union. NEPAD is a merger of the Millennium Partnership for the African Recovery Programme (MAP) and the OMEGA Plan. The merger was finalized on

Human and Peoples' Rights has taken steps to elaborate and give an African context to the issue of minority rights. However, these efforts have not taken into account the historical and ideological antecedents that catalyzed and contributed to the state of minority rights that we experience in Africa today. This paper therefore has sought to expose the underlying causes of minority rights in Africa, the role played by international law in this process and how Africa could use international law, through the regional arrangement mechanism recognised by the UN Charter, to set up a better framework to better understand and tackle minority rights issues

3 July 2001. Out of the merger, NAI was born. NAI was approved by the OAU Summit Heads of State and Government on 11 July 2001. The plan was endorsed by the leaders of G8 countries on 20 July 2001. The policy framework was finalized by the Heads of State Implementation Committee (HSIC) on 23 October 2001, and NEPAD was formed: www.africa-union.org/root/au/AUC/SpecialPrograms/nepad/nepad.htm

SOME REMARKS ON RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

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Abstract

The International Law Commission (ILC) at its fifty-second session in 2000, decided to include the topic “Responsibility of international organizations” in its long-term program of work. The ILC Draft articles made so far have been based on the analogous solutions contained in the Draft articles on “Responsibility of States for internationally wrongful acts” which had been adopted by the ILC in 2005 and submitted to the United Nations General Assembly. Although such an analogy sometimes could raise the question of applicability of the same rule to both, States and international organizations, there is no doubt that international organizations are capable, just like States, not only to breach international law (i.e. to commit an internationally wrongful act – i.e. ex delicto), but also to cause the damage to another international person, even when such a damage arises from an activity not prohibited by international law (i.e. sine delicto). For this reason, we would like in this paper to analyze some results of the ILC work on the topic of Responsibility of international organizations for internationally wrongful acts until the end of 2008, but in the same time to call attention to some additional issues related to it, such as the possibility of analogous international legal regulation of the liability of these organizations for injurious consequences arising out of acts not prohibited by international law.

Keywords: *international law, International Law Commission, international organizations, responsibility*

I. Introduction

For centuries, the responsibility for internationally wrongful acts has been attributed to States only. This is not hard to understand if we take into account that only half a century ago States had been considered the only international legal persons. However, the appearance of international i.e. intergovernmental organizations, as well as the fact that they increased significantly in number during the last century, faced international law with the necessity of legal regulation of international relations in which these organizations had already been participating. Consequently, their international legal personality became indisputable. International organizations obtained the international legal capacity as addressees of international legal norms providing them with international rights and duties. Thereby, international law implied their responsibility as well in case of the breach of these duties, i.e. for internationally wrongful acts.

However, rules on the responsibility of international organizations have developed in international law very recently, mostly by analogy with those legal solutions that have already been developed in regard to the international responsibility of States, particularly in customary international law. The International Law Commission (ILC) had been working on the codification of this topic for decades and completed this process in 2005 when the draft articles on the “Responsibility of States for internationally wrongful acts” were adopted and submitted to the United Nations General Assembly.

At the same time, at its fifty-second session in 2000, the ILC decided to include the topic “Responsibility of international organizations” in its long-term program of work.¹ After the General Assembly had taken note of the ILC decision and of the syllabus for the new topic, the Assembly approved it and requested the ILC to begin its work on codification and (probably even more) on the progressive development of “Responsibility of international organizations”.² The ILC work on the topic started in 2003 and it is still in progress.

Having in mind the complexity of the topic, in this paper we would like to analyze some results of this work until the end of 2008, as well as to call attention to several additional issues related to it.

II. The Notion of International Organization

International organizations differ from States since they are not determined by a territory as States are. In international law doctrine, international organizations are defined by their own constitutive elements. They are usually established

¹ See: Official Records of the General Assembly, fifty-fifth Session, Supplement No. 10 (A/55/10), para. 729.

² See: A/RES./56/82 of 12 December 2001, para 8.

by a treaty that is a constituent instrument - “constitution” of almost every international organization. By its nature, such a treaty is a source of international law (as provided by Article 38 of the Statute of the International Court of Justice - ICJ) binding its parties – members of the organization. Therefore, the rules of the law of treaties (e.g. the Vienna Convention on the Law of Treaties) are applicable in general to “constitutions” of international organizations as well.³ What is more, the very moment of creation of an international organization will mostly coincide with the entrance into force of its “constitution”, in accordance with the law of treaties.

This being so, international organizations differ from States also by the fact that they cannot be established but as a result of the will of the States, or other future members of such an organization, i.e. their existence will always derive from other, already existing international legal persons. Therefore, international organizations could be understood as an institutionalized form of cooperation among their members.

Apart from the “constitution”, some permanent organs could also be considered a constitutive element of an international organization. Actually, they appear exactly as a result of the institutionalization of the earlier mentioned cooperation among members of the organization. Thus, the structure of an international organization will usually consist of a plenary organ, executive body and finally of an administrative organ (secretariat). In plenary organs the principle “one State – one vote” is applied very often, although on the other hand, their decisions are usually nothing more but recommendations, guidelines etc. – i.e. without any binding force.

Furthermore, the membership is another constitutive element of every international organization. Usually, the membership of an international organization is open to States, but sometimes other international legal persons can become its members as well (e.g. the Holy See and other non-State entities, even another international organization). However, it should be emphasized that all these members can never belong to the so-called “private”, non-governmental sector. Therefore, an organization whose membership would include NGOs, international corporations, or even individuals from various States should be

³ Thus, Article 5 of the Vienna Convention on the Law of Treaties states as follows: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.” For the text of the Convention see: *UNTS*, vol. 1155, p. 331. Similar provision can be found in Article 5 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. For the text of the Convention see: Doc. A/CONF.129/15.

considered an international non-governmental, or “quasi non-governmental”⁴ organization (so-called QUANGO), while the term “international organization”, strictly speaking, is related only to intergovernmental organizations (IGOs).

In addition, aims, goals and purposes of an international organization as usually defined by its “constitution” are its constitutive element as well.

Finally, distinct legal personality of an international organization is undoubtedly the most important of its constitutive elements. This being so, an international organization will never be a mere sum of legal personalities of its members, but a distinct subject of international law having its own legal personality.⁵ Such a distinct legal personality could be argued *inter alia* by the decision making process in international organizations, where the majority voting prevails. Thus, the will of an organization will be necessarily distinct (*volonté distincte*) from the will of those members who stayed in minority. Consequently, the responsibility of an organization for internationally wrongful acts should in general also be considered distinct from that of its member States.

However, in contemporary international law it is not easy to find any officially accepted definition of international organizations. In spite of some attempts in this direction,⁶ such a definition can still only be found in the doctrine. This being so, we are going to understand an international organization as an entity composed of its members (States or other international legal persons), established usually by a treaty being the “constitution” of such an organization, and determining its aims and purposes as well as its permanent organs, and finally provided with its own legal personality, distinct from that of its members. Consequently, it should be considered that an international organization came to existence by the fact that it effectively gathered the above-mentioned constitutive elements, while the very moment of its creation will in principle be that of the entrance into force of its constituent instrument.

III. International organizations and their legal personality in international law

Discussing the international legal personality of international organizations will necessarily include several questions: if international organizations possess

⁴ Cf. e.g. Willets, P.(ed.), “*The Conscience of the World*” *The Influence of Non-Governmental Organizations in the UN System*, Washington D.C., The Brookings Institution, 1996, p. 7.

⁵ Cf. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, *I.C.J. Reports* 1992, p. 258. Such a requirement for a distinct legal personality of a legal person could be easier understood in the context of the Roman law roots of international law. Thus, Ulpianus determined a distinct legal personality of legal persons in his well-known sentence: „*Si quid universitati debetur, singulis non debetur; nec quod debet universitas singuli debent.*”

⁶ See: Report on the Law of Treaties by Mr. G.G. Fitzmaurice; art. 3., para. b), *A/CN.4/101, YbILC*, vol. II, 1956, p. 108.

such a personality, how did they acquire it? Does it mean that the international legal personality of international organizations has to be provided by their constitutional acts and is it necessary that States recognize their legal personality? Finally, what are the consequences of their legal personality in international law, or in other words, what does it mean to be an international legal person, i.e. a subject of international law?

The question of the legal personality of international organizations, distinct from that of their member States, appeared in international law doctrine mostly after World War I, when the League of Nations, the most universal international organization at that time, was founded. The majority of States, including even some other international persons like mandate territories, became members of this organization. However, in spite of the fact that the League of Nations was participating in various international legal relations (e.g. as a party to international agreements, in diplomatic relations etc.), its international legal personality *erga omnes* was not unanimously accepted in the doctrine.

Finally, in 1949 it seemed that the ICJ resolved the problem. In its advisory opinion in the so-called “Bernadotte case” the Court proclaimed probably one of the most significant principles ever for understanding legal personality in international law: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.”⁷

Furthermore, the Court explained: “Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of actions upon the international plane by certain entities which are not States.”⁸

Thereby, the Court determined a new starting point for understanding international organizations as distinct international legal persons, and not as a mere sum of “legal personalities” of their member States. Of course, it should be mentioned that in this advisory opinion the Court had not accepted international legal personality of international organizations in general, but only that of the United Nations (UN) with the argument that fifty UN member States at that time were representing “the vast majority of the members of the international community”.⁹ However, very soon international organizations in general were recognized as subjects of international law in regard to the entire international community (*erga omnes*). This being so, it became clear that the very concept of

⁷ Reparation for injuries suffered in the service of the United Nations, *I.C.J. Reports* 1949, str. 178.

⁸ *Ibid.*

⁹ *Ibid.*, p. 185.

international legal personality could not be considered dependant of any particular recognition within the international community any longer. On the contrary, it was confirmed as a *de facto* category, dependent only on the effective fulfillment of the requirements for the achievement of legal personality in general: legal capacity (*capacitas iuridica*) and acting capacity (*capacitas agendi*).¹⁰ Accordingly, there is no doubt that the doctrine of the “objective legal personality” of international organizations has been widely accepted in contemporary international law.¹¹

Thus, we approach another earlier-mentioned question concerning the consequences, or, in other words, the content of the legal personality of international organizations. By acquiring international legal capacity, international organizations became addressees of rights and duties according to the rules of international law. Actually, it was the consequence of their factual participation in international relations already regulated by the rules of international law. International organizations had already been participating in international agreements, as well as in diplomatic relations with States. Yet, they had obtained at least *ius contrahendi*, and *ius legationis* that international law doctrine just had to recognize.

This being so, the international legal personality of international organizations became a factual category, independent of any particular recognition. Thereby, another earlier mentioned question received its answer – it is not necessary that the legal personality of an international organization is provided explicitly in its constitutional act. Even if such a provision exists, it will have only a declaratory effect. As noted earlier, international organizations obtained international legal personality by the mere fact that they had acquired legal (*capacitas iuridica*) and acting capacity (*capacitas agendi*) in international relations, in particular *ius contrahendi*, and *ius legationis*. Consequently they acquired international rights and duties, but at the same time these organizations became capable of committing an internationally wrongful act i.e. breaching their duties as well as the rights of another international person. Thus, in contemporary international law doctrine, international organizations are considered international persons with regard to the entire international community (*erga omnes*) i.e. not only in relation to their member States. Of course, this does not mean that all States have to recognize all international organizations.¹² However, recognition will

¹⁰ However, the legal capacity should be considered the only necessary requirement for the achievement of the legal personality, since in international law, as well as in municipal legal systems there are subjects of law deprived of acting capacity (e.g. ex-trust territories in international law, as well as children or mentally challenged persons in municipal legal systems).

¹¹ See: Seyersted, F., *Objective International Personality of Intergovernmental Organizations*, Copenhagen, 1963., p. 100.

¹² Thus, for example, during the Cold War period the USSR and some States of the so-called „Eastern Block“, refused to recognize the EEC.

have the same declaratory effect as in the case of the recognition of a State, and it will have nothing to do with the creation and the existence of an international organization, i.e. with its objective legal personality. On the other hand, it should be considered that member States of the organization have recognized it by the mere fact of being its members.

Thus, an international organization acquires its legal personality in international law *ipso facto*¹³ i.e. by the fact of its creation and effective participation with other international persons in international relations regulated by the norms of international law.¹⁴

IV. International organizations and their responsibility in international law

As we have already mentioned, the international legal personality of international organizations includes their capacity to have rights and duties according to the rules of international law. However, it also includes their capacity to breach their duties as well as the rights of other international persons, i.e. to commit an internationally wrongful act. This being so, the question of their responsibility for such a wrongful act will necessarily arise.

The responsibility of States has been accepted by the customary international law for centuries. Equally, there is no doubt about its acceptance in international law doctrine. What is more, the *Institut de droit international* (IDI) was dealing with this topic at its session in Lisbon 1995,¹⁵ as well as the International Law Association (ILA) at its Conference in Berlin 2004.¹⁶

Finally, the ILC work on this topic has included not only the earlier mentioned, now already completed process of codification and progressive development of the responsibility of States for internationally wrongful acts (*ex delicto*), but also the ILC has been dealing with the liability of States for acts not prohibited by international law (*sine delicto*).¹⁷

As we have already said, at its fifty-fourth session in 2002, the ILC decided to include the topic “Responsibility of international organizations” in its program of work and appointed Italian professor Giorgio Gaja as Special Rapporteur

¹³ See: Seyersted, F., “Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members?”, *IJIL*, vol. 4, no. 2, 1964, p. 240.

¹⁴ Seyersted, *op. cit.*, (note 11), p. 100.

¹⁵ See: *AnnIDI*, Session of Lisbon, vol. 66, no. I, 1995, pp. 249-469; for the final text of the Resolution see: „The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties“, *AnnIDI*, vol. 66, no. II, 1995, pp. 445-453.

¹⁶ See: International Law Association, Berlin Conference (2004), Accountability of International Organisations, Report of the Seventy-first Conference, 2004, pp. 164-241.

¹⁷ See: *infra*, Chapter 4.2.

for the topic. At the same time, the ILC established a Working Group one of the first tasks of which was to consider the relation between this topic and the draft articles on the “Responsibility of States for internationally wrongful acts”, particularly concerning questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, its implementation as well as the settlement of disputes.¹⁸

IV.1. Responsibility of international organizations for internationally wrongful acts (ex delicto)

The work of the ILC has clearly confirmed at least three theses. Firstly, the legal personality of international organizations became not only indisputable, but it was taken as the starting point for the entire project, since only a legal person can be responsible for a breach of legal rights and duties that the law had imposed upon it (*legal capacity*). Thus, the ILC Text of the draft articles on the responsibility of international organizations (further referred to as “the ILC Draft” or “the Draft articles”) adopted so far states in Article 2 that it refers to an international organization “possessing its own international legal personality.”¹⁹

Furthermore, the ILC dealing with the codification and progressive development of this topic, implicitly recognized that some legal rules on the responsibility of international organizations had already developed at the level of customary international law. Consequently, these rules are applicable in accordance with the provision of Article 38, paragraph 1 of the Statute of the ICJ, even before the ILC codification process will be completed and possibly embodied in treaty obligations.

Finally, according to the Draft articles it is clearly recognized that the responsibility of international organizations for an internationally wrongful act is not limited to the breach of their treaty obligations. On the contrary, the Draft in the provision of Article 8 defines a breach of an international obligation, i.e. the internationally wrongful act, as an act which is not in conformity with what is required by an international obligation, “regardless of its origin and character.”²⁰ Thus, there is no doubt that an international organization can be responsible according to international law in the case of the breach of its obligation originating either from a treaty, including its constituent instrument, or from the rule of customary international law, but also from a general principle of law recognized by civilized nations as equally binding sources of international

¹⁸ *Report of the International Law Commission on the work of its sixtieth session*, 5 May-6 June and 7 July-8 August 2008, General Assembly, Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), para. 125, p. 249.

¹⁹ *Ibid.*, p. 263.

²⁰ *Ibid.*, p. 265.

law, on the basis of Article 38 of the ICJ Statute. Moreover, the ICJ confirmed this in its Advisory opinion on the interpretation of the Agreement of 25 March 1951 between the WHO and Egypt.²¹

On the other hand, the responsibility will exclude any retroactivity. Thus, an act of an international organization does not constitute a breach of an international obligation unless the organization is bound by such an obligation at the time the act occurs (Art. 9).²² However, the breach of an international obligation by an act having a continuing character, no matter whether it originates from the action (*in faciendo*) or omission (*in non faciendo*) of an international organization, is to be considered extended in time over the entire period during which such an act continues and remains not in conformity with the international obligation (Art. 10).²³ Finally, the ILC Draft also provides the situation when an international organization breaches an international obligation through a series of actions or omissions. Thus, Article 11 paragraph 2 states that “in such a case the breach extends over the entire period starting with the first of the actions or omissions of that series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”²⁴

IV.1.1. Towards the mutual responsibility of international organizations and their members

Furthermore, the ILC Draft has broadened the concept of the international responsibility of international organizations by including the situation where an organization aids or assists a State or another international organization in the commission of an internationally wrongful act. However, here the Draft requires knowledge of the circumstances of the internationally wrongful act on the side of the organization (Art. 12).²⁵ Although this provision does not mention the notion of guilt of the organization, it is obvious that it requires some kind of a subjective element of wrongfulness. There is no doubt that ideas of the autonomous will, knowledge, consciousness etc. of international organizations, States and other international legal persons have been widely accepted in contemporary international law. This being so, these elements have ceased to be reserved exclusively to individuals - human beings. However, to find out if an international organization, particularly one such as the United Nations with today more than 190 member States, has that kind of knowledge seems to be a much more difficult task than to find out the same circumstances in regard to

²¹ See: Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *I.C.J. Reports* 1980, pp. 96-98.

²² General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), p. 265.

²³ *Ibid.*

²⁴ *Ibid.*, p. 266.

²⁵ *Ibid.*

an individual. Therefore, it remains to be seen what practical significance such a provision will have.

Moreover, the ILC Draft provides that an international organization would be responsible for an internationally wrongful act committed by a State or another international organization if such an organization, “with knowledge of the circumstances of the internationally wrongful act”, has directed and controlled its commission (Art. 13). Equally, the responsibility of an international organization will occur if an internationally wrongful act committed by member States or another international organization originates from the coercion, binding decision, and sometimes even from the authorization or recommendation of the responsible organization.²⁶

Here we approach one of the most important questions in the context of responsibility in general – the question of imputability. Chapter II of the ILC Draft contains several provisions on the attribution of conduct to an international organization. Thus, in Article 4 the ILC Draft brings the general rule on attribution of conduct to an international organization. It provides that the conduct of an organ or agent of an organization, including officials and other persons or entities through whom the organization acts, committed in the performance of their functions shall be considered as an act of that organization.

In addition, the ILC Draft provides imputability and consequently the responsibility of an international organization even for the conduct of an organ or an agent of the organization if such an organ or agent has acted in that capacity, having exceeded its authority (*ultra vires*) or having contravened instructions of the organization (Art. 6).²⁷

However, according to the ILC Draft, even “the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.” (Art. 5).²⁸ By the same token, armed forces that the member States place at the disposal of an international organization, (such as the UN, NATO, ECOWAS etc.) act as organs of these organizations. If the organization exercises effective control over the conduct of these armed forces (e.g. in peace-keeping missions, collective actions under the authorization of the UN Security Council) their conduct will be attributed to the organization, and will give rise to its responsibility. Thus, it is worth noting that in 1999 the UN Secretary General in his Bulletin clearly confirmed the obligation of the UN forces to

²⁶ *Ibid.*, pp. 266-268.

²⁷ *Ibid.*, p. 264.

²⁸ *Ibid.*

observe international humanitarian law, particularly the Geneva Conventions of 1949.²⁹ Also, the IDI adopted two resolutions (in Zagreb 1971 and in Wiesbaden 1975) concerning the application of humanitarian rules and other rules of armed conflict to military operations in which UN forces may be engaged.³⁰ However, in practice international organizations sometimes try to avoid their responsibility for the conduct of armed forces acting under the command and control of one or more member States, even when these armed forces participate in a military operation based on the decision of the same organization. That was the case in the Korean War 1950. Due to the Cold War at that time and the lack of consensus among the Big Powers within the UN Security Council, any collective action as provided by Article 42 of the UN Charter was impossible. All the Security Council could do was to support the member States in assisting the Republic of Korea to defend itself against the armed attack from North Korea, i.e. to support the collective self-defense. Thus, the Security Council only recommended to all member States to make their military forces and other assistance available to a unified command under the United States of America.³¹ Having in mind that the individual or collective self-defense has been recognized in Article 51 of the UN Charter as an “inherent right” of States, the “authorization” of the Security Council can be understood as nothing more than a mere proclamation of the right that has already existed. In this regard, the only real authorization that the Security Council gave in this case was that to authorize the unified command to use the United Nations flag at its discretion.³²

Unfortunately, the situation was not very different in the subsequent UN operations including the collective self-defense in the case of the Iraqi aggression on Kuwait in 1990/1991. However, as was already stressed, the concept of attribution to an international organization in the ILC Draft has been much extended. Thus, the responsibility of an organization will exist if such an organization, “with knowledge of the circumstances of the internationally wrongful act”, at least directs and controls its member States in the commission of an internationally wrongful act (Art. 13).

In the doctrine there are authors who are proponents of the concept of mutual responsibility of an international organization and its member States,

²⁹ See: Observance by United Nations forces of international humanitarian law, Secretary-General Bulletin, ST/SGB/1999/13, 6 August 1999.

³⁰ See: „Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged“ of 1971 and „Conditions of Application of Rules, other than Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged“ of 1975. The texts of these resolutions can be found in: *AnnIDI*, Tableau des Résolutions adoptées (1957-1991), pp. 86 et 114.

³¹ S/RES./84(1950), of 7 July 1950, para. 3.

³² *Ibid.*, para. 5.

particularly when these States have approved an internationally wrongful act by their votes within the organization.³³ Although such an attitude could seem disputable in the context of the earlier-mentioned requirement for the distinct legal personality of an international organization from that of its member States, there is no doubt that it deserves to be considered by the ILC.

Finally, the ILC Draft also provides the possibility of attribution of an act committed by another person to an international organization, but only if and to the extent that the organization has acknowledged or adopted such an act as its own (Art. 7).

On the other hand, in a separate Chapter the ILC Draft provides the opposite situation of the responsibility of a State for its aid, assistance, or even coercion towards an international organization to commit an internationally wrongful act. By analogy with the earlier-mentioned provisions concerning the responsibility of an international organization in the same circumstances, here the Draft provides that a State which aids or assists, directs and controls, or even coerces an international organization to commit an internationally wrongful act will be held responsible if such a State “does so with knowledge of the circumstances of the act” (Art. 25-27).³⁴ However, until now the above mentioned requirements of the “assistance”, “direction” and “control” on the part of a member State have not yet been sufficiently defined in the Draft. For this reason, these requirements are still going to be determined in every particular case. This being so, the knowledge of the law of the international organization in question will be of great help. At any rate, it seems to us that an applicable test about the real influence of a particular member State on the conduct of the organization could be the answer to the question whether the wrongful act would have been committed by the organization if that State had not been its member.

Without doubt, the above mentioned provisions have significantly enriched even the already codified field of the responsibility of States in international law. However, at the same time they could become a double-edged sword implying a great influence of member States which could challenge the autonomous will of an international organization, and consequently its distinct legal personality.

IV.1.2. Circumstances precluding wrongfulness

Of course, the ILC Draft also provides the circumstances precluding wrongfulness, just like the Draft articles on the “Responsibility of States for internationally wrongful acts” do. Actually, it seems that provisions on these

³³ See: Amerasinghe, C.F., *Principles of the Institutional Law of International Organizations*, Cambridge, Cambridge University Press, 2005, pp. 384-406.

³⁴ General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), pp. 271-272.

circumstances contained in the Draft articles on the Responsibility of States were almost copied in the ILC Draft, except for the countermeasures that were left to be drafted at a later stage, “when these issues will be examined in the context of the implementation of the responsibility of an international organization.”³⁵ Thus, the Draft provides a whole series of circumstances precluding wrongfulness, such as the valid consent of the injured party, the self-defense taken in conformity with the principles of international law embodied in the Charter of the United Nations, countermeasures, *force majeure*, distress and necessity. By definition, all these circumstances preclude the wrongfulness *per se* of the act committed by the international organization, except if such an act would be contrary to a peremptory norm of general international law (i.e. *ius cogens*).³⁶ Notwithstanding the fact that the topic of the international responsibility of States and that of the same responsibility of international organizations are closely connected, it seems to us that such an analogy could sometimes be inappropriate. For instance, it seems quite difficult to apply the provision on self-defense, as contained in Article 51 of the UN Charter, to international organizations, having in mind not only the Definition of aggression³⁷ given by the UN General Assembly that has been tailored for States, but also the distinct legal personality of an international organization from the personality of its member States. Thus, for example, even the collective self-defense as it is mentioned in Article 51 of the UN Charter should be clearly differentiated from the measures taken by the organization itself, such as those provided in Article 41 or 42 of the Charter. Equally, the analogy concerning countermeasures could give rise to the same question.

Therefore, the Working Group was given the task to elaborate countermeasures as being among the circumstances precluding wrongfulness of an internationally wrongful act of an international organization. The previous draft articles (2007) also dealt with this issue, but with the annotation that the text of the draft article which referred to countermeasures, was due to be drafted at a later stage. As noted earlier, the same annotation can be found in the new draft (2008) which, therefore, does not comprise the final text on countermeasures but the Report on the sixtieth Session of International Law Commission presents a detailed and elaborated discussion on countermeasures in the Commission and comments to offered solutions.

The provisions of the Draft articles (2008) on countermeasures analogously follow the provisions of the draft articles on the Responsibility of States for internationally wrongful acts. According to some members of the Commission there was no reason why countermeasures ought to be reserved only to inter-State

³⁵ *Ibid.*, p. 269.

³⁶ *Ibid.* pp. 268-270.

³⁷ See: A/RES./3314(XXIX) of 14 December 1974.

relations, so it was suggested that certain provisions on countermeasures taken by a State against another State could by analogy be extended to the relations between States and international organizations, or between international organizations. After accepting the suggested Draft articles, the ILC will be able to fill in a lacuna which was deliberately left in the Chapter on circumstances precluding wrongfulness.

Furthermore, it was deliberated whether the Draft articles should also envisage provisions regarding countermeasures taken by an international organization against another State. However, precaution should be taken considering the fact that the practice in application of countermeasures by and against international organizations is neither very abundant nor indicative like the one between States. Therefore, there is uncertainty of legal regime of these countermeasures and a high risk of their abuse.

While dealing with countermeasures, the Working Group, among other issues, argued the distinction in legal position of the member States of international organizations and that of the States that were not members of international organizations. It was concluded that a new provision, according to which an injured member State of an international organization may not take any countermeasures against that organization so long as the rules of the organization provide reasonable means to ensure compliance of the organization with its obligations under Part Two of the Draft articles, should be included in the Draft.³⁸ Moreover, the Working Group emphasized that the new draft articles should also take into consideration the specificity of the targeted organization, and should not address the possibility for a regional economic integration organization to take countermeasures on behalf of one of its injured members.³⁹

According to the Draft articles an injured State or international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Two of the Draft. For the time being, countermeasures are limited to the non-performance of international obligations of the State or international organization taking measures against the responsible international organization. While using countermeasures, States and international organizations have to permit the resumption of performing the obligations in question.

The Draft articles enumerate the obligations not affected by countermeasures: the obligation to refrain from the threat or use of force as embodied in the Charter

³⁸ Part two of the Draft articles refers to the content of the international responsibility of an international organization.

³⁹ General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), pp. 250-251.

of the United Nations, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals and other obligations under peremptory norms of general international law. At the same time a State or international organization taking countermeasures is not relieved from fulfilling its obligations under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization and has to respect the inviolability of the agents of the responsible international organization, as well as its premises, archives and documents.

The Draft articles also state that applied countermeasures must be in proportionality with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. Also, they should be terminated as soon as the responsible international organization has complied with its obligations in relation to the internationally wrongful act.

On the suggestion of the Special Rapporteur some members of the Commission agreed that the text of the Draft articles provisionally adopted should be made available for States and international organizations to give their comments and observations. Some of the members thought otherwise, believing that, in its work, the Commission should be isolated from any kind of political influence and political considerations, at least in the first stage of the work. It was suggested by some members that legal experts of international organizations should be engaged in a concrete discussion of the legal issues raised by the present topic, including countermeasures. Unfortunately, the Draft articles, submitted by the Special Rapporteur did not consider the question of the implementation of the responsibility of a State by an injured international organization. Thus, for the time being, an undesirable lacuna was left in the Draft.⁴⁰

Several different points of view of some members of the Commission regarding countermeasures are worth mentioning. Some members wanted to treat the relationship between an international organization and its members differently from the one between an international organization and non-members. Most of them were of the opinion that countermeasures, being among the circumstances precluding wrongfulness, should only be exceptional measures in exceptional situations.

It was also pointed out that the practice within the European Union and its relations with the WTO could not represent a basis for creating general rules on the matter. As regards the EU, some members believed that this was because the EU was an organization of a special nature, a highly economically integrated entity, while others emphasized the fact that the EU member States had lost the

⁴⁰ *Ibid.*, p. 257.

capacity to impose countermeasures in the economic sphere according to EU law. In the case of the WTO, some members expressed the view that retaliations within the WTO system were of a contractual nature and were a part of a special legal regime. It was also stated that such measures, like retaliations, were subject to the law of treaties rather than to the regime of countermeasures.⁴¹

The question was raised whether the sanctions imposed by the United Nations Security Council could be regarded as countermeasures. According to some members, those sanctions are a part of a different legal regime and should be treated as such outside the scope of countermeasures. Namely, sanctions undertaken by the Security Council are more of a punitive nature and their basic purpose is maintenance of international peace and security. By contrast, some of the ILC members have defended a different attitude, according to which sanctions by the Security Council could, in certain situations, be regarded as countermeasures in their core, since they are directed against States that have breached international law and are frequently aimed at cessation of an internationally wrongful acts. The conclusion arose that measures taken by an international organization against its members, in accordance with its internal rules, were to be regarded as sanctions, rather than countermeasures.⁴² Taking into account the difference between countermeasures and sanctions in the doctrine arising from their different aims and purposes, it seems very acceptable to treat countermeasures outside the scope of sanctions. However, it should be noted that the aim of the measures provided in Articles 41 and 42 of the UN Charter is also directed to the cessation of an internationally wrongful act in order to restore international peace and security, i.e. it is non-punitive.

On the other hand, having in mind that international law has never dealt with sanctions except on the doctrinal level, it seems to us that the work on provisions related to this issue will not be an easy task.

Several members emphasized the decisive role of the rules of an organization in determining whether an organization could resort to countermeasures against its own members or be the target of countermeasures by them. It was suggested that it should be accepted as a general rule that a member of an international organization who is injured by that organization could not resort to countermeasures except if using countermeasures is not inconsistent with the character and the rules of the organization. Some of the ILC members stated that the expression "not inconsistent with" should be replaced by the expression "allowed." Similarly, it was suggested that an injured international organization could resort to countermeasures only if such a power was given to it

⁴¹ *Ibid.*, p. 258.

⁴² *Ibid.*, pp. 258-259.

by its constituent instrument or its internal rules. In case that the internal rules do not offer any solutions concerning countermeasures, it was concluded that the Draft articles should express a prohibition of countermeasures that would significantly prejudice the position of the targeted organization or threaten its existence or functioning. The question was raised whether the *implied powers* theory was a sufficient basis for the right of an international organization to resort to countermeasures.

While some members of the Commission agreed with the Special Rapporteur that the internal rules of an international organization were only relevant to the relations between that organization and its members, other ILC members took the view that respect by an international organization of its internal rules while taking countermeasures could also be claimed by non-members. Furthermore, it was proposed that the targeted State or international organization, whether or not a member of the international organization taking countermeasures, should be admitted the right to contest the legality of such measures if the functions of that organization did not allow it to adopt countermeasures or if the organ that resorted to such measures acted *ultra vires*. Having in mind the treaty character of the constituent instrument of the international organization, i.e. its *inter partes* character, the *ultra vires* exception seems to be reserved to members of the organization, while the countermeasures taken by the international organization, having targeted non-members, should find their legal basis in general international law as a “common denominator” binding both sides – the sender and the target of countermeasures.

As regards conditions relating to the resort to countermeasures, the ILC indicates that countermeasures may not be taken, and, if already taken, must be suspended without undue delay, if the internationally wrongful act has ceased or if the dispute is pending before a court or a tribunal which has the authority to make decisions binding on the parties. It was suggested that the scope of this exception be extended to the situations in which a dispute was pending before a body other than a court or a tribunal, provided that such a body had the authority to make binding decisions. This would also include mechanisms possibly available within an international organization for the settlement of disputes between the organization and its members.

Further, the ILC supported the provision on countermeasures taken against a responsible international organization by a regional economic integration organization, at the request of an injured member that has transferred to that organization exclusive competence over certain matters. Most of the ILC members agreed that this provision should not be limited only to regional economic integration organizations, but should include all international organizations that were given competence to act on behalf of their member States. However, some

members expressed their concern that this kind of provision could entail a risk of abuse and could produce the involvement of even more States than those initially injured by an internationally wrongful act. It was proposed that the Draft restricts the entitlement of an international organization to adopt countermeasures only to those situations where such an entitlement was explicitly acknowledged by the mandate of the organization. Moreover, it was proposed that the right of an organization to adopt countermeasures should be limited to those measures that a member could have lawfully taken by itself. The final solution has still not been found.

According to its Report (2008), the ILC was, in the end, divided as to whether the Draft articles should include a chapter on countermeasures and, in the affirmative, as to what extent international organizations should be considered entitled to resort to countermeasures. A Working Group is going to attempt to reach a consensus on these issues.

IV.1.3. Legal consequences of an internationally wrongful act and the implementation of the international responsibility of international organizations

In addition, the ILC Draft also provides the legal consequences of an internationally wrongful act. In the first place, there is the duty of cessation and non-repetition of the internationally wrongful act (Art. 33).⁴³ Thus, for example, there is an obligation of the responsible international organization to make full reparation for injury caused by such an act, i.e. the reparation for any damage, whether material or moral, caused by the responsible organization that committed the wrongful act (Art. 34) or, better to say, to which the wrongful act is attributed.⁴⁴ Hence, the Draft provides that the reparation can take a form of restitution, compensation and satisfaction. Actually, the obligation to make restitution (*restitutio in integrum*), i.e. “to re-establish the situation which existed before the wrongful act was committed”, (or maybe it would be better to say “the situation which would have regularly existed if the wrongful act had not been committed”) is provided as the first possibility, while the compensation should have a subsidiary character – in case the restitution would not be materially possible in part, or if it would not be possible at all (i.e. insofar as the damage caused by the internationally wrongful act could not be made good by restitution). Finally, the ILC Draft provides satisfaction, as well as a form of reparation. According to Article 40 of the Draft, the satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology, or another modality appropriate to cover a moral damage. Therefore, it seems to us that the role of satisfaction would be better understood by its special nature (i.e. as a form of

⁴³ *Ibid.*, p. 273.

⁴⁴ *Ibid.*, p. 274.

reparation appropriate for a moral damage), than by its subordination to other forms of reparation (restitution and compensation).⁴⁵

Anyhow, the Draft emphasizes that no legal consequence of an internationally wrongful act does affect the continued duty of the responsible international organization to perform the obligation breached (Art. 32). However, if we understand the principle of *inadimpleti non est adimplendum* (i.e. *exceptio non adimpleti contractus*) as a possible legal consequence of an internationally wrongful act on the side of the injured party, we would necessarily again approach the earlier-mentioned question of countermeasures which share the character of circumstances precluding wrongfulness (as reactions to the internationally wrongful act), and that of legal consequences of such an act. Therefore, maybe the provision of Article 32 of the ILC Draft should take into account the principle of *inadimpleti non est adimplendum*, as provided by Article 60 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986.⁴⁶

In addition, the ILC draft provides the payment of interest as well, in order to ensure full reparation (Art. 41), but it also takes into account a possible contribution to the injury by willful or negligent action or omission of the injured party (Art. 42).⁴⁷

Furthermore, it is noteworthy that an international organization, as well as a State, may not rely on its rules as justification for failure to comply with its international obligation (Art. 35).⁴⁸

Finally, the text of the Draft articles on the responsibility of international organizations for internationally wrongful acts provisionally adopted by the ILC in 2008 in the new Part Three presents eight new articles concerning the implementation of the international responsibility of an international organization.

The first four articles provide situations when a State or an international organization is entitled to invoke responsibility as an injured party, the legal conditions to invoke such a responsibility, the question of the admissibility of claims which deals with the nationality of claims and the rule of exhaustion

⁴⁵ However, the ILC Draft in Article 40, paragraph 1 states as follows: “The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act *insofar as it cannot be made good by restitution or compensation.*” (accent added); *Ibid.*, p. 276.

⁴⁶ For the text of the Convention see: *supra*, note 3.

⁴⁷ General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), p. 276.

⁴⁸ *Ibid.*, p. 274.

of local remedies, and the circumstances that will cause the loss of the right to invoke responsibility.

A State or an international organization is entitled, as an injured entity, to invoke responsibility of another international organization if the obligation breached is owed to that State or the former international organization individually. This is a more frequent case of responsibility arising for an international organization than the case concerning a group of States or international organizations, which will be discussed later. This provision corresponds to the draft articles on the Responsibility of States for internationally wrongful acts. It is clear that the conditions for a State to invoke responsibility as an injured party cannot be different from the situation where the responsible entity is an international organization. This also includes the situation where an international organization owes an obligation to another international organization.

Another situation is the one when the obligation breached is owed to a group of States or international organizations including the State or the international organization invoking responsibility, or the international community as a whole (*erga omnes*), and the breach of the obligation

- a) specifically affects that State or that international organization; or
- b) is of such a character as to radically change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

An example for a) is a coastal State particularly affected by the breach of an obligation concerning pollution of the high seas, and for b) the party to a disarmament treaty or "any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others." Although breaches of this type rarely affect both States and international organizations, it was preferable for the Commission to include such a possibility in the present Draft. The text of the Draft articles include the following cases: when the obligation breached is owed to a group of States by the responsible international organization; when it is owed to a group of other international organizations; or when it is owed to a group consisting of both States and organizations, but not necessarily a plurality of either (Art. 50-52).

The present Draft articles impose an obligation on an injured State or international organization invoking responsibility of another international organization to give notice of its claim to that organization, in which it may particularly specify the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing, and what form of reparation should the responsible organization give to the injured party. This provision is entirely the same as the one concerning the responsibility of

States towards another State for an internationally wrongful act. However, the ILC Draft does not say anything about the form which the mentioned notice should take nor does it impose an obligation on the responsible international organization to conform to the specifications in the notice.⁴⁹

Furthermore, the Draft articles state that an injured State may not invoke the responsibility of an international organization if the claim was not submitted in accordance with the applicable rules related to the nationality of claims. The nationality of claims is a requirement which applies to States exercising diplomatic protection.⁵⁰ Even though diplomatic protection is generally relevant only to relations between States and is a rare occurrence between a State and an international organization, it is not inconceivable, in particular in relation to an organization which administers a territory or uses armed forces whose conduct caused a breach of an obligation under international law concerning the treatment of individuals. The ILC Draft only concerns the exercise of diplomatic protection by a State, while no requirement regarding nationality applies when an international organization prefers a claim against another international organization.

With regard to the admissibility of claims, the Draft articles further say that when a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy provided by that organization has not been exhausted. The requirement to exhaust local remedies depends on the circumstances of the claim. One of the cases, where this rule applies, relates to the claim regarding the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked in regard to remedies in the EU.⁵¹ The practice in

⁴⁹ *Ibid.*, p. 285.

⁵⁰ Diplomatic protection was defined by the ILC as consisting “of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” (Art. 1), *Report of the International Law Commission on the work of its fifty-eighth session*, 1 May-9 June and 3 July-11 August 2006, General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10).

⁵¹ Here, it would be important to mention the statement made on behalf of all the member States of the EU by the Director-General of the Legal Service of the European Commission before the Council of the ICAO in relation to the dispute between these States and the United States concerning measures taken for abating noise, which originated from aircraft. The member States of the EU contended that the claim of the United States was inadmissible because remedies relating to the EC regulation had not been exhausted, since the measure was at the time “subject to challenge before the national courts of the EU member States and the European Court of Justice.” See: General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), p. 288.

the EU suggests that whether a claim is addressed to the EU member States, or the European Union itself, exhaustion of remedies existing within the European Union would be required.

As in the Draft articles on the Responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of "any available and effective remedy." While this existence of available and effective remedies within an international organization may be the prerogative of only a limited number of organizations, the phrase "provided by that organization" in this provision intends to include remedies available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims.⁵² However, it should be noted here that apart from the UN Administrative Tribunal (UNAT), there are other international administrative tribunals (IATs) as well, within various international organizations that could offer effective remedies in this context (e.g. ILO, IMF, IDB, ADB, Council of Europe, OAS). Equally, in some international organizations the same function is entrusted to the Appeals Tribunal (OSCE), or to the Appeals Board (NATO, WEU, ESA).

The provision dealing with the loss of the right to invoke responsibility states that the responsibility of an international organization may not be invoked if the injured State or international organization has validly waived the claim or if the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. This provision also follows the text of the draft article on Responsibility of States for internationally wrongful acts. In principle, it is imaginable that an international organization could be in the position of waiving the claim or acquiescing in the lapse of one. However, it is important to notice that sometimes it is difficult to identify the organ competent to waive a claim on behalf of the organization and to evaluate whether the acquiescence on the part of an international organization has occurred. Moreover, the acquiescence of an international organization may involve a longer period than the one normally sufficient for States.⁵³

The ILC emphasized that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is "validly" made. Regarding international organizations "validly" implies that the rules of the organization have to be respected.⁵⁴

⁵² *Ibid*, p. 289.

⁵³ *Ibid*, p. 290.

⁵⁴ This requirement, however, may encounter limits such as those stated in Article 46, paragraphs 2 and 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations with regard to the relevance of respecting the rules of the

In case there is more than one injured State or international organization, the waiver by one or more States or international organizations does not affect the right of the others to invoke responsibility.

When discussing cases involving the plurality of injured subjects, it must be noted that each one of the injured States or international organizations is entitled to invoke the responsibility of an international organization for an internationally wrongful act separately. The following cases are included: when there is a plurality of injured States; when there is a plurality of injured international organizations; or when there are one or more injured States or several injured organizations. Any injured State or international organization is entitled to invoke responsibility independently from any other injured party. They can, of course, use the right to invoke responsibility jointly, which would contribute to the avoidance of the risk of a double recovery.⁵⁵ But, if an injured State or an injured international organization refrains itself from invoking responsibility, it can, in case this refraining is not only an internal matter between the injured entities, expose itself to the risk of losing the right to invoke responsibility if, as was stated before, it can be considered as having validly acquiesced in the lapse of the claim.

When an international organization and one or more member States are both injured by the same wrongful act, the internal rules of an international organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

The Draft articles also include the provision considering the case when an international organization is responsible for an internationally wrongful act together with one or more entities, either international organizations or States.⁵⁶ Here the responsibility of each responsible entity may be invoked by the injured

organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules. For the text of the Convention see: *supra*, note 3.

⁵⁵ An example of claims that may be concurrently preferred by an injured State and injured international organization was envisaged by the International Court of Justice in its advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*. The Court found that both the United Nations and the national state of the victim could claim "in respect of the damage caused (...) to the victim or to persons entitled through him" and noted that there was "no rule of law which assigns priority to the one or to the other, or which compels either the state or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense (...)." See: *loc. cit.*, (note 7), p. 186.

⁵⁶ The mutual responsibility of an international organization with one or more States is envisaged in Articles 12 to 15 of the present Draft articles, which consider the responsibility of an international organization in connection with the act of a State, and in Articles 25 to 29, which concern the responsibility of a State in connection with the act of an international organization. Here we could also mention the so-called mixed agreements, which are concluded by the European Community together with its member States, when such agreements provide mutual responsibility. See also: *supra*, Chapter 4.1.1.

State or international organization. However, there are situations where a State or an international organization is only subsidiary responsible, to the effect that it would have an obligation to provide reparation only if, and to the extent that the primarily responsible State or international organization fails to do so.⁵⁷ Since the subsidiary responsibility does not imply the need to follow a chronological sequence in addressing a claim, an injured State or international organization does not need to refrain from addressing a claim to the responsible entity until another entity, whose responsibility has been invoked, has failed to provide reparation.

Furthermore, this provision, following the text on the Responsibility of States for internationally wrongful acts, states that an injured State or international organization is not permitted to recover, by way of compensation, more than the damage it has suffered and that the previous provisions are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

The ILC Draft also reproduces the text on the Responsibility of States concerning the invocation of the responsibility of an international organization by a State or another international organization which is not directly the injured party, but the obligation breached is owed to a group of States or international organizations,⁵⁸ including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group. The "collective interest of the group" specifies that the obligation in question is not only owed, under specific circumstances in which the breach occurs, to one or more members of the group individually. For example, if an international organization breaches an obligation under a multilateral treaty for the protection of environment, the other parties to the treaty are entitled to invoke responsibility because they are also affected by the breach, since they act as "guardians" of the collective interest of the group. It is important to notice that obligations, which an international organization may have towards its members under its internal rules, do not necessarily fall within this category. Moreover, the internal rules may restrict the right of a member to invoke the responsibility of the international organization.

⁵⁷ Such a subsidiary responsibility can be found in Article 29, paragraph 2 of the ILC Draft, which provides that when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is "presumed to be subsidiary." See: General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), p. 272.

⁵⁸ The obligation breached is not necessarily owed to a group consisting of States and international organizations; it may also be owed to either a group of States and international organizations.

Finally, there is another situation when a State or an international organization that is not directly injured by the breach can nevertheless invoke responsibility if the obligation breached is owed to the international community as a whole (*erga omnes*). While no doubts have been expressed within the Commission in regard to the entitlement of a State to invoke responsibility for such a breach, some members were concerned about the idea that also international organizations, including regional organizations, would have the same entitlement. However, regional organizations would then act only in the exercise of the functions that have been attributed to them by their member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.⁵⁹

Legal writers dealing with the entitlement of international organizations to invoke responsibility in case of a breach of an obligation towards the international community as a whole, mainly focus on the European Union. A majority of them thinks that both States and international organizations should be entitled to invoke responsibility in this case. Practice in this regard is not very indicative because it relates to actions taken by international organizations in respect of States. When international organizations react to breaches committed by their members, they often act only on the basis of their internal rules. Inducing from this practice the existence of a general entitlement of international organizations to invoke responsibility would be quite difficult. The most significant practice in this respect appears to be that of the European Union, which in Common positions of the Council has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole.⁶⁰

However, the entitlement of an international organization to invoke responsibility in case of a breach of an obligation owed to the international community as a whole is restricted by the Draft articles. Namely, it is required that "safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility." These functions reflect the character and purposes of the organization and are determined primarily by the rules of the organization.⁶¹

⁵⁹ General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), p. 296.

⁶⁰ For instance, the Common position of the Council of the EU of 26 April 2000 referred to "severe and systematic violations of human rights in Burma." It is not clear whether responsibility was jointly invoked by the member states of the EU or by the EU as a distinct organization. In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. *Ibid.*, p. 297.

⁶¹ For example, the Organization for the Prohibition of Chemical Weapons observed: "In the case of international organizations, the ability to invoke responsibility for violations of obligations owed

IV.2. *International liability for injurious consequences arising out of acts not prohibited by international law (sine delicto)*

Apart from the responsibility of international organizations for internationally wrongful acts (*ex delicto*), the question of the liability of international organizations for acts not prohibited by international law could arise as well, i.e. the liability for activities that are not *per se* a breach of an international obligation, but could nevertheless cause damage to another international subject, and consequently give rise to international liability of the international person who caused such damage.

In 1998 the ILC included the issue of the liability of States for acts not prohibited by international law in its work. Yet, until this moment there has been no indication that the work of the ILC on this topic could encompass the codification and progressive development in regard to the analogous liability of international organizations. Despite the difficulties the ILC has been faced with in dealing with such a complex issue, it seems worth pointing out at least some elements common to the liability *sine delicto* of States and of international organizations, not only on the theoretical level, but also in the Drafts of the ILC, as well as in some already existing treaty provisions in contemporary international law.

In the very early stage the work of the ILC on the topic was divided into two sub-topics: Prevention of transboundary damage from hazardous activities and International liability in case of loss from transboundary harm arising out of hazardous activities. Thus, so far the ILC created the Draft articles on the international liability of States for injurious consequences arising out of acts not prohibited by international law (1996),⁶² the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities (2001)⁶³ and the Draft

to the international community as a whole could depend on the scope of the activities of the organization as defined in its constituent document. Accordingly, every "concerned" international organization could be entitled to invoke responsibility and claim the cessation of the wrongful act to the extent that affects its mandate as set out in its constituent instrument." See more in: United Nations International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, Sixtieth session (5 May to 6 June and 7 July to 8 August 2008), A/CN.4/593, p. 10. However, it should be mentioned here that the "implied powers doctrine" as well as the "functional necessity doctrine", which have been accepted in contemporary international law in the last decades, do not rely only on the grammatical interpretation of the constitutive instrument of an international organization; for more details see: Bernhardt, R., "Ultra vires Activities of International Organizations", u: Makarczyk, J.(ur.), *Theory of International Law at the Treshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski*, The Hague, London, Boston, Kluwer Law International, 1996, pp. 602–603; Lapaš, D., *Pravo međunarodnih organizacija*, Zagreb, Narodne novine, 2008, pp. 29 et 83-85.

⁶² See the text of the Draft articles in *Report of the International Law Commission on the Work of its forty-eighth session*, 6 May-26 July 1996, General Assembly, Official Records, Fifty-first Session, Supplement No. 10 (A/51/10).

⁶³ For the text of the Draft articles see: *Report of the International Law Commission on the Work of its fifty-third session*, 23 April-1 June and 2 July-10 August 2001, General Assembly, Official Records,

Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006).⁶⁴

In regard to the theoretical level of this issue, there is no unique position in the international law doctrine on the question whether the international liability *sine delicto* of international subjects exists at all, and if it does, whether it is limited and only exceptional. Therefore, it is difficult to define precisely to what extent and for which activities the liability of international organizations for acts not prohibited by international law exists.

According to some authors, the process of creating general customary law on liability without wrongfulness is still at the beginning, and according to the view of others, the earlier-mentioned circumstances precluding wrongfulness (consent of the injured party, *vis maior*, self-defense etc.) can be considered as situations of liability without wrongfulness, since the exclusion of wrongfulness does not automatically exclude the obligation of a responsible subject to give reparation for the caused damage.⁶⁵ Probably the best known treaty provisions on liability for damage arising out of activities not prohibited by international law can be found in the Convention on international liability for damage caused by space objects (1972). Thus, Article XXII of the Convention provides an equal applicability of its provisions to “any intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are State Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.”⁶⁶

Having in mind that in the contemporary international community there can hardly be found any field of international cooperation that would be left beyond the scope of at least one intergovernmental organization, as well as taking into account the international legal personality of these organizations distinct from that of their member States, it seems that a similar provision could find its place in many other treaties, i.e. wherever an international organization is able to conduct any hazardous activity on its own. There is no doubt that any damage caused by such activities not prohibited by international law would give rise to the international liability of the international organization in question.

Fifty-sixth Session, Supplement No. 10 (A/56/10).

⁶⁴ See the text of the Draft principles in *Report of the International Law Commission on the Work of its fifty-eighth session*, 1 May-9 June and 3 July-11 August 2006, General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10).

⁶⁵ See more in: Seršić, M., *Međunarodnopravna odgovornost države*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2007, pp. 95-97.

⁶⁶ For the text of the Convention see: *UNTS*, vol. 961, p. 187.

This being so, the Draft articles (1996) as well as the Draft articles (2001) impose the obligation on States to take all appropriate measures in order to prevent or minimize the risk of significant transboundary harm during their activities.⁶⁷ Having pointed out that international organizations sometimes commit the same activities on their own as States do, it seems likely that the above-mentioned provision could be equally applicable to them as it is to States. Thus, international organizations should, when performing certain activities, exercise due diligence which is required from all international subjects, especially from those whose activities involve protection and preservation of environment. This means that international organizations as well as States should be obliged to take all reasonable efforts to notify all factual and legal information connected to the performance of the activity under their control and to take appropriate measures in time.⁶⁸ It must not be forgotten that, in doing so, international organizations have to respect their own internal rules. Analogous solutions to those mentioned above in the Draft articles should also be applied when defining which activities of international organizations should be submitted to such a general obligation.⁶⁹

Furthermore, when discussing the international liability of international organizations for acts not prohibited by international law, the question of joint liability of an international organization and its member States should not be neglected. Here also the internal rules of an organization have to be taken into account. Equally, it would be necessary to consider a question of joint liability of an international organization and a third State or international organization under the same conditions as listed in the Draft articles on the responsibility of an international organization for internationally wrongful acts in chapter IV, which deals with the responsibility of an international organization in connection with the act of a State or another international organization.⁷⁰

In addition, the ILC in its work on the liability *sine delicto* has also been dealing with situations where due diligence has been exercised, although the

⁶⁷ Articles 3, 4 and 7 of the Draft articles (1996) and articles 2, 3 and 5 of the Draft articles (2001). See: General Assembly, Official Records, Fifty-first Session, Supplement No. 10 (A/51/10), *loc. cit.*, (note 62) and General Assembly, Official Records, Fifty-sixth Session, Supplement No. 10 (A/56/10), *loc. cit.*, (note 63).

⁶⁸ Seršić, *op. cit.* (note 65), pp. 100-101.

⁶⁹ According to the Draft articles (1996) and the Draft articles (2001) the criteria for determining the activities in question are the probability of causing harm and the extent of harmful consequences, and the possibility that these activities are connected to the risk of causing significant transboundary harm. That risk encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm. See article 2 of the Draft articles (1996). See: General Assembly, Official Records, Fifty-first Session, Supplement No. 10 (A/51/10), *loc. cit.*, (note 62) and General Assembly, Official Records, Fifty-sixth Session, Supplement No. 10 (A/56/10), *loc. cit.*, (note 63).

⁷⁰ See: General Assembly Official Records, Sixty-second Session; Supplement No. 10 (A/63/10), *loc. cit.* (note 18), Articles 12-15.

damage had nevertheless occurred. Hence, these situations also include the liability without wrongfulness, which exists not only in regard to States, but to international organizations as well.⁷¹

The Draft articles (1996) envisage various criteria that should be taken into consideration in the context of the liability for damage arising out of activities not prohibited by international law. These criteria, although in the ILC Draft articles (1996) shaped for States, could be equally applicable to the liability of international organizations in analogous circumstances. These criteria could be, for example: the extent to which an international organization has complied with its obligation of prevention, the extent to which an international organization has exercised due diligence in preventing or minimizing the damage, the extent to which an international organization benefits from the activity, the extent to which assistance to either parties is available from or has been provided by third States or international organizations etc.⁷²

In addition, the provisions on the settlement of disputes concerning the international liability *sine delicto* could at least be partly applicable to international organizations, of course taking into account the specific personal jurisdiction of particular fora.

However, the Draft (2001) imposes the obligation to negotiate reparation, but without proposing any other means of dispute settlement between the injured party and the State that caused the damage.

Finally, there is another imperfection in the Draft (2006). It lacks a more precise definition of damage, while at the same time its provisions bring only the principles that are not intended to have a binding force. On the other hand, the liability for acts not prohibited by international law is often transferred to natural and legal persons directly involved in exercising these activities. This being so, States usually avoid the burden of responsibility by delegation of liability to their nationals, i.e. to their private or “transnational” legal relations.

For all these reasons it is very difficult to foresee how the issue of the liability of international organizations for acts not prohibited by international law might be regulated, especially because the codification process within the ILC has not yet been completed even for States and the present ILC Drafts on the topic have been exposed to much criticism in the doctrine.

However, this should not discourage possible future attempts and endeavours to treat these topics jointly – the liability *sine delicto* of States and that of international organizations, at least as far as the analogy of these issues allows it.

⁷¹ See more in: Seršić, *op. cit.* (note 65), pp. 104-105.

⁷² *Ibid*, pp. 106-108.

V. Concluding remarks

The development of the international legal personality of international organizations has not been an easy process. However, even though their international personality was widely accepted in international law doctrine and their status became similar to that of States, the issue of their international responsibility has not been codified yet. Although international organizations acquired the international legal (*capacitas iuridica*) and acting capacity (*capacitas agendi*), particularly in regard to the treaty making capacity (*ius contrahendi*) as well as *ius legationis*, which has been confirmed *inter alia* by several conventions (e.g. the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character etc.), the question of the responsibility of international organizations for internationally wrongful acts, i.e. for a breach of their international duties and rights of other international persons appeared on the agenda of the ILC very recently. Notwithstanding that some basic rules on the issue had already developed in the form of customary international law, until the last decade only the international law doctrine was dealing with this topic.

The work of the ILC on the responsibility of international organizations started in 2003 and it is still in progress. However, it is mostly based on the analogous solutions contained in the Draft articles on the “Responsibility of States for internationally wrongful acts” which was adopted in 2005 and submitted to the United Nations General Assembly. Although such an analogy sometimes could raise the question of the applicability of the same rule to both States and international organizations, there is no doubt that international organizations are capable, just like States, of breaching international law (i.e. of committing an internationally wrongful act), as well as of causing damage to another international person, even if such a damage arises from an activity not prohibited by international law (i.e. *sine delicto*). What is more, the earlier-mentioned provision of Article XXII of the Convention on international liability for damage caused by space objects states this explicitly.⁷³

For this reason, it seems to us that the work of the ILC on the international liability of States for injurious consequences arising out of acts not prohibited by international law, which is in progress, could offer a possible basis for some analogous solutions in regard to the same liability of international organizations in

⁷³ See: *supra*, note 66.

the future. Having in mind the increasing number of international organizations in the contemporary international community, as well as the fact that today they cover almost every field of international cooperation, this issue could become very important.

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INTERNATIONAL LAW AND CYPRUS PROBLEM

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Abstract

The question of a partitioned Cyprus after World War II has become an especially sensitive and complex question of the modern international community. The paper analyses the history of Cyprus, starting from the time the Republic of Cyprus attained independence, the covering the Turkish invasion of the island and the declaration of independence of the Turkish Republic of Northern Cyprus (TRNC) to the present day. It gives an overview of relevant United Nations resolutions with special reference to United Nations Peacekeeping Force in Cyprus (UNFICYP). The whole problem of the Republic of Cyprus and the self-proclaimed and by International Law not recognised Turkish Republic of Northern Cyprus and illegal occupation that lasts for more than three decades is analysed from the aspect of International Law. Some of the most important plans regarding a solution to the Cyprus problem are also presented and their advantages and shortcomings are commented.

Keywords: *Cyprus, International Law, intervention, human rights, United Nations, independence, secession*

I. Introduction

Due to its specific geographic position, Cyprus has always been interesting to various conquerors throughout its history. The Ottoman Empire conquered the island in 1571 and kept it as late as the year 1878 when, fearing the expansion of Russia after the Russo-Turkish War (1877-1878), the Turks ceded the

administration of Cyprus to the British. On the basis of the Treaty of Lausanne (1923) Turkey formally recognised British possession of Cyprus. Shortly after that Cyprus became a British crown colony and retained that status until it gained independence in 1960. What makes the Cyprus problem additionally complicated and more complex, but also different in relation to all other problems United Nations has dealt with, is the fact that from the beginning the Cyprus issue involves at least five different parties: Greek Cypriots, Turkish Cypriots, Great Britain, Greece and Turkey¹. Both Greece and Turkey worsened the already difficult situation in Cyprus by their unrealistic requests. This conflict refers to co-existence of two different peoples that have lived on the island for centuries – Turkish and Greek Cypriots. These two peoples have different languages, cultures, country of origin and religion, as well as political goals and interests. The only thing they have in common is intolerance towards the other ethnic group.

It is assumed that today there are about 80% of Greek Cypriots and 18% of Turkish Cypriots, whereas the remaining percentage of the population refers to other less represented ethnic groups. Even before gaining independence from the British in 1960, two political currents were organised on Cyprus based upon ethnic foundation. Major part of Greek Cypriots aspires to annexation of the whole island of Cyprus to Greece (*enosis*, in Greek “union”). On the other hand, Turkish Cypriots want Cyprus to be partitioned (*taksim*) into a Turkish and a Greek part, after which the Turkish part would secede and annex to Turkey. Greece and Greek Cypriots oppose partition of the island by ethnic foundation. As noticed by Wippman, neither community’s preference could be fully accommodated without sacrificing entirely the preference of the other community². Tensions rose in the 70s to finally culminate in July 1974 by a coup d’état which overthrew the government of Archbishop Makarios, the president of Cyprus. Makarios was forced into exile, and a pro-Greek government was established on Cyprus.

Turkey decides to undertake a military intervention the consequence of which was that tens of thousands of people were made homeless. Under the pretext of protecting the Turkish minority endangered by the Greek majority on Cyprus, Turkish authorities decided to send military troops to neighbouring Cyprus and occupy one third of the territory. Turkey established control over the northern third of the island. That caused massive displacement of Greek Cypriots from that part, whereas from the remaining part of Cyprus Turkish Cypriots were forced to move to the northern part of Cyprus, causing the then demographic structure

¹ Gordon, J. King: U.N. in Cyprus, *International Journal*, Volume XIX (1963-1964), Number 3, Summer 1964, p. 328.

² Wippman, David: International Law and Ethnic Conflict on Cyprus, *Texas International Law Journal*, Volume 31, Number 2, Spring 1996, p. 151.

to change irretrievably. As early as in February 1975 some political formation was proclaimed in that part of the island, and in November 1983 President of the Turkish part of Cyprus, Rauf R. Denktash, proclaimed the Turkish part of Cyprus an independent republic called the Turkish Republic of Northern Cyprus (TRNC). To this day only Turkey has recognised this Republic. While Greek Cypriots have believed that as a majority they have the right to decide on the island future, Turkish Cypriots believe that they have equal rights (relations in question are relations between two equal communities)³.

II. Historical background to the Cyprus problem

II.1. Events preceding independence of Cyprus (1960)

In order to be able to understand today's situation in Cyprus and provide its legal analysis, it is necessary to give a historical overview of the Cyprus issue, especially after World War II. Due to its specific geostrategic position, throughout history Cyprus was conquered by Assyrians, Egyptians, Phoenicians, Persians, Romans, Byzantines, crusaders, etc. Greek presence on the island dates back to the Mycenaean times. For three millenia or more, Cyprus preserved its Greek language and its people a sense of special identity⁴. Ottoman invasion of *Cyprus* led to the end of *Venetian rule and the island* was under the control of the Ottoman Empire for three centuries. During that period of Turkish rule, there was little mixture between the Greek and Turkish Cypriot population⁵. The main causes of the then conflicts related to different religions and cultures of two peoples, the process of Islamisation, ensuring tight relations of Turkish Cypriots with Turkey, and later on, tight relations of Greek Cypriots with Greece (including ideas of unification with mainland Greece)⁶. The majority of Greek population on the island as well as in Greece itself consider that the island has always been part of Hellenistic culture. But, it has to be mentioned that by the 19th century two communities enjoyed peaceful ethnic co-existence, that was occasionally ruined by Greek Cypriot rebellions⁷. At that time Turkish Cypriots, though a minority, had economic and political control of the island⁸. Since Turkish Cypriots were a minority, they were afraid of the Greek majority

³ Richmond, Oliver P.: *Mediating in Cyprus: The Cypriot communities and the United Nations*, Frank Cass Publishers, New York, 1998, p. xv.

⁴ Gordon, op. cit., p. 326.

⁵ *Ibidem*, p. 327.

⁶ Turk, A. Marco: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, *Loyola of Los Angeles International and Comparative Law Review*, Volume 28, Number 2, Spring 2006, p. 207.

⁷ *Ibidem*, p. 208.

⁸ *Ibidem*.

and thus they strongly opposed enosis. As a response to the idea of enosis, Turkish Cypriots announced their counter-request, i.e. partition of Cyprus, where in case of annexing the island to Greece, the Turkish part of Cyprus would be annexed to Turkey.

In 1878 Great Britain and the Ottoman Empire concluded a secret treaty according to which Cyprus would be ceded to the British, whereby the Ottoman Empire retains sovereignty over the island in return for political support of Great Britain to the Ottoman Empire. The Convention of Defensive Alliance of 1878 between Great Britain and Turkey was also known as the Cyprus Convention⁹. It stipulated conditions of British occupation and administration of Cyprus. Turkey decided to make that move in order to provide for British support in defence against the increasing Russian power after Russo-Turkish Wars of 1877-1878. Hence in 1878 Great Britain occupied the island and took over its administration even though Britain acknowledged Turkish sovereignty¹⁰.

Greek population on the island preferred union with Greece to British rule¹¹. Britain annexed Cyprus in 1914, after the outbreak of World War I. Britain annulled the Convention of 1878 as soon as Turkey sided with Germany in World War I. In 1923, in accordance with the Treaty of Lausanne, Turkey waived all rights related to Cyprus and accepted British sovereignty over Cyprus. The Treaty of Lausanne states: "Turkey hereby recognizes the annexation of Cyprus proclaimed by the British Government on the 5th November 1914"¹². In the meantime, Cyprus became a British Crown Colony and the British administrated Cyprus as a colony until the independence of Cyprus in 1960.

In the 30s unrest and riots started to break out on the island. Greek Cypriot demands for "enosis" with Greece¹³ grew louder, and there was a growing tension between the two communities on the island. During World War II Greek Cypriots voluntarily fought in the British Army troops hoping in return the British would expedite unification of Cyprus and Greece after World War II as they had previously done with the Ionian Islands¹⁴. But, Great Britain disliked

⁹ Convention of Defensive Alliance between Great Britain and Turkey, June 4, 1878, 68 British and Foreign State Papers 744 (1877-1878); 3 Martens Nouveau Recueil 274 (Ser. 2nd). Cited according to Rossides, Eugene T.: Cyprus and the Rule of Law, *Syracuse Journal of International Law and Commerce*, Volume 17, Number 1, Spring 1991, p. 27.

¹⁰ Gordon. op. cit., p. 327.

¹¹ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 208.

¹² Cited according to Rossides, op. cit., p. 27.

¹³ The movement itself dates back from 1830 and the Greek independent state as well as rising nationalism between Greeks living in and outside Greece. The mission of the movement was to unify the Greek people into one state. Musgrave, Thomas, D.: *Self-determination and national minorities*, Oxford monographs in International Law, Oxford University Press, 2000, p. 223.

¹⁴ *Ibidem*.

enosis from the beginning and became even more disturbed in the post-war period about its effect on the NATO alliance¹⁵. During the British rule, appeasement of the Turkish minority in Cyprus aggravated the inter-ethnic relations: Turkish Cypriots sided with the British, while Greek Cypriots were engaged in uprising against the British¹⁶, which resulted in even deeper animosity and intolerance between the two ethnic communities on Cyprus.

At that time, the Greek Orthodox Church started to argue strongly in favour of unification of the island with Greece and in the mid-50s this attitude was supported by the official Greek government. Namely, Greek Cypriots advocated holding a plebiscite on the island under supervision of the United Nations, invoking the right to self-determination. But, relying on a much greater number of Greeks than Turks, they counted on results that would lead to annexation to Greece, and not to independence of Cyprus itself¹⁷. Since Turkey and Great Britain opposed one plebiscite aimed at determining future of the island that would definitely lead to union with Greece, Greece changed its policy and proposed independence of the island of Cyprus itself, which Turkey and Great Britain agreed to¹⁸.

In the mid-50s Greek Cypriots began guerrilla warfare and terrorist activities against British authorities. National Organisation of Cypriot Combatants (*Ethniki Organosis Kyprion Agoniston*) was building up with only one goal: annexation to Greece. 1950s and 1960s were characterised by a strong decolonisation process. Greek Cypriots argued that the people of Cyprus, under colonial administration, were entitled to choose their future political status in accordance with the will of the majority, whether the choice was for independence or for union with Greece¹⁹.

¹⁵ Britain's concern to retain strong military bases on the island caused it largely to ignore the Greek Cypriots' clamant demands for independence. On the other hand, Turkish Cypriots were content with British rule, seeing a guarantee of their minority rights in the presence of the British. Gordon, op. cit., p. 327.

¹⁶ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 209.

¹⁷ Turks claimed that the Greek proposal for one plebiscite was not a manifestation of the right to self-determination for Turkish Cypriots, but rather a denial of their right to self-determination. Turkey believed that there were two "peoples" on Cyprus and that each of these two "peoples" had the right to self-determination (as a double self-determination). S. G. Xydis: The UN General Assembly as an Instrument of Greek Policy: Cyprus 1954-58, 1968, 12 Journal of Conflict Resolution 141, p. 157, given according to Musgrave, op. cit., p. 224.

¹⁸ *Ibidem*, p. 224.

¹⁹ Turkish Cypriots understood that self-determination for the majority would lead to enosis and they feared that the result would be not just discrimination, but political domination and marginalisation of their group identity. For more details see Wippman, op. cit., p. 166. and further.

Long after World War II Great Britain hesitated to grant independence to Cyprus justifying that by the fact that local authorities were not ready for independence or that they were not capable of ensuring protection of rights of the Turkish minority on the island. British geopolitical interests in this part of the Mediterranean were much more important than ending the decolonisation process. Therefore, on behalf of the people of Cyprus, Greece decided to invoke implementation of the right to self-determination during the session of the United Nations General Assembly held in 1954. But, the United Nations General Assembly adopted Resolution 814 (IX) in which it eliminates the possibility of discussing this topic: "Considering that for the time being it does not appear appropriate to adopt a resolution on the question of Cyprus"²⁰. Meanwhile, unsuccessful negotiations between Great Britain, Greece and Turkey took place in the mid-50s with a goal of finding a solution to the problem of Cyprus. The Suez Crisis was precipitated and the British made a decision to set up a military base in Cyprus²¹. Greece kept insisting that the General Assembly should make its own decision on the future of Cyprus regarding the right to self-determination, but it was unsuccessful²². In 1957 the General Assembly passed a Resolution stating the "earnest desire that a peaceful, democratic and just solution will be found in accord with the purposes and principles of the Charter of the United Nations, and the hope that negotiations will be resumed and continued to this end"²³. Clashes between the two ethnic groups broke out in Cyprus. Turkey did support strongly the Turkish Cypriots' demand for *taksim* or partition, which in the event of British withdrawal would assure the Turkish minority their rights²⁴.

Finally, by the end of 1950s Great Britain made the offer to transfer sovereignty over Cyprus to both Greek and Turkish Cypriots by forming the independent state of Cyprus. The only condition referred to retaining two military bases on the island. Negotiations commenced in Zurich in 1959, but soon after that they continued in London. Five delegations participated in negotiations: Turkey,

²⁰ Application under the Auspices of the United Nations, of the Principle of Equal Rights and Self-Determination of Peoples in the Case of the Population of the Island of Cyprus, United Nations General Assembly Resolution 814 (IX), 17 December 1954.

²¹ Rossides, op. cit., p. 30.

²² In December 1957 the General Assembly passed a resolution stating the "Earnest hope that further negotiations and discussions will be undertaken in a spirit of co-operation with a view to having the right of self-determination applied in the case of the people of Cyprus". Although the resolution was passed by a majority vote of thirty-one to twenty-three with twenty-four abstentions, it did not achieve the 2/3 vote required under United Nations Charter Article 18 (29) to become a "recommendation with respect to the maintenance of international peace and security". UN Department of Public Information, 1957 UN Year Book 72-76 (1958), cited according to Rossides, op. cit., pp. 30-31.

²³ Question of Cyprus, United Nations General Assembly Resolution 1013 (XI), 26 February 1957.

²⁴ Gordon, op. cit., p. 328.

Greece, Great Britain, Turkish Cypriot representatives headed by Dr. Küçük and Greek Cypriot representatives headed by Archbishop Makarios. Based upon the London-Zurich Agreements of 1959-1960 negotiated by Britain, Greece and Turkey, and presented to the Greek and Turkish Cypriots, Cyprus attained independence on August 16, 1960. Archbishop Makarios signed for the Greek Cypriots and Dr. Fazil Küçük signed for the Turkish Cypriots²⁵. The Republic of Cyprus became a member of the United Nations, the Council of Europe and the Commonwealth.

II.2. London-Zurich Agreements (1959-1960)

During the negotiations for independence of the Republic of Cyprus three treaties were signed²⁶. Cypriot representatives did not take part in the drafting of these agreements, but shortly after the agreements were initiated, representatives of the two Cypriot communities were invited to join representatives of Greece, Turkey and Britain at a meeting in London to finalise the Zurich settlement²⁷. Under the Treaty of Establishment between Britain and Cyprus, Great Britain retained sovereignty over two bases (Akrotiri and Dhekelia), training rights in ten specified areas, and the use of roads, communications, harbours and ports, and the airport of Nicosia²⁸. Signatories of the second treaty or the so-called Treaty of Guarantee among Britain, Greece and Turkey acknowledge and guarantee independence, territorial integrity and security of the Republic of Cyprus. The Treaty of Guarantee prohibits enosis (union with Greece) and partition of the island. Finally, the third treaty (i.e. the Treaty of Alliance among Cyprus, Greece and Turkey) obliged the signatories to resist any attack or aggression endangering territorial integrity and independence of the Republic of Cyprus. The Treaty stipulated that the two peoples shall exercise equal constitutive power and have equal rights as to participation in political life of the state. The Treaties of 1960 ban Cyprus from joining an international organisation or alliance that does not count both Turkey and Greece among its members in order to prevent any of these two states from gaining political advantage or prevalence on the island. Any call for partition of Cyprus was forbidden, as well as parties or movements propagating a union with Greece or Turkey.

²⁵ Rossides, *op. cit.*, p. 31.

²⁶ Musgrave, *op. cit.*, pp. 224-226.

²⁷ Cypriot representatives were not present in Zurich for the initial drafting of the Accords and had little opportunity in London for seeking changes in them. On the other hand, Greek Cypriots had reason to fear that a refusal to accept the 1960 Accords might delay the independence of Cyprus indefinitely or result in an imposed settlement even less favourable to Greek Cypriot political aspirations than the 1960 treaty arrangements. Wipman, *op. cit.*, pp. 145 and 149.

²⁸ Gordon, *op. cit.*, p. 330.

The Constitution of the Republic of Cyprus was adopted the same day these three treaties entered into force. The Constitution provided the 18% Turkish Cypriot minority with a veto power over major governmental actions, including taxation, defence, security, foreign affairs and municipal matters, and contained a provision barring amendment of the basic articles²⁹. These Constitutional provisions were a major cause of the dispute between the Greek and Turkish Cypriots³⁰. There was to be a Greek Cypriot President and a Turkish Vice-president. Each had a veto over any decision of the Council of Ministers and over any law passed by the House of Representatives that would relate to foreign affairs or defence³¹. Turkish Cypriots were given three out of ten seats in the Council of Ministers, 30% of the seats in the House of Representatives, 40% of the strength of an army of 2,000, 30% of a police force of 2,000 and 30% of the jobs in the civil service³². The Treaty of Guarantee reinforced the binding terms of the Constitution³³. Under the Treaty of Alliance, Cyprus, Greece and Turkey were obliged to co-operate in common defence³⁴. A Greek Cypriot, Archbishop Makarios was elected first president of the Republic of Cyprus. This made him both a religious and a secular leader – president of the state.

The London-Zurich Agreements were imposed on the Greek and Turkish Cypriots by outside governments and provided for “minority veto government”³⁵. It was more than obvious that Turkish Cypriots were granted much with respect to the fact that they made up only 18% of the overall population. Ehrlich believes that the constitutional framework represented a carefully articulated set of norms designed to permit the two Cypriot communities to live together, but to prevent the richer and more populous Greek community from overwhelming the Turkish minority³⁶. Instead of co-operation, the two communities were

²⁹ The Constitution may be found in 3 Constitutions of Nations – Europe 138-221, A. Peasley, 3rd edition 1968. cited according to Rossides, op. cit., p. 31.

