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Iwona Wrońska

FUNDAMENTAL RIGHTS PROTECTION
IN THE COUNCIL OF EUROPE:
THE ROLE OF THE EUROPEAN COURT
OF HUMAN RIGHTS



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LIST OF ABBREVIATIONS

AU	- African Union
CERD	- Committee on the Elimination of Racial Discriminations
CFR or Charter	- Charter of Fundamental Rights
CLRAE	- Congress of Local and Regional Authorities in Europe
COE	- Council of Europe
Convenats HRIP	- Human Rights International Pacts 1966
Court	- European Court of Human Rights
CPT or Committee	- European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSCE	- Conference on Security and Co-operation in Europe
ECHR	- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECOSOC	- Economic and Social Council
EU	- European Union
GRECO	- Group of States against Corruptions
HRC	- Human Rights Committee
IACHR	- Inter - American Court of Human Rights
ICCPR	- International Covenant on Civil and Political Rights 1966
ICJ	- International Court of Justice
ILO	- International Labour Organization
LAS	- League of Arab States
NGOs	- non - governmental organizations

OAS	- Organization of American States
OAU	- Organization of African Unity
Office	- Office for Democratic Institutions and Human Rights
OSCE	- Organization on Security and Co-operation in Europe
PACE	- Parliamentary Assembly of the Council of Europe
TEU	- Treaty on European Union 1992
UDHR	- Universal Declaration of Human Rights
UNC	- United Nations Charter
UNESCO	- United Nations Educational, Scientific and Cultural Organization
UN	- United Nations

INTRODUCTION

The significance of the judicative role of the European Court of Human Rights (ECHR) is considerable and constantly growing. It has been especially evident in recent years in Central and Eastern Europe, which is a “pioneer” in application of standards of the European Convention on Human Rights and Fundamental Freedoms from 1950, even more so if we realize that states of this region have only more than a dozen years of experience in being members of the Council of Europe which has existed since 1949. Main reasons that contribute to this significance are: development of legal knowledge and awareness of individuals, growing number of infringements of rights and freedoms – especially in the spheres of so called system deficiencies in member states of the Council of Europe, and also political and legal transformations.

This publication provides a holistic presentation of issues relating to the standards of human rights protection within the Council of Europe, with special emphasis on the “constitutional”, for the fundamental rights, role of the European Convention on Human Rights and Fundamental Freedoms and its judicature of the European Court of Human Rights in Strasbourg. The book does not include analysis of broad judicature of the Court, it rather focuses on more general standards for construction and operation of legal regime of the ECHR and the Court. The European Convention, poetically referred to as “the pearl in the crown”, is today the most important international document providing basis for minimal standard of the European democratic states. Of course, the operation of the European Court of Human Rights, whose adjudication serves as a reference point and model in understanding and observance of the rights and freedoms of an individual, is also of great importance.

I hope that familiarization with basic standards of human rights protection system and its operation within the European Convention

on Human Rights and Fundamental Freedoms and the European Court of Human Rights will make this book a position deserving a closer attention.

Iwona Wrońska

HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL RELATIONS

1. Introduction

The study of human rights falls somewhere between philosophy, especially ethics, and numerous branches of law and political science¹. It developed its present and contemporary shape after the Second World War, though its roots can be traced back from the ancient and medieval ages to the Enlightenment ideas.²

Shortly after the Second World War, European and other countries started to seek solutions in international relations which would ensure lasting peace and minimize probability of similar disasters.³ Some claimed that the foundation of such “new order” should, in the first place, be based on respect and observance of human rights. The history of mankind provides numerous examples of exceptional sacrifice and commitment showed by human beings in defence of values that determined their human dignity and national or religious identity.⁴ The beginning of international human rights law is closely connected with the creation of the United Nations (UN). The Charter of the United Nations, signed on 26 June 1945 in San Francisco, for the first time created the foundation for human rights development on the international

1 M. Nowicki, Co to są prawa człowieka?, [in:] Szkoła praw człowieka: teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 1.

2 *Ibidem*

3 M.A. Nowicki, Europejski system ochrony praw człowieka, [in:] Szkoła praw człowieka: teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 1.

4 J.B. Duroselle, Tout empire pépéra. Théorie des relations internationales, Paris 1992, p. 134–138.

basis. A sea of genocide committed during the Second World War gave rise to the creation of the Universal Declaration of Human Rights (hereafter referred to as UDHR) by the General Assembly of the UN on 10 December 1948⁵.

2. Human rights notion

The notion of human rights refers to the body of laws that constitute individuals rights and freedoms⁶ and which is one of the youngest terms in the terminology of societies and international politics. It became a unique social and political value. It is also a very important criterion in the assessment of modern states and their governments, especially on the international arena. Formal law status which encompasses specific laws of individuals as parts of a given society is derived from the legal norms interpreted in accordance with the state's constitution (sometimes given a separate law) and in accordance with the international legal norms⁷.

Considerations about contemporary legal status of an individual are connected with the assumed concept of a human being and its place in the world. This concept has been changing together with the growth of civilization; it was different at the end of medieval times, different in XIX century, and still different at the beginning of the XXI century. During the times of tension between bourgeoisie and absolute monarchy, supra-individualistic concept of state was abandoned and new foundations for people's sovereignty and democratic systems were laid⁸. Some time later, liberal thought contributed to the search for a place for an individual and a minority in democratic systems. A claim was also made from the nature that every human being possesses

5 See more: G. Johnson, J. Symonides [ed.], *The Universal Declaration of Human Rights. A history of its creation and implementation 1948–1998*, Paris, 1998.

6 F. Prusak, *Prawo do sądu i rzetelnego procesu sądowego*, "Zeszyty Naukowe Wyższej Szkoły Handlu i Prawa w Warszawie" 2001, part 5, p. 10.

7 *Ibidem*, p. 93.

8 A. Redelbach, *Pozycja jednostki we współczesnym państwie i prawie*, [in:] *Prawa naturalne – prawa człowieka – wymiar sprawiedliwości: Polacy wobec Europejskiej Konwencji Praw Człowieka*, Toruń, 2000, p. 67.

a definite number of inherent rights⁹. In the twentieth century the concept of a human as a measure of all things¹⁰ was, most of all, an answer to the fact that people had been deprived of basic values during the Second World War. Confrontation with war cruelties did not leave any doubt that a human being is endowed with certain rights, regardless of one's convictions and regardless of legally binding positive law.

Analyzing notions relating to the human rights, one cannot omit differentiation of law between objective and subjective. The former is a set of norms binding in a given place and time, whereas the latter characterizes legal situation of some subject (somebody's law)¹¹. It is beyond doubt that human rights are regulated by the law in the objective meaning and that simultaneously given human right can be given an objective status.¹² As a result, human right ceases to be only an element of political or legal ideology – it effectively and permanently characterizes an individual's situation, can be a basis for claims (claim for protection) within a state and in the international arena. The concept of subjective law understood as power deserved by an individual (potestas, power) over some actions or objects was present in the twelfth century, in the practice of medieval decreists, or at least some of its elements were present in the Roman Law. C. Wellman states that: "it was traditionally considered that human rights are those ethic rights which every human being must possess simply due to the fact that they are human"¹³. Human rights are the rights owed by every human being for mere being a human being. Although the above definition captures the essence of the issue, Wellman suggest an even narrower human rights version, claiming that human rights are ethical rights of an individual as a human being towards the state. This definition does not encompass those ethic rights which an individual has as a human

9 M. Szyszkowska, *Zarys filozofii prawa*, Białystok, 2000, pp. 24–32.

10 The anthropic principle gives human existence meaning because, according to Newton, a human being endowed with cognitive skills is something special and answers concerning the material world in part depend on the existence of the human species. See more: H. Korpikiewicz, *Koncepcja wzrostu entropii a rozwój świata*, Poznań, 1998, pp. 30–31.

11 *Ibidem*, p. 93.

12 See more on subject laws: S. Wronkowska, *Analiza pojęcia prawa podmiotowego*, „Prace Wydziału Prawa UAM”, 1973 no. 61; P. Tuleja, *Normatywna treść praw jednostki w ustawach konstytucyjnych RP*, Warszawa 1997.

13 C. Wellman: *A New Conception of Human Rights*, (in:) *Philosophy of Law*, Wadsworth Publishing Company, Belmont, California, 1986, pp. 329–330.

being towards other human beings or towards organizations other than the state.

There has been a long lasting debate in international law studies whether there is something like international notion of human rights. Some doctrines related to various social and legal philosophies try to prove that such a universal notion does not exist and because of discrepancies between multiple regional concepts will never be created. They add that everything that can be found in international documents possesses an eclectic character¹⁴. On the other hand, some authors claim that international human rights notion exists and that its reconstruction from international documents is feasible¹⁵. One could supply numerous arguments in support of both views. It seems, though, that the organs of international human rights protection¹⁶ make a clear point about the issue by objecting towards excessive ideologization of rights and freedoms and by underlying that there exist objective international notions of specific human rights and human rights as such.¹⁷

As a result, one will not be able to find a legal definition of human rights in international law. Neither could such notion be coined by international courts. Nevertheless, one could try to reconstruct human rights notion from excerpts of international documents and from some utterances of international human rights control bodies. The result of such undertaking would be as follows: human rights are natural human abilities, individual in its nature, though socially defined, equal and inalienable, subjectively common, objectively, territorially, temporarily and partly culturally necessary, and arising from every human being's innate human dignity¹⁸.

14 C. Mik, Wprowadzenie do prawa międzynarodowego praw człowieka, [in:] Szkoła praw człowieka. Teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 120.

15 A. Michalska: O pojęciu praw człowieka, "Państwo i Prawo", 1980, no. 8–9, p. 30.

16 *Ibidem*

17 Especially Inter-American Court on Human Rights in advisory opinion from 1982 and in the context of contrasting universalism with regionalism, stated that "the nature of subject matter itself objects to precise differentiation between universalism and regionalism. Human kind universalism and rights and freedoms universalism, to which people are entitled, create a core of all international systems of protection", *ibidem*, p. 30.

18 C. Mik, Zbiorowe prawa człowieka, Toruń 1992, p. 27. Extensive considerations relating to the notion, normative structure and philosophical background of human rights – see: M. Piechowiak, Filozofia praw człowieka, Lublin 1999.

Considerations about human rights notion should include presentation and characteristic of those paradigmatic elements connected with human rights notion which have become the basis for contemporary international human rights. These are philosophical speculations, jurisprudential considerations relating to law and justice, as well as interdisciplinary deliberations encompassing law, political science, sociology, theology, humanistic studies and economy¹⁹. At present, the existing basic elements behind the concept of human rights should be extended by claims about their innate character and about dignity as sources of laws, universality, inalienability and equality of all people. According to M. Piechowiak the key elements of this concept are also: on the level of legal structures – acknowledgement of their inter-dependence and integrity; on the anthropological level – acknowledgement of a person's exceptional existential status; on the legal level – acknowledgement of the secondary character of the positive law of human rights towards human rights, acknowledgment of human rights and justice as basis of legal order; on the state level – acknowledgement of an individual's well-being as a main goal for actions of institutions and acknowledgement of rights marking an impassable boundary, even in the name of state's existence and stability or interest of the whole society²⁰.

The main underlying element of the human rights is its innate character. In preambles to the Universal Declaration of Human Rights (1948) and Human Rights International Pacts (hereafter referred to as Convenats HRIP) from 1966, it states that “acknowledgment of innate dignity, equal and unalienable rights of all members of human family forms the basis of freedom, justice and peace in the world”. Additionally, in the preambles to HRIP it was admitted that “these rights arise from innate human dignity”²¹. Acts establishing modern protection of human rights fundamentally treat about innate dignity.

19 S.P. Marks, *Emerging Human Rights: A New Generation for the 1980?*, [in:] *International Conflicts, Law and a Just World Order: the 1980 David Stoffer Lectures* (reprinted from *Rutgers Law Journal* 1981, no. 2, vol. 33), p. 435.

20 M. Piechowiak, *Pojęcie praw człowieka*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warszawa 1997, p. 10.

21 Translated from: *Prawa człowieka. Dokumenty międzynarodowe*, ed. B. Gronowska, T. Jasudowicz, C. Mik, Toruń 1993, p. 25 & 26.

Taking under consideration that dignity is a source of rights, its innate character was treated as certainty: they are unalienable, cannot be granted in the course of any human activity. Since the source of human rights is something innate to every person, the source of fundamental rights does not seem to lie in international law, constitution, or the state. Having innate character, human rights are not relativized to positive law norms, but establishment of suitable legal norms is postulated on the grounds of human rights²².

One can multiply examples of determining the nature of human rights²³. It should be noted, though, that all definitions of human rights base on one, common value, which is personal dignity. Obviously, personal dignity should be distinguished from personal dignity identified with honour, reverence and respect²⁴.

Using the personal dignity notion, domestic and foreign legislators accept a certain cultural category, a universal value which springs out from the grounds of classical European philosophy²⁵. It seems truly interesting that in international law of human rights one will not be able to find the definition of the term “dignity”; thus it is impossible to talk about determined content of this term²⁶. In European cultural tradition, the main demands based on acknowledgement of one’s dignity are: the prohibition of a person’s instrumental treatment, and the importance of a person’s treatment as a goal in itself, as a value that cannot be reduced to useful or pleasant wealth²⁷.

22 M. Piechowiak, Pojęcie praw człowieka, [in:] L. Wiśniewski (ed.) *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, p. 15.

23 C. Mik’s definition, widely known due to its comprehensiveness, states that “human rights are situationally varied, natural human abilities, individual in its nature, but socially determined, equal and inalienable, universal in their subjective, objective, territorial, temporary, partly also cultural character, necessary and always arising from every individual’s inherent human dignity”, [in:] *Zbiorowe prawa człowieka. Analiza krytyczna koncepcji*, Toruń, 1992, p. 27.

24 J. Zajadło, *Godność jednostki w aktach prawa międzynarodowego ochrony praw człowieka*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny”, 1989, no. 2, pp. 112–114.

25 J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] *Podstawowe prawa człowieka i ich sądowa ochrona*, L. Wiśniewski (ed.), Warszawa 1997, p. 38.

26 Entry of “dignity” is not present in: *Encyklopedia of Human Rights*, Edward Lawson (ed.), New York 1991.

27 M. Piechowiak, *Godność i równość jako podstawy sprawiedliwości*, “Toruński Rocznik Praw Człowieka i Pokoju”, 1992, part 1, p. 43.

Every human being possesses the same kind of dignity which, as far as human being's position is concerned, creates certain legal consequences. This is reflected in international legislative actions which result in creation of fundamental human rights and freedoms catalogues. At the foundation of international acts relating to the rights of an individual there lies the conviction that human dignity is the source of rights and freedoms due to every human being²⁸ and that their protection is a fundamental and the most important duty of the state²⁹.

Another human rights characteristic is their universality. The Charter of the United Nations treats about human rights and fundamental freedoms "for everyone, without distinction of any kind, such as race, colour, sex, language, or religion, about support of universal respect and observance of human rights and fundamental freedoms"³⁰. If human rights are entitled only due to the fact of being a human being, then their universality is obvious: every human being is entitled to them. That is why their universality is most of all a "structural" feature of human rights, regardless whether these laws are universally accepted and respected³¹. Universal acceptance and respect is called for because of the universal character of human rights³².

Human rights concept characteristics in modern international law must be extended by the feature of its inalienability and the equality of individual's rights. Since the source of the rights is innate, it means that these rights are unalienable. Nobody can deprive anyone of the fundamental rights and nobody can renounce them. Talking about their innate character, it is often stressed that these rights cannot be acquired through any action and similarly their inalienability means that no actions

28 B. Simma (ed.), *Charta der Vereinten Nationen. Kommentar*, München 1991, p. 944.

29 *Ibidem*, p. 38.

30 Art. 1 p. 3, art. 13 p. 1 letter b, art. 55. *Prawo międzynarodowe publiczne. Wybór dokumentów*, (ed.) A. Przyborowska-Klimczak, Lublin, 1996, p. 8.

31 A. Michalska, *Kilka uwag o prawach człowieka*, "Rzeczpospolita" from 25 August 1995, p. 15.

32 Discussing human rights universality, K. Drzewicki notices that in case of post-communistic societies where restoration of civic and political rights led to economic growth and, in spite of inequalities, to a higher standard of life, does not make a valid point about universal application of human rights; seems that geographical location and factors connected with civilization and culture, definitely different than in case of The Third World, played the most substantial role. See more: K. Drzewicki, *Implementation of Social and Economic Right in Central and Eastern Europe Transforming from Planned Economy to Market Economy*, "Nordic Journal of International Law", 1995, v. 64.

can lead to their transfer or loss³³. The postulate of human equality and dignity was expressed in Art. 1 of UDHR, which states that “all human beings are born free and equal in their dignity and rights”. Thus, there are no beings who deserve them in greater or lesser extent. The idea of rights equality is basically included in the acknowledgment of innate dignity as their source. If the source of the rights is innate, it does not depend on accidental and changeable characteristics of a person.

Having the above considerations in mind, one should conclude that human rights are a reality that cannot be expressed in simple formulas. But since the highest normative interests of humanity and international community base on human rights, they should be observed and realized with the best possible effectiveness and in the most realistic way³⁴.

3. International law of human rights

3.1. Introductory issues

Development of international legal protection of human rights was slower and more painstaking than its development in the field of idea, doctrine, and domestic legislation. The greatest obstacle turned out to be, shaped at the dawn of modern international relationships era, the holy rule of states' sovereignty that was used both in doctrine and in practice of interrelationships among countries. Until the Second World War, observance of human rights was each country's internal affair. Each state decided whether and which rights will be observed, promoted or protected. There was no universal, legally binding catalogue of human rights and fundamental freedoms. After the Second World War, majority of international community matured and was ready for international recognition of human rights, realizing the benefits and acknowledging that doing so was in the best interest of every country and every nation.

33 Accurate remarks on inalienability of rights are made by M. Nowicki, *Co to są prawa człowieka?*, Helsińska Fundacja Praw Człowieka, Szkoła Praw Człowieka, Teksty Wykładów, Warszawa, 1996, p. 9.

34 T. Jasudowicz, *Administracja wobec praw człowieka*, Toruń, 1997, p. 30.

Time after the Second World War was characterized by search for mechanisms capable of preventing the tragic human rights violation experiences, genocide and war. There existed a necessity to create institutions and instruments of international character, capable of opposing actions of particular countries. According to common belief, one of the reasons of the collapse of the mid-war order was the weakness of the then international institutions³⁵. In the sphere of human rights, the starting point was an attempt of their universalization (which found its expression in creation of the UN and passing Universal Declaration of Human Rights from 1948), as well as regionalization (which found expression first in European Council from 1949 and then European Convention on Human Rights and Fundamental Freedom Protection from 1950). Underlying philosophy behind forming international organizations and treaties relating to human rights, was acknowledgement of necessity for creation of international forms of national government control. It was justified by vivid experiences of the international community which realized that position of an individual used to be threatened mostly by actions of national governments.

International treaties do not offer legal definition of international law of human rights. There were, however, such attempts within the doctrine. According to S.P. Marks³⁶, international law of human rights are those human needs which attained formal recognition of law through the sources of international law. International law of human rights is a part of contemporary international public law and quite understandably aspires to express broadly perceived human values applying to all people and societies in spite of differences in life conditions. It relates to national experiences in the field of human rights gained by each country before the creation of UNO. Thus, international law of human rights unifies those experiences and promotes best models connected with human rights³⁷.

35 L. Garlicki, *Europejska Konwencja Praw Człowieka a wykonywanie ponadnarodowych zobowiązań przez państwa*, [in:] 60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych, (ed.) H. Machińska, Warszawa, 2009, p. 109.

36 S.P. Marks, *Emerging Human Right: A New Generation for the 1980?*, [in:] "International Conflicts, Law and a Just World Order: the 1980 David Stoffer Lectures" (reprinted from *Rutgars Law*) 1981, no. 2, vol. 33), pp. 436–437.

37 A. Łopatka, *Międzynarodowe prawo praw człowieka*, Warszawa, 1997, pp 13–14.

International law of human rights is a norm group of behaviour expressed in international agreements (of regional and universal character), common law, and general law. International law of human rights is a specialized section of public international law and differs from other sections not only in its subject and the kind of relationships it regulates, but also in the fact that its subject are countries, international organizations, individuals, social groups, and social organizations.

Analysis of international legal norms concerning human rights should take into consideration political processes leading to their creation. Genesis of international human rights protection explicitly shows its repossessive character – it is a response to precise events and threats³⁸. Because of socio-political changes, the human rights concept encompasses in international legislature only a certain minimum – subject of international community's sufficient agreement.

International law of human rights is sometimes in conflict with cultural traditions of other civilizational environments which preserved widely acceptable social behaviours and religious norms (e.g. social inequalities, personal integrity infringement in case of corporal punishment). As far as the rule goes, however, this law is, in spite of minor differences, common to all cultures of the international community.

Relation between international law of human rights and international law is characterized by a kind of “feedback”: international law of human rights influences the entire system of international law towards democratization and reinforcing its human dimension. And the other way round – international law order affects and must affect human rights protection as a whole and affect the function of its protection systems, creating certain framework of cooperation among the states.

International law of human rights relates to national experiences connected with human rights observance gained in respective countries, develops and adds new human rights, develops new and more efficient ways of their promotion and protection. In international law of human

38 M. Piechowiak, *Pojęcie praw człowieka*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warszawa, 1997, p. 11.

rights there takes place unification (connection) and popularization of domestic and international experiences in human rights protection.

Modern international law of human rights reflects widespread acceptance of the rule that every individual should possess such rights which all countries are obliged to observe and protect. In this way human rights protection is no longer only an internal affair of countries and has been removed from exclusive jurisdiction of state. It has become an object of international interest and has become a subject of international law regulation.

International community, motivated by numerous negative experiences, has built parallel human rights protection systems, both on the universal level, as on much more effective, regional level³⁹. Present international human rights protection system is composed of numerous agreements, made by United Nations, specialized organizations, especially by International Labour Organization (ILO)⁴⁰ and United Nations Educational, Scientific and Cultural Organization (UNESCO), and regional organizations: Council of Europe (COE), European Union (EU), and Organization on Security and Cooperation in Europe (OSCE)⁴¹, Organization of American States (OAS)⁴², League of Arab

39 G. Grabowska, Rola międzynarodowego prawa publicznego u progu Trzeciego Millenium, [in:] *Współczesne problemy procesu karnego i wymiaru sprawiedliwości*. Księga ku czci Profesora Kazimierza Marszała, P. Hofmański, K. Zgryzka (ed.), Katowice 2003, p. 121.

40 UNESCO. Grimheden, The International Labour Organization and Human Rights. Access to the ILO [in:] *International Human Rights. Monitoring Mechanism. Essays in Honour of Jacob Th. Moller, G. Alfredsson, J. Grimheden, B. Ramcharan i A. de Zayas* (ed.), Hague 2001, pp. 505–512.

41 On human rights protection systems within OSCE, see: A.D. Rotfeld, *Europejski system bezpieczeństwa w statu nascendi*, Warszawa 1990; W. Korey, *The Promises We Keep. Human Rights, The Helsinki Process and American Foreign Policy*, Nowy York 1993, p. XXI and 14–15; R. Szafarz, *Rozwój prawa międzynarodowego. Z problematyki „europejskiej przestrzeni prawnej*, Warszawa 1994, pp. 22–40; E.B. Schlager, *The Procedure Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972–1990*, "Human Right Law Journal" 1991, no. 6–7; A. Heraclides, *Security and Cooperation in Europe: The Human Dimension, 1972–1992*, Londyn 1993; "Mission Reports on Human Dimension Activities. OSCE Implementation Meeting on Human Dimension Issues", Warszawa, 26 October – 6 November 1998 and "Human Rights: The Role of Field Missions (Rapporteurs' Report). OSCE Human Dimension Seminar", Warszawa, 27–30 April 1999; R. Brett, "Human Rights and the OSCE", *Human Rights Quarterly* 1996, vol. 18.

42 On American system of human rights protection, see: T. Buergenthal, R. Norris, D. Shelton, *Protecting Human Rights in the Americas. Selected problems*, Kehl 1982; D. Cassel, *Peru withdraw from the court: Will the Intern–American Human Rights System meet the challenge*, „Human Rights Law Journal” 1999, Vol. 20, No. 4–6, p. 167 and T. Buergenthal, R. Norris,

States (LAS), African Union (AU)⁴³. Regional interpretation of human rights out of Europe has developed very unevenly. American system is a copy of the Council of Europe, in Africa there is a developed formal construction, Asia and Middle East⁴⁴ witnesses timid attempts on the non-governmental level⁴⁵.

Analysis of international human rights protection should include non-governmental organizations (NGOs), which are elements of a more widely understood system of human rights protection. They encompass all laws, including human rights of the third generation and exist as specific pressure groups playing wider and wider role and being able to pride themselves with immense service in human rights protection all over the world⁴⁶. Most important of them are: Amnesty International (AI), Fédération Internationale Terre des Hommes (FITDH), Human Right Watch, or International Helsinki Federation for Human Rights.

D. Shelton, *Protecting Human Rights in the Americas. Selected Problems*, Kehl-Strasbourg 1990.

43 R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 334. More on African system of human rights protection, see: R. Murray, *Serious or masie violations under the African Charter oh Human Rights and Peoples' Rights: A comparison with the Intern American and European mechanizm*, "Netherlands Quarterly of Human Rights" 1999, Vol. 17, No. 2, p. 133; See also: G.J. Nadoli, K. Magliveras, *Reinforcing the African System oh Human Rights: The protocol on the establishment of a regional court of Human Rights and Peoples'Rights*, "Netherlands Quarterly of Human Rights" 1998, Vol. 16, No. 4, p. 431; D.E. Arzt, *The Apllication of international Human Rights Law in Islamic States*, "Human Rights Quarterly" 1990, no. 12.

44 On human rights protection in Asia, see more, for example, K. Gawlikowski, *Problem praw człowieka z perspektywy azjatyckiej*, *Azja-Pacyfik* 1998, vol. I; K. Yamazaki, *Ochrona praw człowieka w krajach azjatyckich*, „Sprawy Międzynarodowe” 1990, no. 6.

45 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, p. 209.

46 More: R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, p. 209, pp. 260–279; J. Weschler, *Pozarządowe organizacje praw człowieka*, „Sprawy Międzynarodowe” 1998, no. 3; R. Brett, *Non-Governmental Actors in the Fidel of Human Rights* [in:] R. Hanski, M. Suksi (ed.), *An Introduction to the International Protection of Human Rights*, Turku 1997; E. Sottas, *Les Organistaions Non Gouvernementales (ONG): Organistaions Dépassees ou Modèles d'Intégration Sociale*, "Internatioanl Geneva Yearbook" 1996; S. Guillet, *Peuples des Nations Unies. L'action des ONG au sein du système de protection international des droits de l'homme*, Paryz 1995, pp 31–51.

3.2. Significance and development of international human rights law

History of international relation is “to an alarming extent filled with egoism and brutality”⁴⁷. Second World War, which was a war against a human being, triggered the growth of international morality⁴⁸. It was after this war that there appeared projects to elevate a human being to the foreground level of social relationships. Unquestionable progress in international human rights protection, which took place in the last decades, is due to international morality development⁴⁹. Unfortunately, because of size limit, this publication cannot discuss all international aspects of ethical philosophy that are related to the issue of human rights⁵⁰. What should be stressed, though, is the fact that human rights undoubtedly remain in close connection with international morality. Its influence on international relation should not be ignored then, even if moral norms frequently lose in confrontation with economic or security issues. Politics cannot exist in separation from values and moral norms; there is no reason why foreign policy and international relation would be excluded from moral judgement. Right are those who claim that international phenomena and facts can be scrutinized by ethical standards, just like they are scrutinized by legal, economic, or political ones⁵¹.