³⁰ *Ibidem*.

³¹ Gordon, op. cit., p. 329.

³² *Ibidem*.

³³ Great Britain, Greece and Turkey recognised and guaranteed independence, territorial integrity and security of Cyprus and also the basic articles of the Constitution. Each of the three powers reserved the right “to take action with the sole aim of re-establishing the state of affairs established under the present treaty”. *Ibidem*, p. 330.

³⁴ A tri-partite military headquarters was to be established in Cyprus and Greek and Turkish contingents of 950 and 650 officers and men respectively were to be stationed on the island. Greek and Turkish officers were to train the Cypriot army. *Ibidem*.

³⁵ Rossides, op. cit., p. 86.

³⁶ It can be easily concluded that this constitutional arrangement “was doomed to failure”. But, as Ehrlich noticed, the agreement did function reasonably well for over two years and “given patience and a spirit of compromise” it might well have worked much longer than that. Thomas Ehrlich: Cyprus: the Warlike Isle: Origins and Elements of the Current Crises, 18 *Stanford Law Review*, May 1966, p. 1021, cited according to Wippman, op. cit., p. 146.

separated. As King notices: “the miracle of Zurich had lost its glow”³⁷. Very soon after constitutional provisions got implemented in practice, demands for changes referring to the Constitution emerged. The Constitution was hindered by both sides. Makarios advanced a proposal encouraging constitutional reforms, but it was rejected by the British³⁸. However, equal sharing of power between Greek and Turkish Cypriots has never entered into force³⁹. Greek Cypriots thought that Turkish Cypriots were granted too much. Turkish Cypriots did not want to feel inferior and responded to it by blocking passage of important legislation, including extension of the income tax⁴⁰.

It was a matter of time when the conflicts caused by the idea of partition would be moved out onto the streets. Intercommunal fist fights and street clashes erupted very soon. Due to escalation of serious conflicts between the two communities in Cyprus that took place in 1963, under Security Council Resolution 186 (1964) the United Nations Peacekeeping Force arrived on the island⁴¹. The goal of the United Nations Peacekeeping Force in Cyprus (UNFICYP) was to prevent further conflicts between Greek and Turkish Cypriots⁴². At that time Turkey threatened to invade Cyprus. Turkish Cypriots insisted that the only way to resolve the crisis was through the “physical separation and separate administration of the two communities”⁴³. In August 1964 Turkey did bomb Cyprus and the United Nations Security Council passed Resolution 193 that made an appeal to the government of Turkey “to cease instantly the bombardment of and the use of military force of any kind against Cyprus, and to the Government of Cyprus to order the armed forces under its control to cease firing immediately”⁴⁴. That year, the Security Council passed a series of resolutions stating in some of them

³⁷ Gordon, op. cit., p. 331.

³⁸ Makarios submitted for discussion to the Turkish Cypriots thirteen proposed amendments to the Constitution to correct its “undemocratic features”. Makarios did not get British support for his proposals, and Turkey rejected the proposals before any response from the Turkish Cypriots. For more details about the 13 proposed revisions see Rossides, op. cit., p. 32.

³⁹ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 209.

⁴⁰ See Wippman, op. cit., p. 146.

⁴¹ United Nations Security Council Resolution 186 (1964), 4 March 1964, S/5575. Greek Cypriots attacked regions inhabited by Turkish Cypriots, and *Turkey intervened* with *air attacks* against Greek Cypriots. These attacks were condemned by the Security Council by Resolution 193 (1964), 25 March 1964, S/5868. See also Bridge, J. W.: Legal Status of British Troops Forming Part of the United Nations Force in Cyprus, *The Modern Law Review*, Volume 34, 1971, pp. 121-135.

⁴² The mandate of the Mission has been extended to the present day, and the main objective has been to maintain ceasefire, establish a buffer zone between the two communities and undertake humanitarian activities. The information about the Mission itself is available on the official United Nations website: <<http://www.un.org/Depts/dpko/missions/unficyp/index.html>>.

⁴³ Wippman, op. cit., p. 147.

⁴⁴ Security Council Resolution 193 (1964), loc. cit., see note 41.

that the situation on Cyprus was serious and that it could “threaten international peace and security” and inviting all member states “to refrain from any action or threat of action likely to worsen the situation in the sovereign Republic of Cyprus or to endanger international peace”⁴⁵. In November 1967 a new crisis burst in Cyprus and Cyrus Vance was sent to Cyprus on a diplomatic mission to prevent the outbreak of further hostilities. Vance’s mission was assessed as a success by observers, until the fateful events of 1974 precluded further peaceful progress on a negotiated settlement⁴⁶.

III. Turkish invasion of Cyprus and the occupation of the northern part of the island (1974)

On 2 July 1974, in a letter to General Phaidon Gizikis, President of Greece, Archbishop Makarios, President of Cyprus, accused the Greek regime of trying to overthrow his government⁴⁷. Several days after, on 15 July the Greek Cypriot National Guard did overthrow the Government of Cyprus in a coup d’état. Their goal was to kill president Makarios and to install Nicos Sampson, an ultra rightist as president⁴⁸. Makarios was replaced and he left the country. A pro-Greek government was established in Cyprus that invoked the call for enosis openly. According to Turkey, that was a severe breach of the 1960 Treaty⁴⁹.

As a response to activities undertaken by the Greek military junta, on 20 July 1974 Turkish forces invaded Cyprus occupying 5% of the island’s territory. About 35,000-40,000 Turkish soldiers arrived in the northern part of the island and established Turkish administration there⁵⁰. Cyprus’ population in 1974 was about 650,000. Population distribution by ethnic group was about 80% Greek Cypriots and 18% Turkish Cypriots.⁵¹ Consequently 40% of Greek Cypriots were forced to leave their homes in the areas occupied by Turkey, becoming refugees on their own island⁵². Meanwhile, the ethnic composition of Cyprus

⁴⁵ Security Council Resolution 186 (1964), loc. cit., see note 41. See also United Nations Security Council Resolution 187 (1964), 13 March 1964, S/5603 and Security Council Resolution 193 (1964), loc. cit., see note 41.

⁴⁶ For more details see Rossides, op. cit., p. 33.

⁴⁷ *Ibidem*, p. 24.

⁴⁸ *Ibidem*.

⁴⁹ Musgrave, op. cit., pp. 226-227.

⁵⁰ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., pp. 206 and 211.

⁵¹ U.S. Army Area Handbook for Cyprus 73 (1971). The 1970 consensus had the population of 628,000. Cited according to Rossides, op. cit., p. 26.

⁵² Greek Cypriots from the north fled to the south, and the Turkish Cypriots from the south fled to the north. Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 211.

started to change by a great number of Turks coming from the continent to settle on the island. Major natural resources of the island are situated in the occupied northern part.

Turkey obviously violated the most important principles of International Law and the Charter of the United Nations. Turks accounted for that act in the way that the Turkish minority in Cyprus feared that if Turkish troops left Cyprus, Greek authorities in Cyprus would make all Turks leave the island⁵³. Turkey justified that action by Article 4 of the Treaty of Guarantee and believed it was the Treaty providing it with the right to invade and protect the Turkish Cypriot population⁵⁴. The Security Council responded to the invasion on the very same day by adopting Resolution 353 (1974) calling upon “all states to respect the sovereignty, independence and territorial integrity of Cyprus”⁵⁵. By that Resolution the Security Council invoked a ceasefire and insisted on “an immediate end to foreign military intervention”. The Turkish army was demanded to complete “the withdrawal without delay”, and only military personnel present on Cyprus under international agreements was allowed to stay on the island. At the end of July 1974, Britain, Greece and Turkey started negotiations to resolve that new crisis⁵⁶. Meanwhile, truces were declared and ceasefires were systematically violated.

Security Council Resolution 354⁵⁷ invokes immediate compliance with Security Council Resolution 353⁵⁸. Security Council Resolutions 353, 354, 357⁵⁹ and 358⁶⁰ (1974) call for cessation of hostilities and ceasefire. Security Council Resolution 359⁶¹ discusses casualties in the UNFICYP. In Resolution 360⁶² the Security Council expresses “its formal disapproval of the unilateral military actions” undertaken by Turkey against Cyprus. By the same Resolution, the Security Council invokes compliance with previous Resolutions of the Security Council that place special emphasis on the importance of compliance with those resolutions stressing the withdrawal without delay of foreign military personnel (except those present under international agreements). Security

⁵³ *Ibidem*, p. 220.

⁵⁴ Rossides, op. cit., p. 24. and Palmer, Suzanne: The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?, *Boston University International Law Journal*, Volume 4, Number 2, Summer 1986, p. 438.

⁵⁵ United Nations Security Council Resolution 353 (1974), 20 July 1974.

⁵⁶ For more details see Rossides, op. cit., p. 25. and further.

⁵⁷ United Nations Security Council Resolution 354 (1974), 23 July 1974.

⁵⁸ Security Council Resolution 353 (1974), loc. cit., see note 55.

⁵⁹ United Nations Security Council Resolution 357, 14 August 1974.

⁶⁰ United Nations Security Council Resolution 358, 15 August 1974.

⁶¹ United Nations Security Council Resolution 359, 15 August 1974.

⁶² United Nations Security Council Resolution 360, 16 August 1974.

Council Resolution 361⁶³ deals with refugees and their right to return to their homes peacefully. Finally, the last resolution on Cyprus in the Security Council in 1974 was Resolution 365⁶⁴. That Resolution urged the parties concerned to implement as soon as possible General Assembly Resolution 3212 on the “Question of Cyprus”. General Assembly Resolution 3212, *inter alia*, “calls upon all states to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus” and “urges the speedy withdrawal of all foreign armed forces and foreign military presence and personnel from the Republic of Cyprus and the cessation of all foreign interference in its affairs”⁶⁵. Turkey failed to comply with these United Nations Security Council and General Assembly resolutions⁶⁶.

On 14 August 1974, Turkey broke off the negotiations unilaterally and launched a second, more massive attack on Cyprus and occupied over 37% of Cyprus, including 70% of its economic resources⁶⁷. The invasion forcibly displaced from 180,000 to some claimed 200,000 Greek Cypriots from their homes and properties, rendering many Cypriots destitute refugees and it left several thousand dead and missing⁶⁸. Approximately 1,500 Greek Cypriots and 500 Turkish Cypriots remain officially registered as missing⁶⁹. The Security Council responded again and adopted a new Resolution calling for a ceasefire⁷⁰. By that Resolution the Security Council also stressed “its formal disapproval of the unilateral military actions undertaken” by Turkey against Cyprus and urged compliance with its previous resolutions⁷¹.

Since a pro-Greek coup d'état failed due to Turkish invasion of Cyprus, Makarios returned to Cyprus and took over as president. Since the fighting of 1974 both sides have attempted, with the help of their motherlands, to maximise their political rights over each other and minimise involvement of the opposing side's motherland⁷². From that period to the present day, *the northern third of the island of Cyprus* is entirely occupied by Turkey. Turkish Cypriots are convinced that in case the Turkish army leaves Cyprus Greek authorities in Cyprus will

⁶³ United Nations Security Council Resolution 361, 30 August 1974.

⁶⁴ United Nations Security Council Resolution 365, 13 December 1974.

⁶⁵ United Nations General Assembly Resolution 3212 (XXIX), 1 November 1974.

⁶⁶ Rossides, *op. cit.*, p. 54.

⁶⁷ *Ibidem*, p. 26. and Jacovides, Andreas J.: Cyprus – The International Law Dimension, *The American University Journal of International Law and Policy*, Volume 10, Number 4, Summer 1995, p. 1225.

⁶⁸ Jacovides, *op. cit.*, p. 1225. and N.Y. Times, August 15, 1974. Cited according to Rossides, *op. cit.*, p. 26.

⁶⁹ *Rainsford, Sarah*: Bones of Cyprus missing unearthed, BBC News website <<http://news.bbc.co.uk/2/hi/europe/6166560.stm>>.

⁷⁰ Security Council Resolution 357 (1974), *loc. cit.*, see note 59.

⁷¹ *Ibidem*.

⁷² Richmond, *op. cit.*, p. xv.

displace all Turks from the island⁷³. A demarcation line established after the Turkish invasion of Cyprus in 1974 has not changed to the present day. United Nations forces control the ceasefire line (or the so-called Green Line) between the two communities.

IV. Declaration of the independence of the Turkish Republic of Northern Cyprus (1983)

On 13 February 1975 Turkish Cypriots proclaimed, as transitional measures, a semi-dependent Turkish Federative State of Cyprus. In June 1975 they enacted the Constitution confirmed by the referendum held in the Turkish part of Cyprus with 99.4% of votes cast in its approval⁷⁴. Following eight years of unsuccessful negotiations, on 15 November 1983 the Legislative Assembly of the Turkish Federative State of Cyprus, referring to the exercise of the right to self-determination, proclaimed the Turkish Republic of Northern Cyprus by the unanimous vote⁷⁵. By that Declaration the Turkish part of Cyprus seceded from the Republic of Cyprus.

Since 1983 two autonomous administrations, one *de facto* and one *de jure*, have existed on the island⁷⁶. The unilateral Declaration was rejected by the Republic of Cyprus, the United Nations and the international community in general. The TRNC has been recognised only by Turkey⁷⁷. In relation to this issue, the Security Council passed two important Resolutions in 1983. In the first, Resolution 541 the Security Council stated that “the attempt to create a Turkish Republic of Northern Cyprus is invalid”, and therefore the Council called “for its withdrawal”⁷⁸. According to the Security Council, the establishment of the TRNC violates provisions of the 1960 Treaty that prohibited secession of either part of Cyprus. Therefore, the Security Council considered the declaration of independence by the TRNC legally invalid.

⁷³ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 220.

⁷⁴ For more details regarding the TRNC Constitution see Necatigil, Zaim M.: *The Cyprus Question and the Turkish Position in International Law*, Revised Second Edition, Oxford University Press, 2001, pp. 296-310.

⁷⁵ See Necatigil, op. cit., pp. 184-205, Musgrave, op. cit., p. 227 and Shaw, op. cit., pp. 166-167. See also official websites of the Turkish Republic of Northern Cyprus <<http://www.trncwashdc.org>>.

⁷⁶ Çarkoglu A. and Sözen A.: The Turkish Cypriot General Elections of December 2003, Setting the Stage for the Cyprus Conflict?, *South European Society & Politics*, Vol. 9, No. 3, p. 124, cited according to Arslan, Kaya and Güven, Halil: *International Law in Cyprus Problem*, Presented at the 38 International Congress of Asian and North African Studies, ICANAS 38, 10-15 September, 2007, Ankara, Turkey, p. 5.

⁷⁷ See Wippman, op. cit., p. 147.

⁷⁸ United Nations Security Council Resolution 541 (1983), 18 November 1983.

In the second, Resolution 550 the Security Council expressed that it was “gravely concerned” about “the further secessionist acts in the occupied part of the Republic of Cyprus”⁷⁹. The Security Council again called upon all states not to recognise the TRNC. The Security Council expressed their special concern about “the purported exchange of ambassadors between Turkey and the legally invalid Turkish Republic of Northern Cyprus”. They also condemned “the contemplated holding of a constitutional referendum and elections”. By Resolution 550 the Security Council called upon all states “to respect the sovereignty, independence, territorial integrity, unity and non-alignment of the Republic of Cyprus”. On the basis of those Resolutions it was clear that proclamation of an independent state in the northern part of Cyprus was contrary to International Law and as such illegal. Pro-Turkish authors consider that the Turkish Cypriot community, exercising its right to self-determination and sovereignty, has evolved administratively into a *de facto*, independent, democratic entity⁸⁰.

Turkish Cypriots suffered severe economic consequences because of the isolation and exclusion⁸¹. Since no *state except for Turkey recognises the TRNC*⁸², this political formation remained outside international developments and it does not participate in the international processes at all, especially from the economic point of view. Hence it is entirely dependent on Turkey. While Turkish Cypriots are economically weak and dependent on Turkey, their southern neighbours, Greek Cypriots, have made economic prosperity.

V. United Nations Peacemaking in Cyprus

As can be seen, the United Nations played an active role in resolving the Cyprus crisis. A number of resolutions and recommendations were passed. These resolutions systematically called upon all states to respect sovereignty, independence and territorial integrity of Cyprus, whose sovereignty was violated and endangered by the Turkish invasion of Cyprus. The Security Council and the General Assembly expressed their deep concern about the continuation of violence and bloodshed in Cyprus. They also called for the immediate cessation of military intervention on the island and demanded a withdrawal of Turkish military troops from Cyprus. It was stressed that all the refugees should return to their homes in safety. In spite of repeated calls of the Security Council and

⁷⁹ United Nations Security Council Resolution 550 (1984), 11 May 1984.

⁸⁰ Arslan and Güven, *op. cit.*, p. 5.

⁸¹ *Ibidem*.

⁸² More details on the Turkish interpretation of non-recognition of the TRNC by other states can be found in Necatigil, *op. cit.*, pp. 310-331.

the General Assembly⁸³ for withdrawal of Turkish forces from the island, the situation has not changed to the present day. Turkish-Cypriot leader Rauf Denktash stated several times that the two communities could not live together and that only two separate states on the island were the solution to the crisis in Cyprus⁸⁴.

United Nations Peacekeeping Force in Cyprus (UNFICYP)⁸⁵ was established in 1964 which makes it one of the longest-running UN Peacekeeping *missions* ever⁸⁶. Based upon the demand for urgent action that was put forward by representatives of Great Britain and Cyprus, on 4 March 1964 the Security Council unanimously adopted the aforementioned Resolution 186 (1964)⁸⁷, by which it noted that the situation in Cyprus was likely to threaten international peace and security, and recommended the creation of a United Nations Peacekeeping Force in Cyprus (UNFICYP), with the consent of the government of Cyprus. As for the force, the Council said its composition and size were to be established by the then Secretary-General U Thant, in consultation with the Governments of Cyprus, Greece, Turkey and Great Britain. Under Resolution 186 (1964), the Secretary-General was obliged to report periodically to the Security Council on its operation. According to Resolution 186 (1964), the *function* entrusted to *UNFICYP* was to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions. In the same Resolution the Security Council recommended the designation of a mediator to promote a peaceful solution and an agreed settlement of the Cyprus problem.

⁸³ In this historical context it should be mentioned that the United Nations General Assembly adopted the following resolutions on Cyprus: Resolution 3212 (XXIX), 1 November 1974, loc. cit., see note 65; Resolution 3395 (XXX), 20 November 1975; Resolution 3450 (XXX), 9 December 1975; Resolution 32/128, 16 December 1977, A/RES/32/128; Resolution 33/15, 9 November 1978, A/RES/33/15; Resolution 33/172, 20 December 1978, A/RES/33/172; Resolution 34/30, 20 November 1979, A/RES/34/30; Resolution 36/164, 16 December 1981, A/RES/36/164; Resolution 37/181, 17 December 1982, A/RES/37/181; Resolution 37/253, 13 May 1983, A/RES/37/253.

⁸⁴ See the official BBC website, World News, "Cyprus: Divided for 25 years", July 18 1999, <http://news.bbc.co.uk/1/hi/english/world/europe/newsid_397000/397652.stm>. See also Meier, Benjamin M.: Reunification of Cyprus: The Possibility of Peace in the Wake of Past Failure, *Cornell International Law Journal*, Volume 34, Number 2, 2001, pp. 455-481.

⁸⁵ See the official United Nations website <<http://www.un.org/Depts/dpko/missions/unficycp/>>, and the official UNFICYP website <<http://www.unficycp.org>>.

⁸⁶ Of all ongoing peacekeeping operations, only UNTSO (United Nations Truce Supervision Organization) in Palestine and UNMOGIP (United Nations Military Observer Group in India and Pakistan) in the region of India and Pakistan last longer than UNFICYP. UNTSO was set up in 1948 and UNMOGIP in 1949. See the official United Nations website <<http://www.un.org/Depts/dpko/dpko/bnote.htm>>.

⁸⁷ Security Council Resolution 186 (1964), loc. cit., see note 41.

At the request of the representative of Cyprus, the Security Council held an emergency meeting on 13 March and adopted also aforementioned Resolution 187 (1964)⁸⁸. The resolution noted the Secretary-General's assurances that the force was about to be established, called on member states to refrain from action or threats likely to worsen the situation in Cyprus or endanger international peace, and requested the Secretary-General to press on with his efforts to implement Resolution 186 (1964). The peacekeeping force became established operationally on 27 March 1964, when sufficient troops were available to it in Cyprus to enable it to discharge its functions. By 8 June 1964, the force had reached the strength of 6,411⁸⁹. UNFICYP troops were positioned mainly along the length of the "green line" as interposition of forces that would, in case of any confrontation between the warring parties, reduce tension and prevent further escalation of the conflict in the most effective way possible. The consolidation of the security situation that was achieved by the beginning of 1965 made a gradual reduction of the strength of UNFICYP possible. From a total of 6,275 in December 1964, the force was gradually reduced by half by the spring of 1974⁹⁰. UNFICYP played a very important role in the events in the summer of 1974 aimed at preventing further armed conflicts. Because of the suffering caused by the hostilities, UNFICYP undertook an increasing number of humanitarian tasks to assist the afflicted population of both communities.⁹¹

UNFICYP has maintained the status quo to the present day. The Security Council has routinely extended the UNFICYP mandate every six months⁹². The United Nations buffer zone in Cyprus between the two warring parties runs for approximately 180 km along the island and the width of the zone ranges from 20 m at some points to some 7 km, covering about 3% of the island⁹³. Peacekeepers are only allowed to employ their weapons for self-defence. UNFICYP *operates in Cyprus* with the consent and *cooperation* of the Turkish *Cypriot* and the Greek *Cypriot* sides and have complete freedom of movement.

In 1980s and 1990s, due to the deteriorating financial situation of the force and the lack of progress towards a lasting political solution to the Cyprus

⁸⁸ Security Council Resolution 187 (1964), loc. cit., see note 45.

⁸⁹ The official UNFICYP website

<http://www.unficy.org/nqcontent.cfm?a_id=1354&tt=graphic&lang=11>.

⁹⁰ See the official UNFICYP website

<http://www.unficy.org/nqcontent.cfm?a_id=1491&tt=graphic&lang=11>.

⁹¹ The official UNFICYP website

<http://www.unficy.org/nqcontent.cfm?a_id=1599&tt=graphic&lang=11>

⁹² The list of Security Council resolutions which extended the UNFICYP mandate in the last ten years available on the official website of the United Nations

<<http://www.un.org/Depts/dpko/missions/unficy/unficy Drs.htm>>.

⁹³ The official UNFICYP website

<http://www.unficy.org/nqcontent.cfm?a_id=1605&tt=graphic&lang=11>.

problem, a number of troop-contributing governments decided to withdraw their contingents. In March 1996, the total strength of UNFICYP was about 1,200⁹⁴. Following the adoption of UN Security Council Resolution 1568 (2004)⁹⁵, UNFICYP military reduced its presence to 860 troops and placed emphasis on liaison and mediation rather than interposition of forces. The UN Security Council adopted Resolution 1847 (2008) of 12 December 2008⁹⁶ extending the UNFICYP mandate until 15 June 2009.

VI. Implementation of International Law in the case of Cyprus

The consequence of irredentist aspirations of Greek Cypriots, dating back to the 19th century, was the Turkish Cypriot aspiration of secession, and both communities called upon their right to self-determination⁹⁷. According to Greek-Cypriot understanding, self-determination should be achieved by a referendum which shows what the majority of the population wants. Greeks interpreted unification with Greece as a consequence of the right to self-determination by which the people could choose between independence and “*annexation to other state*”⁹⁸. Nevertheless, Turkish Cypriots believe that they have a separate right to self-determination based upon the fact that they constitute a separate ethnic group characterised by common tradition, language, religion and political aspirations. Furthermore, Turkish Cypriots believe that they cannot preserve their community in the present state⁹⁹. Although there are much less Turkish Cypriots than Greek Cypriots, Turkish Cypriots consider themselves a people not a minority, and as such they have the right to self-determination. With

⁹⁴ The official UNFICYP website

<http://www.unficy.org/nqcontent.cfm?a_id=1607&tt=graphic&lang=11>.

⁹⁵ United Nations Security Council Resolution 1568 (2004), 22 October 2004, S/RES/1568 (2004).

⁹⁶ United Nations Security Council Resolution 1847 (2008), 12 December 2008, S/RES/1847 (2008).

⁹⁷ Musgrave, op. cit., p. 227. For more details concerning the relationship between the two communities see *World Directory of Minorities*, Minority Rights Group, Longman Group, St. James Press, Chicago, 1991, pp. 188-190.

⁹⁸ Greek Cypriots believe that Turkish Cypriots are not entitled to the right to self-determination since they are just an ethnic minority. In December 1983 the Greek Cypriot Permanent Representative to the UN expressed his attitude saying that Turkish Cypriots are not entitled to the right to self-determination. He referred to the Declaration on decolonisation (1960) by which self-determination is exercised by the people as a whole, and not based upon different religious or ethnic criteria. If the right to self-determination was exercised by every ethnic group within the state, it would lead to the “*breakdown of every state and nation in the world, including Turkey*”. Musgrave, op. cit., p. 228.

⁹⁹ Since in 1963 the pro-Greek government did not provide for representation of the Turkish people in the government, Turkish Cypriots believe they are entitled to the right to secede under Article 7 of Resolution 2625 (XXV). According to them, the TRNC Constitution represents the exercise of the right to self-determination. *Ibidem*.

respect to Turkish invasion of Cyprus in 1974, the Turkish side would justify their actions in Cyprus stating that they “did not start the Cyprus conflict”, and that all Turkish Cypriots “have been deprived of their rights since 1964”, that they are “subjected to discrimination, suffered from ethnic cleansing in the hands of Greek Cypriots from 1963-74”, and “kept in isolation”¹⁰⁰. On the other hand, Greek Cypriots would say that Turkey is responsible for aggression, invasion, occupation and massive violation of human rights on Cyprus. In their opinion, the Cyprus problem involves “the illegal invasion and occupation of a small country by a far larger and militarily much stronger neighbour”, the systematic destruction of the cultural heritage and ethnic cleansing on a massive scale with the forced displacement of all Greek Cypriots of the area under Turkish occupation¹⁰¹. A double standard has been applied in Turkey’s favour in the name of alleged strategic value, as in Rossides¹⁰². Because, removals of Soviet troops from Afghanistan, Cuban troops from Angola, Vietnamese troops from Cambodia and Iraqi soldiers from Kuwait took place, but Turkish soldiers have not been withdrawn from Cyprus.

The United Nations responded in the case of Cyprus in line with the UN mission “to maintain international peace and security” (Article 1, paragraph 1 of the Charter of the United Nations), and definitely in the case of Cyprus there was a breach of the peace. Use of force by one state (Turkey) against another state (Cyprus) is explicitly forbidden by International Law. Under Article 3, paragraphs 3 and 4 of the Charter, all states shall resolve their international disputes by peaceful means. All states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”. Turkey did not resolve the dispute peacefully, but contrary to the provisions of International Law, it used force. Under Article 51 of the UN Charter every member state has the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken “measures necessary to maintain international peace and security”. Although Turkey tried to justify its invasion of Cyprus by calling upon the provision under Article 51 of the UN Charter, that argument could not have been accepted. Namely, Turkey itself was neither attacked nor threatened by anyone. By calling upon protection of minority rights (Turkish minority on Cyprus), Turkey abused the norms of International Law and launched aggression against the neighbouring state.

¹⁰⁰ Arslan and Güven, *op. cit.*, p. 7.

¹⁰¹ Jacovides, *op. cit.*, p. 1222.

¹⁰² For more details see Rossides, *op. cit.*, pp. 79-81.

Turkey has stated it had the right to invade and intervene in Cyprus under article 4 of the Treaty of Guarantee¹⁰³: “In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representation or measures necessary to ensure observance of those provisions. Insofar as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty”¹⁰⁴. After the Turkish invasion of 1974 various legal interpretations of that item of the Treaty have been distinguished. Generally, all provisions of any treaty that would be in conflict with the Charter of the United Nations became null and void, including the provisions of the London-Zurich Agreements¹⁰⁵. Let us recall that Turkish understanding of Article 4 conflicts with *ius cogens* norms prohibiting forcible interference with the restrictions on force enshrined in Article 2 (4) of the UN Charter¹⁰⁶. But, the London-Zurich Agreements did not authorise Turkey to invade Cyprus. In this disputable article 4 it cannot be seen anywhere that a unilateral right to the use of force without prior authorisation of the Security Council¹⁰⁷ is permitted. That article neither implies the use of “military force” when it refers to “action”, not mentions the word “force” anywhere in the Treaty¹⁰⁸. Article 51 of the UN Charter gives the right to the use of force only in terms of self-defence. But, Turkey was neither attacked nor threatened by such an attack, which means that Turkey severely violated International Law.

As a consequence of the conflict between Greeks and Turks, Greek Cypriot cultural heritage and religious places were considerably damaged or completely destroyed in the northern part of the island. Though, one of the most tragic consequences of the Turkish invasion of Cyprus is the unknown fate of missing persons: the Cypriot government identified 1,614 missing Greek Cypriots and five missing American citizens of Greek Cypriot descent¹⁰⁹. The United Nations passed several resolutions on the issue of missing persons and set up a Committee on Missing Persons that was to investigate the situation on the field, but Turkey

¹⁰³ Legal interpretation of the Treaty of Guarantee by the Turkish side is available in Necatigil, *op. cit.*, pp. 108-133.

¹⁰⁴ Cited according to Rossides, *op. cit.*, p. 56. Also, although Turkey apparently consulted with Britain, Turkey did not consult with Greece and therefore did not meet the requirements of Article 4. Taylor G. Belcher, former United States Ambassador to Cyprus. Cited according to *ibidem*, p. 59.

¹⁰⁵ See Article 103 of the UN Charter.

¹⁰⁶ Wippman, *op. cit.*, p. 148.

¹⁰⁷ See *ibidem*, pp. 153-155.

¹⁰⁸ Rossides, *op. cit.*, p. 56.

¹⁰⁹ *Ibidem*, p. 54.

failed to comply with those resolutions¹¹⁰. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, in article 49 prohibits colonisation by an occupying power¹¹¹. Article 49 states in its last paragraph: “The Occupying Power shall not deport or transfer part of its own civilian population into the territory it occupies”.

Despite the lack of consensus on the exact figures, it is estimated that by the year 2003 there were 115,000 Turkish settlers in Northern Cyprus¹¹², and by 2009 that number has undoubtedly increased by several thousands. These Turkish settlers illegally brought by *Turkey* to the occupied areas represent a serious stumbling block to resolving the future of the Cyprus problem. A massive settlement of Turkish settlers is a problem not only to Greek Cypriots, but also to indigenous Turkish Cypriots, whose animosity towards the dominant newcomers from Turkish mainland with whom they share no points of contact other than religion is on the increase. Turkish Cypriots and Turks from Turkey differ significantly as to culture and tradition, and with respect to a rather small number of Turkish Cypriots in comparison with those from mainland, there is a real danger of extermination directed toward their specific cultural heritage. E.g., one of the Turkish Cypriot opposition party leaders Ozgur warned in 1983 that if settlement of Turks from the continental part of Turkey continues at the same rate, the Turkish Cypriots would become a minority in the north of Cyprus¹¹³. The Parliamentary Assembly of the Council of Europe expressed its concern about the continuous outflow of the indigenous Turkish Cypriot population from the northern part of the island. Their number decreased from 118,000 in 1974 to an estimated 87.600 in 2001. In consequence, what is alarming is the information that the settlers outnumber the indigenous Turkish Cypriot population in the northern part¹¹⁴. The question remains open as to what would happen with

¹¹⁰ See *ibidem*, p. 54.-55. General Assembly Resolution 3450 (XXX), 9 December 1975, loc. cit., see note 83, and General Assembly Resolution 37/181, 17 December 1982, see note 83.

¹¹¹ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 49, Official Gazette – International Treaties of the Republic of Croatia, No. 5/1994.

¹¹² Colonisation by Turkish settlers of the occupied part of Cyprus, Parliamentary Assembly, Council of Europe, Recommendation 1608 (2003), 24 June 2003, paragraph 2.

¹¹³ In a speech in Nicosia on April 14, 1989 Ozker Ozgur accused the Denktash regime and the Ozal government in Turkey of cooperating in turning the north of Cyprus into a Turkish province. Ozgur stated that from 1974 to 1989 around 30,000 Turkish Cypriots had emigrated. “We are against the use of the workers and peasants from Turkey for the destruction of the identity of the Turkish Cypriots and in rendering the Turkish Cypriots ineffective as a communal entity. We must tell the Turkish workers that the Denktash regime sees them as cheap labour and vote for their own selfish interests”. It proves that the Turkish Cypriots are also victims of Turkey’s actions in Cyprus. Rossides, *op. cit.*, pp. 84-85.

¹¹⁴ The Assembly cannot accept the claims that the majority of arriving Turkish nationals are “seasonal workers or former inhabitants who had left the island before 1974”. Therefore it condemns the

those new settlers in the northern part of Cyprus in case of a possible future reunification of the island. Many of these settlers started their families and have children born and brought up in Cyprus. There are doubts about whether they would agree to return to Turkey after years or decades of living in the northern part of Cyprus.

Communication between the Turkish and the Greek part of Cyprus was impossible by the year 2003. Since 2003 it is possible to cross the border at designated points on a daily basis. Some border control points allow pedestrians only, whereas the others allow vehicles as well. Nevertheless, freedom of movement and settlement has been systematically and heavily violated.

The TRNC was set up in violation of International Law, by the Turkish invasion of Cyprus, and it is not independent. It was an invasion, a foreign intervention in internal affairs of one state and occupation of one third of the territory. Pursuant to the norms of International Law, the United Nations does not allow either unification of the Greek Cypriots with Greece or formation of the Turkish Cypriot state¹¹⁵. To this day, the international community does not recognise that “state”. It is recognised only by Turkey which did that on the day following the declaration of independence¹¹⁶. Since the territory depends heavily on Turkey, it cannot be considered modern and independent state, but it remains a *de facto* entity within the internationally recognised Republic of Cyprus¹¹⁷. The United Nations failed in its long-term efforts to provide for a withdrawal of all foreign military troops from Cyprus in order to preserve sovereignty and independence of the central Cypriot authorities. Except for Turkey, the

policy of “naturalisation” designed to encourage new arrivals which was introduced by the Turkish Cypriot administration with the full support of the Turkey. Colonisation by Turkish settlers of the occupied part of Cyprus, Parliamentary Assembly, Council of Europe, Recommendation 1608 (2003), 24 June 2003, paragraphs 4 and 5.

¹¹⁵ Musgrave, op. cit., p. 229. See also Jacovides, op. cit., pp. 1221-1233, Kliot, Nurit and Mansfeld, Yoel: Resettling Displaced People in North and South Cyprus: A Comparison, *Journal of Refugee Studies*, Volume 7, Number 4, 1994, pp. 328-360, Nedjati, Zaim and Leathes, Geraint: Study of the Constitution of the Turkish Federated State of Cyprus, *Anglo-American Law Review*, Volume 5, Issue 1, 1976, pp. 67-93, Blay, S. K. N.: Self-Determination in Cyprus: The New Dimensions of an Old Conflict, *Australian Year Book of International Law*, Volume 10, 1981-1983, pp. 67-101, Evriviades, Marios L.: Legal Dimension of the Cyprus Conflict, *Texas International Law Journal*, Volume 10, Number 2, Spring 1975, pp. 227-265 and Wippman, op. cit., pp. 141-181.

¹¹⁶ A constitution for the TRNC was adopted and approved in a referendum held in May 1985. Nearly 70% of voters voted in favour of the constitution. Musgrave, op. cit., p. 227. See also Palmer, op. cit., pp. 423-451.

¹¹⁷ Shaw, Malcolm N.: *International Law*, A Grotius Publication, Cambridge University Press, 1997, p. 167.

international community and the United Nations agree that the central Cypriot authorities in the Greek part are the only legitimate authorities on Cyprus¹¹⁸.

VII. Problems related to entrance of Cyprus into the European Union

As previously seen, since 1963 the United Nations has played a key role in resolving the Cyprus problem. Until the beginning of a new millennium these efforts of the United Nations did not fall on fertile ground, primarily due to obstinate standpoints of the Turkish Cypriots who wanted to achieve complete independence¹¹⁹. However, at the beginning of the year 2000, on the eve of the accession of the Republic of Cyprus to the European Union a significant number of the Turkish Cypriots was intrigued by the idea of the entrance into the European Union after an age-long international isolation. That seemed to be the right moment for reunification of Cyprus¹²⁰. The then United Nations Secretary-General Kofi Annan stated later on: "The European Union factor in particular offered a framework of incentives to reach a settlement as well as deadlines within which to reach it."¹²¹ In what follows, we will give a brief overview of the 2002-2004 negotiations which, with respect to the reunification, failed to make substantive progress, but they were used as a sound basis for a new round of negotiations on the reunification that commenced in 2008.

The Republic of Cyprus applied for EU membership in the early 1990s, and its application was registered as valid in 1995. The leadership of the Republic of Cyprus invited the Turkish Cypriot community to join the Cypriot negotiating team as full members, but the Turkish Cypriot leadership rejected the invitation and continued advocating their standpoint according to which the two communities cannot live together in the same state¹²². At the Helsinki Summit held in 1999 the European Council adopted the viewpoint according to which the solution to the Cyprus problem is not a condition for the accession of the Republic of Cyprus to the European Union, but both sides were invited to resolve the dispute so that the island as a whole could enter into that organisation¹²³. In an

¹¹⁸ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 219.

¹¹⁹ Vassiliou, George: Cypriot accession to the EU and the solution to the Cyprus problem, *Brown Journal of World Affairs*, Volume X, Issue 1, Summer/Fall 2003, p. 213.

¹²⁰ See Atasoy, Seymen: Cyprus, Turkey, and the EU: The Need for a Gradual Approach, *ibidem*, p. 259.

¹²¹ Report of the Secretary-General on his mission of good offices in Cyprus, 1 April 2003, S/2003/398.

¹²² Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 221.

¹²³ See Atasoy, op. cit., p. 259. and Barkey, Henry J.: Cyprus: Between Ankara and a hard place, *Brown Journal of World Affairs*, Volume X, Issue 1, Summer/Fall 2003, p. 230.

attempt to secure an agreement the Council set the deadline for the Copenhagen Summit scheduled for December 2002, which would decide on the accession of the Republic of Cyprus to the EU in 2004¹²⁴. At the beginning of the year 2002, the leadership of the Turkish Republic of Northern Cyprus, headed by President Rauf Denktash, after initial opposition, consented to negotiations under the auspices of the United Nations. However, as the year passed by, it was clear that the progress of negotiations was too slow, and that the two parties would not manage to reach an agreement within the given deadline¹²⁵. On 11 November 2002 Kofi Annan presented his plan for Cyprus reunification – *The Comprehensive Settlement of the Cyprus Problem*, known as *The Annan plan*¹²⁶, that will be discussed in the next chapter.

The Annan plan was revised on the eve of the Copenhagen Summit, mainly because of objections raised by the Turkish Cypriot leadership, but the deadline for securing an agreement was postponed to 28 February 2003¹²⁷. Since the deadline passed and no agreement was reached, so that the Secretary-General asked to meet with the leaders of the two communities before signing the EU Treaty of Accession planned for 16 April 2003. The meeting was held at The Hague on 10 and 11 March 2003, but it also ended up as a failure¹²⁸. In his report of April 2003 to the Security Council Annan stated that during negotiations the Turkish Cypriot leadership headed by President Glafcos Clerides and his successor Tassos Papadopoulos (as of February 2003) was more flexible and open to securing an agreement than the Turkish Cypriot leadership headed by President Denktash¹²⁹.

In February 2004, on the eve of the accession of the Republic of Cyprus to the European Union, leaderships of the two communities agreed to an additional round of negotiations under the auspices of the United Nations and on the foundations of the Annan plan. Fearing that an agreement would not be ensured, Annan managed to make both sides give their consent to put the Plan to a referendum. The text of the Annan plan was finally presented on the referendum that was held on 24 April 2004 both in the Greek and in the Turkish

¹²⁴ *Ibidem*.

¹²⁵ See *ibidem*, pp. 230-231.

¹²⁶ The Comprehensive Settlement of the Cyprus Problem (The Annan plan), full text of the final version of 31 March 2004 is available at the official website of the United Nations Peacekeeping Force in Cyprus (UNFICYP)

<<http://www.unficy.org/media/Other%20official%20documents/annanplan.pdf>>.

¹²⁷ Barkey, op. cit., pp. 231-232.

¹²⁸ *Ibidem*, p. 232.

¹²⁹ Atasoy, op. cit., p. 260.

part of the island¹³⁰. This double referendum marked “the reversal of historical roles between Greek Cypriots and Turkish Cypriots”¹³¹. Namely, Turkish Cypriots supported the Annan plan and a joint entrance into the European Union, but this time unification was halted by Greek Cypriots, the vast majority of whom voted against the entrance of the Turkish part of the island into the Union¹³². On 1 May 2004 the Republic of Cyprus became a new member of the European Union without the northern part of the island.

Although after accession of the southern part of the island to the European Union it seemed that a historic opportunity for the reunification of Cyprus was missed, recent developments reflect considerable optimism. Currently, both communities are headed by politicians that are more moderate than their predecessors. In April 2005 Rauf Denktash was succeeded by Mehmet Ali Talat at the head of Turkish Cypriots. During his 30-year period of Turkish Cypriot leadership, Denktash was known for his hard-line secessionist policy and resistance to reunification. On the other hand, Talat is a fervent advocate of reunification who was dedicated to revitalisation of negotiations and suspension of international isolation of the northern Cyprus¹³³. On 4 July 2006 the United Nations set up a meeting between the two leaders, Ali Talat and Papadopolous, in which they obliged with a number of bilateral talks referring mainly to some technical, but also political issues. However, it was obvious that the lack of political agreement represented a major obstacle to serious negotiations¹³⁴. After winning the elections in February 2008, Papadopolous was replaced by Demetris Christofias, a left-wing politician who strongly argues in favour of reunification of Cyprus, so that the situation has changed significantly. In March 2008 the two Presidents agreed to reopen formal negotiations on reunification of Cyprus. Opening of a crossing at Ledra Street in Nicosia in April 2008 was as a sign of good will before resuming talks on reunifying the island. Ledra Street, the main artery road of the city, was *divided by a cease-fire line*, known as the *Green Line*,

¹³⁰ Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, op. cit., p. 217.

¹³¹ Turk, A. Marco: Rethinking the Cyprus Problem: Are Frame-breaking Changes Still Possible Through Application of Intractable Conflict Intervention Approaches to This «Hurting Stalemate», *Loyola of Los Angeles International and Comparative Law Review*, Volume 29, Number 3, Summer 2007, pp. 463-501, p. 465.

¹³² See the BBC News website: Country profile: Cyprus, <http://news.bbc.co.uk/2/hi/europe/country_profiles/1016541.stm>, and Analysis: Cyprus result adds to EU woes, by Gerald Butt, <<http://news.bbc.co.uk/2/hi/europe/3656553.stm>>.

¹³³ The BBC News website: Country profile: Cyprus, <http://news.bbc.co.uk/2/hi/europe/country_profiles/1016541.stm>.

¹³⁴ The BBC News website: Q&A: Cyprus peace process, <<http://news.bbc.co.uk/2/hi/europe/2839603.stm>>.

since 1964 thus becoming the symbol of the divided Cyprus¹³⁵. Intensive talks between Ali Talat and Christofias commenced in September 2008 with a view to find a final solution to the question of Cyprus¹³⁶. A new round of negotiations was also welcomed by the Security Council by the said Resolution 1847 (2008) of 12 December 2008¹³⁷.

VIII. Proposals for a solution to the Cyprus problem

In addition to the United Nations working on the problem in the last forty years, a number of proposals for a solution to the Cyprus problem have come, inter alia, from the three guarantor powers (Greece, Turkey and Great Britain), NATO, the USA, Canada and the then USSR¹³⁸. Those proposals basically fall into four categories: a) *partition* – splitting of the island in two autonomous and independent states, b) *enosis* – annexation of the island to Greece, c) *double enosis* – annexation of the southern and the northern part of the island to Greece and Turkey, respectively, and d) reunification of the island on a federal, confederal or some other principle¹³⁹.

One of the most known proposals is the one that was submitted in 1965 by Galo Plaza Lasso, the United Nations mediator on Cyprus and ex-President of Ecuador¹⁴⁰. Plaza Lasso put forward a proposal as to creation of an independent, sovereign and demilitarised state in Cyprus with a single constitution.¹⁴¹ As a minority in comparison to Greek Cypriots, Turkish Cypriots would be protected under a general system of human rights protection¹⁴². Plaza Lasso believed that a system based upon the 1960 Accords or some other similar system separating the two communities by giving them special rights, would influence alienation of communities on a long-term basis, which, in his opinion, would be fatal to successful functioning of a common state¹⁴³. Turkey thought that Plaza Lasso's

¹³⁵ See the BBC News website: Symbolic Cyprus crossing reopens, <<http://news.bbc.co.uk/2/hi/europe/7327866.stm>>, and Symbolic Nicosia wall falls down, by Tabitha Morgan, <<http://news.bbc.co.uk/2/hi/europe/6434919.stm>>.

¹³⁶ See the BBC News website: Cyprus peace back on the agenda, by Tabitha Morgan, <<http://news.bbc.co.uk/2/hi/europe/7308912.stm>>, Cyprus unity hopes rekindled, by Kirsty Hughes, <<http://news.bbc.co.uk/2/hi/europe/7444113.stm>>, and Cyprus rivals begin peace talks, <<http://news.bbc.co.uk/2/hi/europe/7595359.stm>>.

¹³⁷ United Nations Security Council Resolution 1847 (2008), 12 December 2008, loc. cit., see note 96.

¹³⁸ Wippman, op. cit., p. 165.

¹³⁹ *Ibidem*.

¹⁴⁰ Report of the United Nations Mediator on Cyprus to the Secretary-General, 26 March 1965, S/6253.

¹⁴¹ *Ibidem*, paragraph 147.

¹⁴² *Ibidem*, paragraph 159.

¹⁴³ *Ibidem*, paragraph 163.

proposal did not provide for enough protection of Turkish Cypriots, whereas Greece met the proposal with a reserve, primarily because it excluded the possibility of enosis¹⁴⁴. Plaza Lasso was aware of perspectives on such system in a state that was significantly influenced by the opposed foreign powers (Turkey and Greece) and with a history of interethnic conflicts, proposing therefore the United Nations to take over certain commitments becoming in that way guarantors of protection provided for Turkish Cypriots¹⁴⁵. Although that proposal for a solution to the Cyprus problem was found suitable by the prevailing attitude of the international community regarding the protection of human rights after World War II, according to which the emphasis was placed on the protection of individuals rather than groups, it simply did not correspond to the current political reality in Cyprus, which was the main reason why it was not adopted.

It was after 1974 and the *de facto* division of Cyprus into two zones, Greek-Cypriot and Turkish-Cypriot, the option of creating one Cypriot state on the federal (confederal) principle opened up. Namely, by that time Greek and Turkish Cypriots lived mingled on the whole island and at the time of signing the 1960 Accords it was not possible to create a federal (confederal) state¹⁴⁶. Since 1974 to the present day, federalism is a prevailing idea in considerations as to the future of Cyprus, which was especially advocated by the United Nations during a number of negotiations between the two warring parties that were held under UN auspices¹⁴⁷.

In 1989, following a series of negotiations and talks with the warring parties, the then Secretary-General Javier Perez de Cuellar completed a detailed draft called a *Set of Ideas on an Overall Framework Agreement on Cyprus*¹⁴⁸. The draft was based upon the idea that “Cyprus is the common home” of the two communities and that “their relationship is not one of majority and minority but one of two communities in the federal republic of Cyprus”¹⁴⁹. “Set of Ideas” was basically founded on creation of “a bizonal and bicomunal federation”¹⁵⁰, which makes it principally different from the 1960 one. Both of these attitudes are based upon division of powers between the two communities in a way that the Turkish Cypriot community as minority can veto some important decisions made by

¹⁴⁴ Wippman, op. cit., p. 168.

¹⁴⁵ Report of the United Nations Mediator on Cyprus to the Secretary-General, 26 March 1965, op. cit., paragraph 168.

¹⁴⁶ See Wippman, op. cit., p. 171.

¹⁴⁷ See *ibidem*, pp. 173-174.

¹⁴⁸ Set of Ideas on an Overall Framework Agreement on Cyprus, Annex to the Report of the Secretary-General on his Mission of Good Offices in Cyprus, 21 August 1992, S/24472. See Wippman, op. cit., pp. 173-174.

¹⁴⁹ Set of Ideas on an Overall Framework Agreement on Cyprus, op. cit., paragraph 3.

¹⁵⁰ *Ibidem*, paragraph 4.

the government it considers harmful to their interests. In contrast to the 1960 organisation, by this draft there would be two politically equal federal units, with the Greek Cypriot and the Turkish Cypriot majority in either of them¹⁵¹. The draft was accepted by both sides as a foundation for further negotiations¹⁵², and supported by the Security Council in 1992¹⁵³. Soon the negotiations came to a stalemate since the Turkish Cypriot leadership was unwilling to adopt all conditions stipulated in the Draft¹⁵⁴.

Nevertheless, even after that the United Nations persisted on the idea of federalism, which can be seen in the aforementioned, very detailed proposal for a solution to the Cyprus problem that was put forward in November 2002 by the then Secretary-General Kofi Annan¹⁵⁵. In the *intensive talks held in the period from November 2002 to March 2004*, that were discussed earlier, i.e. on the eve of the entrance of Cyprus into the European Union, certain parts of the Annan plan were revised several times, so that the text that was put to the referendum in both Cypriot communities on 24 April 2004 was the fifth and the last version of the Annan plan¹⁵⁶.

The Plan explicitly called for the establishment of a federal state based largely on the Swiss model¹⁵⁷. The Annan plan proposed the establishment of the “United Cyprus Republic” as “an independent state in the form of an indissoluble partnership, with a federal government and two equal constituent states, the Greek Cypriot State and the Turkish Cypriot State“. The state in question would be a member of the United Nations and would have “a single international legal personality and sovereignty“¹⁵⁸. “Within the limits of the Constitution (...)”, two constituent states would have the right to “sovereignly exercise all powers not vested by the Constitution in the federal government, organising themselves freely under their own Constitutions“¹⁵⁹. The Annan plan did not provide for hierarchy between the federal and constituent state laws¹⁶⁰. On the other hand,

¹⁵¹ See *ibidem*, paragraphs 5, 18 and 19.

¹⁵² See *ibidem*, paragraph 1.

¹⁵³ See United Nations Security Council Resolution 750 (1992), 10 April 1992, S/INF/48 (1992).

¹⁵⁴ Wippman, *op. cit.*, p. 147.

¹⁵⁵ The comprehensive settlement of the Cyprus problem, *loc. cit.*, see note 126.

¹⁵⁶ Key points of all five versions of the Annan plan are available at Turk: Cyprus Reunification is Long Overdue: The Time is Right for Track III Diplomacy as the Best Approach for Successful Negotiation of this Ethnic Conflict, *op. cit.*, pp. 211-218.

¹⁵⁷ The comprehensive settlement of the Cyprus problem, *op. cit.*, Main articles, Article 2, paragraph 1.

¹⁵⁸ *Ibidem*, Article 2, paragraph 1, subparagraph a.

¹⁵⁹ *Ibidem*, Article 2, paragraph 1, subparagraph c.

¹⁶⁰ *Ibidem*, Article 2, paragraph 3.

it provided for a dual citizenship, i.e. a single Cypriot citizenship and an internal constituent state citizenship¹⁶¹.

With respect to the most important provisions, it has to be mentioned that the federal Parliament would be composed of two chambers, the Senate and the Chamber of Deputies¹⁶², each consisting of 48 members. As to the proportions, while the Senate would be composed of an equal number of Greek Cypriot and Turkish Cypriot representatives, the Chamber of Deputies should be “composed in proportion to persons holding internal constituent state citizenship status of each constituent state, provided that each constituent state shall be attributed no less than one quarter of seats¹⁶³. Under the Plan, “decisions of Parliament shall require the approval of both Chambers by simple majority, including one quarter of voting Senators from each constituent state“, and in some cases “a special majority of two-fifths of sitting Senators from each constituent state shall be required¹⁶⁴. The main federal executive body would be the Presidential Council “elected on a single list by special majority in the Senate and approved by majority in the Chamber of Deputies for a five-year term¹⁶⁵. According to the same subparagraph, the Presidential Council would have six voting members. Pursuant to the Parliament decision, they could be joined by a certain number of non-voting members, in the way that the composition of the Council be “proportional to the number of persons holding the internal constituent state citizenship status of each constituent state, though no less than one third of the voting members and one-third of any non-voting members of the Council must come from each constituent state¹⁶⁶. The Presidential Council should tend to reach decisions by consensus, and if that failed, the Council would, if not otherwise prescribed, “take decisions by simple majority of members present and voting, provided this comprises at least one member from each constituent state¹⁶⁷. Members of the Presidential Council would elect two of its members not hailing from the same constituent state “to rotate every twenty months in the offices of President and Vice-President of the Council“, but the President and Vice-President would not have “a casting vote or otherwise increased powers within the Council¹⁶⁸. The Supreme Court of the new state would consist of an equal number of judges from each constituent state, and three foreign judges¹⁶⁹.

¹⁶¹ *Ibidem*, Article 3, paragraph(s) 1-2.

¹⁶² *Ibidem*, Article 5, paragraph 1.

¹⁶³ *Ibidem*, Article 5, paragraph 1, subparagraph a.

¹⁶⁴ *Ibidem*, Article 5, paragraph 1, subparagraph b.

¹⁶⁵ *Ibidem*, Article 5, paragraph 2, subparagraph a.

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibidem*, Article 5, paragraph 2, subparagraph b.

¹⁶⁸ *Ibidem*, Article 5, paragraph 2, subparagraph d.

¹⁶⁹ *Ibidem*, Article 6, paragraph 2.

One of the main functions of the Supreme Court would be to “resolve disputes between the constituent states or between one or both of them and the federal government, and resolve on an interim basis deadlocks within federal institutions if this is indispensable to the proper functioning of the federal government”¹⁷⁰.

Although Kofi Annan’s attempts to encourage the reunification of Cyprus on the basis of his Plan finally failed after the referendum held in April 2004, solutions from the Annan plan still remain current as a possible basis of all future talks. Even so, it is obvious that the Plan has advantages as well as disadvantages. Since Turkish Cypriots are obviously a minority on the island, it does not seem very logical that constitutional provisions ensure important and great authorities in the system of authority. Turks are a clear-cut minority on the island so that agreeing that the two peoples are equal and sovereign represents a huge cession to Turkish Cypriots. It seems that instead of one single state with a clear-cut majority and minority, division of Cyprus by ethnic lines and establishment of two ethnic states would be the least desirable solution. On the other hand, with regard to the history of violence and history of former talks, and the fact that Turkish Cypriots would, in certain aspects, gain more with keeping the status quo than being a minority in united Cyprus, it is hard to expect that Turkish Cypriots will accept significantly different solution from one envisaged in the Annan plan.

IX. Concluding remarks

Demands for self-determination of both the Turkish Cypriot and the Greek Cypriot community on Cyprus are contradictory and mutually exclusive. Although the right to self-determination frequently clashes with the right of a state to preserve its territorial integrity as one of the basic principles in International Law, in this case the preference should be given to the protection of territorial integrity (in this case - Cyprus). By invoking International Law (and protection of minority rights) Turkey should not have severely violated the same International Law by invading another member of the United Nations. Turkish invasion is undoubtedly illegal, without the consent of the Security Council and contrary to later Security Council decisions. The Turkish Republic of Northern Cyprus is not a state; it is a non-recognised political formation with no status in the international community although it is a self-proclaimed “state”. In that way, the United Nations have not managed to resolve the Cyprus problem. Since the solution of the crisis in Cyprus is still unachievable, the only possible solution seems to be to maintain the current status quo. Nevertheless, the United Nations succeeded in avoiding any further escalation of conflicts on Cyprus that could

¹⁷⁰ *Ibidem*, Article 6, paragraph 3.

grow into large scale confrontation (e.g. direct military conflict between Turkey and Greece), which would definitely result in a very serious humanitarian crisis and severe violations of international peace and security.

A number of more or less promising solutions to the Cyprus problem of higher or lower quality has been offered so far. But, from the Turkish invasion of Cyprus and after a couple of decades, the solution is not within reach. None of the proposals has been equally attractive and promising for both communities at the same time. All sides are dissatisfied. As we can see, with respect to a solution to the problem of Cyprus various solutions are offered: from partition, to enosis (the union of Cyprus with Greece), to “double enosis” (the union of northern Cyprus with Turkey and southern Cyprus with Greece), to modification of the 1960 Constitutional Accords, to a variety of federal and confederal solutions¹⁷¹. Crucial political issues referring to the territory and sovereignty are still far from being resolved.

A number of questions on Cyprus remain open: return of refugees and property claims from both sides, the issue of fair property compensation for both sides and the issue on citizenship of Turkish settlers in northern Cyprus. Especially sensitive will be issues on the presence of military troops on Cyprus, compulsory disarmament of individuals and paramilitary formations, establishment of joint or separate military and police forces, but also strong condemnation of all forms of extremism. Intolerance and unresolved issues between Turkey and Greece with respect to Cyprus significantly influence developments within the international and regional organisations. Memories of murders, torture, displacement, rape and other misdeeds are still fresh in minds of both Greek Cypriots and Turkish Cypriots. Both sides must be strong enough to overcome long-lasting antagonism and animosity, which will be accomplished with difficulty. Each group should overcome negative stereotypes about the other group, as well as hatred and intolerance that governments of both sides encouraged wholeheartedly. Both sides must learn how to respect culture and tradition of the other side. Media can also play a crucial, positive role on both sides. Communities should connect and discuss their problems openly, try to overcome them and provide opportunity for co-existence. Establishing mutual trust between the two communities will be an extremely difficult task for mediators.

¹⁷¹ Wippman, *op. cit.*, p. 165.

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THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AND IN THE EUROPEAN ECONOMIC AREA: A COMPARATIVE ANALYSIS

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Abstract

The aim of this article is to compare the protection of the fundamental rights in the European Union (EU) and in the EEA Agreement (EEA) from an Icelandic perspective. The fundamental research questions that the author covers are the following ones: 1) Do fundamental rights fall under the scope of EEA law? 2) Does the European Court of Justice (ECJ) case-law on fundamental rights belong to the EEA legal order? 3) Does the jurisprudence of the European Court of Human Rights (ECtHR) belong to the EEA? And last but not least 4) Has the principle of homogeneity of EEA law with EC law resulted in a judicial dialogue between the ECJ and the EFTA Court? Conclusions on the protection of fundamental rights are offered both in the EC and EEA legal orders setting them into the context of different political uncertainties that the EU and the EEA are now facing.

Keywords: *Fundamental rights, European Union, European Economic Area, ECJ, EFTA Court, ECtHR*

I. THE EEA AGREEMENT. GENERAL OBSERVATIONS

The European Economic Area (EEA) constitutes a corner-stone in the history of European architecture. The EEA is still the world's largest free trade area, covering a geographic area that stretches from Iceland to Greece, Reykjavik to Athens, and from Portugal to Norway, or Lisbon to Oslo.

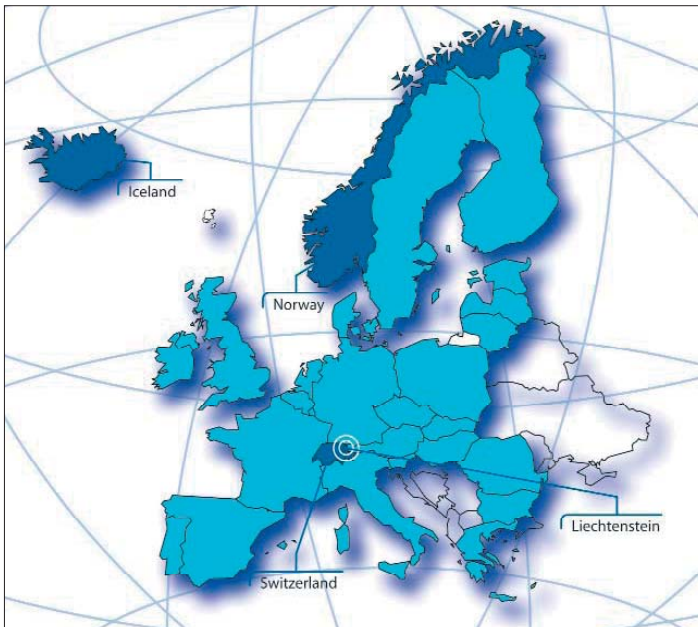
But the EEA is much more than a free trade agreement. It is a dynamic and homogeneous area based on common rules and equal conditions on competition. The EEA Agreement applies in 2009 between the 27 EU/EC Member States on one hand and the three EFTA-EEA states on the other (Norway, Iceland and

Liechtenstein). Within that area, the EEA Agreement creates an internal market governed by the same basic rules (the so-called „acquis communautaire“¹).

Thanks to the EEA Agreement, the fundamental freedoms of the internal market as well as a wide range of accompanying Community rules and policies are extended to the participating EFTA States. Accordingly, the EEA Agreement contains basic provisions – which are drafted as closely as possible to the corresponding provisions of the EC Treaty – on the free movement of goods, persons, services and capital. In addition, it establishes a system ensuring equal conditions of competition and incorporates other common rules such as those relating to state aid and public procurement.

The internal market of the European Community is therefore extended to more than 500 millions persons and to 30 countries. In practice, this means that citizens of all EEA countries have the right to move freely to live, study, work, invest and set up business in that economic space. For all this reasons, the EEA success cannot be minimized.

Figure 1. Countries participating in the EEA Agreement. 27 EU plus 3 EEA. Switzerland is the only EFTA member which is not in the EU nor in the EEA.



Source: <http://www.efta.int/content/about-efta/publications/this-is-efta>. Booklet *This is EFTA 208*.

¹ That is to say the whole range of principles, policies, laws, practices, obligations and objectives that have been developed within the European Community by legislation or by case-law of the European Court of Justice.

But the main question that often practitioners and citizens need to know is whether the EEA Agreement offers a similar protection regarding the area of fundamental rights and this constitutes precisely the object of this research.

II. EEA LAW AS A “SUI GENERIS” HYBRID BETWEEN INTERNATIONAL LAW AND EC LAW

EEA law has a very specific nature. To start with, there is a substantial difference between EC and EEA law. For the European Union, the legal basis for the EEA Agreement is the Article 310 of the EC Treaty (Association Agreements). From the perspective of the EFTA-EEA countries, the EEA Agreement is an international agreement. Thanks to this agreement, there is one internal market extended and supported by two parallel legal orders: the EC on one side for 27 countries and the EEA on the other for 3 countries.

The EEA legal order is a very special “hybrid” or “mix breed” between international law and EC law. After fifteen years of existence, the nature of the EEA Agreement has been interpreted by courts as well as by legal scholars and practitioners². The common accepted view nowadays is that, by virtue of the EEA Agreements, the EFTA EEA States took over neither the Community concepts of direct effect and primacy nor any other concept of the case law of the ECJ related thereto³. For this reason, the EEA is not a supranational legal order. During

² The main general reference books for EEA law are as follows: Norberg, S., Hökberg, K, Johansson, M, Eliasson, D and Dedichen L, *EEA Law, The European Economic Area, A Commentary on the EEA Agreement*, Fritzes, Sweden, 1994, 893 p; Blanchet, T, Piipponen, R and Westman-Clément, M, foreword by J. Delors, *The Agreement on the European Economic Area (EEA)*, Oxford Univ. Press, 1994, 522 p; Blockmans, S. and Lazowski, A.(eds), *The EU and its neighbours*, TMC Asser Press, 2006, The Hague, 653 p; and Stefánsson, S.M., *The EEA Agreement and its Adoption into Icelandic Law*, Centre for European Law, University of Oslo, 1997, 104 p. A recent book has been published in Norwegian on EEA law, Sejersted, F. et al, *EØS-rett*, Oslo, Universitetsforlaget, 2004, 684p.

³ This is a list of very well written articles that cover the specificities of the EEA legal order. The list of references used for this section is not exhaustive but only indicative of some materials available: Baudenbacher, C., ‘The Legal Nature of EEA Law in the Course of Time’, in Björgvinsson (ed.), *Afmálsrit Tor Vilhjálmsson*, Reykjavik. Bókaútgáfa Orators, 2000; Børde, K., ‘The European Economic Area, Norway and the European Union: Achievements, Possibilities and Limitations’, in: Müller-Graff, Selvig (eds), *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berlin: Berlin Verlag A. Spitz, 1997; Bright, C., Williams, K., ‘Understanding the European Economic Area: Context, Institutions, and Legal Systems’, in: *Business Law in the European Economic Area*, Oxford: Oxford Press Oxford, 1994; Bruha, T., ‘Is the EEA an Internal Market?’, in: Müller-Graff, Selvig (eds), *EEA-EU Relations*, Berlin: Berlin Verlag, 1999; Felder, D., ‘Structure institutionnelle et procédure décisionnelle de l’EEE’, in: Jacot-Guillarmod (ed.), *Accord EEE – Commentaires et réflexions*, Zürich, Schulthess, 1992; Forman, J., ‘The EEA Agreement Five Years on: Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts’, *CMLRev*, 1999, p. 751; Graver, H.P., ‘The EFTA Court and the Court of Justice of the EC: Legal Homogeneity at Stake?’, in: Müller-Graff, Selvig (eds), *EEA-EU Relations, EEA-EU Relations*, Berlin: Berlin Verlag, 1999; Jacot-Guillarmod, O., ‘Préambule, objectifs et principes’, in: Jacot-Guillarmod,

the negotiations, EFTA-EEA countries decided to preserve formally their legal autonomy but, in exchange, they had to accept a lack of formal participation in the EC legislative process. To assure the effectiveness of EEA law without those fundamental principles of EC law, the EFTA Court has relied on the doctrines of State liability for breaches of EEA law and on a strong indirect effect of EEA law in relationship with national law. The principle of dynamic homogeneity bounds the EC and EEA together so that both legal orders develop in parallel and there are no discrepancies between the legislation and jurisprudence in the two areas.

The Norwegian doctrine offers an interesting perspective. As Graver well explains, the protection of rights that the EEA Agreement brings along reaches further into the realm of national law than traditional international treaties⁴. EEA law is constructed on the basis of EC law. In this context, it is essential to remember that the rights for the individual to access national courts on the basis of Community rules form an integral and important part of Community law. According to Graver, the EEA agreement is ambiguous on this point. On the one hand the agreement presupposes national transformation for its rules to take effect if that is required by the national law of an EFTA state. On the other hand, its specific provisions substantially reproduce Community rules in such a way that they confer rights upon individuals⁵.

For this reason, this author reminds that despite the fact that the EEA Agreement has been characterised as a treaty under public international law, it contains clear elements that go beyond most such treaties towards elements of supranationality, elements that in the Community legal context have been important in the characterisation of Community law as a “a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only

Accord EEE – Commentaires et réflexions, Zürich: Schulthess, 1992; Müller-Graff, P.C. & Selvig, E. (eds), *EEA-EU Relations*, Berliner Verlag, A Spitz, 1999, Berlin, 329 p; Norberg, S., ‘Perspectives on the Future Development of the EEA’, Bjorgvinsson (ed.), *Afmalisrit Tor Vilhjálmsón*, Reykjavik: Bókauitgáfa Orators, 2000; Norberg, S., ‘The Dynamic and Homogeneous European Economic Area – Challenges for the EFTA Court’, *European Business Law Review*, 1994, 191; Sejersted, F., ‘Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA Agreement’, in: Müller-Graff, Selvig (eds), *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berlin: Berlin Verlag A. Spitz, 1997; Sevón, L., Johansson, M., ‘The Protection of the Rights of Individuals under the EEA Agreement’, *ELRev*, 1999, 373; Van Gerven, W., ‘The Genesis of EEA law and the Principles of Primacy and Direct Effect’, *Fordham International Law Journal*, 1992/3, 955.

⁴ Graver, H.P., ‘Supranationality and national legal autonomy in the EEA Agreement’, ARENA Working paper 00/23, University of Oslo.

⁵ See Graver, H.P., „Supranationality...“, op. cit. He adds that his reasoning follows from the rules themselves read in connection with article 6, which states that these rules be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the agreement, that is to say, 2 May 1992.

the member states but also their nationals”, as the jurisprudence *Van Gend & Loos* established⁶. The Icelandic doctrine tends to disagree with this Norwegian view⁷ and insist on the principle of legal autonomy of the EEA States.

It is arguable then whether this new “hybrid” EEA legal order can ensure in a comparable way the protection of the rights of individuals living in Iceland, Norway and Liechtenstein as well as it protects the rights of the citizens in 27 other EU countries.

III. EEA PROCEDURAL LAW. REMEDIES FOR BREACHES OF EEA LAW FOR PRIVATE INDIVIDUALS AND ECONOMIC OPERATORS

To answer the previous question, one must start by recalling the main objective of the EEA Agreement. According to the fourth recital of the Preamble, the EEA Contracting Parties declare *inter alia* the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement, including at the judicial level.

Furthermore, in the eighth recital of that Preamble, the EEA Contracting Parties declare themselves convinced of “the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by the Agreement and through the judicial defence of those rights”. The rights hereby referred to, are of course the rights entailed in Community legislation that are “substantially reproduced” in the Agreement.

It is essential in this sense to question whether the objective of the EEA could be achieved and the EEA Agreement function properly if the rights of individuals and operators were not adequately protected throughout the EEA and the balance of the rights and obligations of the Contracting Parties not upheld⁸. As it has been stated, the principle of homogeneity is essential in this regard.

One of the most fundamental questions in EEA law is the protection it affords and the remedies it gives to private individual. In case of State breaches of EEA law, are citizens equally protected as in EC law? A proper reply to this question calls for more research from the point of view of the doctrine and methodology

⁶ As the Editorial Comments of the *Common Market Law Review* 1999, vol. 36, pp. 697-701 signalled, the EFTA Case *Sveinbjörnsdóttir* reminds the early days of the case law of the ECJ. See Case 26-62 *Van Gend & Loos v Netherlands Inland Revenue Administration* 1962 ECR 26.

⁷ See the work of Icelandic authors such as Stefánsson and Björgvinsson mentioned before.

⁸ L. Sevón and M. Johansson, “The protection of the rights of individuals under the EEA Agreement”, *European Law Review* 1999, no 24, pp. 373-386. This article refers mainly to the principles of primacy, direct effect and State liability.

of “access to justice”⁹. But a preliminary comment can be nevertheless made, EC law provides a better system of judicial and non-judicial remedies compared to EEA law.

In the first place, it is very important to remember that the rights of the individuals fall under EEA procedural law, if one may use that expression. They are deeply related to the control mechanisms established in the EEA legal order. For this reason, it is essential to remind the relevance of the case law from the ECJ given before and after the signature of the EEA Agreement¹⁰, the regime of infringement actions, actions for nullity¹¹, non-contractual liability of institutions¹² and the role of national courts¹³ in the EEA legal order.

In the second place, each Contracting Party to the EEA Agreement is responsible for the implementation of EEA law within its own legal system¹⁴. The application

⁹ The methodology of the “access-to-justice” movement is summarised in this work. Cappelletti, M., General Report, „Access to Justice: The Worldwide Movement to Make Rights Effective“, in *Access to Justice, A World Survey*, Vol. I. Book 1, Sijthoff and Noordhoff-Alphenaaandernrijn- Giuffrè ed., Milan, 1978; and from the same author, “Some reflexions on the rule of procedural scholarship today”, in *Justice and Efficiency. General Reports and Discussions, The Eight World Conference on Procedural Law*, Dutch Association for Procedural Law, ed. By Dr. W. Wedekind, Kluwer-Deventer, 1989, 460 p.

¹⁰ See conditions for application of Article 6 of the EEA Agreement and 3.1 of the ESA Agreement.

¹¹ Although ESA Decisions may be challenged on the same grounds as in EC law, there are however some differences in legislation concerning actions for nullity. There is no jurisdiction to declare decisions of the EEA Joint Committee in the incorporation of new acts of Community law into the EEA Agreement null and void. However, the Court has concluded that its jurisdiction in such cases can be established under Article 34 of the EEA Agreement (advisory opinions). See EFTA Court case E-6/01, *CIBA*, 2002, EFTA Court Report p. 281. On the other hand, the EFTA Court seems rather strict when it comes to issues such as giving sufficient reasons, opening the formal procedure in state aid cases or respecting the rules of good administration in general. As for „locus standi“ for individuals/associations, there is no open deviation from the EC case law although the EFTA Court has shown more pragmatism being liberal in cases of doubt. In this context, the *Bellona* case E2-02, 19th June 2003, is very relevant for the subject of access to justice as a fundamental right. It will be studied in detail in the next section of this Chapter.

¹² The situation in EEA law is comparable to EC law and there have been no cases so far before the EFTA Court.

¹³ In EEA law, the national courts are bound by the duty of loyalty as Article 3 is constructed in the same terms as Article 10 EC Treaty. However, the preliminary reference procedure differs particularly in EEA law on two points from the procedure laid down in Article 234 EC Treaty. The effects of the advisory opinions are in practice not weaker than the ECJ preliminary rulings, but from a legal point of view, they are not binding. Another difference is that the Supreme Courts of the EFTA EEA countries have no duty to refer a question for interpretation to the EFTA Court. Baudenbacher himself points out that in some cases a reference was avoided although the conditions established for the “*doctrine de l’acte clair*” or ECJ *Cilfit* case conditions, were not fulfilled. Baudenbacher, “EC Law, Fundamental Rights and the EEA Agreement”, *Amicale des référendaires et anciens référendaires de la Cour de Justice*, 15 juin 2006.

¹⁴ This means that they are required to ensure adoption of national implementing measures before specified deadlines, to ensure that national legislation and the behaviour of national authorities are

and enforcement of this legal regime occurs at this national level. And this is the basis principle for the protection of individuals and economic operators.

Regarding infringement actions, it is essential to remember that it is mainly for the EFTA EEA States to provide that adequate protection of individuals before their national courts¹⁵. Individuals cannot start infringement actions against EFTA EEA States before the EFTA Court. Where an EFTA State fails to comply with EEA law, the EFTA Surveillance authority has powers to try to bring the infringement to an end and, where necessary, may refer the case to the EFTA Court¹⁶. On the other hand, ordinary citizens may lodge a complaint with the Authority against an EFTA State arising from any national measure (law, regulation or administrative action) or practice attributable to an EFTA State which the complainant considers to be incompatible with a provision or a principle of EEA law. But, if accepted, it is the ESA which takes the complaint of the citizen before the EFTA Court providing no *locus standi* for the original complainant. This is a kind of indirect access to the EFTA Court that complements the possibility for citizens or economic operators to start a national procedure before the ordinary judge and request this court to ask an advisory opinion.

But, as stated before, this EEA procedural law does not provide the same degree of “access-to-justice” as EC Community law. Citizens of Iceland, Norway and Liechtenstein do not have many of the non-judicial remedies existent in the EC legal order. They cannot present formal complaints to the European Commission nor the Committee of Petitions of the European Parliament neither before the European Ombudsman. Furthermore they do not have procedural rights to present cases directly before the ECJ. EEA law resembles in this sense more to international law. Their complaints must be addressed to the EFTA Surveillance Authority (ESA) who has the final competence to decide if they are taken or not before the EFTA Court. The decision of the ESA cannot be appealed. Furthermore, EEA law relies uniquely on the protection assured through national courts who are supposed to follow it as they would do with national law. If they do not apply it there is no sanction for it similar to the State liability present in the EC legal order. Even more, judges are not obliged to seek advice through the

in conformity with the EEA obligations and to ensure the correct application of EEA provisions. Under the EEA Agreement (Articles 108 and 109 EEA), the EFTA Surveillance Authority is responsible for ensuring that EEA law is correctly applied by the EFTA States.

¹⁵ From the point of view of the doctrine and theories on “access to justice”, the situation is less than perfect. Regarding infringement actions, there is no right of individuals to sue an EFTA EEA State directly before the EFTA Court. Furthermore, there are no participation rights of individuals in actions brought by the EFTA Surveillance Authority. Once they have lodged their complaint, they are sidelined. See Conference given by C. Baudenbacher, “EC Law, Fundamental Rights and the EEA Agreement”, *Amicale des référendaires...*, op. cit.

¹⁶ The legal basis for the Authority’s actions for non-compliance is, in particular, Article 31 of the Surveillance and Court Agreement SCA.

indirect advisory opinions procedure of the EFTA Court. On the rare occasions that the opinion of the EFTA Court is nevertheless sought, the opinion is not legally binding for the judges. Regarding the interpretation of EEA law, this legal system relies unfortunately on the good will of judges.

As affirmed before, in order to compensate for these deficiencies, the EFTA Court has put a strong emphasis on the principle of State liability for infringements of EEA law which has a strong dissuasive effect and plays an important role. But of course State liability in EEA law is subject to similar conditions than in EC law and individual may have a hard time passing the test required by the *Erla María*¹⁷ EFTA Court case which is parallel to the *Francovich*¹⁸/*Factortame*¹⁹ jurisprudence of the ECJ. It could be then discussed what legal order is more effective assuring that States do not violate European rights: EC law giving directly enforceable rights for citizens vs. EEA law relying on the principle of State liability in case of infringements. This is a question that calls for further research.

IV. THE PROTECTION OF FUNDAMENTAL RIGHTS IN EU/EC LAW

Once we have done a short comparison between the two legal orders and the different nature of EEA law, we can examine how the protection of fundamental rights is assured in the European Union and the latest developments in this area. Only after the standards of the EU are explained and revised, can we compare EC law with the EEA legal order and offer final conclusions in this regard.

IV.1. Before the Treaty of Lisbon

The original three European Community Treaties, signed in the 1950s, contained no provisions concerning the protection of human rights. More than fifty years since 1951, when the first of the Communities was founded, it can be said that this position had changed considerably. Thanks to the case-law of the European Court of Justice, it was declared that the “general principles of European Community Law” included protection for fundamental rights which were part of the common constitutional traditions of the Member States and were contained in international human rights treaties on which they had collaborated or signed²⁰.

¹⁷ EFTA Court, Case E-7/97 *Erla María Sveinbjörnsdóttir* judgment of 1998, EFTA Court Report, 95.

¹⁸ ECJ, Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Others v Italian Republic*, Judgment of 19 November 1991, ECR 1991, p. I- 5357. See also *Common Market Law Review* 1993, vol. 2, p. 66.

¹⁹ ECJ, Joined cases C-46/93 and 48/93, joined cases *Brasserie du Pêcheur/Factortame*, Judgment of 5 March 1996.

²⁰ CRAIG, P. and DE BURCA, G. , *EU Law. Text, cases and materials*, 4th ed, Oxford University Press, 2007, 1148 p. See specially chapter 11, pp. 379-427.

Apart from the case-law from the ECJ, the importance of human rights was later affirmed in the EU Treaty itself (TEU). A new policy of human rights developed specially in the field of anti-discrimination law, thanks to the Article 13 of the EC Treaty introduced by the Amsterdam Treaty. Another institutional initiative came with the establishment in the Treaties of a sanction mechanism for serious and persistent breaches of human rights in Article 7 TEU and the establishment in 2002 of an EU network of independent experts on fundamental rights to exercise monitoring and advisory functions. In 2007, an EU Fundamental Rights Agency was established to replace the previous EU Monitoring Center against Racism and Xenophobia.

The Charter of Fundamental Rights for the EU was officially proclaimed for the first time in 2000. The Treaty establishing a Constitution for Europe would have given this Charter full legal effect by incorporating it, with some amendments, into Part Two of the Constitution. Following the non-ratification of the European Constitution in 2005, the legal status of the Charter remained uncertain and was considered as an influential form of “soft law”²¹. This situation changed with the approval of the Treaty of Lisbon, which is examined later in this article.

IV.1.1. The development of human rights protection in the European Treaties.

The protection of fundamental rights is one of the basic tenets of European Community law. However, none of the treaties contains a written list of these rights and no explicit provision for judicial review based on fundamental human rights. Only the principle of equal pay for men and women has from the start been codified in Article 19 of the EC Treaty.

The European Court of Justice recognised the existence of fundamental rights at Community level in the decade of the 70s, and has steadily extended them. Under the Court’s continuing case-law, they form part of the general principles of Community law and are equivalent to primary law in the Community legal hierarchy.

The source of recognition of these general legal principles is now Article 6(2) of the EU Treaty, which commits the EU to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

²¹ See EU network of independent experts on fundamental rights, Commentary on the Charter, June, 2006 available at the website http://ec.europa.eu/justice_home/docs/network_commentary_final%20_180706.pdf

The Treaty of Amsterdam introduced Article 13 of the EC Treaty to combat discrimination and Article 7 of the TEU stipulating that the Council²² may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6. In this case, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaty to the Member State in question. The Treaty of Nice supplemented this mechanism with a new procedure relating to a clear risk of a serious breach by a Member State of these principles (Article 7(1) TEU).

In substance, it can be established that the objectives of European Law are to ensure that fundamental freedoms are protected in the drafting, application and interpretation of Community law²³. In their traditional defensive role the Community's fundamental rights protect the individual from the erosion of sovereignty by Community bodies.

IV.1.2. Relevant case-law from the European Court of Justice (ECJ): giving fundamental rights to citizens

The development of the human rights protection in the Community system did not happen until well advanced the European integration in the decade of the 70s²⁴. As the ECJ declared, although the ECJ has no power to examine the compatibility with the ECHR of national rules which do not fall within the scope of Community law, on the other hand, where such rules do fall within EC law, the Court can exercise its function of judicial review. Fundamental rights form part of the general principles of Community law that it is required to uphold, and that in safeguarding such rights it should be guided by the constitutional traditions of the Member States²⁵. Accordingly, no measure may have the force of law unless it is compatible with the fundamental rights recognised and protected by the Member States' constitutions²⁶.

²² The Council must meet in the composition of the Heads of State or Government and must act by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament.

²³ The new Council Regulations 975/1999 and 976/1999 on Human Rights have extended the respect of human rights and fundamental freedoms to the external relations of the European Community Union.

²⁴ The most important cases of the ECJ during this period are previous to the Maastricht Treaty are the following: case *Stork* 1/58 [1959] ECR 17, case *Nold* 4-73 [1974] ECR 491, case *Hauer* 44/79 [1979] ECR 3727, case *Rutili* 36/75 [1976] ECR 140, joined cases *Cinétheque* 60 and 61/84 [1985] ECR 2605; and the case *ERT-AE v. EDP* C-260/89 [1991] ECR I-2925.

²⁵ In the *Stork* judgment, however, the ECJ had previously refused to engage in judicial review of human rights. It was not until ten years later that it changed its case law initiating such review. In the case *Hauer* the Court sets out its methodology, accepting a review in the light of EC law itself.

²⁶ ECJ, case *ERT-AE v. EDP* [1991] ECR I-2925 at 41. It was in this case that the Court change course, see recital 41.

The main fundamental rights that have so far been recognised specifically by the European Court of Justice are the following:

- human dignity²⁷ ;
- pt equal treatment²⁸;
- non-discrimination²⁹;
- freedom of association³⁰;
- freedom of religion and confession³¹;
- privacy³²;
- medical secrecy³³;
- property³⁴;
- freedom of profession³⁵;
- freedom of trade³⁶;
- freedom of industry³⁷;
- freedom of competition³⁸;
- respect for family life³⁹;
- entitlement to effective legal defence and a fair trial⁴⁰;
- inviolability of residence⁴¹;
- freedom of expression and publication⁴².

The Treaty of Maastricht later provided the ECJ with a more solid ground for judicial review⁴³, as it introduced a preamble confirming the importance of human rights and fundamental freedoms in the Union and some new articles

²⁷ ECJ, case *Casagrande* [1974] ECR 773.

²⁸ ECJ, case *Klöckner-Werke AG* [1962] ECR 653.

²⁹ ECJ, case *Defrenne v Sabena* [1976] ECR 455.

³⁰ ECJ, case *Gewerkschaftsbund, Massa et al.* [1974] 917, 925.

³¹ ECJ, case *Prais* [1976] ECR 1589, 1599.

³² ECJ, case *National Panasonic* [1980] ECR 2033, 2056 et seq.

³³ ECJ, case *Commission v Federal Republic of Germany* [1992] ECR 2575.

³⁴ ECJ, case *Hauer* [1979] ECR 3727, 3745 et seq.

³⁵ ECJ, case *Hauer* op. cit. [1979] 3727.

³⁶ ECJ, case *International Trade Association* [1970] 1125, 1135 et seq.

³⁷ ECJ, case *Usinor* [1984] 4177 et seq.

³⁸ ECJ, case *France* [1985] 531.

³⁹ ECJ, case *Commission v Germany* [1989] 1263.

⁴⁰ ECJ, case *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] 1651 et seq., 1682; and case *Pecastaing v Belgium* [1980] 691 et seq., 716.

⁴¹ ECJ, case *Hoechst AG v Commission* [1989] 2919.

⁴² ECJ, case *VBVB, VBBB* [1984] 9 et seq., 62.

⁴³ Two other cases from the ECJ are relevant during the post-Maastricht period, case C-368/95 *Familiapress* ECR [1997] I-3689 and case C-106/96 *UK v. Commission* ECR [1998] I-2729.

referring to the respect of the ECHR as well as the duties of the European Union, European Community and EU Member States regarding fundamental rights⁴⁴.

If a fundamental right is found to be breached, the European Court of Justice declares the act concerned to be void, with retroactive and universal effect. However, under the case-law of the Court there are certain limits to the protection of fundamental rights:

- In its Opinion 2/94 the Court held that, at the present stage of EC law, the Community does not have a general power to enact rules on human rights nor a competence to accede to the ECHR⁴⁵. This is still a pending issue today.
- For that reason, judicial review is limited to EC law. Within this framework, such rights must be compatible with the Community's structure and objectives. They must always be considered with regard to the social function of the protected activity⁴⁶.
- The principle of proportionality and the guarantee of essential content are further constraints. Consequently, where the Community intervenes in the protected sphere of a fundamental right it may neither violate the principle of proportionality nor affect the essential content of that right⁴⁷.

In this context, it must be noted that it is the European Community that is committed to respecting fundamental rights. The Member States are only required to comply with the minimum standards which the rights lay down when they are implementing Community law⁴⁸ (Article 10(5) of the current EC Treaty).

After the Amsterdam Treaty was approved, the ECJ gave some very significant judgments that many have interpreted as a real development in the EC law approach to fundamental rights⁴⁹. One of the main judgments is probably the case *Carpenter* (2002) where a right of residence in the EU territory was given to a Philippine citizen who was the spouse of a EU national citizen on the basis of the right to respect family life within the meaning of the ECHR⁵⁰.

⁴⁴ Preamble of the TEU, 3rd recital, Article 6 TEU, article 7 TEU, article 13 TEC and article 177 TEC.

⁴⁵ ECJ, Opinion 2/94 of 28 March 1996 on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECR [1996] page I-1759. See Comment from Advocate General Toth, „The European Union and Human Rights: the Way Forward“, in *The Oxford Encyclopaedia of EC Law*, vol I Institutional Law, 1990, p. 284.

⁴⁶ ECJ, case *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁴⁷ ECJ, case *Schröder v Hauptzollamt Gronau* [1989] ECR 2237 at 15.

⁴⁸ ECJ, case *Kremzow v Austrian Republic*, judgment of 29 May 1997, ECR I-2629 at 15 et seq, 19.

⁴⁹ ECJ, case *Schmidberger* C-122/00 ECR [2003] and case *Omega* C-36/02 ECR [2004].

⁵⁰ ECJ, case *Mary Carpenter* C-60/00, ECR [2002] I-6279.

Less noticed and more important in this field is a classical move which is one of the most famous hall marks of the ECJ: the move from norms to institutional duty, from substance to procedure, from *ius* to *remedium*. This move is, for instance, developed in the European constitutional area which defines the relationship between the Community legal order and that of the Member States. Norm oriented doctrines such as direct effect or supremacy are regularly turned by the ECJ into institutional duties for Member States courts⁵¹.

Regarding the jurisprudence of the Strasbourg based European Court of Human Rights (ECtHR), another interesting case is the *decision EMESA Sugar v. Netherlands* where this Court is asked to exercise external control on the respect of fundamental rights in the legal order of the EU⁵². The answer came in the case *Bosphorus Airways* judgement⁵³ where this Court finally confirms that the EU standard for protecting human rights does not breach the ECHR.

IV.1.3. The solemn declaration of the EU Charter of Fundamental Rights (2000).

To draw up the draft European Charter of Fundamental Rights, the European Council decided to set up an *ad hoc* body made up of representatives of various established institutions (meeting in Tampere in October 1999). This body, which decided to call itself a 'Convention on the Future of Europe', broke new ground by publishing its working documents and debates. The Charter of Fundamental Rights was proclaimed by the Commission, the Council and Parliament on 7 December 2000 at the Nice European Council.

The Charter covers rights in three areas:

- civil rights: human rights and the right to justice, as guaranteed by the European Convention of Human Rights adopted by the Council of Europe;
- political rights deriving from the European citizenship established by the Treaties;

⁵¹ The high tide of this move is the *Francovich* jurisprudence but also the decision which found France in violation of its obligations under the EC Treaty for failure to prevent the obstruction to free movement of goods (strawberries) by private individuals at its frontier with Spain. ECJ, joined cases C and 9/90 *Francovich*, ECR [1991] I-5357 and case C-265/95 *Commission v. France*, Judgment of 9 December 1997 ECR [1997].

⁵² ECtHR, Decision as to the Admissibility of Application no 62023/00 issued by the Third Section ECHR on 13 January 2005. EMESA Sugar claimed that Article 6(1) of the ECHR on the right of fair trial had been violated by not allowing it to submit written observations to the Advocate General's Opinion in a preliminary reference procedure before the ECJ. The application was declared incompatible *rationae materiae* with the provisions of the ECHR and was rejected as inadmissible.

⁵³ ECtHR, Case *Bosphorus Hava Yolları Turizm v. Ticaret Anonim Şirketi v. Ireland*, application no 45036/98, judgment of 30 June 2005.

- economic and social rights, incorporating the rights set out in the Community Charter of the Social Rights of Workers, adopted on 9 December 1989 at the Strasbourg summit by the Heads of State or Government of 11 Member States in the form of a Declaration.

These rights are not new: the Charter represents ‘established law’ in the European countries⁵⁴, that is to say, it gathers together in one document the fundamental rights recognised by the Community Treaties, the Member States’ common constitutional principles, the European Convention of Human Rights and the EU and Council of Europe Social Charters. It also responds to the legitimate contemporary demands for transparency and impartiality in the functioning of the Community administration, incorporating the right of access to the Community institutions’ administrative documents and the right to good administration, which sums up Court of Justice case-law in this area.

The Charter consolidates all personal rights in a single text, thus implementing the principle of the indivisibility of fundamental rights. It breaks the distinction that European and international texts had drawn until then between civil and political rights on the one hand and economic and social rights on the other, and lists all the rights grouped according to the basic principles of dignity, freedoms, equality, solidarity, citizens’ rights and justice.

Under the principle of universality, most of the rights listed in the Charter are conferred on all people, regardless of their nationality or place of residence. However, rights linked directly to citizenship of the Union are conferred only on European citizens (such as the right to take part in elections to the European Parliament or municipal elections) and some rights are for certain categories of people (for example, children’s rights and some social rights of workers).

The Charter aims only to protect the fundamental rights of individuals with regard to action undertaken by the EU institutions and by the Member States in application of the EU Treaties.

The question of the legal status of the Charter for the Member States and the Community institutions was not resolved until the Treaty of Lisbon. However, during the period 2000-2007, the European Commission and Parliament stated that they considered it to be binding and the Court of Justice already invoked some of its provisions.

⁵⁴ However, the document aims to respond to problems arising from current and future developments in information technology or genetic engineering by establishing rights such as personal data protection or rights in connection with bioethics.

IV.1.4. Relationship between the EU and the European Convention of Human Rights (ECHR).

The relationship between the EU and the European Convention of Human Rights has not been an easy one, as the European Court of Justice explained in its Opinion 2/94 due to the lack of a proper legal basis in the founding Treaties. As it was made clear by the European Court of Justice in its Opinion 2/94, recital 27

“No Treaty provision confers on the Community institutions any general power to enact rules on human rights [...]”.

During more than 50 years of European integration, the protection of fundamental rights in the EC legal order was based in a weak constitutional architecture⁵⁵. As the Court continued in recitals 34 and 35:

“Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 EC Treaty. It could be brought only by way of Treaty Amendment.”

As the ECJ points out, the lack of legal basis cannot be solved through the “flexibility clause” provided by the Treaties (Article 235). A proper revision of the EU/EC Treaties is needed in order to give the legal basis to the EC to join the European Convention of Human Rights.

IV.2. After the Treaty of Lisbon (2007)

The various institutional and policy developments in the human rights field within the EU did not silence the debate as to whether the EU was or not a significant “human rights organization”⁵⁶, nor as to whether its attention to human rights protection amounted to more than self-serving instrumentalism. In the fields of immigration, asylum, criminal justice and anti-terrorism, in

⁵⁵ On the competences of the Community and Union, see article from J.H. Weiler and S. Fries, „An EU Human Rights Agenda for the new Millenium“, not published nor circulated but available as a working draft in the website: <http://www.jeanmonnetprogram.org/eu/Units/index.html>, Teaching materials EU Law, New York University.

⁵⁶ A. VON BOGDANDY, „The European Union as a Human Rights Organization: Human Rights and the Core of the European Union“, *Common Market Law Review*, 2000, 37, p. 1307.

particular, the EU has been sharply criticized for neglecting and undermining human rights concerns⁵⁷.

Since the EU itself does not have legal personality, it could not yet itself accede to the ECHR. At the same time, thanks to the case-law of the ECJ, it was declared that the EU had to comply with the rights listed in the ECHR. The paradox subsisted for decades. Nevertheless, this old debate over accession by the EC/EU to the European Convention of Human Rights (ECHR) was revived during the drafting of the Constitutional Treaty and the text of the Constitution ultimately provided for accession by the EU.

Following the non-ratification of the European Constitution in 2005, the European Council of June 2007 preceding the signature of the Treaty of Lisbon decided to rethink the way in which the fundamental rights had to be protected in the European Union. The conclusions of that exercise laid the foundations for the relevant provisions in the new Treaty.

The two main innovations introduced by the Treaty of Lisbon are the following:

- 1) The EU Charter will have a legal binding effect.
- 2) The EU Treaty is amended to allow the EU to become a party to the ECHR and ensure that the interpretation of human rights made by the EU and ECHR move in parallel in future.

As a consequence, the new Article 6 (1) of the Treaty of the European Union (TEU) gives the Charter the same legal value than the Treaties recognising the rights, freedoms and principles set out in the Charter. However, the content of the EU Charter is clarified and set into context. The scope of the Charter is not unlimited as the same Article declares that the Charter shall not extend in any way the competences of the Union as defined in the Treaties and another Protocol annexed to the Treaty repeats so. The United Kingdom and Poland negotiated a separate Protocol designed to limit the application of the Charter in certain respects.

Furthermore, new Article 6(2) TEU stipulates that the European Union shall accede to the ECHR, and that such accession shall not accept the European Union's competences or the specific features of EU law. Differences between human rights at EU and at the ECHR are substantial in theory but, in practice, it can be said that the judicial dialogue between the ECJ and the European

⁵⁷ Both Amnesty and Human Rights Watch in recent years have commented critically on the EU's human rights role. See „*Amnesty International's Assessment of EU Human Rights Policy: Recommendations to the Irish Presidency* „, January 2004 and *Human Rights Watch World Report*, 2007.

Court of Human Rights prove that both systems can be complementary and non-exclusive.

The conceptual status accorded to ECHR rights is dealt with in Art. 6(3) TEU, which provides that the fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, constitute general principles of the European Union's law. This approach follows the one taken in the EU Constitution not ratified⁵⁸.

For these reasons, it can be said that the new Treaty of Lisbon constitutes a positive and decisive step forward in the field of human rights in the European Union. However, at the time of drafting it is uncertain whether it will be ratified by all 27 Member States of the European Union, as Ireland rejected it in a national referendum in June 2008.

V. THE PROTECTION OF FUNDAMENTAL RIGHTS IN EEA LAW

The Treaty of Lisbon, if ratified, will ameliorate the protection of the fundamental rights in the EC legal order, no doubt about it. But our question remains, what about EEA law? How will the Treaty of Lisbon will affect this other parallel legal order?

V.1. General comments

When examining human rights in the EEA context it is necessary to take note of one recital of the Preamble to the EEA Agreement stating that the Contracting Parties are

“CONVINCED of the contribution that a European Economic Area will bring to the construction of a Europe based on peace, democracy and human rights”.

As the EFTA Court has consistently and repeatedly held, the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area, and that the proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights before the national courts of EFTA/EEA States. It could even be argued that, for the EFTA Court, the ultimate goal of the EEA Agreement could be the protection of the rights of individuals. For instance, in the case *Ásgeirsson*⁵⁹, the EFTA Court referred to the central role of the “protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review”

⁵⁸ See. CRAIG, P., The Lisbon Treaty, Process, Architecture and Substance, *European Law Journal*, April 2008, pp. 137-166, specially on p. 162.

⁵⁹ EFTA Court, Case E-2/03 *Ákærvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, 2003 EFTA Court Report, 185, paragraph 28.

within the set-up of the EEA Agreement. This is a broad formula that will allow the EFTA Court to develop its jurisprudence within EEA law without having to rely on EC law and only limited by the principle of homogeneity.

The Agreement also provides for human rights in particular fields, such as in Article 69 concerning equal rights for men and women. And, it is also worthy to note the Oporto declaration of the Contracting Parties of the 2nd May 1993 on the continuing effect of international agreements. There it is assumed that rights which are enjoyed inter alia by individual persons, under currently effective international agreements, remain effective with respect to the EEA Agreement to the extent such agreements grant at least equal protection of rights as the EEA Agreement. There can be no doubt that the ECHR is an agreement of the kind mentioned in the declaration.

This common declaration has considerable value for purposes of interpretation as does the Preamble to the EEA Agreement. In so far as the Preamble is concerned, it is clear that the words quoted are to be regarded as an expectation expressed in the form of a declaration. They can therefore not be included among the binding rules of the Agreement which are substantially identical to the corresponding rules of EC law. The same applies to the common declaration.

For these reason, the fundamental questions to ask are the following ones:

- 1) Do fundamental rights fall under the scope of EEA law? 2) Does the European Court of Justice (ECJ) case-law on fundamental rights belong to the EEA legal order? 3) Does the jurisprudence of the European Court of Human Rights belong to the EEA? And last but not least 4) Has the principle of homogeneity of EEA law with EC law resulted in a judicial dialogue between the ECJ and the EFTA Court? All these questions will be examined in the next section.

V.2. Influence of EC law and the European Convention of Human Rights on EEA law

One could start to argue that human rights as such do not fall under the scope of the EEA Agreement and that the ECJ rulings cannot be unreservedly used as a legal source of EEA law, neither on the basis of Article 6 of the EEA Agreement nor on the basis of Article 3 of the EFTA Surveillance Authority and EFTA Court Agreement (ESA). But, on the other hand, it might be more accurate to maintain that human rights, as evolved within the European Union and within the European Convention of Human Rights, constitute an integral part of the substantial rules of the European legal systems, and therefore there is a need to interpret EEA rules on human rights in the same way in order to achieve homogeneity.

The Icelandic doctrine offers diverse conclusions as to this point. Björgvinsson has maintained that Article 6 EEA Agreement leads to the conclusion that the principles derived from the ECJ jurisprudence, including human rights issues, must be seen as a part of EEA law⁶⁰. Stefánsson has emphasized the differences between the EEA and the EU and therefore maintained that applying that jurisprudence without further appraisal would be questionable⁶¹. Most recently, Guðmundsdóttir⁶² has maintained that, in spite of the fact that 1) explicit provisions securing human rights protection cannot be found in the EEA Agreement, and 2) there is a significant difference between the EC and EEA legal orders, the EU doctrine of human rights protection has indeed a legal value in EEA law, at least concerning the application of legislation incorporated through the EEA Agreement and to the extent that ECJ judgments are binding, or at least provide guidance, concerning the interpretations of EEA acts.

It seems advisable to conclude that rules on human rights are included in unwritten EEA law⁶³. Their content would probably be the common denominator of the constitutions of the Member States, and also the ECHR but only in the context of the EEA Agreement and with a view to the objectives aimed for within that Agreement. This means in practice that the judgments of the ECJ may be used for reference when resolving such issues within the EEA, but the special characteristics of EEA law must always be taken into account, in particular the limited objectives aimed for there by comparison to the EC/EU Treaties.

The EFTA Court started to refer to the European Human Rights Convention and to judgments of the European Court of Human Rights in cases involving fundamental rights in its first case *TV 1000*⁶⁴. In this case, the Court dealt with the issue of pornographic material broadcasted from Sweden to Norway. The Court found that there is no common standard of pornography along the EEA and held that programs which might seriously impair the physical, mental

⁶⁰ D.P. Björgvinsson, „Evrópuréttur og vern grundvallarréttinda“, in *Afmælisrit – Gaukur Jörundsson sextugur*, Reykjavík, 1994, p. 188.

⁶¹ Stefánsson, S.M., *Evrópusambandið og Evrópska efnahagsvæðið*, Reykjavík, 2000, p. 185.

⁶² D. Guðmundsdóttir, „Vernd mannréttinda í rétti Evrópusambandsins og EES“, in Jóhann H. Hafstein *et al* (eds), *Bifrost, Rit lagadeildar Háskólans á Bifröst*, Borgarbyggð, 2006, p. 188.

⁶³ Stefánsson, S.M., *The EEA Agreement....*, 1997, op. cit. p. 43. This Icelandic author adds an interesting opinion that, according to Icelandic constitutional rules, the ECHR would not prevail over the EEA Agreement in case these two sources of law conflicted. He answers this question in the negative by reference to Article 30 paragraph 3 of the Vienna Convention on the Law of the Treaties which assumes that international agreements are equal in status and that incompatible interpretations must be resolved on the basis of the principles that *lex posterior derogat legi priori* and *lex specialis derogat legi generali*, that is to say, that the most recent law has priority over older law and special law has priority over general law.

⁶⁴ EFTA Court, Case E-8/97 *TV 1000 Sverige AB v The Norwegian Government*, 1998 EFTA Court Report, 68.

or moral development of minors are not lawful unless they are broadcasted at night or with the addition of some technical device. The Court interpreted the transmitting state principle underlying Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities, and referred to the freedom of expression granted by Article 10 ECHR as well as, with regard to the limitations of that freedom, to the landmark ruling of the European Court of Human Rights in the *Handyside* case⁶⁵.

The case *Bellona*⁶⁶ is probably one of the most interesting of all cases up to now. In substance, it can be reduced to the argument that the EFTA Court refused to take the lead and depart from the disputed ECJ 'jurisprudence'⁶⁷ on *locus standi* for private individuals, even if this restrictive interpretation declared the action inadmissible and left the complainants without any other procedural remedies.

The judgment concerns whether the action was admissible, more specifically whether *Bellona and TBW* had *locus standi* before the EFTA Court in so far that they were directly and individually concerned by the contested ESA decision. In the case-law of the ECJ the applicable test to determine *locus standi* is referred as the *Plaumann* test⁶⁸. The EFTA Court decided to apply that test but that case-law left the applicants with no national remedy for their problem, neither before the national courts nor other State nor European institutions, argument that was rejected by the Court itself.

Although the Court held that, in the context of an action for nullity against a decision of the EFTA Surveillance Authority approving State aid, access to justice constitutes an essential element of the EEA legal framework⁶⁹; it added, however, that it is subject to those conditions and limitations that follow from EEA law. The EFTA Court stated that it was aware of the ongoing debate with regard to the issue of the standing of natural and legal persons in actions against Community institutions and referred, *inter alia*, to the opinion of Advocate General Jacobs

⁶⁵ ECtHR, Judgment of 7 December 1976, A, vol. 24.

⁶⁶ EFTA Court, Case E-2/02 Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority, 2003 EFTA Court Report, 52.

⁶⁷ In *Jégo-Quéré*, the ECJ was criticised for missing an excellent opportunity to broaden access to the Community courts for private applicants under Article 230(4) EC Treaties. ECJ, case C-263/02 *Commission v. Jégo-Quéré & Cie Sa*, judgement of 1 April 2004. As a result, natural and legal persons can only expect reform on this point from the European legislator. If the EFTA Court had departed from the ECJ case-law in this case, the judicial dialogue would have indeed been very interesting.

⁶⁸ ECJ, case 25/62 *Plaumann v. Commission*, ECR 1963, p. 95.

⁶⁹ The EFTA Court referred to the eight recital of the Preamble of the EEA Agreement and referred to human rights as a general principle of EEA law and to its role acting under this legal framework.

in case *Unión de Pequeños Agricultores v Council*⁷⁰. It added that this discussion is important at a time when the significance of the judicial function which is inspired by the idea of human rights appears to be on the increase, both on the national and international level. The Court found nevertheless that caution was warranted, not least in view of the uncertainties inherent in the current refashioning of fundamental Community law⁷¹.

In the case *Ásgeirsson*⁷², The EFTA Court held that provisions of the EEA Agreement are to be interpreted in the light of fundamental rights and that the provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights. One of the defendants in the national proceedings had alleged that the reference of the case to the EFTA Court prolonged the duration of the proceedings and thereby infringed Article 6 of the European Convention of Human Rights. The EFTA Court referred to specific provisions of the ECHR and several judgments of the ECtHR and found that, in those circumstances, the rights of the individual had not been breached.

With regard to the right to a fair and public hearing within a reasonable time granted by Article 6(1) ECHR, the EFTA Court observed that the European Court of Human Rights held in a case concerning a delay of two years and seven months due to a reference by a national court to the Court of Justice of the European Communities for a preliminary ruling, that this period of time could not be taken into consideration in the assessment of the length of a particular set of proceedings. To take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty (now Article 234 EC) and work against the aim pursued in substance in that Article⁷³.

⁷⁰ ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council*, 2002 ECR I-6677.

⁷¹ On the requirements for *locus standi* in EU/EEA law compared to the ECtHR, it is useful to note the different attitude of the two jurisdictions and the elasticity of the notion of victim accepted by the European Commission of Human Rights. See further C. Harlow, „Access to justice as a Human Right“, in P. Alston (ed), *The EU and Human Rights*, Oxford University Press, 1999, p. 193. From the point of view of the access to justice theory, the ECJ and the EFTA Court should not hinder unnecessarily access to courts with inflexible interpretations of the requirements to *gain locus standi*. Although the rules in EC/EEA law are not directly in breach of the doctrine, limiting the right to a fair trial and the right of access to courts might destroy the very essence of that right. For the European Court of Human Rights, this holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of such right restrictively. See, for instance, ECtHR case *AB v. Slovakia*, no 41784/98, 4 March 2003, par 54.

⁷² EFTA Court, Case E-2/03 *Ákærvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, 2003 EFTA Court Report, 185.

⁷³ ECJ, Case *Pafitis and others v Greece*, judgment of 26 February 1998, Reports 1998-I, at paragraph 95. EFTA Court, Case E-2/99 *EFTA Surveillance Authority v Norway*, 2000-2001 EFTA Court Report, 1; EFTA Court, Case E-5/01 *EFTA Surveillance Authority v Liechtenstein*, 2000-2001

The EFTA Court held that the same must apply with regard to the procedure established under Article 34 of the EFTA Court Agreement which, as a means of inter-court cooperation, contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators. The EFTA Court added that in the present case, the time period from the registration of the request to the delivery of judgment amounted to a little more than five months.

VI. Conclusions

Fundamental human rights are equally protected in the EU and in the EEA although the procedural law applicable differs greatly. While it has been proved that EC law offers better procedural law and remedies and greater “access to justice” for citizens, the questions relevant now refer to uncertainties affecting EC and EEA law that are more of a political nature.

Regarding EC law, it cannot be denied that the new Treaty of Lisbon constitutes a positive and decisive step forward in the field of human rights in the European Union. However, at the time of drafting it is uncertain whether it will be ratified by all 27 Member States of the European Union, as Ireland rejected it in a national referendum in June 2008. The EU is nowadays in an “impasse” situation. This uncertainty does not help and constitutes an unacceptable delay for 26 countries and citizens of these countries that aim for a higher standard protection of their fundamental rights.

But even in the event of the Treaty of Lisbon being ratified by Ireland and entering into force, thus providing binding legal force to the EU Charter of Fundamental Rights, some interesting issues will arise as this Charter has a wider scope in some issues than the ECHR.

Regarding EEA law, the fact that the EEA Agreement has celebrated 15 years of existence must be pointed out. At this point one must accept that the EEA has had a longer life than it was generally believed. Furthermore, the parallel integration and homogenous concepts expressed in the EEA Agreement are interesting from a more general point of view as an alternative to EU membership and as a source of inspiration for creative solutions within the general framework of European integration.

The EU Charter could thus improve the human rights protection in EC law but would situate the EEA States and the EFTA Court before new legal challenges. The application of the principle of homogeneity would no doubt question the

EFTA Court Report, 287; EFTA Court, Joined Cases E-5/05, E-6/05, E-7/05, E-8/05 and E-9/05 *EFTA Surveillance Authority v Liechtenstein*, judgment of 29 June 2006.

balance between legal autonomy in the EEA and the supranationality of EU/EC law. How far is the EEA bound to follow the EU in the field of human rights?

Returning to the original questions of our research, it must be said that fundamental human rights are certainly protected in the EEA legal order although the proper statutory legal basis for this protection is missing in the EEA Agreement. So far, some interesting issues relating to human rights have been raised in these fifteen years of legal praxis of EEA law. The European Court of Justice case-law on fundamental rights has certainly an influence on the EEA legal order. The jurisprudence of the European Court of Human Rights surely belongs to the EEA and the EFTA Court takes due account on it. Last but not least the principle of homogeneity of EEA law with EC law has resulted in a judicial dialogue between the ECJ and the EFTA Court.

The EFTA Court has managed so far to preserve the specificity of a legal order based on the legal autonomy of the EEA States while guaranteeing a similar degree of protections for private individuals and economic operators. This Court has opted for a compromise solution to resolve the paradox existing between the double regime of the EC and the ECHR. It has ruled that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights and that the provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights. It is important to note, however, that the EFTA Court has been cautious. While choosing to safeguard its own jurisprudence in this field, it has also missed opportunities for an interesting judicial dialogue with the ECJ on the subject of the higher standard of protection of fundamental rights that European citizens should enjoy. It is regrettable that the limited access to justice that citizens have before the ECJ in direct actions and which has been revised in the Treaty of Lisbon has been accepted without hesitation by the EFTA Court.

As it was the case with the EU, the EEA Agreement also faces different uncertainties of political nature and its own survival is at stake. At the time of this writing the Icelandic nation is seriously considering formalizing an application for membership to the EU. If Iceland decided to join the EU that would put definitely an end to the EEA Agreement as it is clear that the EU has no political will to continue only with Norway and Liechtenstein onboard.

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THE IDEA OF EUROPEAN CONTRACT LAW AND ITS DEVELOPMENT

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Abstract

The study concentrates on the idea of European contract law and its gradual development in the frames of the European Union. As a result, in the first section the existing regulations are presented with particular reference to the Principles of European Contract Law (their adoption, content, scope and functions which they play).

The second section describes the activities undertaken by the European Union institutions. It starts with the resolutions of the European Parliament, then the conclusions of the European Council adopted at Tampere Summit in 1999 are presented and finally all the documents prepared by the European Commission in relation to European Contract Law.

The third section deals with the perspectives of the European Community activities in this field. Therefore, the current works on the Common Frame of Reference for European contract law are also described.

Keywords: *Common Frame of Reference (CFR), European Civil Code, Optional Instrument, the Principles of European Contract Law, revision of the Community regulations on private law*

I. INTRODUCTION

The European Community is a dynamic entity and the same can be said about the law which is adopted by its institutions and organs. At the beginning their legal acts and activities concentrated mainly on economic questions. As a result only public, in particular administrative, law was affected. However, after some time it has become clear that the European Community is also concerned with private law. In the literature it is underlined that “such a tendency is inevitable in a region where national frontiers are rapidly losing their importance, where official policy is aiming at a free flow of goods and services, where merging economies and companies require legal expertise exceeding national systems and languages”¹.

There is no doubt that the realisation of the main objectives of the European Community can be influenced by different national regulations on contract law. This concerns in particular free movement of goods, persons, services and capital. Let us imagine a businessman who in order to perform services in another Member States concludes contracts with foreign partners. At least some of such contracts will be governed by foreign law which is unknown for him. This maybe an impediment and may keep him away from foreign markets. Therefore, it is noticed that “in Europe the existing variety of contract laws is a non-tariff barrier to the inter-union trade. It is the aim of the Union to do away with restrictions of trade within the Communities and therefore the differences of law which restrict this trade should be abolished”².

However, the question arises how to realise this objective. Should we coordinate, harmonise or even unify the existing national contract laws or maybe it is sufficient to have a common set of rules which can be applied by the parties if they decide that their contract should be governed by them? If a coordination of the European Community regulations is necessary, how should it be done? In this study we will try to find an answer to this questions taking into account *inter alia* the Community Acquis in the area of private law, the Principles of European Contract Law, options suggested by the European Commission in its Action Plan of 2003 which moved the development of European contract law into a new phase.

¹ A. Hartkamp, *Perspectives for the Development of a European Civil Law*, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

² O. Lando, *Some Features of the Law of Contract in the Third Millennium*, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

II. THE RELEVANT REGULATIONS FOR EUROPEAN CONTRACT LAW

II.1. Community Acquis in the Area of Private Law

Annex I to the Communication from the Commission to the Council and the European Parliament on European Contract Law³ makes it clear that important fields of private law are already covered by European directives. They concern not only consumer protection but also matters such as: late payments in commercial transactions, cross-border credit transfers, commercial agents, posting of workers, electronic commerce, financial services, protection of personal data, copyright and related rights (intellectual property), public procurement. It should be noticed that the European integration process entails an increasing flow of European legislation, including legislation on private law issues⁴.

In literature an opinion can be found that the adoption of EC regulations in certain areas of private law, in particular in the field of consumer protection, “gradually leads to something that is systematically entirely different from national contract law as we know it (...) The Europeanisation of national systems legal systems through Directives leads to the contrary: not a uniform, but a diverse contract law, in which for example important remedies in case of breach of consumer contracts for the sale of movable goods are governed by different rules than the same remedies in case of other contracts”⁵. It is true that some of the Directives on consumer issues can have such an effect. However, in most of the Member States there had already been separate provisions concerning the so called “consumer contracts” before the EC legislation was adopted. Thus, the implementation of the Directives was not always connected with the adoption of a completely new set of rules but rather with an appropriate change of the binding regulations.

As it was mentioned, the EC legislation concerns different matters covered by private law. For the time being such a method has been applied that these regulations have been adopted without taking into account other provisions even in the same field e.g. certain consumer Directives predict the right to withdraw from the contract during the so called “cooling off period” which is different and depends on the type of the contract⁶. Unfortunately, this leads to many

³ COM (2001) 398 final, Brussels 11.07.2001. Its provisions will be presented in the next section of the study.

⁴ W. Snijders, *Building a European Contract Law: Five Fallacies and Two Castles in Spain*, Electronic Journal of Comparative Law, November 2003, vol. 7.4, p. 2; available at: <http://www.ejcl.org/ejcl/74/art74-2.html> (Accessed 30.12.2008)

⁵ J. Smits, *A Principled Approach to European Contract Law?*, Maastricht Journal of European and Comparative Law 2000, vol. 7, p. 222

⁶ Seven days in case of contracts negotiated away from business premises, seven working days for distance selling contracts and ten days in case of timesharing.

inconsistencies or even legal gaps. Taking this problem into account together with the fact that new regulations will surely be adopted in future one has to agree with an opinion that “the issue of coordination of this increasing flow of European rules cannot well be avoided (...) you cannot solve a puzzle if new pieces are added all the time”⁷.

11.2. The Case-law of the European Court of Justice

The role of the European Court of Justice in developing European private law, in particular contract law, is rather moderate. Some general principles of law which have been developed in administrative and economic law, such as abuse of rights and proportionality, may also exert their influence in private law situations, but such general principles have little unifying force⁸. More is to be expected, however, in the law of torts where the court is empowered by art 288 of the EC Treaty to extract general principles of tort law from the various national legal systems and has used these rules in creating liability of Member States for breaches of Community law (e.g. for incorrectly implementing EU directives)⁹. Generally, the European Court of Justice will not play a very important role in the development of European contract law.

However, it should be remembered that the Court can interpret the provisions of the EC Treaty and all the acts adopted by the EC institutions and European Central Bank. Sometimes such an interpretation requires the analysis of the compatibility of national regulations with the EC law. In such cases the Court can interfere with national contract law in particular when it states that it is incompatible with certain EC rules. For example in its judgment in the case *Quelle*¹⁰ the Court stated that the Directive on consumer goods¹¹ precludes national legislation under which a seller, who has sold consumer goods which are not in conformity, may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods. As a result, the provision predicted in the German law of obligations that the seller is entitled, in cases where goods not in conformity are replaced, to payment by way of compensation for the benefits derived by the purchaser from the use of those goods until their replacement can not be applied in relation to consumers.

⁷ W. Snijders, op. cit., p. 3.

⁸ A. Hartkamp, op. cit., p. 4.

⁹ Ibidem.

¹⁰ Judgment of 17.04.2008, C-404/06, not published.

¹¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, O.J. L 171, 7.07.1999, p. 12-16.

11.3. Soft Law - the Principles of European Contract law

11.3.1. The Work on the Principles

The Commission on European Contract Law (Ole Lando Commission) has been working since 1982 in order to establish the Principles of European Contract Law. It is a non-governmental body and its activities have been financed by the European Communities and various foundations and enterprises. With a few exceptions the members of the Commission of European Contract Law have been academics, but many of the academics have also been practising lawyers. None of them have been appointed by any government, nor have they sought or received instructions from any government or community institutions¹². It is underlined that all the members have pursued the same objective - to draft the most appropriate contract rules for Europe.

The Commission has tried to take into account the economic and social conditions specific for the 15 Member States of the European Community. Therefore, it has paid attention to their legal systems, but it can not be said that each of them has had influence on every issue dealt with. Moreover, the members of the Commission have not tried to find a compromise solution to all of the questions regulated by the Principles of European Contract law except for such situations where a compromise has been indispensable in order to make them operate in a smooth way¹³. The rules of the legal systems outside of the Community have also been considered. So have the American Restatement on the Law of Contracts (published in 1981 in its second edition) and the existing conventions, such as the United Nations Convention on Contracts for the International Sales of Goods (CISG). Finally, some of the Principles reflect ideas which have not yet materialised in the law of any state. In short, on a comparative basis the Commission has tried to establish those principles which it has believed to be best taking into account the existing economic and social conditions in Europe¹⁴.

11.3.2. The Content, Structure and Scope of Application of the Principles

The first results of the work of the Commission could be observed in 1995 when Part 1 of the Principles was published. It dealt with performance, non-performance and remedies. This part was revised later and new regulations were added.

¹² O. Lando, *Principles of European Contract law*, available at: <http://www.kcl.ac.uk/english/sympo/EUDialogue/lando.htm> (Accessed 30.12.2008)

¹³ Compare O. Remien [in:] *Principles of European Contract Law*, O. Lando, H. Beale (eds.), Martinus Nijhoff Publishers 1998, s. XX.

¹⁴ O. Lando, *Some Features of the Law of Contract in the Third Millennium*, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

Consequently, in 1999 the Principles of European Contract Law Parts I and II were published. They covered:

- general provisions (scope of the Principles, general duties of the parties and terminology)
- formation of a contract,
- authority of agents,
- validity of a contract,
- its interpretation,
- its contents and effects,
- its performance,
- non-performance (breach),
- remedies in case of non-performance.

However, this was not the end of the work of the Commission as in 2003 Part III was published. It covered the regulations on:

- plurality of parties,
- assignment of claims,
- substitution of new debtor: transfer of a contract,
- set-off,
- prescription,
- illegality of a contract,
- conditions,
- capitalisation of interests¹⁵.

Like the American Restatements the articles drafted are supplied with comments which explain the operation of the articles. In these comments there are illustrations, ultra short stories which show how the rules will operate in practice. Furthermore, there are notes which tell of the sources of the rules and state the laws of the Member States. The members of the Commission underline that “an attempt has been made to draft short rules which are easily understood by the prospective users of the Principles such as practising lawyers and business people”¹⁶.

According to art. 1:101 the Principles of European Contract law are to be applied as general rules of contract law in the European Union. They will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. It is also provided that they may be applied when the parties have agreed that their contract is to be governed by

¹⁵ The full text of the Principles of European Contract Law Part I, II and III is available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html (Accessed 30.12.2008).

¹⁶ O. Lando, *op. cit.*, p. 364.

“general principles of law”, the “lex mercatoria” or the like or when the parties have not chosen any system or rules of law to govern their contract. Finally, the Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

11.3.3. The Functions of the Principles

These provisions on the scope of the application of the Principles indirectly indicate some of the functions which they can play. First of all, as a general set of rules they can be a source of inspiration for national and international courts to interpret the provisions of the existing uniform law, to fill the gaps which it presents and to offer a background, however informal, for new law to be created¹⁷.

Moreover, the Principles may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contract and, possibly, to find suitable rules to settle them (parties may even decide to incorporate them in part or as a whole in their contract). Parties to an international contract can choose the Principles as the law applicable to their contract¹⁸.

It is also noticed that the Principles may serve as a model law that could inspire legislators who strive for law reform. In this respect, not only legislators in developing countries or in Eastern Europe may find them relevant, but also states trying to modernise existing legislation who seek inspiration from common international standards as they have recently emerged. The Principles will also have an important scholarly and educational value¹⁹.

Finally, “they demonstrate that a common basis could be and has been discovered indeed to make possible an encounter among different systems of civil law, common law and nordic law. (...) The PECL also are something which exists already, with an added force of persuasion by comparison with a mere project. The meaning of this is that they change the perspective for each observer, politician, law practitioner or legal scholar”²⁰. In this way, the Principles, by this simple fact that they have already been adopted, can support the voices of those who advocate the preparation of European Civil Code or at least a common European Contract Law.

¹⁷ See further A. Hartkamp, *Principles of Contract Law*, available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 30.12.2008)

¹⁸ *Ibidem*, p. 5.

¹⁹ *Ibidem*, p. 5 and 6.

²⁰ C. Castronovo, *Contract and the Idea of Codification in the Principles of European Contract Law* [in:] *Festschrift til Ole Lando*, L. L. Andersen, J. Fejo, R. Nielsen (eds.), Copenhagen 1997, p. 122.

The drafters of the Principles underline even that “the main purpose of the Principles is to serve as a first draft of a part of a European Civil Code”. The future will show if this ambitious view will ever be realised. However, even those who are skeptical about this possibility underline that “to have – as we do now at the beginning of the 21st Century – a text on which eminent scholars from all Member States of the European Union could agree, is a good starting point for further discussion on the future contents and shape of a European Contract Law. I feel that it is in this idea of a *common text* with which the various national legal orders can be compared and from which inspiration can be drawn, that the great value of the Principles lies”²¹.

III. EUROPEAN UNION INSTITUTIONS AND EUROPEAN CONTRACT LAW

III.1. Resolutions of the European Parliament

The European Parliament was the first EC institution that referred to the idea of a common European code of private law. In its resolutions of 26 May 1989 on action to bring into line the private law of the Member States²² and of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States²³ it called for work to be started on the possibility of drawing up a common European Code of Private Law. In the preamble to the first resolution it was mentioned that “unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law”.

In the next resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States²⁴ the European Parliament noted inter alia that the Community Directives which have implications for the private law of the Member States “are not coordinated as well as they might be” and that some of them “give rise to problems when implemented in conjunction with national civil codes”. Then the Parliament referred to the Communication on European Contract Law and underlined that:

- it is appropriate to draw up, in the form of a regulation, a European instrument available for use on an optional basis under private international law in legal relationships (for example sales contracts, the law on security, and financial services);

²¹ J. Smits, op. cit., p. 221.

²² O.J. C 158, 26.06.1989, p. 400.

²³ O.J. C 205, 25.07.1994, p. 518.

²⁴ O.J. C 140 E, 13.06.2002, p. 538.

- the Commission should present proposals to revise the existing consumer protection Directives relating to contract law in particular to remove minimal harmonisation clauses which have prevented the establishment of uniform law at EU level to the detriment of the protection of consumers and the smooth functioning of the internal market;
- current problems concerning the conclusion, performance and termination of contracts cannot be solved unless issues relating to general formal provisions, non-contractual liability, the law of restitution and property law are also addressed²⁵.

The European Parliament also called the European Commission to submit an action plan where concrete actions in the field of contract law should be predicted. It suggested that by the end of 2004 legislative proposals aimed at consolidation of the EC legislation in the field of private law should be presented, from 2006 European legislation implementing the common legal principles and terminology for cross-border or national contractual relations should be adopted and from 2010 a body of rules on contract law in the European Union that takes account of the common legal concepts and solutions established under previous initiatives should be established and adopted. Finally, the Parliament underlined that the proper legal basis for the further consolidation and development of the harmonisation of civil law should be the Article 95 of the EC Treaty and that the co-decision procedure involving the full participation of the European Parliament must in principle be used when adopting legislation in this field.

The resolution of the European Parliament of 2 September 2003 was adopted as an answer to the European Commission's Action Plan, which was underlined in its name²⁶ and in its content. The Parliament approved that the Action Plan initiated a common terminology for particular fundamental concepts and typical problems and called the Commission to complete the Common Frame of Reference by the end of 2006 and then speedily to begin to introduce it²⁷. It also underlined that in order to facilitate cross-border trade within the internal market, it should be an early priority to proceed with the establishment of an optional instrument in certain sectors, particularly those of consumer contracts and insurance contracts. Such a body of rules should be elaborated on the basis of the Common Frame of Reference and should be offered to the contracting parties

²⁵ See paragraphs 11 to 13 of the resolution.

²⁶ Resolution on the Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, OJ C 76 E, 25.03.2004, p. 95.

²⁷ See paragraphs 1 and 12 of the resolution.

as an 'opt-in /opt-out' solution (in other words the parties should initially have the option of using it voluntarily and that it could later become binding)²⁸.

The next resolutions were adopted in 2006 and they referred to the general idea of European Contract Law. In its first resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward²⁹ the European Parliament pointed out that it was not clear what the European contract law initiative would lead to in terms of practical outcomes or on what legal basis any binding instrument would be adopted. Then it noticed that "even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European Civil Code, and that in any event the project is by far the most important initiative under way in the civil law field"³⁰. However, the decision to work towards and on such a Code must be taken by the political authorities and therefore it was essential to give the present work the appropriate political input. The Parliament also underlined that "the final product of the initiative should be open to amendment by the EC legislature and should be formally adopted by it"³¹.

Therefore, it called the Commission to exploit the ongoing work by the research groups on the drafting of European contract law and by the Network for a Common Frame of Reference (CFR-Net) with a view to using their results firstly towards the revision of the *acquis* in the field of civil law, and subsequently towards developing a system of Community civil law. At the same time the Parliament gave the Commission certain directions in relation to both substantive law and procedural issues. Most of all, it asked the Commission to submit a clear legislative plan setting out the future legal instruments by which it aims to bring the results of the work of the research groups and the CFR-Net into use in legal transactions.

The resolution adopted on 7 September 2006³² was shorter than the previous one as the European Parliament referred to some of the questions already mentioned in its previous documents. First of all, it repeated its opinion that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law and stated that the current initiative on European contract law is the most important one in the field of civil law. Secondly, it supported an approach for a wider Common Frame of Reference (CFR) on

²⁸ See further paragraphs 14 and 15 of the resolution.

²⁹ Text adopted: P6_TA (2006)0109.

³⁰ Point B of the resolution.

³¹ Point F of the resolution.

³² Resolution on European contract law, text adopted: P6_TA(2006)0352

general contract law issues going beyond the consumer protection field and called the Commission to proceed, in parallel with the work on revision of the consumer acquis, with the project for a wider CFR. Finally, it underlined that - even though the final purpose and legal form of the CFR is not yet clear - the work on the project should be done well, taking into account the fact that the final long-term outcome could be a binding instrument.

On the whole it can be seen that the European Parliament is very active as far as the European contract law is concerned. A formal starting point of the initiatives in this field is its resolution of 1989. Afterwards the Parliament has also supported the developments and actions undertaken in relation to European contract law. This can be seen in its resolution on the Common Frame of Reference which will be presented in the next section of the study.

III.2. The Conclusions of the Tampere European Council (15-16 October 1999)

The European Council³³ held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. In the conclusions from this meeting it was underlined that the European Council “will place and maintain this objective at the very top of the political agenda”³⁴. Moreover, a number of policy orientations and priorities were agreed during the summit which were named: the Tampere milestones. They referred to different questions important for the area of freedom, security and justice and included:

- in the frames of a common EU asylum and migration policy: partnership with countries of origin, a Common European Asylum System, fair treatment of third country nationals and management of migration flows;
- in the frames of a genuine European Area of Justice: better access to justice in Europe, mutual recognition of judicial decisions and greater convergence in civil law;
- in the frames of a union-wide fight against crime: preventing crime at the level of the Union, stepping up co-operation against crime and special action against money laundering;
- stronger external actions.

The most important for the European Contract Law was the conclusion formulated in point 39: “as regards substantive law, an overall study is requested on the need to approximate Member States’ legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council

³³ It is the institution of the European Union which consists of the heads of states and governments of the Member States and undertakes important political decisions in the EU.

³⁴ Introduction to Presidency Conclusions, available at: http://www.europarl.europa.eu/summits/tam_en.htm (Accessed 2.01.2009)

should report back by 2001". Although this was a rather vague and short statement, it became a political basis for the European Commission's documents in the area of European contract law.

III.3. Documents adopted by the European Commission

III.3.1. General Remarks

The European Commission provided a significant impetus for further developments in the field of European contract law when it adopted in 2001 Communication on European contract law³⁵. It was regarded as the initial stage in consolidating contractually essential issues of EC secondary law³⁶ and gave rise to broadening the discussion on European contract law. Its purpose was to identify deficiencies of European contract law and to suggest the most appropriate solutions to do away with these imperfections and make concluding the cross-border transactions safe and simple.

Then, in 2003, the Action Plan³⁷ seemed to be the response to the debate resulted from the prior document. It analysed and summarised the conclusions reached after the first Communication. Having provided many answers to the questions raised before, it, at the same time, produced the new ones. Its purpose was, among many others, to launch the second part of the discussions on the measures and solutions suggested in the document.

In the following year, the Commission published the Communication³⁸ which, in fact, was the follow-up to the 2003 Action Plan. It contained and outlined the views and propositions of the EU institutions, the Member States and other interested parties. It anticipated establishing the Common Frame of Reference, which was supposed to be a tool of improvement of European contract law. Subsequently, it was followed by other documents issued by the Commission, which introduced the results of the consultations and outlined the stages of work and future policy.

³⁵ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, Brussels 11.07.2001.

³⁶ See M. Kenny, *The 2003 Action Plan on European Contract Law: Is the Commission running wild?*, European Law Review 2003, vol. 28, Issue 4, p. 541.

³⁷ Communication from the Commission to the European Parliament and the Council - A more coherent European Contract Law - An Action Plan, COM (2003) 68 final, Brussels 12.02.2003.

³⁸ Communication from the Commission to the European Parliament and the Council- European Contract Law and the revision of the acquis: the way forward, COM (2004) 651 final, Brussels 11.10.2004.

III.3.2. Communication from the Commission to the Council and the European Parliament on European Contract Law

The purpose of this document was to extend the debate about European contract law that so far had been confined mainly to the academic centers. The discussion was intended to engage other European institutions, business and legal representatives as well as the consumer groups. The scope of interest of the Communication covered the issue of the impact of divergences in the contract law between the Member States on the proper functioning of the Internal Market. What is more important, it made an attempt to answer the question whether differences in this area negatively influenced the cross-border transactions.

The next question was if there are any 'side effects' of using the approach of sectoral harmonization of contract law. Might it harmfully affect the implementation and transposition of EC law to the national legal systems of the Member States? It was believed to be necessary to track down any possible threats to a smooth and uniform application of the contractual provisions. In the event of determining any specific problems, the Commission intended to collect opinions about the best types of remedies that should be applied.

The Communication listed four solutions to the problems that might be identified through the process of debate, pointing out, however, that any party interested may come forward with their own suggestions. First option envisaged lack of any EC action. It was based on the conviction that the market could perfectly regulate its processes without any external help. Its ability to generate solutions to the problems without any assistance should be definitely given the credit and, consequently, perceived as the appropriate response to concerns of the public. At the same time, it was emphasised that the Member States as well as trade associations might provide various incentives when it comes to encouraging cross-border transactions.

Second option proposed in the Communication anticipated promotion of the development of the common contract law principles, which was supposed to result in further convergence of national laws. In order to realise that assumption, the Commission indicated the necessity of doing comparative law research as well as the need for cooperation amongst various circles. Not only would it contribute to defining the existing problems in the analyzed area but it would also make an attempt to establish some common principles in regard to the contractual provisions. Working out such common standards or guidelines was expected to facilitate many issues related to international contracts provided they are consequently and consistently applied by many legal practitioners. It would undoubtedly simplify the process of concluding contracts by parties from different legal backgrounds by means of introducing standard contracts, which eliminate the need of negotiation in every single case.

Third solution pointed by the Commission suggested improving the quality of already existing regulations and instruments. The need of ‘consolidating, codifying and recasting’³⁹ instruments in regard to their clarity and transparency was indicated as the condition of their efficient application. The significant role of quality of drafting was mentioned as well. The Commission underlined that coherent presentation and terminology were important for a successful drawing up of a contract. It was also the question of whether or not legal provisions were simplified and comprehensible that contributed to encouraging development of cross - border trading relationships. Another issue raised in this option related to directives, which should regulate more types of contracts with common features in order to guarantee coherence in this respect. Moreover, it was pointed out as advisable to prevent creating new instruments in favor of making the most of the ones already in place.

The last option presented in the Communication entailed the adoption of a new comprehensive legislation at EC level. It was based on the idea of establishing an instrument including general, as well as specific regulations concerning contracts and transactions. However, it was not specified what form the instrument should take so the decision about that was left to be discussed. Within the scope of interest there were a Directive, a Regulation and a Recommendation. It should be emphasised that notwithstanding the binding nature of the proposed acts, additional approaches⁴⁰ were taken into consideration in the process of their application to weaken their mandatory character.

As the list of suggested solutions was not exhaustive, it should be borne in mind that if there were any other propositions and suggestions submitted by the interested parties they undoubtedly would be given appropriate attention.

The Communication launched the debates and public consultations, which involved the EU institutions, lawyers, representatives of academic centers and all other parties interested. As a result, the Commission obtained 181 answers⁴¹, analysis of which led to the following conclusions:

- when it comes to the option I relying on the market itself, it was favoured only by a small minority of respondents;
- option II concerning the common standards and guidelines gained considerable support;

³⁹ The European Commission’s Communication , p.15.

⁴⁰ See the European Commission’s Communication,, p.17.

⁴¹ The answers were published on the Commission’s website

http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html
(Accessed 2.01.2009)

- the majority recognized the option III, relating to improving the existing legislation, as the best one;
- the option IV, based on the idea of a new instrument, received the least approval and acceptance⁴².

Thus it should be stressed that the Communication inspired the discussion that aimed at seeking information concerning the specific problems connected with the existence of different regulations on contractual law in the Member States. Not only did it identify the inconsistencies and discrepancies relating to this area but it also acted as a stimulus to looking for the various ways of improving it.

III.3.3. Communication from the Commission to the European Parliament and the Council - A more coherent European Contract Law - An Action Plan

The Action Plan was perceived as a response to the debate initiated by the Communication. It presented the outcomes of the discussions about the troublesome issues connected with the discrepancies amongst national contract laws of the Member States. Having analysed the results, the Commission reached a conclusion that it was not essential to abandon the sector-specific approach. Additionally, there was no need to consider all the options suggested in the last document, as it appeared that it would suffice to narrow down the debate to options II-IV⁴³. The Action Plan envisaged introducing non-regulatory as well as regulatory measures⁴⁴.

It provided for taking appropriate steps in order to realise the following objectives:

- to increase quality and the coherence of the EC acquis in the area of contract law;
- to promote the elaboration of EU wide general contract terms;
- to examine further the opportuneness of non-sector-specific solutions such as an optional instrument in the area of European contract law.

There were two main solutions anticipated in the document. The first was based on the idea of Common Frame of Reference (CFR), which was to be established with a contribution of all the interested parties. Its purpose was to collect and unify the definitions of terminology fundamental to European contract law, such as 'contract', 'damage' or 'non-performance' of a contract.

⁴² See M. Boszko, *Plan działania Komisji Europejskiej w zakresie Europejskiego prawa umów (The European Commission's Action Plan)*, *Transformacje Prawa Prywatnego (Transformations of Private Law)* 2006, no. 1, p. 9.

⁴³ *Ibidem*.

⁴⁴ See the European Commission's Action Plan, p. 2.

It was expected to link the best solutions from the national laws, the *acquis* and international law⁴⁵ and, as a result, to stimulate the eradication of discrepancies and divergence in this field. Consequently, it would lead to efficient application of law of contract in the Member States and smooth functioning of the Internal Market. It would act as a guidance for future legislation, preventing from creating any further inconsistencies⁴⁶.

Crucial complement to this assumption seemed to be the idea of providing the efficient flow of information about the legislation already in place and the planned one. Furthermore, the CFR would serve not only to the Member States but also to non member states that are interested in harmonising their legislation in order to encourage the cross - border transactions.⁴⁷ Last but not least, the purpose of the CFR was to gather information about the need of introducing non sector -specific solutions and, if necessary, to give rise to a new legal instrument, called the Optional Instrument.

The Optional Instrument mentioned above was the second solution anticipated by the Commission in the Action Plan. It was expected to comprise general principles of contract law. As it was emphasised, the Optional Instrument would not replace national contract laws but would exist simultaneously instead⁴⁸. In its nature, it would not be mandatory and imposed on the parties interested in doing cross-border businesses. The contracting parties would be provided with possibility to decide if the instrument meets the requirements of their contracts better than the domestic regulations. However, as it was suggested, if the parties opt for the instrument, they will spare the time spent on negotiations and settling which law should be applied in the event of breaching a contract⁴⁹.

This approach is the result of the Commission's conviction that contractual freedom is the significant value that must be protected and limited only when it is strongly justified. Consequently, if the parties agree to take advantage of the instrument, they should have the right to modify it according to their needs and requirements. In case the optional instrument were mandatory, it would be necessary to answer the question about the procedure used in the event of conflict of obligatory national provisions and the stipulations of the instrument⁵⁰.

⁴⁵ N. Reich, *A Common Frame of Reference (CFR) – Ghost or Host for Integration?*, ZERP-Discussionspaper 2006, no. 7, p. 10.

⁴⁶ H. Schulte-Nolke, *The Commission's Action Plan on European Contract Law and the Research of the Acquis Group*, Era Forum 2002, no. 2, p. 143.

⁴⁷ *Ibidem*.

⁴⁸ O. Lando, *Contract law in the EU: The Commission Action Plan and the Principles of European Contract Law*, p. 10, available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature.htm (Accessed 2.01.2009)

⁴⁹ *Ibidem*.

⁵⁰ The European Commission's Action Plan, p.16.

The Action Plan attached significance to legal research and pointed out its strong role in the implementation of the document. It described three main kinds of research that should be done with the aim of carrying out the Commission's policy, namely:

- comparative research on the principles of contract law in the Member States;
- research on the principles of the existing *acquis*;
- research on the case law, in the Member States as well as in the Union itself⁵¹.

The Action Plan was thought to be one of the most essential documents investigating the matter of the contract law and contributing to its further development. However, it cannot be passed over that it contained some drawbacks as well. As it was highlighted, 'some part of it suffers from serious methodological weaknesses'⁵². It was stated that the Action Plan that it did not generate a solution for the true deficiencies of European contract law. Moreover, there was an accusation made against the Commission that it did not pay careful attention to the responses from the interested parties, such as governments, companies, academics, etc.⁵³ Balancing the two opposite opinions the conclusion that springs to mind is that the Action Plan, having acted as a spur to further development of European contract law, was undoubtedly a crucial stage in the course of its improvement. At the same time, it must be stressed that there was a need for elaborating on, in order to make it more detailed and efficient.

III.3.4. Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: the way forward

In 2004 the Commission issued the follow-up to its last document as a response to the involvement of the other institutions, the Member States and all the interested parties. It developed and presented in more detail the idea of the CFR, introducing the way in which it was supposed to increase the coherence of the existing and future *acquis*. Additionally, the Communication outlined actions intended to be taken with the aim of promoting EU-wide standard contract terms as well as proceeding with the reflection concerning the necessity and nature of the Optional Instrument.

⁵¹ T. Wilhelmsson, *Comments on 'A More Coherent European Contract Law – An Action Plan*, also available at: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-55.pdf (Accessed 2.01.2009).

⁵² J. Smits, *Editorial: The Action Plan on a More Coherent European Contract Law*, *Maastricht Journal of European and Comparative Law* 2003, vol. 10, p. 111.

⁵³ *Ibidem*; compare also with M. Kenny, *op. cit.*, 548-9.

When it comes to the CFR, not only did the respondent admit its importance but they also confirmed their conviction of its significant role. It was pointed that the CFR would assist in improving the quality and consistency of the *acquis*. Having analysed the assumed roles of the CFR, the Commission indicated that, first of all, it should provide the solutions to the problems resulted from such factors as:

- usage in directives badly defined terms;
- application of the rule of minimum harmonization, which leads to discrepancies between national implementing laws and existence of the areas not covered by the directives at all⁵⁴.

Moreover, the CFR was envisaged to be applied while enacting the law concerning these issues of contract law that lack regulations at EC level. Another advantage ascribed to this document was the fact that it should perfectly lend itself to resolving the conflicts arising between the contractual parties by means of providing unbiased solutions and provisions. It was agreed between the institutions that the CFR would definitely contribute to putting into action the measures and options suggested in the Action Plan, especially formation of the Optional Instrument.

The Communication also raised the issue of using the CFR additionally to national laws by the contracting parties and by other institutions in the process of concluding the contract with third parties. The last but not least, the Commission suggested that the CFR should serve as a helping tool for the European Court of Justice in the course of interpretation the *acquis* on contract law⁵⁵.

The Communication took into account legal nature of the CFR weighing the pros and cons of two opposite solutions, namely whether the CFR should be binding or non-binding in its nature. It stated that it was the second option that should be put into practice with the reservation, however, that this question might be revised and reexamined in the future. The vast part of the Communication was devoted to details pinpointing preparation and elaboration of the CFR⁵⁶, which described such aspects as stakeholder participation, technical input and political consideration and review. Furthermore, it presented possible structure and content of the CFR and further elaboration of the vital issues. Finally, annex 1 contained possible structure of the CFR.

Although it was expressed in the Action Plan that the sectoral approach had not had a detrimental effect on contractual law or smooth functioning of Internal Market, the idea of introducing non sector - specific measures was not

⁵⁴ The European Commission's Communication , p. 3.

⁵⁵ The European Commission's Communication , p. 5.

⁵⁶ The European Commission's Communication, p. 9.

ruled out. It was considered to establish the Optional Instrument whose aim would be to deal with the deficiencies of European contract law. According to the Communication, the Commission planned to proceed with the idea of the CFR along with collecting information and opinions on the intention and need of creating the instrument⁵⁷.

However, it should be borne in mind that the Commission did not intend to suggest creation of 'European Civil Code'. In Annex II there were detailed parameters concerning the optional instrument, which were thought to stimulate further discussion on opportuneness of this instrument. They circulated around such issues as its legal form, binding nature, content, scope and legal base.

III.3.5. Other documents of the European Commission on European Contract Law

The 2004 Communication was followed by subsequent documents concerning the assumption of improvement of European contract law. In 2005 the Commission published the First Annual Progress Report on European Contract Law and the Acquis Review⁵⁸. This document outlined the progress made since the 2004 Communication and introduced the policy for the nearest future. It covered mainly the question of the CFR, especially the establishment of the network of stakeholder experts, its objectives and tasks along with the analysis of the issues that accompanied the first phase of the preparation of the CFR (e.g. procedural issues, horizontal substantive issues). Furthermore, it was stated that the relevant principles and guidelines of the CFR should be incorporated into the EU consumer law acquis review.⁵⁹

In 2007 the Second Progress Report on the Common Frame of Reference⁶⁰ was published, which recapitulated the achievements and progress made since the First Report.

IV. FURTHER DEVELOPMENTS IN THE AREA OF EUROPEAN CONTRACT LAW: WORKS ON THE COMMON FRAME OF REFERENCE

The result of the documents adopted by the Commission is such that today a keyword for Europeanisation of private law, in particular contract law, is the Common Frame of Reference (CFR). In literature it is underlined that this expression, "although it looks alien at first sight, covers surprisingly well what

⁵⁷ The European Commission's Communication, p. 8.

⁵⁸ Report from the Commission - First Annual Progress Report on European Contract Law and the Acquis Review, COM (2005) 456 final, Brussels 23.09.2005.

⁵⁹ First Annual Progress Report, p.10.

⁶⁰ Report from the Commission – Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, Brussels 25.07.2007.

we are hoping to achieve – that is a text serving as a source of inspiration for law making and law teaching at all levels”⁶¹.

According to the European Commission’s Communication of 2004 the CFR was supposed to provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders. The Commission could use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law⁶². It could also provide a basis for a possible optional European code of contract law.

According to the Communication of 2004 the preparation of the CFR was divided into several stages:

- by 2007 the researchers were expected to deliver a final report which would provide all the elements needed for the elaboration of a CFR by the Commission;
- then it was supposed to go through the elaboration process which would result in a Commission CFR;
- such a document should be submitted for final consultation (an open consultation in the form of White Paper);
- finally the CFR was supposed to be adopted by the Commission (its adoption was foreseen for 2009).

Unfortunately, this timetable was not kept as there were many questions which should be discussed. The development of the Draft Common Frame of Reference was undertaken by a European Union coordinated research network, at the centre of which lay the Study Group on a European Civil Code (Study Group) and the European Research Group on Existing EC Private Law (*Acquis Group*). Since the beginning of 2005 the two groups intermittently put forward drafts which were subsequently discussed at workshops - also coordinated by the Commission - composed of interested parties (the so-called „stakeholders”).

Meanwhile, the Commission decided to give priority to the issues related to consumer contracts. This was connected with the fact that the Community *acquis* adopted in this field was supposed to be reviewed. In fact, while the academics were still working on their draft, the Commission in a clear desire to complete the revision of the *acquis*, which is supposed to end in 2009, decided to speed

⁶¹ Ch. von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, Electronic Journal of Comparative Law, May 2008, vol. 12.1, p. 1; available at: <http://www.ejcl.org/121/art121-27.pdf> (Accessed 2.01.2009).

⁶² COM (2004) 651 final, Brussels, 11.10.2004, p. 3.

up the revision process and not to wait until the CFR would become available⁶³. The Competitiveness Council followed the same line and in its conclusions from the meeting on 28-29 November 2005 it welcomed “the prioritisation of the Review of the Consumer Acquis as an integral part of the Better Regulation agenda, meaning that those parts of the Common Frame of Reference directly relevant to the Review will be rescheduled and treated at an earlier stage than previously envisaged”⁶⁴.

Consequently, in organising the 2006 workshops priority was given to topics related to consumer contract law: consumer sales, pre-contractual information, unfair terms, right of withdrawal and right to damages. The researchers’ findings on these issues and the discussions at the workshops, together with the results of other preparatory work, served as input for the Green Paper on the review of the consumer *acquis* that the Commission adopted on 7 February 2007⁶⁵. However, before the decision was taken to give priority to the consumer protection issues, a number of workshops concerning non-consumer contract law *acquis* had also been held. They concerned insurance law and e-commerce questions. Workshops on general contract law were also organised and they concentrated on: content and effect of the contract and authority of agents⁶⁶.

In the meantime legal scholars were working on their general project as it was earlier predicted by the European Commission (it ordered the academic draft in order to implement its Action Plan of 2003). The academic Draft Common Frame of Reference (DCFR) was submitted to the Commission at the end of 2007, an Interim Outline Edition of the Draft Common Frame of Reference (DCFR)⁶⁷ was published at the beginning of 2008 and the final DCFR was ready at the end of 2008⁶⁸. As it was mentioned, the European Commission decided not to wait for the project and continued the process of revision of the Community *acquis*. Around the same time, it became clear that the idea of a European Civil Code, even an optional one, was not going to be high, if at all, on the European political agenda, especially after the debacle with the Constitutional Treaty⁶⁹. Therefore, the future of the DCFR became uncertain,

⁶³ M.W. Hesselink, *The Common Frames of Reference as a Source of European Private Law*, Centre for the Study of European Contract Law, Working Paper Series No. 10/ 2008, p. 3; available at <http://www.jur.uva.nl/csecl>

⁶⁴ See point 11 of the conclusions from the meeting of the Council of the EU (the Competitiveness Council) on European contract law, 28-29.11.2005, 14155/05 (Presse 287) 27-30.

⁶⁵ COM (2006) 744 final, Brussels 8.02.2007.

⁶⁶ Compare Second Progress Report of the European Commission on the Common Frame of Reference, COM (2007) 447 final, Brussels, 25.7.2007, p. 6-8.

⁶⁷ Ch. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition*, Munich: Sellier 2008.

⁶⁸ Its print edition is to be published in February 2009.

⁶⁹ M.W. Hesselink, op. cit., p. 3

in particular that the European Commission seemed to have lost much of its original enthusiasm for the CFR⁷⁰.

However, slightly different attitude was presented by the European Parliament and also by the European Council. The latter institution in number 20 of the Presidency Conclusions of the Brussels European Council (19-20 June 2008) underlined “the need to rapidly follow up on the project to establish a Common Frame of Reference for European contract law”⁷¹. This is a clear political basis for the further works on the CFR. Similarly, the European Parliament approved its elaboration by the European Commission and gave certain directions how it should be done.

Firstly, in its resolution of 12 December 2007 on European contract law⁷² the Parliament called on the Commission to submit a clear plan for the process of selecting those parts of the research CFR which were to form part of the final Commission CFR. It also stressed its support for an approach based on a wider CFR on general contract-law issues going beyond the field of consumer protection. Secondly, in its resolution of 3 September 2008 on the common frame of reference for European contract law⁷³ the Parliament suggested that the project should be worked on by the Directorate General for Justice, Freedom and Security with the full involvement of all other relevant DGs, since the CFR goes well beyond consumer contract law, and to make the necessary materials and human resources available. It also pointed out that “the Commission document will be the basis for the decision of the European Institutions and all interested stakeholders on the future purpose of the CFR, its content and legal effect, which may range from a non-binding legislative tool to the foundation for an optional instrument in European contract law”⁷⁴. If, however, the future format of the CFR would be that of an optional instrument, “it should confine itself to those areas where the Community legislature has been active or is likely to be active in the near future, or which are closely linked to contract law”⁷⁵.

Therefore, the DCFR can play a key role in the future development of European Contract Law. One of its authors underlines that it includes “a set of annotated rules to which the European and national legislators and the European and national courts, including arbitral tribunals, can refer to when in search

⁷⁰ Ibidem.