Human rights are not exclusively a domain of international institutions. In modern times, human rights are protected by international law, as well as domestic one. At the same time, international law has a special and unique role to play in this area⁵², though it is not because it is exceptionally effective or has some priority over other laws –

47 M. Cohen, *Moral Skepticism and International Relation*, “International Ethics” 1985, p. 3.

48 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2000, p. 274.

49 *Ibidem*, p. 277.

50 See more: R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2000, p. 265; R. Kuźniar, *Czynnik etyczny w stosunkach międzynarodowych*, „Sprawy Międzynarodowe” 1990, no. 1.

51 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2000, p. 265.

52 Sources of individual's rights in international law can be defined on the basis of Art. 38 of Statute of International Court of Justice. They include: 1) international agreements; 2) international common practice; 3) general principles of international law. See: B. Simma (ed.), *Charta der Vereinten Nationen – Kommentar*, München 1991, p. 944; A. Klafkowski (editor's commen-

actually it is just opposite⁵³. It is usually the domestic law which in greater extent protects rights of an individual and has undeniable priority in this area. Exceptional place of international law in general human rights protection is that it enacts minimal catalogue of rights and freedoms, which must be observed by all countries that obliged themselves to doing so, it establishes rules, conditions and exceptions from the minimal requirements, and finally imposes a certain general concept of human rights⁵⁴. In view of varied international community, human rights standards included in international law define only a certain minimum of protection of values crucial to an individual⁵⁵. That such was the intention of HRIP founders proves Art. 5 of International Covenant on Civil and Political Rights, which states that: “None of the human rights acknowledged by the state legal order can be limited or suspended for the reason that the Covenant does not recognize such laws or recognizes such laws on a more limited scale”⁵⁶. Thus, international law serves to limit freedoms of states in defining relations between public authorities’ and its subordinate units⁵⁷. It does what domestic law failed to do or have done it ineffectively – it controls public authorities actions in order to eliminate arbitrariness⁵⁸. In considerations over axiology of international human rights standards, Z. Kędzia⁵⁹ points out that the analysis of sources and comparison of legal systems are meant to find external objective assessment criteria of existing and proposed one’s own solutions. The last argument is connected with growing conviction that a state should not arbitrarily establish which values deserve constitutional protection, and that

tary), A. Abraszewski (aut.), Encyklopedia prawa międzynarodowego i stosunków międzynarodowych, Warszawa 1976, p. 472.

53 C. Mik, Wprowadzenie do prawa międzynarodowego praw człowieka, [in:] Szkoła praw człowieka. Teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 1.

54 *Ibidem*, p. 1.

55 Z. Kędzia, Prawa człowieka w prawie międzynarodowym a prawo polskie, „Państwo i Prawo”, 1989, no. 9, p. 22.

56 *Ibidem*

57 C. Mik, Wprowadzenie do prawa międzynarodowego praw człowieka, [in:] Szkoła praw człowieka. Teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 1.

58 *Ibidem*, p. 1.

59 Z. Kędzia, Konstytucyjna koncepcja praw, wolności, obowiązków człowieka i obywatela, [in:] Z. Kędzia (ed.), Prawa, wolności i obowiązki człowieka i obywatela w nowej polskiej konstytucji, Poznań 1990, p. 12.

these values exist independently from the state which may and should guarantee their protection.

Contemporary law of human rights reflects universal acceptance of the rule that every individual should have rights observed and protected by all countries⁶⁰. It is characteristic that all international conventions leave no doubt that every human being is a subject to the rights, not only citizens of a given state. Obviously, not every human rights violation or situation where international standards are infringed is a result of intentional actions of public authorities. As a matter of fact, it is known that more and more often human rights are under threat from other persons or groups.

J.M. McCormick and N.J. Mitchell point out that discussing human rights violation or discrepancy between international human rights standards and reality, one should remember that apart from extraordinary situations, for example armed conflict, it could be a result of several conditions: firstly, intentional government actions which aim to limit civil and political rights and often persecute its political opponents; secondly, inefficient government economical policy leading to backwardness and poverty and, in the long term, inability to realize fundamental social and economic rights; thirdly, cultural or religious conditioning which manifests in various customs or local norms that are in conflict with fundamental and universal human rights; fourthly, economic backwardness caused by historical or natural (e.g. climatic) factors that local authorities or international relief cannot overcome and which cause major discrepancy between all human rights categories and fundamental international standards⁶¹.

Discussing development and significance of international law of human rights, one must stress cultural conditioning of their articulation and level of their protection⁶². As a matter of fact, considerations about human rights universality cannot be made in separation from

60 W. Czapliński, A. Wyrozumka, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 1999, p. 320.

61 See more: J.M. McCormick, N.J. Mitchell, *Human Rights Violations, Umbrella Concepts and Empirical Analysis*, "World Politics" July 1997.

62 A. Redelbach, *Prawa naturalne – prawa człowieka – wymiar sprawiedliwości: Polacy wobec Europejskiej Konwencji Praw Człowieka*, Toruń 2000, p. 85.

cultural variety expressed in Buddhist, Chinese or Christian ethics⁶³. Infringements of human rights that result from tradition or religious norms are socially approved – contemporary states, with their specific cultures and political models, differ substantially in this respect. Culturally different countries cannot be assessed by only Western European criteria where prevail democratic systems⁶⁴.

It should be noted that political conditioning had an immense impact on international law of human rights development. In Western Europe, for example, institutionalization of human rights and their protection system was just another evolutionary, not revolutionary, step forward⁶⁵. The countries introduced international control and universalization of the protected subject regardless of their nationality⁶⁶. However, these solutions concerned individuals—citizens who had already been protected by fundamental internal law and corresponding institutional control system, and where such protection had already been functioning in practice⁶⁷. Thus, International Human Rights Covenants, European Convention on Human Rights and Fundamental Freedoms offered mature democratic countries just new solutions.

Things looked different in Eastern Europe. As far as development of international protection of human rights is concerned, it was only after the collapse of communistic system that full implementation and observance of human rights was possible. Assumption that individual's fate is exclusively determined by the state's internal affairs was in conflict with international protection concept which demanded that a citizen uses entitled instruments that, according to K. Skubiszewski, enable an individual to, in a way, slip between his own country and the international law⁶⁸.

63 *Ibidem*, p. 86.

64 N. Wickramasinghe, From Human Right to Goud Governance: The Aid Regime in the 1990s, [in:] M. Sellers (ed.), *The New World Order. Sovereignty, Human Rights, and the Self-Determination of Peoples*, Oxford 1996.

65 E. Łętowska, O znaczeniu praw człowieka dla polskiego systemu prawa, [in:] *O prawach człowieka w podwójną rocznicę Paktów*, Toruń 1996, pp. 118–119.

66 *Ibidem*, p. 119.

67 *Ibidem*

68 Z. Sędzia, Prawa człowieka w prawie międzynarodowym a prawo polskie, „Państwo i Prawo”, 1989, no 9, p. 17.

Characteristic feature of modern international law of human rights is that it contributes to creation of countries' legal orders. Example of Poland shows that fundamental law catalogue (the way it is normatively presented), establishment of its boundaries in constitutional projects, concern to create procedural guarantee system that would secure its functioning⁶⁹, remained under strong influence of human rights acts, especially the European Convention on Human Rights and Fundamental Freedoms.

Human rights develop over time and their catalogue expands, both in internal law systems of the countries, and also in international law. Specific role of international law can be seen in its creation of the minimal human rights protection standard which is common for all countries of various cultures and traditions. Apart from creation of new rights, there also takes place creation of new threats – for example, privacy infringement caused by fast developing information technology, or new issues connected with the scientific research freedom boundaries⁷⁰. Indeed, new laws and freedoms are being formulated, together with new procedures that would guarantee their effective implementation and various techniques that would prevent their violation. Authorities seem to possess an innate tendency to limit individuals' rights – that applies to both democratic, as well as non-democratic systems. Thus, actions defending human rights will always be necessary. Democratization of international relations requires absolute respect for the rules of sovereignty, non-interference, and most of all, human rights protection⁷¹. Nowadays it can be seen that the more mature democracy, the stronger and the more numerous international actions protecting individualism and uniqueness of a human being against treacherous designs of the authorities.

There are a couple of considerations that come to mind at this point. Firstly, international human rights standard works as a denominator as

69 E. Łętowska, O znaczeniu praw człowieka dla polskiego systemu prawa, [in:] O prawach człowieka w podwójną rocznicę Paktów, Toruń 1996, p. 120.

70 M. Nowicki, Co to są prawa człowieka?, [in:] Szkoła praw człowieka. Teksty wykładów, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 13.

71 See more: S.M. Lipset (ed.), The Encyclopedia of Democracy, Waszyngton–Londyn 1995, pp. 346–349.

far as humanistic understanding of an individual is concerned. Secondly, international law of human rights proves that apart from internal criteria, human rights and freedoms also need external criteria of constitutional regulations assessment. Finally, international law has become a crucial stimulus which shapes human rights norms in particular countries. The aspiration to adjust internal law with the international law of human rights gives rise to introduction of new specific regulations and also acceptance of those philosophical solutions, which are not in conflict with those assumed by international protection of human rights⁷². Evolution of human rights protection has a dynamic and, on the domestic legislative level, gradually more comprehensive character. In the past, human rights existed within acts, today, however, each act should take human rights into consideration⁷³.

4. Human rights and freedoms catalogue in international law

The concept of human rights clearly divides into specific rights that an individual enjoys. There is an extensive human rights and freedoms catalogue protected by international law⁷⁴. The rights and freedoms are not identical, especially when we compare various regional systems (e.g. European and African). Differences occur also among specific universal documents (e.g. UDHR⁷⁵ vs. Convenats HRIP).

On the domestic and international levels, there are two basic groups of human rights: material and procedural. Material laws are specific freedoms and rights: freedom of speech, of conscience, of denomination,

72 M. Piechowiak, Pojęcie praw człowieka, [in:] Podstawowe prawa jednostki i ich sądowa ochrona, L. Wiśniewski (ed.), Warszawa 1997, p. 10.

73 Quoted from: J. Łętowski, Sądownictwo polskie a koncepcja praw człowieka, „Biuletyn Rady Europy”, 2003, no. 3, p. 31.

74 *Ibidem*, p. 40.

75 Many authors think that it includes “reliable catalogue of human rights, became fundamental element of international common law and is binding for all countries, not only UN members. L. Sohn, The New International Law: Protection of Rights of Individuals Rattler than States, „American University Law Review” 1982, n°1, s. 17; see review of viewpoints in: T. Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford 1989, p. 95–97; K.J. Partsch, Vor und Nachteile einer Regionalisierung des internationalen Menschenrechtsschutzes, „Europäische Grundrechte Zeitschrift” 1989, p. 2.

freedom to choose one's place of residence, to study, etc⁷⁶. Procedural rights are available kinds of actions and relevant institutions that help an individual to exercise to exercise his/her rights and freedoms from the authorities⁷⁷. Sometimes the division is not clear, for example, the right to trial can in some situations be considered as material (when the court acts as an arbitrator in dispute between two subjects), or as procedural (when one applies to court against an institution which violated a specific human right).

Human rights can be classified on many levels. Internationally protected rights and freedoms that form a catalogue can be grouped into "families", "generations", or "groups"⁷⁸. The most popular way of presenting the scope of human rights is discussing their international catalogue with the approach that it is only a basic (general) set of rights⁷⁹. International catalogue of rights is often not limited to one international agreement (e.g. UDHR or Convenats HRIP), and even if it is, such agreements usually differentiate status of some groups of rights, differentiating normative quality of guarantee regulations or possibility of claims (for example, see African Charter of Human and Peoples' Rights from 1981)⁸⁰.

Civil and political rights, later called the first generation rights, treat about protection of a person's freedom and his/her participation in public life⁸¹. These include: the right to life, freedom from torture, freedom from slavery, compulsory or forced work, the right to freedom and personal security, right to freedom from slavery for debts, the right to migrate and settle down (including the right to go abroad and return), the right to a fair trial, the right to have legal subjectivity, etc⁸²

76 M. Nowicki, Co to są prawa człowieka? [in:] Szkoła Praw Człowieka. Teksty Wykładów, Helsińska Fundacja Praw Człowieka Warszawa 1996, p. 9.

77 *Ibidem*

78 Mc Dougal, Human Rights and Word Public Oder: The Basic Police of an International Law of Human Rights, New York, 1980, p. 274.

79 B. Wierzbicki, Prawo międzynarodowe publiczne, Białystok 2001, p. 116.

80 *Ibidem*

81 A. Redelbach, Prawa naturalne—prawa człowieka—wymiar sprawiedliwości: Polacy wobec Europejskiej Konwencji Praw Człowieka, Toruń, 2000, p. 94.

82 Personal and political rights also include: prohibition of arbitrary expatriation of foreigners, freedom from arbitrary punishment, right to the respect of private life, to domicile and correspondence, to freedom of thought, conscience and religion, the right to freedom of speech, to the respect of family life, to peaceful assembly, to form unions, to elections, and to perform pub-

The issue of human life surfaced later and as a result there appeared new rights: social, economic, cultural – so called rights of the second generation⁸³. Additionally, those rights came to include: the right to work, to dignity at workplace, to work security, the right to proper work conditions, to fair payment, to social insurance, to satisfactory standard of life, to health protection, to a dwelling, the right to study, and other cultural rights⁸⁴.

Having the above in mind, human rights can be divided into two basic groups: first including civic and political rights, second, including economic, social and cultural ones. This situation leads experts to conclusion that, in fact, there are two law categories connected with states' different duties⁸⁵. What is more, it is sometimes pointed out that the laws' nature is different (civic relate to freedoms, have unchangeable content, are absolute, over-positive, are suitable for judicial protection, and do not require substantial financial funds; on the other hand, economic laws are egalitarian, changeable, relative, created by positive law, are not suitable for judicial protection, and cannot be guaranteed without substantial funds)⁸⁶.

One of the characteristics of human rights is that they are indivisible and codependent. Firm emphasis on their integrity helps one to avoid absolutization of specific rights⁸⁷. The Vienna Declaration signed by the heads of states of the European Council from 1993 declares that: "All human rights are universal, indivisible, codependent and interconnected"⁸⁸. Their indivisibility and integrity spring from the unity of various aspects of human existence which requires wholistic

lic functions; see more: B. Wierzbicki, *Prawo międzynarodowe publiczne*, Białystok 2001, p. 118.

83 See more: R.L. Siegel, *Socioeconomic Human Rights. Past and Future*, "Human Rights Quarterly", 1986, vol. 7, No. 3, p. 225.

84 Apart from fundamental rights there are sector rights, especially rights of persons belonging to national minorities, children, women, family. B. Wierzbicki [ed.] *Prawo międzynarodowe publiczne*, Białystok 2001, p. 118.

85 B. Wierzbicki (ed.) *Prawo międzynarodowe publiczne*, Białystok 2001, pp. 116–117.

86 *Ibidem*

87 M. Piechowiak, *Pojęcie praw człowieka*, [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warszawa 1997, p. 18.

88 See more: *Deklaracja Wiedeńska i Program Działania Światowej Konferencji Praw Człowieka*, Wiedeń, czerwiec, Instytut Nauk Prawnych PAN, Poznańskie Centrum Praw Człowieka, Poznań 1998.

approach to the rights⁸⁹. Personal development requires respect and care for the physical, psychological, moral and spiritual aspect of a person. Furthermore, individual growth requires proper social, political, economical, cultural and ecological conditions. It is often stressed that “popularization, observance and adherence to one kind of human rights and fundamental freedoms cannot justify negation of other human rights and fundamental freedoms”⁹⁰.

Lastly, attention was directed towards solidarity rights – so called collective rights or rights of the third generation⁹¹. These included the right to peace, to development, to life in unpolluted environment, to observance of common human heritage, and the right to humanitarian aid in case of natural disasters⁹². The rights of the third generation stem from universalistic trend and are based on the rule of solidarity in personalistic perspective⁹³. Thus, there is truth in saying that at the bottom of collective rights there lies inability of individual fulfilment of specific human rights⁹⁴. The originator of collective rights idea was French human rights expert and ideologist, K. Vasak, who in the 1970s came forward with the third generation rights concept, according to which, solidarity rights are to be fulfilled gradually and are to complement human rights of the two earlier generations, facilitating better conditions for their fulfilment⁹⁵.

89 Z. Kędzia, Prawo człowieka do integralności, "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1989, no. 3, p. 15.

90 Declaration on the Right to Development, res. 41/128 General Assembly UN from 4 December 1986 – Preamble. See official website of the UN, <http://www.ohchr.org/english/law/rtd.htm>

91 A. Rosas, Rights of the Third Generation, [in:] A. Eide, C. Krause, A. Rosas (ed.), Economic, Social and Cultural Rights. A Textbook, Dordrecht–Boston–Londyn 1995; E. Klein, Human Rights of the third generation, [in:] Rights, Institution and impact of international law according to the German basic law, Ch. Starck (ed.), Baden–Baden, 1987, p. 70; Human Right At the Dawn of the Twenty–First Century. Karel Vasak Amicorum Liber, Bruksela 1999, p. 1189; K. Drzewicki, Trzecia generacja praw człowieka, „Sprawy Międzynarodowe” 1983, no. 10.

92 See more: A. Łopatka, Międzynarodowe prawo praw człowieka. Zarys, Warszawa 1998, p. 22.

93 More extensive collective rights analysis can be found in monograph: C. Mik, Zbiorowe prawa człowieka. Analiza krytyczna koncepcji, Toruń 1992.

94 These rights are called subjectively sectoral (rights of women, prisoners etc.). See: A. Michalska, Uniwersalizm praw człowieka, [in:] Państwo. Prawo. Obywatel. Zbiór studiów ku czci prof. A. Łopatki, Wrocław 1989, p. 595.

95 The idea of third generation rights is denied by some international law theoreticians; see more: T. Jasudowicz, Administracja wobec praw człowieka, Toruń 1997, p. 40.

Human rights catalogue is not a finite collection; actually, it can be said that it has a dynamic and open character. It could be enriched by new rights or elements of presently binding rights, which could emerge and come into its own, autonomic rights⁹⁶. In spite of undoubtedly astonishing achievements of international law in human rights, process of their creation, that is human rights normativization process, has a continuous character. First, there must be an idea which in time transforms into a mature and coherent concept⁹⁷ – international legal norm, which treats about new human right. According to Roman Kuźniar, apart from law, this process could not take place without philosophy, history, politology, sociology, psychology and other types of social science⁹⁸.

96 *Ibidem*

97 K. Drzewicki, Internationalization of Human Rights and Their Juridization [in:], R. Hanski, M. Suksi (ed.), An Introduction to the International Protection of Human Rights, Turku 1997, p. 26.

98 R. Kuźniar, Prawa człowieka, prawo, instytucje, stosunki międzynarodowe, Warszawa 2004, p. 14.

Part 2

HUMAN RIGHTS IN INTERNATIONAL CONVENTION

1. Introduction

Extensive and intensive international human rights protection development during the post-war period lead to a state which best could be described as relatively saturated. What it means is that at the moment we have got a great deal of conventions stretching their normative control over almost all categories and various aspects of those rights. There are also countless documents creating “soft” international law or important political norms that support human rights protection. At present, we are in the phase of improvement and crystallization of norms and rights introduced earlier in basic, though sometimes too general, agreements. New projects frequently extend earlier resolutions or treat about very narrow, although definitely not marginal issues¹.

Evolution of international law of human rights turned an individual into a subject of international law. This statement is a simple consequence of commonly shared view which says that “subject of international law is a person who has rights and duties directly resulting from international law norms, that is a person to whom those international law norms are addressed”². Without getting too deep into doctrine disputes as to the scope individual’s legal subjectivity, today one could take the initial statement, very controversial 20–30 years ago, for granted. It is well supported by numerous human rights conventions and international humanitarian law. International legal subjectivity of an

1 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, p. 124.

2 W. Góralczyk, *Prawo międzynarodowe publiczne*, Warszawa 1979, p. 129. The author adds that law subject possesses the ability to act, that is to cause legal effects by its action; see also pp. 156–158.

individual is developing in two fundamental aspects: individual rights and his responsibility for actions that are in conflict with international law, in a given context for serious infringements of human rights³.

2. Sources of human rights international protection

“The law of humanity stands before the law of the state (...)” – said long-standing French Foreign Affairs Minister Roland Duma⁴. These words, in a very suggestive way, illustrate the importance and rank of universal and effective guarantee of human rights observance on the global scale. The doctrine clearly points out that international community’s concern about human rights.

It is widely believed that sources of international law are most authoritatively defined in Article 38(1) of Statute of the International Court of Justice. Those are also sources of the human rights regulations and include: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law⁵. There is no indication of any priority or hierarchy of the sources listed in Article 38, except for the single reference to subsidiary means in item⁶.

3 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, pp. 128–129.

4 Quoted from: Za M. Fleming, *Podstawowe prawa człowieka a międzynarodowy konflikt zbrojny*, “Wojskowy Przegląd Prawniczy”, 1993, no. 3, p. 19.

5 Statute of the International Court of Justice, <http://www.icj-cij.org/documents/>

6 The most controversial form of obligations are those resulting from the acts of bodies of international organizations which are not mentioned in Art. 38 of the Statute of International Court of Justice. Although they are not formally binding, one could wonder if they are not something more than a reason for creation of new norms of international law – something more than just soft law. Since the whole international law is permeated by the principle of good faith, it seems that they desire to be treated as more than “empty words”, meaningless and free of obligations for countries that express them by passing Acts.

International agreements, custom, and general law principles are treated as three independent processes that create the law, whereas adjudications and research papers are treated as supporting factors in international law norms verification⁷.

In traditional international law, but also in international law of human rights obligations are formed among countries which are the main subjects of those laws. They obviously result from the norms of that law: treaty, custom, general principles of the law and partly from international organizations' resolutions.

Treaties, which are the most important instrument in international cooperation, are also basic means for creation of international obligations. Human rights treaties have been adopted at the universal level (within the framework of the United Nations and its specialised agencies, for instance, the ILO and UNESCO), as well as under the auspices of regional organisations, such as the Council of Europe, the Organisation of American States and the African Union. These organisations have greatly contributed to the codification of a comprehensive and consistent body of human rights law.

International agreements on human rights regulate relationships between countries – parties, but also between the state (its organs and officials) and an individual. Obligations created on the basis of the treaty, work on horizontal (between countries) and vertical (between authorized individual and the state) level.

Objective character of obligations from international agreements influences their structure. Practically speaking, the content is different in case of horizontal and vertical obligations. In case of the former, the construction resembles classical international obligations, with the restriction as to their effectiveness *erga omnes*. In this way, the roles of authorized and obliged are taken by respective countries (they are simultaneously authorized and obliged).

Obligations existing on the vertical plane play the main role in all obligations, because they are responsible for legal relation between the

7 M.N. Shaw, Prawo międzynarodowe, Warszawa, 2006, p. 70.

state and an individual. The state obliges towards other parties of the agreement, that it will observe specific rights and freedoms resulting from the treaty and apply them towards those under its jurisdiction. In vertical obligations, similarly to the horizontal ones, the obliged subject is the state. However, in case of the latter, the state is not so much a sort of unity, but rather an embodiment of the state apparatus. Human being is the authorized subject here, whereas the international agreement secures an individual from abuse of power and arbitrariness of authorities, giving him an opportunity to use means of human rights control in an international way.

International custom. Apart from numerous norms included in regional and common international agreements on human rights, human rights can also be included in international customary law which is the result of countries' general practice⁸. Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to "general practice accepted as law". In order to become international customary law, the "general practice" needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (*opinio juris et necessitatis*). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty. Customary norms of international law of human rights include prohibition of: torture, genocide, slavery, and discrimination. In the domain of human rights protection custom is created by a source supplementary to a treaty (in a limited range), which results from specification on customary law formation (consistent practice of a state and conviction that it is binding in the same way as the current law, and not of accidental or provisional character).

General principles of law can also be the source of international law. In international law they have been defined as "logical propositions resulting from judicial reasoning on the basis of existing pieces of international law. General principles of law can be found in all legal systems. Their function is clearly to assist where written sources of law have failed to provide an answer, since the latter

8 See: R.M.M. Wallace, International Law, Fifth Edition, London 2005, pp. 9–19.

can hardly cover all questions which come before the courts. At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified. Why are general principles used? No legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases⁹.

General principles of law play an important part in protection of human rights, which can be observed through judicature of international control bodies (especially specialized courts of human rights). In solving contentious issues, courts invoke domestic law rules, compare them, and when they find them identical or similar, treat them as the source of law, which allows more precise interpretation of general norms of international law of human rights (for example, the rule that flogging is a degrading and humiliating form of punishment in the sense of Art. 3 of European Convention on Human Rights and Fundamental Freedoms from 1950)¹⁰, or allows reinforcement of the protective system (for example, the acceptance of the acquired rights principle).

According to Article 38 of the Statute of the International Court of Justice, **judicial decisions and the teachings of the most qualified publicists** are ‘subsidiary means for the determination of rules of law’. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law.

9 See more: B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, New York 2006; J. Hall, *General Principles of Criminal Law*, Second Edition, Clark, New Jersey, 2005.

10 Article 3 (Prohibition of torture), No one shall be subjected to torture or to inhuman or degrading treatment or punishment, European Treaty Series – No. 5.

As for the judicial decisions, Article 38 of the Statute of the International Court of Justice is not confined to international decisions (such as the judgements of the International Court of Justice, the Inter-American Court, the European Court of Human Rights and the future African Court on Justice and Human Rights); decisions of national tribunals relating to human rights are also subsidiary sources of law.

3. International systems of human rights protection

3.1. Human rights protection universalism in the United Nations

Contemporary international protection of human rights is realized within the framework of so called human rights protection systems, both in universal and, even more efficiently, in regional dimension. The systems, which are responsible for international legal protection of individual's rights, were shaped by international organizations of governmental character. International organizations for human rights protection are created by the will of the states and their task is to tackle issues connected with the creation of common international standard for individual's rights supervisory.

The advocates of universality claim that international human rights must be the same everywhere. **Universalism** of human rights protection is based on legal international instruments which work on a global scale. This includes functioning of a government international organization which forms common legal international standard of human rights protection for all people and communities in every region of the globe. In practice, this means international instruments that were created within the UN framework.

Human rights protection **regionalism** means that these rights are protected by instruments developed by countries belonging to one geographical region, united in a specific governmental organization of regional character. Modern international regulations on human rights protection, created on the ground of so called regionalism, were created

in three geographical areas (continents) and influenced European, African, and American systems.

The creation of one of the most significant and unique, universal system of human rights protection (both in the subjective meaning – encompassing all member states, as well as in objective meaning – encompassing all fundamental categories of human rights)¹¹ was a result of tragic Second World War experiences. As early as even during the war, there were first initiatives directed towards the creation of new post-war order, which would base on inalienable rights and freedoms of a human being (Franklin Delano Roosevelt suggested such an order based on freedom of speech and denomination, freedom of the choice of government system or human rights regulation in Atlantic Declaration¹²). The creation of the United Nations Charter, signed 26 June 1945 in San Francisco (hereafter UNC), has started the development of international protection of human rights system in the United Nations¹³.