⁷¹ Presidency Conclusions, Brussels 19-20 June 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf (Accessed 3.01.2009)

⁷² Text adopted : P6_TA(2007)0615

⁷³ Text adopted: P6_TA(2008)0397

⁷⁴ See paragraph. 5 of the resolution

⁷⁵ See paragraph 12 of the resolution.

for a commonly acceptable solution to a given problem”⁷⁶. Moreover, it allows parties to a contract to incorporate its contents into their agreement and “even if the Common Frame of Reference were not to be turned into applicable law and were to remain something like a set of standard terms, it could serve a useful purpose, the only difference then being that, if agreed upon by the parties, it would remain subject to the applicable *ius cogens*”⁷⁷.

Summing up, the DCFR is not only the starting point for further political activities but it can be applied in practice now. It should also be added that apart from the contract law issues, it covers other private law regulations e.g. non-contractual liability arising out of damage caused to another, unjustified enrichment, transfer of movables. Consequently, its scope is broader than the scope of the Principles of European Contract law which have, however, been used as a starting point to works on the DCFR.

There are several reasons why the DCFR covers a rather wide range of subjects (including an amended and partly revised version of the PECL) but the most important is its authors’ view that it would not be sufficient to include only rules on general contract law in the Academic CFR. However, the Draft is structured in such a way that if some of these additional issues can not be accepted by the EC institutions working on it, they can be omitted and left to the later stage of deliberation. In other words, the Academic Common Frame of Reference will not be structured on a ‘take it (all) or leave it’ basis; perhaps not every detail can be cherry-picked in tact, but in any event larger areas could be taken up without being forced to accept the entirety⁷⁸.

V. CONCLUSIONS

There is no doubt that the idea of European contract law has developed considerably since 1982 when the Commission on European Contract law led by Ole Land started its works. It should be stressed that the academics were the ones that gave an impetus to this process – their research on European contract law began long before the political discussion on this issue. The latter should be connected with the first European Parliament resolutions, the conclusions of the Tampere summit of heads of states and governments in 1999 and various Commission documents adopted since 2001.

Now the decision has to be made about the future of the Common Frame of Reference. One of the question which should be discussed is its legal character. In other words, if it is going to be an official document and if yes, a non-binding

⁷⁶ Ch. von Bar, *A Common Frame of Reference for European Private Law...*, p. 1

⁷⁷ *Ibidem*.

⁷⁸ *Ibidem*, p. 7.

or binding act. Still, there are many options and the EC institutions will have to take a proper decision.

Anyway, it seems that it is more probable than not that Europe will get its Common Frame of Reference. It has the support of the European Council and of the European Parliament. The Council of Ministers of Justice also generally approves the CFR even though it underlines that it should be “a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.”⁷⁹ Thus; maybe in 2009 or later the European Union will have its own regulations on European contract law. The time will show if the works undertaken by academics will take a form of an act, even a non-binding one.

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⁷⁹ See the position adopted by the Justice and Home Affairs Council on 18 April 2008.

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HUMAN RIGHTS PRINCIPLE IN THE EUROPEAN COMMUNITY TREATIES OF MAASTRICHT, AMSTERDAM AND NICE

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Abstract

The European Community Treaties of Maastricht, Amsterdam and Nice brought significant changes into the Community legal order. They emphasized the importance of the human rights in the EU and gradually introduced appropriate provisions. Was it necessary to introduce provisions on human rights to the Community law?

The article attempts to answer some of the questions. Apart from this the reader may find some comments on the general principle of the respect for human rights and fundamental freedoms in the Community legal order.

Keywords: *The Community Treaties; the Treaty on the EU; Article 6 of the Treaty on the EU; the general principle of the respect for human rights; the European Court of Justice (ECJ); the Court of First Instance; the European Convention on Human Rights; the political and citizen's rights; the social rights.*

I. THE EUROPEAN COMMUNITY TREATIES OF MAASTRICHT, AMSTERDAM AND NICE

1.1. The Maastricht Treaty

The Maastricht Treaty – Treaty on European Union was signed on 7 February 1992¹. On the basis of this treaty the EU was established. The EU, as a new structure constructed out of the three pillars, was supposed to bring the EC/EU closer to its citizens². It had its implications on the placement of the principle

¹ The Maastricht Treaty came into force on 1.11.1993; test [in:] *Dokumenty Europejskie [European Documents]*, ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, Lublin 1996, p. 295.

² Preamble and art. A TEU, in: *ibid.*, p. 295 and 298.

of the respect for human rights and freedoms as a source of the EC law³. In the preamble we read, that the heads of states and governments established the EU, being *resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities*⁴. The preamble to the Treaty on European Union emphasizes the attachment of the EU to *the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law*⁵. It is also marked in the preamble that the EU is being established *desiring to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them*⁶.

It is worth mentioning in this context, as W. Czapliński and P. Saganek point out, that *the principle of democracy was introduced to the Community law through the adjudication of the ECJ. It is based on the replacement of the principle of the separation of powers by the principle of the institutional balance and the introduction to the Community law basic procedural principles of the state of law (principle of non-retroactivity, the obligation to justify the decisions, the obligation to hear the parties before issuing the decision relating to them)*⁷. The principle of the democracy, understood as the equivalent of the political liberalism, is therefore inseparably linked with the principle of the respect for human rights. It is so

³ See P. Filipek, *Protection of Human Rights in the EU-Meeting the Standard of a European Human Rights System*, in: *The Emerging Constitutional Law of the European Union*, ed. A. Bodnar, M. Kowalski, K. Raible, F. Schorkopf, Berlin 2003, p. 53, where we read: *A new tendency of giving the protection of human rights a treaty-binding base was first marked by the Treaty of Maastricht*.

⁴ D. Lasok & Bridge, *Law & institutions of the European Union*, London-Dublin-Edinburgh 1994, p. 25 characterizing this *new stage* write that *Maastricht does not make us wiser, Article F (1) simply stating that 'the Union shall respect the national identities of its Member States', thus vaguely referring to a 'Europe of States'. Occasionally the Community is described as a federation, the idea favoured by the Court of Justice, but the adjective 'federal' (though not the reality) was excised from the drafts of the TEU. Art. A (3) of the Draft 'Treaty on the Union', Working Document prepared by the Netherlands Presidency of the Council of Ministers on 12 and 13 November 1991: 'The Treaty marks a new stage in the process leading gradually to a Union with a federal goal'. Compare it with art. A of the Treaty on European Union, in: op.cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 298, where we read 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'*.

⁵ Ibid., p. 295.

⁶ Ibid.

⁷ W. Czapliński, P. Saganek, *Demokratyczna forma rządu i ochrona praw człowieka w Unii Europejskiej w świetle traktatów z Maastricht i Amsterdamu* [The democratic form of governing and the protection of human rights in the European Union in the light of the treaties of Maastricht and Amsterdam], in: *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej* [The Constitution of the Republic of Poland from 1997 and the membership of Poland in the European Union], ed. C. Mik, Toruń 1999, p. 18.

because the general principle of the respect for human rights is linked with the basic procedural principles of the state of law⁸.

The principle of the respect for human rights was articulated in the Treaty of Maastricht for the first time as a principle of Community law. Article F (2) of the Treaty on the EU states that *the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*⁹.

The above-mentioned regulations are the only ones of the concerned treaty directly applying to the principle of the respect for human rights¹⁰. In the context of frequently pointed out problem of the deficit of the democracy in the EU it is worth saying that they had implications for the question of the legality of actions of the EC itself and by this they slightly decreased the deficit of the democracy.

Apart the necessity to present the real legal basis of the action of the EC, the inclusion of the principle of the respect for human rights into the Community law brought about the consequence that the actions of the EC should be in conformity with *the general principles common to the laws of the Member States*¹¹. Moreover, on the basis of Article 164 of the Treaty establishing the EC *the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed*¹². 'The law' shall be understood broadly, that means the Community law, the public international law and the general principles of law¹³.

It is also worth mentioning that through the Treaty of Maastricht the changes to the Treaty establishing the EC were introduced. They were relating to the principle of the respect for human rights and freedom. Above all the institution

⁸ See A. Wyrozumska, *Jednostka w Unii Europejskiej [The individual in the European Union]*, in: *Prawo Unii Europejskiej [The law of the European Union]*, ed. J. Barcz, Warszawa 2004, p. 400 and the following p., where the author enumerates as *the principles of the Community law of the special significance for the individuals* exactly the procedural principles, as: the principle of the legal certainty, including the protection of the legitimate expectations and the principle of non-retroactivity, and also material principle of the prohibition of discrimination; compare with J. A. Usher, *General Principles of EC Law*, London-New York 1988, p. 72 and the following p.

⁹ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 299.

¹⁰ It does not exclude the indirect relation of some articles of the Treaty of Maastricht with the principle of the respect for human rights, as for example art. J.1 in the point 2 of the TEU.

¹¹ Art. 215 of the Treaty establishing the EC in the Maastricht edition, in: op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 158.

¹² Ibid., p. 134.

¹³ D. Lasok & Bridge, op. cit., p. 27 write that *The Union, though consisting of sovereign states, is a separate, albeit supranational, entity and, in this respect, it is governed by the law of international institutions in general and its own constitution in particular. In this context the law of international institutions, an offshoot of public international law, applies to the Union as a regional arrangement.*

of the European citizenship was introduced¹⁴. Article 8 (2) states that *Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby*. It relates indirectly to the general principles of EC law as well¹⁵.

There are many other references to human rights in the provisions relating to the II and III pillars. One can indicate the provisions indirectly relating to the principle of the respect for human rights through the invocation to its source—the European Convention on Human Rights—for example the provision relating to the III pillar—the provisions on judicial cooperation and internal affairs—article K.2 (1) of the Treaty on the EU¹⁶.

The references to the UN Charter and the Helsinki Final Act of the Conference on Security and Cooperation in Europe, as well as the Paris Charter in article J.1 (2), the provision relating to the II pillar—the provisions on a common foreign and security policy—shall be recognized as a sign that the principle of the respect for human rights is binding on the EU. This provision states for example that one of the goals of the common foreign and security policy is *to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms*¹⁷. Despite the above-mentioned provisions it is important to point out that the provisions of the titles V and VI of the Treaty on the EU—II and III pillars—where not included in the jurisdiction of the ECJ¹⁸ because it has jurisdiction only in the sphere of the I pillar.

On the overall the changes introduced by the Treaty of Maastricht in the sphere of the regulation of the relation between the EU and the EC and the human rights are recognized as insufficient¹⁹. Concerning the principle of the respect for human rights itself, it is of a guiding character in the realization of the goals placed before the EU and the EC especially. The Treaty of Maastricht

¹⁴ Part II of the Treaty establishing the EC in the Maastricht edition—op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 49.

¹⁵ Article 230 of the Treaty establishing the EC in the Maastricht edition is another important provision indicating indirectly the binding character of the principle of the respect for human rights on the EC (today article 303 of the Treaty establishing the EC), which stated and states invariably that *the Community shall establish all appropriate forms of cooperation with the Council of Europe*.

¹⁶ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 306.

¹⁷ Ibid., p. 301.

¹⁸ Article L of the Treaty on the EU, in: Ibid., p. 309.

¹⁹ P. M. Twomey, *The European Union: three Pillars without a Human Rights Foundation*, in: *Legal Issues of the Maastricht Treaty*, ed. D. O'Keefe, P. M. Twomey et al., Chichester 1994, p. 121 describes the appeal of the Treaty on the EU to the human rights as a defeat; the author writes that it is *a lost opportunity and a basic defect in the Community in the process of the expansion towards the Ural*.

was widened additionally by the recognition of the fundamental constitutional doctrines, such attributes of the power as subsidiarity and proportionality²⁰.

1.2. *The Treaty of Amsterdam*

The Treaty of Amsterdam not only enhanced the achievements but took over new challenges as well. The Treaty of Amsterdam was signed on 2 October 1997²¹. The document adopted then was titled 'The Treaty of Amsterdam changing the Treaty on the EU, Treaties establishing the European Communities and various relevant acts'. The provisions of the Treaty of Amsterdam were presented in 15 articles and were divided into three parts²². The Treaty of Amsterdam was a significant step forward compared with the Treaty of Maastricht²³.

In the preamble to the Treaty on the EU in the consolidated version of the Amsterdam Treaty we read that the EU is being established by the Member States *confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*. In the following paragraph we read that it takes place *confirming their attachment to fundamental social rights as defined in the European Social Charter signed in Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers*.

It is very important to point out that the Treaty of Amsterdam was signed already after issuing by the ECJ the negative opinion 2/94 stating that the EC's competence to access to the European Convention on Human Rights

²⁰ See ex article 3 b of the Treaty establishing the EC (today article 5 of the Treaty establishing the EC)-text in: op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p.46.

²¹ The Treaty of Amsterdam came into force in 1999-consolidated version of the Treaty on the EU and the Treaty establishing the EC in the Treaty of Amsterdam edition in: *Dokumenty Europejskie [European Documents]*, ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, Lublin 1999, p. 45-95 and 99-337.

²² I part of the Treaty of Amsterdam (articles 1-5) contains the amendments to the treaties: on the EU, establishing the EC, establishing the ECSC and the European Atomic Energy Community in the substantial law as well as to the Act relating to the Elections of the representatives to the European Parliament of 1996 (which is an attachment to the Council decision of 20.9.1976); II part (articles 6-11) contains the provisions simplifying Community treaty foundations: demands and proposals relating to arrangement and consolidation of the founding treaties in order to make them understandable for the European citizens; through article 11 the competence of the ECJ was broadened by including in the sphere of its competence the provisions of this treaty relating to the simplification contained in its second part; III part of the Treaty of Amsterdam contains the general and final provisions (articles 12-15), i.e. defining the 'vacatio legis'-the binding effect was given from 1.5.1999; The Final Act of the Treaty of Amsterdam contains consolidated versions of the treaties: on the EU and establishing the EC; it is worth mentioning that the equivalent tables are the integral part of this treaty.

²³ Despite the fact the same can not be said about the question of the simplification of the treaties-see B. De Witte, *Simplification and reorganization of the European treaties*, in: *Common Market Law Review*, Vol. 39, no. 6, 2002, p. 1257.

doesn't rise from Article 235 of the Treaty establishing the EC in the Maastricht version²⁴. Despite the above-mentioned we don't find the appeal to the European Convention on Human Rights in the preamble to the Treaty on the EU in the Treaty of Amsterdam edition, nor the necessary amendments for the accession to the European Convention on Human Rights in the Treaty establishing the EC.

Article 6 (1) of the Treaty on the EU unchangeably enumerates fundamental principles of the EU. However, Article 6 (2) of the Treaty on the EU in the new version states additionally that *the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*²⁵. B. Tonra rightly points out that these are principles common to the Member States of the EC/EU but in the Treaty on the EU they are principles of the EU. The author emphasizes that in the Treaty of Amsterdam the situation from the Treaty of Maastricht was reversed because the EU is pulled back from the organization based on its member states to the organization based on its own values. He writes that these values have a specific significance in the EU and *for the first time, the Union's constitution contains a mechanism to deal with breach by a Member State of these principles*²⁶. This is due to the fact that the Treaty on the EU was amended by the provisions of Article 7 regulating the way in which the Council is going to reply to the cases of serious and persistent breach of the principles in question. The Treaty of Amsterdam in this way introduces a system of sanctions in order to protect human rights. One can say that gradually the area of freedom, security and justice, therefore the III pillar was established²⁷.

²⁴ ECJ's opinion 2/94 from 28.3.1996, in: *The Relationship between European Community Law and National Law: The Cases*, ed. A. Oppenheimer, vol. 2, Cambridge 2003, p. 46 we read that *the Council of the EU needed the opinion of the ECJ according to article 228 (6) of the Treaty establishing the EC (the Treaty) about whether the EC could access to the European Convention, 1950 (the Convention). According to the Council none decision could be taken on the basis of opening the negotiations until the ECJ found that such decision is compliant with the Treaty. The Council supported by the Commission, Parliament and 5 Member States (the Belgian government, French, German, Italian and Portuguese governments) maintained that when the text of the agreement in question in the frames of understanding article 228 (6) of the Treaty didn't exist yet, the demand for the opinion was still admissible. The Convention to which the Community would accede was known and the legal questions which would arise due to the accession were clear enough, despite the existence of various solutions taking into consideration the participation of the Community in the organs established on the basis of the Convention. Other Member States nevertheless maintained that the demand for the opinion was inadmissible or at least immature.*

²⁵ Op. cit., ed. A. Przyborska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 53-55.

²⁶ *Amsterdam. What the Treaty Means?*, ed. B. Tonra, Dublin 1997, p. 44.

²⁷ It is worth mentioning here that the questions of immigration were transferred from article K of the Treaty on the EU-III pillar to the I pillar and in this way the ECJ gained jurisdiction over these questions.

Nevertheless there was ambiguity as to the jurisdiction of the ECJ in the application of Article 6 of the Treaty on the EU, which it had not possessed directly²⁸. As B. Tonra indicates, an open question was *whether the Court of Justice can take Article F (6) into account when interpreting provisions of Community law or of the Treaty on the EU (such as in the third Pillar) over which it does have jurisdiction*²⁹. Changed Article L-Article 46 d of the Treaty on the EU in the Treaty of Amsterdam version, which regulates the ECJ's competence, states that the competence of the ECJ shall apply to *Article 6 (2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty*³⁰.

W. Czapliński and P. Saganek accurately suggest that in fact Article 46 d of the Treaty on the EU in the Treaty of Amsterdam version was a confirmation of *a status already existing in practice*³¹. B. Tonra concludes that *this would appear to exclude reliance on Article F.1 (7) in similar circumstances*³². The regulation of Article 46 still leaves the actions of Member States concerning fundamental rights beyond the ECJ's jurisdiction. New Article 7 of the Treaty on the EU is a mechanism of a political control and Article 46 of the Treaty establishes mechanisms of jurisdictional control³³.

There is another important regulation-of Article 49 of the Treaty on the EU, which establishes as the criteria of the accession to the EU the observance of the

²⁸ It is worth mentioning in this context that the new article 35 of the Treaty on the EU in its title VI, therefore in the sphere of III pillar of the EU, which determines the subject scope of the property of the ECJ, especially point 6, which is a particular form of a complaint contesting the validity of an act; see also cases of constitutional tribunals of Member States based on this article and a relatively new case before the ECJ: i.e. the judgment of the Polish Constitutional Tribunal from 27.4.2005, No. P 1/05 about constitutionality of a state's implementation of European arrest warrant, in result of which the Constitution of the Republic of Poland from 1997 was changed; see as well the judgment of the German Federal Constitutional Tribunal, *Bundesverfassungsgericht*, decision from 18.7.2005, 2 BvR 2236/04 about the German law on the European arrest warrant and the judgment of the ECJ from 16.6.2005 in case: *Pupino*, (2005) ECR I-5285, par. 58 and 59, where we read that *the framework decision must be interpreted in the way that the fundamental rights, including especially the right to a fair hearing as it is established on the basis of article 6 of the Convention (European Convention on Human Rights) and interpreted by the European Court of Human Rights, are respected*.

²⁹ Op. cit., B. Tonra, p. 148.

³⁰ The ECJ is not entitled to estimate the regularity of the declaration of existence of a breach of the principles formulated in article 6 (1) of the Treaty on the EU by the Council of the EU and the European Parliament.

³¹ W. Czapliński, P. Saganek, op. cit., p. 26.

³² Op. cit., ed. B. Tonra, p. 148.

³³ A. Płachta, *Zasada ochrony praw podstawowych [The principle of the protection of fundamental rights]*, in: *Stosowanie prawa Unii Europejskiej przez sądy [The application of the EU Law by the courts]*, ed. A. Wróbel, Kraków 2005, p. 350-351.

principles enumerated in Article 6 (1) of the Treaty on the EU³⁴. W. Czapliński and P. Saganek state with reason that the conditions introduced to the new version of Article O³⁵-Article 49 of the Treaty on the EU *stopped being merely a premise to estimation of the candidate's ability to access to the EU but were the condition 'sine qua non' of the participation in the EU*³⁶. They rightly point out that *the Copenhagen Council made it precise that the candidate states must have a stable institutions guaranteeing the preservation of the democracy and the rule of law, human rights and the rights of minorities and must be able to fulfill the obligations arising from the community law i.e. interception of the 'acquis communautaire'*³⁷. A. Płachta emphasizes that *the Treaty of Amsterdam in this respect constitutionalized the Copenhagen criteria formulated on the 1993 European Council Summit, which observance was a condition to open the negotiations with the candidate states*³⁸. The Amsterdam Summit resulted in this context in the fact that the Protocol on Social Policy from Maastricht³⁹ became a new chapter in the Treaty establishing the EC, therefore a part of it⁴⁰. It is exactly implied that *the inclusion of it (the Protocol on Social Policy) to the basic normative document of the EU had a great symbolic significance because in this way 'the Social Europe' became an important goal to be realized*⁴¹.

The preamble to the Treaty establishing the EC in the consolidated version of the Amsterdam Treaty states that the Member States establish the EC *intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations*⁴². Following provisions of the Treaty establishing the EC in the consolidated version of the Treaty of Amsterdam relate to the

³⁴ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 91.

³⁵ Article O of the Treaty on the EU in the Maastricht version stated that *Any European State may apply to become a member of the Union*-text in: op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 310.

³⁶ W. Czapliński, P. Saganek, op. cit., p. 22.

³⁷ Ibid.

³⁸ A. Płachta, op. cit., p. 351-352.

³⁹ It enabled the United Kingdom to be excluded from the acceptance and implementation of decisions relating to social rights.

⁴⁰ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 213 and the following p.

⁴¹ K. Gromek-Broc, *Europejska polityka socjalne przed i po Traktacie z Amsterdamu* [The European social policy before and after the Treaty of Amsterdam], in: Państwo i Prawo, 9-12, z. X, 2002, p. 39; see also I. Boruta, *Polityka społeczna, zatrudnienie, edukacja, szkolenie i młodzież* [Social policy, employment, education, training and youth], in: *Prawo Unii Europejskiej* [The EU Law], ed. J. Barcz, Warszawa 2004, p. 885-921 and K. Głębicka, *Pozycja socjalna obywateli Unii Europejskiej* [The social position of the EU citizens], in: *Pozycja obywatela w Unii Europejskiej i jego uprawnienia* [The position of the citizen in the EU and its rights], ed. J. Justyński, J. Maliszewska-Nienartowicz, Toruń 2003, p. 51-71; see also articles 2, 3 and 43 par. 1 a and b of the Treaty on the EU in the Amsterdam version.

⁴² Op. cit., ed. A. Prz

human rights protection: Part I-Principles: Articles 2 and 3 in conjunction with Article 4 point 1 and Article 5 (3 b); Article 7 (4); article 12 (6); Article 13 (6 a); Article 14 point 2 (7 a); Part II-Citizenship of the Union: Article 17 (8)-22 (8 c); Part III-Community Policies: Article 31 point 3 (37); Title III-Free movement of persons, services and capital, Chapter I-Workers: Article 39 (48)-42 (51); Title VIII-Employment: Article 125 (109 n)-Article 130 (109 s); Title XI-Social policy, education, vocational training and youth: Article 136 (117)-150 (127); Title XII-Culture: Article 151 (128); Title XIII-Public health: Article 152 (129); Title XIX-Environment: Article 174 (130 r); Title XX-Development cooperation: Article 177 (130 u); Part VI: Article 303 (230) and Article 309 point 2 (236)⁴³. The reading of the above-mentioned provisions proves that the Treaty of Amsterdam introduced significant changes especially in the sphere of the social policy⁴⁴. Apart from this B. Tonra indicates that *the sense that the Union represents a community of shared values is underlined by a new article on non-discrimination*⁴⁵-Article 13 of the Treaty establishing the EC in the Treaty of Amsterdam consolidated version. A. Płachta rightly remarks that *the changes introduced into the Treaty establishing the EC by the Amsterdam Treaty were an attempt to significantly enhance the standard of human rights protection in the frames of the Communities. Their goal was to guarantee a wider protection against discrimination through the widening of the Council's legislative competence*⁴⁶. The author comments on Article 13 writing that *this provision is not recognized as a provision of direct effect. It is not an absolute prohibition but rather an additional legal basis enabling the Council to take action in frames of Community law in order to eliminate discrimination in the above-mentioned spheres*⁴⁷.

A very important innovation of the Treaty of Amsterdam was also an Article 225 of the Treaty establishing the EC, which stated that *a Court of First Instance shall be attached to the Court of Justice*, although substantially the position of the Community courts didn't change: *the Court of Justice shall ensure that in the*

⁴³ Op. cit., A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 99-333.

⁴⁴ See especially articles 136, 137 and 141 of the Treaty establishing the EC and articles 2 and 3 of the Treaty on the EU in the Treaty of Amsterdam version, in: *ibid.*; see K. Gromek-Broc, op. cit., p. 39-41; also J. Sozański, *Ochrona praw socjalnych i konsumenta w Unii jako podstawowe wartości ustrojowe* [The protection of social and consumer's rights in the Union as basic structural values], in: *Prawo Unii Europejskiej. Prawa obywatelskie* [The EU Law. Citizen's rights], nr 7-8/2004, p. 10, where we read that comparing the scope and catalogue of social rights in the EC with the same type of rights in the universal system (of the International Covenant of Political and Citizen's Rights) and in the system of the Council of Europe (of the European Social Charter) *it has to be said that the Community provisions formulate social rights in a different way, giving them more binding character and wider scope*.

⁴⁵ Op. cit., ed. B. Tonra, p. 44.

⁴⁶ A. Płachta, op. cit., p. 349.

⁴⁷ *Ibid.*, p. 350.

*interpretation and application of this Treaty the law is observed*⁴⁸ and the Court of First Instance has a jurisdiction *to hear and determine at first instance (...) certain classes of action or proceeding* and his decisions can be *subject to a right of appeal to the Court of Justice on points of law*⁴⁹.

In the context of the principle of the respect for human rights in the Community law, it is important to take into consideration Article 230 (173) of the Treaty establishing the EC in the Treaty of Amsterdam consolidated version in the point where it states that ECJ, when reviewing the legality of certain acts of Community institutions, has jurisdiction *in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*⁵⁰. The expression *any rule of law* relating to the application of the Treaty establishing the EC the Member States should be understood as the general principles of law.

1.3. The Treaty of Nice

On 30 January 2001 published in Brussels and 26 February 2001 was signed in Nice the Treaty of Nice amending the Treaty on the EU, the Treaty establishing the EC and certain acts relating to them⁵¹. It consists of the preamble, two parts, the protocols and declarations. Part I relates to substantial changes which are contained in six articles. Part II relates to general and final provisions (article 7-13).

The Treaty of Nice didn't bring major institutional changes but several structural reforms. It was supposed to prepare the EU to the accession of next ten or even twelve states by introducing the principle of the rotation of the Members of the Commission and the system of weighted votes in the Council of the EU⁵². Apart from that it broadened the scope of decisions taken by a qualified majority of votes. The Treaty of Nice related to the reforms of the basic agenda formulated by the European Council in Helsinki in December 1999. In the context of human rights protection in the Community law it led to the amendment of Article 7 of the Treaty on the EU, widening the possibilities to take action by the EU compared with the Treaty of Amsterdam, enabling the EU

⁴⁸ Article 220 of the Treaty establishing the EC in the Treaty of Amsterdam consolidated version in: op.cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 271.

⁴⁹ Article 225 (168 a) paragraph 1 of the Treaty establishing the EC in the Treaty of Amsterdam consolidated version in: *ibid.*, p. 273.

⁵⁰ *Ibid.*, p. 277.

⁵¹ The Treaty of Nice came into force on 1.2.2003-text: *The Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts*, Brussels, 30 January 2001, in: SN 1247/01.

⁵² Article 3 of the Protocol to the Treaty of Nice on the enlargement of the EU.

to act also in case of the existence of *a clear risk of a serious breach by a Member State of principles mentioned in Article 6 (1)*, therefore before the existence of *a serious and persistent breach by a Member State of principles mentioned in Article 6 (1)*⁵³. Moreover, the Council of the EU may in such a case address appropriate recommendations to that State⁵⁴. Additional implication of the Treaty of Nice for the protection of human rights in the EU is the acceptance by the Conference of the representatives of the governments of the Member States called on 14 February in Brussels ‘the Declaration on the future of the EU’. In the point 3 of this declaration we read that *after clearing the way for the new accessions, the Conference calls to open a more insightful and wider in scope debate on the future of the EU*⁵⁵. The process of discussion of this type between all interested parties was to relate also to the question of the status of the Charter of Fundamental Rights of the EU. The Charter of Fundamental Rights of the EU was proclaimed already on the European Council Summit in Nice by the Council of the EU, the European Parliament and the European Commission on 7 December 2000. Unfortunately this Charter is not binding and only exists as ‘a soft law’. Even during the preparation of the final version of the Charter of Fundamental Rights of the EU there were various proposals concerning the reforms in the sphere of human rights in the EU i.e. the idea of the creation of a separate judicial panel on human rights in the ECJ⁵⁶ which would guarantee a homogeneous standard of protection of human rights in the EC, raising its level and limiting the judicial conflicts with the European Court of Human Rights⁵⁷.

As a result of the above-mentioned initiatives, besides the other institutional changes, the Treaty of Nice introduced significant changes into the EC’s judiciary

⁵³ J. Justyński, *Instytucje i porządek prawny Unii Europejskiej na tle tekstów prawnych oraz orzecznictwa Europejskiego Trybunału Sprawiedliwości* [*The Institutions and a legal order of the EU in the light of the legal texts and the ECJ’s adjudication*], Toruń 2003, 213.

⁵⁴ See *Traktat ustanawiający Wspólnotę Europejską (tekst ujednolicony). Traktat o Unii Europejskiej (tekst ujednolicony)* [*The Treaty establishing the EC (consolidated version). Treaty on European Union (consolidated version)*], Warszawa 2005, p. 390-394, article 7 is given the following words: 1. *On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6 (1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call an independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.*

⁵⁵ *The Treaty of Nice...*, op. cit., p. 169.

⁵⁶ See C. Tuner, *Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights*, in: *European Public Law*, vol. 5, no. 3, Netherlands 1999, p. 457-463.

⁵⁷ *Ibid.*; see also a comment by C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* [*European Community Law. The Problems of the Theory and Practice*], Warszawa 2000, p. 453-454.

power, which were necessary to provide enhanced effectiveness and the democracy in adjudication⁵⁸. Through the removal of the mention about the attachment of the Court of First Instance to the Court of Justice the position of the EC's courts became equal. For the first time Article 220 of the Treaty establishing the EC states that the assurance that the law is observed in the interpretation and application of this Treaty belongs not only to the ECJ but also to the Court of First Instance⁵⁹. This article emphasizes the fully autonomous character of the Court of First Instance. Additionally Article 225 of the Treaty establishing the EC in a new version emphasizes the absolute autonomy of the Court of First Instance by enumerating the cases in which this court is competent⁶⁰. The democracy in the adjudication is ensured also by the composition of the Court of First Instance—at least one judge from each Member State, the nationality isn't important but in practice each judge has a citizenship of a state which he or she represents.

The opinions about the Treaty of Nice were varying⁶¹. The position of Poland on this matter was presented by a Ministry of Foreign Affairs in a document 'the Treaty of Nice-Polish point of view', Warsaw, 15 February 2001⁶². Poland expressed its satisfaction about the amendment of Article 7 of the Treaty on the EU and stated that it introduces a practical and democratic mechanism of early warning in case of a clear risk or a serious breach by a Member State of the principles mentioned in Article 6 (1) of this Treaty. Poland appreciated also a proclamation of the Charter of Fundamental Rights of the EU during a Nice Summit.

Nevertheless one may have doubts whether the changes brought by the Treaty of Nice were sufficient. Contrasting with the position of the candidate states, which recognized the results of the Treaty of Nice as compatible with their expectations and postulates, is statement by J. Delors who found the conclusions from Nice as disappointing from the institutional point of view but still paving the way towards enlargement⁶³. I rather feel inclined to this sceptical point of

⁵⁸ See *Trybunał Sprawiedliwości i Sąd Pierwszej Instancji Wspólnot Europejskich [The Court of Justice and the Court of First Instance of the European Communities]*, ed. K. Wójtowicz, T. T. Koncewicz, Warszawa 2003, p. 31.

⁵⁹ *Traktat ustanawiający ...*, op. cit., p. 268.

⁶⁰ *Ibid.*, p. 272; see also p. 274, where we read that judicial panels may be created next to the Court of First Instance under the conditions described in article 225 a *to hear and determine at first instance certain classes of action or proceeding brought in specific areas*.

⁶¹ *Traktat Nicejski [The Treaty of Nice]*, ed. A. Podraza, Lublin 2001, p. 37-41.

⁶² The fundamental questions of this document were presented in: *ibid.*, p. 40-41; an access to a full document was on a web-site: www.msz.gov.pl.

⁶³ „*Le Nouvel Observateur*”, in: *Oceny Nicei w odgłosach prasowych (Wybór) [Estimating Nice in the press (the selection)]*, Departament Systemu Informacji MSZ [The Department of the Information System of the Ministry of Foreign Affairs], Warszawa 16 February 2001.

view on the Treaty of Nice especially because of the fact of merely a proclamation of the Charter of Fundamental Rights of the EU during the Nice Summit as a document of a political declaration character.

The position of the principle of the respect for human rights in the Community law was enhanced slightly by the introduction of Article 7 to the Treaty on the EU. Nevertheless the procedures before the ECJ or the Court of First Instance remain the same, despite various structural reforms which help them operate more efficiently. The national courts in the application of the Community law still must observe the principle of the primacy of Community law over the national legal orders and the principle of direct effect, particularly the provisions of Article 6 of the Treaty on the EU. They may not question the legality of the Community norms, nor apply the national norms incompatible with the Community law. National courts may only refer to the ECJ for preliminary ruling in case of doubts about the understanding, or the legality of a Community norm. The national courts are obliged to protect the individual's rights following from a directly effective Community norms which must be interpreted in the light of the principle of the respect for human rights and they are obliged to indemnify the individuals for the damages caused by the breach by a Member State of the Community law⁶⁴. Only the ECJ is competent in cases when a claimant is a Member State, the Community institution or other Community organ whereas the Court of First Instance is competent when an individual is a claimant.

II. CONCLUSIONS

First clear references to the human rights are to be found in the preamble to the Single European Act as well as in the preamble to the Treaty of Maastricht. However, the most important provisions are contained in: Article F of the last-mentioned treaty, Article 6 of the Treaty on the EU in the Treaty of Amsterdam version; and Article 6 of the Treaty on the EU in the version amended by the Treaty of Nice, which expressly state that *the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

It seems that the Treaty on the EU, called also a Treaty of Maastricht, sums up the hitherto prevailing experiences including the ECJ's adjudication in the sphere of human rights. The Treaty on the EU regulates fundamental rights in Article F. The widening of the sphere of human rights in the Community law was a result

⁶⁴ C. Mik, op. cit., p. 718.

of the introduction into the Treaty establishing the EC the provisions concerning the European citizenship (Article 8)⁶⁵. The Treaty on the EU also contains the provisions on the human rights in Article B which states that the EU sets itself *to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union*⁶⁶. C. Mik accurately points out that any attempt to differentiate the citizen's rights and fundamental rights in the Treaty on the EU is incorrect⁶⁷. Further widening of the sphere of human rights protection in the Community law can be attributed to the creation of the institution of the Ombudsman, and the right to petition the European Parliament (Article 8 d of the Treaty establishing the EC)⁶⁸. Both institutions have a well established position in the area of the human rights protection and therefore play a role of an important guarantee.

The observation of many years of EC activity leads to a conclusion that finally it is the ECJ which determines the importance of respective legal provisions⁶⁹. The ECJ through its own adjudication recognized the fundamental rights as the general principles of EC law which have its source in the constitutional traditions common to the Member States and the attainments of the international society⁷⁰. There has been continuous scientific debate as to the question whether the attainments of the international society may be modified in cases when the Community's objective. The ECJ stated that it may be modified in the cases which cannot be decided on the ground of prior precedent (judgment) or in the cases where there can be a clearer inspiration drawn from the Community law following in the slightly different direction⁷¹. As a result the ECJ ignored for a long time or rather didn't apply the European Court's of Human Rights adjudication⁷². Although since the end of 1990-s, probably under the influence of the opinion presented by the Advocate General G. Tesauro, the ECJ changed

⁶⁵ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 49; The question of European citizenship caused many discussions-see i.e. A. Clapham, *A Human Rights Policy for the European Community*, in: Yearbook of European Law, vol. 10, Oxford 1990, p. 311; D. O'Keefe, *Union Citizenship*, in: *Legal Issues of the Maastricht Treaty*, ed. D. O'Keefe, P. M. Twomey et al., Chichester 1994, p. 91-92; C. Closa, *Citizenship of the Union and Nationality of Member States*, in: *ibid.*, p. 111.

⁶⁶ Op. cit., ed. A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 298.

⁶⁷ C. Mik, op. cit., p. 443.

⁶⁸ Op. cit., A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 50.

⁶⁹ About the ECJ's role in the process of EC law interpretation see i.e. S. Biernat, *Źródła prawa Unii Europejskiej* [*The sources of the EU law*], in: op. cit., ed. J. Barcz, p. 225-226.

⁷⁰ *Ibid.*, p. 207-209; see also C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka* [*The normative conception of the European human rights law*], Toruń 1994, p. 118.

⁷¹ C. Tuner, op. cit., p. 457-463.

⁷² The ECJ only referred to various provisions of the European Convention on Human Rights as a source of the general principles of the Community law.

its attitude⁷³, it didn't change an attitude towards the fact that the ECJ is not entitled to estimate the compatibility of the national regulations of the Member States with the European Convention on Human Rights, when it doesn't have a clear relationship with the Community law⁷⁴.

The change took place also as a result of the importance attached to the problem of social rights both in the Treaty of Maastricht and the Treaty of Amsterdam⁷⁵. The Treaty on the EU puts more emphasize on the maintenance and the development of *the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*⁷⁶. The formulation of the above-mentioned Article 2 of the Treaty on the EU in the Treaty of Amsterdam version indicates the absorbance of the human rights into the Community primary law⁷⁷. The categories of human rights which were absorbed into the Community law are, *inter alia* general notions of the rights and interest of the citizens of the Member States, as well as the stress on the creation of the area of freedom, security and justice but especially the guarantees connected with the asylum and immigration defined in the following parts of the Treaty on the EU and Treaty establishing the EC⁷⁸. The relation of the Community law with the human rights is expressed directly by Article 6 of the Treaty on the EU in the Treaty of Amsterdam version stating that *the Union is founded on the principles of liberty, democracy, respect*

⁷³ See the ECJ's judgment from 26.6.1997 in case C-368/95: *Vereingte Familiapress Zeitungsverlags und vertriebs GmbH v. H. Bauer Verlag*, (1997) ECR I-3689.

⁷⁴ See the ECJ's judgment from 20.5.1997 in case C-299/95: *F. Kremzow v. the Austrian Republic*, (1997) ECR I-2629; see also C. Mik, *Europejskie prawo wspólnotowe...* [European Community Law...], op. cit., p. 447.

⁷⁵ See B. Brandtner, A. Rosas, *Human Rights and the external relations of the EU: An Analysis of Doctrine and Practice*, in: *European Journal of International Law*, vol. 9, no. 3, Oxford 1998, p. 469-490.

⁷⁶ Article 2 of the Treaty on the EU in the Treaty of Amsterdam version in: op. cit., A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 51.

⁷⁷ *Europeistyka w zarysie*, ed. A. Z. Nowak, D. Milczarek, Warszawa 2006, p. 42.

⁷⁸ Op. cit., A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 141-149, where we find the new Title IV of the Treaty establishing the EC on visas, asylum, immigration and other policies related to free movement of persons, which provisions were not accepted by Ireland and the United Kingdom; in the First Additional Protocol to the Amsterdam Treaty these countries noticed the separation of the provisions on the borders controls; two next protocols enable to maintain special regulations in the areas falling in scope of the Title IV on one hand by the United Kingdom and Ireland and on the other hand by Denmark; the fourth Protocol introduces the provisions of the Schengen Treaty into the Treaty of Maastricht and Treaty establishing the EC; the last Protocol attached to the Treaty establishing the EC is on the questions of the asylum applications send each other by the Member States. These provisions reflect the positions of the Member States, which were supposed to submit the important questions of internal affairs to the international cooperation in order to gradually establish the area of freedom, security and justice.

for human rights...as well as stating in the point 2 that *the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*⁷⁹. Moreover, in the provisions on Common Foreign and Security Policy (II pillar) the attention is drawn to the fact that one of the fundamental objectives of the EU is *to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms*⁸⁰. Therefore, in the formulation of the fundamental objectives of the EU foreign policy the protection of human rights has an important place, eg. in the Title VI of the Treaty on the EU, in Article 29 (K.1-III pillar), a basic task in the sphere of human rights was specified in the statement that the objective of the EU is to prevent and combat racism and xenophobia⁸¹-in that way the EU is transforming into the *area of freedom, security and justice*.

The Treaty establishing the EC, both in the Maastricht and Amsterdam versions emphasize some social rights⁸². In the Amsterdam Treaty equality between men and women⁸³ however, and the appropriate social policy⁸⁴ are clearly distinct. Moreover, the Declaration on the abolishment of the death penalty was attached

⁷⁹ Ibid., p. 53-55.

⁸⁰ Article 11 (J.1) of the Treaty on the EU-text in: *ibid.*, p. 59; See *Członkostwo Polski w UE-na jakich zasadach [The membership of Poland in the EU-based on which principles]*, ed. M. Kisielewska, Warszawa 2003, p. 171.

⁸¹ *Op. cit.*, A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, p. 73; Now there are discussions around the establishment of the EU's Agency on Fundamental Rights, according to the European Council's decision from 13 December 2003, which replaces the European Centre Monitoring Racism and Xenophobia; its goal is to perfect the realization of the Union principles and practices noted in article 6 of the Treaty on the EU and to act in the spheres enumerated in Title VI of the Treaty on the EU; see *the Opinion of the European Economic-Social Committee from 14 February 2006 on the application on the Council's regulation establishing the EU's Agency on Fundamental Rights-the application relating to the Council's decision entitles the EU's Agency on Fundamental Rights to act in the spheres enumerated in the Title VI of the Treaty on the EU*, in: COM (2005) 280 final-2005/0124-0125 (CNS), SOC/216-CESE 239/2006-2005/0124-0125 (CNS); On the base of article 262 of the Treaty establishing the EC the Council asked on 22 September 2005 the European Economic-Social Committee to release this opinion.

⁸² See *op. cit.*, A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 1, p. 108-article 117 of the Treaty establishing the EC and *op. cit.*, A. Przyborowska-Klimczak, E. Skrzydło-Tefelska, vol. 3, p. 213-article 136 of the Treaty establishing the EC which refers to fundamental social rights *such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers*; article 303 of the same treaty states that *the Community shall establish all appropriate forms of cooperation with the Council of Europe*.

⁸³ *Ibid.*, p. 103 and following p.-articles: 2, 3 (2), 13, 137 and 141 of the Treaty establishing the EC.

⁸⁴ *Ibid.*-articles 3 point j and Part III-Community policies, Title XI-Social policy, education, vocational training and youth (articles 136-150) but also other parts of the Treaty establishing the EC in the Amsterdam version relate to the social problems.

to it. The declaration referred to the Protocol no. 6 to the European Convention on Human Rights. There were also other noticeable declarations attached to the Treaty of Amsterdam such as: the Declaration on the status of churches and non-religious organizations and the Declaration on disabled persons. The culminating point in the area of human rights was achieved in the Treaty of Nice together and the EU Charter of Fundamental Rights.

The analysis of the above-mentioned treaty provisions leads to a conclusion that since the Single European Act, subsequent treaties introduced into the written Community law the principle of the respect for human rights in the form of a guiding principle⁸⁵. As a guiding principle the respect for human rights marked out a direction of the integrative legal and political actions⁸⁶. This means that the principle of the respect for human rights in conjunction with the principle of primacy of Community law over the national legal orders of the Member States of the EU⁸⁷ marked the specific character of the European integration⁸⁸. Due to the conjunction of these principles the European integration in frames of the EU can be characterized by the efficiency and consequence in the building of the democracy on international scale. The building of democracy based on the principle of the respect for human rights as a guiding principle is consistent with the general tendency in the international arena, especially the principles of the UN Charter, the principles of the Helsinki Final Act and the principles of the Council of Europe⁸⁹. Only by choosing the principle in question as a guiding

⁸⁵ P. Craig, G. de Búrca, *EU Law, text, cases & materials*, Oxford 2003, p. 369 characterize the position of the principle of the respect for human rights in the following manner: *Human rights issues occupy an increasingly high profile within EU law and policy, in particular following the introduction of anti-discrimination powers in Article 13 EC, and following the adoption of the Charter of Fundamental Rights. The Council in its annual Human Rights Report also now asserts a commitment to mainstreaming human rights into all aspects of EU external and internal policies.*

⁸⁶ *Ibid.*; see also A. Arnall, *The European Union and its Court of Justice*, Oxford 1999, p. 210 where the author concludes on the influence of the principle of the respect for human rights on the integration process: *Since EC Treaty (in the Amsterdam version) was signed, there has therefore been a steady expansion in the extent to which the Court of Justice is prepared to intervene to insure protection for fundamental rights. There has undoubtedly also been a corresponding increase in political awareness of the importance of acting-and being seen to act-in accordance with such rights.*

⁸⁷ See M. Wiktorowicz, *Praktyczne uwagi na temat relacji między prawem krajowym a prawem Unii Europejskiej* [Practical remarks on the relationship between the national law and the law of the EU], in: *Prawo Unii Europejskiej. Porządek prawny UE* [The EU law. The EU legal order], nr 7-8/2004, p. 4-5.

⁸⁸ See Z. Brodecki, *Prawo europejskiej integracji* [The law of the European integration], Warszawa 2000, p. 92 and the following p., where the author presents different methods of the integration of the Community law.

⁸⁹ See articles 11 of the Treaty on the EU and 303 of the Treaty establishing the EC in the Nice version; the Member States of the EU are members of the United Nations and the Council of Europe at the same time, as well as parties to the Helsinki Final Act. According to the Treaty on the EU they shall act according to the principles of those organizations and according to enumerated

principle the process of building the democratic system may take a peaceful course thanks to the international political and legal cooperation⁹⁰.

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JUDICIAL COOPERATION IN THE FIELD OF CIVIL AND COMMERCIAL MATTERS IN EUROPEAN UNION THE APPLICATION AND SCOPE OF THE "BRUSSELS I" REGULATION

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Abstract

On 22 December 2000 the Council of European Community European Community adopted the Regulation No 44/2001 (Brussels I), which removes barriers impeding the free enforcement of law and movement of judgments, documents and settlements in civil and commercial matters in the whole territory of the European Union.

According to recital 2 in the preamble to that Regulation, its main objective of cooperation in civil law is to unify the rules of conflict of jurisdiction in civil and commercial matters, simplify the formalities with a view to the recognition and enforcement in a Member State of judgments delivered in another Member State and to establish better collaboration between the authorities of Member States to facilitate the movement of these citizens and commercial activities.

The Regulation is binding for all member states of the European Union and is also directly applicable regardless of national procedural rules of individual member states and therefore it fully substituted the previous regulation valid in the territory of EU member states, i.e. the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968.

Keywords: *Jurisdiction, Recognition, Enforcement of Judgments, European area of freedom, security and justice.*

I. BACKGROUND

On the basis of the fourth indent of Article 220 of the EEC Treaty (which became the fourth indent of Article 220 EC, now the fourth indent of Article 293

EC Treaty) Member States shall, insofar as is necessary, enter into negotiations with each other with a view to securing the simplification of formalities governing the reciprocal recognition and enforcement of judgment of courts or tribunals and of arbitration awards. According to this provision on 27 September 1968, Member States concluded in Brussels, a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention)¹. The Brussels Convention is the first instrument adopted by the Member States of the Community governing conflicts of national jurisdiction and the enforcement of judgments in civil and commercial matters².

A further convention was negotiated in 1985-1988 by the then Member States with Austria, Iceland, Finland, Norway, Sweden and Switzerland (the EFTA countries). Subsequently the Member States of the Community and those of the European Free Trade Association (EFTA), with the exception of Liechtenstein, concluded on 16 September 1988 the Lugano Convention³ in order to create between them a system similar to that of the Brussels Convention. The Lugano Convention was closely aligned to the Brussels Convention (and during its negotiation was referred to informally as the 'Parallel Convention'), with the result that a near uniform system of rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applied across Western Europe⁴.

At a meeting held on 4 and 5 December 1997, the Council appointed an *ad hoc* group of representatives of the Member States of the Union and of the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation to work towards a parallel revision of the Brussels and Lugano Conventions. Essentially, the discussions had the twin objectives of modernising the system of those two Conventions and eliminating differences between them⁵.

¹ The Convention of Brussels on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Brussels on 27 September 1968 (OJ 1978 L 304, p. 34).

² The Brussels Convention was followed by a protocol, which was signed in Luxembourg on 3 June 1971 and entered into force on 1 September 1975, giving the Court of Justice jurisdiction to interpret the convention if so requested by national courts of appeal or last resort.

³ The Convention of Lugano on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (OJ 1988 no. L 319, p. 9).

⁴ Following the subsequent accession to the European Union of several EFTA Member States, the only Contracting States which are not currently Member States of the European Union are the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. The Republic of Poland ratified that Convention on 1 November 1999 but became a Member of the European Union on 1 May 2004.

⁵ The mandate of the *ad hoc* group was based on Article 220 of the EC Treaty and the work of that group was completed in April 1999. It had reached agreement on a text revising the Brussels and Lugano Conventions. That agreement was ratified at the political level by the Council at its meeting which took place on 27 and 28 May 1999 (Document 7700/99 JUSTCIV 60 of 30 April 1999)

At the end of April 1999, an EU-EFTA working group completed a draft of the substantive part of the revision of the Lugano and Brussels Conventions. In May 1999, the Treaty of Amsterdam came into force for the EU member states. The Amsterdam Treaty made the matters covered by the 1968 Brussels Convention ones of Community policy under Title IV of the EC Treaty (Articles 61(c) and 65 EC).

The Commission therefore submitted to the Council on 14 July 1999 a proposal for a regulation to incorporate into Community law the result of the work of that group. On 22 December 2000 the Council adopted, on the basis of Article 61(c) EC and Article 67(1) EC, Regulation No 44/2001 (Brussels I Regulation)⁶, which entered into force on 1 March 2002. Regulation (EC) No 44/2001 did not apply to Denmark, since that country does not participate in measures adopted under Title IV EC⁷. For a period, therefore, the Brussels Convention (which did apply between all Member States) was replaced by Regulation (EC) No 44/2001 which did not. This situation was eventually resolved by an agreement between the European Community and Denmark which applied the provisions of Regulation (EC) No 44/2001 from 16 July 2005⁸. The regulation is based largely on the Brussels Convention, with which the Community legislature aimed to ensure true continuity⁹.

II. THE SCOPE OF REGULATION

II.1. General

Regulation No 44/2001 regulates, the jurisdiction of courts within its territorial scope and the recognition and enforcement of judgments of those courts in a Member State other than that in which the judgment was given.

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 no. L 12, p. 1).

⁷ Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community.

⁸ Three Member States – the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland – obtained the right not to participate in principle in measures adopted on the basis of Title IV of the Treaty. However, Ireland and the United Kingdom have agreed to be bound by Regulation No 44/2001 (recital 20 in the preamble). The Kingdom of Denmark also undertook to apply Regulation No 44/2001 under an agreement of 19 October 2005, approved by Council Decision 2005/790/EC of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2005 L 299, p. 61). Pursuant to Article 68 of Regulation No 44/2001, the Brussels Convention continues to apply to the part of the territories of the Member States excluded from the scope of the Treaty, as defined in Article 299 of the Treaty. Finally, Regulation No 44/2001 has applied since 1 May 2004 to the ten new Member States of the European Union.

⁹ Recital 19 in the preamble to Regulation No 44/2001.

The regulation contains no provisions on the recognition and enforcement of judgments from non-member States in the Community or of judgments of the courts of Member State in non-member States. It is necessary to differentiate the territorial scope of Regulation No 44/2001 from its *reference area*, that is, the area to which judgments of a court of a Member State, which are to be recognised and enforced under the regulation, may relate. The reference area is broader than the territorial scope and also covers non-member States. The regulation therefore also applies to proceedings which include a non-member-country element¹⁰.

The 'scope' of the Regulation is defined in Title I, consisting of Article 1, which provides, that the Regulation lays down rules governing the jurisdiction of the courts in civil and commercial matters. A judgment given in a Member State is to be recognised automatically, no special proceedings being necessary unless recognition is actually contested. A declaration that a foreign judgment is enforceable is to be issued after purely formal checks of the documents supplied. The Regulation lists grounds for non-enforcement, but the courts are not to raise these of their own motion. The Regulation does not cover revenue, customs or administrative matters. It does not apply to:

- the status or legal capacity of natural persons, matrimonial matters, wills and succession;
- bankruptcy;
- social security;
- arbitration¹¹.

II.2. *The concept of 'civil and commercial matters'*

The Regulation is based largely on the Brussels Convention, with which the Community legislature aimed to ensure true continuity. It reproduces the system of jurisdictional rules laid down in that convention, based on the principle that the courts of the State in which the defendant is domiciled have jurisdiction, to which it adds rules on exclusive or concurrent jurisdiction. Adhering to the custom

¹⁰ This was confirmed by the Court in Case C-281/02 *Owusu* (ECR 2005 I-1383, par. 29.) and in its *Opinion on the Lugano Convention*. (see Opinion 1/03 [2006] ECR I-1145, par143). According to that case-law, a relevant international element for the purposes of the application of the regulation may also exist by virtue of the place of occurrence of the events at issue in a non-Contracting State. The regulation is intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on international jurisdiction and on the recognition and enforcement of judgments given by foreign courts. In the Court's view, those disparities have a detrimental effect on the internal market even when they concern judgments which have a bearing only on a non-member State. (Opinion Of Advocate General delivered on 18 December 2008, Case C-420/07 *Apostolides*, p. 29)

¹¹ Article 1(2) of the regulation.

prevailing in Brussels Convention and other international treaties¹², and with a view to avoiding the pitfalls of setting out a list of matters covered¹³. However, according to case-law based on Brussels Convention, the term is an independent concept and excludes acts *iure imperii*.

II.2.1. The independent concept

In the Opinion in *Rich*¹⁴, Advocate General Darmon stated that the interpretation of the Convention gives rise to many difficulties because, in addition to the complexity inherent in the field, the Convention uses terms which, while well-defined in national legal systems, frequently have different meanings, leading the Court to propose independent definitions.

The foregoing happened in relation to the term ‘civil matters’, which the Court described in *LTU*¹⁵ as an independent concept that must be interpreted by reference not only to the objectives and the scheme of the Convention but also to the general principles which stem from the corpus of the national legal systems, stating that a reference to the internal law of one or other of the States concerned is not appropriate because the delimitation of the scope *ratione materiae* of the Convention seeks ‘to ensure ... that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform’ (paragraph 3)¹⁶.

II.2.2. The exclusion of acts *iure imperii*

In *LTU*, the Court held that the Convention applies to disputes between a public authority and a private individual, where the former has not acted in the exercise of its public powers (paragraphs 4 and 5). Although the Court was

¹² In the Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 1), P. Jenard states that the committee of experts responsible for drafting the Convention followed the practice of existing Conventions in that regard. In academic legal writing, the same point is made in Droz, G.A.L., *Compétence judiciaire et effets des jugements dans le marché commun (Étude de la Convention de Bruxelles du 27 septembre 1968)*, Librairie Dalloz, Paris, 1972, p. 33. See, likewise, Advocate General Darmon at point 19 of the Opinion in *Sonntag*, to which I will refer below. At point 20 of that Opinion, the Advocate General states that ‘it is rare in a bilateral context to draw up an exhaustive list of matters coming under civil or commercial law’. See the Opinion Of Advocate General Ruiz-Jarabo Colomer delivered on 8 November 2006 to the Case C-292/05 I. Lechouritou, p. 20-36

¹³ Desantes Real, M., *La competencia judicial en la Comunidad Europea*, Bosch, Barcelona, 1986, p. 79 and 80.

¹⁴ Opinion to the case C-190/89 *Marc Rich & Co AG v. Societa` Italiana Impianti PA* [1991] ECR I-3855.

¹⁵ Judgment of the Court of 14 October 1976. - *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, Case 29/76 [1976] ECR 1541.

¹⁶ That characterisation was followed in other judgments, such as *Bavaria Fluggesellschaft and Germanair*, (Joined Cases 9/77 and 10/77 [1977] ECR 1517.) par. 4; *Gourdain*, (Case 133/78 [1979] ECR 733) par. 3; *Rüffer*, (Case 814/79 [1980] ECR 3807) par.7 and 8;

referring to the provisions governing the recognition of judgments (Title III), the same approach applies to the provisions on jurisdiction (Title II), because Article 1 defines the scope of both sets of provisions. The judgment in *LTU* led to the amendment of the Brussels Convention so as expressly to exclude ‘revenue, customs or administrative matters’ when the Community was expanded for the first time¹⁷.

As Advocate General Jacobs pointed out in the Opinion in *Eir. Lechouritou*¹⁸ that public authorities’ activities are not exhausted with those fields, although they deal with them frequently; in addition, the terms ‘revenue’, ‘customs’ and ‘administrative’ have the same conceptual autonomy as ‘civil’ and ‘commercial’, owing to identical requirements of uniformity and legal certainty. It should be noted that article 2(1) of Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims¹⁹ adopts that approach by providing: ‘This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (“*acta iure imperii*”)’.

Acts *iure imperii* do not fall within the scope of the Regulation 44/2001. New Community legislation also exclude acts *iure imperii*. Thus, Article 1(1)(g) of the European Parliament and Council Regulation on the law applicable to non-contractual obligations (‘Rome II’) ²⁰ excludes ‘non-contractual obligations arising in connection with the liability of the State for acts done in the exercise of public authority (“*acta iure imperii*”)’. However, Advocate General Jacobs notice, that disagreements arise in relation to the definition of such acts *iure imperii* and to whether they cover the conduct of the armed forces of one State in the territory of another. It is therefore necessary to consider the reasons for the exclusion of acts *iure imperii* and the criteria on which the exclusion is based in each case.

In *LTU*, the Court drawing a distinction between situations where a public authority acts in the exercise of its powers and those where it acts in the same way as an ordinary individual²¹.

¹⁷ The sentence concerned was added by Article 3 of the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77)

¹⁸ See: Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 8 November 2006 to the case C-292/05 *I. Lechouritou*, p. 28-29

¹⁹ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143, p. 15

²⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ n. L 199, p. 40.

²¹ Par. 4

Advocate General Léger, in the Opinion in *Préservatrice foncière TIARD*²², examined the exclusions laid down in the second paragraph of Article 1 of the Convention relating to ‘matters which lie outside the independent will of the parties and concern public policy’, from which he deduced that, ‘in those matters, the draftsmen of the Brussels Convention intended the exclusive legislative competence of a Member State to be matched by the competence of the administrative and judicial authorities of the same State. When those matters constitute the principal subject-matter of the dispute, it is the courts of that State which are regarded as best placed to settle them. The effective protection of legal positions, which is one of the objectives of the Brussels Convention, is therefore guaranteed by the designation of a national system competent in its entirety...’. Advocate General Léger stated that, in his view, that reasoning should also apply to ‘public-law matters, in which the State exercises its rights and powers of public authority’.

In view of the fact that the concepts concerned are independent, an examination of case-law will help to identify the criteria on which the exclusion of such acts is based. In *LTU*, the Court considered the payment of certain charges owed by an entity governed by private law to an organisation governed by public law for the obligatory and exclusive use of its equipment and services, and held that the Convention did not apply. The Court stated that the scope *ratione materiae* of the Convention is essentially defined either by ‘the legal relationships between the parties to the action or ... the subject-matter of the action’²³.

In *Sonntag*²⁴, a judgment concerning criminal proceedings which were brought as a result of the death of a pupil from a German state school during a trip to Italy and in the framework of which a civil action for damages was also brought against the accompanying teacher, the Court held that the Brussels Convention applied on the ground that the claim for financial compensation ‘[was] civil in nature’²⁵ because: at first even where a teacher has the status of civil servant and acts in that capacity, ‘a civil servant does not always exercise public powers’; second, in the majority of the legal systems of the Contracting States, the supervision of school pupils does not entail the exercise of any powers going beyond those existing in relations between private individuals; at third in such situations, teachers in state schools and teachers in private schools assume ‘the same functions’; and at least the characterisation of the dispute under the law of the State of origin of the teacher was irrelevant, as is the fact that the

²² Opinion of Advocate General Léger delivered on 5 December 2002 Case C-266/01, *Préservatrice foncière TIARD SA v. Staat der Nederlanden*, 2003 E.C.R. I-4867, p. 53–55.

²³ Par.4

²⁴ Case C-172/91 *Sonntag* [1993] ECR I-1963 par.18.

²⁵ Par.19

accident concerned is covered by a social insurance scheme. The Court pointed, that in case *Lawrie-Blum*²⁶ he had already held that the awarding of marks and participation in the decisions on whether pupils should move to a higher class do not entail the exercise of public powers.

Préservatrice foncière TIARD concerned a claim for payment of a customs debt, made by the Netherlands against the guarantor of the principal obligation. The Court held that the Brussels Convention applies to a claim by which a Contracting State seeks to enforce against a private individual a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, although the Court added the condition, required by the paucity of information in the order for reference, that that is the case 'in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals'²⁷.

In conclusion, it may be deduced from the cited case-law that, in order to determine whether an act is an act *iure imperii* and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and the basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals.

III. THE RULES CONCERNING JURISDICTION OF COURTS

III.1. General rules

Regulation No 44/2001 came into force on 1 March 2002. It applies only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force²⁸. It reproduces the system of jurisdictional rules laid down in that convention, based on the principle that the courts of the State in which the defendant is domiciled have jurisdiction (regardless of his or her nationality), to which it adds rules on exclusive or concurrent jurisdiction²⁹. Domicile is determined in accordance with the domestic law of the Member State where the matter is brought before a court. If

²⁶ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, par. 28.

²⁷ Par. 36

²⁸ Article 66 of the regulation.

²⁹ Article 2(1) of Regulation No 44/2001 thus provides that: 'Subject to this Regulation, persons domiciled in a Member State will, whatever their nationality, be sued in the courts of that Member State'.

a party is not domiciled in the Member State of the court considering the matter, then, in order to determine whether the party is domiciled in another Member State, the court is to apply the law of that other Member State³⁰.

In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In the case of trusts, domicile is defined by the judge of the Member State whose court is considering the case; the court applies its own rules of private international law (Article 60(3)).

Jurisdiction provided for in Article 2 of Regulation, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State³¹.

III.2. Special jurisdiction

Articles 5, 6 and 7 set out a number of cases of ‘special jurisdiction’ within the context of general domicile principle. The Community legislature expressly states that it is the closeness of the court to the action that justifies these special jurisdictions. Recital 12 in the preamble to Regulation No 44/2001 states that these special grounds of jurisdiction are authorised because of the close link between the court and the action or in order to facilitate the sound administration of justice.

Article 5 (1b) of Regulation sets an autonomous criterion of jurisdiction for the two most common types of contract in international commercial relations, namely contracts for the sale of goods and the provision of services. In these two cases, this autonomous criterion of jurisdiction is the place of performance of the obligation that is characteristic of the contract, in other words the place of delivery of the goods in the case of a contract of sale and the place of provision of the services in that of a contract for the performance of services. The rule on special jurisdiction contained in Article 5 (1b) of Regulation is intended to apply to all actions based on a contract.

In matters relating to maintenance, jurisdiction have the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

³⁰ Article 4 of the Regulation

³¹ See: Case C-103/05 *Reisch Montage* [2006] ECR I-6827, par. 22

In matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may, be sued in the courts, for the place where the harmful event occurred or may occur;

A person domiciled in a Member State may, in another Member State, be sued as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings

In accordance with Article 6, person domiciled in a Member State may also be sued:

- where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
- as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
- on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
- in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Regulation No 44/2001 lays down a number of cases in which, as an exception to the principle of autonomy of the parties to a contract) thereof, the jurisdiction of the courts of the Member States is determined by the provisions of that regulation even if the defendant is not domiciled in a Member State³². These are:

³²The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation. In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions.

- exclusive jurisdiction (for example, proceedings relating to immovable property rights, to the validity of decisions of legal persons, to the validity of entries in public registers and to the enforcement of judgments)³³;
- prorogation of jurisdiction (in the case of the conclusion of a convention conferring jurisdiction)³⁴;
- provisions of jurisdiction protecting a weak party:
- in relation to insurance³⁵
- in relation to consumer contracts³⁶
- in relation to individual employment contracts³⁷
- provisions relating to *lis pendens* and related actions³⁸.

IV. THE RULES ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS

A judgment given in a Member State is to be recognised in the other Member States without any special procedure being required. Article 32 defines ‘judgment’ as follows: “judgment” means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. Article 32 (likewise art. 25 of Brussels Convention³⁹) seeks to cover all judgments, whatever they may be called in the national legal system, which fall within the substantive ambit of the Regulation⁴⁰. It is not limited to a judgment terminating in whole or in part the proceedings before the court. It also covers interlocutory court decisions and decisions ordering provisional or protective measures.

The decision in question must issue from a court of a Contracting State. This requirement means, in the first place, that the body from which the decision originated acted independently of the other organs of the State. In the case *Denilauler*⁴¹ the Court concluded that the Convention is fundamentally

³³ as referred to in Article 22

³⁴ as referred to in Article 23

³⁵ Article 9(2)

³⁶ Article 15(2)

³⁷ Article 18(2)

³⁸ Articles 27 to 30

³⁹ see: Schlosser Report on the Convention on the Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71.

⁴⁰ See Opinion of Advocate General Léger delivered on 13 July 2004 Case C-39/02 *Mærsk Olie & Gas A/S*, [2004] ECR I-300, par. 48,

⁴¹ Case *Denilauler* 125/79 [1980] ECR 1553, par.13.

concerned with judicial decisions which, before their recognition and enforcement are sought, have been, or have been capable of being, the subject, under various procedures, of an inquiry in adversarial proceedings.

By way of derogation from Article 21 of Regulation Brussels II, a judgment referred to in Article 1 of this Regulation which has been given in a Member State and is enforceable in that Member State, even provisionally, can be enforced in all the other Member States without any special procedure being required. Under no circumstances may a foreign judgment be reviewed as to its substance.

In accordance with article 34 a judgment will not be recognized especially if:

- if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
- if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Enforceable decisions in the Member State where they are handed down can be declared enforceable and executed in any other Member State. The party who wishes to enforce a judgement in another Member State, requests that the court that has given the judgement issues a certificate, confirming the enforceability. The court or competent authority designated by each Member State to examine applications simply makes a formal check of the documents accompanying the application. An appeal may be lodged by one of the parties before one of the courts listed in the annex. It relates solely to enforcement of the judgement. The Brussels I Regulation clearly states that the sole ground for non-enforcement is where this is manifestly contrary to public policy.

In accordance with the 18th recital in the preamble to Regulation No 44/2001. the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation. The defendant have right to appeal in an adversarial

procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures is also available to the claimant where his application for a declaration of enforceability has been rejected.

V. AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. The court will refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them are also regard as authentic instruments

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded will be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved will issue, at the request of any interested party, a certificate using the standard form.

VI. THE COUNCIL REGULATION AND ITS IMPACT ON POLISH LAW

The recognition and enforcement of foreign judgments and orders in Poland is subject to the following pieces of legislation:

- articles 1150-1153 of the Code of Civil Procedure which lay down the general rules of enforceability of foreign judgments and orders.
- Council Regulation 44/2001
- bilateral agreements on jurisdiction

The Polish Code of Civil Procedure introduced a system which is quite similar to the one of Regulation 44/2001. Moreover, they have been consistently applying the Brussels Convention and Council Regulation 44/2001, which replaced it. Given that council regulations are binding and immediately enforceable in EU member states without any legislative intervention, Council Regulation 44/2001 has introduced an autonomous system of recognition and enforcement of foreign judgment and orders which prevails over the equivalent provisions of Polish law.

Polish law is applicable only if an international agreement does not stipulate otherwise. Should there be a conflict between an act of law and an international agreement, the absolute precedence is that of an agreement. Besides, as it results

from Art. 91 § 3 of the Constitution, if an agreement, ratified by Poland, establishing an international organization so provides, the laws established by it are applied directly and have precedence in the event of a conflict of laws. This provision constitutes the ground on which Polish courts apply the community law. Thus, where there is an international agreement which does not make the recognition or the enforcement of a foreign court judgment conditional upon reciprocity, such an agreement will apply⁴².

The declaration of enforceability procedure is applicable only to those foreign courts' judgments which are final and enforceable in the states of their origin and those which have been pronounced in the civil and commercial matters liable to recourse to law in Poland (art. 1150). The declaration of enforceability is applicable to both the foreign courts' judgments, including those of the courts of conciliation, and to the amicable settlements which have been made before foreign courts. Official documents may not be matters of court proceedings.

The declaration of the enforceability of a judgment pronounced by a court, or by a court of conciliation, may be made on condition of reciprocity. Condition may be admitted to have been fulfilled where the state of origin has declared the enforceability of similar Polish judgments and where it does not impose in their respect more rigorous requirements than those provided for in that respect by Polish law, in particular, where the state of origin does not require checking them as regards their contents. Apart from observance of the principle of reciprocity, the proceedings to recognise foreign courts' judgments require checking whether the following conditions have been fulfilled (art. 1146 §1):

- if the judgment has the status of a final court judgment in the state of origin;
- if, under Polish law or under an international agreement, the matter in question does not belong to the exclusive jurisdiction of Polish courts or to the jurisdiction of the courts of a third state;
- if a party has not been deprived of the possibility to defend itself, and, where not having capacity to be a party in a civil case, to be duly represented at court;
- if the final court judgment made in the matter in question has not already been pronounced by a Polish court or if the proceedings in the matter in question had not been initiated before a competent Polish court, before the foreign court's judgment has become final;

⁴² See: Report Enforcement of Foreign Courts' Judgments before Polish Courts, Problems of enforcement of european law - Fifth session Enforcement of Commercial Judgments (Regulation 44/2001 of 22 December 2000), available on: http://www.courdecassation.fr/colloques_activites_formation_4/2004_2034/enforcement_of_8257.html#polish

- if the court judgment is not in conflict with the principal rules of the Polish legal order;
- if, upon the pronouncement of the judgment in the matter to which Polish law should have been applied such law has been applied, unless the foreign law applied to it is not significantly different from Polish law.

On condition of reciprocity, an amicable settlement made before a foreign court constitutes an enforcement title provided that the settlement is enforceable in the state in which it has been made and that it is not in conflict with the fundamental principles of the Polish legal order. It should be emphasised that the Code of Civil Procedure is not clear as regards the regulation of the question of admissibility of cassation (ultimate appeal) against the judgment of the second instance court⁴³. This is in contrast to the procedure provided for the proceedings for recognition of a judgment of a foreign court, in which cassation is admitted (Art. 1148 § 3)⁴⁴.

VII. CONCLUDING REMARKS

As it has been presented, the Union is interested in developing the judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and, also, decisions in extrajudicial cases.

Until now, at the European level the principle of mutual recognition, the basis of judicial cooperation, was successful implementing. European regulation created a unique area where the judgments and judicial decisions in civil and commercial matters are being recognised and enforced, and thus can circulate freely.

For the future the most important in the Area of Justice is to create a “European judicial culture” based on diversity of the legal systems of the Member States and unity through European law.

It should be emphasized that the European Commission is preparing new proposals in areas not yet regulated by Community law (e.g. succession and wills) and is initiating amendments to existing legislation (e.g. a review of the Decision establishing the European Judicial Network in civil and commercial matters). It should be notice, that the new Treaty on the Functioning of the European Union (TFEU) will bring a number of modifications to the current Title IV (“Visas, Asylum, Immigration and Other Policies Related to Free Movement

⁴³ Ibidem

⁴⁴ The Supreme Court has several times admitted cassation against such judgments. See its judgment of April 27, 2001 r. (III CZ 4/01, OSNC 2001, nr 12, item 184).

of Persons”), Part III (“Community Policies”), of the TEC, which provides the legal basis for measures in the field of judicial cooperation in civil matters⁴⁵. A major innovation is the power of veto granted to national Parliaments, pursuant to the second part of Art. 69d(4)⁴⁶, as to the activation of the “passerelle” clause in respect of aspects of family law which may be subject of acts adopted by the ordinary legislative procedure, following a decision by the Council on a proposal from the Commission: in this respect, each national Parliament can make known its opposition to the “passerelle”.

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⁴⁵ see Art. 61(c), Art. 65 and Art. 67(5) of the TEC, as amended by the Treaty of Nice

⁴⁶ Article 69d

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
 - (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
 - (b) the cross-border service of judicial and extrajudicial documents;
 - (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
 - (d) cooperation in the taking of evidence;
 - (e) effective access to justice;
 - (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
 - (g) the development of alternative methods of dispute settlement;
 - (h) support for the training of the judiciary and judicial staff.
3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.
4. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. This proposal shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

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HOW RUSSIAN CITIZENS REGARD INFRINGEMENT OF THE LAW?

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Abstract

According to the information from the 15th round of RLMS (Russian Longitudinal Monitoring Survey) the existence of law and order and fair courts are very important for Russian citizens. At the same time the considerable majority of Russian citizens do not trust the Government of the Russian Federation, the State Duma, Courts, Police etc. Some Russian citizens even contemplate breaking the law. We have tried to estimate the influence of citizens' socio-economics characteristics on the process of decision-making with the help of ordered logit and probit models. We have established that the higher citizen's level of education the more law-abiding the citizen. Women are more law-abiding, than men. A person with subordinates tends to be more trusting of political institutions and is less inclined to break the law. With the growth of income citizens trust the political parties and police less and are more willing to break laws.

Keywords: Confidence, Institutions, Social attitude, Infringement of the Law

I. INTRODUCTION

As many researchers (Glaeser E., 2004, Asoni A., 2008) have shown, the rate of economic growth is influenced by the attitude of citizens towards the basic social and political institutes.

There are many sources of data reflecting the relationship of a citizens' confidence in churches, labour unions, parliament, political parties, the armed forces, the government, the justice system, etc.(e.g. World Values Survey Association official data (www.worldvaluessurvey.org) for more than 100 countries).

Many investigators have tried to estimate the influence of various factors on the relationship of the citizens to either one or several political or social institutes with the help of statistical methods and econometric models.

M. Cammett (M. Cammett, 2008) has discussed how welfare programs affect citizen attitudes towards the state in both Western and Eastern European countries using a random intercept multi-level model, in which the coefficients are fixed across countries, while the intercept varies. Bean C. (Bean C., 2003) compared the level of confidence in 14 different Australian institutions with the help of multiple regression analysis on several dimensions of confidence, with ten independent variables: gender, age, education, occupational grade, trade union membership, subjective social class, religious denomination, church attendance, region of residence and political party identification. Older people display more confidence than younger people in institutions of security. Ivkovic S. (Ivkovic S., 2008) has studied the determinants of public support for the police in 28 countries and has found that the respondents' views of the police, both general confidence and specific ability to control crime, are affected by the respondents' gender and age and by the quality of governance in the country in which they live. Kelleher C. (Kelleher C., 2007) used ordinal logit model with education, race, age, sex, representation ration of women in the office, measure of income inequality etc. as the explanatory variables for explaining the public confidence in the branches of state government. Peral B. (Peral B., 2008) tried to answer the questions: "Which aspects make citizens identify themselves with their political institutions? Which is the main source of the differences among societies in term of political support?" using the data for Europe in 1999-2005.

Many authors were engaged in the research of the questions, concerning the opinion of Russians on political institutes and processes occurring in the country.

V. Shlapentox (V. Shlapentox, 2006) has noted, "Russia is a country, much more than any other, that mistrusts its social institutions, political institutions in particular. There is no one institution that can garner more than 40 to 50 percent of the nation's trust". Denicova I. et al (Denicova I., 2007) describe the perception of the Russian people about the transitional process and the role of the state.

This paper continues the theme of the relationship between the socio-economics characteristics of Russian citizens and there attitudes to the main political institutions, such as the government, the police, the parliament and the courts. We also investigated the dynamics of the changes in the attitude of Russian inhabitants to the basic political institutes from 1990 to 2005. Using ordered logit and probit models we discussed the influence of social and economics characteristics of Russian inhabitants on their attitude to both political and social institutes and their willingness to infringe of the law.

II. DATA AND VARIABLES

The data for this study were taken from the two surveys: Russian Longitudinal Monitor Survey (RLMS) and World Values Survey (WVS). We used the fifteenth wave of RLMS (2005) and four waves of WVS for Russia (1990, 1995, 1999 and 2005). Both surveys contain rich information on individual characteristics, such as age, sex, education, income, wage, demographic characteristics etc. We use these variables as independent in our empirical analysis. The definition of such variables is given in table 1. RLMS and WVS also contain a series of questions regarding the attitude of individuals to the main social and political institutions. We separated all the questions into three parts: concerning the trust in the main political institutions, concerning the importance of several social and political institutions for Russians, concerning the opportunity to break the law. Corresponding variables are dependent in our analysis, the description of all such variables is provided in tables 2 - 4. The scales of the answers in RLMS and WVS differ; scale in RLMS is more detailed and contains answers like "yes or no". The four waves in WVS data allow tracking the changes which have occurred concerning the attitude of Russian citizens to the main political institutes, such as the Government of the Russian Federation, the State Duma, the courts, Army, Police, Political parties. We exclude from our analysis individuals who refused to answer the questions.

Table 1. Independent variables.

Variables	Definitions of variables in RLMS	Definitions of variables in WLS
AGE	2006 – kh6, where kh6 is a year of individual's birth	V237- age
SEX	kh5 – Sex of respondent 1-male, 2-female	V235 – Sex of respondent 1-male, 2-female
DIPLOM	k_diplom 1 - Professional courses, e.g., tractor driving, chauffeuring, typing, accounting 2 - Vocational training school without secondary education 3 - Vocational training school with secondary education, technical trade school 4 - Technical community college, medical, music, pedagogical, art training school 5 - Institute, university, academy 6 - Post-graduate course, residency	V238 - What is the highest educational level that you have attained? 1 - No formal education 2 - Incomplete primary school 3 - Complete primary school 4 - Incomplete secondary school: technical/vocational type 5 - Complete secondary school: technical/vocational type 6 - Incomplete secondary: university-preparatory type 7 - Complete secondary: university-preparatory type 8 - Some university-level education, without degree 9 - University-level education, with degree
WAGE	kj10- money received in the last 30 days from individual's primary job after taxes	
INCOME	kj60 - the total amount of money that individual received in the last 30 days.	V253 – Scale of incomes 1- lowest step, . . . , 10 – upper step

EXPER	kj79 – the total work experience	
CHIEF	kj6 – Answer to question: "Do you have subordinates at your primary job?" 1 – yes, 2 – no.	

Source: RLMS, Round 15 (www.cpc.unc.edu/rlms);
World Values Survey Association, waves 1-5 (www.worldvaluessurvey.org)

Table 2. Variables for measuring the level of confidence.

Variables	Definitions of variables in RLMS	To what extent do you trust . . . (1 – Completely trust 2 – Rather trust 3 – Trust nor distrust 4 – Neither rather trust 5 – Doesn't trust at all)	Definitions of variables in WLS	How much confidence you have in . . . (1 – A great deal 2 – Quite a lot 3 – Not very much 4 – Not at all) Quite a lot Not very much None at all
CONFGOV	kj207.1	Government of the Russian Federation	V138	The government
CONFPARL	kj207.2	State Duma	V140	Parliament
CONFCOURT	kj207.3	The courts	V137	The courts
CONFARMY	kj207.5	Army	V132	The armed forces
CONFPOLICE	kj207.6	The Police	V136	The Police
CONFPOLPAR	kj207.11	Political parties	V139	Political parties

Source: RLMS, Round 15 (www.cpc.unc.edu/rlms);
World Values Survey Association, waves 1-5 (www.worldvaluessurvey.org)

Table 3. Variables for measuring the level of importance.

Variables	Definitions of variables in RLMS	How much is it important for you personally, that in our country today exist. . . (1 – Very Important, 2 – Rather Important, 3 – Both yes and now, 4 – Rather not important, 5 – Not important at all)
IMPFIREL	kj208.1	Free and fair election
IMPLAWORD	kj208.2	Law and order
IMPFERSP	kj208.3	Freedom of speech
IMPINDPRESS	kj208.4	Independent press
IMPPOLOP	kj208.5	Political opposition
IMPFIRCOUR	kj208.6	Fair courts
IMPPRRIGHTS	kj208.7	Protection of the rights of national, religious, etc. minorities

Source: RLMS, Round 15 (www.cpc.unc.edu/rlms)

Table 4. Variables for measuring the opportunity for infringement of the law.

Variables	Definitions of variables in RLMS	Do you agree with the statement . . . (1 – Strongly agree, 2 – Somewhat agree, 3 – Both yes and no, 4 – Somewhat disagree, 5 – Strongly disagree)
UNFAIRLAW	kj173.1	If the law is unfair, the person has the right to bypass it
VENALJUDGE	kj173.2	Judges in Russia are venal
BREAKLAW1	kj173.3	It is impossible to live in Russia, without breaking the law
BREAKLAW2	kj173.4	If statesmen or politicians do not observe the law should simple people observe the law?

Source: RLMS, Round 15 (www.cpc.unc.edu/rlms)

III. EMPIRICAL RESULTS

III.1. Which institutions are trusted by Russians?

Figures 1-3 contains charts demonstrating the dynamics of the changes which have occurred during 15 years in the attitude of Russian citizens to the main political institutes. Questions of confidence to some institutes have not been included in all waves of WVS, therefore for some institutes we have 4 charts, and for some - only two.

Figure 1. Dynamics of the confidence in the Government of the Russian Federation and the State Duma.

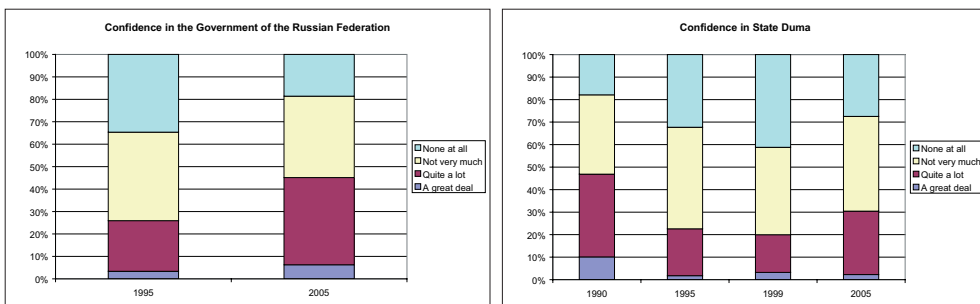


Figure 2. Dynamics of the confidence in the Courts and the Armed forces.

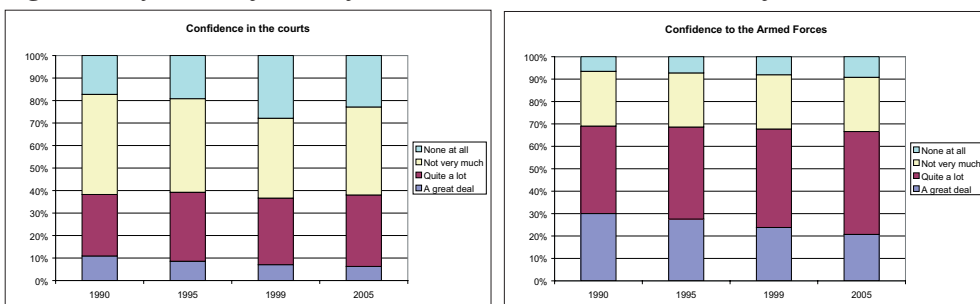
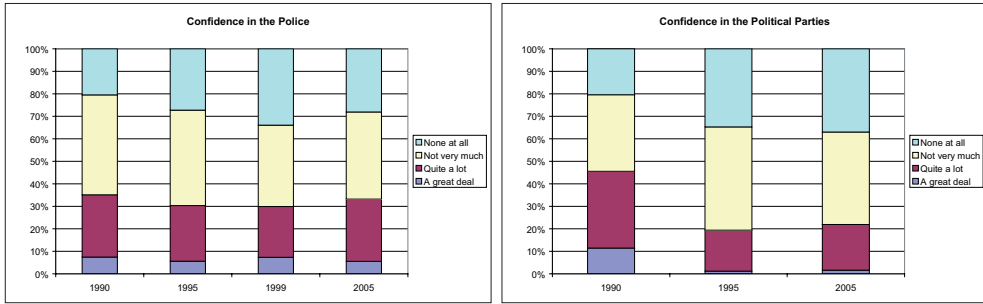


Figure 3. Dynamics of the confidence in the Police and Political Parties.



To make comments on the received results, it is necessary to notice that Russians really trust only the armed forces; however the degree of trust decreases very slowly. For all the other political institutes, the level of trusts of the Russian people is less than 50 %. Thus if in 1999 the degree of trust in the State Duma, Political Parties sharply decreased in comparison with 1990, then in 2005 the situation gradually started to change for the better. It is possible to consider as a positive factor the increase in level of trust to the government of the Russian federation. The degree of trust to Police and the courts varied a little.

To get a better understanding of the determinants concerning the attitude of Russian citizens to main political institutions, we ran a series of ordered logit and probit regressions. To avoid a problem with data multicollinearity we used stepwise backward-selection estimation. The results are summarized in Table 5.

Table 5. Logit and probit models with confidence dependent variables.

	CONFGOV	CONFGOV	CONFPARL	CONFPARL	CONFCOURT	CONFCOURT
	LOGIT	PROBIT	LOGIT	PROBIT	LOGIT	PROBIT
AGE					.0116167***	.006455***
SEX	-.0877534*	-0.0569208**	-.1437548***	-0.0974437***	-0.1458899***	-0.884143***
DIPLOM					-.0708565***	-.0369357**
CHIEF	.1279019**	0.075784**	.1049612*		.1282878**	.0740508**
WAGE			6.91e-06**		9.53e-06**	3.92e-06*
INCOME						
EXPER			.0085522***	0.0040938***		
	CONFARMY	CONFARMY	CONFPOLICE	CONFPOLICE	CONFPOLPAR	CONFPOLPAR
	LOGIT	PROBIT	LOGIT	PROBIT	LOGIT	PROBIT
AGE	-.0052641***	-.00308***				
SEX	.4052288***	.2315492***				
DIPLOM			-.0760036***	-.0426627***		
CHIEF	.1254554**	.0726004**			0.1413889**	0.0750359**
WAGE	.0000199***	.0000107***				
INCOME			.0000107***	5.15e-06***	0.0000109**	4.59e-06**
EXPER			.0065394***	0.0036211***	.0079521***	.0043862***

* - significant at 10%, ** - significant at 5%, *** - significant at 1%.

The results obtained by logit and probit models are similar. For interpretation of the received results it is necessary to calculate the marginal effects of explaining factors. However it is easy to show (Green W., 2008) that marginal effect $\frac{\partial p(Y_i = 5)}{\partial X_j}$ signs ($i = 1, \dots, 6$, $j = 1, \dots, 7$, $Y_1 = \text{CONFGOV}$, ..., $Y_6 = \text{CONFPOLPAR}$ are defined in table 2, and $X_1 = \text{age}$, ..., $X_7 = \text{exper}$ are defined in table 1) coincides with a sign of X_j coefficient β_{ji} in the model with dependent variable Y_i , the marginal effect sign for $\frac{\partial p(Y_i = 1)}{\partial X_j}$ is opposite to a sign of the coefficient β_{ji} .

We have dropped tables with signs on all marginal effects since they are rather bulky. We shall note, that the sign of marginal effect $\frac{\partial p(Y_i = 2)}{\partial X_j}$, as well as the sign of marginal effect $\frac{\partial p(Y_i = 1)}{\partial X_j}$, has appeared opposite to the sign of the coefficient β_{ji} , and the sign of marginal effects $\frac{\partial p(Y_i = 4)}{\partial X_j}$, as well as the sign of marginal effect $\frac{\partial p(Y_i = 5)}{\partial X_j}$, has coincided with sign of the coefficient β_{ji} .

Proceeding from the signs of coefficients in table 5, it is possible to draw following conclusions:

Women more than men, trust the Government of the Russian Federation, the State Duma and the courts, but trust the Armed Forces less.

More educated people trust the courts and the police more.

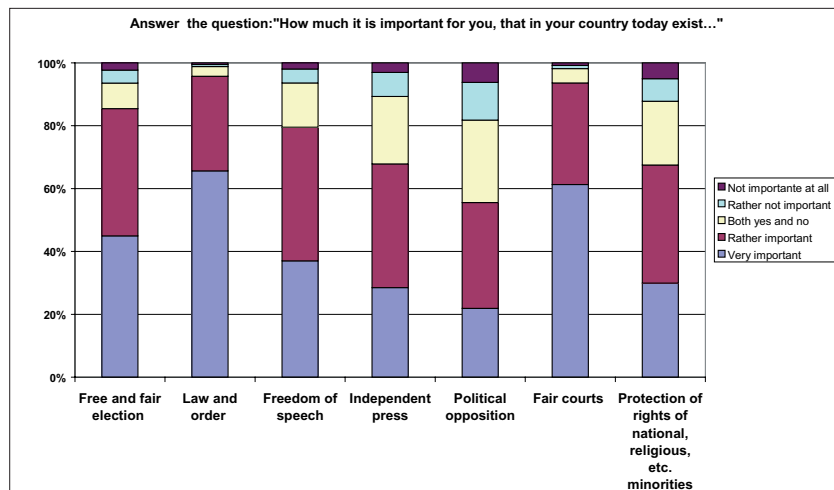
With an increase in the level of wage or income the confidence in the political parties and police decrease.

A person having subordinates trust almost all political institutes more.

III.2. What is important for Russians?

Results of the distribution of answers of the Russian respondents to questions on importance of some political and social institutes (table 3) are shown in figure 4.

Figure 4. The importance for Russians of several social and political institutes.

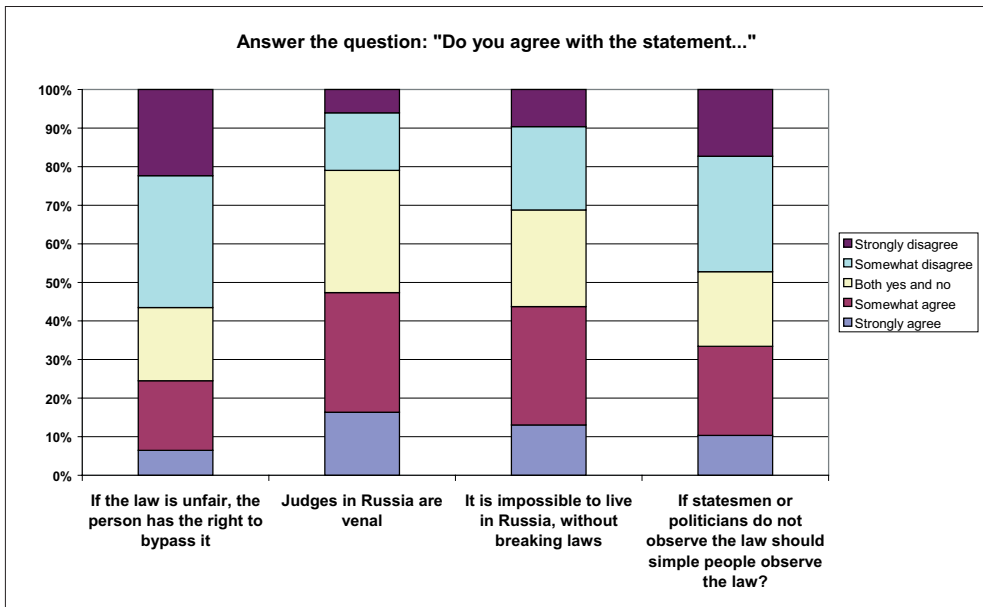


More than 50 % of Russians mark, that for them it is very important or rather important to have free and fair election, ..., protection of rights of national, religious, etc. minorities. But law and order and fair courts are the most important for Russian people. But, despite of it, a considerable part of the Russian citizens declare an opportunity to break the law. This question is discussed in more detail in the following paragraph.

III.3. How Russians regard breaking the law?

Distribution of answers of the Russian respondents to questions on the attitude to judges, opportunities to break laws (table 4) is resulted in figure 5.

Figure 5. The willingness of Russians to break the law.



More than 40 % of Russians, to a greater or lesser extent, assured that “ It is impossible to live in Russia without breaking laws ” and “ Judges in Russia are venal”. More than 20 % of Russians are ready to break laws. By means of logit and probit models we have tried to catch the influence of social and economic forces on probability of acceptance of such decisions. As above we used stepwise backward-selection estimation. The results are summarized in Table 6.

Table 6. Logit and probit models with dependent variables describing the opportunity to break the law.

	UNFAIRLAW	UNFAIRLAW	VENALJUDGE	VENALJUDGE
	LOGIT	PROBIT	LOGIT	PROBIT
AGE			-.0052203**	-.002945**
SEX	0.1063516**	.185116***		
DIPLOM	0.0943479***	.1631253***	.1399207***	.0789885***
CHIEF	-0.0891241**	-.1763441***		
INCOME	-0.00000492***	-9.18e-06***	-.0000211***	-.0000116***
	BREAKLAW1	BREAKLAW1	BREAKLAW2	BREAKLAW2
	LOGIT	PROBIT	LOGIT	PROBIT
AGE				
SEX			.1262793**	.07379**
DIPLOM	.1203918***	.0671281***	.1427382***	.0798685***
CHIEF	.1305543**	.0784894**		
INCOME	-.0000211***	-.0000121***		

*- significant at 10%, **- significant at 5%, *** - significant at 1%.

The relationship of coefficient signs and signs on marginal effects of explaining factors was discussed already in section 3.1. We can give the following interpretation to the received results:

Women are less inclined to break the law, than men

More educated people are more law-abiding.

Older people trust judges less.

Although those having subordinates are more assured that “It is impossible to live in Russia without breaking laws”, they are less inclined to bypass “unfair laws”.

With growth of the citizens’ income the willingness to infringe of the law increases.

IV. CONCLUSIONS

Generalizing the results received in section 3, we can draw the following conclusions on moods in the Russian society:

Women, more than men, trust the Government of the Russian Federation, the State Duma and the courts and are less inclined to break laws.

More highly educated people trust the police and justice system more and also are more law-abiding.

A person having subordinates trusts almost all political institutes more and is less inclined to break laws.

Incomes of citizens do not influence the degree of trust in the Government of the Russian Federation, the State Duma

However with the growth of income, citizens trust the political parties and police less and are more inclined to break laws.

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THE AMENDMENT OF JAPANESE LAWS AND ITS CHALLENGES IN THE FIELD OF ANTI-TRAFFICKING IN PERSONS

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Abstract

Japan has formulated the Action Plan of Measures to Combat Trafficking in Persons in the end of 2004 and amended related laws in order to ratify the Palermo anti-Trafficking Protocol. In 2005, the Diet approved ratification of the Protocol.

Local NGOs have supported trafficked women and girls from other Asian countries since 1980s and also pushed the Government to take appropriate measures including legal measures. Although it has not listened to their voices, it has begun to take measures as soon as the United States required it to do so as a series of its national policy on “anti-terrorism”.

The Government’s measures are insufficient from the viewpoint of human rights-based approach taken by UN bodies related to human rights and NGOs in this field. Furthermore, it is very problematic that the Government is not so keen in constructing cooperative relations with NGOs.

Key words: *Trafficking in persons, the Palermo anti-Trafficking Protocol, the National Action Plan, amendment of laws, Human rights based approach,*

I. The Palermo anti-Trafficking Protocol's Impact on Japan

1.1. The Dilemma of the Japanese Government

On 15 December 2000, UN adopted The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, the so-called the Palermo anti-Trafficking Protocol. The Protocol entered into force on 25 December 2003. Japan has signed it on 9 September 2002, but has not yet ratified.

What was the obstacle for the Government that prevented it from ratifying it? It is the United Nations Convention against Transnational Organized Crime! In order to ratify the Protocol, a State must first ratify the Convention. The Government was very positive about the ratification of the Convention because USA was its strong supporter, but the Government failed to persuade Diet members, particularly the opposition parties. The obstacle was article 5 of the Convention.

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

The Government proposed introduction of new conspiracy offences in order to implement article 5 of the Convention. But the opposition parties objected strongly, insisting that their introduction would undermine democracy, particularly violate the freedom of thought and expression guaranteed under Article 19 and 21 of Japanese Constitution. In addition, the Japan Federation of Bar Association expressed an opposition, too. The Association argued that the Penal Code of Japan basically punishes conducts which are detrimental to legal interests, and even attempts or preparations are punishable in exceptional cases and that the Government, however, aims to punish conducts, which are at far earlier stage to preparations, as conspiracy offenses. Under such a situation, the ratification plan underwent continuous deliberations. At last, on 8 June 2005, The Diet approved the conclusion of the Protocol. The Government explained that after the ratification of the Convention, the Government would ratify the Protocol as soon as possible. But its prospect is not still promising.

1.2. The National Action Plan

In spite of failing to ratify the Protocol, the Japanese government set up the Inter-Ministerial Liaison Committee (Task Force) at the Prime Minister's Office in April 2004. The Task Force adopted the National Action Plan on 7 December 2004 which was approved by the Cabinet Meeting on Anti-Crime Measures on 14 December 2004. The Member Ministries/Agencies of the Task Force are composed of the Cabinet Secretariat, Cabinet Office, National Police Agency, Ministry of Justice, Ministry of Foreign Affairs and Ministry of Health, Labour and Welfare. After that, the membership was enlarged to include the Gender Equality Bureau of the Cabinet Office and the Human Rights Bureau of the Ministry of Justice. The Government explained that its enlargement was done for the purpose of the promotion the National Action Plan in more comprehensive manner. It should be noted that such as the Government's prompt action for anti-TIP was also the fruit of NGOs' efforts for anti-trafficking in persons (TIP) and for human rights of foreigners living in Japan as well as the result of pressure from U.S.A that ranked Japan "Tier 2 watch list" in 2004 Report on TIP.

But why were not such Bureaus as the Gender Equality and the Human Rights included from the start? It proves which aspect of three, prevention, protection and prosecution for anti-trafficking policy the Government gives the highest priority. It is true that The National Action Plan covers superficially all of the three aspects, but the implementation dose not. I will mention details later on this point. Here I will outline the National Action Plan.

The National Action Plan points out the necessity of 3 measures to prevent trafficking in persons (TIP), eradicate TIP and protect victims of TIP.

Measures to prevent TIP;

- Revise the Immigration Control and Refugee Act.
- Strengthen immigration control.
- Ensure security of travel-related documents.
- Review residence status and visas for “entertainers”
- Countermeasures against false marriages.
- Measures to prevent illegal employment.
- Measures to prevent prostitution

Measures to eradicate TIP

- Revise criminal laws.
- Criminalize trafficking in persons by revising the Penal Code.
- Implement thorough crackdown.
- Promote information exchange on travel documents, etc.
- Enhance coordination with and promote information exchange among investigating authorities of foreign countries.

Measures to protect victims of TIP;

- Identify victims.
- Provide shelters.
- Use Women’s Consultation Offices.
- Entrust private sector shelters to offer temporary protective custody.
- Conduct counseling and consultation.
- Provide protection to victims who have sought shelter at police.
- Handle residence status of victims (give special permission for residence).
- Ensure the safety of victims.
- Offer return and reintegration assistance to victims

Moreover, the National Action Plan lists up 4 points to be considered.

- Examine and review the action plan.
- Raise social awareness and conduct PR activities.

- Cooperate with domestic and international agencies concerned (foreign agencies, NGOs, etc.).
- Implement trainings for officials involved in measures to combat TIP.

II. Amendment of the Penal Code and other laws to eradicate TIP

II.1. Amendment of the Penal Code

In order to carry out the National Action Plan, the Government launched a reform of the Penal Code. In accordance with the Protocol, the Ministry of Justice submitted to the 162nd Diet session on 25 February, 2005 a bill for Partial Amendment of the Penal Code, which included a new article, Article 226.2 to criminalize the buying and selling of human beings, that is Trafficking Crime. The Diet passed the bill on 22nd June 2005, and the amended Act entered into force on 12 July, 2005. This amendment has made it possible to severely punish traffickers of persons.

Additionally, abduction crime aimed to attack the life and body of a person was criminalized under Article 225 and Article 227.3. Transporting, bringing over and harboring of abducted people were criminalized under Article 227.1. Abduction beyond national borders' punishment was widened under Article 226, 226.2.5, and 226.3. Maximum limit of statutory penalty of Abduction of a minor charge was increased from 5 years to 7 years under Article 224. And limit of abduction and confinement penalty was raised from 5 years to 7 years under Article 220.

II.2. Amendment of other laws

In 2005, some other laws were amended to eradicate TIP. Firstly, the law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters was amended to designate trafficking in persons stipulated in Article 226.2 of the Penal Code as an offence to be covered as predicate offences for money laundering (Article 2.2.1). The law was enacted and promulgated on 18 August, 1999 and came into effect on 1st February, 2000. One of the major reasons of its enactment is that it became firstly one of the most important agendas at Birmingham Summit in 1998.

Secondly, The law on Control and Improvement of Amusement Businesses was amended to inhibit illicit work by requiring the owners of amusement/sex-related businesses to verify immigration status of foreign employees at the time of their recruitment (Article 36-2.3a). The Government publishes that it is a measure taken to eradicate TIP, but is it true? The law itself is so tricky because it officially allows sex-related businesses. The law was enacted on 10 July 1948 and came into effect on 1 September 1948. 10 years later, Anti-Prostitution Law

came up. While it prohibits the selling and buying of sex, buying is not penalized, and only selling sex for unspecified person is penalized. After all, in Japan all types of sex-related businesses except for selling sex which means insertion of penis into vagina is OK!

III. Prevention and protection measures

III.1. Amendment of Immigration Control and Refugee Recognition Act

The partial amendment of the Immigration Control and Refugee Recognition Act is one of the most famous prevention measures taken. In Article 2(vii) of the Act, “trafficking in persons” was newly defined according to its definition in the Protocol. And while the Act prohibits a person who has engaged in prostitution, or acting as an intermediary or in solicitation of prostitutes for other persons or provision of a place for prostitution, or any other business directly connected to prostitution from entering in Japan (Article 7.vii), it excepted those who have engaged in these businesses under the control of another due to trafficking in persons from the list and added a person who has committed trafficking in persons or incited or aided such acts on the list (Article 7.vii-2). While Article 24 provides that persons who have committed trafficking in persons or incited or aided such acts (Article 7.iv.c) and a person who engages or has engaged in prostitution, or intermediation or solicitation of prostitutes for others, or provision of a place for prostitution, or any other business directly connected to prostitution may be deported from Japan, it excepted those under the control of another due to trafficking in persons from the list.

Moreover, under the Act, the Minister of Justice gives special permission of residence for victims of TIP in principle. But it should be noted that it is not the right which victims of TIP have but a discretionary power that the Minister of Justice possesses. The Government also started to implement strict identity checks, especially for applicants of “Entertainer” visas and careful examination of young women from source countries that are vulnerable to TIP. Since reviewing “Entertainer” visas in March 2005 and June 2006 in order to reduce abuse by traffickers, the number of foreigners entering Japan with “Entertainer” visas has dropped about 77.7% from 134,879 in 2004 to 48,249 in 2006. Particularly, it is well known that very many people from the Philippines have been entering Japan with “Entertainer” visas. But the number of people from the Philippines newly entering Japan has sharply dropped about 41.3 % from 147,817 in 2004 to 91,474 in 2006. On the other hand, the number of foreigners entering Japan with “Japanese’ spouse” visas has increased about 12% from 23,083 to 25,922 and the number of foreigners entering Japan with “permanent foreign resident’s spouse” has also increased about 62% from 807 in 2004 to 1,311 in 2006.

III.2. Protection measures

To protect and support victims of trafficking, care for both their mind and body is needed. Public shelters for women were set up in every prefecture under Anti-Prostitution Law. Article 34 stipulates the shelters can give advice, teach and temporarily take women who may sell sex into protective custody. Accordingly the shelters could not originally accept victims of TIP. In the National Action Plan, the Government let them have a function to protect victims of TIP temporarily.

For every victim who was received in private (nongovernmental) shelters through referrals from public shelters for women, the shelter can receive fees for providing public services, 6500 yen per person per day. But it is still too little for taking victims into temporary protective custody. They can stay in a public or private shelter for 2 weeks as a general rule although the period can be extended to a maximum of 4 weeks in exceptional cases. Public and private shelters can provide them with food, space and clothes although private shelters have no public funds except for receiving such fees for providing public. Private shelters' staffs are fewer in number but they are very skilled and can communicate with victims in their languages. On the other hand, Public shelters' staffs do not have much acknowledge of the background of victims of TIP nor interpreters full timed.

The Government does not consider the shelters as core organizations to help victims of TIP to recover their physical and mental health but just temporal resting rooms until they go back to their home country. Therefore, the public shelters' staffs face a dilemma because most of them want to master necessary skills and give them good advice and sufficient supports.

After 2 weeks for temporary protection of victims of TIP, all of them return to their country with the help of IOM (International Organization for Migration). The Government funded IOM Voluntary Return and Reintegration Assistance. It has been available since April 2005. The Government reports that it assisted 126 victims in returning to their home countries and supported the victims' social reintegration as of December, 2007. The Government explains that all of victims want to return to their country.

IV. Its challenges

IV.1. Has the National Action Plan already been completed?

As shown in the table below, the number of victims has dropped sharply from 117 in 2005 to 43 in 2007. The Government explains that one of major reasons for the decrease is that the Government has been making every effort in anti-

TIP such as operation of strict border control since the Government set up the National Action Plan in 2004. Is it true?

In order to protect victims of TIP, the Government firstly needs to identify them as victims. How do they do it? In the most of cases, the Police or the Immigration Control Office first find women working in sex-related businesses in their crackdowns and detain them. Secondly they questions women about their reason why they work there. Lastly they identify some of women as victims of TIP according to the definition of TIP.

Table 1. Numbers of Identified Trafficking Cases and Victims

Year	2001	2002	2003	2004	2005	2006	2007	Total
Number of cases	64	44	51	79	81	72	40	431
Number of arrested persons	40	28	41	58	83	78	41	369
Number of victims	65	55	83	77	117	58	43	498
Philippines	12	2		13	40	30	22	119
Thailand	39	40	21	48	21	3	4	176
Indonesia	4		3		44	14	11	76
Romania					4			4
Taiwan	7	3	12	5	4	10		41
Korea				3	1	1	5	10
Australia					1			1
Estonia					1			1
Colombia	3	6	43	5	1			58
Russia				2				2
Laos				1				1
China		4	2					6
Cambodia			2					2
Japan							1	1

Source: National Police Agency

The Government says in the pamphlet with the title of “A Prompt and Appropriate Response from a Humanitarian Perspective Japan’s Actions to Combat Trafficking in Persons” that they are ensuring a system for victim identification and protection and draws a flowchart from “identification the victim” to “assistance to social reintegration of victims in their home countries”. But it does not give any detailed information about how to identify persons as

victims of TIP although it says that they identify the victim in collaboration with all concerned agencies. If some agencies have a different opinion, what happens? In fact, I hear that there are some cases in which the public prosecutor prosecuted a woman while the Police identified her as a victim of TIP and another cases where the Police sent a case of a women to the public prosecutor for prosecution while a staff of a public shelter identified her as a victim of TIP. A guideline for identification of victims is not available anywhere.

While in 2007 the number of victims identified is only 40 all of which are women, at the same year, the number of illegal foreign female workers arrested is 16,056 and 5,409 of those were engaged in the service trade such as hostesses. In Japan, foreigners are not permitted to work as hostesses and waitress and so on unless they stay in Japan with the “permanent resident” or the “long-term resident” or the “spouse of Japanese national” or “spouse of permanent resident” status of residence. It is well known that a considerable number of foreign women with the “Entertainer” status of residence such as singers or the “Temporary” status of residence such as tourists illegally work as hostesses or sew workers. It is not sure where the 40 victims were found but there is some possibility that they worked in the same field. The correct number of arrested foreign women for the violation of Anti-Prostitution Law or the Immigration Control and Refugee Recognition Act in 2007 is not available but the Report about Organized Crime published by the Task Force of Organized Crime in the National Police Agency in 2007 reports some cases in which foreign women were arrested for working without legal permission which is the violation of the Immigration Control and Refugee Recognition Act. While some are arrested and deported, others are rescued and protected as victims of TIP. It is crucial for the protection of victims of TIP not to treat victims as criminals. Therefore, the Government should immediately make the identification procedure.

IV.2. Are they illegal foreign workers or victims of TIP?

The Government’s policy for anti-TIP forms a part of the policy for anti-terrorism. Therefore, the Government is keen on strengthening immigration control rather than finding and protecting victims. The strict immigration control policy makes TIP just go underground and can never stop the inflow. In Japan, many cases of TIP were reported by NGOs until 2000 and some of them were taken with the mass media. But since 2000 the victims have become more invisible because the trick of traffickers became more skillful. For example, in the first half of 90’s, some murder cases that Thai women involved were up. They were victims of TIP and murder their watch who was from Thai or other Asian countries in order to escape from confinement. In the second half of 90’s, many cases of women from Colombia trafficked were reported by the Colombia

Embassy in Japan. They were suffered from cruel physical, mental and sexual violence.

NGOs analyze that the method of exploitation has become more sophisticated in 21st century. Trafficked persons may be under less severe confinement. For example, some trafficked women may agree to be exploited and engaged in prostitution in order to pay back their fictitious “debt” which they do not need to do legally. According to Article 3(b) of the Protocol, the consent of a victim of TIP to the intended exploitation set forth Article 3(a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used. There is every possibility that some of arrested women because of illegal work are victims of TIP. The definition of TIP of the Protocol is the following;

Article 3

For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

It should be also noted the fact that the Protocol itself dose not attach greater importance to the punishment of traffickers rather than the protection of victims of TI . The main purpose of the Protocol is not to ensure the human rights of trafficked persons but to combat international organized crimes. It is the reason why UNOHCHR(the United Nation Office of High Commissioner of Human Rights) has been underlining the importance of human rights based approach to combat TIP and that the office submitted “Recommended Principles and Guidelines on Human Rights and Human Trafficking” as a report of UNHCHR(the United Nations High Commissioner for Human Rights) to the Economic and Social Council in 2002. The Guideline is recognized its

importance in the reports of The Special Rapporteur on trafficking in persons, especially in women and children who was appointed by the UN Commission on Human Rights. The Guideline stipulates that the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking. Japan is one of main destination countries, and should adopt anti-TIP policy based on the Guideline.

IV.3. The Government should keep and advance the relations with NGOs

While the Government has launched to take measures for anti-TIP since 2004, NGOs have been taking actions for protection of foreign women including victims of TIP from 1980's. In 2003, NGOs established JNATIP (Japanese Network against Trafficking in Persons) which is composed of 48 NGOs. JNATIP researched the situation of female victims of TIP who were enforced to be engaged in prostitution and published two reports in 2005 and 2007. The first author, Masumi Yoneda is a core member of JNATIP and was involved in making these reports. In the 2005 JNATIP Report, JNATIP published the result of a questionnaire survey on NGO's activities to protect victims of TIP and announced the actual conditions of the victims of TIP in Japan.

Particularly, the activities of two NGOs, HELP (House in Emergency of Love and Peace) and Saalaa are notable. The both have a shelter. HELP was established in 1986 and has 10 rooms and can accommodate 15 persons. In times of emergency, 5 or 6 women use just one room and others sleep in living room. HELP have protected more than 2,000 abused foreign women from 1986 to 2004. "Saalaa" was established in 1992. "Saalaa" means a small house in Thai.

It has protected about 500 women from 1992 to 2004. They succeeded in cooperating with related embassies to Japan such as Thai embassy for the effective protection of the victims. But after public shelters began to protect the victims in 2005 according to the National Action Plan, the Police and the Immigration Control Office send the victims to only public shelters. When embassies protect them, they also began to send them to public shelters. As the result, the number of victims using NGOs' shelters has sharply decreased. Then, JNATIP carried out an interview with 4 NGOs having a shelter, including HELP and Saalaa and a questionnaire survey on the difficulties the staff of public shelters face. JNATIP explored the necessary steps to realize the construction of the network between NGOs and public shelters. The 2007 JANTIP report is the product of this research. It published that although the total number of the victims of TIP who NGOs protected was 25 in 2003, 35 in 2004, and 44 in 2005, the number was only 4 in 2006. On the other hand, public shelters totally received 120 victims in 2005 and 9 in 2006. As I mentioned earlier, The Government announced

that the number of victims of TIP was 117 in 2005 and 58 in 2006. It proves that most of victims protected in 2006 return to their country without using private and public shelters. The Government says that the return is voluntary. But if they can receive good physical and mental care in a shelter and judicial support to file a suit to claim compensation, do all of them want to return to their home country very soon? The report also revealed that many staff members of public shelters thought that they were not yet ready to receive the victims of TIP and that they desired to learn many things from NGOs having good skills and knowledge. JNATIP continues to negotiate with the Government to ensure the human rights of the victims and has a meeting with relevant officers of ministries and agencies regularly. It is true that the Government does not ignore NGOs but it is questionable whether the Government seeks to construct a partnership with NGOs. Such a regular meeting with NGOs may be used as a just excuse of being an open-door government. The Government comes in the time to show the flag.

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AUTHENTICATION ISSUES OF DIGITAL RECORD IN RELATION TO COMPUTER-RELATED EVIDENCE

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Abstract

Digital record relating to computer related-evidence has forwarded numerous advantages to human society such as increasing of speed, reducing of expenses and saving time. Its prevalence had drowned law attention to recognized digital record as admissible evidence. But its admissibility has been challenged by technical issues of authentication, i.e., alteration, fabrication, tempering or identify real author of stored data and reliability of system. This is due the nature of digital system itself. Therefore, Malaysian legislations through Evidence Act 1950, Electronic Commerce Act 2006 and Digital Signature 1997 and Iranian Electronic Commerce Act 2003 have provided some provisions to tackle those technical issues of authentication. This chapter attempts to examine the ability of the legal provisions to cater the said problems as well as to identify the legal vacuums in the relevant provisions.

Keywords: *Authentication, Digital record, Evidence, Malaysia, Iran.*

I. INTRODUCTION

Nowadays, the legal systems of countries are affected by the second industry revolution that is called “information revolution”. It is safe to say that more than ninety percent of the information generated in the business world is in the form of digital records and approximately seventy percent has never been translated

into paper form¹. The capacity of digital and analog system in the computer system due to the rapid development of information technology has drawn the law's attention to the presentation of digital data as legal evidence.²

In *Tecoglas Inc v. Domglas Inc*, court presented about the prevalence of computers:

“There are not many large enterprises of operating successfully today who don't use computers in connection with their record-keeping. It would be almost impossible and certainly impractical to prove expenditures of the nature of those in this case without admitting the computer records or documents based on the computer print-out.”³

The significant requirement of admissibility of evidence is authentication. Before a court admits digital record as evidence, the claimant has to show that his claims are authenticated.⁴

In *United States v. Simpson*:

“Authentication as an initial examination of digitally stored data to determine whether the contents of the digitally stored data is unchanged; that the digitally stored data originated from a specific sources which may be human or machine; and that the prosecutor must offer evidence `suffocation to support a finding that the computer record or other evidence in question is what its proponent claims”.⁵

In accordance with the above decision, Chris Reed believes that:

“Authentication satisfies the court in accordance to these stipulations (a) the contents of the record have remained unchanged, (b) the information in the record does in fact originate from its purported source, whether human or machine, and (c) the extraneous information such as the apparent date of the record is accurate”.⁶

¹ Hoppin, J. 2003. Processing computer information is changing how cases are done. <http://www.law.com/jsp/article.jsp?id.html> (26-6-2008).

² Sieber, U, *International hand book on computer crime*, Translated by Bakhtyarv, M., Nakhjavani, R., Rahimi, A., & Nori, A, Ghanjedanesh, Tehran, 2004, pp.192-197.

³ [1985], 51 O.R. (2d) 196, 3 C.P.C. (2d) 275, 19 D.L.R. (4th) 738 (Ont .H.C.)

⁴ R .v. Petersen(1983),45N.B.R.(2d)271(N.B.C.A.)

⁵ [1998] 152 F.3d 1241, 1250 (10th Cir. 1998)

⁶ Reed, C.2005. The admissibility and authentication of computer evidence a confusion of issues. 5th BILETA Conference British and Irish legal technology association. <http://www.bilata.ac.uk/90papers/reed.hutml>(21.may 2008)

The flaws of this definition are referred to lack of requirement of identity of author. Consequently, these authentication concepts show that the main elements of authentication are accurate and relevant.⁷

The changeable nature of digital records has made authentication difficult. The authentication process of digital records differs from that of paper documents.⁸

In *R v. Mc Mullen* supra court stated:

“I accept that the demonstration of reliability of computer evidence is a more complex process than proving the reliability of written record...”⁹

When digital record is created, it has two parts, that is, the paper documents namely content and medium. The issue in this case is that the content in digital records or documents can be separated from the original medium and transferred to another medium. In addition, multiple documents can be sent from this hardware to other software of the same medium. As a result, it can effectively break down the medium of content, and eventually, there will be difficulties in the authentication process; however, the content on the paper document is not separate from the medium. Moreover, in authenticating a handwritten document, the proponent must show its originality by a witness or other evidence. The witness must have special qualifications, but the complex nature of digital records in relation to computer-related evidence has changed the rules of the ordinary process of authentication. A witness to the authentication of digital records does not need special qualifications. Witness also does not need to understand the technical operation of the records, but if the court demands all the relative facts to the case, “the witness must have first-hand knowledge of the relevant facts to which he testifies for authentication”.¹⁰ In spite of the fact that ordinary requirement of authentication has been changed by the complex nature of digital record. However, the technical issue of the authentication of digital records (identifying authors, alteration, reliability of system and other elements) is still being questioned.

This chapter will elaborate and evaluate some of the authentication issues for the purpose of identifying the legal weaknesses and strengths. At the outset, the

⁷ Authentication in the multimedia can be roughly be classified in to two types; 1 hard authentication 2 soft authentication. See, Nandakishore Ramas wamy, A video authentication scheme using digital signature standard and secure hash algorithm for h.264/AVC main profile, Master thesis, University Texas, Arlington, 2004, p.5. <http://Proquest.umi.com.ezplib.ukm.my/pqdweb?> (30.6.2008)

⁸ Gaten, I, *Electronic Evidence*, Translated by Ramazani, M, Shoriali Etelearesani, Tehran, 2003, p. 220.

⁹ [1978] 6 C.R.(3d)218,42 C.C.C. (2d) 67 (Ont.H.C.), Affirmed (1979),25 O.R. (2d)301,47 C.C.C.(2d)499,100 D.L.R.(3D) 671 (Ont.C.A.) &United States V.DeGeorgia,420 F2d 889,893 n.11(9th cir.1969) See: Gahtan ,A.M, *Electronic Evidence*, Cars well ,Canada, 1999, P.163.

¹⁰ *United States v. Whitaker*, 127 F.3d 595, 601 (7th Cir. 1997)

chapter sets out by giving an overview on the process of authentication and then discussing the processing of digital record evidence on the computer, and its technical issue, as well as its legal positions in Malaysia and Iran.

II. GENERAL REQUIREMENTS OF AUTHENTICATION

There are various requirements of authentication, but only three elements relating to the topic are discussed.¹¹ To understand the legal issue of digital records relating to computer evidence, some guidelines, methods or steps to authentication are examined. The analysis begins with the issue of the distinctive characteristics, followed by the chain of custody and the process of digital record in relation to computer-related evidence.

II.1. Distinctive Characteristics

One of the common methods of authentication is distinctive characteristics, which is applied to authentication of evidence. In this method of authentication, the evidence is to show the identity of the item through some distinctive characteristics or qualities.¹² An item of a document or evidence is distinctive from another item if one can find the accuracy or relevancy of the document by its “appearance, contents, substance, internal patterns, or other distinctive characteristics...”¹³ This poses the question of whether the old method is relevant. Hypothetically, Mara has taken a photograph depicting the action of Mr. Ria in a criminal case. Then Ms. Pura employs the picture as evidence. Furthermore, she gives it to an Internet Café to be scanned for the purpose of using it as evidence at the trial. In this situation, the question is whether the stated photo is “a fair and accurate representation” of the scene. As matter of fact, the photograph can be easily altered. Then how can one show the authenticity of the photograph? Therefore, the method is questioned and it is insufficient in solving the issue of the changeability of digital records. This will be discussed further in the section which focuses on technical issues of authentication of digital records in relation to computer-related evidence.

II.2. Chain of Custody

The chain of custody is a process that proves the reliability of evidence by demonstrating who handled the evidence, what has been done to it and whether

¹¹ Shaw, G. 2008. Digital document integrity. [http://ieeexplore.ieee.org/iel5.\(26.6.2008\)](http://ieeexplore.ieee.org/iel5.(26.6.2008)). See, S 901Federal Rule of Evidence, United Stets.

¹² Griffiths, E. & Gupta, R.S. 2008. Distinctive Protein Signatures Provide Molecular Markers and Evidence for the Monophyletic Nature of the *Deinococcus Thermus* Phylum. <http://www.pubmedcentral.nih.gov> (26.6.2008)

¹³ S.901Federal Rule of Evidence noted: “Distinctive” and the like, “Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”

it has been altered or not. It also includes a question whether there is an opportunity for unknown people to access it or to substitute the evidence for something else? ¹⁴

The process has some links to testing or showing the accuracy of data. For example a police officer or detective, who investigates the file of computer, finds the crime picture that has been scanned in file D of the personal computer. The initial method of the custody of the picture is important in order to prove the claim that this picture has come from this file and hasn't been altered. ¹⁵ It should also be noted that a digital record is different from physical evidence, especially when the officer or opponent is ready to admit the original. It must be carefully protected because the image in the hard disk is as good as the original in the eyes of the court. The original or first image that the officer takes is the best evidence because the image is the closest to the original source.

It is necessary to authenticate because the lack of chain of custody leads to error in the foundation of evidence or inadmissibility of evidence.¹⁶ In *R v. Rowbotham*¹⁷ the court refused to admit computer bills due to lack of evidence which will illustrate the origin of documents and data, the preparation of document and the procedures followed. Over all, evidence without a chain of custody is worthless.¹⁸

11.3. Digital Record Evidence and Computer Processing

Digital record in relation to computer-related evidence is more susceptible to tampering and unauthorized interception. Data and time, software licensing or computer program logarithms can easily be manipulated. Therefore, computer evidence processing is the general requirement of authentication which guides us to identify the legal issues. Computer processing consists of the following elements:

¹⁴ Sarah Scalet believes that "Chain of custody is a process of validating how any kind of evidence has been gathered, tracked and protected on its way to a court of law". See, Scalet, S.D.2008. How to keep a digital chain of custody. [http://www.csoonline.com/article\(26.06.2008\)](http://www.csoonline.com/article(26.06.2008))

¹⁵ SweeSeng, L. *E-security law & strategy*, Zaid Hamzah (ed.), Malayan Law Journal, Malaysia, 2005 p.150.

See, also Chain Of Custody at: [http://www.introspectvideo.com/downloads/Introspect\(26.6.2008\)](http://www.introspectvideo.com/downloads/Introspect(26.6.2008))

¹⁶ Abraham, A. *Cyber forensics, afield manual for collecting, examining and preserving evidence of computer crimes*, Marcella, A.J. & Greenfield, R.S.(ed.), Auerbach Publication, United States America, 2002, P.136.

¹⁷ [1977], 2 C.R. (3D) 244, 33C.C.C. (2d) 411(Ont.Co.Ct.). For more dissection see, Johnson, T.A. 2006. *Forensic computer crime investigation*, United States America, Crc.2006, P.155.

¹⁸ Nemeth, Ch. P. *Law & evidence*, Prentice Hall, United States of America, 2001, p. 56.

11.3.1. Computer Time and Date Settings

With regard to the changeability of the digital record in identifying the time and date that the files were created, it is significant to authenticate digital records in relation to computer-related evidence.¹⁹ The accuracy of time and date on the files can show real time and date of stored data in device even though sometimes identifying the accuracy of the time data seems like a difficult task because of the faulty system. In *Alliance and Leicester Building Society v. Ghahremani* court pointed:

”... it would be very simple to rest the computer’s clock/calendar for the express purpose of making it appear that a file had been saved to disc on any given data.”²⁰

Consequently, documenting the accuracy of these settings on the seized computer is significant and it can reduce authentication issues.²¹

11.3.2 Hard Disk Partitions

The hard disk should be examined by a program like FDISK (that comes with DOS or windows to show whether hidden partitions have been created or not). It leads to identifying the alteration of the file system and finding the data which are deleted.²² In *Com v. Copenherfer*, in which the defendant thought that his data has been successfully deleted, found out otherwise. His hard disk gave a copy of his data in the case of his kidnapping.²³

11.3.3. Data and Operating System Integrity

The Operating System (OS) is the basic software that runs the server²⁴. The relevancy of any data that exists is directly linked to the operating system, directory and data storage areas. Therefore, in order to authenticate the data, any errors in the operating system should be documented.

¹⁹ See, Eoghan Casey, M.A, ‘Error, Uncertainty, and Loss in Digital Evidence’ (2002) 1 (2) *International Journal of Digital Evidence*.

²⁰ [1992] R.V.R. 198 (Eng.Ch.Div.).

²¹ <http://www.computerhope.com/issues/ch000554.htm> (25.6.2008)

²² Hard disk defined: “A hard disk partition is a defined storage space on a hard drive” See, <http://www.tech-faq.com/hard-disk-partition.shtml>.29.62008

²³ [1991]526 Pa.555,587 A.2d 1353, 59 USLW 2619(Pa.1991)

²⁴ Cho, J.W, *Innovation and competition in the digital network economy*, Kluwer law international, New York, 2007, p.6.

Other elements of processing such as Operating System and Version, Computer Virus Evaluation, File catalog²⁵. Software licensing²⁶ and Retention of software, input files and output files should be examined in order to authenticate a digital record relation to computer-related evidence. For example, the examination of a file catalog can identify files which are stored on the computer hard disk drive(s) and floppy diskettes. Moreover, the dates and times that the files were created and updated can be recorded. Consequently, the general requirements of authentication have impacted the identification of technical, legal issues of authenticating digital records in relation to computer-related evidence. Therefore, the technical issues of authentication will be identified and examined in the subsequent paragraph.

III. TECHNICAL ISSUES IN AUTHENTICATION

The difficulties in authenticating digital records are as follows:

- (i) Alteration, manipulation or damage of digital records in relation to computer-related evidence.
- (ii) Reliability of system program digital record in relation to computer-related evidence.
- (iii) Inability to identify the author of the digitally stored data.

III.1. Alteration, Fabrication and Tempering of Digital Record in Relation to Computer -Related Evidence

Nowadays, majority of information has been stored on digital systems. It is imperative to understand which information recorded on the digital system is changeable. (Or fabrication and tempering). Furthermore, when system of records or the system that protects the information on the files (such as up-to-date) is altered, the data (forms and other documents) is changed by the action of the system. This alteration of the digital records can be called an advantage.²⁷

²⁵ File Catalog has many parts that can help to identify or authenticating the data: data set template, data set collection template, instrument template, instrument host template, template and references template. See, Catalog Object Files http://pds.jpl.nasa.gov/documents/qs/catalog_files.html(29.6.2008)

²⁶ “Licensing System Authentication: The goal of this authentication scheme is to allow an application (or a management tool) to check both the integrity and the authenticity of each message (that is, input and output parameters) passed between the application and the licensing system which the agent is communicating with. If an application software publisher chooses to implement this scheme into an application, they will restrict the application to work only with those licensing system which have provided to the application the needed information prior to a license request”. <http://www.opengroup.org/onlinepubs/> visited at 29.6.2008.

²⁷ It is referring to nature of booth systems; analog and digital.

But it also has disadvantages which affect the authentication of data as well. Due to this alteration, the suspects are likely to change the data that are recorded.²⁸

To solve this issue, the anonymizer was applied. An anonymizer or an anonymous proxy is a tool that attempts to make activity on the Internet untraceable.²⁹ It accesses the Internet on the user's behalf; protecting personal information by hiding the source of the information. However, the anonymizer was on websites. In other words, it only protects the World Wide Web. Other digital records such as pen drive or desktop computers were unprotected. Accordingly, the imperfection of the anonymizer has made the user apply the encoding system. Encoding system is a digital system; a method of assigning binary codes to represent characters of data.³⁰ In this process, the mathematic logarithm changes the codes (unreadable data) to readable data; the security of this system depends on the key and algorithm applied to the data.³¹ There are two types of encoding, i.e, symmetric and asymmetric.

Shortcomings of "anonymize" with regard to authentication has not been decreased by encoding system (symmetric). The symmetric type uses one key for reading the bit that is useable for the file documents only. It is not practical to encode a message or information which is transferred through an email or similar means. This is due to the fact that reading a data in cyberspace such as digital signature requires our access to public key. In this method using one key a user must send the public key accompanied with data if the sender wants the receiver to read the data. This action i.e. sending the public key with data is not secure. To reduce and tackle these shortcomings in authentication, the asymmetric was developed and used as a replacement for symmetric system.

An asymmetric key pair such as the private key and public key are illustrated below:

Ms Alice has made two keys and she keeps one of them as a private key and reserves the public key for one website that Mr. Jack is familiar with. If Mr. Jack likes to send the message to Ms Alice, it is enough to have a look at her public key. When Ms Alice wants to read this message, she uses her private key to move the codes of message and changes this to readable form. Anyone can use and send information or any relevant things to your file and change the form and latest data. In short, encoding cannot solve the issue of alteration, manipulation and damageability of the data.

²⁸ *United States v. Farzier*, [2003]3222 F3d 1262 (1)th Cir2003)

²⁹ <http://en.wikipedia.org/wiki/Anonymizer> (29.6.2008)

³⁰ <http://www.answers.com/topic/encoding-system?cat=technology> (2.7.2008)

³¹ <http://www.mathwords.com/s/symmetric.htm> (2.7.2008)

III.2 Reliability of System Program Digital Record in Relation to Computer-Related Evidence

Apparently, the accuracy of the data as an essential element of digital record authentication is based on the reliability of the computer program. When a program which stores or generates evidence has serious programming errors, this will lead to problems in the authentication of digital record evidence.³² Developing a program which attacks viruses reduces the reliability of the programming system. For example, Microsoft windows currently cover the majority of the computer programs. This is the reason why other companies try to sabotage the program by reducing customers' interest in using Microsoft. Meanwhile, some programs such as windows XP don't work with other software antivirus such as MacAfee, Kaspersky, Sophos, and others. This is because Microsoft doesn't support these software's antivirus.³³ Furthermore, there is BHO-Borrower Helper Object, BHO searches the websites the users are visiting, and it changes the information or adds further information. Consequently, it is difficult to rely on the process that generated the digitally stored data. It cannot be proven that it was the product of a computer system that was functioning normally. Therefore, duty of the proponent that is to show the accuracy of the programming system becomes complicated and misleading.

III.3. Inability to identify author of the digitally stored data

The inability to identify the author of the digitally stored data is a critical issue in the authentication of a digital record because the main aim of authentication is to show how the data has changed and who has altered the data or information.³⁴ Development of hacking, multimedia crimes and other crimes led to lack of ability to identify the author. If we look at our e-mail inbox, we can see that there are many e-mails sent to our inbox without our permission. Two questions need to be addressed: how have they found our e-mail address ID's? How can we identify them? The answer maybe lies in the cookies developed by MS (Microsoft System). One of the reasons for this action is that cookies can increase the interest and grab their attention by increasing the quality of the monitor. But, on the other hand, they chase us in the cyberspace and gather our personal information in the personal computer and then transfer it to other users. Following that the other user can get our information and alter our data. This reveals that identifying the person who has stored, altered the data or created data seems most impossible, even though in the time it use own or specific connection network it can be identified (such his home connection). It is worth mentioning that

³² *United Stated v Bonallo*. [1988] 858F.2d 1427,99 A.L.R. Fed. R.Evid.Serv.1085 1436(9thCir. (OR.).1988).

³³ Frzaneh, F, *Home internet security*, Naghos, Tehran, 2007, p.124.

³⁴ Article 1(a),(d) Computer Crime Islamic Republic of Iran Bill.2004 ,shows the differences of data and information

encoding of system programs such as digital certificate is not able to offer any solution because these digital certificates are likely to be forged or used without the owner's permission.

Apparently survival of the virtual world depends on the admissibility of digital records in relation to computers.³⁵ Given the importance of the admissibility of digital records, some technical issues need to be solved. Solving these technical issues as a legal duty is recognized by the virtual world or human society. In the following section, we have examined the responsibility of the law in showing whether the current legislations are able to unravel technical issues or not. To achieve this goal, we have investigated Malaysian and Iranian legislations.

IV. LEGAL ISSUES IN AUTHENTICATION

IV.1. Malaysian Legislations

The main reason of authentication is to ensure the relevancy of evidence. This is required in the Malaysian legislations. It has been documented by Malaysian legislations. The Evidence Act 1950, the Digital Signature Act 1997 and Electronic Commerce Act 2003 have provided provisions to authentication of digital record in relation to computer-related evidence. The technical issues of authentication will scrutinize first in the facture of Evidence Act 1950.

IV.1.1. Evidence Act 1950

The Malaysian evidence law has amended the definition of the document by the Evidence Act 1993 (act A851) with effect from July 1993. The document has defined in the section 3 Evidence Act 1950:

Document means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device what so ever, by means of-

- (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;
- (b) any visual recording (whether of still or moving images) ;
- (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
- (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a) , (b) or (c), or by more than one of the means mentioned in paragraph (a), (b), (c) and (d),

³⁵ *Tecoglas Inc.v.Domalas Inc.* at note 3.

intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;³⁶

This definition demonstrated that digital record has been accepted as a document. It has been clarified in the illustration of section 3 of the Act as “A matter recorded, stored, processed, retrieved or produced by a computer is a document”. Moreover, it has been recognized as documentary evidence according to the evidence classification in section 3. Authentication has become one of the most important requirements of admissibility since digital records has been accepted as evidence.

In *Garton v. Hunter* Lord Denning MR said that:

“That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in one’s hand, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we cannot confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility.”³⁷

Based on the new nature of the best evidence rule and the admissibility which seeks the relevant evidence to settle the technical issues of authentication, the Malaysian Evidence Act 1950 has complied with the new nature of the best evidence and has turned its attention to the relevancy and accuracy of the document. It has admitted to present computer digital data as primary evidence but it does not mean that the opposing party will not challenge the authentication of the document.³⁸

In *R v. Sunila*;

“A court may also admit computer printouts as prima facie proof of the matters contained therein but permit the other party to challenge the accuracy of the record.”³⁹

³⁶ Illustrations :

A writing is document.

A word printed, lithographed or photographed are documents.

A map, plan, graph or sketch is a document.

An inscription on wood, metal, stone or any other substance, martial or thing is a document.

A drawing, picture or caricature is a document.

A photograph or a negative is document.

Tape recording of a telephonic communication, including a recording of such communication transmitted over distance, is a document.

A matter recorded, stored, Processed, retrieved or produced by a computer is a document.

³⁷ [1969] 1 A LL ER 45.

³⁸ Section 62(3): a document produced by a computer is primary evidence.

³⁹ (February 8,1990) (B.C.Prov.Ct.).

Therefore, the Malaysian Evidence Act 1950 has authenticated digital records in relation to computer-related evidence (as an admissibility requirement) and the technical issue of its authentication has been established in section 90A, section 90B and section 90C.

Section 90A has been applied in authentication to tackle the technical issues. Therefore, a digital record in relation to the computer-related evidence is authenticated if it complies with the following requirements:

1. It must be a document produced by a computer or statements contained in such document⁴⁰.
2. It should be produced in the ordinary use or computer works on the ordinary course⁴¹.
3. A certificate should be issued⁴²

The aforementioned requirements have to be complied with in order to authenticate the digital records. The United Kingdom has established some terms that will make it possible to accept digital records as authenticated document and that will also reduce the technical challenges. Its provisions which has been interdicted by the section 69 of the Police and the Criminal Evidence Act 1984⁴³

⁴⁰ 90A (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

⁴¹ *ibid*

⁴² 90A (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

⁴³ (1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown-

- (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;
- (b)
 - (a) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
- (c)
 - (a) That any relevant conditions specified in rules of court under subsection (2) below are satisfied.

At the time of s.69, it was the challengeable question which above provisions need to be applied on all types of computer evidences (direct or hearsay evidence). There were some different points that when the evidence is hearsay exception doesn't need to comply this provision so because of those challenges and other main problems to authentication and admissibility the Law Commission abolition this section and prompting repeal of the provision by s. 60 of the Youth Justice and Criminal Evidence Act 1999. Main problem of abolition are: First, uncertainty concerning the precise scope of the section; secondly, proof of reliability of computer evidence under s. 69; and finally, the wording of

has been replaced by section 60 of the Youth Justice and Criminal Evidence Act 1999 which states that “evidence from computer records are inadmissible unless conditions relating to proper use and operation of computer is shown to be satisfied”.

In the *R v. Wood*, the court holds that computer output for admissibility should be proven:

“That the computer was correctly operated: that the computer was used with the appropriate programs to produce the sorts of results which are under consideration; and the calculations performed could be accepted as reliable.”⁴⁴

Consequently, the United Kingdom has applied the above established term to cover digital documents as authenticated documents. Therefore, a question arises relating to the above requirement that is whether those legal requirements are sufficient enough to tackle the technical issues of authentication particularly in the issues of the unreliability of the system, identifying of the author and alteration of the documents. To understand the legal perspective, the above legal requirements are investigated in the light of the issues below.

Alteration, Fabrication and Tampering Digital Record as a Technical Issue.

As mentioned in the technical issue of authentication⁴⁵, digital records in relation to computer-related evidence can be easily altered, fabricated and tampered. The question is whether there are any legal terms in section 90A which give answers to these issues. Section 90A stated that when a document is produced by the computer in the course of ordinary circumstances and issued as a certificate, it can be accepted as an authenticated evidence or admissible evidence. In *PP v. Hanafi Mat Hassan*⁴⁶, the accused, Hanafi bin Mat Hassan was allegedly charged for murder and rape. The accused bought a bus ticket through a ticket machine. The bus ticket was presented in court by the prosecution and the defense counsel objected on the grounds that the document was computer-generated evidence. The HC represented the same type of evidence in *Gnanasegaran Pararajasingam v. PP*⁴⁷ and stated that the ticket machines

the provision. Thus, the provision for authentication set out by section 60 of the Youth Justice and Criminal Evidence Act 1999; Section 69 of the [1984 c. 60.] Police and Criminal Evidence Act 1984 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer is shown to be satisfied) shall cease to have effect. Although this section much focuses on the admissibility, it looks at the authentication as a step of admissibility, the end result is that the alteration and other issues of authentication still are in the united kingdom legislations’.

⁴⁴ [1983] 76 Cr. App. R23 (Eng. C.A.)

⁴⁵ See p.7.

⁴⁶ [2003] 6 CLJ 459

⁴⁷ [1997] 4 CLJ 6. see, Gita Radhakrishna, legal issue in electronic evidence, *3rd conference on law & technology*, University Kebangsaan Malaysia & University of Tasmania, Australia, Malaysia, 2008, p. 387

installed on the buses were computerized. There were two prosecution witnesses who testified that the ticket machines stored and recorded information as well as produced tickets. Thus the information printed on the ticket can be admissible in court as evidence.

In the case of *PB Securities S/B Justin Ong Kian Kuok and Anor*⁴⁸ the plaintiff claim against the defendant was in respect of contra losses incurred in the defendant's share trading account arising from the purchase and sale of shares. The defendant testified that that he did not give instructions to the remisier of the plaintiff's company to conduct shares trading for and on his behalf, which resulted in losses. The defendant also testified against the plaintiff saying that numerous transactions were carried in excess surpassing the trading limit. The plaintiff presented the certificate under section 90A and section 90A (1) of the Evidence Act 1950. All the documents including contra and monthly statements were admissible in court as evidence of the fact that shares had been bought and sold by order of the defendant.

Consequently, the above cases illustrate that following s.90A provisions mean authentication and it's sufficient to reduce the alteration or fabrication or tampering of issues. It, also, can be prove by content of section 90A (5) and 90A (6) as well.⁴⁹ Additionally, it has conveyed this meaning that other party has to prove that it has been altered even though digital record produced in the course of ordinary circumstances.

In the case *United States v. Bonallo*:

“The fact that it is possible to alter data contained in a computer is plainly insufficient to establish untrustworthiness.”⁵⁰

Without the evidence to prove alteration claims, proving its capacity to tempering, and alteration is not able to prove inadmissibility.

In the case of *United States v. Allen*, court stated:

⁴⁸ [2007]7 CLJ 68

⁴⁹ (5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such a document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such an investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

⁵⁰ *United States v. Bonallo at note 33 [1988] 858 f.2d1427,1436*(9th Cir.1988) see, *Untied States v. Whitaker*, [1997]127F3d 595,602(7th Cir.1997)

“Merely raising the possibility of tempering is insufficient to render evidence inadmissible”⁵¹

Furthermore, in the case of *United States v. Glasser*:

“The existence of an air-tight security system [to prevent tampering] is not, however prerequisite to the admissibility of computer print out. If such a prerequisite did exist, it would become virtually impossible to admit computer-generated record; the party opposing admission would have to show only that a better security system was feasible”⁵².

In the end, even though evidence which is produced according to section 90(A) is admissible, it is unable to tackle the technical issues of alteration, fabrication and tampering. For example, when a computer does not have a safe logarithm to make a program, it is difficult to prove that a document has not been altered. This is open to a question whether the certificate is able to confirm its proper use and showing the accuracy of the data. This issue will be discussed in the next sub-topic.

Reliability of system program digital record in relation to computer- related evidence authentication

The unreliability of the system produces inaccurate documents. The Malaysian Evidence Act 1950 shows the reliability of the system in section 90A (4) that a certificate is given presuming that the system is working on an ordinary course.⁵³ In other words, certificate confirms the reliability of system or accuracy of data. Apparently, to show the reliability of the system, it seems that the foundation of the evidence must be proven by showing that digital records worked correctly and were based on the appropriate program and the nature of the quality of the evidence shows the accuracy of the system and data. In the case *R v. McMullen* the court stated:

“The nature and quality of the evidence put before the court has to reflect the facts of the complete record-keeping process-in the case of computer records, the procedures and processes relating to the input of entries, storing of information and its retrieval and presentation”.⁵⁴

Sometimes, the system is attacked by worms, virus, hackers, cookies and such things. In *R v. Minors* the court of appeal mentioned that;

⁵¹ [1997]106 F.3d 695,700(6th Cir 1997)

⁵² [1985] 773 F.2d 1553, 19 Fed. R. Evid.Serv.1336 (11 th Cir.(Fla.), 1985)

⁵³ 90A(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in a good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

⁵⁴ *R. v. McMullen ,at note 9*

“Computers are not infallible, they do occasionally malfunction. Software systems often have ‘bugs’. Unauthorized alteration of information stored on a computer is possible. The phenomenon of a ‘virus’ attacking computer system is also well established. Realistically, therefore, computer must be regarded as imperfect devices....”⁵⁵

On the other hand, sometimes, the system may be working with the wrong information that the operator gives to it.⁵⁶ For example, there is an advertisement on the www.jag.com website, which shows Ms. Sahar who wants to sell her car for RM290000 and the last day of acceptance is 15.6.2008. She had received an e-mail from Mr. Babak (Iranian) on the last day. However, she had changed her operating system to show the date and the time of the received e-mail. The date on which receives the e-mail shows a day later from the aforementioned date. Does this certificate (issued by her buyer) solve the unreliability of the system of the processing of the evidence? Furthermore, another matter which needs to be examined is whether the certificate (which shows the good purpose or ordinary course) is a compulsory provision. Those questions will be examined below.

Is the digital record certificate a compulsory provision?

The term “may” in section 90A (2) is challengeable. The word gives the impressions that issuing the certificate is not a compulsory provision. In case *Gnanasegaran a/l Pararajasingam v. Public Prosecutor Shaik Daud* stated:

“Section 90A was added to the act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under subsection (1) the law allows the production of such computer-generated document or statement if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view there are two ways to proving this one way is that ‘may’ be proved by the production of the certificate as required by subsection (2). thus subsection (2) is permissive and not mandatory. This can also be seen in subsection (4) which being with words ‘where a certificate is given under subsection (2) these words show that a certificate is not required to be produced in every case.’”⁵⁷

In *Standard Chartered Bank v. Mukah Sing*, HC Cin J⁵⁸ also held that the computer-generated document produced in the course of ordinary use under section 2 is not necessary.

⁵⁵ [1989] 2 ALLE.R. 208 (Eng.C.A.).

⁵⁶ Javidneya, J, *Electronic commerce crime*. Khorsand, Tehran, 2008, p.205.

⁵⁷ *Gnanasegaran a/l Pararajasingam v Public Prosecutor*, at note 48

⁵⁸ [1996] 3 MLJ 240 (HC) see also *PP v Ongcheng Heong* 1997] 3 MLJ I 11(A). *R v Cochrane* (1993) Crime IR 48

In the case of a non mandatory certificate under subsection 2, it needs to be written that according to the term “court” in context of the section 90A (2) illustrate certificate is a norm for computer produced documents which are meant to be used in court.⁵⁹ Therefore, documents which are intended to be presented to other organizations do not need the certificate. Thus, to presume in section 90A (6) that the certificate shows reliability of a system is impossible as producing certificate is not mandatory.

Does this certificate (issued by a non-expert person or her buyer) solve the unreliability of the system of the processing evidence?

According to section 90A (4), the certificate shows that computer processing was in good working order and it was operating properly in all respects. This certificate, according to section 90A (2) has been issued by” the person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used”. In short, it demonstrates that the person who has right to do or issue the document does not need be familiar with the computer.⁶⁰

In the case *R v. Shephard*, House of Lord stated that:

“Proof that the computer is reliable can be provided in two ways: either by calling oral evidence or by tendering a written certificate...it is understandable that if a certificate is to be relied up on it should show on its face that it is signed by a person who from his job description can confidently be expected to be in a position to give reliable evidence about the operation of the computer.....it does not however follow that the store detective cannot in fact give evidence that shows she is fully familiar with the operation of the store’s computer and can speak to its reliability.”⁶¹

The certificate can also be issued by the investigating officer at the time of the investigation. The director or operating manager does not need to be involved.

In case *Gnanasegaran a/l Pararajasingam v. Public Prosecutor, Shaik Daud* stated:

“...it is also overview that the prosecution can tender the computer printout through the investigating officer without calling any bank officer.”⁶²

⁵⁹ Section 90A (2) ...which is signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

⁶⁰ Sub.s.90(A)2 Malaysia Evidence Act 1950 and it can be also seen in 90B(3)

⁶¹ [1993]A.C. 380, [1993] 1 ALL E.R.225, [1993] 2 W.L.R. 103,96 Cr.App.R.324.157 J p.145, [1993] Crim.L.R.295 (Eng.H.L.)

⁶² *Gnanasegaran a/l Pararajasingam v Public Prosecutor*, at note 48

Therefore, solving the authentication issues by this issuing certificate seems impossible. The reasons are clear as below:

Digital record processing is invisible or in other words, the data (bit form) in signal processing cannot be seen by humans. Therefore, the certificate which has been issued by the person who does not have computer knowledge or is not responsible for transferring data cannot disclose whether the data has been altered or not.

Furthermore, due to the changeability of the digital records or their deterioration, the certificate stated in section 90A (2) in both forms either in digital form or in paper document forms can easily be altered. Therefore, this seems to be another reason of the ineffectiveness of the certificate to the elimination of the authentication issues. For further elaboration, consider the following example. Mr. Abe was going to type his lecture notes. For this reason, he sent them to a shop to be typed. After six hours, they called him to inform him that his notes are ready. There were seventy-eight pages which were stored in Mr. Abe's pen drive. Mr. Abe paid and received a certificate stating that the computer processor for typing and storing his file was in the good working condition (90A (4)). Imagine that the data transferred to the pen drive was not saved on the typist's PC. Once Abe reached home, he intentionally changed some parts of the data on the pen drive and deletes eight pages. Then supposing he claimed that he had paid for 78 pages but the total number of pages was 70 and he demands a refund for the eight pages which had been deleted. To strengthen his claim, he even asks the typist to check the pen drive as a proof. According to the certificate that has been issued by the typist, the computer used was in good working condition during the typing process. Based on the issued certificate and the customer's claim, the typist has no other choice but to refund the money for the eight pages and the errors in the file. As can be seen, eliminating authentication issues by this type of certificate seems highly impossible especially when it is issued by a person who does not have computer knowledge like the typist in this example.

Inability to Identify the Author of Digitally Stored Data

The authentication of a digital record in relation to computer-related evidence is related to its integrity and the identity of a digital record in relation to computer-related evidence. For example, if the computer works properly in the ordinary course, but your email inbox shows you have one e-mail from the MR.Parsa which contains pornographic pictures. Then how can one claim that the pornographic pictures were sent by MR.Parsa? Is it possible to prove that the pictures are from MR.Parsa? Even though the certificate according to the subject in section 90A (2), 90A (4) and 90A (6), shows that the processing system in the computer is working properly, it is incapable to identifying the sender of the pornographic photos. In short, it is evident that the terms and conditions

of the Evidence Act 1950 are unable to resolve certain issues. As a result, the terms in s. 90A are not in accordance with the technical authentication issues. In order to find a legal solution, the legal protection of the issues in the Electronic Commerce Act 2006 needs to be scrutinized.

IV.1.2. Electronic Commerce Act 2006

The authentication issues of the digital record in relation to computer-related evidence have a broad scope covering aspects such as the technical issues of authenticating electronic transactions, digital signature and non-commercial records or documents and many others.

The Electronic Commerce Act 2006 made some adjustments to the electronic signature in section 9 to tackle the technical issues of authentication of any commercial transaction conducted through electronic means including commercial transactions

The Electronic Commerce Act compared to the Evidence Act considered the technical issues of authenticating electronic documents. In order to reduce the alteration of electronic signature issues and electronic document issues, the Electronic Commerce Act made provisions to verify the reliability of electronic signatures and to detect alterations. Meanwhile, it has closely paid attention to the reliability of the system and identifying the person.⁶³ But on the other hand, the Evidence Act 1950 doesn't have any provision for the technical issues of authentication. It has accepted all of the computer-produced documents. Even those that do not have certificates can refer to subsection 2 to find authenticated evidence.

Consequently, although the Electronic Commerce Act is more protected than the Evidence Act, the technical issue of digital record (alteration, unreliability of the system, identification of the author) is still present.

The reasons that prove this claim are stated below:

⁶³ s.9.Signature(1) Where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature which—

- (a) is attached to or is logically associated with the electronic message;
 - (b) adequately identifies the person and adequately indicates the person's approval of the information to which the signature relates; and
 - (c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.
- (2) For the purposes of paragraph (1) (c), an electronic signature is as reliable as is appropriate if—
- (a) The means of creating the electronic signature is linked to and under the control of that person only;
 - (b) any alteration made to the electronic signature after the time of signing is detectable; and
 - (c) any alteration made to that document after the time of signing is detectable.