United Nations Charter states that the people of the United Nations are determined to “restore faith in fundamental human rights, equality of men and women, in equality of small and big states”. The Charter also recognizes that the aim of the United Nations is “to bring about an international cooperation in order to solve economic, social, cultural, and humanitarian issues”, but also to support and encourage observance of human rights and fundamental freedoms for all people, without distinction to race, sex, language, or denomination (Art. 1). Article 13 (1) states that General Assembly may supervise realization of resolutions on human rights and may also formulate necessary recommendations and Article 55 includes resolution that United Nations will support supervision of human rights. In another, equally important, Article 56, it is stated that “all members oblige to undertake common and independent, but together with Organization, actions to

11 Presently, these are 192 countries, March 2011, <http://www.un.org/en/members/growth.shtml>

12 See more: R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa, 2004, pp. 58–61.

13 E. Widawska, *System ochrony praw człowieka w ramach Organizacji Narodów Zjednoczonych*, [in:] *Prawa człowieka. Wybrane zagadnienia i problemy*, (ed.) L. Koba, W. Waclawczyk, Warszawa, 2009, pp. 57–58.

achieve goals mentioned in Article 55¹⁴, that is those connected with human rights protection. Thus, UNC became the starting point for development of international law and institutions dealing with human rights and existing within UN.

Formulation and development of human rights by UN turned out to be a phenomenon fraught with consequences: there appeared countless declarations and agreements on human rights and they were accompanied by establishment of various advisory institutions, implementation mechanisms, and supervisory organs¹⁵.

Universal Declaration of Human Rights, passed by the United Nations General Assembly on 10 December 1948, was the first UN document on human rights and it became a milestone in the construction of international system of human rights protection. UDHR for the first time formulates the main list of human rights and fundamental freedoms, specifically mentioning civic, political, economic, social, and cultural rights. Philosophical foundations of international law of human rights that can be found in the Declaration, undoubtedly play a considerable part in popularization and universalization of human rights idea in the world.

UDHR initially designed as a document preparing to pass the convention of human rights protection, in the course of time became an independent instrument which has had a great influence on international practice, on legislation and application of domestic law, especially the constitutions. International legal character of UDHR is disputable. Although it is not a legally binding contemporary document, there arises a question if in the course of time, custom, and general principle of international law, interpretation of the UN Charter, and later practice, it has not become one¹⁶. Some authors treat it as a non-binding document (for it does not have international character),

14 United Nations Charter 26.6.1945 (Dz.U. 1947.23.90).

15 M.N. Shaw, *Prawo międzynarodowe*, Warszawa, 2006, p. 183.

16 For example, in a document issued in January 1991 called "Human Rights In Foreign Policy", Foreign Affairs Ministry of Great Britan took a stand that although the Declaration "is not legally binding in itself, it could be said that most resolutions expressed in it form a part of international common law", UKMIL, 62BYIL, 1991, p. 592. See also: Oppenheim's *International Law*, (ed.) R.Y. Jennings, A.D. Watts, Londyn, 1992, p. 1002.

others think that using it in international practice favours its treatment as an element of common law. Whatever the truth is, all authors agree that as a fundamental universal document, the Universal Declaration of Human Rights plays a crucial role in the protection of human rights and fundamental freedoms¹⁷.

Creation of the UDHR was the beginning of human rights codification in the UN system. Numerous treaties were signed under the auspices of UNO. The most important are, for example, Human Rights Covenants from 1966, i.e. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Other acts included: International Convention on removal of all forms of women discrimination (1979), Convention against torture and, cruel, inhuman or degrading treatment or punishment (1984), Children Rights Convention (1989) etc.¹⁸

UN works to offer the best expertise and support to the different human rights monitoring mechanisms in the United Nations system: UN Charter-based bodies, including the Human Rights Council, and bodies created under the international human rights treaties and made up of independent experts mandated to monitor State parties' compliance with the treaty obligations. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights (OHCHR).

By the power of UN Charter (Art. 7), there was created institutionalized network of bodies which in various degree were responsible for human rights issue. General Assembly, with its representatives of member states within the UN "initiates studies and makes recommendations for the purpose of [...] assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 13 UNC). Security Council, comprising 15 members, holds "primary responsibility for the maintenance of international peace and security" (Art.24 UNC). Just like the General Assembly, it can impose sanctions

17 Prawa człowieka. Dokumenty międzynarodowe, (ed.) T. Jasudowicz, B. Gronowska, C. Mik, Toruń 1993, p. 18.

18 <http://www.un.org/en/documents/index.shtml>, accessed 4.3.2011

on the member states. Economic and Social Council, (ECOSOC) is in power to “make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all” (Art. 62 UNC), and its members are responsible for “preparing drafts of international treaties”. International Court of Justice, with its head office in the city of Hague, comprises 15 judges, selected by the General Assembly and Security Council for nine years term. International Court of Justice settles international disputes (in case of states’ assent), issues directives and advisory opinions for UN organs and other international organizations. ICJ’s verdicts are final for all parties. Secretariat carries out tasks from administrative level and is subordinate to the Secretary General, appointed by General Assembly for the period of 5 years (by Security Council recommendation), who is not only an administrative superior, but is also involved in solving factual issues relating to human rights. The last of six main bodies of the UN is the Trusteeship Council, which formally suspended its activity when the last trust territory of Palau regained its independence in 1994¹⁹.

UN has some special bodies that monitor implementation of the treaties of human rights. They are not UN auxiliary bodies, but autonomous institutions. They are established in treaties, for example: Human Rights Committee (HRC), Committee on the Elimination of Racial Discrimination (CERD). The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the elimination of all forms of racial discrimination by its state parties²⁰. The above committees are called “UN contractual bodies”.

19 E. Widawska, System ochrony praw człowieka w ramach Organizacji Narodów Zjednoczonych, [in:] Prawa człowieka. Wybrane zagadnienia i problemy, (ed.) L. Koba, W. Waclawczyk, Warszawa 2009, p. 58.

20 Other examples: Committee on Economic, Social and Cultural Rights (CESCR – The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28.5.1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. All States parties are obliged to submit

Apart from maintaining international peace and security, UN also focuses on another of its main aims, on human rights protection. The whole scope of activities relating to human rights is complex and wide. It is based on basic principles, which should be common to all states involved in this undertaking. First one states that it is the authorities of particular countries that are originally responsible for promotion and protection of human rights. Second one says that promotion and protection of human rights is the rightful concern of the whole international community. Third one assumes that there exists a co-dependence between democracy, development and respect of human rights. Fourth one claims that the international community should support the human rights implementation process, democracy, law and order, and also to take steps to prevent human rights violation and to eliminate most severe cases of rights violation²¹.

3.2. Regional systems of human rights protection

3.2.1. European model of human rights protection

When it comes to the operation of regional systems, the most complex and effective is the European system of international protection of human rights; formed by three sub-systems or independent normative centres: Council of Europe (hereafter COE), European Union (hereafter UE) and Organization for Security and Co-operation in Europe (hereafter OSCE). Combined achievements of these organizational structures defines the frames of European system of human rights, where international norms developed into a vast

regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations"). Committee on the Rights of the Child (CRC – The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations"). <http://www.universalhumanrightsindex.org/>, <http://www2.ohchr.org/english/bodies/crc/index.htm>, 25.2.2011.

21 Interview with The High Commissioner for Human Rights, Jose Ayala-Lasso, [in:] The High Commissioner for Human Rights, UN, New York and Geneva, 1996, p. 14.

catalogue of individual's rights and freedoms. At present, international norms created on the European continent are defined as European law of human rights.

Council of Europe, presently forming an association of 47 states of "old" continent (Poland joined in 1991), was the first organization that started international protection of human rights in Europe. It started on 5 May 1949 with the signature of so called Statute of the Council of Europe²², which laid out main aims and principles of the organization's activity. Vast catalogue of reasons for its creation is given in Preamble to the Statute, which stresses the necessity of the preservation of peace in the world, attachment to spiritual and moral principles as sources of personal freedom, civic rights, law and order, which are at the foundation of every genuine democracy, and finally, conviction, that only closer cooperation of European counties can turn the above ideals into reality. However, the catalogue does not present all real reasons for the creation of the Council of Europe. It should be added that the additional reason was lack of determined measures towards implementation and enforcement of human rights supervisory by the United Nations²³.

Initiative of the Council of Europe most frequently takes the form of convention which aims to incorporate COE standards. So far, 200 conventions have been prepared within the COE framework, of which the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 is the most important and every state joining COE is obligated to ratify. Among other COE Conventions that relate to the protection of human rights and freedoms, one should mention the Convention on inhuman or degrading treatment or punishment from 1987, European Social Charter from 1961 together with Revised European Social Charter from 1996, Framework Convention for the protection of national minorities from 1995, European Convention on

22 See: European Council Statute, [in:] Wybór Konwencji Rady Europy, Warszawa 2006, pp. 14–24.

23 See: G. Robertson, Crimes against Humanity – The Struggle for Global Justice, The New Press, New York 2006, p. 64.

the Exercise of Children's Rights from 1996, and finally Convention on Human Rights and Biomedicine from 1997.

Human rights protection system within COE was in 1999 expanded by the institution of the Commissioner for Human Rights of COE. His main tasks include support of education and awareness about human rights, examination of states' compliance of legislation and practice with accepted standards, as well as promotion of human rights supervisory²⁴.

Until the nineties, COE was called an exclusive club of western democracies. Its opening to the countries which were just beginning their journey on the democratic path, was not without consequences for the Council of Europe and the new member states. Thanks to that process, countries of the former Soviet Republic became part of the democratic European structures. At present, these countries are undergoing the process of consolidation of the European standards, which is obviously connected with their accession to the European Union.

Human rights protection in Europe is also realized in the subsystem of the **European Union**. Although, European Communities did not aspire to a separate human rights protection system, their activities were always characterized by elements of such protection. Human rights protection elements can be found first in Roman Treaties (1957), through next important documents setting new phases and passage into European Union. A crucial event in terms of legal reinforcement of human rights in the system of common law was Single European Act (1986). In its preamble, member states stressed the necessity of joined actions towards democratization based on fundamental rights, especially rights to freedom, equality, and social justice. The sources of fundamental rights were member states constitutions, European Convention on Human Rights and Fundamental Freedoms, and European Social Charter. Among many significant acts passed after the introduction of Single European Act, though of non-binding and rather political character, were: Fundamental Rights and Freedoms Declaration

24 M. Matyasik, Polska w systemie ochrony praw człowieka w Radzie Europy, [in:] Prawa człowieka. Wybrane zagadnienia i problemy, (ed.) L. Koba, W. Wacławczyk, Warszawa 2009, p. 98.

from 12 April 1989, Community Charter of Fundamental Social Rights of Workers from 9 December 1989, and Human Rights Declaration from 29 June 1991. None of the above declarations became a decisive document in human rights protection in European Communities, but they undoubtedly stimulated interest of member states and community bodies in this issue.

Single European Act and other initiatives of the community institutions relating to protection of fundamental human rights, especially European Parliament, resulted in introduction of relevant regulations in Treaty on European Union (hereafter TEU). The Maastricht Treaty (1992) is quite an important document in the attitude evolution of European Union member states towards the issue of fundamental human rights protection. In the Treaty Preamble, member states confirm its attachment to the principles of freedom, democracy, fundamental human rights and freedoms observance, and the rule of law. The Treaty states that “The Union respects fundamental rights, such as guaranteed by European Convention on Human Rights and Fundamental Freedoms (...) and those which result from constitutional heritage of member states as community common law principles”. Another important event was the legislation of EU citizenship institution in the Maastricht Treaty, with all its implications and laws.

Confirmation of human rights protection in the legal system of European Union was the Amsterdam Treaty, in which Art. F states that “Union is based on the principle of freedom, democracy, respect for human rights and fundamental freedoms, law and order, on the rules that are common for all Member States”. This Treaty, for the first time in history, called for introduction of sanctions for member states which would violate the above mentioned principles. Additionally, the Amsterdam Treaty reinforced human rights protection by reference to European Convention on Human Rights and by addition of existing in Treaties ban on discrimination, obligation to respect the equality of women and men, the right to protection of personal information, and the obligation to respect the rights of the disabled²⁵.

25 K. Klecha, *Integralność osoby ludzkiej w ujęciu Karty Praw Podstawowych, Prawa Człowieka, Humanistyczne Zeszyty Naukowe*, 2002, No. 8, p. 62.

Obligation to respect fundamental rights by the member states, both in treaty law and in Court of Justice's judicature, resulted in Fundamental Rights Charter, passed in Nice on 2 October 2000. This Act encompasses all categories of law: personal, political, social, cultural, economical, and its enactment is to reinforce human rights protection in the European Union. Although, EU members did not make the Charter legally binding at the beginning (the Charter was a political declaration), the document had a major impact on the future establishment of fundamental human rights protection in the law of the European Union.

Lisbon Treaty of 2009 is the last European Union document also concerning human rights protection, which maintains and expands existing protection of an individual. It does so by, firstly, giving Fundamental Rights Charter primal legal character, secondly, placing human rights protection among many aims of the European Union, specifying guarantees of freedom, security and justice without internal limits, fight with social impoverishment and discrimination, support of justice and social protection, equality of women and men, solidarity between generations, child rights protection, respect for cultural and lingual diversity, protection of European cultural heritage²⁶.

The political system formed within the framework of **Conference on Security and Co-operation in Europe** (hereinafter: CSCE) – today known as Organization for Security and Co-operation in Europe has also been playing an important role in development of human rights protection in Europe. The Helsinki Act from 1975, document²⁷ signed by 22 European states, USA and Canada, devotes a great deal of attention to human rights and fundamental freedoms supervisory and humanitarian issues. In 1989, the meeting in Vienna developed the concept of “human dimension” of OSCE with special procedure for handling human rights violation cases.

Realization of human dimension of OSCE is supervised by three specially formed institutions: Office for Democratic Institutions and

26 Consolidated version of Lisbon Treaty, i.e. treaties on European Union and its operation, [in:] Dz. Urz. UE C 115, 9.5.2008.

27 See more: A. Bińczyk–Massala, Misje obserwowania; www.osce.org/odihr

Human Rights (hereinafter: Office) with the headquarters in Warsaw (from 1990), High Commissioner on National Minorities (from 1992), and Representative on Freedom of the Media (from 1997)²⁸.

Office for Democratic Institutions and Human Rights is the main instrument of the organization, which helps member states in democratization process and in implementation of human rights standards. One of the most important tasks of the Office is elections monitoring. This means observation of the election process before, during, and after the elections. For this, the Office may send short-term and long-term missions. Since 1992 it leads Coordinated Aid Program to facilitate new member states integration with the organization and fulfilment their obligations towards the Organization, mainly by organizing seminars and studio visits²⁹. The Office especially supports democratization processes by helping to develop the principles of lawful legislature, particularly increasing the role of women in the society. The Office tasks also include monitoring and implementation of obligations taken by the OSCE members, which relate to human rights and issues connected with their promotion and protection. Moreover, it stresses the significance of tolerance and prevention of discrimination, slave trade, refugees, migrants, and migrant workers.

Appointment of the High Commissioner for National Minorities came as a reaction to ethnical conflicts that took place at the decline of communism, all over the Russian dominance area, especially in the Balcan, the Caucasian, and in the Moldavian Dniester River territories.³⁰

The main task of High Commissioner for National Minorities is early prevention of tensions between the minorities and the state and activities aiming at minimalization of the tensions which could

28 Question relating to broadly understood human rights lie within the scope of interest of other OSCE sections. This would include Gender Section and the youngest of institutions in person of OSCE Special Coordinator for Human Trade in Mid-Eastern Europe, which came into being in 2001 (both operating in organization's Secretariat). R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2006, p. 253.

29 R. Zięba, *Funkcjonowanie paneuropejskiego mechanizmu bezpieczeństwa KBWE/OBWE, "Studia Europejskie"* 1998, no. 3, p. 92.

30 M. Jeziorowski, *Wysoki Komisarz KBWE ds. Mniejszości Narodowych, "Sprawy Międzynarodowe"* 1994, vol. 2, pp. 135–140.

destabilize the situation in the country. His competence also covers early action and diplomatic measures preventing potential conflicts. To fulfil his tasks, High Commissioner may visit member states, without their consent but after prior consultation, or collect information from non-governmental organizations. Conclusions are presented to interested countries and the High Council (OSCE organ).

High Commissioner was involved in minority issues in over a dozen countries of Mid–Easter Europe, the Caucasian, Middle Asia (in Albania, Croatia, Estonia, Georgia, Kyrgyzstan, Macedonia, Romania, Slovakia, and Ukraine). Activity of the first High Commissioner, Dutch Max van der Stoel, was highly assessed by international community³¹.

The last organ that supervises human rights within OSCE is Representative on Freedom of the Media (from 1997). It was created to counter growing tendencies of some authorities to limit freedom and independence of public and private media. Its creation was a proof that the media play a very important role in developing civic society, where actions of authorities are constantly being monitored, including those related to human rights. The Representative, with its head office in Vienna, monitors freedom of the media and adherence to resolutions of the Helsinki Process by member states – it plays the role of a watch dog. His tasks include protection of journalists against repression, especially rights of investigating journalists, promotion of media and their independence, including depenalization and decriminalization of cases where journalists disclosed confidential information, protection of their informers, and issues connected with technological development of the media. Additionally, the tasks also include workshops for journalists and media representatives, and exchange of information between them³².

To other forms of activity and OSCE instruments connected with human rights, applied especially in a crisis situation, belong: the Vienna Mechanism (started by Review Conference in 1989) and the Moscow Mechanism (created during Moscow conference on human

31 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2006, p. 255.

32 official website of the Representative on Freedom of the Media: www.osce.org/rfm

dimension in 1991). The former one allows a state to turn to OSCE for information and explanation, another possibility includes bilateral meetings for the purpose of explaining specific issues. Should the above prove ineffective, the next solution is to present an issue on the agenda of the organization. One of the shortcomings of these solutions is lack of sanctions and reliance on the principle of consensus, which enables involved governments to block them (in such situation, everything depends on the strength of political pressure)³³.

OSCE character as regional international human rights protection system is, contrary to other systems (e.g. European Council), strictly political. It is directed towards implementation of OSCE human rights standards and early warnings of their infringements. Due to the political nature of actions, the most important prerequisite is the political will of the countries. Unfortunately, it is frequently absent. Thus the political character of mechanisms is its weakness because with the binding consensus principle, one cannot enforce the fulfilment of obligations without the consent of the involved state³⁴.

OSCE activity relating to human rights is not spectacular and, because it does not arouse media interest, unnoticed. Nevertheless, the achievements in this field are worth mentioning. Most effective were, characteristic for OSCE, preventive measures, such as human rights supervision monitoring, early warnings about potential ethnic conflicts or human rights infringements and mediation efforts, in which OSCE specializes. As a matter of fact, OSCE human rights activity supplements the European Council system which aims to create human rights and democratic behaviour standards by numerous conventions and Strasburg Tribunal judicature. It is worth mentioning that organization concentrates on the trouble spots of the continent, especially in the post-soviet area and the Balcans³⁵.

33 A. Bloed, *Dwadzieścia lat procesu KBWE: od konfrontacji do współpracy*, Warszawa 1995, pp. 38–40; R. Kuźniar, *op. cit.*, p. 231.

34 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, p. 209.

35 J. Piuliński, *Prawa człowieka w działalności Organizacji Bezpieczeństwa i Współpracy w Europie*, [in:] *Prawa człowieka. Wybrane zagadnienia i problemy*, (ed.) L. Koba, W. Waclawczyk, Warszawa 2009, p. 84.

3.2.2. Non-European approaches to regional protection of human rights

Non-European human rights solutions seem to be very uneven, in Latin America there exists a system copied from the Council of Europe model, in Africa there is only an extensively developed formal construction (existing only in theory), Asia and the Middle East witnesses timid attempts to tackle the issue on non-governmental level³⁶.

Inter-American system was founded and is functioning on the basis of Organization of American States (OAS) comprising 35 member states from both Americas. Its one of the oldest regional organizations founded by signing OAS Charter in Bogota in 1948. Among various goals, the Charter does not mention human rights protection, though it does not mean that they are not present in the document. Among fourteen principles there is one which states that "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex". This was the basis for creation of Inter-American human rights protection system within OAS, which includes international law norms and implementation mechanisms³⁷.

OAS resolution to codify human rights initiated a process which resulted in legislation of two most important documents: American Declaration of Rights and Duties of Man (1948) and American Convention on Human Rights (1969). It is important to note that the mentioned Declaration, passed as a not legally binding document, started to be treated as legally binding after creation of Inter-American Commission on Human Rights (consultative and advisory body) in 1959³⁸. After legislature of American Convention on Human Rights, basing on the European model, was created Inter-American Court on Human Rights.

36 R. Kuźniar, *Prawa człowieka. Prawo...*, Warszawa 2004, p. 209.

37 Por.: K. Complak, *Ochrona praw człowieka w Ameryce Łacińskiej*, (w:) B. Banaszak i in., *System ochrony praw człowieka*, Kraków, 2003, s. 289–319; T. Sokółowski, *Międzynarodowa ochrona praw człowieka. Zarys*, Zakamycze, Warszawa 2004; A. Wąsiewicz–Szczepańska, *Interamerykański system ochrony praw człowieka*, in: L. Wiśniewski (ed.), *Ochrona praw człowieka w świecie*, Warszawa–Poznań 2000, pp. 213–230.

38 R. Kuźniar, *Prawa człowieka. Prawo...*, p. 209.

Inter-American system passed also other treaties relating to protection of a category of human rights or protection of particular groups of people. Examples of such are: Inter-American Convention to Prevent and Punish Torture from 12 September 1985, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women from 9 June 1994, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities from 7 June 1999, Inter-American Convention on Child Illegal Trafficking from 18 March 1994, Inter-American Convention on International Child Trade from 18 March 1994, Inter-American Convention on the Granting of Civic Rights to Women and Inter-American Convention on Granting Political Rights to Women from 2 May 1948.

The task of protecting the above mentioned norms belongs to many institutions that were created specifically for this purpose. Special place is taken by Inter-American Commission on Human Rights, which is an autonomous OAS body, as specified in Art. 106 of the OAS Charter. Its organizational structure and competences are defined by Inter-American Convention on Human Rights and the Statute. In order to maximize the effectiveness of Inter-American system for protection of human rights, on 3 September 1979 on the strength of American Convention on Human Rights, was created Inter-American Court of Human Rights (hereinafter: IACHR). It comprises seven judges, elected by OAS General Assembly for the term of six years. Court's competences cover investigation of cases filed by Inter-American Commission on Human Rights and settlements of cases within individual complaints (which are obligatory) and international (which are of facultative character, as in such cases the state has to issue a separate consent).

Although cohesive and wholistic, the construction of the Inter-American system did not find any practical implementation and had scarce impact on the situation of human rights in Latin America. Political, military, economic, and cultural factors in the countries of the region were, and in a few countries still are, the reason for dramatic gap between the law and the reality. The situation has slowly, though systematically, started to improve since the second half of the 80s, when Latin America was swept by so called "third wave of democratization".

As a result of the fall of the right-wing and left-wing authoritarian regimes, human rights started to be the subject of better protection from undergoing democratization internal systems of the states³⁹.

Another regional system of human rights protection is the African system started by Organization of African Unity (OAU). The Organization of African Unity was established at the height of the decolonization processes in Africa in 1963, in Addis Ababa, Ethiopia. Its primary focus was to unify the independent states and facilitate the end of colonialism on the continent. The issue of human rights was not deemed by the leaders at that time to be a matter of pressing concern⁴⁰.

In 2002, the OAU transformed into the African Union, heralding new developments and initiatives, especially with regard to the protection of human rights on the continent⁴¹. The Constitutive Act of the OAU expressly states that one of its main objectives is to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments⁴². The African Union is loosely based on the European Union, aims to promote cooperation and integration among the independent nations of Africa. It consists of 53 African nations and its headquarters are in Addis Ababa, Ethiopia. It works to promote African unity on issues involving the continent, and deals with security matters and regional conflicts. Though human rights is also part of its portfolio, its record of dealing with dictators and genocidal conflicts has been mixed. As the Organization of African Unity, which was formed in the decolonization upheavals of the early 1960's, it was criticized as an ineffective "talk, no walk" organization and called a "dictators' club"⁴³.

39 R. Kuźniar, *Prawa człowieka. Prawo...*, p. 210. See more: S.P. Huntington, *Trzecia fala demokracji*, Warszawa 1995.

40 See the Charter of the Organization of African Unity, adopted on 25 May 1963, 479 UNTS 39, 2 ILM 766 (1963). See also: generally G.J. Naldi, *The Organization of African Unity*, 2nd edn, London, Mansell, 1999, pp. 2–18.

41 G.W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, Ardsley, NY, Transitional Publishers, 2003, p. 3.

42 Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July 2000, entered into force on 26.5. 2001, Article 3.

43 *The New York Times*, Monday, March 7.3. 2011

The most important document protecting human rights is, legislated in 1981, the African Charter on Human and People's Rights from Banjul⁴⁴. It consists of a wide range of rights, including not only traditional civic and political ones, but also economic, social, cultural and rights of various nations⁴⁵. The African Charter is the first convention on human rights which defines obligations of an individual towards the state, society and family, for example, avoidance of endangering state's safety, reinforcement of social and national solidarity and independence.⁴⁶

In order to implement the African Charter on Human Rights, there was created African Commission on Human and People's Rights and in 1988 African Court on Human and People's Rights (legislated on the basis of the Protocol from formation of African Court on Human and People's Rights)⁴⁷. The functions of the Commission include both the promotion, as well as the protection of human and peoples' rights, and it also has the responsibility of interpreting the Charter⁴⁸.

Personal jurisdiction of the African Court on Human and Peoples' Rights is in the Protocol to the African Charter. It provides for both a compulsory and optional personal jurisdiction. The compulsory jurisdiction of the African Court entitles the following bodies to submit cases: a) The African Commission, b) The state party which has lodged a complaint at the African Commission, c) The state party against which the complaint has been lodged at the African Commission, d) The state party whose citizen is a victim of a human rights violation, e) African intergovernmental organizations. Additionally, 'when a state party has an interest in a case, it may submit a request to the Court to be permitted to join'. The African Court on Human and Peoples' Rights will exercise optional jurisdiction with regard to cases submitted

44 The African Charter on Human and Peoples' Rights is also known as the „Banjul Charter” and its text is reprinted in (1982) 21 ILM 59, (1981) 27 International Commission of Jurists Review 76 and Brownlie, (ed), Basic Documents in International Law, (3rd edn 1983) 75, hereinafter referred to as the „African Charter” or as „the Charter”. 2. The African Charter will come into force in accordance with its Article.

45 M.N. Shaw, Prawo międzynarodowe, Warszawa 2006, p. 238.

46 *Ibidem*

47 <http://www.au.int/en/treaties/status>, <http://www.au.int/en/content/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-people>

48 See: Article 45 (1 a–c, 2 and 3) The African Charter on Human and Peoples' Rights

by ‘non–governmental organizations with observer status before the Commission and individuals’⁴⁹.

Regional human rights mechanisms exist in Europe, the Americas, Africa, and under the auspices of the Arab League in West Asia and North Africa. Regional instruments are felt to be an appropriate complement to the universal human rights processes of the United Nations due to, for example, greater cultural similarity within regions. Regional mechanisms are also stronger, with states agreeing to the adjudication of human rights cases by judicial bodies with powers to make binding decisions, while judicialisation at the global (UN) level remains lacking.

The Asia–Pacific is the only region which lacks a regional human rights mechanism. Asian continent has always belonged to a different and hardly penetrable cultural circle. Although 1987 witnessed legislature of the Human Rights Charter for the Pacific and Asia but it is not an inter–governmental document. In that area there are only timid and non–governmental attempts of human rights protection.