The legal protection of this act can only apply to the protection of authentication issues of electronic transactions which are fixed to electronic signatures. Its application does not permit the protection of authentication issues of electronic personal documents which are not under commercial transactions (such as personal photo, or letter, or personal email and so on); therefore, it appears that the alteration, the reliability of system and identifying the author as the issues of personal documentation and authentication is not within the scope of this act.⁶⁴

There are differences between the electronic signature and digital signature according to section 5, Electronic Commerce Acts 2006 electronic signature; “Electronic signature” means any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature. Clearly, the increase of technical issues of authentication is due to the ability of the data to change, as a result the data which is stored, generated or transferred without the asymmetric form or encoding forms can easily be changed. For example, a letter which is attached to a document shows that it belongs to a specific person or a scanned copy of a signature can easily be changed or forged. Therefore, how can we identify the real author? Therefore, admitting a non encoding form or non asymmetric signature can increase authentication issues.

IV.1.3. Digital Signature Act 1997

In authentication, digital signature is seen as a proof of authenticity and reliability which is applied in an electronic document. Digital signature is based on the asymmetric cryptosystem. Both keys (the private key and the public key) show authentication or show that the document has been signed by the person who used the private key and the transformation has not been altered since it was made.⁶⁵ The Digital Signature Act 1997 has focused on the technical approach to create a secure method to processing or data interchange and has recognized the authentication as key step to admissibility.

⁶⁴ Its application has been set out by section 2 Electronic Commerce Act 2006

- (1) Subject to section 3; this Act shall apply to any commercial transaction conducted through electronic means including commercial transactions by the Federal and State Governments.
- (2) This Act shall not apply to the transactions or documents specified in the Schedule.
- (3) The Minister may by order to amend, vary, delete from or add to the Schedule.

⁶⁵ S.2 Digital Signature Act 1997 “Digital signature” means a transformation of a message using an asymmetric cryptosystem so that a person having the initial message and the signer’s public key can accurately determine-

- (a) Whether the transformation was created using the private key that corresponds to the signer’s public key; and
- (b) whether the message has been altered since the transformation was made;

Authentication was regarded as a compulsory requirement in the licensed certificate under section 66.⁶⁶ However, it is a question of whether or not the digital signature can settle the authentication issues of signature and can protect the electronic documents which have digital signatures. It is undeniable that making a forge license is possible by creating a digital signature without the authorization of the rightful holder of the private key. It can also be done by creating a digital signature verifiable by a certificate listing the subscriber who either does not exist or does not hold the private key corresponding to the public key listed in the certificate. Another remarkable point is that if the license that verifies the digital signature was created by the private key corresponding to the public key and the message has not been altered since its digital signature was created by the person who found the private key without forging, how can one verify that this private key is used by somebody else? As an example, supposing you lost your laptop in a taxi. Someone took it and found your private key which they used. How can you identify the person who has used your private key? This is a significant issue in authentication. Furthermore, admitting a copy of a digital signature as an original document according to section 65 has increased the legal vacuum of authentication.⁶⁷

Section 65 demonstrate that recognizing a copy of digital signature as an original leads to the issue of authenticating a copy of digital signature such as detecting alteration or identifying the real author. At first, it needs to be clear whether the term “copy” in this section means copy of digital signature on the print of computer evidence or not. Section 65 literature indicates that it includes both types of copy (soft and hard copy). Now the crucial matter is how we can authenticate a hard copy of a digital signature. For example, Mr. A sent a letter to Mr. B. When Mr. B received the letter, he made a copy of it and put it in his box in his company.

Based on the content of the letter, Mr. A and Mr. B were partners in one house. Mr. B died last year and his son intended to use this document against Mr. B to prove his father’s partnership with Mr. A., but he does not have any knowledge about his father’s private keys and he does not have access to his computer in

⁶⁶ Section 66 states that “. Authentication of digital signatures: A certificate issued by a licensed certification authority shall be an acknowledgement of a digital signature verified by the reference to the public key listed in the certificate, regardless of whether the words of an expressed acknowledgement appear with the digital signature and regardless of whether the signer’s physically appeared before the licensed certification authority when the digital signature was created, if that digital signature is- (A) Verifiable by that certificate; and (B) affixed when that certificate was valid.”

⁶⁷ Section 65 provides that “Digitally signed document deemed to be original document. A copy of a digitally signed message shall be as valid, enforceable and effective as the original of the message, unless it is evident that the signer designated an instance of the digitally signed message to be a unique original, in which case only that instance constitutes the valid, enforceable and effective message.”

which his father recorded his partnership contract with Mr. B. Therefore, the question that arises is whether this copy can be authenticated or not. Can the court give permission to Mr. A to oblige the server to cooperate in order to authenticate the copy digital signature in the partnership contract? In legislations in some countries such as the United States, in section 901 of Federal Rule, the government has the responsibility of authenticating the documents, which indicates that such permissions and obligations may be issued by the court in the country. On the contrary, nothing has been defined in the Malaysian law.

Other legal vacuum of the digital signature is that, it does not protect the content of the document from alteration or competing in other issues. Filip Boudrez stated, “The identity of a document is usually registered in the metadata of the document. File names, document profiles, attributes (author’s name, date, place), classification codes, used within work processes, and others are the typical methods for identifying digital documents.”⁶⁸

In conclusion, this Act due to its limited scope and ambiguity of its term is not capable of eliminating the authentication issues of digital records, i.e., in the electronic document.

IV.2. Iranian Legislations

IV.2.1. Authentication provisions

Among the Iranian legislations, the Electronic Commerce Act 2003 has direct impact on digital record in relation to computer-related evidence in all aspects i.e. hearsay, best evidence and authentication. The Electronic Commerce Act 2003 focuses on the integrity as the first and most important condition of authentication. According to this Act, the “data message” should be in its integrity and with no change”.⁶⁹ Furthermore, it has designed and put forward some provisions on authentication that can be classified as below:

Using the security information system (Article (H))⁷⁰

Security electronic signature condition(Article 10)⁷¹

Electronic signature certificate(Article 31)⁷²

According to the above provisions, the rule of identifying an authenticating digital record in relation to computer-related evidence can be divided in two parts.

a) Rule to authenticating digital record documents and b) Rule to authenticating electronic signature.

⁶⁸ Filip Boudrez, ‘Digital signatures and electronic records’ (26 October 2007) Springer *Science Business Media B.V.* 182.

⁶⁹ Article 2 (e), Electronic Commerce Act 2003

⁷⁰ *ibid*

⁷¹ *ibid*

⁷² *ibid*

a) Rule to Authenticating Digital Record Document

The criterion used for the authentication digital record in relation to computer-related evidence (without electronic signature) is “security information system”. The security information system is in compliance with secure methods and reasonably protected against any misuse or penetration⁷³. Therefore, digital documents which are produced in a “security information system” are deemed to be reliable⁷⁴ and authenticated and their authentication may not be questioned or denied, only a claim of forgery of a “data message” or proof of its invalidity on a legal basis may be considered.⁷⁵

Review of the provisions illustrated above reveals some flaws in accepting the security information system as an authentication method. The first flaw of the secure method is reasonableness of the system. Due to the changeability and damageability of the digital record, it seems impossible to rely which system is reasonable and can solve the alteration issue. Furthermore, it is not clear, as to who has the duty of certifying the system or method to demonstrate that the user has applied a reasonable system. Another defect of this method is its inability to identify the author of the digital records. The purpose of authentication is not restricted to accuracy or relevancy (alteration or manipulation of data), identifying the author is also significant.

⁷³ *ibid.*, Article2 (h), “Secure Information System”: An information system that:

1. Is reasonably protected against any misuse or penetration;
2. possesses a reasonable level of proper accessibility and administration;
3. Is reasonably designed and organized in accordance with the significance of the task on hand;
4. Is in compliance with secure methods. *ibid* Article2 (i), “Secure Method: A method to authenticate the correctness, the originality and the destination of a “data message”, along with its date and to detect any error or modification, in communication, content, or storage of a “data message” from a certain point. A secure message is generated using algorithms or codes, identification words or numbers, encryption, acknowledgement call back procedures or similar secure techniques

⁷⁴ *ibid*, Article 14 – All “data messages” which have been generated and stored via secure method are deemed to be valid and reliable documents by judicial or legal authorities in terms of what they contain as well as included signature therein, obligations of both parties or the party who covenants and all persons who act legally on their behalf, and effecting the terms and conditions contained therein.

⁷⁵ *ibid*, Article 15 – The validity of a secure “data message”, secure electronic record and secure electronic signature may not be questioned or denied; only a claim of forgery of a “data message” or a proof of its invalidity on a legal basis may be considered.

-See, Aslani, HR, Information *Technology Law*, Mizan Publication, Tehran2005, p275.

b) Rule to Authenticating Electronic Signature

The E. Commerce Act 2003 defines the electronic signature⁷⁶ as “Secured/Enhanced/Advanced Electronic Signature”⁷⁷ and demonstrates provisions for authentication of a secured electronic signature as follows:

- a) To be unique to the signatory.
- b) To identify the signatory of “data message”.
- c) To be signed by the signatory or under his/her sole intention.
- d) To be affixed to “data message” in a way that any change in data message can be detected and identified.⁷⁸

According to the aforementioned provisions, if an electronic signature complies with the above provisions and it is produced in the secure method, it is accepted as authenticated evidence. But, there are legal issues to be solved. That is whether article 10b has the capability to identify the real user when A uses the unique signature of D which he finds in his computer or collects from the cookies of his computer system. Is it really a unique signature? This person who is using the signature is not the owner of the signature or doesn't have the owner's permission to use his signature. By the terms of this article, how can it be verified that the real owner has not used⁷⁹. Furthermore, there is the dilemma of whether the electronic signature can identify the author and settle other authentication issues.

The identification issue of authentication is also on the certificate⁸⁰ because the electronic signature can be created without public and private key given the difference in concepts of both digital signature and electronic signature.⁸¹ Besides, according to the content of article 31, it does not have any provision to identifying the author or showing reliability of the system. It should confirm the identity of the person or user.⁸² Thus, this certificate does not resolve the identifying issue and does not resolve the content of document.

⁷⁶ Article 2 (j) Iran's Electronic Commerce Act 2003 “Electronic Signature”: Any sign appended or logically affixed to a “data message” this may be used to identify its signatory

⁷⁷ *ibid* Article 2 (k) “Secured/Enhanced/Advanced Electronic Signature”: Any electronic signature that complies with Article 10 of this Law

⁷⁸ *ibid.*, Article 10

⁷⁹ Some countries “determine that there is a presumption that the person who can affix a digital signature to a document is the sender”. See Zaid Hamzah, E.Security Law&Strategy, p183

⁸⁰ *ibid*, Article 31. The aim and regulation of Electronic Signature Certificate are as the following: “Certification Service Providers are established to provide electronic signature services nationwide. These services consist of generation, issuance, transmission, confirmation, dismissal and updating of the electronic signature certificates

⁸¹ Permission to create electronic signature without private and public key and asymmetric system leads to creating and sustaining authentication problems.

⁸² Mason, S, *Electronic Signature in Law*, United Kingdom, Lexis Nexis Butterworths, 2003, p.121.

V. CONCLUSION

The nature of digital record in relation to computer related-evidence is changeable and damageable. It can easily be changed. It may be changed intentionally by humans or it may be changed as a result of the system such as changing file location or format by up- to -dating systems. Overall, digital record authentication is difficult than a paper document, because digital records can be separated from the original medium and transferred to other medium. Whereas, the content of paper documents cannot be separated, based on the nature of the digital record, its authentication has the following technical issues: alteration, reliability of system and identifying author of the digital stored data.

Malaysian legislations have made provisions to settle the technical issues of authentication by the Evidence Act 1950, Digital Signature Act 1997 and Electronic Commerce Act 2006. The Evidence Act 1959 in section 90 A has stated producing a computer in “course of ordinary use” and issuing a certificate under subsection 90A (2) as authentication provisions. The above provisions underlined in section 90A reaffirms that if a document is produced by computer in the “course of ordinary use”, it will be accepted as authenticated evidence. It is presumed that this document has not altered and does not have any system error. Particularly, if the document has a certificate (under subsection 90A (2), this means that the system is in good working condition and there is no doubt to the reliability of the system. (It is worth noting that issuing a certificate is not compulsory).It appears that the above provision does not have any rule to identify author of the digital stored data and detect alteration. Furthermore, showing the reliability of system by a certificate (which is issued by an unfamiliar person seems unfeasible.

The Electronic Commerce Act 2006 made provisions to verify the reliability of electronic signatures and to detect alterations. Furthermore, it has closely paid attention to the reliability of the system and identifying the person.⁸³ Comparing with the Evidence Act 1950, the Evidence Act 1950 has not made any provisions

⁸³ S.9.Signature(1) Where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature which—

- (a) is attached to or is logically associated with the electronic message;
 - (b) adequately identifies the person and adequately indicates the person’s approval of the information to which the signature relates; and
 - (c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.
- (2) For the purposes of paragraph (1) (c), an electronic signature is as reliable as is appropriate if—
- (a) The means of creating the electronic signature is linked to and under the control of that person only;
 - (b) any alteration made to the electronic signature after the time of signing is detectable; and
 - (c) any alteration made to that document after the time of signing is detectable.

for the technical issues of authentication. It has accepted all of the computer-produced documents and even those that do not have certificates are subject to subsection 2 as authenticated evidence.

Digital signature (which is based on the asymmetric cryptosystem) has been recognized as a technical approach by the Digital Signature Act 1997. It has some flaws such as forged license and unauthorized use of the private key. Overall, limitation area of this Act (only document with fixed digital signature) and ambiguity of its term does not solve the technical issues.

The Iranian Electronic Commerce Act 2003 differs from the Malaysian legislation by dividing its provisions into two parts: Rule about authenticating digital record document (without the electronic signature) and rule about authenticating electronic signature. To authenticate the digital record document instead of “the course of ordinary use and certificate” terms, Iran has applied the “secure information system”. The document which has been produced by secure information system (secure information system constitutes a secure method and secure logarithm) is assumed to be an authenticated document. Their authentication may not be questioned or denied; only a claim of forgery of a “data message” or proof of its invalidity on a legal basis may be considered.

Consequently, the term of “secure information system” seems wide and more appropriate than the terms “course of its ordinary use” or “issue a certificate”. Even though it has created the chance to tackle the alteration data and reliability issue of system, it does not have the provisions to identify the author or identity as a term of authentication. Besides, the Iranian Electronic Commerce Act 2003 and Malaysian Electronic Commerce Act 2006 are sharing familiar provisions to electronic signature. The Malaysian Digital Signature Act 1997 has recognized differences between digital and electronic signature. Therefore, based on the concept and nature of the provisions, it seems that the Malaysian digital signature certificate is more reliable than the Iranian electronic signature certificate (Article 31).

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THE REGULATORY REFORM IN THE US AND THE FINANCIAL CRISIS OF 2008

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Abstract

Regulatory reform started by the OECD in the 90s has been successfully implemented by the US. Better regulation was and is crucial to improve the competitive position of American businesses. The experience of the US could therefore be used in other countries.

During the recent discussion on the financial crisis the deregulation of financial market is often mentioned as a main cause of the crisis. Experts call for re-regulation, more regulation is regarded as a best step that can and should be taken to make future crises less likely or severe. But there are also opinions that deregulation in 1970s and 1980s has helped mitigate, rather than contribute to the instability of the financial system.

According to the author the scope and method of regulation in financial market should more closely follow 7 recommendations of a good regulation formulated in 1997 by the OECD regulatory reform program. The regulatory reform should be more present in the discussion on the recent crisis.

Keywords: *regulatory reform, financial crisis, deregulation, regulation quality*

I. Seven principles of a good regulation

The regulatory reform started by the OECD in 1995 is used to refer to changes that improve regulation quality, that is: enhance the performance cost-effectiveness, or legal quality of regulation and related government formalities.¹

In 1997 seven principles of a good regulation have been published. Recommendations were the first-ever international statement of regulatory principles common to member countries. All of them have stood the test of

¹ Regulatory Reform. A Synthesis. OECD 1997, p11.

time although after almost 20 years some issues have received greater attention in 2005 than in 1997.

The list of the 2005 principles :²

1. Adopt at the political level broad programs of regulatory reform that establish clear objectives and framework for implementation
2. Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex environment
3. Ensure that regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory
4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy
5. Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests
6. Eliminate unnecessary regulatory barriers to trade and investment through continued liberalization and enhance the consideration and better integration at market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness
7. Identify important linkages with other policy objectives in ways that support reform.

Their task is to help governments to prepare better new rules and improve existing rules, the task is not achieved unless principles are actually applied. An effective regulatory policy has 3 basic components:³

- a. It should be adopted at the highest political levels
- b. Contain explicit and measurable regulatory quality standards
- c. Provide for a continuing regulatory management capacity

There are several tools which can assure high quality of regulation: regulatory impact analysis, public consultation, consideration of regulatory alternatives and compliance burden-reduction measures. The way they are implemented decides on the efficiency of regulatory management.⁴

² The 2005 OECD Guiding Principles for Regulatory Quality and Performance, www.oecd.org/dataoecd/19/55/37318586.pdf

³ „Measuring Regulatory Quality”, OECD Observer, April 2008

⁴ More on Regulatory Reform: Ewa Freyberg „In Search for a Perfect Regulatory System” in: “Growth Versus Security: Old and New EU Members Quest for New Economic and Social Model”, edit.: W. Bienkowski, J. Brada, M.J. Radło, Palgrave Macmillan 2008

II. Major characteristics of the Regulatory Reform in the US

The regulatory reform in the US started relatively early: Benefit Costs Analysis and Regulatory Impact Assessment for example have been used since 1970s. The reform is carried out in a persistent and consistent manner. Successive US Presidents attached great importance to regulatory reform and their policies in that area may be termed, subject to certain reservations, as a policy of continuation. The reform was initiated due to the pressure from the private sector demanding reduction of the discrepancy in the quality of services between the public and the private sector. Effective reform management methods were applied, for example by placing the institution responsible for reform coordination appropriately high within the administration's hierarchy and by introducing the requirement of annual reporting to the Congress on the progress of reforms. The Office of Management and Budget (OMB) oversees the reform, controls and coordinates the operation of over 60 regulatory agencies. The Office of Information and Regulatory Affairs (OIRA), being a special OMB unit is responsible for analysis of Impact Assessments.

The quantitative assessment of the impact of regulation is conducted in a professional manner. Every year the general public is apprised of the total costs and benefits of issued major regulations and the same information concerning particular regulatory acts. Much importance is attached to the quantitative approach (in terms of dollar amounts) to possibly all benefits and costs, including also hard to measure effects of social regulations. Estimation methods are improved continually, good working relationships exist between the administration and research centers in that field. The most interesting recommendation for IA analysis is to make agencies to compete for the right to score the costs and benefits of their proposals and to introduce competition between agency experts and outside experts working on IAs.

Other important recommendation is to provide always an alternative regulatory action to a planned regulation. All draft regulations are subjected to public debate. Well-developed institutions of the civic society make it possible to citizens to exert an influence and sometimes even pressure to improve the quality of regulation.

III. The quality of regulation

Assessing the quality of a given regulations and regulations across countries presents a significant challenge.⁵ A direct analysis requires the use of special

⁵ Jacobzone, Stephane, Gregory Bounds, Chang-Won Choi, and Claire Miguet "Regulatory management Systems across OECD Countries: Indicators of Recent Achievements and Challenges", OECD 2007, Paris, OECD Working Papers on Public Governance, No 9

indicators which are difficult to construct, therefore indirect method is usually applied. The quality is measured and compared across countries through the assessment of the quality of regulatory practices and their relation to 7 principles of a good regulation.

Unfortunately that method has several weak points. First of all is based on published information given by institutions responsible for the regulation reform. The assessment is reduced to checking the formal aspects of the reform. The OECD report has collected answers (“yes” or “no”) to the questions on: number of the bodies in charge of regulatory oversight and their functions, presence of formal coordination across levels of government, parliamentary regulatory quality oversight, role of judiciary: compliance and enforcement, forms of public consultations: informal or formal, public meetings, use of internet, openness of the consultation process, communications methods of regulations, provisions of justification for regulatory action, regulatory impact assessment adoption and its core procedural aspects.

Results are showing that majority of the OECD countries have established institutions and procedures recommended by the seven principles of a good regulation, it does not mean that the quality of regulation is the same in individual countries.⁶

To assess the quality of regulation one can not rely on the number of procedures officially introduced but has to analyze the way institutions are operating, documents are prepared, people are trained and consultations are carried out.

Quite often the regulatory reform is reduced to deregulation. Elimination of regulations is recommended by the 5. principle for regulatory quality and performance except cases where it is a clear evidence that existing regulations serve public interests. There are several studies presenting a positive impact of markets deregulation on the performance of economy⁷. The US is often used as a case worth to be followed by other countries. A major deregulation process started there 30 years ago when President Carter signed the Airline Deregulation Act of 1978. Later deregulation has spread to energy, tracking, telecommunications, financial services and trade. Advocates of deregulation

⁶ Case of Poland and the US could be a good example. The answers for majority of questions are the same in both countries although quality of regulations differs a lot

⁷ Sveinbjorn Blodal and Dirk Pilat “The Economic Benefits of regulatory reform” OECD Economic Studies, No 28 1997; Rauf Gonene, Maria Maher and Giuseppe Nicoletti “The Implementation and the Effects of Regulatory Reform: Past Experience and Current Issues, OECD 2000, OECD Economic Working Papers No 251

argue that this decline in the role of government was the essential for US competitiveness.⁸

Opponents of the liberal approach to governments role indicate that deregulation increases costs of market failures and makes crisis situation more probable to occur.⁹

The recommendations of regulatory reform ask for a different approach: the quality of regulation and market efficiency is not the question of less or more regulations. The reform program is much more complex issue. Good results could be achieved when the process is transparent, actions of all participants coordinated and efforts made by all participants continued . The current debate on the financial crisis shows that it is not an easy task and that regulation failures could happen even in a country which as the US is quite advanced in applying regulatory reform.

IV. The 2008 financial crisis and the quality of regulation

According the OECD Financial Market Committee measures taken to improve quality of financial market regulation should be both effective and efficient and be not constrain to innovation.¹⁰ That opinion expressed by the OECD Financial Market Committee is shared by many US experts.

What are arguments of that group?

- the current world is moving to a situation in which individuals bear more and more risks, without being able to cope with them. The US economy is described as a country built on an appetite for risk¹¹, driving force of innovations. More regulation could destroy that, therefore it should be substituted by a new culture of risk awareness and financial education mechanisms promoted by the OECD regulatory framework.¹²
- Rating agencies are paid by those they rate for their judgments so they are not impartial and therefore can be blamed for helping cause the crisis¹³ . Tightening up registration and regulation of the bond rating agencies private companies that have official government recognition but no government

⁸ Michael Mandel “ 30-year deregulation dies a sudden death”, Business Week, Sept. 18,2008.

⁹ Robert Kuttner “Financial Regulation after the Fall”, prepared for Demos, at: <http://www.demos.org>

¹⁰ <http://www.oecd.org/document/35/0,3343> For a better world economy 19.11.2008

¹¹ David Ruder – professor emeritus at the Northwestern University School of Law , Herald Tribune, Oct. 6, 2008

¹² „OECD Financial Committee calls for fundamental reform of financial markets”, www.oecd.org/document/35,0,3343 , 19.11.2008

¹³ The Economist” Nov. 15-th-21st 2008, p. 81

regulation - may be the proposal going into wrong direction. The right solution is to introduce more competition to existing oligopoly structure of rating services market. Oligopoly gives investors a false sense of security and stops them to make their own credit judgments. Less regulation and more competition together with the requirement put on bond issuers to release any information they provide to rating agencies to the public will allow investors to think for themselves. More transparency, more competition, equal access to information instead of more regulation goes perfect along principles for regulatory quality.

- Deregulation of financial services done in earlier years mitigated rather than contributed to the crisis¹⁴ but many economists and politicians seem to believe that deregulation is the main and solely cause of the crisis. James Gattuso as well as the authors of The Economist special report "When fortune frowned"¹⁵ indicate that deregulation done in the 1970s and 1980s repealed or eased particular rules which have been questioned as outdated. In 1994 the restrictions banning banks from operating in more than one state was eliminated. The legal change has increased competition between banks and led to easier conditions to obtain credit and to start new business. More new firms produced more intensive competition in other parts of the economy¹⁶ and since then nationwide banks can better balance risk which helps mitigate instability of the financial system. There is a lot of controversy on effects of the other example of deregulation: the repeal of the prohibition on banks engaging in the securities business. The ban introduced by the Glass-Steagall Act - a cornerstone of New Deal regulation - has been removed in 1999 by Gramm-Leach-Bliley Act. Since then commercial banks, well regulated and supervised were allowed to jump into less regulated and more risky activity as investment banks and insurance companies. Robert Kuttner calls that change as a deadly sin of deregulation¹⁷ but President Bill Clinton-who signed the bill- defended the legislation saying: "I don't see the signing that bill had anything to do

¹⁴ James L. Gattuso „Meltdowns and Myths: Did Deregulation cause the Financial Crisis?, Web Memo No. 2109, Oct. 22, 2008, Heritage Foundation

¹⁵ The Economist, Oct. 11th-17th 2008, pp 62-93

¹⁶ Ross Levine, Alexey Levkov and Yona Rubinstein „Racial Discrimination and Competition”, NBER Working Paper No14273, August 2008

<http://papers.nber.org/papers/w14273> Authors have observed additional benefit of the elimination of the rule preventing banks incorporated in one place from opening branches in other states. According their research the side effect of more competition due to deregulation is the reduction of wage gap between blacks and whites in states with an initially high degree of racial bias after they deregulated their finance industry.

¹⁷ R. Kuttner „Seven Deadly Sins of Deregulation – and Three Necessary Reforms” [http://www.prospect.org/cs/articles?article=seven deadly sins of deregulation and...](http://www.prospect.org/cs/articles?article=seven%20deadly%20sins%20of%20deregulation%20and...), Sept.17,2008

with the current crisis. Indeed one of the things that has helped stabilize the current situation as much as it has is the purchase of Merrill Lynch by Bank of America which was much smoother than it would have been if I hadn't signed the bill".¹⁸ It seems that net effect of deregulation is not easy to evaluate. Regulatory reform calls for the constant monitoring of the results of regulation and the development of sophisticated methods of regulatory impact assessment through close cooperation with research institutes. More reliable information helps decide which regulations are outdated and may be removed. Public opinion and some experts blame now deregulation for the current crisis. If the situation on financial market were caused by elimination of needed rules the solution would be very simple: restore those rules – says J.L.Gattuso.¹⁹

- The case of two lending institutions Fannie Mae and Freddie Mac and their risky lending practices are often regarded as the best examples of regulation failure but Brett D. Schaefer reminds that the Federal Reserve and the US Treasury warned repeatedly of pervasive risks posed to the US financial system by the creation of more and more riskier products. Congress rejected measures proposed by the Administration to constrain these practices because politicians preferred to protect interests of lower income voters. In that case a political failure not a regulatory failure was the cause of crisis.²⁰ The better quality of information delivered to Congress and recommended by principles of regulatory reform public debate on unsound lending practices could make Administration warning more effective.
- Wall Street greedy innovations such as credit-default swaps are blamed for the crisis but they have been used to avoid existing bank regulations. We will observe the same situation in the future. Tomorrow's innovations will arbitrage tomorrow's rules because bankers will be better paid and more highly motivated than regulators,²¹ stronger regulation means more challenge to be creative to neglect it. Therefore more cooperation is needed between private and public sector, politicians and regulators to propose better quality regulation and establish more efficient oversight of its implementation. Financial innovations together with the appetite for risk make the US the most competitive economy. Regulatory changes provoked by the crisis should not change this behavior. "We don't want be France" said

¹⁸ Maria Bartiroma, „Bill Clinton on the Banking Crisis, McCain and Hillary”, Business Week, September 24, 2008

¹⁹ J.L.Gattuso „Meltdowns and Myths: Did the deregulation cause the financial crisis?. WebMemo, No 2109, Oct.22.2008, The Heritage Foundation

²⁰ Brett D. Schaefer „Gordon Brown's Financial Folly: The Global Economy Does Not Need More Regulation” WebMemo No 2107 October 17, 2008

²¹ „A Special Report on the World Economy “. The Economist, October 11th 2008, p16.

D. Ruder, the former chairman of the Securities and Exchange Commission commenting President Nicolas Sarkozy observation that “The idea that the markets are always right was a crazy idea”.²²

- An Independent Financial Markets Commission (similar to 1987 Brady Commission) has been proposed as the substitute of over-regulation.²³ Three most important tasks of the Commission are: 1) gathering information for the Congress and Administration necessary to make right decisions about regulation and better understand functioning of financial markets; 2. Breaking institutional barriers . There is a need to decrease the number of agencies dealing with banking and financial markets regulation and improve Congressional oversight of financial regulation.²⁴ 3) reaching political consensus on regulatory reform. Commission could help the Congress to assess its role in the crisis and provide alternative solutions to excessive financial markets regulation.

V. How regulatory structure should be reformed?

Almost all participants of the discussion on the financial crisis propose the same set of measures: more transparency, improvement of information flows, better coordination of public financial institutions activities, more cooperation between public and private sector, increased efficiency of public oversight on public and private financial institutions, changes in the regulatory structure.

In January 2009 the Congressional Oversight Panel published a comprehensive proposal for a restructuring of the US financial regulatory system (The Special Report on Regulatory Reform)²⁵. The submission of the report has been instructed by Congress as a part of the Emergency Stabilization Act. The report has two parts: part 1 presents a framework for analyzing the financial regulatory system, part 2 concentrates on critical problems and recommendations for improvement. The appendix to the report gives information on other publications on financial regulatory reform. Majority of them have been issued in last months of 2008 and January 2009. Authors of reports and commentaries represent a wide array of public and private institutions: consumers and investors organizations, institutes and universities, various research groups integrating members from public and private sector. They focus on analysis of the state of regulatory system which is blamed for financial market instability. The list of regulatory failures includes:

²² Alex Berenson, International Herald Tribune, Oct. 6, 2008 at: <http://www.iht.com/bin/>

²³ David M. Mason „Why an Independent Financial Markets Commission Is Needed Now” WebMemo, No 2112, October 23, 2008, The Heritage Foundation

²⁴ At least 6 committees are active: agriculture (House and Senate), banking, finance, financial services, ways and means

²⁵ <http://cop.senate.gov/documents/cop-012909-report-regulatoryreform>

1. no adequate framework for risk management; 2. regulatory gaps – not all financial institutions and financial products subjecting to regulation; 3. no sufficient transparency; 4. lack of efficient supervision of financial institutions; 5. lack of costs-benefit analysis useful to assess impact of regulations; 6. fragmented inefficient structure of regulatory agencies; 7. rating agencies not enough independent in their opinions; 8. enforcement of existing regulation not tough enough.

Recommendations aimed to improve regulation do not propose restoring of rules eliminated in the past . Report of Congressional Oversight Panel recommends: 1. identification and regulation of financial institutions posing systemic risk, 2. putting the limit on excessive leverage; 3. modernization of supervision of financial institutions, in particular those from shadow financial system ; 4. establishment of integrated system of federal and state regulation, 5. better coordination among financial institutions.

Although there is consensus that a new structure of regulation is needed: several different options for consolidated supervision of financial institutions are considered. Committee on Capital Market – an independent body composed of 22 corporate and financial leaders from the investors community, business and law - recommends diminishing the number of regulating bodies to 2-3 independent regulators and establishment of a new institution: US Financial Services Authority (USFSA).²⁶ 3 options for consolidated supervision are discussed: 1. Federal Reserve takes supervision on financial institutions systemically important and new USFSA responsible for all other financial institutions; 2. Federal Reserve supervises all financial institutions; 3. USFSA supervises all institutions which make Fed free to focus on its core mission of monetary policy.²⁷

The Group of 30 – a private nonprofit body composed of senior representatives of private and public sector – analyses institutional approach (firm's legal status determines the type of overseeing regulator), functional approach (oversight determined by the type of business activity) and integrated approach (a single regulator conducts supervision for all financial sector).²⁸ The Group 30 report gives a number of characteristics important to a good system of financial regulation:

- coordination among agencies,
- treating financial services common to different institutions uniformly,

²⁶ According Committee's report the US employs more financial regulators and expands a higher percentage of its GDP on financial oversight than any other major country,

²⁷ "Recommendations for Reorganizing the US Financial Regulatory Structures", Committee on Capital Market, January 14, 2009 at <http://www.capmktreg.org>

²⁸ "The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace", Group of 30 (G-30), October 2008, at <http://www.group30.org>

- public agencies overseeing the financial sector insulated from political or private interests.

The new model of regulatory structure proposed by the US Treasury recommends to replace existing “rules-based” regulation of financial institutions with “objective-based” regulation. The structure should consist of three primary regulators: 1. Market stability regulator – one for the whole financial sector, focused on proper tools, greater transparency and better information on activities of investment banks, insurance companies, hedge funds; 2. financial regulator consolidating all federal banks regulators into one regulator; 3. Business regulator monitoring business conduct regulations across all types of financial firms. Having one agency responsible for important issues for all financial products should bring greater consistency to regulation and help eliminate regulatory “dead zones” which exist between the jurisdiction of various regulators. According to H.M. Paulson the new structure will be more flexible and allow for much faster adjustments to new market conditions.²⁹

It is too early to predict which of these proposals will be chosen as a model of future regulatory structure of financial system. All of them call for integration of fragmented “patchwork” in nature current system, not all however call for cost-benefit analyses of particular models. Strongly promoted by the OECD regulatory reform impact assessment of regulatory changes should be treated as a standard procedure of financial sector reform.

VI. Conclusions

Reform of financial regulatory system is now the most discussed issue in the US.

Against popular opinions deregulation of the financial services sector should not be blamed for the crisis. Several sources are of the opinion that regulation has held constant or increased in recent years.³⁰

Quality of regulation although not easy to measure should be the main priority of the reform.

Seven principles of a good regulation published by the OECD in 2005 may be used as a pattern to improve regulatory system. They should be better promoted among those responsible for financial regulatory reform.

²⁹ “Blueprint for a Modernized Financial regulatory Structure”, US Department of Treasury, March 2008 at <http://www.treas.gov/press/releases>

³⁰ “Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers and Ensuring Stability”, Congressional Oversight Panel January 2009 at <http://cop.senate.gov>

The most needed but not most present in the debate is the implementation of the second principle recommending to “assess and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment”.³¹ A good US experience in applying Regulatory Impact Assessment in other sectors (environment , social sector) should be used to improve the quality of financial regulation.

The most serious regulatory failure is linked to archaic and fragmented structure of regulatory system resulted in a weak and full of regulatory gaps regulation, unclear division of responsibilities among state and federal regulators. Costs and benefits of numerous proposals aimed to improve that structure should be evaluated and used as the base for final government decision.

The more active role of the Congress and various organizations representing interests of financial market participants (consumers, investors) could make the reform process more transparent.

Innovation has been crucial to the success of the US financial system the most important therefore is to balance market flexibility with stronger market oversight to keep pace with innovation. Financial innovations introduced by highly motivated financial and legal experts make financial regulations outdated much faster than before. Standards provided by the regulatory reform principles if applied in a right way could help regulators efficiently adjust rules to a changing environment. It seems that the US is well prepared to find this balance. First, the country has a relatively good results in applying regulatory reform which is crucial to maintain a high quality of regulation. Second its drive to innovation which according to some experts made a crisis worse, could be now used to create effective and efficient measures to overcome the current disaster and make future crises less likely or severe.³²

The crisis creates a good opportunity to increase the knowledge on regulatory reform possessed by all actors of the law making process. Despite constant efforts of the OECD and European Commission the average American or European citizen has rather poor knowledge on “Better Regulation” Program. Better, more intensive education is especially needed to understand new complex products offered by financial institutions. According Angel Gurría, OECD Secretary-General “government action can improve financial education so that consumers and investors will make better decisions and not only protect themselves, but also help to improve how markets function.”³³.

³¹ “Measuring Regulatory Quality”, Policy Brief, OECD April 2008

³² “A Special Report on the Future of Finance”, The Economist, January 24th-30th 2009

³³ „The Global Financial Crisis: Where to Next and What does it Mean for OECD countries?“, Address by Angel Gurría, OECD Secretary-General at Victoria University of Wellington, 30 July 2008

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THE MANAGEMENT OF OPERATIONAL RISK IN BANKS

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Abstract

Operational risk has become one of the most discussed topics by both academics and practitioners in the financial industry in the recent years. The reasons for this attention can be attributed to higher investments in information systems and technology, the increasing wave of mergers and acquisitions, emergence of new financial instruments, and the growth of electronic dealing. In addition, the New Basel Capital Accord demands a capital requirement for operational risk and further motivates financial institutions to more precisely measure and manage this type of risk.

Keywords: *instrument, operational risk, extreme value theory*

I. INTRODUCTION

Operational risk is not a new risk. However, the idea that operational risk management is a discipline with its own management structure, tools and processes is new. This quotation from

British Bankers Association in Power (2005) well describes the development of operational risk management in the last years. Until Basel II requirements in the mid 1990's, operational risk was largely a residual category for risks and uncertainties that were difficult to quantify, insure and manage in traditional ways. For this reasons one cannot find many studies focused primarily on

operational risk until the late 1990's, although the term 'operations risk' already existed in 1991 as a generic concept of Committee of Sponsoring Organizations of the Treadway Commission.

Operational risk management methods differ from those of credit and market risk management. The reason is that operational risk management focuses mainly on low severity/high impact events (tail events) rather than central projections or tendencies. As a result, the operational risk modelling should also reflect these tail events which are harder to model¹.

Operational risk can build ideas from insurance mathematics in the methodological development. Hence one of the first studies on operational risk management was done by Embrechts² who did the modelling of extreme events for insurance and finance. Later, Embrechts conducted further research in the field of operational risk and his work has become classic in the operational risk literature.

Later, Cruz M., Coleman R. and Gerry S.³, provided other early studies on operational risk management.

Operational risk modelling helps the risk managers to better anticipate operational risk and hence it supports more efficient risk management. There are several techniques and methodological tools developed to fit frequency and severity models as Extreme Value Theory (EVT).

When modelling operational risk, other methods that change the number of researched data of operational risk events are used. The first one are the robust statistic methods used Chernobai and Ratchev⁴ that exclude outliers from a data sample (e.g. 5% or 10% the highest operational risk events).

II. DEFINITIONS OF OPERATIONAL RISK

The operational is *"the risk arising from human and technical errors and accidents⁵"* or *"a measure of the link between a firm's business activities and the variation in its business results⁶"*.

¹ Jobst, A. A., "Operational Risk — The Sting is Still in the Tail but the Poison Depends on the Dose", IMF Working paper 07/239, International Monetary Fund, 2007

² Embrechts, P., C. Klüppelberg, and T. Mikosch, "Modelling Extremal Events for Insurance and Finance". Springer, 1997.

³ see Cruz, M., Coleman, R. and Gerry, S. (1998): "Modeling and Measuring Operational Risk", Journal of Risk, Vol. 1, No. 1, pp. 63–72.

⁴ see Chernobai, A.S. and Rachev, S.T., "Applying Robust Methods to Operational Risk Modeling", Journal of Operational Risk 1, 2006, pp. 27–42.

⁵ Jorion, P., "Financial Risk Manager Handbook". Wiley Finance, 2007.

⁶ King, J. L., "Operational Risk: Measuring and Modelling", John Wiley & Sons, New York, 2001

The Basel Committee offers a more accurate definition of operational risk as “*the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events failures*”⁷). This definition encompasses a relatively broad area of risks, with the inclusion of for instance, strategic, transaction or legal risk (see Table 1).

However, the reputation risk (damage to an organisation through loss of its reputational or standing) and strategic risk (the risk of a loss arising from a poor strategic business decision) are excluded from the Basel II definition. The reason is that the term “loss” under this definition includes only those losses that have a discrete and measurable financial impact on the firm. Hence strategic and reputational risks are excluded, as they would not typically result in a discrete financial loss. Other significant risks such as market risk and credit risk are treated separately in the Basel II.

Table 1. Operational risk and main factors

People	Systems	Processes	External Events
Fraud, collusion and other criminal activities	IT problems (hardware or software failures, computer hacking or viruses etc.)	Execution, registration, settlement and documentation errors (<i>transaction risk</i>)	Criminal activities (theft, terrorism or vandalism)
Violation of internal or external rules (unauthorized trading, insider dealing etc.)	Unauthorized access to information and systems security	Errors in models, methodologies and mark to market (<i>model risk</i>)	Political and military events (wars or international sanctions)
Errors related to management incompetence or negligence	Unavailability and questionable integrity of data	Accounting and taxation errors Inadequate formalization of internal procedures	Change in the political, regulatory and tax environment (<i>strategic risk</i>)
Loss of important employees (illness, injury, problems in retaining staff etc.)	Telecommunications failure	Compliance issues Breach of mandate	Change in the legal environment (<i>legal risk</i>) Natural events (fire, earthquake, flood etc.)
Violations of systems security	Utility outages	Inadequate definition and attribution of responsibilities	Operational failure at suppliers or outsourced operations

Source: Sironi A., Resti A., “*Risk Management and Shareholders’ Value in Banking*”, 1st edition, Wiley, 2007

⁷ Basel Committee on Banking Supervision, “International Convergence of Capital Measurement and Capital Standards, A Revised Framework”, Comprehensive Version, Basel Committee on Banking Supervision, Bank for International Settlement, Basel, 2006, p.144

Some peculiarities of operational risk exist compared to market and credit risks. The main difference is the fact that operational risk is not taken on a voluntary basis but is a natural consequence of the activities performed by a financial institution. In addition, from a view of risk management it is important that operational risk suffers from a lack of hedging instruments. For other peculiarities see Table 2.

Table 2: Operational risk peculiarities

Market and Credit Risks

Consciously and willingly face
 "Speculative" risk, implying losses and profits
 Consistent with an increasing relationship between risk and expected return
 Easy to identify and understand
 Comparatively easy to measure and identify
 Large availability of hedging instruments
 Comparatively easy to price and transfer

Operational Risks

Unavoidable
 Pure risks, implying losses only*
 Not consistent with an increasing relationship between risk and expected return
 Difficult to identify and understand
 Difficult to measure and identify
 Lack of effective hedging instruments
 Difficult to price and transfer

* *with few exceptions*

Source: Sironi A., Resti A., "Risk Management and Shareholders' Value in Banking", 1st edition, Wiley, 2007

III. THE OPERATIONAL RISK MANAGEMENT

There are two main ways to assess operational risk – the top-down approach and the bottom-up approach. Under the top-down approach, operational losses are quantified on a macro level only, without attempting to identify the events or causes of losses⁸.

The main advantage of these models is their relative simplicity and no requirement for collecting data. Top-down models include multifactor equity price models, capital asset pricing model, income-based models, expense-based models, operating leverage models, scenario analysis and stress testing and risk indicator models.

On the other hand, bottom-up models quantify operational risk on a micro level and are based on the identification of internal events. Their advantages lie in a profound understanding of operational risk events (the way how and why are these events formed). Bottom-up models encompass three main subcategories: process-based models (causal models and Bayesian belief networks, reliability models, multifactor causal factors), actuarial models (empirical loss distribution based models, parametric loss distribution based models, models based on extreme value theory) and proprietary models.

⁸ Chernobai, A.S., Rachev, S.T., Fabozzi, Frank, J., "Operational Risk: A Guide to Basel II Capital Requirements", Models, and Analysis, John Wiley & Sons, Inc., 2007

The best way for operational risk management is a combination of both approaches.

III.1. Top-down approach of modelling operational risk

Basel II provides an operational risk framework for banks and financial institutions. The framework includes identification, measurement, monitoring, reporting, control and mitigation of operational risk. Stated differently, it requires procedures for proper measurement of operational risk losses (i.e. ex-post activities such as reporting and monitoring) as well as for active management of operational risk (i.e. ex-ante activities such as planning and controlling). The Basel Committee distinguishes seven main categories of operational risk and eight business lines for operational risk measurement as depicted in the following table (Table 3).

Basel II is based on three main pillars. Pillar I of Basel II provides guidelines for measurement of operational risk, Pillar II requires adequate procedures for managing operational risk and Pillar III sets up requirements on information disclosure of the risk.

Basel II distinguishes three main approaches to operational risk measurement:

- 1) Basic indicator approach (BIA)
- 2) Standardised approach (SA)
- 3) Advanced measurement approach (AMA)

Table 3: Business lines and event types according to Basel II

Business line	Event type
1. Corporate Finance	1. Internal Fraud
2. Trading & Sales	2. External Fraud
3. Retail Banking	3. Employment Practices and Workplace Safety
4. Commercial Banking	4. Clients, Products and Business Practices
5. Payment & Settlement	5. Damage to Physical Assets
6. Agency Services	6. Business Disruption and System Failure
7. Asset Management	7. Execution, Delivery and Process Management
8. Retail Brokerage	

Source: Basel Committee on Banking Supervision, "International Convergence of Capital Measurement and Capital Standards, A Revised Framework", Comprehensive Version, Basel Committee on Banking Supervision, Bank for International Settlement, Basel, 2006

Under the BIA, the simplest approach, gross income⁹ serves as a proxy for the scale of operational risk of the bank. Hence the bank must hold capital

⁹ Gross income = interest income + non-interest income

for operational risk equal to the average over the previous three years of a fixed percentage (denoted as alpha, α) of positive annual gross income.

Alpha was set at 15 %.

The capital charge (K_{BIA}) can be expressed as follows:

$$K_{BIA} = \frac{\left[\alpha \cdot \sum_{t=1}^n GI_t \right]}{n} \tag{1}$$

GI_t - gross income at time t

n - the number of the previous three years for which gross income was positive

α - the fixed percentage of gross income (15%)

The Standardised Approach (SA) is very similar to the Basic indicator approach (BIA), only the activities of banks are dividend into eight business lines.

Within each business line, gross income is a broad indicator of operational risk exposure.

Capital requirement ranges from 12 to 18 % (denoted as beta, β) of gross income in the respective businessline (see Table 4).

The total capital charge (K_{SA}) can be rewritten as follows:

$$K_{SA} = \frac{\sum_{i=1}^3 \max \left\{ \sum_{k=1}^8 GI_{ik} \cdot \beta_k, 0 \right\}}{3} \tag{2}$$

GI_{ik} - gross income at time i for business line k

β_k - a fixed percentage of GI for each of eight business lines

Table 4: Beta Factors under the Standardised Approach

Business Lines	Beta Factors
Corporate finance	18%
Trading and sales	18%
Retail banking	12%
Commercial Banking	15%
Payment and settlement	18%
Agency services	15%
Asset management	12%
Retail brokerage	12%

Source: Basel Committee on Banking Supervision, “International Convergence of Capital Measurement and Capital Standards, A Revised Framework”, Comprehensive Version, Basel Committee on Banking Supervision, Bank for International Settlement, Basel, 2006

III.2 Bottom-up approaches of modelling operational risk

Under the Advanced Measurement Approach (AMA), the regulatory capital requirement shall equal the risk measure generated by the bank's internal operational risk measurement system.

The bank must meet certain qualitative (e.g. quality and independence of operational risk management, documentation of loss events, regular audit) and quantitative (internal and external data collection, scenario analysis) standards to qualify for using the AMA. For instance, a bank must demonstrate that its operational risk measure is evaluated for one-year holding period and a high confidence level (99.9% under Basel II¹⁰). The use of the AMA is subject to supervisory approval.

The above-mentioned description of three approaches indicates that the BIA is the simplest while the AMA is the most advanced. The idea behind Basel II requirements lies in the assumption that

$$K_{BIA} < K_{SA} < K_{AMA} \quad (3)$$

In other words, *equation 3* implies that the AMA capital charge (K_{AMA}) should be lower than K_{BIA} and K_{SA} . Therefore banks should be motivated to use the most advanced approach – AMA.

At present most banks use a combination of two AMA approaches to measure operational risk:

- The loss distribution approach (LDA), which is a quantitative statistical method analyzing historical loss data.
- The scorecard approach, which focuses on qualitative risk management in a financial institution¹¹.

The above-mentioned approaches complement each other. As a historical data analysis is backward-looking and quantitative, the scorecard approach encompasses forward-looking and qualitative indicators.

However, we would like to point out that a combination of both approaches is necessary for successful operational risk management.

Once operational risks have been assessed both qualitatively and quantitatively, the next step is to manage them, the following ways are suggested (Fitch Ratings, 2007):

- avoidance of certain risks;

¹⁰ Basel Committee on Banking Supervision, "International Convergence of Capital Measurement and Capital Standards, A Revised Framework", Comprehensive Version, Basel Committee on Banking Supervision, Bank for International Settlement, Basel, 2006, p.151

¹¹ this approach was developed and implemented at the Australian New Zealand Bank

- acceptance of others, but an effort to mitigate their consequences;
- or simply acceptance some risks as a part of doing business.

IV. CONCLUSION

The last few years have seen a tremendous shift in emphasis on operational risk in financial institutions. An event-centric concrete definition has evolved, and expectations of regulators and management have changed for a significantly higher standard than before. Analytical methodologies have also evolved within the industry to measure operational risk and to compute economic capital for operational risk. These methodologies are still nascent, but are rapidly advancing toward a consensus approach to economic capital for operational risk.

The Advanced Measurement Approach under Basel II enables a qualifying bank to choose its own methodology to compute regulatory capital, as long as certain broad principles are satisfied. Therefore, the methodological efforts toward economic capital can also be used to compute regulatory capital for operational risk. Basel II has required an explicit capital charge under Pillar 1 for operational risk. This has, in fact, catalyzed recent developments in quantification of operational risk and calculation of capital.

Most operational risk events are preventable. Investment in state-of-the-art operational risk management can reap significant tangible benefits. Recent advances indicate that operational risk is quantifiable. Basel II has provided the framework and the incentive. It is for banks to follow through.

From a policy perspective, it should be noted that emerging market banks, such as Central European banks, face increasing exposure to operational risk events. Data from the Bank evidenced an improvement over time, attributed to managements' devoting more attention to recording and mitigating operational risk events. Moreover, successful estimates of the distribution of these risk events can be estimated based on data derived from more mature markets.

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WOMEN AS DEMOGRAPHIC MAJORITY AND POLITICAL MINORITY: CROATIAN EXPERIENCE

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Abstract

Governments around the globe have introduced institutional mechanisms to promote gender equality, particularly when it comes to the advancement of women in decision making, yet it seems that the gender equality remains the story of expectations unmet. International statistics point out at the persistence of gender asymmetry in both economic and political life, thus seriously hindering more equitable development outcomes. The focus of this paper is the gender inequality in decision making in Croatia. Even though women represent a demographic majority according to the last Census (2001), they are political minority which has an adverse impact on the development potentials. The paper discusses reasons why women are underrepresented group in Croatian political life, as well as it discuss institutional and legal framework that should encourage gender equality. Paper concludes with some policy suggestions how to achieve balanced participation of women in political and public decision-making since it would influence the improvement of political life effectiveness by redefining political priorities and opening new political questions, consequently leading to improved quality of living for all citizens of Croatia.

Keywords: *gender equality, women in decision making, legal quotas, Croatia*

I. Introduction

During the past decade governments around the globe have introduced institutional mechanisms to promote the advancement of women, including measures to increase women's political participation rates and to incorporate women's interests into policy-making. Increasing women's representation in

parliaments was identified as one of the indicators for achieving Millennium Development Goal Three: Promote Gender Equality and Empower Women. The indicator is the proportion of seats held by women in national parliament. The recently released report of Taskforce Three of the Millennium Project, "Taking action: achieving gender equality and empowering women", included the increase of women's share in national parliaments and local government bodies as one of its recommended seven strategic priorities. As Winnie Byanyima¹, director of the UNDP Gender Team stated, there are three main values of women in decision-making that leads to more equitable development outcomes: (i) equality of opportunity in politics is a human right; (ii) increasing women's political participation is to ensure that women's interests are fairly represented in decision-making. Evidence suggests that women who participate directly in decision-making bodies press for different priorities than those emphasized by men. They are often more active in supporting laws that benefit them, their families and children; and (iii) focus on increasing women's presence in legislatures is that women's participation in political decision-making bodies has been shown to improve the quality of governance. Recent studies² found a positive correlation between women's increased participation in public life and a reduction in the level of corruption.

Even though gender equality has been on the top of the agenda across the world, the gender equality is still a story of expectations unmet. The same holds true for the Republic of Croatia. According to the last Census (2001), out of total population in Croatia, 51.9% are women. In spite of the fact that women are demographic minority and thus make more than a half of the elective body of Croatia, they are still greatly underrepresented when it comes to political and public decision making. Namely, political life has still been largely dominated by men performing mainly public decision making functions.

This paper deals with the reasoning and obstacles that stand women in their way when entering the world of politics.

¹ Byanyima, W.: Women and Leadership: The Missed Millennium Development Goal, Distinguished Lecture Series, Trinidad and Tobago, Ministry of Community Development, Culture and Gender Affairs in collaboration with United Nations Development Programme, lecture delivered at 11 October 2007, available at <http://www.undp.org.tt/Speeches/Women-and-Leadership.pdf> (Accessed 10 February 2009)

² See for example Dollar, D., Fisman, R., Gatti, R.: Are Women Really the 'Fairer' Sex? Corruption and Women in the Government, World Bank Gender and Development Working Paper Series 1, Washington, D.C., 2001 and Swamy, A., Knack, S., Lee, Y., Azfar, O.: Gender and Corruption, *Journal of Development Economics* 64(1), 2001, pp 25–55

II. Gender Equality – Still an (Un)attainable Ideal?

According to the Constitution of the Republic of Croatia, gender equality is on the one of the major constitutional values.³ However, constitutional provisions require more than just equal treatment and opportunities - they require equal final results as well, taking into consideration the specific needs and situations of both women and men. Although legal and institutional mechanisms for promoting gender equality have been established, women politicians in Croatia are more an exception than a rule.

Election results are certainly the best indicator for actual political participation of women and status of their right to public and political life. In spite of the fact that since 3 January 2000 the number of women in the Croatian parliament has risen from 8% to 21%, which undoubtedly is a significant progress, the percentage remained unchanged after the 2003 and 2007 elections. What is even more disturbing is a small share of women exercising authority at local levels – only 11% of mayors in Croatia are women, average share of women councilors in 2001 was 11.5% and in 2005 it grew to 12.9%⁴. The data point to the devastating fact that there is no level of authority at which women would be given significant political influence. Although there is an increase in political female representatives, the women political participation growth rate will not suffice for the future aspiring to equal membership of the big European family.

Europe has not been satisfied with the current state either since women have remained underrepresented in the highest positions in the world of politics and business. Ten years ago there were 16% women in European parliaments meaning that their share grew by 50% in the course of the last decade but still remaining under the critical point of 30% necessary for women to have more influence on politics. More equal gender representation exists only in Sweden where women make almost half of the Government - 46%, in Spain 41% and in the two following states women are the heads of more ministries than men - in Finnish government there are 60% women and in Norway 53%.

There are states that cannot pride on that fact e.g. Romanian government is exclusively male, in Slovakian, Greece and Turkish governments there is only one woman respectively⁵. Exceptions to the rule are eight members of the Union – Sweden, Finland, the Netherlands, Denmark, Spain, Belgium, Germany and Austria. The European parliament with 31% of female representatives counts among the better-positioned. The least female represented with less than 15%

³ Art. 3 of the Constitution of the Republic of Croatia-consolidated text, Official Gazette no. 41/2001

⁴ Source of data: www.zenska-mreza.hr, (Accessed 14 December 2008)

⁵ Šinko, M.: Žene u parlamentu – globalna perspektiva, *Politička misao*, Fakultet političkih znanosti u Zagrebu, Zagreb, br. 2, 2007, pp 71-92

are the parliaments of the Czech Republic, Cyprus, Ireland, Slovenia, Hungary, Romania and Malta.

II.1 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Aiming at the protection of women rights and necessity to eliminate discrimination an agreement has been reached within the United Nations General Assembly in the document of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter: the Convention). The purpose of the Convention is to recognize equal human rights *de jure* and their *de facto* realisation by eliminating all forms of discrimination against women by any person or organisation in political, economic, social, cultural, civil and family spheres⁶.

The Convention entered into force on 3 September 1981 as a global and universal legally binding treaty establishing international supervising mechanism – the Committee on the Elimination of All Forms of Discrimination against Women. This Committee supervises the implementation of the Convention by consideration of the Reports that the parties to the Convention are obliged to submit. The treaty comprises a number of provisions in all areas that discrimination can and most frequently does appear. In the first place this refers to elimination of stereotypes (especially in media), elimination of discrimination of women in political and public life, equal participation for women in government representation at international level, participation in international organisations and elimination of discrimination in economic and social spheres of life⁷.

Croatia became a party to the Convention upon the notification of succession on 9 April 1992. In accordance with the Constitution the Convention is, in terms of legal effects, above law and a powerful instrument for legal regulation of women position in the Republic of Croatia.

II.2. Recommendation REC (2003)3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision-making

As a member of the Council of Europe Croatia has adopted a number of international instruments in the field of human rights since 6 November 1996 passed within that organisation. Among these it adopted the «Recommendation REC (2003)3 of the Committee of Ministers to Member States on Balanced

⁶ Gender Equality Office: A Brief Guide to CEDAW - The Convention on the Elimination of All Forms of Discrimination against Women and its Implementation in the Republic of Croatia, 2004, Zagreb

⁷ Centar za edukaciju, savjetovanje i istraživanje: Rodna perspektiva u politici i praksi, Zagreb, 2005

Participation of Women and Men in Political and Public Decision-making»⁸ (hereinafter: the Recommendation) by which member states are invited to:

- promote balanced participation of women and men, publicly announcing that equal decision-making power sharing between women and men of different origin and age enhances and enriches democracy;
- protect and promote equal civil and political rights of women and men including nomination for political positions and freedom of association
- promote and motivate special measures to stimulate and support women willingness to participate in political and public decision-making etc.

The Recommendation requires that states reconsider adopting legislation for introducing the parity threshold level - minimum percentage of each gender participation - for candidate selection at local, regional, national and supranational levels. Public financing of political parties has been recommended as a way to motivate promotion of gender equality.

According to the Recommendation of the Council of Europe⁹ balanced participation of women and men means that neither gender is represented with less than 40% in the body that makes decisions in political life. Thus, if we believe in democracy values, we cannot leave half a population without authority since gender equality is also suitable for business.

Since Croatia is a candidate for EU membership, which is surely one of the most important historic and political objectives of a state, a number of legal regulations have been passed and a few administrative bodies set up with a primary task of eliminating discrimination of women and promoting gender equality and thus contributing to the awareness of gender equality in the society in general.

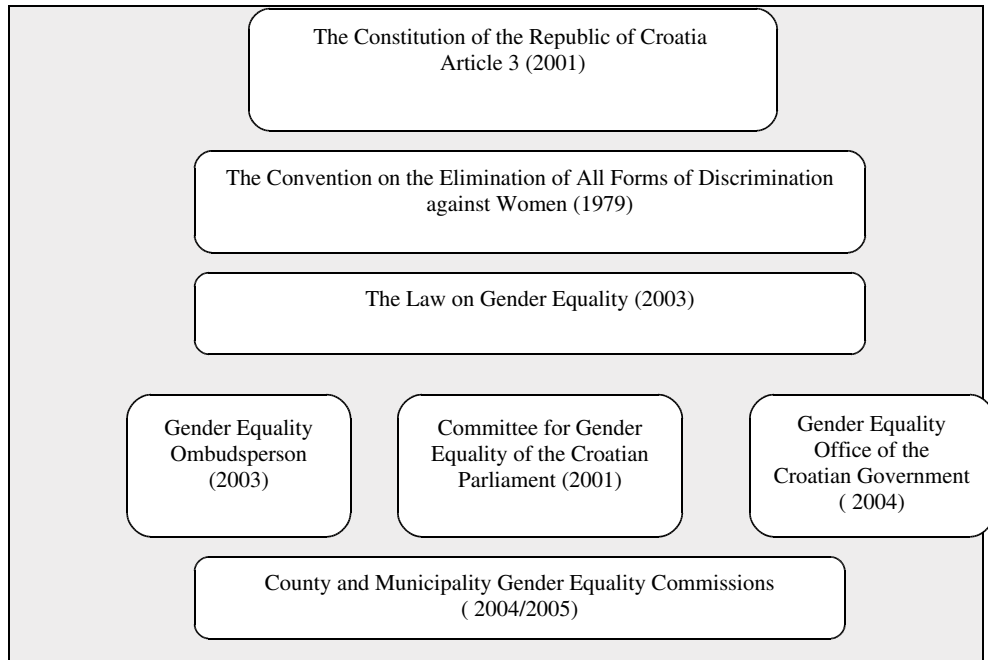
II.3. Legislative framework and institutional mechanisms for promoting balanced participation of women in politics in Croatia

Croatia has developed an institutional and legislative framework for implementation of gender equality policy that has been in align with international standards (figure 1).

⁸ Recommendation REC (2003)3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision-making was adopted by the Committee of Ministers on 12 March 2003

⁹ Office for Gender Equality of the Croatian Government: The Recommendation REC (2003)3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision-making and the Memorandum with Explanations, 2007, p 24

Figure 1 Legislative and institutional framework for implementation of gender equality policy in the Republic of Croatia



The Constitution of the Republic of Croatia and the Convention on the Elimination of All Forms of Discrimination against Women are basic legal instruments for women legal status regulation in the Republic of Croatia.

The Law on Gender Equality adopted in 2003 protects and promotes gender equality as a fundamental value of the constitutional system of the Republic of Croatia, regulates the protection against gender discrimination and creation of equal opportunities for both women and men in political, economic, social, educational and all other spheres of life. It establishes state mechanisms for achieving equality and non-discrimination and obligation to introduce gender mainstreaming¹⁰. Furtheron, in accordance with Article 11 of the Law on Gender Equality all state bodies, legal entities vested with public powers and legal entities mostly in state ownership or ownership of local and regional self-government units must implement certain measures and make action plans for promoting and establishing gender equality.

¹⁰ Gender mainstreaming comprises not only limited attempts to promote equality while implementing special measures to help women but also to activate all general policies and measures aiming at achieving equality through active and open recognition by the very planning of possible effects on particular situation that women or men are confronted with. It represents systematic implementation of non-discrimination policy in all systems, structures, political measures and programmes, processes and projects.

With the purpose of implementation of the Law on Gender Equality in October 2003 the Gender Equality Ombudsperson was appointed and in 2004 the Office for Gender Equality was established as an expert body of the Government of the Republic of Croatia to deal with the issues of gender equality. By anticipation of the mentioned institutions in addition to the activities of the Committee for Gender Equality of the Croatian Parliament since 2001 the institutional mechanism for implementation of gender equality policy at state level, human rights promotion and protection has been completed.

The process of establishing institutional framework and mechanism for implementation of gender equality policy continued in 2004/2005 by founding county and municipal/district gender equality commissions. There are county commissions in all counties with an aim to raise awareness of equal opportunities and gender equality in cooperation with non-governmental organisations. Commissions currently act in almost all counties and a number of cities and districts. Since 1997, every five years a national action plan «The National Policy for Promotion of Equality» has been adopted with an aim of gender equality implementation in all spheres of policy. It has been adopted upon obligations deriving from the UN Convention on the Elimination of All Forms of Discrimination against Women as a treaty that Croatia is a party to.

III. The social awareness development level – the key to changes

Our social awareness development level in our everyday life may not necessarily match our theoretical and legal solutions. This has become obvious from the answer to the question put in the course of a survey on what female and male citizens think of women in politics¹¹ «Who would you vote for: a man or a woman, if they were persons of similar working, organisational and other abilities?» The survey shows that among both men and women there are significant differences in the set dilemma - politically active women prefer female candidates whereas politically passive women prefer male candidates, and men prefer mostly male candidates.

In spite of the legal equality, the distribution of power and responsibilities between women and men is still discriminatory for the deep-rooted traditional gender roles. The mere gender imbalance itself between electors and the elected is unjust. Women as a discriminated group deserve perfectly equal opportunities of access to political decision-making bodies i.e. their voices are worthwhile.

Unfortunately, competent women in Croatia have not been chosen candidates for a political function or have not been appointed to government committees or a position in government since they do not enjoy confidence of those responsible

¹¹ Leinert Novosel, S.: Politika u životu žene i žena u politici, Fakultet političkih nauka, Zagreb, 1990, p 27

for the selection procedure. Those who are responsible for the selection very often think that decision-making is inappropriate for women. Such discrimination of women is founded on the fact that general public does not have as much confidence in women performing these duties as they have in men.

By exclusion of women from democratic political processes the values that these women embody - their knowledge, skills and abilities are excluded as well and it is for this reason that balanced participation of women and men in political and public decision-making in itself is an issue of justice and need not be particularly rationalized.

Leinert Novosel¹² points out three most important arguments by which women could introduce new qualities into democratic relationships in every society while performing in the sphere of politics:

- i) *women as role models argument*: in other words, their presence in political life could increase the respect for women in general and at the same time they would be a model for young women and future aspirants for political engagement
- ii) *argument of legitimacy of political institutions*: by exclusion of large segments of population, and women are surely the largest minority in politics, the confidence of citizens in institutions has been seriously shaken;
- iii) *women diversity argument*: it is assumed that women introduce novelty in common political style and discourse and that the increase in number of women will consequently change the very quality of politics.

IV. The causes of underrepresentation of women in political processes

There are numerous causes of underrepresentation of women in politics:

- *socio-economic*: education of women, the intensity and the power of female movements, double load of women, economic development level of the state;
- *socio-cultural*: political culture type of the state, religion, gender discrimination, lack of confidence);
- *political*: party - related system, politics as «men's club», (non)cooperation with other social group, etc).

The majority of surveys carried out in the most developed democracies pointed at political factors as crucial and for that reason worth of being paid special attention to in the paper. The politics as «men's club» is not only issue of perspective but also expression of political reality as we know it. It is made to fit men according to political style and working conditions (women politicians with families combine their careers with being mothers and wives), thus marginalizing and excluding women. In other

¹² Ibidem.

words the ideology of the party connected to its power in a party - related system is a good indicator of potential female representation. Left - wing parties would rather support gender equality objectives, implement incentives for women and in general «recruit» more women from among own rank into the parliament than right - wing parties. Thus if one of the main parties in the party - related system stands for left - wing ideology, it will surely suggest that women representation in that political system will increase. Such preference of left - wing parties for women has been widely researched and documented¹³. It has turned out that political parties with tendency towards modern social values and social intervention have significantly bigger number of women in parliament than traditional parties that stand for the principle of self-regulation of social processes¹⁴.

Consequently, it is the role of political parties that is crucial since they are the factors developing the strategy of candidate selection, some including, the others avoiding and by acting so they bear the responsibility for democracy i.e. the parity in composition of the parliament. Unfortunately we have witnessed different reality in that decision-making at highest positions of political life of Croatia remains exclusively a strictly gender controlled men-power domaine.

Cooperation of women and women organisations can contribute to intensive political women activism. This can help women build their self-confidence, acquire experience in public activities and support the process of nomination. A woman who can use women organisation sources while ensuring support for her campaign might run for the office and her party apparatus will consider her a competent candidate.

Additional incentive for women to enter political life could be given by women branches within political parties. Instead, women can decide to organise on their own. Important contribution that would prepare women for entering the world of politics and additional gain of political capital could be party trainings that train female members for women representative roles, encourage them to nomination in the sense of raising political awareness, learning lobbying techniques and stimulating female leadership. The presence of active female party members is extremely important since there has been an increase in the choice of political female aspirants on one hand and on the other hand the pressure on party leaders to introduce changes and carry them out with consistency. The lack of female aspirants of this kind seems to be a key issue to party recruitment of women not only in Croatia but also in most European countries.

¹³ Caul, M.: Women's Representation in Parliament – The Role of Political Parties, *Party Politics*, vol. 5, no. 1, 1999, pp 81-82

¹⁴ Leinert Novosel, S.: Politika ravnopravnosti spolova: kako do kritične mase žena u parlamentima?, *Politička misao*, br. 3, Fakultet političkih znanosti u Zagrebu, Zagreb, 2007, pp 85-110

After having considered the socio-economic factors we come to the conclusion that success of women in politics depends at least partially on the level of progress that women achieve outside politics. Greater representation of women in politics could be conditioned also by high education level of women since above average education is one of the basic features of political élites. Research has shown that political élites are not only more educated than their voters but are also recruited from specific professions (lawyers, journalists, doctors, bankers etc.).

The analysis of socio-economic factors impact on women proportion in parliaments indicates to the importance of institutional mechanisms, i.e. quota as a measure of conscious intervention crucial for the growth of female participation. Illustrative examples can be found in countries of modest socio-economic abilities such as the countries in the south of Africa (Namibia, Republic of South Africa...) where the percentage of women in parliaments varies from 27 to 33% unlike developed countries like Canada where the share percentage of women is 20.8%, in Great Britain 19.7%, the USA 15.2% and to 12.2% in France. A particularly interesting fact is the percentage of 9% women in parliament in the country that by all economic indicators counts among the most developed ones i.e. in Japan.¹⁵

However, one of the most significant socio-economic factors that must not be neglected in any way and that has an impact on women entering the world of politics is the lack of self-confidence. A decision to enter political competition is determined by abilities on one hand and personal ambitions of women on the other. Most studies¹⁶ have confirmed that religion, education and understanding of gender based social roles (traditional or egalitarian concept of gender roles) are cultural factors that influence share of women in parliaments most of all.

V. Political parties- democratic equality mechanisms

Every election year is a challenge not only for the voters but also for political analysts because assessment focuses on political institutions and processes functioning and finally on effectiveness and credibility of the politicians themselves. The focus is mostly on comparison of promises and realisation i.e. formal democracy and its democratic practice.

The best insight into how gender equality policy comes into effect in Croatia in the segment of women participation in political decision-making processes at parliamentary level can be gained by taking election results into consideration starting from the first multi-party election in 1990 until today. Since the first

¹⁵ Šinko, M.: Žene u parlamentima – globalna perspektiva, *Politička misao*, br. 2, Fakultet političkih znanosti u Zagrebu, Zagreb, 2007, pp 71-92

¹⁶ Leinert Novosel, S.: Politika ravnopravnosti spolova: kako do kritične mase žena u parlamentima?, *Politička misao*, br. 3, Fakultet političkih znanosti u Zagrebu, Zagreb, 2007, p 88

multy-party elections in 1990 the number of women in the Croatian parliament has risen from 4.6% to 7.1% in 1995, and after the 2000 and 2003 elections it settled at approximately 22%. In elections for parliament in 2007 political parties nominated only 29.93% women. In the last parliament session the share of women was 22%, which means that there has been no progress in political participation of women in Croatia.

A great number of parties on Croatian political scene accept the principle of women equality, their mebmership and activities, however, there are a number of obstacles that women encounter within political parties. Under the surface political parties are genuine reflexion of traditional attitude of the society towards women participation in public and political life. Some men perceive women in political parties just as mothers and housewives and ignore their pursuit of dealing with politics whereas women active in politics or those with political experience resolutely prefer male candidates in parties. The problem lies within the fact that political parties very often do not acknowledge specific women issues denying them right to speak on behalf of the party or to represent it. Thus besides special reference to the biggest parties in Croatia, internal organisation and party hierarchy are the greatest enemies to individual involvement of women.

The analysis of the attitude towards women within party organisations points to the following: Firstly, low percentage of women in parties regardless of the party character and secondly, «a rule» that by an increase of political decision-making level the presence of women decreases.¹⁷ Key problem is that party leadership structure, dominated by men, determines the nature of internal relations. It is completely clear that this puts limits to the impact women could have on creating policy within parties and structure of candidate list structure of parties.

Within political parties in Croatia there are many educated women, successful businesswomen, female scientists and women politicians - Members of Parliament and councilwoman but their names unfortunately take up mostly the bottom of candidates lists; the atmosphere of the last pre-election campaign reflected socio-cultural features of our still extremely patriarchal society. There are only a few women in Croatia who have become women-politicians in the true sense of the word, whom public recognizes and who have taken quite high positions in parliamentary structure; have become equal to men and in a certain way have set standards of successful performance. They are precious for their political experience and knowledge, which in fact is not the quality of all women in the Croatian parliament. It is a devastating fact that most women members of the parliament act exclusively according to the criteria of party discipline so that female members of the parliament in Croatia have not managed, unlike most

¹⁷ Leinert Novosel, S.: Političke stranke Hrvatske o ulozi žene u društvu, Fakultet političkih znanosti u Zagrebu, Zagreb, 1995, pp 112-139

world's parliaments, to form their separate body or a club as to coordinate and harmonize their actions serving the best interest of women and not parties or the governing policy. It has been noted that some active women politicians do not prefer and are not susceptible to gender equality and general women rights issues. They perceive the status of all women in Croatia through the prism of their own success and position that is, broadly speaking, far better than the position of an average woman in Croatia. Internal party structure has an important role in taking this attitude since they ignore women issues and their human rights for taking a men's view or traditional attitude has often been awarded by promotion within the party and on the political scene in general.

In this view, it is well known that great majority of women are introduced to the election list just before elections with an aim to only formally meet the quota requirements, which speaks for the fact that party leaders are not aware of the fact that formal completing of the lists with unambitious women with quota determined list positions they deprive ambitious women from political activity. Correspondingly, the first step should be to secure «critical mass» of women in parliament in order to expect any qualitative changes in male-dominated politics.

By experience this aim is easier to reach if started from lower levels at which quota introduction is necessary. The conclusion offers itself that parties do not have obvious strategies for promoting gender equality, solving women issues and improving the role and influence of women branches that exist in some parties but unfortunately without any obvious role. Therefore it is much-needed that political parties reform their work in accordance with the time we live in and needs of people whose votes they need in elections.

VI. Media portrayal of women - women image in society

The mere presentation of women in media has always been the discourse of stereotype image and presentation of a woman as a person whose primary role in life is of a wife and a mother. According to the way of presentation in media it could be concluded that women do not act in public, which is not true. The politics i.e. the whole sphere of public power on television is mainly men-bound. Contents projected by media have so far been quite masculinised and it is very rarely that women are presented in «classic» female roles. In that way media support stereotypes of women that are deeply rooted in most people's views.

One of the reasons of their media invisibility lies obviously in their way of performing far from the so called «big party politics» reflected in membership in legislative and executive authorities, which finally is the focus of Croatian media.

Analyses have shown that media, when it comes to socially significant issues are dominated by men whereas women are present in amusement or advertising

contexts. Such media image points not only to decreased social presence of women compared to men but also to their prevailing low social status.

An opportunity to actually determine what stereotypes and prejudices are related to which gender, in the context of political life in Croatia would surely be to monitor the 2007 parliamentary campaign¹⁸. Analysis sample included all TV broadcast at the time of official pre-election campaign with themes referring to party activities. Croatian Television broadcast total of 423 of programmes of that kind with 590 guests. 494 or even 94% of the total were male guests. There were 96 or 16% female guests. During the campaign the men were far more represented than women. Main topics of the elections for parliament were the usual ones for each election: domestic policy, economic and social issues. Gender topics were often mentioned during pre-election campaign and took the place seven on frequency list. This topic was mostly discussed by persons from Croatian political life margin, parties of the «green» leaning mostly dedicated to women rights to work, equal payment and generally to gender equality. Surveys done by daily newspapers showed similar results.

Such inappropriate presentation of women in media is responsible for reduction of already suppressed position of women in every society and indeed in ours. If we add the attitude that television programme is the mirror of the society and women are socially passive we realise that we are dealing with a very conservative mind both in the society and in most media. All this suggests the conclusion that Croatian television is men-dominated and prone to promoting social values typical of men and that we live in a culture in which men are the standard and women a deviation.

VII. Temporary Special Measures Aimed at Participation Increase of Women in Politics

The data on women show that the percentage of women representation is the highest where mechanisms of affirmative action, mostly quotas, have been used, which happens more frequently in less-developed countries.