4. International instruments of human rights supervision

International system for protection of human rights is not a reflection of ideals but rather a resultant between an ideal treatment of a human being and politics with its realization of states’ interests. It can be said that it is a reference effect of ideals on the contemporary reality of the world.

International human rights protection system provides for various legal guarantees (means of control) for people, which allows more efficient protection of an individual’s rights, but are also in accordance and do not violate the principle of non–interference with internal affairs and respect state’s sovereignty.

49 See: Protocol to the African Charter, Article 5(3).

Human rights protection in international law system is experiencing an effective growth. Bearing in mind, that on the international level, classical legal obligations entitle parties of the treaty to a request of fulfilling agreement obligations, states developed an unwritten practice of enacting so called means of international control of human rights supervisory. It can be assumed, then, that international control is based on activities of international bodies that result from treaties, which determine whether state's activity is in accordance with accepted international legal obligations.

International agreements do not assume a unified standard of international control operation in connection with the implementation of human rights. According to the generally accepted principle, that the content of international agreement depends on the parties' consensus, the operation of control bodies resulting from treaties has a facultative character. After analysis of specific treaties, legal solutions relating to international means of human rights supervision can be divided into three groups: a) international agreements which do not include any control procedures, b) international agreements which do not include any control procedures, but of which implementation could be, in various degree, controlled within a wider system existing in specific international organizations (e.g. Statute of the Council of Europe assumes states' responsibility for infringements of human rights and violation of the principle of law and order); c) international agreements including special control procedures.

Treaties, which mention specific instruments of legal supervision of human rights, specify the following means: reports (preliminary, periodical) individual complaints and international complaints, inspections (analysis on the spot), and petitions. Presented catalogue of legal instruments is featured in treaties in a variety of ways: can be limited to only one instrument, for example inspection, as it is in case of European convention on prevention of torture and inhuman or degrading treatment or punishment (1987), or to a few means simultaneously, for example reports and complaints, as it is in case of International Covenant of Civic and Political Rights (1966).

State reports are part of control procedure in which the state – a party of the treaty – makes a report on realization of obligations resulting from the agreement. Reports are analyzed and studied by international body which is authorized to request the states about additional information. Each state, which is a party of an international agreement including reporting mechanism, after signing the agreement, issues so called preliminary report (initial), and then, in intervals of a few years, periodical reports. Reports present measures taken by the state in order to realize the rights included in the treaty and in order to present the progress in application of those rights. Such document refers to specific resolutions of the treaty, defining in legal and factual terms the standard of rights guaranteed the a given state. Assessment of the report by treaty bodies takes the form of so called final remarks, which include specific recommendations for the government authorities⁵⁰. The instrument of report is used in International Covenant on Civil and Political Rights from 1966 (passed within UN)⁵¹. According to Art. 40 of ICCPR “The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned, (b) Thereafter whenever the Committee so requests (...).The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant (...)”⁵².

Another category of instruments on human rights supervision are **complaints**. In international system of human rights, complaint is one of the means to ensure their proper implementation. Complaint is usually filed against a state or international body. This instrument is designed to inform competent international bodies about human rights infringement by the victims themselves or in their name or interest, also

50 See: R.M.M. Wallace, *International Law, Fifth Edition*, Londyn 2005, pp. 236–238.

51 Dz.U. 1977, no. 38, pos.167.

52 *Ibidem*

by particular victim but in the common interest. State's complaint is referred to as international complaint. Complaint filed by an individual or a group of individuals is referred to as an individual complaint⁵³.

The filing of an individual complaint depends on a number of factors. The most important conditions include: a) the state where the complaint comes from must be the treaty party which enacted such an instrument; b) during infringement, the individual was under the jurisdiction of the infringing state – this means state's citizens and foreigners residing in a given state; c) the complaint refers to rights and freedoms guaranteed by the agreement; d) the complaint is not anonymous; e) domestic means have proven ineffective; f) the case is the subject of proceedings of another international body; g) filing was preceded by the time limit for vindication, counting from the day of issuing final domestic decision. If the complaint meets all the formal requirements, it is recognized on its merits by the proper international judicial or non-judicial body. The proceeding ends with a decision or adjudication which may or may not be legally binding. Examples of regulations allowing individual complaints (also international complaints) that can be considered by judicious bodies include: European Convention on Human Rights and Fundamental Freedoms from 1950 (where operates the European Court of Human Rights)⁵⁴, Inter-American Convention on Human Rights from 1969 (with operating Inter-American Court of Human Rights)⁵⁵, or African Charter on Human and People's Rights from 1981 (with African Court of Human and People's Rights jurisdiction⁵⁶).

International complaint is a procedure of filing a complaint to the treaty body by one state party of the treaty about violation of a particular obligation by the other party of the agreement. In practice, this mechanism remains just a letter of law, because states rarely resolve to apply it due to political reasons. The main cause of such a state is

53 K. Łasak, Warunki dopuszczalności skargi zbiorowej w systemie Europejskiej Karty Społecznej, [in:] Polska i Rada Europy 1990–2005, (ed.) H. Machińska, Warszawa 2005, p. 237.

54 Dz.U. 1993, Nr 61, pos. 284.

55 Official website of the Organization of American States: www.oas.org/en/topics/human_rights.asp

56 Official website American Court on Human and Peoples Rights: www.african-court.org/en/const/mandate/general-information

basically fear of political or economic deterioration of the relationship between the states involved in this kind of litigation.

Another form of human rights supervision are **inspections** (on the spot control). Inspection includes a special kind of investigation, collection of information about either supposed human rights infringements or information from periodical control carried out in accordance with the treaty conditions. An example of such a treaty is the European convention on prevention of torture and inhuman or degrading treatment or punishment from 1987⁵⁷. For this purpose the Convention enacted European Committee for Prevention of Torture. On inspection, the Committee examines how confined persons are treated (this includes all places of compulsory confinement, psychiatric institutions, detention wards, detoxification centres, etc.) and, if necessary, protect them from torture or degrading treatment.⁵⁸ According to Art. 1 of the Convention “There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as ‘the Committee’). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. Each Party shall permit visits (...), to any place within its jurisdiction where persons are deprived of their liberty by a public authority (art. 2)”⁵⁹.

In the application of the Convention, the Committee and the State concerned are obliged to co-operate. The purpose of the Committee is not to condemn States, but, in a spirit of co-operation and through advice, to seek improvements, if necessary, in the protection of persons deprived of their liberty⁶⁰. The Committee shall not perform

57 Official website the Council of Europe: <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>

58 R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warszawa 2004, p. 189–190.

59 *Ibidem*

60 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Text of the Convention and Explanatory Report*, Council of Europe, CPT/Inf/C (2002) 1, p. 19 point 20, <http://www.cpt.coe.int/en/documents/eng-convention.docx>

any judicial functions: its members will not have to be lawyers, its recommendations will not bind the State concerned and the Committee shall not express any view on the interpretation of legal terms. Its task is a purely preventive one. It will carry out fact-finding visits, and, if necessary, on the basis of information obtained through them, make recommendations with a view to strengthening the protection of persons deprived of their liberty from torture and from inhuman or degrading treatment or punishment⁶¹.

The last category of individual rights supervision belongs to a **petition**⁶². Petitions are appeals directed to an international body, where an individual or a legal entity, usually directly concerned, informs about infringement of a specific international agreement. As a matter of fact, petition is in itself similar to a complaint, so it is examined by such international bodies. This instrument was found applicable in the legislation of the European Union. Any citizen of the European Union, or resident in a Member State, may, individually or in association with others, submit a petition to the European Parliament on a subject which comes within the European Union's fields of activity and which affects them directly. A petition may take the form of a complaint or a request and may relate to issues of public or private interest. The petition may present an individual request, a complaint or observation concerning the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter. Such petitions give the European Parliament the opportunity of calling attention to any infringement of a European citizen's rights by a Member State or local authorities or other institution⁶³. The Petitions Committee of the European Parliament may seek to cooperate with national or local authorities in Member States to resolve an issue raised by a petitioner. Details of petitions may therefore be shared with such authorities unless the petitioner specifically objects. The Petitions Committee cannot, however, override decisions taken by competent authorities within Member States. As the European

61 *Ibidem*, p. 20 point 25.

62 See more: G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, pp. 246–247.

63 Official website of the European Parliament: <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?jsessionid=71AEA5919CBBB20B15FC1C93A024A7D6.node1?language=EN&id=49>, 4.3.2011.

Parliament is not a judicial authority: it can neither pass judgement on, nor revoke decisions taken by, the Courts of law in Member States⁶⁴.

Rights and freedoms accepted in regional systems are basically the same as in United Nations system. Although means of supervision in some systems are more abounding. Apart from reports issued by the states, complaints of a state about ignoring convention resolutions by another state, judicious bodies also deal with complaints from individuals or organizations. There is also international inspection in specific objects located in particular countries. Organization and effectiveness of international supervision are varied in each regional system. Worth mentioning is the fact, that together with the development of some regional systems of human rights and fundamental freedoms protection and promotion, there take place improvements in the control mechanisms themselves⁶⁵.

As it is seen on the example of international agreements, the system of international supervision of human rights is complex, which is not necessarily detrimental on effectiveness of such control. However, operation of international system of supervision of human rights obligations does not always guarantee that agreements will be respected. Quite often, human rights infringements leads to dialogues with governments and persuasion aiming to improve human rights supervision standards. Thus, although treaty control procedures have more of a legal than political character, also in this case the most effective turns out to be diplomacy and international politics.

64 *Ibidem*

65 A. Łopátka, System Międzynarodowej Ochrony Praw Człowieka, [in:] Ochrona praw człowieka w świecie, (ed.) L. Wiśniewski, Bydgoszcz–Poznań, 2000, p. 111.

ACTIVITY OF THE COUNCIL OF EUROPE

1. Genesis of the Council of Europe

The Council of Europe has 47 member states, covering virtually the entire continent of Europe. It seeks to develop common democratic and legal principles based on the European Convention on Human Rights and Fundamental Freedoms and other reference texts on the protection of individuals. Ten founding states signed the Council of Europe's Statute on 5 May 1949: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. The fall of the Berlin Wall in 1989 triggered a wave of accessions involving the countries of Central and Eastern Europe, and they were followed by other countries, including some former Soviet Republics.

“In purely formal terms the Council of Europe is a classical interstate organization. It offers an interstate forum within which to conclude conventions and it can also adopt softer instruments such as recommendations to guide the policies of its Member States. The Council of Europe is different, however, from more classical interstate organizations in that it exists not merely to provide a forum for its Member States, but also to pursue a mission of its own with respect to those states. This mission is predicated on the theory first announced by Spinelli that the internal constitutional arrangements of its Member States are not merely of internal concern but also implicate all of Europe. Although it accepts existing nation-states that were built on theories of ethnicity, it seeks to identify and “enforce” a new pan-European ethics—one based on human rights.” That is, it insists on the notion of a

common European public morality – one that all peoples can subscribe to regardless of their ethnicity”¹.

From Zurich to Hague. “Even before the Second War ended, politicians like Winston Churchill (British Prime Minister), idealists like Richard Coudenhove – Kalergi (Austria), writers like Salvador Madariaga (Spain) and former members of the French Resistance like Henri Frenay and Albert Camus were envisaging a fresh political start for post – war Europe. Their aspiration was magnificently voiced by Churchill, who had just left office, in his historic speech in Zurich students on 19 September 1946. Franco – German reconciliation and unification of the “European family” were his primary demands.”We must create something like United State of Europe”, he declared². “He asked rhetorically “why should there not be a European Group which could give a sense of enlarged patriotism and common citizenship” and which could take its rightful place in the world. He spoke of the establishment of a Council of Europe”³. His words struck a chord in the hearts of countless war – traumatised Europeans, and many of them helped to found the International Co – ordinating Committee of Movements for European Unity in 1947. This symbolic coming – together was the first step, and the next came when the various the pro – Europe movements organized a Hague congress in The Hague (Netherlands) from 7 to 10 May 1948, to promote unity and lay the foundations of the future Europe”⁴.

The Hague Congress. Chaired by Winston Churchill, the congress was attended by 800 leading Europeans and delegates from 30 countries, including ten founder members of the future Council of Europe⁵. But the split soon developed between the “federalists”, who as

1 G. Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, McGill Law Journal 2001, vol. 46, p. 856.

2 See generally: W.S. Churchill, “The Tragedy of Europe”, [in:] B.F. Nelson & A.C.–G. Stubb. *The European Union: Readings on the Theory and Practice of European Iniegration*, 2d ed., Boulder, 1998, p. 7 at 9.

3 G. Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, McGill Law Journal 2001, Vol. 46, p. 855.

4 A. Royer, *The Council of Europe*, Strasbourg 2010, p. 4. See generally history of the Council of Europe: R. Kicker, *The Council of Europe: pioneer and guarantor for human rights and democracy*, Council of Europe, 2010, p. 11–13.

5 There were also observers from Bulgaria, Hungary, Poland, Yugoslavia and even the United States and Canada.

the name suggests wanted a federal Europe, and the “unionists”, who were determined to preserve state sovereignty⁶. General substantive consensus exists rarely within nations and almost never among them. It did not exist in Europe in 1948⁷.

The Congress closed with the participants adopting a political resolution calling for the convening of a European assembly, the drafting of a charter of human rights and the setting up of a court responsible for ensuring compliance with that charter.

From London to Strasbourg. While the United Kingdom saw intergovernmental co – operation, France and Belgium wanted a federal Europe – as the answer. The second options carried the day and, on 5 May 1949 the Council of Europe was brought into being by the Treaty of London (Statute), signed by ten countries. The Statute was and is the progression of hundreds of years of visions of philosophers and states people for a more united Europe and especially the drive and leadership of Winston Churchill to forge a European unity that would finally bring an end to war⁸.

The Committee of Ministers met for the first time in Strasbourg (which is the seat of the Council of Europe⁹) on 8 August, and immediately invited Greece, Turkey and Iceland to join the new organisation¹⁰. After the fall of the Communist regimes in 1989, several states from Central and Eastern Europe became members of the Council of Europe. It is reason why following the fall of the Berlin wall on 9 November 1989, the organisation became the most appropriate structure for monitoring the democratisation of the countries of Central and Eastern Europe that had emerged in the post–Communist era. Since 1989, the Council of Europe has initiated specific legal cooperation programmes aimed at assisting the transition of applicant states to democracy. This involved assisting states in bringing their institutional, legislative and administrative structures into line with European democratic standards.

6 A. Royer, *The Council.....*, p. 5.

7 E.B. Haas, *Consensus Formation in the Council of Europe*, Berkeley, p. 4.

8 J.S. Gibson, *International Organizations, Constitutional Law and Human Rights*, New York 1991, p. 123.

9 Statute, Articles 11 and 33.

10 A. Royer, *The Council.....*, p. 5.

On 9 October 1993, in Vienna, this new policy of openness towards Central and Eastern Europe was formally announced by the Heads of State and Government of the member states at the organisation's First Summit. Between 1989 and 2010, the organisation increased from 23 to 47 members. The official languages of the Council of Europe are English and French.

History of the Council of Europe is a history of new international institutions. When the Statue was being negotiated in the winter of 1948–1949, two sharply differing approaches had in fact divided the ten founder members: while France, Italy and the Benelux countries wanted to give the new institutions sweeping powers and a supra – national decision – making capacity, the United Kingdom and the Scandinavian countries were unwilling to go beyond the well – trodden ways of intergovernmental cooperation. The debate grew particularly heated when it came to setting up the “European Parliamentary Assembly” called for in The Hague: what eventually emerged was a “Consultative Assembly” with limited powers, while all the real decisions were taken by the Committee of Ministers¹¹.

In July 1948, the French Government took up the idea launched at the Hague Congress and proposed the establishment of a European assembly. But the British Government was doubtful and called for more detailed information on how exactly such an assembly was to be convened. In order to clarify the matter, the International Committee of the Movements for European Unity drew up specific proposals and, on 18 August 1948, presented them to the governments concerned in the form of a memorandum¹².

The French Government approved the proposals set out in the August 1948 memorandum and, supported by the Belgian Government, referred the plan to the Standing Committee of the Treaty of Brussels on 2 September 1948. Consequently, France and Belgium submitted proposals to the other signatory states to the Treaty of Brussels

11 D. Huber, *A decade which made history. The Council of Europe 1989–1999*, Strasbourg 1999, p. 3.

12 See generally about history of the Council of Europe: *The Parliamentary Assembly: practice and procedure*; Council of Europe 2008, p. 21–22.

(Luxembourg, the Netherlands and the United Kingdom) for the setting up of a European assembly which would have a consultative role and be responsible for representing the views of the European public. The assembly would consist of representatives appointed by the various national parliaments and would adopt resolutions by a majority of votes cast.

However, the British rejected the idea of an international institution whose members were not appointed by their governments. They envisaged the establishment of a ministerial committee whose composition would vary according to the issues to be addressed and which would be accompanied by parliamentary delegations and other experts.

On 26 October 1948, in order to reconcile both positions, the Consultative Council of the Brussels Treaty Powers decided to establish a Committee for the Study of European Unity which, chaired by Edouard Herriot, met in Paris from November 1948 to January 1949. On 15 December 1948, the Committee entrusted the task to a sub-committee which then submitted a draft constituent text for a European Union. On 18 January 1949, however, the British Government, which was still lukewarm about the plan, submitted a new proposal. No agreement had been reached when the Committee's work came to an end two days later.

Finally, on 27 and 28 January 1949, the Foreign Ministers of the five Brussels Treaty countries reached a compromise at a meeting of the Consultative Council of the Brussels Treaty Powers. This consisted in the setting up of a ministerial committee endowed with the power to take decisions and of a consultative assembly whose members were to be appointed in accordance with their own government's procedures, as had been requested by the United Kingdom.

2. Aims and tasks of the Council of Europe

The Council of Europe was founded to promote human rights, the rule of law and pluralistic democracy, all of which are fundamental values for present-day Europe. These three pillars were on the one hand, aimed at combating fascism of the kind practiced in Spain and Portugal for some time after the second war and which temporarily flared up in Greece after the military coup in the 1960s. On the other hand, these fundamental values were meant to distinguish Western Europe from the communist states in central and Eastern Europe¹³.

The Council of Europe should not be confused with the European Union, because all of the 27 European Union States are also members of the Council of Europe. All states that want to join the EU consider it the EU's "waiting room"¹⁴.

The fundamental aims of the Council of Europe are embodied in Preamble of the Statute which it refers to "the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy. Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity [...]"¹⁵.

According to article 1 the Council of Europe statute, the aim of the organization is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms"¹⁶. This very comprehensive aim has to be achieved by the means and procedures of an intergovernmental

13 M. Nowak, Introduction to the International Human Rights Regime, Boston 2003, p. 158.

14 R. Kicker, The Council of Europe: pioneer and guarantor for human rights and democracy, Council of Europe, 2010, p. 13.

15 Statute of the Council of Europe, www.coe.int

16 *Ibidem*

organization and the structure of its organs and furthermore with quite a modest budget¹⁷. Essential for the Council of Europe are mechanisms to protect fundamental and human rights. Article 3 of Statute states that “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council [...]”. Quite exceptional in the realization of these aims is the role of the European Convention on Human Rights and Fundamental Freedoms Protection from 1950 and, enacted for the purpose of their supervisory, the European Court of Human Rights.

“The Council of Europe is different, however, from more classical interstate organisations in that it exists not merely to provide a forum for its Member States, but also to pursue a mission of its own with respect to those states. This mission is predicated on the theory first announced by Spinelli that the internal constitutional arrangements of its Member States are not merely of internal concern but also implicate all of Europe. Although it accepts existing nation–states that were built on theories of ethnicity, it seeks to identify and “enforce” a new pan–European ethics – one based on human rights. That is, it insists on the notion of a common European public morality – one that all peoples can subscribe to regardless of their ethnicity”¹⁸.

Today, the European Council embodies the political reality that seemed utterly utopian at the moment of creation in 1949: it is the unity of the European continent, based on common involvement in the values of democracy, human rights, law and order. These three pillars of the temple (European Council) built patiently for more than 60 years are sometimes called “The Holy Trinity”. It is not enough, though, that government institutions and public authorities take to them and show a little bit of good, albeit sometimes constrained, will. There should be a shift, therefore, from political democracy to democratic culture, which

17 R. Kicker, *The Council of Europe: pioneer...*, p. 16.

18 G. Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, *McGill Law Journal* 2001, Vol. 46, p. 856.

will reveal to each person their rights of an individual and duties of a citizen¹⁹.

States that join the Council of Europe retain their individual sovereignty and political identity. According to the Statute of the Council of Europe, the organisation's aim to achieve a greater unity between its members is pursued through its bodies, by discussion of questions of common concern, by agreements and by common action in economic, social, cultural, scientific, legal and administrative matters, as well as by the maintenance and further realisation of human rights and fundamental freedoms.

Through its various bodies, the Council of Europe is, first and foremost, a meeting place and a forum for dialogue for its member states. The organisation's pursuit of a common approach to dealing with the major issues facing society – human rights, legal cooperation, local and regional democracy, social cohesion, health, bioethics, education, culture, heritage, sport, the environment – leads its bodies to adopt texts which act as non-binding recommendations to its member states, and, above all, results in agreements which are binding on the states which ratify them and become the basis for the harmonisation of European law. Amongst these agreements, the conventions adopted in the sphere of human rights have, since the organisation's inception, been at the very core of its activities.

Although the scope for securing partial agreements between a limited number of member states, such as extending agreements to include non-member states, has led to various forms of 'variable geometry' cooperation, harmonisation has continued apace on the basis of the growing number of new forms of cooperation.

19 D. Huber, Rada Europy po rozszerzeniu: umocnienie jedności kontynentu w obecnych realiach, [in:] Polska i Rada Europy 1990–2005, (ed.) H. Machińska, Warszawa 2005, p. 62.

3. Organization and composition of the Council of Europe

3.1. Membership of the Council of Europe and the admission of new members

The Council of Europe, just like any other international governmental organization, features two types of membership: primary and secondary. Primary members take part in drafting and signing an agreement enacting international organization, secondary members are the states accepted into the organization during its operation on the basis of conditions mentioned in the statute – the founding agreement.

Apart from a membership status, other states may obtain the status of an observer, which can be granted to a non-member state of the Organization. The observer participates in the organization debates (may raise a point only by the chairperson's consent).

As of March 2011, the Council of Europe has 47 member states. Ten founding states (primary membership) signed the Council of Europe's Statute on 5 May 1949: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. Greece and Turkey are not mentioned in the Statute but those countries may still be regarded as *de facto* founder members²⁰.

Other countries which have since signed the Statute (secondary membership): Iceland in 1950, the Federal Republic of Germany in 1951, Austria in 1956, Cyprus in 1961, Switzerland in 1963 and Malta in 1965. The end of dictatorial regimes enabled Portugal to join in 1976 and Spain in 1977. Liechtenstein joined in 1978, San Marino in 1988 and Finland in 1989.

Hungary joined in 1990, Czechoslovakia and Poland in 1991 and Bulgaria in 1992. In 1993, the Czech Republic and the Slovak Republic replaced the former Czechoslovakia. Estonia, Lithuania, Romania and Slovenia also became members in 1993. Other countries which have joined the organisation are: Albania, Andorra, the Former Yugoslav

20 F. Benoît-Röhmer, H. Klebes Council of Europe law: towards a pan-European legal area, Council of Europe, Strasbourg 2005, p. 35.

Republic of Macedonia (FYROM), Latvia and Moldova in 1995; Croatia, the Russian Federation and Ukraine in 1996; Georgia in 1999; Armenia and Azerbaijan in 2001; Bosnia–Herzegovina in 2002; Serbia in 2003; Monaco in 2004; and Montenegro in 2007²¹.

The Council of Europe not only has 47 member states but also five countries which enjoy observer status with the organisation: Canada, the Holy See, Japan, Mexico and the United States of America²².

The Statute of the Council of Europe regulates that it is intergovernmental, international organisation of “European” country. The terms “European states”, “European countries” and “Europe” in the Statute have changed substantially due to the geographical expansion eastwards in the course of time. With the exception of Turkey, only the Western European states were Council of Europe member states up until 1989. A large number of states in Central and Eastern Europe have become members since the fall of the Communist regime. Now that Azerbaijan and Georgia have acceded, the borders of Europe seem extendable to Asia at a whim²³.

According to the Assembly’s Recommendation 1247 (1994) dated October 4, 1994 on the enlargement of the Council of Europe: “The membership of the Council of Europe is in principle open only to states whose national territory lies wholly or partly in Europe and whose culture is closely linked with the European culture. However, national and cultural links and adherence to the fundamental values of the Council of Europe might justify a suitable co–operation with other states neighbouring the ‘geographical’ boundaries (p. 2). Countries bordering directly on Council of Europe member states should be able to enjoy privileged relations with the Parliamentary Assembly, if they so wish. This applies in particular to the states on the eastern and southern shores of the Mediterranean”²⁴.

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- 21 The Parliamentary Assembly: practice and procedure, council of Europe 2008, p. 29–33; www.coe.int
22 *Ibidem*
23 G. Winkler, *The Council of Europe. Monitoring procedures and the Constitutional Autonomy of the Member States*, Springer–Verlag/Wien 2006, p. 347–348.
24 www.coe.int

During preparatory activities on the Council of Europe in 1948, there clashed two contradictory concepts connected with COE membership. The first one assumed that the main advantage of the Council of Europe is the developed system of democratic standards, especially the human rights protection system. These values need to be protected so membership is to be granted only to states that have achieved the mentioned standards. Other states, the ones that are still building democracy, should attain the status of an observer until they adjust their legal and institutional systems to the required high level. Without diminishing the importance of human values, supporters of the second concept emphasized that meeting all the requirements by new democracies means that accession of some states will be postponed for tens of years. In consequence, the influence of the Council of Europe on the democratization processes would be limited and the development of international cooperation slowed down. Thus, membership should be granted to all states that entered the path to democratization but the states should meet certain requirements. It was not an easy choice because it involved far-reaching consequences. Nevertheless, in the early stages of work on the Statute of the Council of Europe, the latter solution was chosen and this decision had a crucial significance for the further transformations in Europe²⁵.

Ultimately, the Statute of the Council of Europe defined fundamental membership conditions, stating in Article 3 that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I" (that is attainment of greater unity between the members of the Council of Europe, implementation and protection of ideals and principles constituting common heritage of the states, and facilitation of economic progress of the society²⁶). The membership conditions have been extended in recent years with the accession to the European Convention on Human Rights and Fundamental Freedoms.

25 J. Regulski, *Demokratyczne bezpieczeństwo i spójność – kilka refleksji*, [in:] *Polska i Rada Europy 1990–2005*, (ed.) H. Machińska, Warszawa 2005, p. 108.

26 *Law Gazette* from 1994, no. 118, pos. 565.

The criteria for admitting new members are in Article 4 of the Statute:” Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute”. There are two basic criteria that states wishing to join. One is geographical: they must be part of Europe. The second is political: they must accept democratic values of the Council of Europe, and work to increased solidarity within it by excluding any state that does not share those ideals²⁷.

The Statute provides for the withdrawal of membership (art. 7); for the suspension and ultimate termination of the membership of a state which “which has seriously violated Article 3” (art. 8). “The Committee of Ministers may suspend the right of representation on the Committee and on the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled”.

“The Council of Europe has become a community of values guided by the ideas of democracy, rule of law, and human rights. This was indeed the intention of its Founding Fathers. The idea that there are common values binding on all present and future members of the Organization has been slowly, though progressively, developed over the years. The corresponding norms now include not only the relevant provisions of the Council of Europe Statute and of the European Convention of Human Rights, but also other basic texts and subsequent interpretation of the Statute by the Heads of States and Governments at the Vienna Summit in 1993, and of the Convention by the European Court of Human Rights. Thus emerged what has been called, in analogy to French constitutional theory, a “constitutional bloc” of the Council of Europe which is now the de facto yardstick for the admission of new members. The concept of a “constitutional bloc” was taken up by the Council of Europe’s Parliamentary Assembly in the 1990s when it examined applications for membership from formerly communist

27 F. Benoît-Rohmer, H. Klebes Council of Europe law: towards..., p. 36.

Central and Eastern European States. In this context, it meant that prospective members had to abide not only by the letter of the Statute of the Council of Europe (i.e., the Treaty of London of May 5, 1949), but also by other elements of written (like European Convention on Human Rights and Fundamental Freedoms) or customary law. Candidate States must sign the Convention at the very moment they accede to the London Treaty. These elements will be examined one after the other. It was understood that where national constitutions or important legislation were in contradiction with the Council of Europe's standards giving expression to the community of values, they had to be changed before admission²⁸. It is meaning one more condition. A country's suitability for membership is measured not only in terms of "formal democracy", „i.e. the letter of the law, but by the degree to which democratic principles are applied in practice"²⁹.

3.2. Statute bodies

In accordance with Article 10 of its Statute, the Council of Europe initially consisted of three statutory bodies, the Committee of Ministers and the Parliamentary Assembly, both political bodies, and the Secretariat, a purely administrative body.

The Committee of Ministers. The member States' foreign ministers are entitled to sit on it³⁰. The ministers themselves usually meet once a year and activity is carried out by the Ministers' Deputy (their Permanent representatives (ambassadors) in Strasbourg), who meet regularly, approximately once a week (in Strasbourg). The Committee of Ministers shall be in session during the days immediately preceding and following the opening of the session of the Consultative Assembly³¹.

28 H. Klebes, Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe, St. Louis–Warsaw Transatlantic Law Journal 1999, p. 71–76.

29 H. Klebes, *op. cit.*, p. 72.

30 Statute, Article 14.

31 Rules of Procedure of the Committee of Ministers, Article 1 (5th revised edition: 2005), http://www.coe.int/t/cm/WCD/basictexts_en.asp#

The chairmanship of the Committee is rotated on a six-monthly basis, changing with each session in the English alphabetical order of member States³². The Chair shall pass to a new Chair mid-May and mid-November, at a date to be fixed by the Committee of Ministers based on a joint proposal by the incoming and outgoing Chairs³³. Current Chairmanship is Turkey: 10 November 2010–11 May 2011. Next Chairmanships are: Ukraine: 11 May–November 2011; United Kingdom: November 2011–May 2012; Albania: May–November 2012; Andorra: November 2012–May 2013; Armenia: May–November 2013³⁴ etc. According to Article 17 of Statute, the Committee of Ministers may set up advisory and technical committees or commissions for such specific purposes as it may deem desirable.

“The Committee of Ministers is the Council’s supreme intergovernmental body, with sole authority to act and decide on its behalf. On the Committee, the member governments meet on an equal footing to voice their countries’ views on European problems, and work together on finding European solutions to them³⁵.

“It makes collective decision – making possible, and promotes co – operation between the member States on all questions for which the Council is responsible. Finally, with the Assembly, it guards the values on which the Council is founded”³⁶.

The work and activities of the Committee of Ministers include:

- a) Political dialogue;
- b) Interacting with the Parliamentary Assembly: the Statutory report of the Committee of Ministers; requests for the Assembly’s opinion; follow-up to recommendations of the Assembly;

32 R. Kicker, *The Council of Europe: pioneer and guarantor for human rights and democracy*, Council of Europe, 2010, p. 16.

33 *Rules of Procedure of the Committee of Ministers* (5th revised edition: 2005)...., Article 6.

34 http://www.coe.int/t/cm/home_en.asp

35 F. Benoît-Rohmer, H. Klebes *Council of Europe law*...., p. 48.

36 See generally about the Committee of Ministers: G. de Vel, *The Committee of Ministers of the Council of Europe*, Council of Europe, 1995; F. Benoît-Rohmer, H. Klebes *Council of Europe law: towards a pan-European legal area*, Council of Europe, Strasbourg 2005, p. 48; R. Kicker, *The Council of Europe: pioneer and guarantor for human rights and democracy*, Council of Europe, 2010, p. 16.

- c) Interacting with the Congress of Local and Regional Authorities of the Council of Europe;
- d) Admitting new member States; it has the authority to invite European States to become members of the Council of Europe (Articles 4, 5 and 6 of the Statute). It may also suspend or terminate membership;
- e) Monitoring respect of commitments by member states;
- f) Concluding Conventions and agreements: Article 15.a of the Statute states that the Committee of Ministers “shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions and agreements”;
- g) Adopting recommendations to member states. Article 15.b of the Statute provides for the Committee of Ministers to make recommendations to member states on matters for which the Committee has agreed “a common policy”. Under Article 20 of the Statute, adoption of a recommendation requires: 1) a unanimous vote of all representatives present; 2) a majority of those entitled to vote. Recommendations are not binding on member States. Since 1993 the Committee has also adopted recommendations in accordance with its role in the implementation of the European Social Charter (Article 29 of the Social Charter).

The Statute permits the Committee of Ministers to ask member governments “to inform it of the action taken by them” in regard to recommendations (Article 15.b). In 1987, at their 405th meeting, the Ministers’ Deputies adopted a message to the intergovernmental committees (steering committees and committees of experts), urging them to improve their monitoring of the implementation of recommendations and resolutions.

- h) Adopting the budget. Under Article 38.c of the Statute the Secretary General is required to prepare a draft budget each year and submit it to the Committee of Ministers for adoption. The draft budget is presented to the Deputies in November of each year;

- i) Adopting and monitoring the Programme of Activities. Since 1966 the Council of Europe has organised, planned and budgeted its activities according to an annual work programme. The Deputies adopt the programme towards the end of each year and are entrusted with overseeing its implementation;
- j) Implementing cooperation and assistance programmes;
- k) Supervising the execution of judgments of the European Court of Human Rights in accordance with Article 46 of the European Convention on Human Rights and Fundamental Freedoms as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights³⁷.

The Parliamentary Assembly (PACE). Statute of the Council of Europe features the name of Advisory Assembly, however, on the strength of the act of the Assembly from 1974, and without other formal ruling, the name changed to Parliamentary Assembly. It is the Council of Europe's advisory and debating body. The Assembly elects its President and Vice-Presidents and sets up the general committees. The present President is Mevlüt ÇAVUŞOĞLU (Turkey). He was elected in January 2010. The Assembly comprises 636 members of parliament – delegates of parliaments from 47 member states.

In order to facilitate the process of accession of the countries from Central and Eastern Europe, the Assembly introduced in 1989 a so-called special guest status, applicable to all national legislative assemblies of European non-member states, which have signed the Helsinki Final Act (1975) and the Charter of Paris for a New Europe. The National Assembly of Belarus obtained the status on 16 September 1992 but it was suspended on 13 January 1997. The number of seats allocated to each special guest delegation is the same (although without substitutes) as that likely to be attributed when becoming a full member. Special guests have many rights in the Assembly and in committees with the exception of the right to vote or to stand for election.

37 http://www.coe.int/t/cm/aboutCM_en.asp

The Assembly may grant Observer status to national parliaments of non-member states of the Council of Europe³⁸. The Knesset of Israel participates in the work of the Parliamentary Assembly as an Observer since 1957, the Parliament of Canada since May 1997 and the Parliament of Mexico since November 1999³⁹. The parliaments concerned are not required to submit credentials to the President of the Assembly but, in appointing their delegations, they should reflect the various currents of opinion within their parliaments. Members of such delegations may sit in the Assembly but without the right to vote. They shall have the right to speak with the authorisation of the President of the Assembly.

The Assembly elects its own President and twenty Vice-President s(nominated by national delegations) from amongst its member⁴⁰. The President is assisted in his or her work by the Bureau of the Assembly. This comprises twenty Vice-Presidents, leaders of each of the political groups, and the chairpersons of each of its general committees. The Standing Committee of the Assembly comprises the same membership as its Bureau with the addition of the leaders of the national delegations. The Presidential Committee comprises the President of the Assembly, the leaders of the political groups and the Secretary General of the Assembly⁴¹.

The Assembly meets four times a year in Strasbourg (an annual plenary session⁴²) in plenary session (“part-sessions”), usually the last full week in January, April, June and September⁴³. Between part-sessions, the Standing Committee acts on behalf of the Assembly. The debates of the Assembly and Standing Committee are conducted by the President, who also ensures observance of the Rules of Procedure.

PACE elects the Secretary General, judges of the Court of Human Rights and the Commissioner for Human Rights of the Council of

38 See the conditions set out in paragraph 1 of on Observer status: Statutory Resolution (93) 26 of the Committee of Ministers, <http://assembly.coe.int>

39 Official website of the Council of Europe: http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_history.htm

40 Statute, Article 28.

41 The Parliamentary Assembly: practice and procedure, Council of Europe 2008, p. 36.

42 Statute, Article 32 and 33.

43 The Parliamentary Assembly: practice..., p. 37.

Europe. Similar to domestic parliaments, specific issues, subjects of discussion, are prepared and discussed in commissions on particular thematic fields, such as, for example, legal and human rights, social rights, health and family, culture and education, migration, refugees and demography⁴⁴.

Secretariat and Secretary General. The Statute does not treat the Secretariat as one of the Council's statutory bodies, and says very little on its functions. Article 10 merely notes that the Committee of Ministers and the Assembly "shall be served by the Secretariat of the Council of Europe".

The authors of the Statute were obviously anxious not to inflate the Secretary Generalship's importance, and to make the office purely administrative. Nonetheless, election by the Assembly (the practice since the third incumbent) gives it political legitimacy, and has allowed successive Secretaries General to strengthen and expand their role. Today, they play a major part in shaping Council policy, although their influence obviously depends, as well, on their personal charisma and dynamism.

Under Article 36b of the Statute, the Assembly appoints the Secretary General and the Deputy Secretary General on the recommendation of the Committee of Ministers. Under Statutory Resolution (49) 20, both are elected for a five-year term, which is renewable. Nonetheless, no Secretary General has ever served for more than one term. Since it was founded, the Council of Europe has had thirteen Secretaries General⁴⁵. The Parliamentary Assembly of the Council of Europe elected on 29

44 G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, p. 161.

45 Secretaries General of the Council of Europe: Jacques Camille Paris (France, 1949–53); Léon Marchal (France, 1953–56); Lodovico Benvenuti (Italy, 1957–64); Peter Smithers (United Kingdom, 1964–69); Lujo Tončić-Sorinj (Austria, 1969–74); Georg Kahn–Ackermann (Germany, 1974–79); Franz Karasek (Austria, 1979–84); Marcelino Oreja Aguirre (Spain, 1984–89); Catherine Lalumière (France, 1989–94); Daniel Tarschys (Sweden, 1994–99); Walter Schwimmer (Austria, 1999–2004); Terry Davis (United Kingdom, 2004–2009). Catherine Lalumière is the only woman to have held the office. F. Benoit–Rohmer, H. Klebes *Council of Europe law: towards a pan-European legal area*, Council of Europe, Strasbourg 2005, p. 71–72.

September 2009 Thorbjørn Jagland (Norway) Secretary General of the Organisation for a five-year term⁴⁶.

The Secretariat, which serves the parliamentary Assembly, the Committee of Ministers and the Congress of Local and regional Authorities of Europe, possesses innovative responsibilities. It has given impetus to ever greater European and now pan-European co-operation, while also initiating discussion of the major issues confronting the European continent today⁴⁷.

Originally, Secretaries General simply assisted the Committee of Ministers and the Assembly, but they are now required to co-ordinate the Council's work and give it direction.

On the financial side, they prepare the Council's budget and submit it, in conditions laid down in the Financial Regulations, to the Committee of Ministers for approval⁴⁸.

On the administrative side, they ensure that the Council functions effectively, and have overall charge of its activities. Unless otherwise decided, they attend all meetings of the Committee of Ministers, the Joint Committee and the Assembly in an advisory capacity. The numerous treaties concluded at the Council are also deposited with them.

“The Secretary General also has a special role under the European Convention on Human Rights. Under Article 15 (3), High Contracting Parties intending to derogate from their obligations under the Convention in time of war or any other public emergency threatening the life of the nation, must keep the Secretary General fully informed of the measures taken and their reasons for taking them. Article 52 also empowers the Secretary General to ask any High Contracting Party to furnish an explanation “of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

46 http://www.coe.int/t/dc/files/events/2009_election_sg/default_en.asp

47 D. Pinto, *The Council of Europe: its missions and its structures*, [in:] *The Challenges of a greater Europe: the Council of Europe and democratic security*, The Council of Europe, Strasbourg, 1996, p. 33.

48 See: T.E.J. Kleinsorge, *Council of Europe*, Kluwer Law International BV, Alphen aan den Rijn, The Netherlands, 2010, p. 109.

Secretariat staff are recruited, appointed, assigned and dismissed by the Secretary General “in accordance with the Administrative Regulations”. They have the status of international civil servants. As in all international organisations, there must be a geographical balance in both the number and seniority of posts. To ensure that staff are independent of member States, Article 36.d of the Statute stipulates that: No member of the Secretariat shall hold any salaried office from any government or be a member of the Consultative Assembly or of any national legislature or engage in any occupation incompatible with his duties.

Article 37 of the Statute provides that the Secretariat is located at the seat of the Council, and that the Secretary General is responsible to the Committee of Ministers for its work. Among other things, he or she must provide the Assembly with the administrative services which it requires⁷⁴⁹.

3.3. Other bodies

The number of bodies set up by the Committee of Ministers and the Assembly has grown. Now, the Council of Europe has some important bodies, referred to as subsidiary bodies in relation to the statutory bodies that set them up, include for example:

- the Congress of Local and Regional Authorities of Europe (CLRAE), the consultative body which represents local and regional authorities;
- the Commissioner for Human Rights, a non-judicial institution which promotes education in, awareness of and respect for human rights;
- the European Court of Human Rights, the supervisory body established under the European Convention on Human Rights (it is comments in next chapters)

Congress of Local and Regional Authorities in Europe. The Congress of Local and Regional Authorities of the Council of Europe

49 F. Benoît-Rohmer, H. Klebes Council of Europe law..., p. 73–74.

is a pan-European political assembly, the 636 members of which hold elective office (they may be regional or municipal councillors, mayors or presidents of regional authorities) representing over 200,000 authorities in 47 European states. Congress of Local and Regional Authorities in Europe (CLRAE) was established in 1994 by Statutory Resolution (94) 3 in 1994. “It is composed of locally elected representatives of member States of the Council of Europe. Members of the Chamber of Regions must be from authorities placed between central government and local authorities, enjoying prerogatives either of self-organisation or of a type normally associated with the central authority and having a genuine competence to manage, on their own responsibility and in the interests of their populations, a substantial share of public affairs, in accordance with the principle of subsidiarity⁵⁰. the Congress shall be composed of representatives of local and regional bodies who either hold a general local or regional authority mandate resulting from direct elections or are politically accountable to a directly elected assembly, on the condition that they can be individually dismissed by, or following the decision of the aforementioned assembly and that dismissal is provided for by law⁵¹. CLRAE consists of two Chambers: the Chamber of Local Authorities and the Chamber of Regions. Representatives and Substitutes shall be appointed for a period of two years⁵². Any Representative prevented from attending a sitting of the Congress may nominate as his/her replacement a Substitute to the Congress from his/her national delegation⁵³.

The functions of the Congress are issues resolutions directed at all the municipalities and regions of Europe, like opinions and recommendations to the Parliamentary Assembly and the Committee of Ministers⁵⁴.

50 The Congress of Local and Regional Authorities: Rules of Procedure of the Congress and its Chambers Revised by the Congress at its 19th Session, on 27 October 2010 (Resolution 309 (2010)), Strasbourg 2010, Rule 2.

51 *Ibidem*, Rule 3.

52 *Ibidem*, Rule 4.

53 *Ibidem*, Rule 5.

54 Methodology for implementing mechanisms for monitoring commitments by member states of the Council of Europe and the OSCE: compendium of documents for the joint meeting of the Council of Europe and the Organisation for Security and Co-operation in Europe, Council of Europe, Strasbourg, 1999, p. 17.

Its role is to promote local and regional democracy, improve local and regional governance and strengthen authorities' self-government. It pays particular attention to application of the principles laid down in the European Charter of Local Self-Government. It encourages the devolution and regionalisation processes, as well as transfrontier co-operation between cities and regions.

On the ground, the Congress gauges the situation of local democracy. The Congress conducts regular monitoring visits to all member states to appraise their implementation of the European Charter of Local Self-Government. After these visits the Congress sets out conclusions in its monitoring reports and adopts recommendations which the governments are required to follow, as well as resolutions with a view to improving the governance of local and regional authorities.

As observer of local and regional elections, the Congress periodically observes local and regional elections in the Council of Europe's 47 member states. Its observation duties extend to the whole election process and go hand in hand with its monitoring of the European Charter of Local Self-Government.

The results of the work of the Congress are conventions and charters. Since it was set up, the Congress has drawn up a number of international treaties, including the European Charter of Local Self-Government, which has become the international benchmark in this field, laying down common European standards to protect local authorities' rights⁵⁵.

The Commissioner for Human Rights. The position of the Commissioner for Human Rights was approved at the Summit of Heads of State and Government in October 1997, and was established in April 1999 when the Committee of Ministers adopted it. The Parliamentary Assembly elects the Commissioner by a majority of votes. Candidates for the post are selected from three candidates submitted by the Committee of Ministers. A candidate must be a national of a COE member state

55 Official website of the Council of Europe: http://www.coe.int/t/congress/presentation/default_en.asp?mytabsmenu=1

with expertise in the area of human rights. Commissioner's term lasts 6 years and is of a one-time character.

A term lasts six years. The first Commissioner for Human Rights was Mr. Alvaro Gil-Robles of Spain from 1999 until 2005. Mr Thomas Hammarberg was elected Commissioner for Human Rights on 5 October 2005 by the Council of Europe's Parliamentary Assembly. He took up his position on 1 April 2006. The Commissioner has three main duties: a) to promote human rights education and awareness of human rights; b) to identify areas of laws that fail to recognize human rights to a full extent and human rights laws that are not fully implemented; c) to promote a respect for and enjoyment of human rights in COE member states. The Commissioner isn't a judicial organ and does not address individual complaints of rights violations.

The Commissioner for Human Rights issues recommendations and opinions, and if necessary, sends reports on human rights to the Committee of Ministers or to the Parliamentary Assembly. What is more, reports annually to both organs on his activity⁵⁶. According to Resolution (99)50, the Commissioner shall both promote education in human rights and contribute to the effective observance of those rights. It is stated that he is to work impartially yet in cooperation with existing national, international, governmental and non-governmental human rights structures⁵⁷.

The promotion of the effective observance of human rights is made by official visit in the Member States. The aim of these visits is to gain an accurate, independent view of the human rights situations in these states and to make such recommendations as the situation demanded and the Commissioner's authority allowed. Each visit consists of meetings with political and legal officials and interviews with the representatives of human rights organisations working in the area. The personal inspection of sites such as prisons, refugee camps and other areas tending to the undermining of human rights are central

56 G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, p. 162.

57 T.E.J. Kleinsorge, *Council of Europe*, Kluwer Law International BV, Alphen aan den Rijn, The Netherlands, 2010, p. 106.

to the Commissioner's itineraries. On his return from each visit the Commissioner outlines, in a report addressed to the Committee of Ministers and the Parliamentary Assembly and published on the internet, his opinion of the human rights situation in each area and his recommendations for their possible improvement⁵⁸.

The mandate of the Commissioner for Human Rights of the Council of Europe stipulates too that he shall "... submit an annual report to the Committee of Ministers and the Parliamentary Assembly"⁵⁹, without giving any indication as to the form or content expected. It is necessary to offer an account of all the work accomplished to date having regard to the interventions effected, the recommendations made and the cooperative ties established⁶⁰.

4. Legal heritage of the Council of Europe

The sources of Council of Europe's *acquis* are multiple. The most important of which are:

- Council of Europe conventions, treaties and charter
- Committee of Ministers decision and/or conclusions, recommendations, request, summit declarations and resolutions
- Parliamentary Assembly resolution, recommendations and opinions
- Congress of Local and Regional Authorities of the Council of Europe resolution, recommendations and opinions
- reports of other Council of Europe bodies, for example The Group of States against Corruption (GRECO)

58 Commissioner for Human Rights, Annual Report October 15th 1999 to April 1st 2001, To the Committee of Ministers and the Parliamentary Assembly, Strasbourg 2001, CommDH(2001) 9, p. 9.

59 Resolution 99(50) of the Council of Europe on the Commissioner for Human Rights, http://www.coe.int/t/commissioner/Activities/mandate_en.asp

60 Commissioner for Human Rights, Annual Report October 15th 1999 to April 1st 2001, To the Committee of Ministers and the Parliamentary Assembly, Strasbourg 2001, CommDH(2001) 9, p. 9.

- other reports and publications that support activities of the Council of Europe, including background report to resolution, recommendations and opinions⁶¹.

Each of these categories has a different status and will shape *acquis* in different ways⁶².

The Council of Europe has contributed to creating a pan-European legal area by concluding more than 200 treaties in all areas of its competence. These treaties constitute the concrete applications of the three fundamental principles that underlie the work of the Council of Europe: democracy, human rights and the rule of law. The treaties are called in different way like: “agreement”, “convention”, “arrangement”, “charter”, etc., but all these texts are international treaties in the sense of the Convention of Vienna of 1969 on the law of treaties.

The conventions of the Council of Europe are prepared and negotiated within the institutional framework of the Council of Europe. Negotiations culminate in a decision of the Committee of Ministers to adopt the final text of the proposed treaty. It is then agreed to open the treaty for signature by member states of the Council and, if necessary, by the other states or organisations who have taken part in its elaboration. The conventions of the Council of Europe are not statutory acts of the Organisation. They owe their legal existence to the consent of those member States that sign and ratify them⁶³. The most important of these instruments are the Convention for the Protection of Human Rights and Fundamental Freedoms (see the next chapter), the European Social Charter and the Additional or Amending Protocols thereto, the European Cultural Convention, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁶⁴.

61 L. Pratchett, V. Lowndes, *Developing democracy in Europe: an analytical summary of the Council of Europe's *acquis**, Strasbourg 2004, p. 12.

62 *Ibidem*, p. 13.

63 <http://conventions.coe.int/general/v3IntroConvENG.asp>

64 The text of all Council of Europe treaties, their explanatory reports, the status of signatures and ratifications, declarations and reservations made by States and the notifications issued by the Treaty Office are available on the website of the Council of Europe Treaty Office: <http://conventions.coe.int>

Among treaties of the Council of Europe, three more will be evaluated briefly: the European Social Charter, the European Convention for the Prevention of Torture and the Framework Convention for the Protection of National Minorities.

The European Social Charter. The European Social Charter was adopted in 1961 and guarantees human rights and fundamental freedoms in the social and economic sphere, with rights to⁶⁵: housing, health, education, employment, social protection and non-discrimination⁶⁶. “The Charter consists of four parts. The first contains social rights and principles, which the acceding parties accept as the aim of their policy. However, the provisions concerning the safeguarding these rights are not legally binding *per se*. It is Part II, which contains the legal obligations designed to ensure the exercise of those rights. This part deals with the specific measures to be taken in relation to each of rights”⁶⁷. Part III “reflects the principle of progressive implementation tailored to suit the circumstances of individual states”⁶⁸. Part IV provides the procedure for a monitoring system based on the submission of regular reports by Contracting Parties. The European Social Charter adds by Additional Protocol (opened for signature on 9 November 1995) to the system of examining government reports a collective complaints procedure to deal with alleged breaches of the Charter (it is procedure before European Committee of Social Rights)⁶⁹. The European Social Charter lacks of a judicial body; thus, it is not possible for either legal or real entities to file a complaint against Any Contracting Party.

The European Convention for the Prevention of Torture. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was signed in 1987. The main purpose of the Convention is to enable the supervision of persons

65 Human rights Social Charter monographs – No. 8: Employment, vocational guidance and training in the European Social Charter, Council of Europe 2001, p. 7–8.

66 European Social Charter Short guide, Council of Europe. Directorate of Human Rights 2000, p. 16.

67 C. Çakamak, Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights, Uluslararası Hukuk ve Politika Cilt 2,2007, No: 8, p. 127–128.

68 Henry J. Steiner and Philip Alston, International Human Rights in Context: Laws, Politics. and Morals, Oxford 1996, 580–581.

69 Human rights Social Charter monographs – No. 7: Social protection in the European Social Charter, Council of Europe 2000, p. 12.

deprived of their liberty and to prevent the torture and other ill – treatment of such persons⁷⁰.

The European Convention on Human Rights did not provide a definition of torture. This lack has significantly affected the legitimacy and the recognition of both the Council of Europe and the Convention. To fill out this void, the Council of Europe adopted this Convention.

The monitoring mechanism of the Convention is based on a system of visits made by a Committee of independent experts; called the European Committee for the Prevention of Torture and Inhuman, or Degrading Treatment or Punishment (CPT)⁷¹. The CPT organises visits to places of detention, in order to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centres, police stations, psychiatric establishment, holding centres for immigration detainees, social care homes, educational institutions etc⁷². The CPT should not carry out judicial functions or adjudicate on violations of the relevant international instruments⁷³.

Even though CPT seems to be effective in some respects, it does not fully ensure the prevention of torture. Moreover, it will have to deal with the challenge posed by the growing number of States bound by the Convention. Especially, the fact that Protocol No. 1. to the Convention opens it for signature by non–member States will likely increase the burden of the Committee. Most importantly, the individuals subjected to torture that is substantiated by the Committee is unable to proceed with claiming a remedy before the European Court of Human Rights, as the Court is able to act in accordance with the provisions of the European Convention on Human Rights only. Of course, ECHR provides guarantee against torture. Those individuals who hold that

70 M.N. Shaw, *International law*, Cambridge University Press, 2003, p. 338.

71 See: M. Evans and R. Morgan, *Combating Torture in Europe – The Work and Standards of the European Committee for the Prevention of Torture*, Strasbourg 2001; J. Rehman, *International Human Rights Law*, 2 nd ed., Dorset 2010.

72 *Eradicating violence against children*, Council of Europe 2008, p. 130.

73 *Ibidem*, p. 129–130.

they are subjected to torture are entitled to file a complaint with the European Court of Human Rights⁷⁴.

The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities was opened for signature on 1 February 1995, and entered into force in 1998. It is “the first treaty designed to protect the rights of persons belonging to national minorities and it is also “the first concrete manifestation of a concern for the rights of minorities that the Council of Europe has shown since its inception”⁷⁵.

This Convention contains no complaint mechanism for individuals or groups. It means that violations concerning the minority rights under protection of the Framework Convention cannot be brought before the European Court of Human Rights.

The most remarkable shortcoming of the Framework Convention is that it does not provide a definition of national minority. This rises „fundamental questions about to whom the Convention applies. In other words, it is unclear that whether these rights are bestowed on the individual members of the minority group, or on the collectivity itself. Instead of a definition of the concept, it defines legal standards in the form of principles and provisions constituting a program to be put into effect. Although it is often the case that Declarations such as the Framework Convention have no definitional provisions, the fact that such a binding legal document as the Framework Convention contains no definition of minorities raises fundamental questions. Combined with that rights contained in the Framework Convention are not enforceable that the Convention contains no definition makes the document very ineffective”⁷⁶.

74 C. Çakamak, Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights, *Uluslararası Hukuk ve Politika* Cilt 2, 2007, No: 8, p. 129.