The Convention on Elimination of All Forms of Discrimination against Women supports the use of the term «temporary special measures» for the reason that they are temporary in its purpose and can last as long as discrimination. They can be suspended when equal opportunities and treatment for women and men are acquired.

¹⁸ On the initiative of the Committee for monitoring and evaluation of gender equality policy implementation in media, Medianet d.o.o. has carried out the research under the title Monitoring Gender Frequency and Way of Representation and Gender Topics in Television Programmes Concerning Elections for Parliament in 2007, See for more details www.izbori.cesi.hr (Accessed 14 February 2009)

Quotas count among the oldest and most frequent measures that by the method of deliberate interference in social processes stimulate women representation in politics. Their nature has been easily recognizable in both socialist systems and parliamentary democracies. Quota¹⁹ is a percentage or share of places, positions or resources that has to be filled or awarded to a particular group with the purpose of discrimination correction. Quota is also called preferential quota, quota for women and gender quota.

In spite of all reputation quota does not give immediate results. Caul²⁰ argues that it takes 10-15 years to see the quota effects i.e. three election cycles to entirely implement it. Quota is more often and simpler to implement in proportional representation. Unlike all plurality systems in which one candidate must be elected to attract the majority of electorate different candidates could be elected to party list of candidates each individually attracting particular electorate strata. Quota is therefore more similar to this type of election²¹.

Quota can be defined as *gender neutral* and *women quota*. In case of gender neutral quota the representation of men and women is regulated and in this sense this quota determines the minimum representation of one gender in relation to majority gender or allows maximum representation for each gender. This kind of quota determines the framework of representation for both genders. Female quota, as the name indicates, is aimed at female underrepresentation correction. They are temporary incentives by which minimum share or number of women on an election list or political bodies are determined. Most states that adopted quota system implement female quota.

Regarding the level of election process in which they are introduced (does it guarantee entrance to candidate lists or to electorate body), or level of their compulsory quality (regulated by statues or ordinance of political parties or constitution or electoral law) and political active participants introducing it (introduced by political parties or parliament and government) quota can be divided into constitutional or legal²² and voluntary political²³ party quota. The mere term quota can undoubtedly indicate to the conclusion that constitutional and legal quotas for their general compulsory quantity compared to voluntary

¹⁹ Office for Gender Equality: in: Glossary of Gender Terminology According to EU Standards, 2007

²⁰ Caul, M.: Women's Representation in Parliament. The Role of Political Parties, Party Politics, 1999, pp 79-98

²¹ Matland, R. E.: Enhancing Women's Political Participation: Legislative Recruitment and Electoral Systems, in: Women in Parliament, International Institute for Democracy and Electoral Assistance, 1998, pp 76-79

²² Quotas stipulated by constitution are applied eg. in Burkina Faso, Nepal and the Philippines, stipulated by law eg. in Belgium, Bosnia and Herzegovina and Sudan. See for more details www.quotaproject.org/ (Accessed 16 February 2009)

²³ Voluntary political party quota is a frequently applied type of quota. More than ¾ of EU countries apply this type of quota.

political party quota contribute to increasing representation of women. However, this is not the case. Implementation of constitutional and legal quota does not guarantee that political status of women will improve. In order to be effective quota should meet two additional requirements:

(1) anticipation of sanctions for political parties not implementing it, (2) determination of women status on candidate lists. If there are no sanctions or they are not restrictive enough, it is quite probable that political parties will avoid its implementation. On the other hand, if there are no regulations on the position of women on the lists, the parties can fill the quota so that women are at the bottom of candidate lists, acting in accordance with the law but against the spirit of law. As for the intensity, the so called minimalist quota satisfying particular percentage, i.e. critical mass of mostly 30% can be noted as well as maximalist aiming at parity i.e. equal percentage of women and men.

One group of states that exceeds world average and comes up to the ideal balanced political participation of women and men is the group of Scandinavian states - Denmark²⁴, Norway and Sweden. Variables that are credited for the success of Scandinavian quota system and that made the women representation percentage possible have most surely been proportional representation, egalitarian political culture and women activity both in parties and in women feminist organisations that have been putting pressure on institutional policy.

Therefore, quota should be used in proportional representation, if possible; double quota must be accepted as the only way for women to take positions in which they can be elected and sanctions for parties must prevent them from calculating with women omission. Quota system bears a burden of responsibility not on individual women but those controlling the recruitment process such as political parties. Quota approach should be respected not only as a policy but the way of outlawing injustice of women exclusion from public spheres.

VIII. Conclusion

Croatia is an example of how we can have all more or less known mechanisms and institutions for equal opportunities policy but without actual power of performance. They must be equipped with content, used for enhancement of women status, parity participation of women in political and public life and achieving actual gender equality. Gender discrimination is our social reality. For existing disparity equal treatment of men and women it is not sufficient to achieve gender equality but it is necessary to enhance women and take specific affirmative

²⁴ Danish party that started to introduce quota in the mid 70ies, abandoned it in the mid 90ies concluding that it served its purpose: increase of women share in political life and awareness of party leadership and public of its significance.

actions and other forms of affirmative discrimination. Women participation in political, social, economic and cultural life at the same level with men is not just an issue of justness or good will but of politics. In order to realise full equality of women and men changes of traditional roles of men and women in the society and family, social and cultural conduct pattern of women and men with an aim to do away with prejudices and customs based on inferiority or superiority idea of one or the other gender are needed. Representation democracy pattern that Croatia should realise by its constitutional system cannot be realised if almost one half of the society is excluded from democratic processes.

Accordingly the state must ensure full participation and representation of women in political parties, ensure approach to leading positions in parties for women, promote nomination of women candidates for indirect elections and stimulate additional education on fundamental political skills for women candidates. It is therefore necessary for Croatia to achieve «critical mass» of women in politics by introducing quota at party levels, democratic selection nomination procedures and inclusion of candidates of both genders in the lists by turns. By doing so the equality policy is achieved and women are awarded half the political power.

Achieving balanced participation of women in political and public decision-making will influence the improvement of political life effectiveness by redefining political priorities and opening new political questions and consequently influencing the improved quality of living for all citizens of Croatia.

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TYPES OF RELATIONSHIPS BETWEEN FIRMS, COMMUNITIES AND GOVERNMENTS AND THEIR OBSTACLES

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Abstract

This paper is aimed to analyze the horizontal and vertical relationships between firms, communities and governments. Also it analyzes the obstacles between these relationships. It is concluded that hybrid forms of cooperation and coordination agreements between firms, communities and governments are the new strategy to absorb uncertainty of economic competition on the international market.

Keywords: Relationships of cooperation, firms, communities, governments.

I. Horizontal and vertical relationships of firms, communities and governments

Macneil (1978, 865) defines the firm to be “in significant ways, nothing more than a very complex bundle of contractual relations”. Klein et al. (1978, 326) also considers the firm as a particular set of interrelated contracts and suggest that these may be used to examine the economic rationale of different kinds of contractual relationships.

Collaboration between firms, social organizations and governments is an important trend of the last 3 decades in order to engage in activities aimed to common goals and to have access resources otherwise could not. There is an increasing recognition of relationships and linkages between firms, networks, business organizations, industrial associations, social and community organizations and governments. There are institutionalized structures and formal - informal relationships of cooperation between firms, national states, communities, international organizations and non-governmental organizations.

Public-private partnership (PPP) is a kind of informal cooperation, which takes different forms.

State policy makers call on expertise, political support and manpower, for example, from associations, communities, firms, non-governmental organizations, etc, through a combination of conflict, competition and cooperation.

There are vertical and horizontal relationships with different nature of trade-offs between cooperation/harmony and competition/conflict. Close vertical ties characterized by rich information exchange and long-term commitments lead to greater cooperation and joint activities between the partners and higher levels of asset specific investments, all of which translate into concrete performance benefits for the firms forming such ties (Helper, 1991; Heide and Miner, 1992).

Through the formation of horizontal alliances firms seek to strategically cooperate having resulted in the emergence of new organizational structures in order to manage the relationships of cooperation. The set boundaries of the firms are blurring. A firm can be involved simultaneously in different types of horizontal and vertical relationships to other firms based on the value chain, but involving economic and non-economic exchanges:

Podolny and Page, (1998, p59) define a network form of organization as “any collection of actors ($N=2$) that pursue repeated, enduring exchange relations with one another and, at the same time, lack a legitimate organizational authority to arbitrate and resolve disputes that may arise during the exchange. This definition ... includes a wide array of joint ventures, strategic alliances ... franchises ... relational contracts, and outsourcing agreements.”

A network is a distinct, highly differentiated, heterogeneous organizational form (Powell, 1990). Networks are associations and the effects of institutions on beliefs and decision making. A network binds relations between complementary resource owners, tied together by personal relationships in order to accomplish a variety of purposes and tasks, allowing them to use each other's core competencies. Networks bind the independent social and technical entities of two or more organizations by relationships of trust, common culture, interdependence, and complementarity. A network remains more open to admit new participants. Networks evolve into multiple webs of technical, financial and social interactions (Kogut & Zander, 1992; Gulati, 1995).

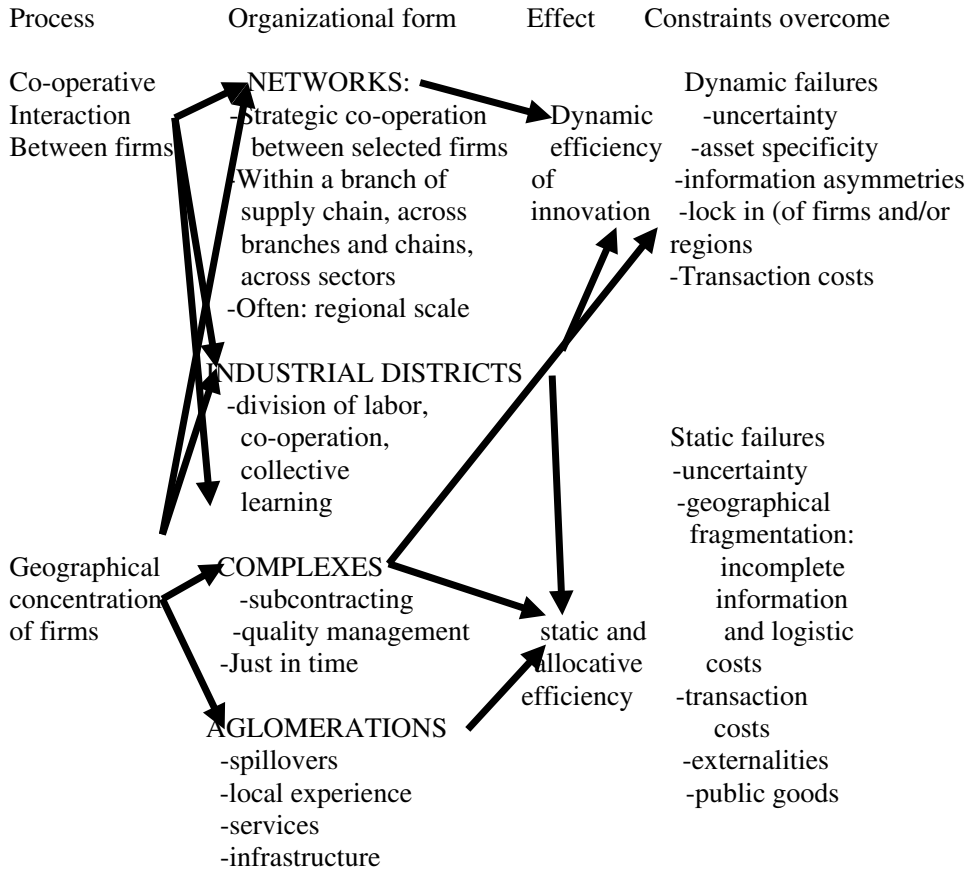
Cooperation networks as an element of agile organizations (Goldman et al. 1994) increased with the emergence of flexible specialization depending on cultural requirements (Amato Neto, 2003) of the market infrastructure, financial conditions, characteristics of the partners, and so on. Cultural infrastructure is related to cooperation among partners. Goranson (1995) list the requirements in terms of legal infrastructure such as economic agreements, physical infrastructure

such as communication technologies and the cultural barriers represented in the lack of trust which facilitates coordination and cooperation forms among inter-firm networks.

Tie modality is the set of institutionalized rules and norms that govern appropriate behavior in the network spelled out in formal contracts or simply understandings that evolve within the dyad and the network (Laumann, Galaskiewicz, & Marsden, 1978). The modality of ties created by firms maintains the relationships characteristics of the network, such as the degree of cooperativeness or opportunistic with implications in the strategic behavior and performance. The relationships in most strategic networks are mixed-motives of partners neither strictly competitive nor cooperative (Gulati, Khanna, and Nohria, 1994). Networks determine the choices available to partners and network structure determine of private and common incentives to compete or cooperate

Chalmers, Martin and Piester (1997) define associative networks as the 'non-hierarchical structures formed through decisions by multiple actors who come together to shape public policy'. Chandler (1977) emphasized the coordination in hierarchical structures. Within any given network, there may or may not be competition, conflict, inscriptive features, domination and dependency, or cooperation. Strategic networks within the venture capital industry have significant profit differentials among firms depending on the cliques to which they belong (Piskorski, 1999).

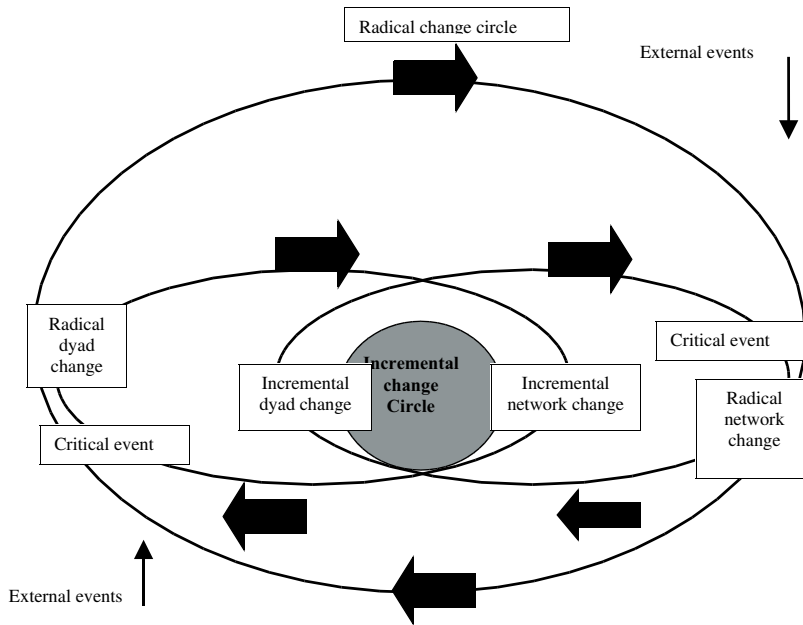
Figure 1. Organizational forms of co-operative interaction between firms and geographical concentration of firms



Source: Visser, E.J. & R. Boschma (2004),

Networks have two types of change, radical and incremental. Radical change has two levels, the dyad and the network (Knoben and Rutten)

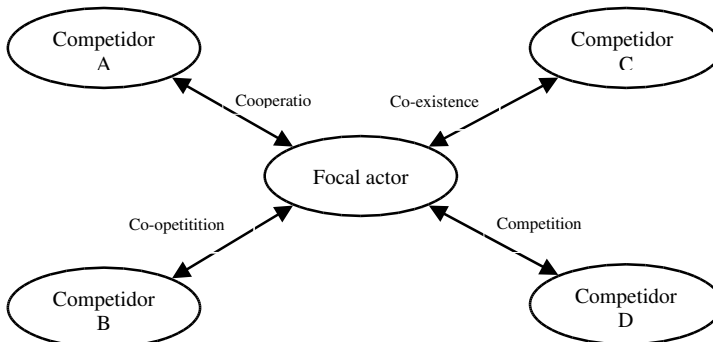
Figure 2. A framework of change in networks and dyads



Source: based on: Halinen et al. 1999.

Four types of horizontal relationships are based on trade-offs between cooperation and competition (Easton and Araujo, 1992; Easton et al., 1993). In a no clear pattern, the content of the relationships can change from competition to cooperation, coexistence or coexistence, steered by the other relationships in the environment.

Figure 3. Horizontal relationships between competitors



1.1. Relationships of competition

The notion of competition derives from the structural equivalence of firms, or the extent to which they share the same resources or customers. Power and dependence are related on the actor's position and strength. Dependence is more

equally distributed but related to the actor’s strength and position in the business network. Conflicts arise frequently due mainly to invisible norms as part of the climate. The goals are object oriented. Proximity of competitors that have common goals is based on psychological and functional factors. Competitive relationships have not been analyzed between vertical actors.

Competition allocates resources by unilateral actions, creates internal and external pressures. Competition is a process of selecting the best practices to innovate as source of profits.

In neoclassical economic theory, competitive relationships take place between different structures. Criticism from industrial organization theory introduces the concepts of strategic groups (Caves and Porter, 1977; Porter, 1979; Harrigan, 1985; Thomas and Venkatraman, 1988), dependency between firms at imperfect markets, competitive rivalry at an intermediate level (Hunt, 1972).

In traditional competition, firms compete against other firms. In collective competition, constellations of allied firms are the competitive units. A comparison of features between traditional and collective competition is below-

Figure 4. Features of traditional competition and of collective competition

	Traditional competition	Collective competition
Competitive units	Firms	Constellations
Industry structure	Oligopoly of firms	Oligopoly of constellation
Source of differentiation	Firm-based advantage	Group-based advantage
Valuable resources	Controlled by the firm	Assembled by constellation
Governance of resources	Corporate structure	Constellation structure
Source of profit	Rent of value chain	Rent in the constellation

Source: Gomes-Casseres, 2003.

The notion of “hyper competition” is similar to high velocity environments between individual firms, which are shifting towards one more dynamic model of “hyper-cooperation” (D’Aveni, 1994). Firms competing in hyper competitive environments exhibit behavior that differs significantly from behavior in more static environments (Thomas, 1996). The identified drivers for a shift towards hyper competition are consumer demand, the knowledge base of firms and associated workers, declining entry barriers, and the increasing frequency of alliances among firms. To assess the structure of competition in the global currency trading industry has been used the interactions between banking firms in a global electronic network (Zaheer and Zaheer, 1999).

1.2. Collusive relationships

Collusive relationship takes place when two competitors join forces to damage a third one. Collusive behavior dominates the study of cooperative behavior.

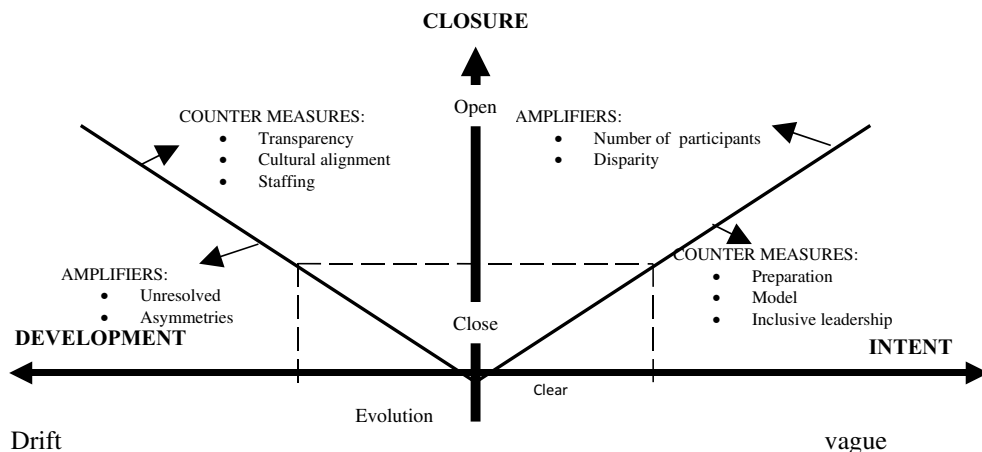
Adam Smith (1776) wrote, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”.

II. Obstacles for cooperation and coordination

The ability to provide coordination, for hierarchical controls especially in situations involving high interdependence and uncertainty in inter organizational relations is a challenge (Barnard, 1938; Thompson, 1967 and Chandler, 1977). The ability of organizational hierarchies to mitigate the uncertainty resulting from coordination and control of complex and interdependent tasks by creating cooperation and coordination among organizational members (Barnard, 1938) Anticipated interdependence resulting from the logistics of coordinating tasks can create considerable uncertainty at the outset. “Since there is both conflict and cooperation and formal authority structure is lacking.” (Litwak and Hylton, 1962: 399).

Chandler (1977) emphasized the significance of coordination in hierarchical structures. Transaction cost economists have begun to examine issues such as “temporal specificity,” or the importance of timing in receipt of goods or services that are related to coordination costs (Master, Meehan, and Snyder, 1991). Genevke (2001) draws the path from the goal of the collaboration over the difficulties inherent in non-closed partnerships to the collaborative fate, which can evolve into at tight-knit cooperation or drift into some un-manageable entity. Any assessment of formal cooperation is based on benefits, costs and risks. Global and local governance establish limits and problems to solve the areas of potential co-operation.

Figure 5. The 2001-Model of Factors Influencing Collaborative Success



Source: Genevke (2001).

Some obstacles to co –operation in clusters are:

Table 1: Obstacles to co-operation in clusters

Obstacles to co-operation between firms	Obstacles to co-operation between firms and supporting institutions	Obstacles to co-operation between private and public sector
Prisoner's dilemma in an un-cooperative environment	Difficult relationship between SMEs and associations, in particular chambers	Local governance issues (political rivalry, collective conservatism, and role of chambers)
Costs and risks of co-operation	Common problems of co-operation between firms and supporting institutions	Global governance issues (externally owned firms, foreign buyers)

Source: Amato Neto (2003).

According to Amato Neto (2003) the social and cultural barriers for creating cooperation networks among SME’s in Latin America, among others are

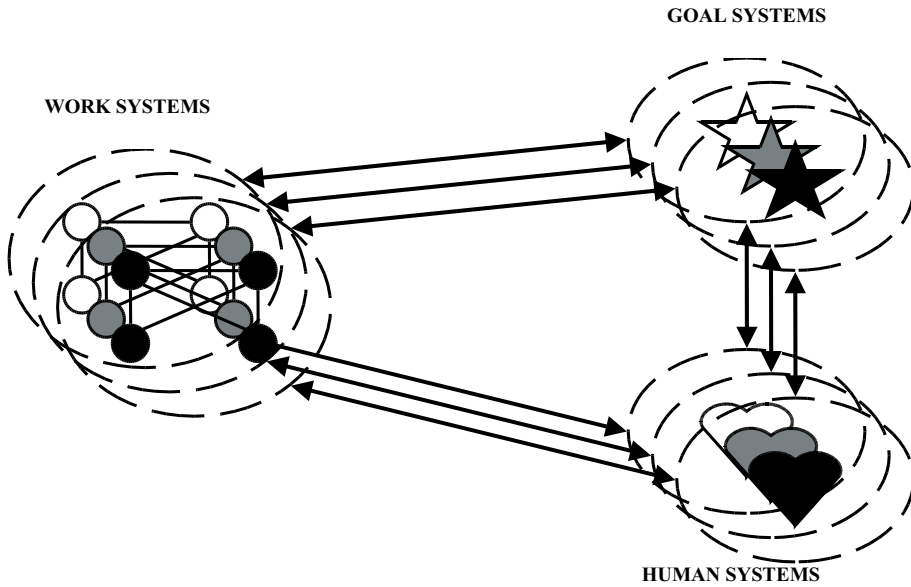
1. Lack of real commitment and confidence among the partners.
2. Lack of resources in terms of information technology (IT).
3. SME’s don’t use to cooperate with each other.
4. The precarious organizational structure and the specific organizational culture
5. SME’s are in general just concentrated in performing everyday operations and there is no vision for the long run.

To establish a cooperative relationship between firms requires some elements. León (1998) present different aspects to consider in a trustworthy situation:

- The importance of the pre-existent social relations networks
- The importance of the mutual respect
- The learning of the relationship
- The importance of the reputation of each partner
- The risks involved in cases of opportunistic behavior, mainly in terms of the necessity of shouting out some partner from the network
- The learning of the social “savoir-faire”, among others.

A successful collaboration involves a shared mental picture of the dependencies between the participating organizations’ work-, goal, and need systems. A messy picture gives misunderstandings and conflict (Genefke, 2001).

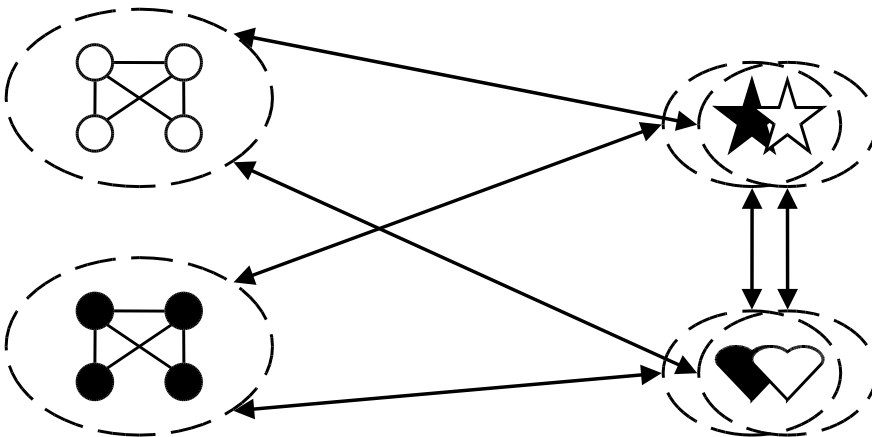
Figure 6: A human system view of collaboration



Source: Genefke (2001)

A partner who perceives that the two partners' goals and needs is related, but the work-systems' are unrelated which can be understood that the problem is one of trust

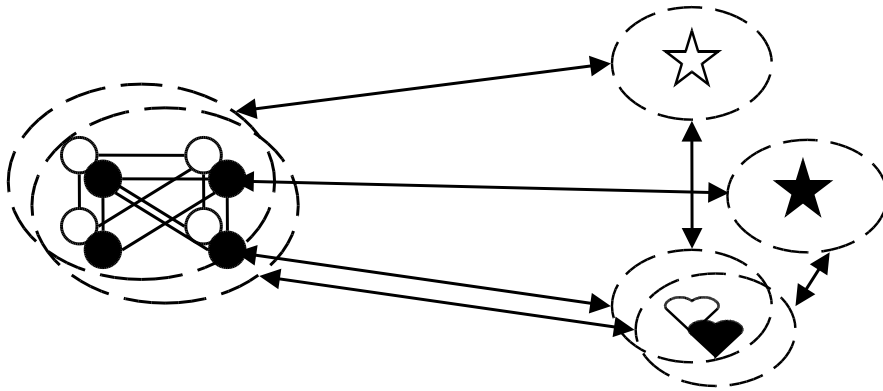
Figure 7. Problem of trust in collaboration



Source: Genefke (2001).

When the partners perceive they do not have common goal-systems but the work- and need-systems are closely related, the problem may be one of ensuring reputation.

Figure 8. The ensuring reputation's problem



Source: Genefke (2001).

Traditional set of beliefs held by economic and political elites are attitudes suggesting distance, clientele relations, or authoritarian postures, etc., blockade any possible interaction and relation with other actors. This non-cooperative behavior is a barrier for complex social coordination to make and implement decisions in particular settings like communities, firms, government agencies, etc. Social coordination and governance requires more collaborative and cooperative attitudes between the different private and public stakeholders involved, more specifically when public goods are scarce and common-pool resources need to be managed to promote cooperation in associative network between popular sectors (workers) and elites (managers) it is necessary to develop cognitive skills. Such network is an arena where outcomes will not be determined by political resources associated by property, class, social status or access to the means of coercion (Chalmers, et al, 1997).

Regardless of whether collaboration is driven by strategic motive or by learning considerations to gain access to new knowledge or by embedded ness in a community of practice, connectivity to an inter-organizational network and competence at managing collaborations have become key drivers of a new logic of organizing.

This view of organizations and networks as vehicles for producing, synthesizing, and distributing ideas recognizes that the success of firms is increasingly linked to the depth of their ties to organizations in diverse fields. Learning in these circumstances is a complex, multi level process, involving learning from and with partners under conditions of uncertainty, learning about partner's behavior and developing routines and norms that can mitigate the risks of opportunism, and learning how to distribute newly-acquired knowledge across different projects and functions Powell (1998)

III. Concluding remarks

A Strategic alliance or scale alliance is a horizontal, link alliance or vertical strategic, diagonal alliance or cooperation between firms in different industries. It is set up as a separate joint venture if there is a perceived need to tie in the partners, scope is a distinct of core business or geographically, assets are specific and separable from parents, and clear objectives.

Cooperative relationships between vertical agents are built on a distribution of activities and resources. Through vertical cooperation or integration between firms, the problems of appropriateness of complementary assets can be solved. Through different forms of cooperation, firms can achieve targets that could not achieve alone as for example, to combine the advantages of vertical integration and scale economies in merging resources but keeping individual companies focused on its core competencies. A vertical alliance is an agreement between a firm and organizations to exchange in one direction, either supplying inputs or using its outputs.

Vertical integration is a hierarchical relationship more likely to predominate where the innovation chain is characterized by uncertainty and complexity of environment. Cooperation through vertical associations between innovating firms, users of innovations and suppliers is user and supplier led. Trade-offs in vertical relationships between cooperation and competition/conflict involve that actors compete to be effective and cooperate to create long-term relationships.

Some forms of these cooperative arrangements can be horizontal alliances between organizations. These alliances compete for the same resources with exchanges in one direction. Politicians for example, support horizontal cooperation between firms for innovation and international competitiveness and to solve market failures and deficiencies through exploitations of economics of scale and scope, use of synergies, internalization of externalities and reduction of financial constraints and risks.

The complexity of scientific and technological inputs, the uncertainty of economic conditions and the risks associated with uncertain technological trajectories, appear to have reduced the advantages of vertical and horizontal integration and made hierarchies a less efficient way of responding to market imperfections. But the needs to respond to and exploit market imperfections in technology have also increased, and have thus pushed inter firm agreements to the forefront of corporate strategy. Hybrid arrangements include all forms of cooperative relationships between market transactions and vertical or horizontal integration.

Hybrid forms of cooperation and coordination agreements between firms are the new strategy to cope uncertainty of economic competition on the

international market. Cooperation agreements between the transaction partners are hybrid forms of cooperation lying in between hierarchies and markets, have the advantages of the first and the benefits of the second. Network is a hybrid form of cooperation alongside relations of competition between markets and hierarchies and includes formal and informal arrangements.

Firms both compete and cooperate in a well-functioning market economy. Relationships at the horizontal level focus on cooperation between competitors between competitors can emerge vertical and horizontal relationships, which include elements of competition/ conflict and cooperation/harmony. Conflict, competition and cooperation are also present within an alliance.

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HUMAN EFFICIENCY

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Abstract

Since the beginning of the 1990-ies modern economic thought has been focused on humans as a key factor of development. Numerous research results have contributed to creation of knowledge economy whose fundamental term intellectual capital is considered to be new wealth of a nation.

Numerous researches and published papers at the J.J. Strossmayer University of Osijek indicate that we have objective prerequisites for inclusion in knowledge economy and knowledge society. The papers published at the Faculty of Economics in Osijek represented the point of inflection after which there followed interdisciplinary joining of other faculties. What is common to these researches is a purposeful orientation – orientation towards development, dimensioned through efficiency, democratism and ecological sustainability, for realization of which a key factor is a human with his/her emotional, motivational, cognitive, communication, moral and social component.

It is in consideration of a moral and social dimension that we see indispensability of including legal science into interdisciplinary research of the role of human capital in the development.

Keywords: *development, humanity, moral, ethics, knowledge, law*

I. Introduction

Since September 1991 when Fortune magazine published the front cover with the left and right brain hemisphere there has been a huge improvement as to the quality of comprehending the role of human capital in development. Scientists and experts dealing with this issue have been slowly moving from margins towards the centre of economic, legal and political events. In the development of human capital the most developed countries in the world see development of new wealth of a nation. By becoming aware of both strengths and weaknesses of this resource prerequisites are met for navigation of knowledge economy.

But, the story of knowledge economy started at the Faculty of Economics of the J. J. Strossmayer University of Osijek in 1977 when Ante Lauc¹ published research results according to which the rate of return to investments in human capital is significantly greater than the rate of return to investments in physical capital. These results represented the point of inflection after which many Lauc's associates started with interdisciplinary research of the role of human capital in economy and development in general. Results were published in numerous journals, presented through projects as well as at conferences, published as Master's theses and doctoral dissertations and books².

What is common to these researches is a purposeful orientation – orientation towards development, dimensioned through efficiency, democratism and ecological sustainability, modern theoreticians of knowledge economy would call it orientation toward the future. It is possible by optimal allocation into

¹ Later on Ante Lauc published results of his doctoral research with Prof. R. Legradić in the book entitled *Dijalektička teorija i praksa društva*, J.J. Strossmayer University of Osijek, Osijek, 1977. Due to his specific educational background (a psychologist with a PhD degree in economics), Lauc, a long-time professor of the Osijek Faculty of Economics, has often stirred controversy by his public presentations and published papers, to which scientists are condemned who in quest of answers “stray off” ordinary boundaries of their respective fields. Problems faced by such theoreticians are very often not accepted as straight research directions, and they themselves are not sure whether they will be able to recognize proper answers if they come across them (they take over the risk for their careers). Development of knowledge economy shows that A. Lauc raised proper questions and obtained proper answers which he knew how to articulate to the scientific community.

² E.g.: Kovačić, B.: *Prilog usavršavanja organizacije razvojne funkcije metaloprerađivačke industrije*, PhD dissertation, Zagreb 1990; Mujić, N.: *Postmoderna društvenog razvoja u funkciji upravno političkog ustrojstva Hrvatske s osvrtom na razvoj regije Slavonije i Baranje*, Master's thesis, Osijek, 1993; Mujić, N.: *Organizacija u uvjetima kompleksnog i neizvjesnog okruženja*, PhD dissertation, Osijek, 1999; Mujić, N., Baučić, Ž. and Rukavina, K.: *Utjecaj emocionalne inteligencije poslovođstvenih struktura u poslovanju poduzeća*, *Informatologija* (33)2000; Mujić, N., Barković, I., Verner, J.: *Motivational, Emotional and Communication Assumptions for Changes - An Insight into Croatian Enterprises*, 48th World Conference “Advancing Entrepreneurship and Small Business”, Proceedings - Book of Extended Abstracts, CD ROM with full papers, Belfast, Northern Ireland, June 15-18; Požega, Ž.: *Analiza utjecaja ljudskog kapitala na stupanj razvijenosti zemalja svijeta*, PhD dissertation, Osijek, 2007.

resources, and then it implies significantly greater investments in comparison to past investments into human capital since it has a higher rate of return than physical capital.

Within the framework of human capital the importance of the following dimensions has been noticed and confirmed by numerous researches:

- emotional,
- motivational,
- cognitive, and
- communication, and based upon results obtained by further research, the model is supplemented by the:
 - moral and
 - social dimension.

Since the role of human capital in economy is too abstract for some, too experimental for others, those who have dealt with this issue have taken a risk for their careers. Resistance offered by traditional power centers showed how revolutionary that new economy was. But, shallow ideas have always been accepted easily, whereas ideas that require from people to transform their image of the world have been met with a hostile reception.

With current research results³, special importance of moral and social capital not only in economic but also in the overall development has been taken into consideration, which inevitably leads towards interdisciplinarity of professional and scientific branches pertaining to treatment of this issue.

II. Euro-Atlantic environment

European environment will soon become a medium in which not only our economic subjects will do business, but also all other legal and natural persons. Business will be run in conditions of extremely efficient competition provided by renowned European and world companies. In such conditions not only outstanding successes but also crushing defeats might be achieved. According to numerous analyses and assessments we are facing in the period of pre-accession negotiations, we are criticized for the presence of all indicators with respect to

³ E.g.: Wallis, J., Killerby, P., Dollery, B., "Social economics and social capital", Emerald Group Publishing Limited, 3/2004; Brooks, K., Nafukho, F. M., "Human resource development, social capital, emotional intelligence", 2/2006, Emerald Group Publishing Limited; Arregle, J. L., Hitt, M. A., Sirmon, D. G., Very, P., "The Development of Organizational Social Capital: Attributes of Family Firms", Emerald Group Publishing Limited, 1/2007; Fabiani, 2005; Goleman, 2004; Mujić, N., Legčević, J.: Human capital development, new wealth of a nation, XV International scientific conference "Društvo i tehnologija", Zadar, 26-28 June 2008, abstract published in Conference Proceedings, p. 46, paper published on CD-ROM.

disregard of moral principles, i.e. larceny, mobbing, grey economy, exceeding the budget, and missing deadlines.

Regulation of social relations falls into the scope of legal science and practice. But, are we capable of regulating the society in complex and uncertain transition and integration processes such that it is insured to be continuously open to everything that is developmental, confining it at the same time by various forms of to immoral and deviant behavior in general.

Lawyers, judges in particular, are obliged by the letter of the law and the Constitution to make decisions referring to compliance of a certain act with morality, but in practice annulment of contracts, organization acts or other legal jobs due to lack of morality is almost not present at all (it might be said – at the level of coincidence). However, there exists space for establishing business environment better than the existing one as well as for profiling sounder economic subjects and it is possible to make a major move in the right direction in general interest. By entering European integration, our society, and every legal and natural person will have to make minor or major changes as to their businesses and life in general.

Problems we encounter search for their solutions, and some of these solutions already exist and have thousand-year continuity, they gave rise to civilization, and from time to time we just have to remind ourselves of them. There have been many novelties in science: decoding the genome, brain research, first manipulations of genes, cells, embryos and brain, nonlinear processes, quantum physics, etc.; a classical scientific view of life has become increasingly inadequate for understanding, let alone solving problems. Metamorphosis of science occurs and new scientific paradigms are developed. But, as chaos theory implies: Simple systems initiate complex behavior. Complex systems are the source of simple behavior. And what is most important, the laws of complexity contain universality, not taking into consideration at all what the system is made up of.⁴ Let us paraphrase this, that what is true is independent of time and space. It will be shown in this paper that we do not always have to search for solutions in the field of new scientific cognition, but that there already exist some “ancient and distant truths” which might improve the quality of our lives even today.

Many good quality solutions already exist in the European economic and legal space and it is rational to accept them. Some other solutions require an explicitly individual approach due to reasons referring to preserving economic, legal, political, cultural and even national identity and they cannot be “copied down” from anybody.

⁴ Glick, J.: *Kaos*, Izvori, Zagreb, 1996, p. 308.

One of such values that should not be forgotten by lawyers is the Protestant ethics (formulated in M. Weber's papers) whose properties are recognized in one part of developed Europe, but not in the part we are located in.

In the USA, it is though Christian-Jewish morality which, from a developmental point of view, proved very functional.⁵

It is important to notice from where developed communities pulled their particularities. What is "general" from which Weber, Kant, Descartes, Hegel deduced?

"General" primarily refers to: Greek philosophy,
Roman law (Codex Justinianus), and
Christianity.

The aforementioned refers to historic civilizations. Here lies a fundamental structure from which, with modifications and adjustments, others, more successful ones, have paved their ways toward success.

That is something we should also do ourselves, i.e. determine optimal values in historic spaces in which this was also done by other European peoples and expand them in accordance with our own properties and purposes. In order to better understand the matter itself and adjustment to specific issues referring to human resource efficiency in our country and human essence in general, we will go back a little further into history.

III. Ptahhotep's instructions

When it comes to determining the identity of a Republic of Croatia citizen, the elementary starting point could be set in one way only, and that is to perceive a living person, a physical person. This person is a member of several concurrent communities so that in some communities this person retains his/her identity entirely, whereas in others he/she participates only as a functionally and hierarchically positioned element of a social organism. When such social organisms are acknowledged their personality by the rule of law, they are

⁵ The first question that has to be addressed here is the following: is this coalescence or coexistence of two communities? The answer to this question would be better presented in terms of quality by theologians, but even lay knowledge of the matter will suffice for detecting coexistence. Hence, it is a matter of coexistence of two separate communities inhabiting the same area, which exists as such in the USA. The Jewish community of the USA is economically extremely powerful, and the Christian community in the USA is characterized by superiority in numbers. A simple analysis of statistical data points out at a certain duality that might result in cooperation, but in conflict as well. Here the term Christian-Jewish moral is functional; this is an intelligent solution in the USA. It enables exploitation of diversities useful for both sides. An excellent environment for management of jobs is developed in this way.

considered legal persons. Legal persons have their identity that is different from identities of its members.

What motivates a man to such type of organization? Why does he accept hierarchical superiority of others even when he is not directly forced to do that? Why does he take over responsibility for actions i.e. failures of his subordinates? When did such communities emerge? Where is the value of human unity and what is it based on?

Answers to these questions may be found in the ancient Egyptian civilization, primarily due to a high level of direct human work efficiency that was achieved by this ancient civilization.

If we state that people there were building monumental buildings and that even now science cannot explain the force they used for lifting extremely heavy blocks made of stone, a **high level of efficiency** is discerned which must be adopted by everybody since in the Egyptian pyramids we have a material proof of an ancient social technology, unreachable today. When we envisage organization needed for building the aforementioned buildings, the image we have in our mind is mostly the one with starving slaves towing stone only because they were whipped by their keepers if they did not work. Today we know that multi-ton blocks of stone cannot be manipulated by starving slaves in forced labor, thus our perception is wrong. These builders, as people, had intellectual and manual power that is still unknown and incomprehensible to us.

In a modern society we produce on a massive scale working bodies **outside** a human body, we create machines and tools and use them for the purpose of (re)forming the material world.

Obviously we should try to understand this phenomenon by starting from another, different perception. Since truths do not know spatial and time boundaries in explaining and comprehension of modern problems, we will mediate knowledge of the ancient Egyptian civilization⁶.

⁶ Uranić, I.: Stari Egipat, Školska knjiga, Zagreb 2002, p. 9. *“It might be said that Egyptology was born as a science in 1882 when Jean-Francois Champollion (1790-1832) managed to get into the writing system used in Ancient Egyptian. For a long time Europeans hankered after secrets of Pharaonic Egypt. Even Greeks and Romans tried to come to grips with linguistic and cultural barriers in order to understand better this civilization that impresses them by their achievements. In the Middle Ages darkness over Europe does not allow interest in, but encourages hatred towards everything that is foreign and exotic, but it is revived in the Renaissance. After Renaissance..., the interest in Egypt vanishes again...”*
Some time later, Napoleon, a military genius, devotes his attention to historical **secrets of human efficiency**. Very soon museums in numerous European cities are enriched with huge collections of Egyptian antiquities. In Croatia, Dr. Petar Selem published a series of scientific papers dedicated to monuments and cults of the Egyptian province that was transferred to the territory of today's Croatia by Romans. He also dealt with sphinxes from the Palace of Diocletian in Split.

Here we are going to have “*The Maxims of Ptahhotep*”⁷ as the basis.

Vizier Ptahhotep teaches Pharaoh’s son the principles of wise living and the work itself represents a strong moral instruction based upon respect showed toward strict social hierarchy (parents as well). The instructions date back to the period from 2635 to 2155 BC, the name of the period is “The Old Kingdom”. Ptahhotep himself calls his instructions the advice of **the old (?)**, to which gods themselves adhered in ancient times (hence, these pieces of advice are rules holding for everybody, which is similar to the modern rule of law but there are no sanctions here, here persons in power rule and **speak correctly** whereas the so-called little people obey and imitate rightness, that is the **rule of morality**). **Hierarchy is equated with parental relationship** (father-son). It is attributed such quality and such relationship is established between the teacher and a student.

Ptahhotep’s maxim *on the knowledge*:

“Be not proud because you are learned; but converse with the ignorant man, as with the sage. For no limit can be set to skill, neither is there any craftsman that possesses full advantages. Fair speech is more rare than the emerald that is found by slave-maidens on the pebbles”.⁸

It is important to notice here certain respect of rationality of **every** human being. It is emphasized that formally and legally a female slave is placed at the lowest level of social hierarchy of the then slave-holding and patriarchal society, but it does not mean that her opinion is worthless, sometimes even in respect to reflections referring to universal values such as truth and justice.

Hence, a rational content of the said is important, i.e. as the Egyptians would call it, fair speech which is a **constant method of civilized state** at all times.

In the first sentence it can be seen that Ptahhotep considers the relation between the intellect and emotions in the context of knowledge; contemporaries would say he ponders emotional intelligence as a key competence⁹. An expert, blocked by emotional restrictions, may show exceptional inefficiency even in the field in which he is very competent.

On courteous debate:

“If you find a debater talking, one that is well disposed and wiser than you, let your arms fall, bend your back, be not angry with him if he agrees not with you. Refrain from speaking evilly; oppose him not at any time when he speaks. If he addresses you as one ignorant of the matter, your humbleness shall bear away his contentions.

⁷ *ibid*, pp. 75-83.

⁸ *ibid*, p. 76.

⁹ Goleman, D.: *Emocionalna inteligencija, zašto je važnija od kvocijenta inteligencije*, Mozaik knjiga, Zagreb, 1997.

If you find a debater talking, your fellow, one that is within your reach, keep not silence when he says anything that is evil; so shall you be wiser than he. Great will be the applause on the part of the listeners, and your name shall be good in the knowledge of princes.

*If you find a debater talking, a poor man, that is to say, not your equal, be not scornful toward him because he is lowly. Let him alone; then shall he confound himself. Question him not to please your heart, neither pour out your wrath upon him that is before you; it is shameful to confuse a mean mind. If you be about to do that which is in your heart, overcome it as a thing rejected of princes.*¹⁰

It is important to notice here that in no way does Ptahhotep predict real withdrawing, even in situations when actions look like withdrawal. Essentially, he proposes control of the situation based upon estimation of opponent's qualities. Control of the situation **is achieved by controlling ourselves**. Everything else is less important. It determines only the method of action. Debate is a communication and when it is done without resignation, familiarity and/or revanchism, by fostering fair relationships, it creates more mature atmosphere for all dimensions of life, including business.

On leadership:

*"If you be a leader, as one directing the conduct of the multitude, endeavor always to be gracious, that your own conduct be without defect. Great is Truth¹¹, appointing a straight path; never has it been overthrown since the reign of Osiris."*¹²

Anger of the goddess is pointed out as a sanction reaching those who do not reign lawfully. Such sanction is not clearly visible and it does not occur immediately, but words like "great and mighty" instruct a person in power to be careful, **for himself** primarily. Namely, it is important to notice that a sanction is not human, it comes from force majeure and it is just. Perhaps such force majeure does not exist any more, that is not decisive. What is crucial is **fair speech**; it **creates morality**, so that constant repetition of certain statements creates corresponding perception with all listeners.

On the basis of this emerges fear of sanctions by sinners. Awaiting punishment in such circumstances might be hard to the extent that the punishment itself brings relief to the perpetrator. A sinner may interpret any evil that happened to him as punishment, regardless of reality referring to the cause-effect relationship. The environment will react in the same way: "This is for that."

¹⁰ Uranić, I.: Stari Egipat, Školska knjiga, Zagreb 2002, p. 76.

¹¹ Goddess of Justice, i.e. Truth in Ancient Egypt.

¹² *ibid*, p. 76.

Interaction between man and reality in real life often has a form of **retorsion**.¹³ It may be detected in a series of proverbs in Croatia: “The bitter bitten, falling into one’s own trap”, “Ill-gotten gains never prosper”, “Easy come, easy go”, etc. Fear of retorsion is the reason why some of the proverbs even have a form of commands, e.g. “Don’t mock other people”.

Fair speech of renowned men determines a general **perception of harmony** and just solutions and there appears rule of morality. Persons in power who speak fairly and reign lawfully are the pillars of moral society. They are responsible for morality. Morality excludes chaos. In a society governed by morality, a sanction of legal norm is an instrument that is not used very often. People take care of correctness of things they do. They imitate persons in power, mostly unconsciously. Courts are not overcrowded, and judges are not too tired. Excellence is not a rare phenomenon.

Rule of morality is a higher quality level of social relations than rule of law.

An excerpt from the Code of Conduct of the Caterpillar company exemplifies business behavior with respect to legal norms: “Integrity. Excellence. Teamwork. Commitment. The words in this Code of Conduct define us. Despite our differences - in geography, culture, language, and business - we are one Caterpillar, one company united by these common principles and a shared commitment to the highest standards of conduct. While we conduct our business within the framework of applicable laws and regulations, for us, mere compliance with the law is not enough. We strive for more than that. Through our Code of Conduct, we envision a work environment all can take pride in, a company others respect and admire, and a world made better by our actions. Together, we are laying the foundation for the values-based culture that will carry us forward to even higher levels of success.”¹⁴

On the method in general:

*“One that reckons accounts all the day passes not a happy moment. One that gladdens his heart all the day provides not for his house. The Bowman hits the mark, as the steersman reaches land, by diversity of aim. He that obeys his heart shall command.”*¹⁵

The second fundamental feature of the interaction between a man and reality, in addition to retorsion, is relativity. Perception of interaction relativity devastates goals and praises means (method) since the method is also life itself. A civilized method is conditioned by humanity. **Human efficiency is human**

¹³ From Latin *retorquere*, meaning turn, (in) return, e.g. response to insult.

¹⁴ Caterpillar, <http://www.cat.com/cda/>

¹⁵ Uranić, I.: *Stari Egipat*, Školska knjiga, Zagreb 2002, p. 80.

civilization. When humanity vanishes in a human community, the community is transformed into a herd. It happened when there emerges perception on the existence of some absolute goal on earth that is greater and more important than human lives. Individuals, i.e. communities made up of individuals fight for that “goal” with all their hearts and souls. There is no humanity in a herd, it is reigned by the strongest animal, but only until it is overpowered. There is neither cohesion nor harmony there. The goal is to postpone the moment of downfall. The overall energy of a being is in the end spent for bare survival.

Environment perceives us on the basis of effects of our speech and actions. When a person does understand that some absolute goal of living in this world does not exist but what is absolute is only the beginning of that living, his reaction might be twofold:

- 1.) panic fear of reality, or
- 2.) adjustment.

The one who adjusts respects all people doing the same thing. When he is energetic in what he is doing, he is successful, and it is called **creativity**. It may also be called self-realization.

But, many will be frightened by perception of relativity. This is dangerous space, bifurcation point, from which there is no return. Either strength or weakness is developed. There follows the power of tranquility or a long-term fight with panic. If we look at people around us, we will see many who failed this fight. This is the most serious topic people are interested in. We cannot and should not run away from it. Ptahhotep proposes a middle-course path implying **moderateness and mansidedness** of activity as next methodological features. Radicalism leads to the extreme and the extreme is always bad, it is just the way in which it is bad that differs.

If “heart” is mentioned as the road to success, then it must be interpreted as a **rational** activity i.e. wisdom, since for Egyptians heart is the center of the mind. We would also say today that linking emotions, thoughts, speech and action makes both individuals and society healthy and it represents a key prerequisite for development.

On doing business in a right way:

“The one who overlooks laws is punished; that is what is overlooked in the sight of the greedy. It is the small-minded that seize riches, but crime never managed to land its rewards. Whoever says “I snare for myself” does not say “I snare for my needs”. The final part of what is right is its endurance; of which a man says “that is my father”¹⁶.”¹⁷

¹⁶ In Ancient Egypt father and teacher are synonyms.

¹⁷ Uranić, I.: Stari Egipat, Školska knjiga, Zagreb 2002, p. 76.

Hence, greed is an impermissible method of doing business. Indeed, prosperity can be reached only by using right methods. Obviously the notion 'prosperity' does not imply mere raising funds and other material goods.

In our business, we have to adjust to those values considered especially valuable by the community. At the state level these values are contained in constitutions and worked out by laws. However, that is not the maximum but the minimum of requirements laid down for a successful businessman. A businessman trying to reach the maximum becomes a value himself in his community.

*"Good ethical behavior in doing business arises from values and values are learnt. In various business activities, different values exist and are applied which enter certain business decisions and oppose each other (such as e.g. stability vs. risk in a new business project). This disagreement or opposition is especially noticeable in certain crises...."*¹⁸

Values of ethically educated individuals are mostly revealed in crises.

Ethics-determined behavior also works preventively; it prevents emergence i.e. expansion of a crisis.

The **need for learning proper action as a social technology** is also pointed out here, especially in the education process of young people. It is proper education of future persons in power that Ptahhotep sees as the road to rule of morality in the community more than 4,000 ago.

The one with power, if he has good sense, will know that a higher level of satisfaction by the existing criterion of values in the society by the so-called little people suits him best. When there is discontent, there may also be some changes and then somebody else might become powerful. On the other hand, society which implies satisfaction and pride tends to excellence.

On greed:

*"If you want your conduct to be perfect, deliver yourself from every evil, (and) combat against the greed of the heart. It is a grievous sickness without cure, impossible to penetrate. It causes disaster among fathers and mothers, among the brothers of the mother, and parts wife from husband. It is an amalgam of all evils, a bundle of all hateful things. That man endures who correctly applies Maat, and walks according to his stride. He will make a will by it. The greedy of heart has no tomb."*¹⁹

¹⁸ Klopčić, R.: Osnovi poslovne etike, Narodna i univerzitetska biblioteka Derviš Sušić, Tuzla, 2005, p. 18.

¹⁹ Uranić, I.: Stari Egipat, Školska knjiga, Zagreb 2002, p. 79.

It is obvious that Ptahhotep considers greed as some kind of malign tumor which **destroys** relations between people as well as people themselves. Thus, greed is a first-class self-destructive property of a man. Both a man and the community he belongs to are built by means of a proper method of activity. Greed functions in the opposite direction, breaks down the structure of a being and destroys cohesion without distinction of business, family or any other community. It appears in all forms of human society organization, it cannot be eliminated. It may and has to be combated constantly. Greed is intensified when a greedy person attains a certain level of power, what can be exemplified by a proverb from this area that says "Give all power to a person if you want to see what he is like."

On character:

"If you seek to probe the true nature of a friend, do not inquire after him, but approach him yourself. Then deal with him alone, until you are no longer uncertain about his condition. After a time, dispute with him. Test his heart in dialogue.

... Be bright-faced as long as you exist! But what leaves the storehouse does not return. For what belongs to one also belongs to another!

... The good deed profits the son-of-man. An accomplished nature is a memorial."²⁰

Character is the entirety of person's important features; mental figure, property, feature. A person of firm character is a stable person with unremitting beliefs and of consistent behavior; a man of honor. He is a creative subject who emits his beliefs and attitudes towards other members of the community. A creative person defines principles himself and harmonizes them with the environment. By such action he poses them in the sense that attitudes of an individual may also become attitudes of the community. At the same time, he offers resistance to delusions posed by greedy and malevolent people. A person with weak character is passive; he is a manipulation object of others. Rule of morality in a certain community is impossible without persons of firm character. Presumption of fair behavior of all participants in a certain business results in confidence. Confidence not only simplifies but also speeds up business since it decreases the need for business insurance. In that way commodity money flows are accelerated so that the profit made by primary business participants at the time rate is increased as well. The whole structure of morality will fall apart completely when only one business participant acts unfairly and is not punished for that. Confidence vanishes; it can only be rebuilt from its foundations and that is a long and hard process. The most common cause of the structure of morality breakup is greed. Damage

²⁰ *ibid*, p. 81.

caused by greed is general, it primarily affects all business participants, even the mischief-doer himself, from a long-term perspective, it also affects legal-political community by reduced tax revenue, unemployment, etc. In accordance with damage classification, this type of damage will be best qualified as eluded profit.

Ratio of the court decision can also be outlined from the aforementioned, when the judge declares null and void a legal job or act in civil law relations that was done contrary to public morality. In this way the court prevents the structure of (business) morality of the environment from breaking up; i.e. a breakup motivated by private interests and directed against general and public interest of the community.

The court also protects morality in order to protect some other values such as e.g. dignity of a person against whom immoral behavior is directed.

Generally speaking, there are two ways of protecting the structure of social morality:

1.) Preventive and indirect – by means of a legal norm a legislator determines immoral acts considered to be particularly harmful, describes them as forbidden in the disposition of a legal norm and defines a sanction in case of violation.

2.) Subsequent and direct – the court is authorized by the constitution and legislation to make a decision and declare null and void the existing act which it assesses as being contrary to morality of a society. Generally, return of the gained is to follow since the basis of gaining is annulled.

It has to be stressed, though, that ignorant and gullible persons are not protected, since business of good quality implies skills referring to people and risk assessment, for which not many people are capable of; selection on the basis of competence is inevitable. Business competence is not immoral, malevolent acts are. From the above mentioned there arises one chance more to point out the advantage of education in relation to awaiting justice and help. Ptahhotep says: *“The one who hears²¹ will possess the virtue.”*²²

On the essence:

*“The knower wakes early to his lasting form, while the fool is hard pressed. The fool, who does not listen, can accomplish nothing at all. He sees knowledge as ignorance, usefulness as harmfulness. He does all that is detestable, and is blamed for it each day. He lives on that by which one dies, he feeds on damned speech. His sort is known to the officials, to wit: ‘A living death each day!’ One passes over his doings, because of his many daily troubles.”*²³

²¹ In Ancient Egypt listening and learning are synonyms.

²² Uranić, I.: Stari Egipat, Školska knjiga, Zagreb 2002, p. 81.

²³ ibid, p. 82.

This is objective from a bird's eye view. Thousands of years later, by looking at the same issue subjectively and from a worm's-eye view Descartes briefly said: I think, therefore I am.

In the era of networks, abundance of data and information, there is still too little knowledge and even less wisdom. Namely, by understanding relations among data, they become information, by understanding patterns among information there emerges knowledge and by understanding the underlying principles, the knowledge turns to wisdom.

IV. Morality

Ethics deals with issues referring to the source of morality, criteria for moral judgment of human acts and assessment of what is moral. "According to Klaić, *ethics* – from Greek (*ethos*) custom, habit – **science on morality**; its task is not only to introduce us to what morality is and what its main components are, but also to take a critical viewpoint toward the existing moral practice....**Morality** is one of the most fundamental ways of the human relationship towards the world. **Ethics** is though a theory or a philosophical contemplation of that relationship."²⁴ The word ethics originates from a **Greek** word "**ethos**: custom, nature, character".²⁵ The word morality originates from the **Latin** word "**moralis**: character, nature, **mos**: custom".²⁶

From the aforementioned it seems that the terms morality and ethics are to be primarily technically distinguished, where morality is the object dealt by ethics as a theory i.e. as a scientific discipline. Morality is characteristic of people. Morality is a subjective truth, and knowledge tends toward the objective truth.

Sometimes the source of morality is to be found outside a person (in the word of God, in state acts, etc.), which points out morality heteronomy, or in human consciousness, which points out morality autonomy.

Sociology of morality also deals with by the phenomenon of morality, but from another viewpoint, from the position of real condition and significance of morality in a certain society (how things are, not how they should be).

Moral customs, principles and norms, by means of which perception of good and evil, just and unjust, moral and immoral is expressed, fix interpersonal relations, and therefore a moral relation is a social relation. These universal human morality elements hold for all people, they are universal although there are some other opinions. Positive achievements in the field of morality represent

²⁴ Bebek, B. and Kolumbić, A.: Poslovna etika, Sinergija d.o.o., Zagreb, 2000, p. 3.

²⁵ Anić, V. et al.: Hrvatski enciklopedijski rječnik, Book 3, EPH d.o.o. and Novi Liber, Zagreb 2004, p.176.

²⁶ Anić, V. et al.: Hrvatski enciklopedijski rječnik, Book 6, EPH d.o.o. and Novi Liber, Zagreb 2004, p.229.

acquisition of civilization. In every human community there is always a possibility of moral progress and moral downfall as well, bearing in mind that in principle downfall (i.e. taking the line of least resistance) takes place much faster.

Morality is an extremely important human quality. Machines, information technology, etc. do not have morality. They do not have implicit will for action. They must be run and/or programmed by a man. By building up morality numerous debates between science, more precisely technoscience (an inseparable link between science and engineering that produces huge powers making science deeply ambivalent since it can be both useful and harmful to people) and ethics will not be that acrimonious (such as in the case of e.g. euthanasia, biochemistry interventions into mood, reproduction, genes, etc.).

Personal morality (autonomous), but immorality as well, is an efficiency mechanism by which it is primarily form and not content that matters. Competence of an individual to move within the area he limited himself by his principles as boundaries brings a feeling of self-realization. Self-realization leads to self-satisfaction, but it is not permanent and it is renewed when an individual achieves additional (better) results. When an individual tends to the feeling of self-satisfaction, he becomes more efficient. Keeping the same position is simply not possible since self-satisfaction fails to take place. A person, who does not get such feeling on a long-term basis, falls into apathy.

A person whose morality is based upon inadequate values advances only to a certain point at which he comprehends shallowness of his direction. Then the whole personal system falls apart rapidly which is usually supplemented by alcoholism, drug addiction and/or some other form of addiction. These are successful but unhappy people.

Social morality is also an efficiency mechanism which does not refer to an individual but to a community as a whole. It is therefore indispensable here to harmonize personal moralities of all members of the society and this is achieved through content. Thus content of those principles limiting person's activity is of great importance here. That content must be harmonized and universally accepted, providing in that way internal cohesion. Internal cohesion results in the fact that 20 people or 100,000 or 1,000,000 people act as one huge, dominant individual. Here, there exists common self-realization i.e. common self-satisfaction, what makes efficiency of the society unquestionable. Depending on the character of the community, in addition to general values, some special contents are introduced here, so that we distinguish between middle-class morality, Christian morality, doctors' morality, etc.

Immorality implies unacceptable principle contents by both the society and an individual. Unacceptability is defined by environment; hence immorality of

an individual is defined by a social group he belongs to whereas immorality of the society is defined by a broader society, i.e. civilization in general.

From immorality efficiency, in the initial phase, there follows an exceptional volume of its social harmfulness. Wisdom as to determining what is socially acceptable (what is true) is posed here as a problem, and the following is raised as a fundamental question: What if through globalization mechanisms immorality incorporates the whole civilization? A logical answer would be that it is temporarily transformed into morality so that it would be possible e.g. to revive slavery.

Evil intent is a compulsory feature of such activity that is considered immoral with opposition offered to a certain principle, custom or norm.

Moral qualification (personal); first an individual creates his own values. Then he sums them up as a fact under social values and continues to promote them (formed in such way) as personal but also as socially acceptable assets.

Such individual is perceived by the society as its useful and desirable element and from such perception does an individual bring his feeling of purpose up. Harmony between subjective and objective provides general progress of the society.

Absolute morality, in terms of universal civilization values of good and just, is unattainable to a living person, but when a man or the society stops taking notice of moral principles, when they are rejected, there emerges chronic discontent with oneself. It is defined here as **moral pathology**, i.e. immorality.

Protection of morality is carried out in every specific case of violation of moral values which are in the community considered to be institutes worth of protection. Every specific case that is not sanctioned functions potentially as a “precedent” in “common law” legal systems, but by automatism. There is a high level of probability that an immoral act that has not been sanctioned is to expand progressively so that it could become installed as a new morality institute. A delayed reaction is also harmful, because it may result in bipolarization of the community. Every moral community member should deal with protection of morality in general, but to the optimal extent, without exaggeration when it comes to morality of other people. When it comes to public morality, state authorities (court) deal with protection of morality.

What is actually public morality is determined by the court by making a choice between various customs, moral norms and principles which coexist in a certain environment.

“Laws ensure that everybody is treated equally, which could be taken first as a prerequisite for legal security and second as realization of the principle of equality. In that way privileges and discriminations are eliminated equally. However, such formal

equality provided by the law by its structure, as an abstract or a general rule, does not necessarily imply real equality and justice.”²⁷

Under the notion morality the legislator encompasses morality of a broader human community. From morality of a broader community we distinguish **business morality** as good business habits all business people should follow, which has to be harmonized in accordance with morality of a broader community.

By such legal formation of permissivity we are getting close to the notion of fair activity primarily because we attain creative protection of rights and freedoms of other citizens, especially other entrepreneurs, eliminating thereby the problem of statics and boundedness of the range of law as a method for achieving equality and justice at the market. Fair activity ensures that constitutional guarantees are efficiently carried out in real practice.

Morality is not the only corrective element by which we (subsidiary) supplement effects of law i.e. eliminate legal gaps in order to attain a high level of civilized behavior as a universally desirable goal.

Corrective elements also appear as protection of public order in a certain state, application of legal principles referring to national or transnational legislation, especially principles of conscientiousness and honesty and prohibition of abuse of rights. Immoral acts are often at the same time contrary to public order so a question as to their differentiation must naturally arise.

Specific quality of morality lies in its subjectivity and a double function; at the same time morality contains both a motivational and a regulative function. It moves people, changes the present condition towards excellent, but at certain positions it stops its holder by determining both his direction and boundaries of activity.

Public order contains certain values given in the constitution and international conventions. Their role is to give direction, and acts should not be conducted contrary to these values. They are linked to law and institutions from which they rise, and not to a man and his interaction with the community at a specific moment.

V. Codes of ethics in Croatia

The Modern Age has witnessed development of autonomous politics, economy, science and arts that tear apart global ethics posed by theology in the Middle Ages. Although ethics depends on social and historical circumstances enabling its emergence, an ethics decision is primarily situated in an individual whose duty is to choose his own values and goals. A human being, as defined by E.

²⁷ Vrban, D.: *Država i pravo*, J.J. Strossmayer University of Osijek, Osijek 1995, p.56.

Morin²⁸, is a hologram point that contains the individual-species-society entirety, since although it remains completely separated, it contains within itself species-related genetic heritage and a norm of one culture-society. Individual-species-society are inseparable and throughout history there have been disturbances and suppressions among these three ethics elements. Ethics is made rather lay and individual and by weakening responsibility and solidarity, there is a disagreement between individual ethics and state ethics. Corruption of all forms that is on the increase, incivility in general and wild violence cause a sincere need for creation of “new ethics”. Hence much has been said and written about autoethics, by means of which egoism is to be disciplined and altruism is to be developed, then about socioethics, that links us to other people, community and the world in general, as well as about anthropoethics, which especially refers to planetary humanism (its special task is to civilize the earth).

What is of special interest to us in the present day is business ethics as “... the application of principles of ethics to business relations and activities; bearing in mind that many companies that have formal codes of ethics in written form...”²⁹

Amendment to the Companies Act (Official Gazette, No.118/03) regulates the issue of codes of ethics for joint stock companies doing business in the Republic of Croatia. Article 272.a of the said law poses a commitment to the management and supervisory boards of the companies, whose stocks are quoted at the stock market, to issue a statement every year confirming that they acted in compliance with recommendations published in the code of corporation management and that they will continue to act accordingly. In case the society does not hold on to particular provisions i.e. does not want to hold on them in future, it has to be indicated in the given statement which has to be made permanently available to company shareholders.

Code of business ethics (published in Official Gazette, No. 71/05) was stipulated by the Croatian Chamber of Commerce and its decision based upon the Act on the Croatian Chamber of Commerce and the Statute of the Croatian Chamber of Commerce on the session held on 23 May 2005. The Decision entered into force on the same day.

By taking into account the following it was decided on the existence and contents of the Code:

- approving of the value of responsible and ethics-based behavior of business subject as a necessary requirement for effective functioning of the market and integration of Croatia economy into international flows,

²⁸ Morin, E.: *Etika*, Masmedia, Zagreb, 2008.

²⁹ Bebek, B. and Kolumbić, A.: *Poslovna etika*, Sinergija d.o.o., Zagreb, 2000, p. 7.

- promoting development of good relations and loyal competition among business partners and with business environment these business subjects do their activities in,
- respecting specific qualities of individual business subjects and activities,
- stressing the need for an open public dialogue that will set basic ethics guidelines which will encourage business people to make decisions in favor of their business subjects and the society as a whole,
- promoting corresponding care for the environment.

The Croatian Chamber of Commerce has recommended to all of its members and others (including joint stock companies) to adopt the rules of the Code. Fundamental guidelines of ethical behavior of business subjects within the framework of the Croatian economy are laid down by the Code.

Code signatories assume an obligation of acting in accordance with general principles of responsibility, truthfulness, efficiency, transparency, quality, acting bona fide in good faith and respect for fair business practices. An obligation in relation to doing business in a socially and ecologically responsible way is also pointed out. At the end of the act, a Code acceptance form is enclosed as well.

Code of ethics of government employees (published in Official Gazette, No. 49/06) was passed by the Government of the Republic of Croatia. It regulates rules of good behavior of government employees based upon the Constitution, ratified and published international agreements, as well as laws and other regulations of the Republic of Croatia. It contains rules of good behavior of government employees towards citizens and in interrelations.

Employees are required to treat citizens professionally, impartially and nicely. By their expert knowledge employees are to help citizens execute their rights, acting thereby in compliance with the principle of legality and the public interest principle.

Interrelations among employees are based upon mutual respect, trust, cooperation, politeness and patience.

Numerous other codes have been published in Croatia (in Official Gazette), e.g.:

- Code of lawyers' ethics (Official Gazette, No. 64/2007),
- Code of judicial ethics (Official Gazette, No. 131/2006),
- Code of ethics for psychologists (Official Gazette, No. 13/05),
- Code of medical ethics and deontology (Official Gazette, No. 47/04),
- Elections code of ethics (Official Gazette, No. 178/03),
- Code of professional ethics (Official Gazette, No. 40/99), etc.

VI. Humanity, religion and science

Ptahhotep's instructions belong to the oldest known study. Although they are older than numerous religious records, they are compatible with them to a great extent, and in principle modern science has not gone too far away from them. A conclusion may be drawn that justice and injustice, as well as good and evil are universal categories and **promotion of the good and the just as universal categories is a fair activity.**

Humanity is the most perfect form of living on earth. A man has the greatest possibility of adapting to the environment and the highest efficiency in forming the environment. A man has the greatest possibility of managing the living world on earth. He can eliminate a certain form of life (exterminate a plant and/or animal species). He can also destroy certain spiritual gains. Thus, a man possesses extreme efficiency and therefore he has great responsibility. Due to the mechanism of natural balance a wolf can never exterminate rabbits, does, or any other species used as food. A man can. Does natural balance work even within the human race? Do wars, pandemy, atmospheric disturbances occur if we ignore the fact of our own responsibility?

Topics opened up by Ptahhotep as the advice of the old *“adhered to by gods themselves in ancient times”*³⁰ are not less current today.

Religions try to retain the old knowledge; they command the believers to practice its application, but with due respect paid to certain differences regarding comprehension and application.

Some think ethics is extracted from religion and that ethics is particular so that comprehension of the good and the just depends on where and when it is taken into consideration. Extraction of ethics as a theory from any world religion means to deprive it of its very essence and space for activity it carries out to the benefit of all. This means to start from the middle and not from the beginning, since as already mentioned, theory of ethics is older than all religions existing in our environment. It is as old as human civilization. More than 4,000 years ago, Ptahhotep outlines theory of ethics as *“the advice of the old”*.³¹

Science has its path open, a direct one. Science and religion may act here, each in its own area, since space for activity is huge and every progress is extremely useful.

VII. Conclusion

Respecting written regulations is *condicio sine qua non*. By setting this condition as a goal to a higher level is our existential commitment, since in the

³⁰ Uranić, I.: Stari Egipat, Školska knjiga, Zagreb, 2002, p. 75.

³¹ *ibid*, p. 75.

situation when others tend to excellence, we cannot tend to sufficiency. This is not only the question of reputation and competition, but also the question of survival.

When our community makes efforts towards a state of law i.e. rule of law (in the form considered in “civil law” states), it sets its goal too low. Therefore, we must insist on including correctives into legal reality, we must tend to morality in the Republic of Croatia.

Even more so, since in the processes of unification and harmonization of legislation in the European Union all “civil law” states implement certain institutes from the “common law” system which brings them a stronger application of judicial practice but also principles, especially customs, in addition to positive laws.

Morality is a feature of an efficient subject aware of values of personal limits the subject is exposed to for the purpose of attaining a civilized quality of the environment it exists in. Efficiency is that what distinguishes a moral person or community from other persons i.e. communities which also respect boundaries in form of rules, customs or principles.

Morality also protects persons in power, their families and friends from the pressure power as a phenomenon may exert on its holder as well. It is dangerous when a person not capable of controlling himself properly runs a certain community.

Today, power is partly based upon money. Money is a powerful instrument, but it is not a goal.

We define our goals ourselves in accordance with our developmental needs, rationally, and money is but a generalized medium by means of which it is easier to master complexity and uncertainty on the way to realization of our own goals.

With this paper we wanted to point out at the fact that high morality of a man and a community was an important characteristic of efficient systems in ancient history as it is now in modern times. There is both space and time universality of this phenomenon.

We also tried to point out at the fact referring to a close relationship between morality, work and wisdom, which is also universal in space and time. It makes the essence of harmony in a certain community. In communities where harmony has not been reached, strength reigns, there wise people keep quiet, and the powerful ones govern in the way they consider to be wise.

Disharmony does not last long in a historical setting, but it can last long enough to ruin living of several generations.

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USE AND DEPLETION OF NATURAL RESOURCES: A MULTI-POLICY MODEL FOR SUDAN

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Abstract

The paper develops a model that focuses on the agricultural use of land and its depletion. The model shares common features with computable general equilibrium (CGE) models. It is used to address two questions. First, should there be a concern for resource degradation as the gross domestic product (GDP) is increased, what are the prospects for a green GDP? Secondly, which policies are more effective than others? As alternative policies, we treat investment in human capital, price incentives, property rights and poverty reduction.

Key words: Economic development, resource degradation, CGE models

I. Introduction

The conflict between economic growth and environmental sustainability is nowhere more obvious than in developing countries. In these countries, the overwhelming majority of people are dependent for their economic growth on agricultural activities that are highly related to land use and depletion.

Four adverse barriers are commonly acknowledged. First, the inaccessibility of poor farmers to modern technical knowledge and information leads to misuse of natural resources [1, 2]. Second, farm-gate prices in most developing countries are far below their world market levels. This discourages farmers' incentives for

soil conservation and encourages soil depletion [3, 4, 5]. Third, lack of well-defined private property rights over natural resources lead to overexploitation and degradation of these resources [6, 1]. Fourth, pressured by their poverty, poor people adopt short-term survival strategies, and overuse land resources, thus giving environmental protection a low priority [7].

In spite of these adverse barriers and their negative consequences, it has not been established for badly affected developing countries whether economic growth net of land degradation is positive or negative. In other words, if the notion of green GDP can be quantified, it is important to establish whether it is on the increase or decrease.

This paper focuses on modelling the trade-off between economic growth and resource degradation. We take the Sudan as a case study, a country very rich and diverse in land potential but equally so with ecological risks.¹ One concern will be to build a model capable of establishing, quantitatively, future prospects of green GDP in the Sudan, and identifying whether there are reasons for alarm or not, and to what extent.

A second concern is to develop a modelling framework capable of evaluating alternative policies for reducing the above trade-off.

We will show that the prospects for resource friendly economic development in the Sudan - a rising green GDP- are weak in the medium-run, but that there are some corrective mechanisms that improve the situation in the longer run. There is also a range of policy choices that could effectively reduce the trade-off between growth and degradation.

There are a few policy models that explore the links between economic growth and environment and conservation in the context of agriculture and (or) forestry. Those focusing on agriculture include incentives for upland farmers in Indonesia for investing in soil conservation as an alternative to existing methods of cultivation that lead to considerable soil erosion [10], Others examined the deforesting behaviour of smallholder agriculturists in rural Nepal as off-farm labour market conditions change in the context of an open access regime [11]. There is also the computable general equilibrium (CGE) model for Costa Rica in

¹The Sudan is a typical country in which the four resource degrading factors apply [8,9,5]. For example, the low level of farmers' education and training leads to overexploitation of arable land. Next, price controls imposed by the government on irrigated agriculture have discouraged farmers from adoption of long-term sustainable cultivation practices. Besides, land tenure insecurity has pushed farmers in mechanised agriculture to "mine" arable land in pursuit of short-run gains. Finally, poverty in subsistence agriculture has compelled farmers to exploit arable land unsustainably. Furthermore, open access to woodland is a major cause behind the excessive clearance of forestland, and lack of well-defined property rights over grazing land has left no incentives for livestock owners to invest in improving the prevailing conditions in grazing land.

which the effects of economy-wide government policies are traced on development of agriculture and forestry [6]. Some models have assumed a narrower scope in studying the environmental effects of stabilisation and structural adjustment programmes for Thailand [12] and Malawi [13].