75 G. Gilbert, The Council of Europe and Minority Rights, *Human Rights Quarterly*, Vol. 18, Issue 1 (1996), p. 173. See: P. Thornberry, M. Amor, M. Estébanez, *Minority rights in Europe: a review of the work and standards of the Council of Europe*, Council of Europe, 2004.

76 C. Çakamak, Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights, *Uluslararası Hukuk ve Politika* Cilt 2, 2007, No: 8, p. 130. See generally: S. Troebst, From paper to practice: The Council of Europe's Framework Convention for the protection of national minorities, *Helsinki Monitor* No. 1, 1999, p. 19–27; Framework Convention for the

Other documents

a) Committee of Ministers

Recommendations. Under Article 15.b of the Statute, the Committee may, in the context of “the adoption by governments of a common policy with regard to particular matters”, address recommendations to the governments of member States. It is important to note that, to be adopted, these recommendations require a unanimous vote of the representatives casting a vote, and a majority of the representatives entitled to sit on the Committee of Ministers. Their adoption then constitutes a joint expression of European governmental opinion on a given subject, which obviously lends them considerable weight, even though they do not have the binding force of conventions. The Committee of Ministers may request governments to inform it of the action taken by them with regard to its recommendations.

Resolutions. Resolutions concerning important member state matters. On the one hand, the administrative decisions taken by the Committee of Ministers sometimes take the form of resolutions. On the other hand, the Committee also adopts resolutions when fulfilling its functions under Articles 32 and 54 of the European Convention on Human Rights, Article 75 of the European Code of Social Security and Article 29 of the European Social Charter⁷⁷.

Declarations. General declarations on Council of Europe matters in the sense of its objective according to Chapter I of the Statute.

Summit declarations and actions plans such as those which the heads of state and government heads passed at the summits of Vienna, Strasbourg and Warsaw (in 1993, 1997, 2005) – it is the future made by the Committee of Ministers in cooperation with heads of state and government heads⁷⁸.

Protection of National Minorities: collected Texts, 5th edition, Council of Europe, Council of Europe, 2008.

77 G. De Vel, The Committee of Ministers of the Council of Europe, Strasbourg 1995, p. 37–38.

78 G. Winkler, The Council of Europe. Monitoring Procedures and the Constitutional Autonomy of the Member States, Springer-Verlag/Wien 2005, p. 386

b) Parliamentary Assembly

Resolutions. Resolutions by the Assembly on issues which it is competent to put through or statements of views within its own competence. Resolutions are embody decisions by the Assembly on questions, which it is empowered to put into effect or expressions of view for which, it alone, is responsible.

Recommendations. “Recommendations from the Assembly to the Committee of Ministers in the sense of a (previously passed) resolution, the implementation of which involves cooperation between the two statutory organs or the member states’ governments.

Opinions. Opinions are given by the Assembly on issues the Committee of Ministers has submitted to it, such as the accession of new members of the Council of Europe, draft contracts, the budget, implementation of the Social Charter: opinion of a commission (of the Committee or the Venice Commission) on a specific issue”⁷⁹.

79 G. Winkler, *The Council of Europe. Monitoring...*, p. 388–389.

HUMAN RIGHTS PROTECTION MODEL IN THE SYSTEM OF EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1. Subjective and objective scope of ECHR

“There seems to be unanimous agreement in Europe today that the European Convention on Human Rights... is one of the major developments in European legal history and the crowning achievement of the Council of Europe. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, perhaps in the history of all law”¹.

For more than a couple of decades the European Convention on Human Rights has been setting the material standard of human rights protection on the European continent. Preamble’s Treaty refers to the Statute of the Council of Europe from 1949 and to the Universal Declaration on Human Rights from 1948. Part I, Art. 2–18 sets material regulations – the fundamental rights and freedoms; however, ECHR does not copy UDHR’s social and economic rights, especially the right to asylum from prosecution or to possession of citizenship of one’s state, etc². The catalogue of rights and freedoms is relatively modest and has a closed character, however, it was substantially extended by the additional Protocols to the European Convention and the European Court of Human Right’s judicature. It means that more rights and freedoms may be added to the catalogue already established by means

1 M.O’ Boyle, “On Reforming the Operation of the European Court of Human Rights” *European Human Rights Law Review* 2008 No. 1, p. 1.

2 J. Sozański, *Prawa człowieka w Unii Europejskiej*, Warszawa–Poznań 2010, p. 104.

of further protocols. But new protocols will obviously be subject to individual ratification³. ECHR forms an individual catalogue of the most important rights and freedoms which are a minimum requirement for functionality of any democratic country. ECHR protects, first of all, so called political and civic rights. This way the protective system of the European Convention covers: right to life (Art. 2), prohibition of torture and inhuman or degrading treatment (Art. 3), prohibition of slavery or forced labour (Art. 4), right to liberty and security (Art. 5), right to a fair trial (Art. 6), right to no punishment without law (Art. 7), right to respect for private and family life (Art. 8), right to Freedom of thought, conscience and religion (Art. 9), Freedom of expression (Art.10), right to freedom of assembly and association (Art. 11), right to marry (Art. 12). Convention also contains the Right to an effective remedy (Art. 13) and the prohibition of discrimination (Art. 14). Additional protocols complement the catalogue with the following: the right to one's possessions, to education, to free elections (Art. 1–3 of Protocol 1), guarantee that no one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation, that no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national (Art. 1–4 of Protocol 4), freedom from capital punishment (Art. 1–2 of Protocol 6), freedom from arbitrary expulsion of aliens, the right of appeal in criminal matters, the right for compensation for wrongful conviction, the right of not to be tried or punished twice, equality between spouses (Art. 1–5 of Protocol 7), general prohibition of discrimination understood as the right for protection against it (Art. 1 of Protocol 12), abolition of death penalty (Art. 1–2 of Protocol 13). Suspension of the above rights may take place only in case of war or other circumstances endangering the existence of a nation, except for the right to life, prohibition of torture and the rule that law does not work backward.

What seems exceptionally important is that ECHR does not merely mention the above rights and freedoms of every citizen of the party

3 L. Mikaelsen, *European protection of human rights. The practice and procedure of the European Commission of Human Rights on the admissibility of applications from individuals and states*, BRILL 1980, The Netherlands, p. 13.

state, but assigns control procedure executed by the European Court of Human Rights in Strasbourg, which in case of their violation is capable of demanding their reinstatement or obtaining proper financial compensation.

Until the Protocol 11 dated November 1, 1998 entered into force, ECHR was protected by the European Commission of Human Rights which did not adjudicated any cases but only issued decisions on admissibility of a complaint and prepared factual reports which could be sent to the Committee of Ministers of the Council of Europe or the European Court of Human Rights. It was their task to ultimately settle the complaints.

With the Protocol 11 entering into force, the procedural and institutional system underwent reform making the European Court of Human Rights its permanent body for formal and substantial settlements of complaints about the infringement of ECHR by the state parties.

Court's jurisdiction became obligatory and independent of additional statements of the state parties (the European Commission on Human Rights was liquidated)⁴.

Subjective analysis of ECHR requires characteristic of persons protected by the power of the treaty. As a rule, every law protected by legal norms (legal right) consists of four elements: entitled subject, obliged subject, the content of law, and sanctions⁵. Entitled subject and obliged subject are constant elements and in considerable degree identical for all rights and freedoms⁶.

Having in mind the subject and the aim of the ECHR, the subjective aspect should first of all take under consideration regulation of Art. 1 of ECHR, which states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [...] Convention." This means that the protection of ECHR spreads over

4 C. Mik, Znaczenie postanowień EKPCz dla ochrony praw podstawowych jako ogólnych zasad prawa w UE, [in:] Ochrona praw podstawowych w Unii Europejskiej, (ed.) J. Barcz, Warszawa 2008, p. 206.

5 C. Mik, Prawo do procesu w sprawach cywilnych w orzecznictwie Europejskiego Trybunału Praw Człowieka lat 90, „Toruński Rocznik Praw Człowieka i Pokoju” 1996, vol. 3, p. 49.

6 *Ibidem*

not only citizens of a given state, but also aliens and stateless persons, etc, even if they found themselves for a brief period of time within jurisdiction of a state-party⁷. Most resolutions of the Convention – stated the ECHR in *Lithgow v. The United Kingdom* adjudication from 8 July 1986⁸ – guarantees the citizens and aliens the same kind of protection.

What is more, having in mind Art. 14 of the ECHR, it must be stressed that the protection must be applied without any form of discrimination⁹: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. According to the present adjudication of the Court, Art. 14 is not autonomous – it complements other material resolutions of the ECHR.

Subjective scope of the ECHR seems to be clear, both on the ground of interpretation provided in adjudication of the Court and in considerations of the doctrine. As the doctrine stresses, the decision about introduction of international control procedures given into hands of individuals, groups of persons, or non-government organizations, is in fact a considerable limitation of a state's sovereignty¹⁰. At the same time, however, it is important to constantly maintain a mechanism where an individual or a legal entity may address the Court in case of the ECHR's violation.

State-party of the ECHR is always the obliged subject. It involves the duty of the state-party to “guarantee rights and freedoms contained in the Convention to all people under its actual authority[...]”¹¹. The

7 M.A. Nowicki, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka*, Kraków 2002, p. 88.

8 M.A. Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, Warszawa 1998, thesis 4, p. 4.

9 It must be noted that the list does not have enumerative character, by the statement “other status” the ECHR understands possibility of discrimination on other basis, which according to Art. 14 is obviously forbidden.

10 Such views are presented by A. Łopatka, *Międzynarodowe prawo praw człowieka. Zarys*. Warszawa 1998, p. 220.

11 *Judicature Cyprus vs. Turkey* from 26 May 1975, [in:] M.A. Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, Warszawa 1998, thesis 25, p. 7.

European Convention of Human Rights is directed to the states which, as its addressees, take its obligations upon themselves. This principle is confirmed in regulation of Art. 1, 33, 34 which define conditions when a complaint is acceptable. One of those conditions is the requirement of directing complaints exclusively against the state—parties of the Convention. It is due to the fact that the complaints cannot result from actions of individuals who, according to the rule of international responsibility, cannot be assigned to a state¹².

The Convention is principally a charter of negative liberties that constrain the behaviour of state actors. But it also imposes a limited set of positive obligations on European governments¹³. Regulation of Art. 1 clearly shows that the states face a fundamental duty to create legal and factual framework for use of rights and freedoms guaranteed in the Convention. The duty to take action is defined by the term “positive obligations” (French: obligations positives). On one hand, positive obligations involve enabling effective use of entitled rights and freedoms by creating an appropriate legal system, on the other hand, they involve providing means of their protection against violations¹⁴. It is crucial to determine the scope of positive obligations because failure of a state to fulfil them may lead to acknowledgement of infringement of the Convention in a given case¹⁵.

Positive obligations also involve observance of the principle of proportionality by the states of the Council of Europe. Without actually getting into too much legal and theoretical considerations as to the character of the norm or principle of proportionality, it must be stated that in the directive version, the principle narrows down to the norm stating that the state bodies respecting the principle of legal state in

12 M. Jankowska–Gilberg, Zakrs obowiązków pozytywnych państwa na tle aktualnego orzecznictwa Europejskiego Trybunału Praw Człowieka, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Numer specjalny – ochrona praw człowieka, Vo. VIII, 2009, p. 35.

13 Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, *Harvard International Law Journal* 2008, Vol. 49, No. 1, p. 7.

14 *Ibidem*, p. 39.

15 C. Mik, *Teoria obowiązków pozytywnych państw–stron traktatów w dziedzinie praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka*, [in]: J. Białkocerkiewicz, M. Balcerzak, A. Czeczko–Durlak [ed.], *Księga Jubileuszowa dra hab. Tadeusza Jasudowicza*, Toruń 2004, p. 257.

constitution and application of law (both criminal and administrative), and using their due competences, should not set excessive limitations which would disable the use of fundamental rights and freedoms by an individual¹⁶. Referring to the principle of proportionality in judicature of the European Court of Human Rights in Strasbourg, it must be said that the principle of proportionality is cited in reference to the acts of law application. This results from the character of the Court's judicature activity which encompasses control of individual and precise acts of the law bodies.

Violation of the positive obligations may have a deeper underlying reason and result from the faults of the legal system or it may arise in a specific situation in which a state should take action towards protecting an individual. In this case obligations may be fulfilled in different ways.

Firstly, they concern the actions of a legislator, such as legislation of proper articles of the criminal law, procedural regulations. Secondly, some situations require undertaking precise actions within competences of some authorities. The court rarely describes such actions in great detail, the ECHR assesses only whether selected means were capable of resolving the issue. Thus, state's obligations take the form of careful actions. Thirdly, through some of the mentioned categories of positive obligations, the Convention enters the horizontal sphere – between individuals. However, it must be remembered that the earlier mentioned condition of accessibility of complaint has not changed and still requires that the complaint specifies in what way the state violated the ECHR¹⁷.

“When reviewing the actions of national governments, the ECHR gives pride of place to the Convention's text, from which it has distilled a diverse array of bright-line rules and multi-part balancing tests. But

16 See: J. Oniszczuk „Orzecznictwo Trybunału Konstytucyjnego w latach 1994–1995, wybrane zagadnienia”, część III, Warszawa 1996, p. 118 i n. and see: A. Walaszek–Pyziol, Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego, Przegląd Ustawodawstwa Gospodarczego, No. 1/1995, p. 15 i n.

17 M. Jankowska–Gilberg, Zakres obowiązków pozytywnych państwa na tle aktualnego orzecznictwa Europejskiego Trybunału Praw Człowieka, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, Numer specjalny – ochrona praw człowieka, Vo. VIII, 2009, p. 48.

other interpretive methodologies have been equally vital forces in shaping European human rights jurisprudence. For example, the Court assesses the functional importance of particular rights in democratic societies, the rationales governments advance for restricting those rights, the arguments for and against deference to domestic decision makers, and the need for the Convention to evolve in response to legal, political, and social trends in Europe. As explained below, the Court has applied each of these doctrines and interpretive tools when analyzing the right of property”¹⁸.

The scope of positive obligations influences the scope of states’ responsibility. When referring to positive obligation, however, the Court does not formulate a general theory, it rather acknowledges that recognition of their existence depends on the circumstances of a given case¹⁹.

The whole judicature of ECHR applies the casuistic approach which aims to pragmatically resolve a specific case and does not aim to formulate general principles and theories²⁰. This, and the fact that the Convention is treated as a living instrument which constantly evolves through judicature, makes the definition of the scope of protection resulting from the Convention depend on not only the text itself and the classical methods of legal text interpretation, but also on the judicature. It is only when the Convention is read together with the judicative precedents that it will reflect the real scope of obligations it imposes²¹. When selecting the means for effective realization of rights and freedoms, a state is given so called margin of appreciation.

18 Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, *Harvard International Law Journal* 2008, Vol. 49, No. 1, p. 7.

19 C. Mik, *Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka*, *Państwo i Prawo* 1992, vol. 4, p. 12; C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Toruń 1994, p. 203.

20 Sentence from 9 X 1979 in case of *Airey vs. Ireland*, § 26. See also: G. Ress, *Die „Einzelfallbezogenheit“ in der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte*, [in:] R. Bernhardt and others [ed.], *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte*, *Festschrift für Herman Mosler*, Berlin 1983, p. 719.

21 L. Garlicki, *Zakres zobowiązań państwa w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka*, [in:] M. Granat (ed.), *Stosowanie prawa międzynarodowego i wspólnotowego w wewnętrznym porządku prawnym Francji i Polski*, Warszawa 2007, p. 123 i n.

2. Control mechanism of the European Convention on Human Rights and Fundamental Freedoms

2.1. Evolution of the protective system of the European Convention on Human Rights and Fundamental Freedoms

The main intention of the authors of the European Convention on Human Rights and Fundamental Freedoms was creation of collective system of human rights protection on the European continent.

Apart from drawing up a catalogue of civic and political catalogue, ECHR created a control system for observance of obligations taken by the state–parties of the Convention. The function of the ECHR control was initially delegated to three institutions: the European Commission on Human Rights (formed in 1954), the European Court of Human Rights (created 1959). Additionally, there was the Committee of Ministers for the Council of Europe, which controlled the execution of verdicts of the ECHR²². The dichotomy between the two institutions initially worked well since the Court dealt with a relatively small caseload.

The system of control based on the system of complaints, i.e. the state–parties, or in case of individual complaints also individuals, groups of people or non–government organizations, could file complaints to international bodies against those state–parties which in their opinion infringed the rights guaranteed by the ECHR.

Individual complaints were initially analyzed by the European Commission on Human Rights (hereinafter: Commission), which issued decisions on their accessibility and then was at the disposal of the parties for out–of–court settlement. If the state and the complaining side did not achieve any agreement about out–of–court settlement, the Commission drew up a report in which it described the facts and gave an opinion whether there was an infringement of the rights guaranteed

22 J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Warszawa 2008, p. 61.

by the ECHR. The report was then passed to the Committee of Ministers of the Council of Europe.

In cases when the State, which was the addressee of the complaint, accepted compulsory jurisdiction of the court, the Commission and/or the state–addressee could, within three months after submitting the Report of the Commission to the Committee of Ministers, file a complaint to the Court in order to obtain final and binding adjudication. Individuals were not entitled to file cases to the Court.

If the case was not filed to the Court, the Committee of Ministers decided whether the Convention had been violated and, if deemed appropriate, granted the victim of violation proper compensation. The Committee of Ministers also supervised execution of the Court’s verdicts by the state–parties.

Since the enactment of the ECHR, fourteen Protocols have been passed. Protocols number 1, 4, 6, 7, 12 and 13 added further rights and freedoms to the ones guaranteed by the Convention, and the Protocol w gave the Court the right to issue advisory opinions. Protocol 2 enabled individual complainers to file their cases to the Court if the state, which was the addressee of the complaint, ratified that Protocol, and a special qualification group working at the Court allowed the case to be recognized by the Court. Protocol 11 to the Convention reformed the control mechanism for the observance of obligations of the Convention. Other Protocols referred to organization and procedures connected with the institutions of the Convention.

In the early years of the Convention for the Protection of Human Rights and Fundamental Freedoms, the number of applications lodged with the European Commission of Human Rights was comparatively small and the number of cases decided by the Court even lower. This changed in the 1980s, by which time the steady growth in the number of cases brought before the Convention institutions had made it increasingly difficult to keep the length of proceedings within acceptable limits. The problem was compounded by the rapid increase in the number of contracting states from 1990 onwards, rising from twenty–two to the current total of forty seven. The number of applications registered annually with the Commission increased from 404 in 1981 to

4 750 in 1997, the last full year of operation of the original supervisory mechanism²³.

The rising load of conventional institutions inspired a long debate on the necessity of reform in control institutions of the ECHR.

The first radical changes to the Strasbourg mechanism were achieved by the adoption of the 11th Additional Protocol which entered into force on 1 November 1998. The members of the Commission and the Court, which until then had been working on a voluntary and part – time basis, were replaced by full – time professional judges of a newly established single and permanent European Court of Human Rights. Furthermore, the optional clauses were deleted, which meant that individual complaints and inter– state complaints procedures before an independent court were now compulsory for all states parties. The Committee of Ministers was eliminated from the decision – making procedure and its role reduced to supervising the execution of the judgments of the Court at the national level. The Court remains as the only body to decide on both the admissibility and merits of individual and inter–state complaints.²⁴

Protocol 11 involved an annual trial period (from 31 October 1999), during which the Commission still worked on cases which had been deemed acceptable before its enactment.

Since the introduction of Protocol 11, the workload of the Court has unprecedentedly grown. The number of registered complaints has risen from 5979 in 1998 to 13858 in 2001, which amounts for about 130% growth.

In order to secure the Court's ability to recognize the growing number of complaints, its resources were increased. There appeared also speculations about the appropriateness of further reforms. During the Conference of Ministers on Human Rights, which took place in Rome on 3–4 November 2000 to commemorate the 50th anniversary

23 Background documents, High–level conference on The future of the European Court of Human Rights organised in Interlaken, Switzerland, on 18 and 19 February 2010 by the Swiss chairmanship of the Committee of Ministers of the Council of Europe, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg, p. 101.

24 M. Nowak, Introduction to the International Human Rights Regime, Leiden 2003, p. 164.

of opening ECHR for signature, the Committee of Ministers of the Council of Europe was faced with a resolution to begin, as soon as possible, detailed analysis of various possibilities and options in order to ensure full effectiveness of the Court's activity in the new situation. In February 2001, in answer to the resolution, the Committee of Ministers brought to life the Evaluation Group which presented its report in September 2001. It proposed drawing up a Project of Protocol to the Convention, which would entitle the Court to reject complaints which are not essential from the point of view of the Convention and to analyze the possibility of creation of separate organizational unit which would deal with initial analysis of complaints. The works resulted in presentation of another reform of the control system activity of the ECHR – Protocol 14.

The changes introduced by Protocol 14 relate more to the functioning than to the structure of the control system. The main changes are: (a) the introduction of a new admissibility requirement in Article 35 ECHR; (b) the introduction of a single-judge formation who have the competence to make final decisions on the admissibility of applications where such decisions can be taken without further examination; (c) the extension of the competence of the committee of three judges to cover repetitive cases; (d) the establishment of a new procedure which will enable the Committee of Ministers to bring proceedings before the Court where a state refuses to comply with a judgment²⁵.

2.2. The character of individual and inter–state complaint

Strasbourg's control is sometimes said to be “quasi–Constitutional”–providing both generalized standards of human rights for the European space, and through the right of individual petition, specific relief for distinct violations²⁶.

25 K. Yildiz, L. Claridge, *Taking Cases to the European Court of Human Rights. A Manual*, Kurdish human Rights Project Bar Human Rights Committee of England and Wales, 2006 London, p. 19. See generally: *Reform of the European human rights system*, Proceedings of the high–level seminar, Oslo, 18 October 2004, Directorate General of Human Rights Council of Europe, Council of Europe, Strasbourg 2004.

26 L. Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, *Human Rights Law Journal* 2000, no. 23, p. 161.

The ECHR provides for both inter–state and individual complaint procedures. Inter–state applications are made in accordance with Article 33 of the Convention, which states that: “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party”. The original thinking was that states would be the guardians of *the ordre public* of Europe and bring before the ECHR control bodies other states whose activities within their jurisdictions violated human rights. However, it has not worked out like that²⁷. The procedure of inter – state complaints has been used only very seldom and with very limited results.

Inter–state relationships are delicate and inter–state mechanisms may not be ideal procedures as states bringing complaints may elicit reprisals. In addition, many states have not recognised the competence of the supervisory bodies to receive inter–state complaints, require any special authorisation for a state party to be able to lodge interstate complaints.

The European mechanism is inter–state mechanism that has been deployed several times although the Court has only delivered judgements in a few cases, for example: *Ireland v. The United Kingdom* (1978); *Denmark v. Turkey* (2000) and *Cyprus v. Turkey* (2001). In 2007 Georgia lodged an application against the Russian Federation with proceedings commencing in April 2009. Most of them involved bilateral conflicts: the strive for independence in Cyprus (two complaints from Greece against the united Kingdom), the South Tyrol conflicts (one complaint from Austria against Italy) and conflict in Northern Ireland (one complain from Ireland against United Kingdom)²⁸.

There have been very few inter–state complaints over the ECHR’s more than sixty – year history. Rather it has been the individual complaint mechanism that has been the driver of the ECHR and is

27 K. Boyle, *The European experience: the European Convention on Human Rights*, Victoria U. Wellington Law Review 2009–2010, N. 167, p. 171.

28 M. Nowak, *Introduction to the International Human Rights Regime*, Leiden 2003, p. 166.

responsible for its astonishingly broad and rich jurisprudence on ECHR rights and freedoms”²⁹.

The establishment of the right of individual petition and the – at last – compulsory nature of the Court’s jurisdiction indisputably rank among the benefits of the reform. The fact that the mechanism is now purely judicial in nature is an undeniable improvement on the former system. The right of individual petition and the compulsory jurisdiction of the Court no longer depend on decisions of the States; they have existed *de plano* since the 11th Protocol came into force and, in respect of the States that ratified the Convention subsequently, since ratification³⁰.

Regulations of Art. 1, 34, and 35 of the ECHR provide legal basis for filing individual complaints. Every citizen of the member state of the Council of Europe, and every alien staying on the territory of such state (Art. 1), according to Art. 23 of the ECHR, has the possibility of filing a complaint to the European Court of Human Rights in Strasbourg: ”The Court may receive applications from any person, non–governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. This means that the ECHR offers protection not only to citizens but also to anyone within the jurisdiction of a Contracting State, whether he or she is an immigrant, refugee or tourist, and they can also complain to the ECHR. Complaints have been received from nationals of more than 80 countries. In addition, the ECHR has in certain circumstances accepted that a Contracting Party has exercised extra–territorial jurisdiction. For example, in the case of *Loizidou vs. Turkey*, the Respondent State claim edit did not have jurisdiction over the activities of the Turkish military forces occupying Northern Cyprus, who had prevented the applicant from gaining access to her property. The ECHR confirmed

29 K. Boyle, *The European experience: the European Convention on Human Rights*, *Victoria U. Wellington Law Review* 2009–2010, N. 167, p. 171.

30 J. Paul Costa, *Opening speech, [in:] ten years of the “new” european court of human rights 1998–2008 situation and outlook*, *Proceedings of the Seminar 13 October 2008 Strasbourg*, European Court of Human Rights Council of Europe, Strasbourg 2009, p. 12.

that Article 1 of the Convention comprises the idea of State jurisdiction over the individual through State organs or authorities”.³¹

According to Art. 35, the complaint must fulfil precise formal requirements. What is more, the complaint may refer only to the infringement of the right guaranteed by the ECHR and the additional protocols by the state (public authorities, administration, courts, local authorities, etc.). One cannot then complain about infringement of rights which the Convention does not mention (for example social ones). What is more, according to Art. 1 of the ECHR, it is not possible to carry out proceedings against individuals or private organizations.

Evaluating the system of human rights protection within the ECHR, one must underline its uniqueness. The individual complaints mechanism of the ECHR is the crown jewel of the world’s most advanced international system for protecting civil and political liberties³². Two main factors are principally responsible for the rising number of complaints: (1) the accession of former Soviet bloc countries whose transitions to democracy were often slow and fitful; and (2) systemic human rights problems in long standing Convention member states³³. Nevertheless, the ECHR’s creation of international law’s first class action mechanism saved the Court an enormous amount of time and labour’ and dramatically publicized its determination to find comprehensive solutions to systemic human rights problems³⁴.

The Strasbourg Court constructs rights in a dynamic and progressive way, in light of changing circumstances. Like other powerful constitutional courts, the Court performs an *oracular* function: the nature and scope of Convention rights are identified, clarified, and expanded through the Court’s pronouncements, over time, as circumstances change. The Court’s oracular (lawmaking) function is

31 K. Yildiz, L. Claridge, *Taking Cases to the European Court of Human Rights. A Manual*, Kurdish human Rights Project Bar Human Rights Committee of England and Wales, 2006 Londyn, p. 14.

32 Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, *The European Journal of International Law* 2008, Vol. 19 no. 1, p. 159.

33 *Ibidem*, at para.

34 *Ibidem*, at para, 148.

defensible to the extent that the fundamental rights in the Convention are defensible³⁵.

“The right of individual petition, directly before the Court, which is a key feature of the European system, a victory slowly won, and one that is unique in the world. The right of individual application is today both an essential part of the system and a basic feature of European legal culture in the field [of fundamental rights] The principles of subsidiarity and solidarity between national systems and European supervision appear [...] to be necessary to reduce the inflow of cases, or in any event of unmeritorious ones. The states [...] need to go further, such as by providing for still more domestic remedies, on condition of course that these remedies are effective and result in full and adequate redress. [...] The authority, influence and prestige of the Court are intact. [...]. Its influence contributes to the increased protection, in the various countries, of the rights laid down in the Convention. [...] The very high number of applications, which are not all – far from it – ill-founded, reveals both that human rights protection calls for constant vigilance and that some 800 million Europeans trust to Court to provide it. [...] Provided, of course, that the determination is there – the determination of the States, but also of civil society – human rights will not decline in the 21st century. On the contrary, they should progress”³⁶.

“The right of individual petition is essential as a matter of principle. It symbolizes the recognition of the individual, no longer merely as an object, but as a subject of international law. The President of the Inter-American Court of Human Rights [...] emphasised that “individual petitioners would thus act as genuine subjects of human rights international law, once their full procedural capacity is recognised”. He stated that direct access was alone capable of guaranteeing procedural equality between the parties and respect for “the adversarial principle between the victims of violations and the States presumed to be responsible”. The right of individual petition is

35 A.S. Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court in Faculty Scholarship Series 2009*, Paper 7, p. 5.

36 J. Paul Costa, *Opening speech, [in:] Ten years of the “new” European Court of Human Rights 1998–2008 situation and outlook, Proceedings of the Seminar 13 October 2008 Strasbourg*, European Court of Human Rights Council of Europe, Strasbourg 2009, p. 14–15.

also a precondition for the effectiveness of rights where other means of protecting them have failed or have proved ineffective. [...] the right of individual petition is a necessary yet inadequate precondition for the effectiveness of the guarantee of human rights. [...] access to a court must be not only theoretical and recognised in principle. It must also be genuinely open to everyone, and therefore attention must be paid to the material conditions allowing this right to be exercised. “Hindrance in fact can contravene the Convention just like a legal impediment.” It is not enough to assert the principle that any individual may lodge an application with the European Court of Human Rights. There must also be a solid legal culture of human rights in the member States. There is still much to be done to ensure that lawyers, other legal practitioners, the domestic courts, civil society, law students, associations, etc, are trained in and curious about the protection that the European Convention on Human Rights can offer individuals. Few lawyers and judges know and use the lessons of the Court’s case-law. Frequently, only a few older judgments are known, masking the case-law’s wealth. The principle of subsidiarity, which provides that the Convention be primarily implemented in the domestic legal systems, is more frequently reflected in the States’ reliance on the margin of appreciation, which – they claim – permits them to restrict a protected right, than in a domestic court’s reference to the Convention. Rarer still are those who consider that a teleological interpretation of the text can occur outside the circle of the Court and without waiting for the latter to take a stance. At the same time, greater solidarity must be developed with the most weak, those for whom the right of individual petition is extremely difficult to exercise. It is about especially of situations where the risk of breaches of human rights concerns mass violations, as in the countries in the south of our continent, where thousands of foreigners disembark in search of a better future”³⁷.

37 S. Saroléa, A critical look at direct access to the Single Court: a practitioner’s perspective, [in:] ten years of the “new” European Court of Human Rights 1998–2008 situation and outlook, Proceedings of the Seminar 13 October 2008 Strasbourg, European Court of Human Rights Council of Europe, Strasbourg 2009, p. 23–24.

3. Legal international character of obligations of the European Convention on Human Rights and Fundamental Freedoms

International organizations are created by the will of countries for realization of tasks which are beyond the strength of individual states³⁸. Giving up some of their sovereign rights for the sake of the organization, they expect specific benefits, intensification of cooperation in a given field or fields, creation of common administration which would manage a certain area of international activity, etc.

In classical international organization, member states take on obligations not so much towards the organization, as towards one another, especially by signing international agreements “under the auspices” of the organization, but without its participation as a party of an agreement. These are mutual obligations, so their respect is based on the principles of good faith and solidarity.

It seems that it is not possible to properly adjust to the ECHR or to observe its regulations without understanding fundamental issues connected with the character, structure and the scope of legal obligations that it brings about.

In traditional international law obligations arise mostly between the states as the main subjects of that law. They result from the law norms – treaty law, common law, general principles of law and partly from acts of international organizations. Obligations taken by the members of the organizations under its auspices and in connection with its activity, may be subject to control of the Council of Europe. Thus we may distinguish four kinds of obligations depending on their importance and legal strength.

The most important are **statute obligations**, i.e. obligations resulting from the constitutional act of the organization – the Statute. They are most general and broadly presented obligations which serve as

38 International organizations are usually created by states, though one can imagine that one international organization could be a member of another international organization. For example, the European Union is a member of the World Trade Organization.

a starting point for the whole political and legal activity of the Council of Europe. One could mention here acknowledgement of the principle of the rule of law³⁹, respect of human rights⁴⁰, or more political obligation of member states to “honest and effective” cooperation in achieving better unity between the members⁴¹.

Another, probably most representative and legally “clear” category of obligations, are **convention obligations**, i.e. obligations resulting from international agreements signed under the auspices of the Council of Europe. The convention obligations achievement of this organization is really impressive and it grows every year.

Next special kind of legal international obligations are **commitments**⁴². This type of obligations is taken by the states accessing the Council of Europe and they are the result of negotiation between the candidate state and the Council of Europe. In practice they can be found in the opinion of the Parliamentary Assembly of the Council of Europe on the accession of the candidate state to the organization and in the resolution of the Committee of Ministers inviting the state to join the organization. Various countries have taken different number and scope of those commitments, depending on the time when the state accessed the organization. Basically, the later the accession, the bigger number of commitments, which was connected with greater negotiation experience towards the states of the Central and Eastern Europe, and the willingness to maintain high standards of membership in the Council of Europe. For example, commitments may mean obligations that are to be signed and ratified in the time of certain conventions of the Council of Europe, obligations to adjust the national legal system to the standards of the Council in some areas or aspects, or solutions to some internal problems, e.g. the observance of rights of national minorities.

39 Art. 3 of the Statute of the Council of Europe.

40 *Ibidem*

41 Art. 3 in connection with Art. 1 of the Statute of the Council of Europe.

42 English terms *obligations* and *commitments* are in Polish translated as “zobowiązania” (obligations). This creates difficulties in their usage as the two English words are not identical. Other equivalents of the term *commitments* could be searched (for example “powinności”), but none of them are commonly used.

Such obligations will be subject to political procedures of monitoring by the Parliamentary Assembly and the Committee of Ministers.

The last and most arguable category of obligations are the ones resulting from the **recommendations of the Committee of Ministers of the Council of Europe**. They are not legally binding from the formal point of view, but one could wonder if they are not something more than just a contribution to creation of new norms of international law, something more than soft law. In the face of the principle of good faith which pervades the international law, they cannot be treated as “empty words”, meaningless words that do not bind the states which express them by passing a resolution. Undoubtedly, they may be used as a form of lobbying, exerting certain political pressure on the governments of the member states. The most important argument for considering the recommendations of the Committee as special, though limited in its binding force category of obligations, is the fact that the Statute of the EC executes some kind of, if not control, then at least monitoring because it may request from the member states information about actions taken in response to recommendations (Art. 15 of the Statute)⁴³.

Most conventions of the Council of Europe do not set any control mechanisms. Failure to fulfill the obligations of the convention brings about standard of international responsibility, that is a special international legal relationship between the state-parties of the convention, excluding the Organization itself. Different situation takes place in case of ECHR which has its own control system of international obligations, based on the activity system of the European Court of Human Rights, a judicial body which is entitled to examine individual complaints (Art. 34 of ECHR) and state complaints (Art. 33 of ECHR).

43 See more: Monitoring of compliance with commitments entered into by Council of Europe Members States: An Overview, Document prepared by the Secretary General 's Monitoring Unit, 6 March 2000, Monitor/Inf (2000) I, p. 11–12, pt 37. Initially the reports on recommendations of the Committee were drawn up by specific governments of the member states, later this assignment was given to the steering committees and the secretariat of the organization; <http://cm.coe.int/reports/monitoring/2000/2000monitorinfl.htm>

The system of international control of the ECHR bases on the assumption that the most effective protection of human rights must be exercised “at home” and that the international protection mechanisms can only complement domestic legal instruments and will not provide “first hand” protection, unless domestic means are not effective or systematically unavailable⁴⁴.

Rolv Ryssdal, former president of the European Court of Human Rights used to say on many occasions that: “proper anchoring of the guarantees in the domestic legal systems of our countries is vital. It would be senseless to expect their protection only from European institutions. Strasbourg should be considered as final resort after using up all other means of settlement before domestic courts”⁴⁵.

This philosophy clearly results from the Statute of the Council of Europe (Art. 3) and the Preamble to the ECHR, which refers to the common heritage of ideals and political tradition of respect for freedom and the rule of law, which can be found in national legislation. Through the system of collective guarantee of rights, the ECHR reinforces, in accordance with the rule of subsidiarity, the protection available at the national level⁴⁶. On the basis of Art. 1 of the Convention called “Obligation of respect of human rights”, states “secure rights and freedoms defined in Chapter I of the Convention to each individual under their jurisdiction”. The court stressed that the ECHR does not only impose obligation of its rights on a state, but, as the modal verb in the phrase “shall secure” implies. It also requires their usage and application where authorities take actions that prevent their violation and compensate their infringement⁴⁷.

According to the ETPC judicature, the subject and object of the ECHR requires that its resolutions are interpreted and applied in a way

44 M.A. Nowicki, *Nowe standardy Konwencji dotyczące krajowej ochrony podstawowych praw*, (in:) *Zasady procesu karnego wobec wyzwań współczesności*. Księga ku czci prof. Stanisława Waltosia, Warszawa 2000, p. 193.

45 R. Ryssdal, *Co-operation between courts and tribunals of member States and the European Court of Human Rights*, speech in Brussels 19 May 1992, doc. Cour (92) 135.

46 *Case on United Communist Party of Turkey and Others vs. Turkey* from 30 January 1998, RJD 1998-1, § 28.

47 *Case on De Wilde, Ooms i Versyp vs. Belgium* from 18 June 1971, A. 12, § 82.

that secures effective execution of its guarantees.⁴⁸ This condition influences then the scope and boundaries of state's obligations. In a case of *Sunday Times vs. The United Kingdom*⁴⁹, the ECHR stated that vague terms must be interpreted "in the best way for achieving the goal and realization of the matter of the treaty", which also means that in case of obligation of effective guarantee of human rights, there is also the imperative of effective interpretation of the resolutions of the ECHR.

Obligations of the ECHR have an objective character. According to the ECHR, this means that, unlike in case of classical international treaties, it enters into more than an ordinary mutual agreement between the states. It creates objective obligations which are beyond and above the network of mutual, two-sided obligations, and which, according to the Preamble, use collective protection⁵⁰. This means that obligations resulting from the treaty have two levels: the horizontal (interstate) and vertical (authorized individual vs. state). In considerable degree, the objective nature of obligations results from the object of regulation (the object of service), which are the human rights and freedoms.

The objective character is also determined by the fact that obligations found on the latter (vertical) level play the lead role in all obligations. From the objective character of obligations it becomes clear that the human rights and fundamental freedoms protected in the treaty do not belong to the internal competence of the states. In present times, they have become an object of international regulations and underwent internationalization and exclusion from exclusive domain of the state⁵¹. Such exclusion does not imply state's incapacitation, but only limitation of its will (imposition of respect for the resolutions of international law in legislation and domestic practice) and introduction of at least minimal international control⁵².

48 Case on *Soering vs. The United Kingdom* from 7 July 1989, A. 161, § 87.

49 Case on 26 April 1979, A. 30, § 48.

50 Case on *Ireland vs. The United Kingdom* from 18 January 1978, A. 25, § 239.

51 C. Mik, *Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka, Państwo i Prawo* Nr 4/1992, p. 6.

52 *Ibidem*, p. 6.

Objective character of obligations carried by the Convention directly influences their structure⁵³. This means that its content is different in case of horizontal and vertical obligations. The former are similar to classical international agreements, with the reservation to their erga omnes effectiveness. This way the state takes the role of the entitled and the obligated⁵⁴.

In case of the latter the structure is more complex. The entitled subject is a human being, because according to Art. 15 in connection with Art. 1 of the ECHR, each person is entitled to international protection as long as it is under the jurisdiction of the state-party, regardless of citizenship (or its lack), sex, race, language, religion, political or other views, national background, wealth, class status, minority group. In vertical obligations, similarly to horizontal, the obligated subject is the state. What is different though, is that here the state is not as much of an entirety or a subject of private relationships, but rather a personification of the state apparatus. A crucial element of obligation is service. In ECHR it refers to the human rights and fundamental freedoms. The dichotomy of obligations brings dichotomy of services. As it is known, service is the behaviour of subjects in accordance with the content of rights and obligations. On the international level this means submission to appropriate control carried out by the European bodies (Art. 14 and 46 of the ECHR), cooperation in support of common respect of human rights (Section 3 and 5 of Introduction to the ECHR, Art. 3 of the Statute of the Council of Europe).

On the vertical level the behaviour goes even further and refers mainly to the state. In case of *Ireland vs. The United Kingdom*⁵⁵, the European Court of Human Rights clearly stated that the Convention obligates not only the high authorities of the States that agree to respect its rights and freedoms as the term “shall secure” in Art. 14 implies. The Convention also assumes that in order to secure the use of rights and freedoms, the authorities must also prevent and deal with every violation at subordinate levels.

53 *Ibidem*, p. 10.

54 *Ibidem*, p. 10.

55 Adjudication from 18 January 1978, A. 25.

Subordinate level must be understood not as a lower level of authority but also (or maybe first of all) as the body of subjects subordinate to state's jurisdiction – individuals, legal entities, and other subjects. It would be in total accordance with Art. 17 of the ECHR which forbids interpretation of any resolution of the Convention in a way that assumes involvement of any state of law, group or individual in any act or activity aiming to violate the rights and freedoms recognized in the Convention or aiming to limit them in a wider scope than the Convention provides for ⁵⁶.

Respect of rights and freedoms of the ECHR is subjected to the general rules of carrying out treaty obligations because of membership in the Council of Europe and is additionally reinforced with the ability to file individual complaints (Art 34 of the ECHR) and interstate complaints (Art. 33 of the ECHR) to the European Court of Human Rights. In case of severe infringement of the European Convention, a state is threatened because of the fact that the ECHR mechanism is linked with the institutions of the Council of Europe. The Committee of Ministers may impose sanction of expulsion from the organization (Art. 8 in connection with Art. 4 of the Statute). It is possible in case of systematic, serious, mass infringements of Convention obligations. However, the main way to sanction violations of the ECHR by the members of the Council of Europe is the adjudication of the European Court of Human Rights.

4. The place of the ECHR in European democratic architecture

In contemporary international relations human rights are the prime mover of social and political progress, the directive of system regulation and legal solutions. It must be clearly showed that the general human imperative of human rights and freedoms blasted out the former, communistic political system and was the causative force behind the political changes. This imperative undoubtedly influenced the nature,

56 C. Mik, Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka, Państwo i Prawo Nr 4/ 1992, p. 11.

shape, and scope of human rights. The attempt to answer the question about the future of the European civilization and culture involves proper conditioning and interpretation of future law system, especially in the domain of the rights and freedoms of an individual. All of this has an obvious impact on the construction of contemporary vision of protection of an individual by the European states. This protection is shaped not only by the internal legislation of states, but most of all by the standards of the ECHR.

It is unquestionable that the ECHR is a document which is fundamental for the European system of human rights protection⁵⁷. Thus, everything that deals with effectiveness of its application has a crucial meaning for the Council of Europe as an entirety. All in all, it is an “organization of values” which aims to create and promote democratic standards, rule of the law, and human rights in the member states⁵⁸. The realization of this task greatly depends on how effectively Convention’s resolutions are implemented which in a natural way takes us to the European Court of Human Rights.

It is not accidental then, that the Council of Europe focuses its interest on conditioning the activity of the Court. It became even more important after 1989 when the Council of Europe got extended with the states of Central and Eastern Europe, which increased the Court’s workload.⁵⁹ Like every international agreement that sets jurisdiction guarantees of its observance, the ECHR gathered around itself numerous judicative precedents. The ECHR, similarly to other treaties on human rights and typically for such kinds of documents, was written in a general language, full of undefined terms. Thus, understanding the actual content of the rights and freedoms of the ECHR is possible after total analysis of the written text and its judicative specification⁶⁰. It is worth remembering that the ECHR treats the Convention as a “living

57 R. Beddard, *Human Rights in Europe*, Cambridge 1995, p. 24.

58 P. Leuprecht, *Reflection on Human Rights*, “*Human Rights Law Journal*” 1988, No 2–3, p. 164.

59 J. Schokkenbroek, I. Ziemele: *The European Convention on Human Rights and the Central and Eastern European Member States of the Council of Europe: an Overview*, *Netherlands Juristenblad* 2000, No 39, p. 1918.

60 L. Garlicki, *Obowiązywanie Europejskiej Konwencji Praw Człowieka w porządku prawnym Rzeczypospolitej Polskiej*, „*Biuletyn RE*”, 2003, nr 3, p. 19.

organism” that constantly grows through dynamic interpretation of Convention’s text and through its judicative decisions⁶¹.

Bearing in mind the judicative achievements of the Court, one could conclude that Strasbourg judicature has certainly defined the real scope and meaning of specific resolutions of the ECHR. The creators of the Convention aimed to base the control process and its the application on the judicative activity of the Court, which somehow led to incorporation of the judicative activity into the Convention system⁶². This is why the domestic bodies must apply judicature of the ECHR in practice and it seems that all attempts to contrast the text of the Convention and judicative practice would be very risky⁶³. In this context it would be pointless trying to negate the existence of obligation of the “Strasbourg judicature” application by the domestic bodies of member states of the Council of Europe or its application in the meaning given by the judicature. Polish Supreme Court noticed this long time ago, stating that “since Polish accession to the Council of Europe, judicature of the ECHR may and should be taken into consideration while interpreting Polish domestic regulations”⁶⁴.

The binding character of the ECHR imposes two kinds of obligations on all public authorities of member states of the Council of Europe: on the material level, it is the obligation to apply resolutions of the Conventions in the activity of a given body; on the procedural level it is the obligation to carry out the verdicts of the ECHR and to subject itself to the control procedure of the Committee of Ministers. From the practical perspective of how member states apply the resolutions of the Convention, one could point out a couple of areas where the judicature of the ECHR harmoniously influences the practice of member states. In the first case it is so called “mental influence” which is less spectacular but easily noticeable. In the second area it is the creation of law and in the third it is the change of the judicative line of domestic courts or bodies of domestic administration which is, on the other hand, starkly

61 W. Czapliński, A. Wyrozumski, *Prawo międzynarodowe publiczne*, Warszawa 1999, p. 363.

62 L. Garlicki, *Obowiązywanie Europejskiej Konwencji Praw Człowieka w porządku prawnym Rzeczypospolitej Polskiej*, „Biuletyn RE” 2003, no 3, p. 19.

63 *Ibidem*

64 Decision from 11 January 1995, III ARN 75/94, OSNAPIUS 1995, sect. 106.

visible but difficult to systematise because of high number of subjects (states) which are affected by the international order of the ECHR.

The mental influence of the ECHR and the Strasbourg Court is visible in acceptance and popularization of axiological assumption that the protection of the rights of citizens belongs to the main tasks of a democratic state (the rule of subsidiarity). On one hand, the functioning of the state of law guarantees protection of individual's rights in its constitutional aspect, on the other it recognizes rights and freedoms guaranteed in international treaties, i.e. the ECHR.

In case of ECHR and its judicature in the European Court of Human Rights, the law formation process (second area) can be influenced in three ways: by modelling, revocation, or alteration of the law. These forms apply both to constitution and to acts⁶⁵.

Modelling is broadly understood "acknowledgement" of the ECHR's international norms and standards in the process of creation of legal acts. This could mean acceptance of a general concept of the ECHR's resolutions, the nature of a given regulation or standard, or the use of some fragments of resolutions or even incorporation of a whole norm.

Another form of influence of the ECHR and its judicature is **revocation** or change of domestic law. This is a situation when the rights and freedoms contained in the ECHR are already in effect but due to ratification or an unfavourable binding adjudication of the ECHR, it is necessary to alter the whole act of law or to rescind it in parts or as a whole.

The influence of the adjudication of the ECHR is also visible in the change of judicative line of domestic courts or bodies of domestic administration (third area), which in their practice use legal standards resulting from the verdicts of the ECHR.

What is also worth mentioning, is that the verdicts of the Court cause direct changes in the functioning of domestic courts of states

65 C. Mik, Porządek międzynarodowy a porządek krajowym w dziedzinie praw człowieka, Państwo i Prawo Nr 10/1992, p. 5.

that belong to the Council of Europe, such as organizational changes (the number of personnel), or procedural practices (ways of notifying parties to the suit).

As it was shown, the harmonization in the area of rights and freedoms of the ECHR in domestic orders and practices unambiguously indicates that the influence of the European Court of Human Rights has a comprehensible character. It improves and harmonizes domestic democratic procedures, either because of the necessity to find legal solution which would be widely accepted in the context of socially accepted moral or legal norms, or because of the need to find optimal standard in the face of potential political and social consequences of development of contemporary European states.

The most characteristic feature of the Court in respect to rights and freedoms of the ECHR is its indefinable character, which is reflected in changing opinions of the Court on understanding and interpretation of specific legal issues connected with the protection of individual's rights and freedoms.

Presentation of the activity of the European Courts of Human Rights as a dynamic, evolving process carries clear indication that contemporary scope of protection has an expanding character. The tendency to extend the minimal standard of rights and freedoms of the ECHR by the judicature of the Court must be evaluated as a positive thing. As a matter of fact, it shows that the scope of protection and the activity of the Court will further evolve depending on the needs of contemporary European states.

It is beyond any doubt that the legal international order shaped directly by the ECHR's judicature and interpretation of Convention's provisions has introduced a common European standard of human rights protection in states belonging to the Council of Europe, and the Court's judicature refined and specified the content of specific standards of the ECHR.

From the discussion forums and creation of new legal solutions, the Council of Europe started to transform into an active observer and commentator of human rights standards created by the European Court

of Human Rights. It is interesting to notice that the initial idleness of states in the area of execution of the Court's verdicts changed with the passage of time into acceptance. A good example is the position of Italy or Poland, which were troubled by the lengthy court procedures. These countries were initially quite critical towards changes in the judicial system, however, gradually this attitude changed which resulted in acts that enabled one to sue the lengthy court procedures. Especially recent years have witnessed the growth of the Court's role in the area of rights and freedoms of the ECHR as the consequence of socio-political changes in the Central and Eastern Europe – it was marked by the ability to introduce international legal standards in the countries of the former eastern bloc by the Council of Europe.

The ECHR is undoubtedly one of the most important treaties on the European continent. It lies at the core of law and order of democratic community. Reconstruction of specific standards of rights and freedoms has confirmed that the obligations of the ECHR are closely connected with the formation of European standard of human rights observance. Complaints filed to the European Court of Human Rights, on the basis of the ECHR, have considerably contributed to understanding that the scope of rights and freedoms guaranteed by the domestic legislation did not suffice. Thus, the European Court of Human Rights plays a vital role in the protection of an individual.

Analysis of the Strasburg judicature in the context of the ECHR reveals that, firstly, it still remains a fairly often violated treaty, secondly, in some cases it has a restrictive character because interpretation of its resolutions must be considered unfavourable for those states of the Council of Europe, which do not meet legal requirements of the Court's judicative standards, as it is evident in numerous adjudications. Reconstruction of specific standards of the ECHR and the practice of authorities revealed that the legal solutions and the practice of domestic bodies developed by the countries belonging to the Council of Europe, are to some extent incompatible with the international standard of human rights and the judicature of the European Court of Human Rights. Such inconsistencies have been recorded in basically all resolutions of the ECHR.

Analysis of solutions on human rights and freedoms in the ECHR, which were suggested and accepted by the member states of the Council of Europe, bring to mind the following conclusions. The European Convention and its Court's judicature have set the framework for holistic construction of human rights protection system in internal legislations, with the aid of international legal means and with all formal consequences. However, as the analysis shows, the taken actions were narrowed down to only mechanical acceptance of existing standards on individual's protection. The European states should, first of all, introduce the ECHR standards in practice and in actions of the authorities in an effective and realistic way.

It must be noted that numerous cases of negligence in legislature of member states of the Council of Europe and in the practice of government authorities have led to concern that the European Court of Human Rights will become international final instance for the multitude of cases of human rights infringements. Such concern is justified if we realize the incredible growth in Strasbourg complaints since the nineties and consequent problems with managing the Court's procedures, which have only partially been dealt with by the Additional Protocol no. 11 and 14.

It is beyond question that the ECHR plays and will play crucial role in European architecture as a treaty most suitable for support of "new democracies", for construction of democratic institutions and human rights protection, and as a forum of European cooperation in the legal, social, cultural, and numerous other fields⁶⁶. According to the General Secretary of the Vienna Convention (1993), Catherine Lalumiere, the Council of Europe may help in creation of "democratic security of Europe" by preventive and supportive actions, which is quite an achievement⁶⁷. Recent years have proven beneficial character of the organization in reinforcement of stabilization and peace during the progressing work on the construction of New Europe. As it can be seen from the above, contemporary democracies shaped within the Council of Europe have gained a new legal dimension: apart from the

66 J. Regulski, 5 lat w Radzie Europy, Warszawa 1998.

67 J. Kaczmarek, Rada Europy, Wrocław 2002, p. 55.

necessity to introduce Montesquieu principle, it is also necessary to introduce legal principles and international legal standards bound up with the membership in the Council of Europe.

The above actions of the Council of Europe and suggested solutions on human rights protection must be assessed positively. It does not mean, however, that they are free from certain faults. Of these, so far the most noticeable is inconsistent execution of sentences of the European Court of Human Rights. Choice and introduction of new legal possibilities of enforcing adjudications of the Court should be the starting point in providing more effective protection of an individual. This is not the case, however, and it seems that this issue still lacks any new suggestions for its solution.

The system of human rights protection realized within the Council of Europe is commonly accepted in the European states, but it is not equally well observed. It is necessary to eliminate recommended faults so that it achieves coherent character. Holistic assessment, however, will only be possible after acceptance of uniform execution principles of the Court's adjudications.

The ongoing process of development of the Council of Europe played an important role in the context of solutions on human rights protection. The states aspiring to the membership must adjust their legal regulations to the requirements of the ECHR and in consequence to the judicature of the European Court of Human Rights. Taking into consideration the scope of protection of the individual on the grounds of domestic legislation, one can distinguish among the European states three groups of states: the first one characterized by the closest cooperation, highly developed harmonization, is made up from the Western European states; the second group comprises the states of the Central and Eastern Europe (for example Poland, Romania, Hungary) which gradually adjust their legislation to the standards of the ECHR; finally the third group consists of the remaining European states such as Turkey and post-soviet states which face considerable obstacles in adjusting domestic legal standards to the ones of the Council of Europe. In this sense, the Council of Europe still remains the most suitable forum for development of common European solutions on protection

of human rights. From the above considerations it can be seen that the policy of the Council of Europe on observance of human rights possesses paneuropean character and is the effect of cooperation of 47 states of our continent. According to the statistics, European legislation does not always meet the legal requirements set by the ECHR. The fact that violation of human rights is becoming a global issue, cannot be an excuse for domestic bodies. Present situation requires diverse repair actions of financial, legislative, technical, and organizational nature.