The key conclusion drawn from a review of this literature is that the policy modelling of trade-offs between growth and conservation in the development context emphasises the need for joint appraisals of economic incentives, property rights, population and poverty pressures and modern farming knowledge. However, available models do not go beyond focussing on one aspect to the exclusion of others. The models also emphasise the importance of land substitution between agriculture and forestry and the importance of relative prices in determining the outcome, supporting the use of general equilibrium models in modelling the problem. This paper represents a step in the directions mentioned above. The economy-wide model we develop thus incorporates the joint appraisal of economic incentives, property rights, poverty pressure and the role of modern farming knowledge in the determination of sustainable growth. The model elaborates on links between agriculture, forestry, livestock, the AFL sectors, and the rest of the economy. The model gives also due emphasis to relative prices in influencing the allocation of resources, and shares common features with CGE models.

Section 2 focuses on the model specifications for agricultural activities. Section 3 includes remarks on estimation, calibration, and results of the model under alternative pricing closures. Section 4 uses the model to appraise alternative policies to reduce the trade-offs between growth and conservation. Section 5 concludes the study.

II. The model

II.1. Main features

The model we formulate below consists of 13 equation sets falling into 54 equations. This paper will focus on equations 1 to 6, which give specifications for three main sectors of agriculture in the Sudan. These are commonly classified as irrigated, mechanised, and subsistence, $i = 1, 2, 3$, respectively. The model contains a forestry sector and a livestock sector whose developments have environmental consequences as well. There is also a sector for the rest of the economy. We shall be brief in our elaboration on these.

Cultivated land by sector is denoted by N_i .² The product mix is different for the three sectors of crop agriculture, but not exclusively. We assume the product

² Irrigated N_1 represents about 24% of the total cultivated area in Sudan, it is generally fixed and its expansion requires significant public investments in irrigation works. Mechanised N_2 and subsistence

of each sector to be a constant composite of all crops produced in that sector. Furthermore, each of the three sectors has a different land tenure arrangement: farming knowledge, marketing channels, and productivity performance.

The irrigated land, N_1 , producing wheat, cotton, sorghum and groundnuts, is composed of government owned schemes run by tenants. Tenancy renewal is automatic and the right of heirs to inherit the tenancy is recognised. There is a very limited freehold. Government marketing boards set the price that producers in irrigated agriculture receive at a lower rate than the international market price at which the produce is exported. While this practice can have the advantage of stabilizing off-farm produce prices, it can form a disincentive to produce more in times of rising international market prices [14].

The mechanised land, N_2 , using mechanical traction power, produce sorghum, sunflower, sesame, and millet as the main crops, and market them freely. N_2 is composed of privately owned large-scale schemes mostly on leasehold basis from the state for periods between 15 to 25 years. Renewal of lease is not automatic, and farmers rate the tenancy system as insecure [15].

The subsistence land, N_3 , falling in small-scale family farms, uses traditional methods of cultivation to produce millet, sorghum, sesame, and groundnuts as main crops, with a limited production of rain fed cotton. All produce is freely marketed. Land tenure here is based on customary rights and is more secure relative to the one based on leasehold. The problem here is that poor subsistent farmers, in their daily struggle for survival, may often find themselves compelled by poverty to adopt cultivation practices that are harmful for the long-term sustainability of land productivity.

A crucial input that determines the yield is the farming knowledge of farmers. It stands in the model for education, training, information and experience with modern technical packages for crops [2]. Due to extension services provided by government, farmers in irrigated land N_1 have better access to education, training and information than farmers in mechanised N_2 , while the least access is in subsistence N_3 .

As regards the crop yield per unit of land, data show that the irrigated comes first, mechanised second, and subsistence third. This applies to cases of one and the same crop that is being produced in all three sectors, as well as when the aggregate productivity value per feddan is compared for the three sectors; a feddan is equivalent to 0.42 hectares. As regards income, farmers in irrigated agriculture

N_3 are rain-fed and they form 33% and 43%, respectively. Rain fed land can shift between subsistence and mechanised cultivation, very much governed by market forces, depending on the relative value of land in the two alternatives. The rest of rain fed land is occupied by forestry N_4 and livestock N_5 . In 1990, N_4 was twice N_5 .

are a middle-income group, while those engaged in mechanised agriculture are a high-income group while subsistence farmers are the low-income group.

The above features of Sudanese agriculture are manifested in our model by focussing on different factors that determine patterns of land use, productivity and degradation in the different sectors. In irrigated agriculture, land use is specially influenced by the price farmers receive for their cash crops. In mechanised agriculture, land use is dominated by the security of land tenure, while in subsistence agriculture basic needs considerations are dominant. Furthermore, land use is dependent on the amount of farming knowledge farmers have, which happens to vary between the three sectors. Therefore, changing the different behaviours of the farmers in these three sectors requires different policies that address varying needs and motivations underlying their behaviour. The proposed policy model incorporates these sectoral differences.

Forestry activities can lead to deforestation and depletion, which jeopardise the sustainable exploitation of land. The model specifies the driving forces behind deforestation, which are the lack of well-defined property rights and poverty. Likewise, for the livestock sector, the model specifies the overstocking of grazing land, a situation where animal population is in excess of grazing land carrying capacity, and hence leads to land degradation. The model elaborates on determining factors such as the size of grazing land, its vegetation yield and the growing number of grazing animals.

Land has generally shifted between the three modes of agriculture, forestry and livestock, but not in all directions. Extension of N_l is a policy decision, with the documented shift having been from livestock and forestry towards mechanised and subsistence. The relative prices for land in alternative uses are the dominant mechanism behind the eventual shift. After undergoing some restructuring investment cost, the transformed land is deployed to produce the average yield of its new destination. The model follows this factual stylisation.

Another important feature of the model is that practically all agricultural products of the Sudan are exportable. World markets thus determine the prices of these crops. Producers and exporters in a small player like the Sudan tend to look at these world prices as given. There can be a domestic price lower than the world price, as in the case of the irrigated sector due to government price controls; but, the given world price at the macro level cannot be circumvented. There is, therefore, a reason to model domestic prices of the agricultural sectors in terms of exogenous world prices. In contrast, the domestic price level of the non-agricultural sector is endogenously determined as it includes both tradables and non-tradables.

11.2. Specifications for the agricultural sectors

Equation (1) is formulated generally for the agricultural sectors and postulates that an average piece of land N_i has a sustainable productivity that can be standardised in an index Q_i , which ranges from zero to unity, with unity representing the highest sustainable productivity possible. The sustainable productivity index reached in any actual case is determined by the nature and degree of land exploitation, which, in turn, is influenced by four conditions that include farming knowledge K_i , market incentives P_i , land tenure security S_i , and satisfaction of basic income needs for the poor $Y_{i,poor}$.

$$Q_i = q_i(K_i, P_i, S_i, Y_{i,poor}) \quad i=1, \dots, 5 \quad (1)$$

Primary inputs of capital, labour, and intermediate inputs of fertilisers, water, seeds, etc., which correspond with a specific level of Q_i , are assumed to be forthcoming and do not form a bottleneck. This allows us to deal more at length with the four factors behind sustainable productivity. Understanding the shortfall in Q_i in terms of the four factors is equivalent to answering the policy question of why the sustainable productivity of land resources is not reached. The dependence of Q_i on K_i , P_i , S_i and $Y_{i,poor}$ takes the form of a Cobb-Douglas function in the agricultural sectors. The degree of influence depends on the specific agricultural sector.

We can now treat specification of the equation for each AFL sector separately. The first factor that determines farmers' sustainable productivity index is their farming knowledge K_i . We take the proportion of farmers who have adequate farming knowledge and experience to represent K_i . This variable is controllable for policy purposes where its effect on raising Q_i is captured by elasticity α_i . Farming knowledge is highest in the irrigated sector, is less in mechanised, and least in subsistence. The differential significance of the knowledge effect in the three sectors declines accordingly and is reflected in the following values: $\alpha_1 < \alpha_2 < \alpha_3$.

Market incentive is a second factor. This is approximated by the ratio of the price per unit of crop that farmers actually receive, $(1-\tau_{ig})P_i$, and the world price that farmers generally expect P_i . Here τ_{ig} is the tax rate withheld by the government. It is argued that the more the producer's farm-gate price approaches the expected world price the more the farmers have the money and the incentive to undertake soil conservation and improvement measures. This incentive effect is captured by the elasticity β_1 . This factor is especially relevant for irrigated agriculture, so that $\beta_1 > 0$ while $\beta_2 = \beta_3 = 0$.

Tenure security is a third factor. In the absence of land tenure security, farmers adopt short-term cultivation practices, namely, negligence of fallow periods, crop

rotation and soil conservation and improvement measures. All of these exhaust and degrade the land. S_2 is the ratio of actual lease period to the relatively secure one, which is generally viewed to be 40 years; and its effect is captured by γ_i . This factor is especially relevant in mechanised agriculture where the actual lease term is between 15 and 25 years; hence, we focus on $\gamma_2 > \tilde{\gamma}$ while $\gamma_1 = \gamma_3 = \tilde{\gamma}$.

Satisfaction of basic needs is a fourth factor. We represent it by the ratio of the poor farmers' income actually earned from all sources to a pursued or desired basic needs income, $Y_{i,poor} / Y_{i,desr}$, and its effect by δ_i . Poor farmers, unable to satisfy basic needs and having a limited time horizon, are bound to overexploit the land during their lifetime [16]. It has been regularly observed that the negligence of the fallow period, crop rotation and soil conservation and improvement measures in subsistence rain fed agriculture reflects both the poverty and the lack of necessary farming knowledge in this sector [16]. Subsistence farmers, who are the poorest, are driven by this factor to cultivate the land more frequently and, hence, the fallow period becomes shorter and shorter, or ignored completely. Ignoring crop rotation reflects the limited options they have in pursue of a basic income.³

Poor farmers cultivate mainly food crops (sorghum and millet) on which they depend for their survival, and it happens that these food crops are more soil erosive than others [17]. The lack of crop rotation leads to soil nutrient depletion and soil erosion and consequently declining yield. Accordingly, we take $\delta_3 > \tilde{\delta}$, while $\delta_1 = \delta_2 = \tilde{\delta}$.

The above stylised facts for irrigated, mechanised and subsistence agriculture result in the following specifications of Q for the three sectors. We opt for a Cobb-Douglas specification, where $\alpha_i + \beta_j = 1$, $\alpha_2 + \gamma_2 = 1$, and $\alpha_3 + \delta_3 = 1$.

$$Q_1 = q_1 (K_{1,t-1})^{\alpha_1} (1 - \tau_{1g})^{\beta_1} \tag{1. 1}$$

$$Q_2 = q_2 (K_{2,t-1})^{\alpha_2} (S_{2,t-1})^{\gamma_2} \tag{1. 2}$$

$$Q_3 = q_3 (K_{3,t-1})^{\alpha_3} \left(\frac{Y_{3,poor,t-1} + T_{g3}}{Y_{3,desr}} \right)^{\delta_3} \tag{1.3}$$

³The desirable income can be simply modelled as their past earned income plus a small addition $Y_{i,t-1} (1 + \gamma_i)$. Obviously, the desirable and actual income they make in any one year can deviate from each other. We also model the situation where the poor farmers receive transfers from government T_{gi} meant to help them reach their desirable income. Poor people, in their desperation to secure their basic needs may overuse land resources and cause depletion. Therefore, government can help them through a transfer payment to partially close their poverty gap, and prevent land overuse and depletion.

Attention can be turned now to determination of the sectors' physical output. Equation (2) gives the agricultural sectors' actual annual yield per feddan, O_i , as the yield of the base year $o_{i,0}$ and its annual growth rate o_i as determined by production technology, and the sustainable productivity index, Q_i . It is assumed that complementary inputs to realise the actual yield are readily available.

$$O_i = o_{i,0} (1 + o_i)^t Q_i \quad (2) \text{ for } i=1,2,3$$

Equation (3) gives the value per feddan Z_i in sector i as the share of the land factor in the yield per feddan valued at world prices $p_i P_i$ and discounted with a constant discount rate r . In this equation, small p_i is the price of the product of sector i in the base year, and capital P_i is the relative price index of the product of sector i to that of the irrigated sector 1, the latter being taken as a numeraire.

$$Z_i = \left(\frac{b_i p_i P_i O_i}{r} \right) \quad (3)$$

Equation (4) specifies $c_i Q_i$ the mechanism behind distribution of types of land other than the predetermined irrigated land. The allocation is fully governed by market forces [18]. In this equation changes from a base year in land allocation between type i and mechanised agriculture are formulated as a function of relative changes in last year's land value as compared to the base year. Hence, λ is the land value elasticity of substitution between sector $j=2$ (mechanised land) and sectors $i = 3,4, 5$ (other lands). Practically speaking, land conversions proceeded in the past from forestry and livestock to subsistence and mechanised agriculture, but mostly to the latter, making it logical to take land values of mechanised agriculture as the numeraire for the purpose of clearance of the land market.

To account for varying investment costs c_i in the conversion of land i from one use to another, and the changing states of sustainable productivity Q_i of the concerned land i , the term is deducted from the value of the concerned land i as per last year and the base year. Note that in this equation, $j=2$.

$$\frac{N_i}{N_j} = \frac{N_{i0}}{N_{j0}} \left[\frac{Z_{i,t-1} - c_i Q_{i,t-1}}{Z_{i0} - c_i Q_{i0}} \bigg/ \frac{Z_{j,t-1}}{Z_{j0}} \right]^\lambda \quad (4) \text{ for } i=3,4,5$$

Equation (5) fixes the sum of all land while allowing annual reallocations between the individual sectors to occur, except for irrigated land $i=1$, which is assumed constant throughout all periods

$$\sum_i N_i = N_1 + \sum_i N_{i,t-1} \quad (5)$$

Equation (6) gives the value of agricultural output, X_i , of sector i as the price of the product in the base year p_i weighted by the relative price index for the current year P_i , the numeraire being the price of the irrigated sector. The price expression is then multiplied by both the actual yield per feddan O_i and the land under cultivation in that sector N_i .

$$X_i = p_i P_i O_i N_i \quad (6) \text{ for } i=1,\dots,3$$

The model includes similar equations as the above for forestry and livestock but appropriately adapted to correspond with the particulars of these activities. A simplified production function is employed to model the production capacity of the non-agricultural sector.

There are additional equation sets that equally apply to the whole economy, and are typically present in CGE models. These equations relate to the intermediate deliveries between sectors, demand for consumption goods by sector, demand for investment goods by sector, and exports and imports by sector. In turn, private consumption is obtained from income equations of household groups based on their remuneration and factor use, and private consumption equations. Public consumption is exogenous. Private investment is determined in a behavioural equation. Public consumption and public investment are given. Furthermore, there are balance equations for foreign payments, and for the equality of demand and supply of goods by sector.

In solving the model we take as exogenously given variables those of K_p , S_p and imports and exports for $i=1,2,3$; sectoral relative price indices P_i for $i=1,2,3$; total land $\sum_i N_i$ and irrigated land N_i ; desired income $Y_{3, desr}$, and public transfers T_{gi} . The endogenous variables relating to agriculture are Q_p , O_p , Z_p , N_i (except irrigated) for $i=1,2,3$. As stated earlier, the model contains other exogenous and endogenous variables relating to forestry, livestock and the non-agricultural sector that covers the rest of the economy. All in all, the model counts a total of 54 endogenous variables falling in a determinate system of 54 equations.

In evaluating the results of the alternative policy simulations we put focus on two important considerations: (a) what is the trade off between created GDP and resource degradation for each simulation? This can be expressed in net terms as the Green GDP, if the cost of resources degradation can be deducted from the GDP. (b) Any policy will require the use of public resources that will be ultimately financed by tax revenue. The point is then to determine the budgetary implications of each policy simulation, and the relative worthiness of each policy

in terms of the benefits and costs. For this purpose, we specify two equations (7) and (8).

$$D_i = c_{id} (p_i P_i b_i O_i) (1 - Q_i) N_i \tag{7}$$

Equation (7) underscores the effects of environmental degradation by estimating the degradation loss D to be incurred so as to reclaim foregone sustainable productivity, this being defined in relation to the desirable value of $Q_i = 1$. Reclamation cost per feddan has been generally estimated for the average piece of land of average sustainable productivity at about 10 % of the foregone yield per feddan as a result of resource degradation, i.e. $c_{id} = 0.1$. Foregone yield per feddan is the lost product of the land factor $b_i O_i$, valued at the world price of the produced commodity $p_i P_i$; the degree of loss being dependent on the degradation level $(1 - Q_i)$. If Q_i is at its ideal level of 1, then the reclamation cost becomes zero.⁴ The degradation loss per feddan is then multiplied by N_i to give total degradation loss.⁵

The indicator of land degradation, $D = \sum_i D_i$, is useful in highlighting the environmental loss of economic growth since D gives the welfare loss due to natural resources' misuse. The equation can tell also how simulated agricultural policies will affect environmental degradation. The other aim variable is GDP, which can be denoted by $Y = \sum_i Y_i$. Deduct D from the actual gross domestic product Y and one can obtain a value for the green GDP. Divide Y by D and one gets a relative measure of the trade-off, which gives the created income per unit of degradation. Results from the absolute and the relative indicators do not necessarily point in the same direction.

The performance of degradation indicator D_i is decomposable into three elements: changes in yield O_p , changes in sustainable productivity Q_p , and changes in land exploited N_p , although it is clear from the model that all three components are interrelated. Higher Q_i enhances O_i and results in shifting land from more to less costly degrading sectors.

Equation (8) states that government, by imposing price levies on irrigated agriculture, appropriates the difference between the world price for the irrigated product and that which it offers to farmers. The revenue that the government appropriates in this way is used to finance several items relating to agriculture and

⁴ One alternative is to define foregone sustainable productivity in relation to the base year value of $Q_{i,0}$. So instead of the term $1 - Q_{i,t}$, it can be suggested to have $Q_{i,t} - Q_{i,0}$. If $Q_{i,t} \Rightarrow Q_{i,0}$, then there are no degradation costs. And, thus, the notion loses its relevance, even though there are costs required for upgrading the land to its sustainable productivity. Hence, we work with $1 - Q_{i,t}$.

⁵ The cost of reclaiming a degraded feddan of arable land of an average quality is found to be about 10% of its foregone yield [20].. Note that arable land degradation can be seen as a process that ranges from mild degradation to extreme desertification, in which case c_{id} rises sharply. We keep here to a constant value of c_{id} , since, in any case, the degree of degradation is included via $1 - Q_i$.

the rest of the economy. One item of government expenditure is general purpose public expenditure, denoted by G . The plausible and realistic policy assumption is that, the part of government revenue that goes to finance general purpose expenditure, should not fall below a certain lower limit. This lower limit is set at 50% of the government revenue from taxing agriculture, i.e. $G \geq 0.50 \tau_{1g} P_1 O_1 N_1$, which is consistent with governing practice in the Sudan. Any evaluation of the different policy changes in agriculture should consider whether the outcome of G , as a result of these policy changes, meets that minimum threshold.

Next, there is the cost of policies relating to transfers to poor populations in subsistence cultivation and forestry $\sum_i T_{gi}$. Then, there is the cost of policies for education and training of farmers $\sum_{i=1}^3 c_{im} M_i \Delta K_i$.

$$(\tau_{1g} P_1 O_1 N_1) = G + \sum_i T_{gi} + \sum_{i=1}^3 c_{im} M_i \Delta K_i \quad (8)$$

III. Estimation and forecast

The base year of the model is 1990. A Social Accounting Matrix (SAM) of Sudan for 1990, constructed in the context of the model, provided the base year data for most variables and estimates of some coefficients.

The crop mix plays an important part in the present study. Crop data were aggregated following the product mix per sector to give main variables by sectors. This applies to the crucial variables of land cultivated, land productivity, agricultural production, land values, and the sectoral time series of price indices.⁶

Additional available data for other main variables allowed a calibration for 1990-95, which was used to estimate missing values of some parameters. Various studies undertaken by the Ministry of Agriculture in Sudan allowed estimation of elasticities relating to the sustainable productivity indices. Once the calibration was done, the entire model was solved annually for ten years over the period 1991-2000. In these solutions, the exogenous variables were set to grow at their past growth a decade before the base year.⁷

⁶ Relative prices between the agricultural sectors have moved very closely with those of the relative indices based on world market prices, so that working with the latter is justified. The strong inflationary tendencies in the Sudan were neutral in effect as far as these relative prices are concerned. The price elevation is about 9 times for each of the AFL sectors. Taking the irrigated price index as numeraire, the relative price indices for all agricultural sectors are calculated accordingly, and set to grow exogenously based on the past growth path of relative world market prices. Note that, in contrast, the price index for the rest of the economy sector is endogenously solved. For more details, see Abdelgalil [22].

⁷ The level of desired basic needs income, Y_{dev} , for the poor population engaged in subsistence agriculture, about 26% of the population, is calculated as being in the range of 13% of the gross domestic product, and is assumed to grow annually at 5%, same as that of GDP in the past. Government transfers to the poor population in subsistence and forestry sectors, T_g , for the purpose of meeting basic needs is set to

The model is solved to reproduce the observed values in the year 1990, and solutions for the subsequent ten years. This is done under two price closure scenarios: (a) unchanging relative prices, and (b) exogenously changing relative prices for the agricultural sectors as are projected from world market tendencies. As the future course of exogenous relative prices is difficult to predict, consideration of two variants is desirable. It is likely that the actual relative prices in the future may be somewhere between the two scenarios. It is noted that the numerical differences in relative prices between the two scenarios happen to be minor, and, hence, the impact is minimal.⁸ Even though the outcomes are not significantly different, comparing the growth and environmental results under unchanging and changing relative prices can give insight into the relevant aspects of world market price tendencies. Will these tendencies favour growth or the environment?

Table 1: Annual growth rates of main variables in base run projections of economy-wide and decomposed models, under unchanging and changing relative prices, 1990-2000.

M.=Million, LS= Sudanese Pound

Symbol	Description	Measurement	Base year 1990	Unchanging Relative Prices % p.a.	Changing Relative Prices % p.a.
Q1	Sust. productivity	Index	0.700	0.000	0.000
O1	Yield	Metric Ton	0.625	4.900	4.900
Z1	Land value	LS	56241	4.900	4.900
N1	Cultivated land	M. Feddan	5.0	0.000	0.000
Y1	GDP irrigated	M. LS	23647	4.900	4.900
D1	Degradation loss	M. LS	843	4.900	4.900
Mechanized Agriculture					
Q2	Sust. productivity	Index	0.463	0.000	0.000
O2	Yield	Metric Ton	0.220	4.900	4.900
Z2	Land Value	LS	20971	4.900	4.199
N2	Cultivated land	M. Feddan	7.0	1.875	1.887
Y2	GDP mechanized	M. LS	11781	6.867	6.880
D2	Degradation loss	M. LS	788	6.867	6.880
Subsistence Agriculture					
Q3	Sust. productivity	Index	0.393	0.788	0.757
O3	Yield	Metric Ton	0.095	5.727	5.694

zero in the year 1990, but is simulated at positive levels in the policy runs. Agricultural labour force is assumed to grow by an annual growth rate of 2.7%, as it did in the previous decade.

⁸ The relative price indices are projected to move within a narrow range. For instance, while the numeraire price index of irrigated grows at 0.048% per annum, that of mechanized grows at 0.041%, giving a declining relative price index of mechanized at $P_2=1.041/1.048=0.9933$. The magnitudes of the other indices are $P_3=0.9924$, $P_4=0.9952$, $P_5=0.9943$. These projections show P_4 and P_5 standing for forestry and livestock, to experience slightly more favourable price trends than P_2 and P_3 , which stand for mechanized and subsistence, respectively.

Z3	Land value	LS	2156	5.727	4.887
N3	Cultivated land	M. Feddan	9.0	2.549	2.446
Y3	GDP subsistence	M. LS	5408	8.422	8.280
Y3,poor	Income poor	M. LS	13690	6.624	6.560
D3	Degradation loss	M. LS	117	7.834	7.717
Whole economy					
$\sum_i Y_i$	GDP all sectors	M. LS	192660	5.181	5.139
$\sum_i D_i$	Degradation loss all	M. LS	2234	6.284	6.283

The unchanging relative prices closure. We note for this closure in Table 1, that variables of the irrigated sector are shown to grow annually at 4.9%, being fully dependent on the projected growth of the yield, O_1 , since neither sustainable productivity, Q_1 , nor irrigated land, N_1 , undergo changes.

As subsistence farmers see their income, Y_3 , grow, their cultivation practices improve slightly and their sustainable productivity, Q_3 , is raised. In contrast, the mechanised sector undergoes no change in Q_2 . The result is that the subsistence yield, O_3 , grows faster than the mechanised, O_2 , making possible a greater appreciation of the value of land for subsistence, Z_3 , than mechanised, Z_2 . Results show that the subsistence and mechanised sectors will increase their land at the cost of other uses (forestry and livestock) due to the relatively higher value of land in agriculture, but that relatively more land will shift to subsistence than to mechanised agriculture. Growth of production, X , and income, Y , will thus be higher in subsistence than mechanised, but growth in degradation loss D is about the same, indicating less degradation per unit of growth in subsistence compared to mechanised. Taking all of agriculture together, we find that total agricultural output, $\sum_{i=1}^3 X_i$, and total agricultural income, $\sum_{i=1}^3 Y_i$, grow annually by 6.01%, while agricultural degradation loss, $\sum_{i=1}^3 D_i$, grows faster at 6.03%.

For the economy as a whole, GDP grows annually at about 5.2%. Although degradation increases at a higher rate than income, deducting D from Y gives positive and increasing values of what can be termed a 'green GDP'. This is demonstrated in Table 2.⁹

⁹Note that degradation for the whole economy, 2234 MLS, includes the degradation impact of irrigated, mechanised and subsistence agriculture, these are together 1748 MLS; and the degradation impact of forestry and livestock activities, this is 486 MLS.

Table 2: Green GDP and degradation loss by sector of activity under unchanging and changing relative prices, 1990-2000.

URP = unchanging relative prices; CRP = changing relative prices

Values are measured in million Sudanese pounds (LS)

	Green GDP (Y-D)			Degradation loss/ GDP (D/Y)		
	1990 Base		2000 CRP	1990 Base	2000 URP	
Sector	Value (2)	% Δ p.a.	% Δ p.a.	Value	% Δ p.a.	% Δ p.a.
Irrigated	22804.3	4.900	4.900	0.036	0.000	0.000
Mechanized	10993.4	6.867	6.880	0.067	0.000	0.000
Subsistence	5291.1	8.435	8.292	0.022	-0.542	-0.520
Economy	190426.0	5.167	5.125	0.012	1.049	1.088

The changing relative prices closure. This closure can be argued to be the more complete closure since it captures substitution effects due to both internal and external stimuli, and thus gives a more comprehensive treatment of land reallocation between the sectors. This closure incorporates the working of “future” changes in relative prices in reallocating land. The future price changes, as depicted by the observed post-benchmark trends of world prices for 1990-2000, favour forestry and livestock to mechanised and subsistence. This period is characterized by relative world prices that are environment-friendly. The result for the Sudan is a moderation in the shift of land away from forestry and livestock to mechanised and subsistence, as compared to the solutions from the closure that specifies unchanging relative prices. The outcome is a lesser degradation, but, also, a lower growth. The improved environment is demonstrated to occur at the cost of less economic growth.

In agriculture, the irrigated sector remains unaffected. Performance of the mechanised improves and that of subsistence worsens, reflecting the slight positive bias of world prices to mechanised over subsistence. The reduced performance in subsistence reduces incomes and drives down sustainable productivity, land yield, and land value, making it less attractive for subsistence to attract more land.

For the whole economy, GDP and degradation costs grow at slightly lower rates than in the previous closure. The reduction in GDP growth is 0.042 percent p.a. (i.e., 5.181-5.139), while the reduction in degradation growth is 0.001 percent p.a. (i.e. 6.284-6.283). As was stated above, this study shows that the world pattern of changing relative prices at the turn of the century can be considered environment friendly, this being at the cost of a reduction in GDP growth. In relative terms, the loss in economic growth can be assessed to be more significant in magnitude than the gain in environment, if equal weights are assigned to a percentage change in growth and environment. The differences are too wide to be significantly modified by uncertainties in the estimated model parameters.

Several conclusions can be drawn from the above discussion. First, the model predicts land shifts from forestry and livestock uses to mechanised and subsistence because of relatively more rising land values under cultivation, caused by relatively higher sustainable productivities, Q_i , and, to a lesser extent, land yields, O_i , in agriculture.

Second, overall production and income would increase but so will the degradation cost as land transfers from forestry and livestock to mechanised and subsistence agriculture, the latter being more polluting, and thus degrading sectors. The average degradation cost per unit of land in mechanised and subsistence agriculture, the sectors to which land is reallocated, exceeds that of the forestry and livestock sectors, the sectors from which land is shifted. In the base year, the average degradation cost per unit of land was Ls 112.6 for mechanised, 13.1 for subsistence, 2.1 for forestry and 2.2 for livestock. In spite of the association of higher growth with higher degradation costs, there is a net increase in the green GDP when degradation costs are deducted from income, as shown in table 4. This tendency is substantiated by empirical evidence from the Sudan and other developing countries at a similar stage of economic development.

Third, our model under alternative price regimes shows slightly lower growth in sectoral output coupled with lower degradation costs under changing versus unchanging relative prices, (See Table 1). Past trends in relative prices at the world level thus favour sustainable productivity in land use at the cost of more economic growth in the Sudan. The net effect, if this can be represented by the green GDP, i.e. $Y-D$, or by D/Y , is less favourable under the projected changing relative prices.

We have also decomposed the model into partial models for each agricultural activity based on a few simplifying assumptions. This allowed quick and separate solutions per agricultural sector. We compared the results of the partial models with the economy wide model. As the partial models allow very limited shifts in land, there is less dynamics, less growth and less degradation. Partial models are helpful in tracing the mechanisms we model. However, a realistic assessment of environmental policies requires working with the economy-wide model that incorporates the effects of changing relative prices on resource reallocation between all sectors.

IV. Policy cost and simulations

IV.1. The Simulated policy interventions

The economy-wide model with changing relative prices is further used to appraise the following policies:

- (i) Educating and training of farmers in the three agricultural sectors (human capital)
- (ii) Reducing government tax on the irrigated sector (price incentives)
- (iii) Defining property rights in mechanised and forestry sectors (property rights security)
- (iv) Making transfers to the poor population in subsistence and forestry sectors (basic needs)

Each policy involves costs and brings benefits. The policy of human capital involves cost because educating and training farmers requires resources. The price incentives policy involves cost because tax reduction reduces government revenue. The policy of basic needs involves cost because transfers are made to the poor population. The costs of these three policies are taken up in equation (12). The policy of property rights security does involve some cost, but this is expected to be relatively insignificant, and is therefore ignored here.

In all four policies, the size of policy simulations has been put at a comparable effort level so as to make an unbiased comparative appraisal of these policies. The percentage change between the base and policy run forecasts for the year 2000 are presented for the main variables in Table 3.

Table 3: Percentage change of variables between policy runs and base run in year 2000

M.=million, LS= Sudanese pounds

			Baseline 2000 Value	Human Capital Δ Value (%)	Price Incentives Δ Value(%)	Property Rights Δ Value(%)	Basic Needs Δ Value(%)
	Description	Measurement					
Irrigated							
Q_1	Sust.productivity	Index	0.700	5.4	10.2	0.0	0.0
O_1	Yield	Metric Ton	1.009	5.4	10.2	0.0	0.0
Z_1	Land value	LS	90742	5.4	10.2	0.0	0.0
N_1 (exogenous)	Cultivated land	M. Feddan	5.0	0.0	0.0	0.0	0.0
Y_1	GDP irrigated	M. LS	38155	5.4	10.2	0.0	0.0
D_1	Degradation loss	M. LS	1361	-7.9	-16.0	0.0	0.0
Mechanised							
Q_2	Sust.productivity	Index	0.463	8.2	0.0	20.2	0.0
O_2	Yield	Metric Ton	0.355	8.2	0.0	20.2	0.0
Z_2	Land value	LS	31642	8.2	0.0	20.2	0.0
N_2	Cultivated land	M.Feddan	8.4	-4.1	-2.2	14.9	-8.3
Y_2	GDP mechanized	M. LS	22917	3.7	-2.2	38.1	-8.3
D_2	Degradation	M. LS	1533	-3.6	-2.2	14.1	-8.3
Subsistence							

Q_3	Sust.productivity	Index	0.424	22.1	4.1	2.9	15.6
O_3	Yield	Metric Ton	0.165	22.1	4.1	2.9	15.6
Z_3	Land value	LS	3475	22.1	4.1	2.9	15.6
N_3	Cultivated land	M. Feddan	11.5	8.0	1.8	-1.6	6.8
Y_3	GDP subsistence	M. LS	11983	31.9	6.0	1.2	23.4
$Y_{3,poor}$	Income poor	M. LS	25844	17.5	6.8	4.9	25.8
D_3	Degradation loss	M. LS	248	10.4	2.8	-0.9	9.2
Economy							
$\sum Y_i$	GDP all sectors	M. LS	317993	1.421	0.287	1.314	0.280
$\sum D_i$	Degradation loss all	M. LS	4109	-3.507	-6.024	4.858	-4.444
Gov	Gov. revenue	M. LS	17023	-20.1	-25.5	-19.8	-43.7

IV.2. Policy simulation I: Human capital

This policy intervention is applied to equations (1.1), (1.2) and (1.3). The proportions of educated and trained farmers in irrigated sector K_1 , mechanised sector K_2 , and subsistence sector K_3 are adjusted upward by 30% simultaneously.

The impact of this policy is that the sustainable productivity indices rise in all agricultural sectors, but mostly in subsistence where performance surpasses the base forecasts by 22.1%. Subsistence farmers, now earning higher incomes, enhance their productivity index further.

Yield and value of land in the various sectors increase and diverge accordingly. The consequence is that land is reallocated from mechanised, forestry and livestock sectors to subsistence because of its relatively rising value there. Agricultural GDP grows significantly while degradation loss in agriculture falls. Concerning the costs of this policy, Table 5 shows government revenue to fall by 20.1% as a result of the costs of training farmers and subsidising exports that have exceeded prescribed limits. These costs are lower than those involved in alternative policies.

Greater exports of agricultural goods are compensated by greater imports of non-agricultural goods in a model of balance of payments equilibrium and constant foreign exchange rates. This reduces the growth of the non-agricultural GDP by 1%, as seen in Table 3. Forestry GDP, which is dependent on intermediate deliveries to non- agriculture, falls by 0.4%. Q_4 is unaffected while D_4 falls. In contrast, livestock GDP rises by 0.4% due to the enhanced final consumption demand for livestock products resulting from an elevated growth in overall GDP. The decline of stock per feddan relieves the pressure on grazing land, and, as a result, the sustainable productivity index, Q_5 , improves while degradation loss, D_5 , falls.

In summary, the policy of investing in human capital, achieves a greater economic growth on the base forecast of 1.4%, and a mitigation of degradation of 3.5%. The policy contributes significantly to the reduction of the trade-off between growth and environment.

IV.3. Simulation II: Price incentives

This policy intervention is applied to the irrigated sector in equation (1.1). The government tax rate on the price of irrigated product is reduced from 0.30 to 0.21, i.e., by 30%.

In the irrigated sector, the productivity index rises by 10.2%. As result, yield and land value rise by the same rate. Degradation cost falls by 16%. As subsistence farmers get additional earnings from working in the irrigated sector, their total income, $Y_{3,poor}$, increases by 6.8%. This causes the sustainable productivity index to rise by 4.1%, as do yield and land value, leading to a reallocation of land to subsistence cultivation from mechanised agriculture. The policy results in a net decline in degradation loss.

The costs of this policy consist of a decline in government revenue by 25.5% due to forgone tax income, and the cost of subsidising agricultural exports that have exceeded their upper limit.

Since the non-agricultural sector carries the burden of the balance of payments adjustment, non-agricultural GDP would fall by 1.4%. This causes a further fall in the output of forestry accompanied by a reduction in degradation loss. The livestock output is also diminished due to less slaughter and the slow economic growth, hence resulting in overstocking, a fall in the grazing land sustainable productivity index, and a rise in the degradation loss.

The overall impact of this policy is that the economy GDP grows by 0.3% while total degradation cost falls by 6%. The previous policy of human capital thus performs better than the policy of price incentives.

IV.4. Simulation III: Property rights

This policy intervention is applied to equation (1.2), where relative land tenure security in the mechanised sector, represented by S_2 , is increased from 0.50 to 0.65, i.e., a 30% upward adjustment in lease term. This policy intervention is applied to the forestry sector also, and works in a similar way.

The impact is that the sustainable productivity index in the mechanised sector increases by 20.2%, as do yield and value of land. Consequently, land moves from subsistence, forestry and livestock activities to mechanised agriculture, where the value of land is rising faster relative to other land using sectors. With

the movement of land, degradation loss increases in mechanised agriculture since it is the sector with the highest degradation cost per unit of GDP.

In subsistence agriculture, the productivity index increases by 2.9%, as do yield and value of land. At the same time, subsistence poor farmers income, $Y_{3,poor}$, is boosted by growth in mechanised agriculture. Degradation loss decreases as a result of land moving out of the sector to mechanised agriculture. Government revenue falls by 19.8%, since it incurs the cost of subsidising agricultural exports that have exceeded their upper limit. The balance of payments adjustments lead to a negative growth in non-agriculture of -2.1%.

The impact of introducing greater security in property rights allows the stock of tree biomass per feddan to increase and, as a result, the sustainable productivity index rises while degradation loss declines.

In the livestock sector, due to a higher consumption of meat caused by higher GDP growth, the sustainable productivity index rises, causing vegetation yield to rise and degradation loss to fall.

Concerning the overall economy, the impact of this policy is that the economy GDP rises by 1.3%, but at the same time, degradation loss rises by 4.8%. This is explained by the movement of land to mechanised agriculture, which has the highest degradation cost per unit of GDP among the land using sectors. This policy has a more positive impact on achieving economic growth than that of price incentives, but, it is associated with a higher degradation loss. The policy intensifies the trade-off between growth and environment.

IV.5. Simulation IV: Basic needs

This policy intervention is applied to equations (1.3) and (2) for subsistence agriculture, where income of the poor population is adjusted upward by 30% through a direct government transfer, T_g . This policy intervention is applied also to the poor population in the forestry sector, and works in a similar way.

The impact of this policy on subsistence agriculture is that the sustainable productivity index and, as a result, yield and value of land, rise by 15.6%. Land is thus moved from mechanised to subsistence agriculture. Degradation loss falls in mechanised agriculture where land is moving out, but increases in the subsistence sector where land is moving in. Government revenue falls by 43.7% as a result of making transfers to poor farmers.

In a similar way, with an income transfer, forestry workers are less inclined to cut trees, so the tree stock biomass per feddan increases, the sustainable productivity index increases, and degradation loss declines. The sectoral income from cutting wood trees falls by the amount of the government transfer, i.e. 10%.

In the livestock sector, output per feddan increases because both non-agricultural output and the economy GDP work in the same direction to increase final consumption and intermediate demand for livestock products. This leads to an improvement in the sustainable productivity index, as vegetation yield rises while degradation loss declines.

Summarizing, GDP increases by 0.3%, while total degradation loss falls 4.4%. The policy of making direct government transfers to the poor population in the subsistence and forestry sectors brings about more economic growth with less degradation. This is the case since it enhances the conservation behaviour of poor populations in the subsistence and forestry sectors, but the cost involved in this policy is the highest among the four treated policies here.

The relative performance of the four policies in relation to the base forecasts is demonstrated graphically in Figures 1 and 2. In Figure 1, the dotted line is 45-degrees. Policies that lie most below this line and are most stretched to the right contribute more to economic growth and to a reduction in degradation loss, and, therefore, mitigate the trade-off between growth and environment. Policies that lie above the line thus perform least in resolving the trade-off. All the simulated policies, except that of property rights security, contribute to economic growth as well as reduce degradation loss, when measured from the baseline. When the relative effectiveness of policy is evaluated in terms of this trade-off, the most effective policies across the 1990s are those involving human capital and price incentives that lie far to the right of the other policies; with human capital 'better' in GDP, and price incentives 'better' on environment. These are followed by the policy of basic needs. On the other hand, the policy of property rights security, which lies above the 45-degree line, tends to intensify the trade-off by promoting economic growth at the cost of more degradation loss.

In Figures 2a and 2b, the policy numbering (i.e. I, II, III, IV) is the same as that shown in the legend at the bottom of Figure 1. Figure 2a shows the degradation loss due to policy intervention measured from the baseline for the year 2000. As shown, the policies of human capital I, price incentives II, and basic needs IV reduce degradation loss, which means degradation declines relative to the baseline before the policy change. The policy of property rights security III increases degradation loss.

Figure 2b shows the effect of policy intervention on GDP and green GDP (i.e. GDP after deduction of degradation loss) as measured from the baseline for year 2000. It shows that the policy of human capital I render the highest green GDP. Price incentives II and basic needs IV show positive but moderate changes in green GDP. The real surprise here is in the policy of property rights security III, which shows a strong positive performance in green GDP, reversing the impressions obtained from Figure 1. When deterioration of the environment

is monetised and is allowed to be traded against the gains in GDP, this policy climbs to second place in terms of green GDP.

From the above, it appears that the policy of human capital is the most successful in terms of both easing the trade-off and maximising green GDP, as is apparent from Figures 1 and 2, respectively.

Figure 1: Trade off between Economic Growth and Degradation Loss, 1990-2000

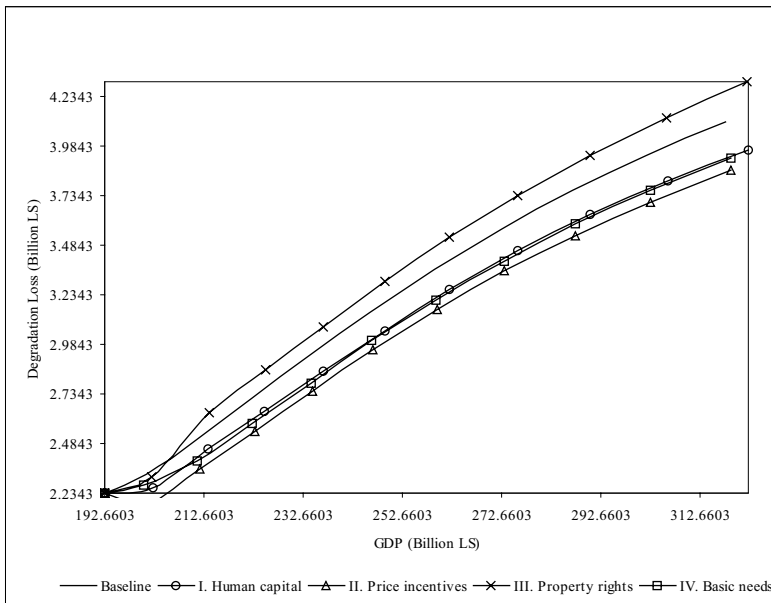


Figure 2a: Degradation Loss: Difference between Policy and Baseline, 2000.

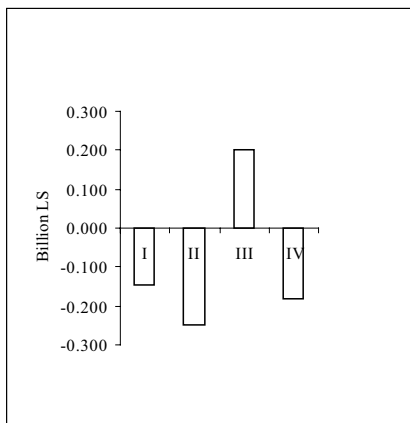
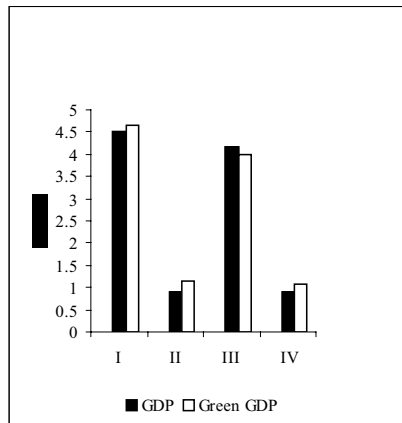


Figure 2b: GDP and Green GDP: Difference between Policy and Baseline, 2000.



V. Concluding remarks

Basically, the traditional uses of land, i.e. subsistence cultivation, forestry and grazing activities, have lower degradation loss per unit of output relative to the modern land uses, i.e. irrigated and mechanised. Economic development involves a shift of land from the first to the second. Therefore, reallocation of land from the traditional uses to the modern uses leads to more production, but at the same time it involves more degradation loss. Fortunately, there are policies that can mitigate this trade off between economic growth and resource degradation. The policy of investment in human capital and training programmes appear to be the most effective in combating the trade-off and resolving the conflict between growth and environment. This policy is followed by price incentives and income transfers to maintain basic needs. The policy for promoting greater security in property rights favours growth at the cost of environment.

The specification that takes the economy-wide model and incorporates the effects of changing relative prices based on world market prices trends represents a very workable assessment of the trade-off between growth and environment. The observed trends in relative prices at the world level at the turn of the century (1990-200) seem to favour environment but the effect is very marginal. The cost to economic growth of the environment friendly relative prices is relatively greater, however. The net effect is a lower green GDP in the Sudan. Given the present distribution of land in the Sudan, it seems that there is no need to worry about reaching the critical ecological balance between growth and environment any time soon.

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CORRUPTION DETERMINANTS AND IMPACTS ON FOREIGN DIRECT INVESTMENTS

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Abstract

Corruption is a worldwide problem perceived as hampering competition and the efficient allocation of resources. The amount of corruption for most countries is measured by several indicators and aggregated in the Transparency International Corruption Perception Index. For the case of Pakistan these indices and their growths in time are illustrated and compared to neighbour countries within the same region. This article also discusses the variables which determine corruption and uses an econometric model to measure their significance for the corruption perception in the Pakistani economy over time. Afterwards a second model for determinants of FDI is applied to assess possible causes and consequences of corruption on foreign direct investments.

The estimation results of the determinants of FDI inflows in Pakistan are strongly influenced by the perception of corruption. Consequently it was found that the high level of corruption may pretend foreign investors from investing their money in Pakistan.

Keywords: *corruption, FDI, foreign direct investments*

I. Introduction

The UN Convention against Corruption (UNCAC) has now been ratified by 107 countries and it is largely acknowledged that many of the Millennium Development Goals (MDG) cannot be achieved without seriously tackling corruption. Indeed, by diverting resources, biasing decision-making processes, and undermining trust in politics and the economy, corruption is a major stumbling block for good governance and thus for sustainable development. One of the Millennium Development Goals agreed to by all the world's countries and all the world's leading development institutions is to fight poverty by the target date of 2015. But, since many years, the World Bank also has investigated financial

crimes by government and bank officials. In 1996, former World Bank President James Wolfensohn warned of the need to deal with the “cancer of corruption”.

The World Bank defines corruption as offering, giving, receiving, or asking for anything of value to influence the action of a public official (Andvig; Fjeldstad, 2001, 10ff). For example, a local official may demand that a foreign company pay him money, or a bribe, to permit a project to go forward. The World Bank says corruption is the biggest barrier to development. Corruption hurts the poor people who are supposed to gain from development bank loans and aid. According to the World Bank Institute, more than 1 trillion USD are paid in bribes each year (GTZ, 2008). Estimations for rough size of transactions and illicit incomes for Pakistan are given with 333 billion PKR or 10.4% of GDP (Khalid Maqbool, 2000).

Chapter 2 gives an overview of different corruption indices and FDI inflows for Pakistan and analyses their use for time series analysis. The amount of corruption for most countries is measured by several indicators and aggregated in Transparency International’s Corruption Perception Index. For the case of Pakistan these indices and their growths in time are illustrated and compared to neighbour countries within the same region. Chapter 3 discusses the variables which determine corruption and uses an econometric model to measure their significance for the corruption perception in the Pakistani economy over time. It also gives the variable definitions and data sources. Chapter 4 applies another model for determinants of FDI to assess possible causes and consequences of corruption on foreign direct investments. Chapter 5 concludes.

II. Corruption indices for Pakistan

This chapter gives an overview of the most important corruption indices for the region which are available for Pakistan. Unfortunately most indices are only available for one or a few single years. Bertelsmann Foundation measures governments’ ability to prevent corruption. Transparency International combines several indices in one single index, so that a time series on corruption is available.

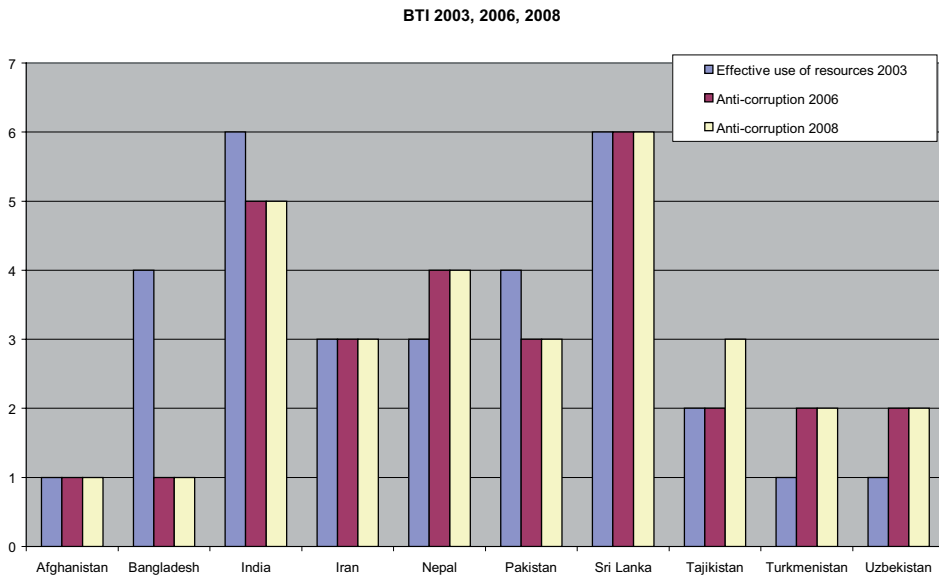
II.1. Bertelsmann Transformation Index (BTI)

The German Bertelsmann Foundation is a non-profit organization that evaluates since 2004 development and transformation processes in 116 countries. The BTI provides information about the status of democracy and the market economy as well as the quality of political management in each country. BTI measures the extent to which governments and political actors have been consistent and determined in their pursuit of a market-based democracy. Those states showing progress in the last five years and in which transformation has

resulted from astute management receive the highest scores. These scores are prepared with the help of strict evaluation manuals by country experts including cross checks (Bertelsmann Foundation, 2008a, 86ff). The scores range from 1-10 regarding the given answer to the following question:

The BTI measures under the criteria “quality of the political management” the efficiency of resource allocation. How far is the government capable to prevent corruption successfully?

Figure 1: BTI in the region



Source: Own figure with data from Bertelsmann Foundation.

For the year 2003 the corruption is measured as resource efficiency, which includes 1. efficient use of economic and human resources 2. coordination of incompatible aims and coherent policy and 3. successful constraint of corruption through the government (Bertelsmann Foundation, 2008b, 20). This successful limitation is decreasing in Pakistan from 2003 to 2006. In other countries this government quality stays constant or increases, except for India and especially Bangladesh.

11.2. Transparency Internationals Corruption Perception Index (CPI)

The CPI is a composite index, making use of surveys of business people and assessments by country analysts. It consists of credible sources using diverse sampling frames and different methodologies. Overall, in the CPI 2007 14 sources are included, originating from 12 independent institutions like ADB,

Worldbank, United Nations etc.. Each of the sources uses its own scaling system, requiring that the data be standardized before each country's mean value can be determined (Lambsdorff, 2007).

The correlation between the different integrated sources is relative high and can for the years 2006 and 2007 be measured with the Pearson correlation:

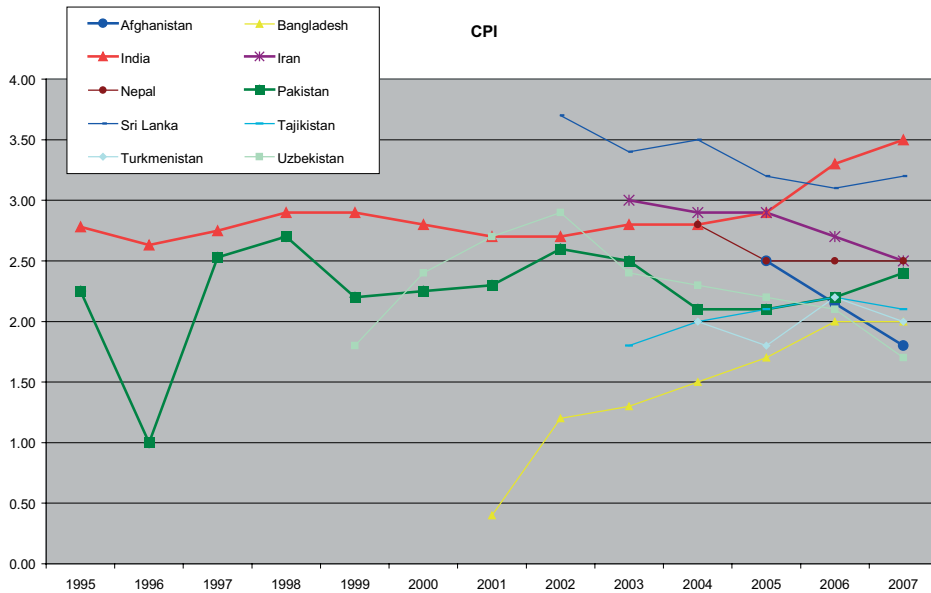
Table 1: Correlations between several indices for corruption

	ADB 2006	AFDB 2006	BTI 2007	CPIA 2007	EIU 2007	FH 2007	GI 2007	IMD 2006	IMD 2007	MIG 2007	PERC 2006	PERC 2007	UNECA 2005	WEF 2006
ADB 2006	1.00		0.76	0.79	0.36		0.40			0.55				0.57
AFDB 2006		1.00	0.58	0.68	0.48		0.45			0.59			0.61	0.58
BTI 2007	0.76	0.58	1.00	0.75	0.81	0.86	0.78	0.74	0.71	0.78	0.94	0.78	0.71	0.75
CPIA 2007	0.79	0.68	0.75	1.00	0.63	0.71	0.66			0.67			0.30	0.25
EIU 2007	0.36	0.48	0.81	0.63	1.00	0.86	0.88	0.90	0.90	0.91	0.93	0.87	0.47	0.90
FH 2007			0.86	0.71	0.86	1.00	0.91	0.75	0.88	0.89				0.79
GI 2007	0.40	0.45	0.78	0.66	0.88	0.91	1.00	0.89	0.89	0.93	0.90	0.81	0.77	0.91
IMD 2006			0.74		0.90	0.75	0.89	1.00	0.99	0.92	0.95	0.90		0.92
IMD 2007			0.71		0.90	0.88	0.89	0.99	1.00	0.93	0.94	0.88		0.92
MIG 2007	0.55	0.59	0.78	0.67	0.91	0.89	0.93	0.92	0.93	1.00	0.94	0.86	0.81	0.93
PERC 2006			0.94		0.93		0.90	0.95	0.94	0.94	1.00	0.91		0.88
PERC 2007			0.78		0.87		0.81	0.90	0.88	0.86	0.91	1.00		0.88
UNECA 2005		0.61	0.71	0.30	0.47		0.77			0.81			1.00	0.61
WEF 2006	0.57	0.58	0.75	0.25	0.90	0.79	0.91	0.92	0.92	0.93	0.88	0.88	0.61	1.00

Source: Lambsdorff, The Methodology of the TI Corruption Perceptions Index 2007, 2007, 10.

CPI is available as time series from 1995 till 2007 for Pakistan and several countries of the region. Historical data are also available, but only in aggregated form for the periods 1980-1985, 1988-1992 and 1993-1996 (Lambsdorff, 1996, 5ff).

The CPI assesses the degree to which public officials and politicians are believed to accept bribes, take illicit payment in public procurements, embezzle public funds, and commit similar offences. According to the perceived level of corruption, CPI ranks countries on a scale from 10 to zero. A score of 10 represents a reputedly totally honest country, while a zero indicates that the country is perceived as completely corrupt (Andwig et. al., 2001, 39).

Figure 2: CPI in the region

Source: Own figure with data from Transparency International, CPI, 1995-2007.

The figure shows a relative constant perception of corruption in Pakistan except the year 1996, when corruption increased sharply to a level of 1 (out of ten). Pakistan's ranking in CPI has consistently been in the lowest group of countries (Eigen; Hossain, 2003). Overall the corruption in Pakistan seems to be higher than in its neighbour countries India, Iran, Sri Lanka and Nepal. Afghanistan. Transition economies in the region Tajikistan, Turkmenistan and Uzbekistan show similar values to Pakistan. Only Bangladesh has for the whole period higher corruption values than its former part of the same country.

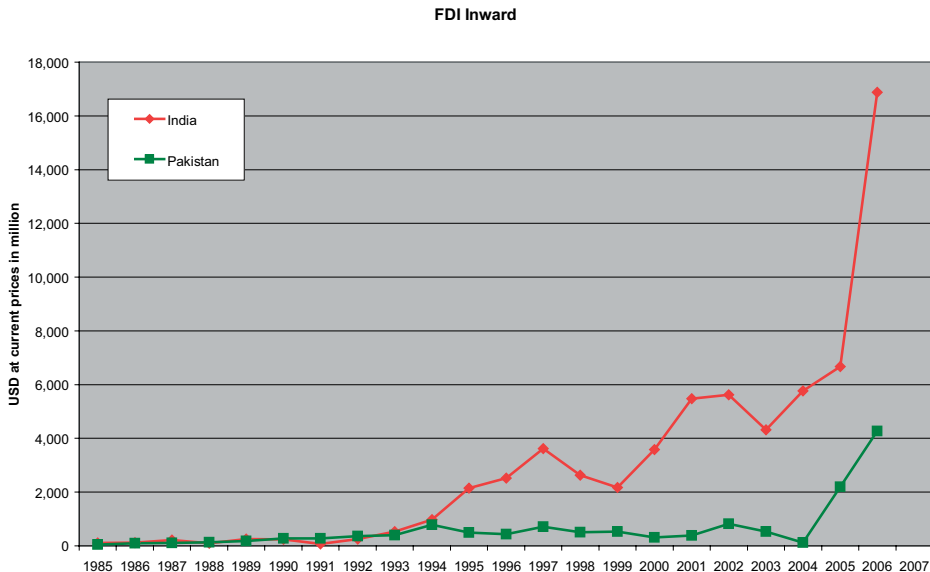
The data of the CPI are applied for the time series analyses in chapter 3.

11.3. FDI data

For associates and subsidiaries, FDI flows consist of the net sales of shares and loans (including non-cash acquisitions made against equipment, manufacturing rights, etc.) to the parent company plus the parent firm's share of the affiliate's reinvested earnings plus total net intra-company loans (short- and long-term) provided by the parent company. For branches, FDI flows consist of the increase in reinvested earnings plus the net increase in funds received from the foreign direct investor (definition of FDI flows from United Nations Conference on Trade and Development).

Data on foreign direct investments in Pakistan can be obtained from the World Investment Report which is provided by the United Nations Conference on Trade and Development.

Figure 3: FDI inflows in India and Pakistan



Source: Own figure with data from United Nations Conference on Trade and Development, World Investment Report.

Until 1994 the development of Investments is very similar in India and Pakistan. From 1995 onwards the FDI in India increase sharply compared to Pakistan and remain on a clearly higher level. For the years 2005 and 2006 the FDI inflows also for Pakistan are increasing. Regardless of discouraging economic and political indicators, FDI flows in Pakistan reached a total of \$3.481 billion in 10 months of the fiscal year 2007-08.

Despite that the country rankings by Inward FDI Performance Index for Pakistan stay relative poor. For 2006 Pakistan ranks 89 in the Inward FDI Performance Index and even 126 in the Inward FDI Potential Index (UNCTAD, 2007). The FDI trend in Pakistan is different from India and China where FDI landed in various sectors, including manufacturing and production sectors, which helped these countries, keep their growth rate much higher than all other countries (Iqbal, 2008).

Robust near-term economic growth should drive strong foreign direct investment flows into South Asia despite corruption, poor infrastructure, rigid

labour laws and civil unrest, the Asian Development Bank said in a press release in 2008. FDI flows into the Indian sub-continent had risen rapidly since 2004, growing by 132.9 per cent in 2006 to \$24.3 billion as economies moved away from the failed closed socialist model. However, its share of FDI stock remained low at just 6.5 per cent of South Asia's gross domestic product (GDP), compared to Southeast Asia's 39.5 per cent of GDP and East Asia's 29.1 per cent of GDP.

ADB said political uncertainties and security challenges were "likely to hinder FDI in Afghanistan, Pakistan and Sri Lanka". It said United Nations and World Bank surveys showed South Asia was the world's "least attractive FDI destination" and the "second-least business-friendly region" after Sub-Saharan Africa. This was due to "poor business climate, poor infrastructure, restrictive labour policy and labour unrest, political uncertainties and civil conflicts, weak regulatory systems, and rampant corruption" (Dawn, 2008).

III. The model for corruption

In this chapter I apply the model for determinants of corruption from Ghulam Shabbir and Mumtaz Anwar (much more detailed analyses and empirical results of relevant determinants and a literature overview can be found in Shabbir; Anwar, 2007) and use the available data for Pakistan. The following hypotheses regarding the relevance of factors and alternative measures can be derived and explain the variables used in the model:

It is commonly assumed that economic freedom commonly lowers the rent of economic activities and consequently lessens the motive of public officials and politicians to grasp some parts of these rents by means of corruption (Paldam, 2001). Therefore one can state that the higher level of personal economic freedom (less political control over nation's economic resources and opportunities) will lessen the perceived level of corruption.

The residents of the open economies not only imports goods, services and capital, but also exchange norms, information and ideas. The freer trade would remove the control of public official over administrative commodities like quota licenses and permits etc. Therefore, the process of globalization would reduce the chances of exchanges of these products for private benefits. So, openness is negatively associated with corruption and a higher degree of openness generally leads to reduction in corruption (Ades; Di Tella, 1997, 1999).

The levels of development have significant impacts on the level of corruption. The countries having low average income level creates least wealth for its vast majority of citizens in developing countries. This scenario shows that in such economies the marginal additional income have a significant impact on the living conditions of the peoples. This means the marginal value of money in

poor economies is greater as compared to rich economies. Therefore; the level of income is commonly used to explain the level of corruption (Persson et al., 2003).

In economic literature, the income in-equality (distribution of income) is also considered a determinant of corruption. The theoretical relation between corruption and income inequality is derived from rent theory and leads to the hypothesis that the level of corruption is positively correlated with higher income inequality.

Along with economic factors, various non-economic factors like democracy, press freedom, share of population affiliated by a particular religion etc can also be empirically investigated. For example the freedom of speech and press in democratic states enables the citizens to uncover information, ask questions, demand inquiries and broadcast their discoveries; and in some countries, record their grievances directly to the ombudspersons. Therefore higher degree of press freedom will lead to reduction in the level of corruption. To see the relationship between these two in developing countries, the following hypothesis is checked: The freedom of press is negatively related to the level of corruption (The analysis of further non economic factors can be found in Shabbir; Anwar, 2007).

III.1. Variables definition and data

Data on corruption in Pakistan for the time period 1995 till 2007 can be obtained from Transparency International. Data on FDI in Pakistan can be obtained from United Nations Conference on Trade and Development for 1985 till 2006. Both variables are described in chapter 2.

The Heritage Economic Freedom Index measures 10 specific factors, and averages them equally into a total score. Each one of the 10 freedoms is graded using a scale from 0 to 100, where 100 represents the maximum freedom. A score of 100 signifies an economic environment or set of policies that is most conducive to economic freedom. The ten component freedoms are: Business freedom, trade freedom, fiscal freedom, government size, monetary freedom, investment freedom, financial freedom, property rights, freedom from corruption and labour freedom.

The globalisation can be measured economically by the sum of imports and exports (trade) as share of the GDP to quantify the economic integration. Even though, in this paper beside FDI flows, the KOF Index of Globalisation is used, because it includes in addition to economic globalisation (having weight of 36%) also social freedom (38%) and political freedom (26%).

For average income, the GDP per capita is used to measure the level of development (Sandholtz and Gray 2003). But also the average educational level

in form of the literacy rate can be applied for this purpose (Ades; Di Tella, 1999). GDP per capita data are collected from UN databank.

The remaining variables in economic model are income distribution (measured by United Nations Gini Index) and level of education (Adult literacy rate obtained from Choudhry, 2005 and Ministry of Finance, Pakistan). The score of Gini index varies between 0 and 100; 0 represents perfect economic equality and 100 perfect inequalities.

The press freedom is measured by the press freedom index (2006) constructed by Freedom House Index. This index includes three categories; Legal Environment (0-30), Political Environment (0-40) and Economics Environment (0-30). The index score range is 0 to 100. The lower value of index score indicates high degree of freedom (0 for most freedom) and vice versa.

III.2. Corruption estimation methodology and results

The determinants of corruption include economic freedom, (economic) globalization (international integration), education level, the average income (GDP per capita), income distribution (Gini coefficient) and – as non-economic determinant - the freedom of press.

All these explanatory variables – except the Gini coefficient - are inversely related to the level of corruption. For the estimation, the following equations were used:

Model 1:

$$CP = \beta_0 + \beta_1 EF + \beta_2 EGLO + \beta_3 LIT + \beta_4 GDP_{pc} + \beta_5 GINI + \beta_6 PF + \mu_i$$

Model 2:

$$CP = \beta_0 + \beta_1 EF + \beta_2 EGLO + \beta_3 FDI + \beta_4 LIT + \beta_5 GDP_{pc} + \beta_6 GINI + \beta_7 PF + \mu_i$$

Model 3:

$$CP = \beta_0 + \beta_1 EF + \beta_2 GLOKOF + \beta_3 FDI + \beta_4 LIT + \beta_5 GDP_{pc} + \beta_6 GINI + \beta_7 PF + \mu_i$$

with CP = corruption perception,
 EF = economic freedom,
 EGLO = economic globalisation, measured by the sum of trade,
 GLOKOF = globalisation, measured by the index,
 FDI = international integration,
 LIT = level of education,
 GDP_{pc} = level of development,
 GINI = income distribution and
 PF = press freedom.

Model 1 and 2 estimate the influences of the globalisation with help of the sum of trade, while in Model 3 the Index KOF is applied for this purpose. In Model 2 and 3 the FDI are added as factors influencing the perception of corruption. The three models are able to explain 46, 48 and 40% of the relevant factors of the perceived corruption.

Table 2: Estimation results for influence factors on perceived corruption

	Model 1		Model 2		Model 3					
	Unstandardized Coefficients B	Std. Error	Unstandardized Coefficients B	Std. Error	Unstandardized Coefficients B	Std. Error				
(Constant)	8.729285	a	1.363414		10.357702	a	1.448417	9.430695	a	1.656257
EF	-0.061742	a	0.016191		-0.103437	a	0.021512	-0.112289	a	0.024318
EGLO	0.000000	a	0.000000		0.000000	a	0.000000			
GLOKOF								0.060145	a	0.019944
FDI					0.000229	a	0.000080	0.000294	a	0.000086
LIT	-0.096129	a	0.020411		-0.018819		0.033596	0.037647		0.035683
GDPpc	0.004902	a	0.000666		0.002654	a	0.001020	-0.002093	a	0.000688
GINI	-0.076502	b	0.036328		-0.062344	c	0.035828	0.022917		0.034341
PF	-0.054467	a	0.013713		-0.047473	a	0.013616	-0.041073	a	0.015359
Adjusted R Square	0.458				0.483				0.395	

Source: Own calculation with data from United Nations, Ministry of Finance, Pakistan, Freedom House, Choudhry, 2005, KOF Index of Globalisation, Transparency International, Heritage Foundation. a, b, or c means significant at the 1, 5, or 10% level.

The estimation results of the three models show that the perceived corruption was significantly influenced by the level of economic freedom. The less economic freedom was found, the higher the perceived corruption in all three models. The level of globalisation is significant in all models, but with very small coefficients in Model 1 and 2. Also the FDI are significant at the 1% level. Literacy rate and also the Gini Index do not strongly influence the corruption according to these results. Important is the GDP per capita and the press freedom, which increases corruption perception with decreasing press freedom in all three models.

IV. The model for FDI

FDI are an influential element of international transactions and the cross-border mobilisation of factor resources. In pursuance of transnational production, FDI constitute new dimensions for sustained economic growth. Pakistan still seems to be unattractive for FDI inflows besides being one of the world's most populated countries, a relatively high growth rate of GDP, with a significant stock of natural resources and a variety of remaining investment provisions.

The economic factors that determine Foreign Direct Investment can be grouped into two categories. The first is the size of the market, the potential for growth and the absorption of output. The second is the incentive mechanism of the host country and the cost of international production as compared to export and licensing. Most of the empirical work on FDI produced conclusive evidences, which support the positive relationship between FDI and market size. Proxies used for size, growth rate and absorption are Gross Domestic Product, Gross National Product, Per Capita GNP, GDP growth rate and exports from the home country. These reflect expected sales of the subsidiaries and their profitability (Chang; Kwan, 2000).

The investment incentive mechanism is conceived to be two-dimensional, attractiveness due to low costs of production (the taxation policy) and the future expectation of the investing firms. The cost factors consist of the cost of capital, relative wage rate, transportation costs and the fiscal incentives in the form of tax expenditure provisions offered by the host country. Empirical studies have found a significant negative relationship between FDI and the cost of capital in both developed and developing countries (Love and Hidalgo, 2000).

IV.1. Variables definition and data

The theoretical model developed in this research study is similar as developed by Love and Hidalgo (2000). For any monopolistic firm seeking production abroad, it is assumed that it first decides the level of production in a foreign market under the relevant business environment along with the production in the home market and then selects the appropriate combination of inputs for that level of production in the host country. The two choices are the minimisation of total cost at home and abroad and the efficient combination of inputs (Zahir Shah; Qazi Masood Ahmed, 2003).

Market size represents the absorption of output in the host country and reflects the level of profits from sale. This is the total demand from the consumers of that country where the foreign firms are looking for investment. According to the market size hypothesis, multinationals tend to invest in larger countries in order to exploit economies of scale (Jaumotte, 2004). In this study the per capita GDP in terms of US dollar and the relative changes in GDP are incorporated.

In order to test the cost hypothesis per unit cost of foreign capital in the develop areas is used as an explanatory variable. This proxy has strong implications for investment firms and public institutions as it can be influenced by the fiscal incentives and public actions. Cost of capital for foreign firms computed from the available data on income tax, depreciation allowance and rate of interest. Here the direct tax revenues as % of all tax revenue are applied. The income tax has a share of over 95% of all direct taxes (Statistical Bulletin, 2008).

To test the effects of political environment dummy DM1 is used for democratic government versus military rule. It is argued that a democratic government is more acceptable to investing institutions and therefore value 1 is assigned to that period of democracy and 0 to military regime.

Tariff barriers indicate the host government's policy to protect home industry by restricting imports through tariff walls. FDI might be encouraged if it is found difficult to export and realised that there is more profitability by establishing its affiliate. It can be a source of reduction in transportation cost and marketing expenses and ultimately can avoid tariff restrictions. The proxy used for tariff rate is the effective import duty and is obtained by finding out the ratio of import duty to total value of imports in Pakistan.

Infrastructure, a source of reducing overhead production cost, has significant relationship with the investment opportunities. Most of the developing countries are emphasising more on the provision of infrastructural facilities as it provides access to market and production location opportunities.

IV.2 FDI estimation methodology and results

These functional equations are based on the theoretical formulation developed earlier in this section. The linear formulation of FDI function in two models, which are assumed as distributed independently and normally with zero mean and constant variance, is given as:

Model 1:

$$FDI = \beta_0 + \beta_1 GDP_{pc} + \beta_2 dGDP + \beta_3 CAPC + \beta_4 tariff + \beta_5 TC \exp + \beta_6 demo + \mu_i$$

Model 2:

$$FDI = \beta_0 + \beta_1 GDP_{pc} + \beta_2 dGDP + \beta_3 CAPC + \beta_4 tariff + \beta_5 TC \exp + \beta_6 demo + \beta_7 corr + \mu_i$$

with FDI = FDI inflows in USD

GDP_{pc} = expected profits from sale (per capita GDP)

dGDP = market size development (absolute changes of GDP)

CAPC = capital costs (income tax)

tariff = protection of home industry (incidence of import duty as proxy for tariff rate)

TCexp = infrastructure (public expenditures on transport and communication)

demo = democratic government versus military rule (1;0)

corr = corruption perception (CPI)

μ_i = stochastic error term capturing the left over effects

The mentioned hypotheses suggest that the size of the market and the expected growth potentials in output and its absorption might have positive effects on inward FDI. These hypotheses also indicate that the public sector's developmental expenditures, specifically in providing good infrastructure, can attract more FDI. Also, a democratic and stable government seems to have the capacity to get the attention of transnational producers. Finally, a high perception of corruption may deter foreign direct investors.

Table 3: Estimation results of influence factors on FDI

	Model 1			Model 2		
	Unstandardized Coefficients B		Std. Error	Unstandardized Coefficients B		Std. Error
(Constant)	-15648147.000	a	468129.000	-12851713.000	a	384090.000
capc	60571.000	a	12386.000	67103.000	a	8380.000
GDPpc	5691.000	a	0.207	5955.000	a	0.141
dGDP	-14904258.000	a	1756654.000	-21880212.000	a	1305178.000
tariff	133154.000	a	18243.000	77019.000	a	13076.000
TCexp	0.023	a	0.003	0.012	a	0.002
demo	897260.000	a	101091.000	723461.000	a	69605.000
CP				-715705.000	a	55823.000
Adjusted R Square	0.965			0.984		
a, b, c, significant at 1, 5, or 10% level						

Source: Own calculations with data from Statistical Bulletin, State Bank of Pakistan, Ministry of Finance, Pakistan, Federal Bureau of Statistics, Pakistan.

Both models find all relevant factors significant at the 1% level. Model 1 is able to explain 96.5% of all relevant factors. Model 2 includes corruption as additional determinant and explains 98.4% of the relevant factors influencing FDI. Therefore, corruption with a t-statistics of -12.82 has a significant negative effect on FDI. This negative influence has also been found in Smarzynska and Wei (2000) and Wei (2000).

V. Conclusions

The analysis of corruption indices for Pakistan shows a decreasing ability to successfully constrain corruption measured by the Bertelsmann Transformation Index in the last five years. Furthermore the perceived corruption measured by Transparency International data was increasing during the last four years. The foreign direct investments stayed relatively constant at a low level from 1985 till 2004. They increased in the years 2005 and 2006, but are still on a much lower level than those in India.

The estimation results of the determinants of corruption show that the perceived corruption measured by Transparency International is significantly influenced by the level of economic freedom. Corruption is decreasing with higher press freedom. The influence of FDI on corruption is small, but significant.

The determinants of FDI inflows in Pakistan are strongly influenced by the market size development, which supports the market size hypothesis. But also the other factors like capital costs, tariff rate, public expenditures on transport and communication and democratic government have significant influence on FDI. The perception of corruption has significantly negative influence on FDI. Consequently it was found that the high level of corruption may pretend foreign investors from investing their money in Pakistan.

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