ACTIVITY OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. Organization structures of the European Court of Human Rights

1.1. Judicial composition of the European Court of Human Rights

The European Court of Human Rights (hereinafter the Court) operates on a permanent basis and is made up of full-time professional judges resident in Strasbourg. According to Article 20 of the ECHR “The Court shall consist of a number of judges equal to that of the High Contracting Parties”. The judges of the Court are elected by the Parliamentary assembly of the Council of Europe from the list of persons nominated by members of the COE, each state can nominate three candidates (art. 22 ECHR)¹. The criteria for selection are in Article 21 “1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence”².

These requirements have remained unchanged since the adoption of the Convention in 1950. These terms are susceptible to some degree of objective definition. The criterion of “high moral character” is

1 D.W. Jackson, *The United Kingdom confronts the European Convention on Human Rights*, University Press of Florida, 1997, p. 12. See art. 22 ECHR: “The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party”.

2 A.R. Mowbray, *Cases and materials on the European Convention on Human Rights*, New York 2007, p. 17–18.

somewhat vague and general, whilst that of eligibility for “high judicial office” is more operational³. High judicial office means that the persons concerned must be eligible for membership of one of the country’s senior courts. Thus for example members of Supreme, Constitutional, Supreme Administrative Courts clearly satisfy this requirement, whereas persons eligible for appointment only to the lowest level of jurisdiction in principle do not.

The meaning of “jurisconsults of recognised competence” also requires further analysis. This qualification is recognised only by some member states. To date, most candidates presented by national authorities are members of the judiciary. As a result, the majority of the Strasbourg Court’s judges have been members of the highest judicial bodies in their national systems. Jurisconsults (academics, legal practitioners) follow in second position. There is, however, a dominant view that while a balance of professional backgrounds is of great value to the diversity of the Court, the emphasis should nevertheless remain on judicial experience on the bench, a position which was emphasised by several of the experts during the hearing, who also found solid judicial experience more relevant to the Court’s work than specific experience in human rights law⁴.

To be a “jurisconsult of recognised competence” requires extensive experience in the practice and/or teaching of law, the latter generally entailing publication of important academic works. One objective indication of this requirement would be the length of occupation of a professorial chair. The States clearly have a fundamental role in ensuring that the three candidates whose names are submitted to the Parliamentary Assembly are all suitably qualified so as to offer the Assembly a real choice between candidates of an equivalent standing and to guarantee that, whichever of the candidates is elected, he/she

3 Nomination of candidates and election of judges to the European Court of Human Rights, Report Committee on Legal Affairs and Human Rights, Doc. 11767, 1 December 2008, p. 6; H. Davis, Human rights law. Directions, New York 2007, p. 32.

4 *Ibidem*

will have a sufficient level of expertise in a relevant field of law (international law, criminal law, administrative law, humanitarian law etc.).⁵

The candidates on judges are considered not only as individuals but also with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance. On the basis of the candidatures transmitted to it, the Assembly elects the judges to the European Court of Human Rights during its part-sessions. The candidate having obtained an absolute majority of votes cast is declared elected a member of the Court. If no candidate obtains an absolute majority, a second ballot is held, after which the candidate who has obtained a relative majority of votes cast is declared elected. Election results are publicly announced by the President of the Assembly during the part-session⁶.

The judges shall be elected for a period of nine years, they may not be re-elected (art. 3). Article 23 of the ECHR also introduced too a mandatory age of retirement for judges “The terms of office of judges shall expire when they reach the age of 70.” In certain instances, the fact that a person is already in his or her mid-60s does not prevent states from putting forward the person’s candidature for the Strasbourg Court, even where this may impede him/her from completing his/her mandate⁷.

According to Article 20 of the ECHR “ the judges shall sit on the Court in their individual capacity. 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court”.

The independence, impartiality and quality of the judges is central to the Court’s credibility as an international judicial institution.

5 National procedures for the selection of candidates for the European Court of Human Rights, Report Committee on Legal Affairs and Human Rights Doc. 12391, 7 October 2010, p. 6.

6 Sub-Committee on the election of Judges to the European Court of Human Rights, Committee on Legal Affairs and Human Rights, Procedure for electing judges to the European Court of Human Rights, Information document prepared by the Secretariat, 11 October 2010, AS/Jur (2010)12 rev3, ajdoc12 2010 rev3, p. 3.

7 Nomination of candidates and election of judges to the European Court of Human Rights, Report Committee on Legal Affairs and Human Rights, Doc. 11767, 1 December 2008, p. 14.

On the activity level of the Council of Europe, the interpretation of the principle of independence and impartiality of the courts is defined by the Recommendation of the Committee of Ministers of the Council of Europe no. /94/12 from 13 October 1994.⁸ According to the Recommendation of the Committee of Ministers of the Council of Europe, judicial independence is connected with maintenance of division of authority (pt. 15). Thus, the most gross evidence of violating independence is the administrative or political (executive authority's) interference in specific judicial solutions.

There is no unanimity on how to interpret terms “independence” and “impartiality”, because they are not defined in the ECHR. Some light is thrown by the doctrine heritage of the West–European states, especially judicature of the Court. The notion of “independence” involves independence from executive authority (i.e. government and local administration) and from legislative authority, and independence of sides. In English independence of judges is defined by the term “judicial independence” or “the independence of judiciary”⁹. This term has two meanings: it refers to individual judges in performance of judicial functions, and to independence of the judiciary as a body, both of those aspects depend on one another¹⁰. “Judicial independence” means, firstly, independence of individual judges (the judges are not subordinate to any authority in their verdicts and functions except the law and the scope of duties and time of service is properly regulated); secondly, independence of specific courts (in a narrow, precisely determined scope, the court may order a proper body of executive authority to transfer financial resources to ensure proper functioning of the court); thirdly, independence of judiciary as a body (freedom from in-

8 Recommendation no. R (94) 12 of the committee of ministers to member states on the independence, efficiency and role of judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies. Interpretation of understanding the principle of independence and impartiality of judges offers Pt. 8 of Fundamental principles of judiciary independence enacted in 1985 by the VII Congress of United Nations and accepted by the General Assembly (Polish text in: *Standardy Prawne rady Europy*, t. IV, Zalecenia Komitetu Rady Ministrów dotyczące sądownictwa, postępowania i orzekania, wybór, tłumaczenie i redakcja J. Jasiński, Warszawa 1998. p. 44–49).

9 M. Jankowski, Niektóre zagadnienia niezawisłości (niezależności) sędziowskiej w prawie i doktrynie angielskiej i amerykańskiej, „*Nowe Prawo*” 1987, no. 2, p. 79.

10 K. Korzon, *Niezawisłość sędziowska (sądów) w systemie trzeciej władzy*, (in:) *Filozofia prawa a tworzenie i stosowanie prawa*, Katowice 1992, p. 421.

tervention of executive and legislative authority in the performance of judiciary functions)¹¹.

There is no doubt that impartiality of the judge is closely linked with independence. In the doctrine those two terms usually surface together, which is quite logical because one cannot suspect impartiality of judges whose dependence on the executive authority or on one of the sides has been proven¹². Sometimes impartiality is considered as an ingredient of judicial independence, at other times, it is considered as a means of ensuring impartiality in the system of justice, in other contexts it is stressed that judge's independence does not guarantee impartiality of adjudication, or that judicial independence is a condition for creation of genuine impartiality¹³.

“Impartiality” means “lack of prejudice, objectivity, impartiality of judges, objectivity of a verdict”¹⁴. According to A. Wasilewski, impartiality means simply lack of prejudice or preference of either side¹⁵. S. Waltoś¹⁶ in independence sees one of institutional means realizing and securing impartiality in the system of justice, stressing however, that the notions of independence and impartiality should be separated¹⁷. According to S. Waltoś, objectivity has a broader meaning than impartiality because impartiality is “independence” and the same attitude of the judicial body to the sides and other participants, whereas objectivity, apart from the above, involves “lack of bias and forgone expectations of outcome”. One must give S. Waltoś his due and note that the factors of objectivity are: freedom of decision, open and undetermined perception of the essence of the case, minimal influence of irrational factors that could influence the verdict (e.g. anger), and versatility.

11 M. Jankowski, Niektóre zagadnienia niezawisłości (niezależności) sędziowskiej..., p. 17. See more: E.L. Wędrychowska, M.P. Wędrychowski, Pojęcie “niezawisłość sędziowska” w polskim procesie karnym jako element zasady uczciwego procesu, “Studia Iuridica” 1997, vol. 33; A. Murzynowski, A. Zieliński, Ustrój wymiaru sprawiedliwości w przyszłej konstytucji, PiP 1992, p. 9; A. Rzepliński, Sądownictwo w PRL, Londyn 1990, p. 9.

12 J. Pradel, Rzetelny proces w europejskim prawie karnym, PIP 1996, vol. 9, p. 13.

13 E.L. Wędrychowska, M.P. Wędrychowski, Pojęcie “niezawisłość sędziowska” w polskim procesie karnym jako element zasady uczciwego procesu, “Studia Iuridica” 1997, vol. 33, p. 257.

14 Słownik języka polskiego, ed.: M. Szymczak, vol. II, Warszawa 1979, p. 374.

15 A. Kwasniewski, Pojęcie “sądu” w prawie polskim w świetle standardów europejskich, “Przegląd Sądowy” 2002, vol. 11/12, p. 7.

16 S. Waltoś, Proces karny. Zarzys systemu, Warszawa 1995, p. 216.

17 *Ibidem*, p. 214.

1.2. Composition of the European Court of Human Rights: Plenary Court, Single-judge formation, Committees, Chambers and Grand Chamber

Before it is possible to explain the Strasbourg Court's admissibility criteria it is necessary to understand the structure of the Court itself.

Plenary Court. Plenary Court is attended by all the members – judges. It is the Court's highest bench holding administrative functions¹⁸. According to Article 25 of ECHR – Plenary Court shall: a) elect its President and one or two Vice-Presidents; b) set up Chambers; c) elect the Presidents of the Chambers of the Court; d) adopt the rules of the Court; e) select the Registrar and one or more Deputy Registrars; f) make any request under Article 26, par. 2.

The President of the Court. The plenary Court shall elect its President, two Vice-Presidents and the Presidents of the Sections for a period of three years, provided that such period shall not exceed the duration of their terms of office as judges¹⁹. They are elected for a term of three years. The President of the Court shall direct the work and administration of the Court. The President shall represent the Court and, in particular, be responsible for its relations with the authorities of the Council of Europe²⁰.

The Vice-Presidents of the Court shall assist the President of the Court. They shall take the place of the President if the latter is unable to carry out his or her duties or the office of President is vacant, or at the request of the President. They shall also act as Presidents of Sections²¹.

Judges of the Court may not preside in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party²².

18 J.F. Renucci, Introduction to the European Convention on Human Rights. The rights guaranteed and the protection, Council of Europe 2005, p. 100.

19 Rule 8, point 1, [in:] Rules of Court, European Court of Human Rights, Registry of the Court, Strasbourg, 1 June 2010, p. 5, <http://www.echr.coe.int>

20 Rule 9, point 1.

21 Rule 10.

22 Rule 13.

The Single-judge formation. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected (art. 26 par. 3). A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34 – individual applications, where such a decision can be taken without further examination. The decision shall be final. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination (art. 27).

The judges sit in cases concerning their own country and they are named „national judges”. “National judges” cannot sit in a single-judge formation, but the composition of the Court always includes the “national judge” when it hears cases as a seven-judge Chamber or a seventeen-judge Grand Chamber.

Single judges shall be appointed for a period of twelve months in rotation. The President of the Court and the Presidents of the Sections shall be exempted from sitting as single judges²³.

In the Court exist the kind of ad hoc judge. Ad hoc judge is appointed by the government concerned when the national judge does not sit in the case because of inability, withdrawal or exemption.

Committees. The Court President, in consultation with section presidents, can establish committees of three judges to declare inadmissible or strike out those individual applications which do not require further examination.

Chambers. Within each section chambers of seven judges are established. These are constituted for each particular case and should include either the president or vice president of the section to which the case was assigned, the “national judge” and five other judges designated by the Section President in rotation. Consequently the president of a chamber in a case may not be the section president. And although in relation to each case the judge of a contracting state which is a party to the case will sit as a member of the chamber, that judge cannot be pres-

23 Rule 27A point 2.

ident of that chamber. A chamber decides on the admissibility of cases referred to it and also the merits of an application.

The difference between a Chamber and a Section is a Section is an administrative entity and a Chamber is a judicial formation of the Court within a given Section. The Court has five Sections in which Chambers are formed. Each Section has a President, a Vice-President and a number of other judges²⁴.

The Grand Chamber. The Grand Chamber consists of 17 judges, including the President, the Vice-Presidents, the Section Presidents, and the national judge, together with other judges selected by drawing of lots. When it hears a case on referral, it does not include any judges who previously sat in the Chamber which first examined the case.

Chambers may refer cases to the Grand Chamber if the case raises serious questions under the Convention or where there is conflicting case law. If a party gives a ‘duly reasoned’ objection, then in theory the chamber may not relinquish jurisdiction.

Within three months of a chamber delivering its judgement, a party can request that the case be referred to the Grand Chamber. For the Grand Chamber to accept such a referral the request must identify a serious question affecting the interpretation or application of the Convention or be a serious issue of general importance. Five judges from the Grand Chamber, consisting of the President of the Court and the other section presidents (excluding the president of the section that delivered the judgement) and one other judge, decide on whether to refer the case or not²⁵.

The Court’s Registry. The European Court of Human Rights is assisted by the Court’s Registry. The Registrar and Deputy Registrar are elected by the Plenary Court for a term of five years and may be re-elected. The Registry is staffed with lawyers and legal secretaries as well as administrators²⁶.

24 The ECHR in 50 questions, European Court of Human Rights Council of Europe 2010, p. 6.

25 H. Davis, *Human rights law. Directions*, New York 2007, p. 31–32.

26 See generally: A.R. Mowbray, *Cases and materials on the European Convention on Human Rights*, New York 2007, p. 18.

The official languages. The official languages of the Court shall be English and French. In connection with applications lodged under Article 34 of the Convention, and for as long as no Contracting Party has been given notice of such an application in accordance with these Rules, all communications with and oral and written submissions by applicants or their representatives, if not in one of the Court's official languages, shall be in one of the official languages of the Contracting Parties. If a Contracting Party is informed or given notice of an application in accordance with these Rules, the application and any accompanying documents shall be communicated to that State in the language in which they were lodged with the Registry by the applicant²⁷.

The Court's budget. The Court's expenditure is borne by the Council of Europe, whose budget is financed by contributions from member states (Article 50 of the ECHR) in accordance with scales based on population and GDP. For 2010 the Court's budget amounts to just over 58 million euros. It covers the salaries of judges and staff and the various overheads (IT, official travel, translation, interpreting, publications, representational expenses, legal aid, fact-finding missions, etc.)²⁸.

2. Recognition of individual complaints

2.1. Conditions of admissibility of individual complaint

Compared with many of the domestic systems of procedural law existing in Europe, the procedure of the European Court of Human Rights (ECHR) is quite straightforward and easy to use. Nonetheless, even Strasbourg procedure requires some understanding on the part of practitioners. Just as in domestic proceedings, an error can harm the interests of the applicant and, at worst, result in the loss of the case. The function of the Court is to ensure observance of the Convention and its protocols. The Court does not have the function of rectifying errors

27 Rule 34 point 1 | 2, [in:] Rules of Court, European Court of Human Rights, Registry of the Court, Strasbourg, 1 June 2010, p. 20, <http://www.echr.coe.int>

28 The ECHR in 50 questions, European Court of Human Rights Council of Europe 2010, p. 6.

made by domestic judges in applying domestic law. Nor does the Court take the place of domestic courts in assessing the evidence²⁹.

Art. 34 of the ECHR specifies that individual complaint can be filed to the Court by every person, non-government organization or a group of individuals who think that a member state violated the rights guaranteed by the ECHR. Cases can only be brought against one or more States that have ratified the Convention. Any applications against third States or individuals, will be declared inadmissible.

The text of the ECHR and Additional Protocols (mainly no. 11 and 14) specifies conditions that must be fulfilled in order to file a complaint by an individual³⁰. These criteria mirror the supranational and subsidiary function of the European Court of Human Rights and the primary role that is played by the State Parties³¹.

Violation of the ECHR regulations. The Complaint may concern only the violations that are guaranteed by the ECHR and the Additional Protocols. This means that not every violation, assessed subjectively by the complainant as justifying the complaint, can be the basis for filing the complaint, but only those that relate to the rights and freedoms protected by the ECHR and the Additional Protocols.

Personal Interest. The complainant can be a private individual or a legal entity (e.g. a company or association). The complainant must have been a direct victim of the alleged violation. An applicant is held to be a victim if there is a sufficiently direct link between him and the alleged violation³².

It is not possible to make a general complaint about a measure which seems unfair or to complain on behalf of someone else, unless

29 E. Myjer, N. Mol, P. Kempees, A. van Steijn, J. Bockwinkel, Submitting a complaint to the European Court of Human Rights: eleven common misconceptions, Slightly updated English translation of: Een klacht indienen bij het EHRM: elf veelvoorkomende misverstanden, in: *Advocatenblad* 18 februari 2005, p. 110–115.

30 See generally: J. Wołosiewicz, Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na przemianę narodowego poczucia sprawiedliwości, [in:] *Polska i Rada Europy 1990–2005* (ed. H. Machińska), Warszawa 2005, pp. 148–149.

31 See: in particular with regard to the requirement of exhaustion of domestic remedies, ECtHR, judgment of 16 September 1996, *Akdivar v. Turkey*, Reports 1996–IV, § 65.

32 J.F. Renucci, Introduction to the European Convention on Human Rights. The rights guaranteed and the protection, Council of Europe 2005, p. 105.

the complainant is clearly identified as the official representative of the alleged victim (e.g. a close friend or relative)³³.

Legal Interest. The object of the complaint can only be a violation made by the body of public authority or by persons or bodies performing activities commissioned by the state and the violation occurred during such activities³⁴. The Court does not examine complaints against: entrepreneurs, cooperatives, associations, foundations, trade unions, employers' unions, etc.

Legitimacy of a complaint. A complaint cannot in an obvious way be illegitimate or devoid of considerable loss of the Complainant. It is not easy to explain these conditions because for the Complainant the complaint of the infringement of his rights is in his subjective view legally justified and is connected with severe loss. Here, however, it is the Court's assessment that matters. Additionally, a complaint cannot be justified by facts that are unchecked, that do not infringe the ECHR, or that are simply not true.

The principle of subsidiarity. Before resorting to filing a complaint to the Court, all means of appeal for settling the case that exist in the domestic legal system must be first exhausted³⁵. The domestic remedies rule reinforces a fundamental element of any international complaint procedure; namely, that the state accused must have had the opportunity to address the grievance domestically before it can be made to answer it in an international court or other forum. The Court frequently emphasises that its role is subsidiary to the national protection system. It is only when the individual has exhausted domestic remedies or such remedies are inadequate and ineffective that the case can be examined at the ECHR level. There is, as might be expected, a substantial body of ECHR case law that has considered what constitutes inadequate or ineffective remedies and when an applicant can be said to have

33 V. Miller, *Applying to the European Court of Human Rights*, House of Common Library, Standard Note: SN/IA/5353 2010, p. 5.

34 ECtHR: *De Becker v. Belgium*, 27.3.1962, Series A no. 4; *De Wilde, ooms and Versyp v. Belgium*, 18.6.1971, Series A No. 12.

35 Article 35–1 ECHR. ECtHR: *Broca and Texier–Micault v. France*, 21.10.2003, No 27928/02, not Publisher; *Santoni v. France*, 29.7.2003, No. 49580/99, not Publisher.

exhausted them³⁶. Complaints to the Court are secondary and presuppose that the matter has been submitted to national courts. The Court often emphasizes that it is not a “fourth instance” reviewing the evidence or the application of domestic law. The duty of the Court is to ensure that the States apply the Convention, and it does not deal with errors of fact or law allegedly committed by a national court unless the rights of the Convention have been violated.

Jurisdiction of the Court. The European Court of Human Rights examines only the complaints that refer to event, facts, or actions that took place after recognition of the Court’s jurisdiction by the states. Thus, impossible are the complaints that a) have been filed against the state that did not sign the declaration on recognition of individual complaint; b) have ratified the ECHR after the infringement took place; c) refer to violation that occurred outside the territory of the defendant state, or on territory which is within the state’s responsibility but the state did not sign the declaration in accordance with Art. 63, act. 1 of the ECHR.

Time limit on filing a complaint. Another important condition on the time limit of filing a complaint to the European Court of Human Rights, is period of not more than 6 months after getting final and legally binding case decision (sentence) by domestic bodies³⁷.

Identification of the complainant. According to Art. 34 of the ECHR, anonymous complaint will not be examined³⁸. The Complainant must sign it with his name and surname, specify sex, date of birth, and give his address. However, he can reserve his personal information not to be revealed to the public.

Prohibition of accumulation. One important condition on admissibility of complaint is the prohibition of accumulation. Complaints similar to the ones already settled on the ground of European system of protection, or similar to the ones that were the subject of other international procedures are not examined, unless they contain new and impor-

36 K. Boyle, *The European experience: The European Convention on Human Rights*, Victoria University of Wellington Law Review 2009, no. 40, p. 173.

37 ECtHR: *Papamichalopoulos and Others v. Greece*, 24.6.1993, Series A No. 260–B.

38 ECmHR: *Church of the Scientology v. Sweden*, 5.5.1979, Dr 16/68.

tant information. This concerns all cases initiated by the same subject. Thus, filing a complaint to, for example, the European Ombudsman or the Committee of Human Rights (on the basis of the Pact of Civil and Political Rights from 1966) excludes possibility of filing the case to the European Court of Human Rights. It is possible to file identical complaints by various subjects, although in such case the complaints are examined altogether.

Only fulfilling all the above conditions guarantees admissibility of complaint by the Court. Decision of inadmissibility is final. After admission of complaint, the Court begins its essential examination.

2.2. Recognition procedure of individual complaint

Initial application. The applicants have to write to the Court in English, French or one of the official languages of the states parties, giving clear details of a complaint, or complete an application form and send it to the ECHR³⁹. The Convention system provides for “easy” access to the Court, enabling any individual to bring a case even if he or she lives in a remote region of a member State or is penniless. With this in mind, there are no fees for proceedings before the Court.

It is sufficient to send the Court a duly completed application form with the requisite documents. However, the registration of an application by the Court is no guarantee that it will be admissible or successful on the merits. The application must provide: a) a summary of the facts of the complaint(s); b) an indication of the Convention rights which have been violated; c) the remedies already used; d) copies of the decisions or rulings given by all public authorities in the case so far; e) a signature of the applicant’s or the signature of your representative.

The Registry may ask for additional documents, information or explanations relating to the complaint.

The Court examines the facts and decides whether the application complies with the basic conditions set out in the Convention. If these

39 See about proceeding before European Court of Human Rights: rules of court, registry of the court, strasbourg 2009.

are not met, the application is rejected. In the case of multiple complaints, the Court may declare one or more admissible and dismiss others. The decision on admissibility is final and is not subject to appeal. The majority of applications are declared inadmissible. Decisions on admissibility, which are taken by a majority vote, must contain reasons and be made public. Article 45 of the Convention states that “Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible”.

Legal representation. Legal representation is not indispensable at the start of proceedings; anyone can bring a case before the Court directly. The assistance of a lawyer becomes necessary, however, once the Court has given notice of the case to the respondent Government for their observations. Legal aid may be granted to applicants, if necessary, from that stage in the proceedings.

There is no list of authorized lawyers for the written or oral submissions to the Court. An applicant may be represented by anyone who is a lawyer qualified to practice in one of the States Parties to the Convention, or who has been so authorized by the President of the Chamber.

The stages of the proceedings before the Court. There are two main stages in the consideration of cases brought before the Court: the admissibility stage and the merits stage (i.e. the examination of the complaints). The processing of an application also goes through different phases.

A single-judge formation will declare an application inadmissible where inadmissibility is clear from the outset; its decisions cannot be appealed against.

A Committee will give a final decision or judgment in a case which is covered by well-established case-law of the Court.

A Chamber will give notice of the case to the respondent Government for their observations. Written observations are submitted by both parties. The Court then decides if it is appropriate to hold a public hearing in the case, but this remains exceptional in relation to the number of applications examined. Ultimately, the Chamber deliv-

ers a judgment that will become final only after the expiry of a three-month period during which the applicant or Government may request the referral of the case to the Grand Chamber for fresh consideration.

If the request for referral is accepted by the panel of the Grand Chamber, the case will be reconsidered and a public hearing will be held if necessary. The Grand Chamber judgment will be final.

A third-party intervener. The President of the Court may authorize any person other than the applicant, or another State Party to the Convention other than that against which the application has been lodged, to intervene in the proceedings. This is called third-party intervention. The person or State in question is entitled to file pleadings and take part in public hearings.

The experts and evidence from witnesses. The Court may decide to take investigative measures and to travel to certain countries in order to clarify the facts of a given case. The delegation from the Court may then take evidence from witnesses and carry out an on-site investigation. The Court occasionally appoints experts, for example when it requests expert doctors to examine applicants in prison.

Public hearings. The Court basically has a written procedure but occasionally decides to hold public hearings in specific cases. Hearings take place in the Human Rights Building in Strasbourg. They are public unless otherwise decided by the President of the Chamber or Grand Chamber, as the case may be. The press and the public are thus usually authorized to attend. All hearings are filmed and broadcast on the Court's website on the day itself, from 2.30 p.m. (local time).

Preliminary objections and a friendly settlement. Preliminary objections are arguments submitted by the respondent Government in support of their claim that the case should not be examined on the merits.

A friendly settlement is an agreement between the parties to put an end to proceedings initiated by an application. When the parties concerned agree to settle their dispute in this way, the outcome is usually that the State pays the applicant a sum of money. After examining the terms of the friendly settlement, and unless it considers that respect for

human rights requires continuation, the Court will strike out the application. The Court always encourages parties to negotiate a friendly settlement. If no agreement is reached the Court will proceed to examine the merits of the application.

The interim measures. When the Court receives an application it may decide that a State should take certain measures provisionally while it continues its examination of the case. This usually consists of requesting a State to refrain from doing something, such as not returning individuals to countries where it is alleged that they would face death or torture.

The Court's deliberations. The Court's deliberations are always secret. The Court passes judgment on a case by a majority vote.

States' cooperation with the Court. There have been cases where States have omitted or even refused to provide the Court with the information and documents required for its examination of an application. In such cases the Court may find against the State under Article 38 of the Convention (obliging States to furnish all the necessary facilities to the Court).

The length of proceedings before the Court. It is impossible to indicate the length of proceedings before the Court. The Court endeavours to deal with cases within three years after they are brought, but the examination of some cases can take longer and some can be processed more rapidly. The length of the proceedings before the Court obviously varies depending on the case, the formation to which it is assigned, the diligence of the parties in providing the Court with information and many other factors, such as the holding of a hearing or referral to the Grand Chamber. Some applications may be classified as urgent and handled on a priority basis, especially in cases where the applicant is alleged to be facing an imminent threat of physical harm.

The difference between a decision and a judgment. A decision is usually given by a single judge, a Committee or a Chamber of the Court. It concerns only admissibility and not the merits of the case. Normally, a Chamber examines the admissibility and merits of an application at the same time; it will then deliver a judgment.

States are bound by judgments against them. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.

Possibility of appeal. Inadmissibility decisions, and also judgments delivered by Committees or the Grand Chamber, are final and cannot be appealed against. However, the parties have three months following the delivery of a Chamber judgment to request referral of the case to the Grand Chamber for fresh consideration. Requests for referral to the Grand Chamber are examined by a panel of judges which decides whether or not referral is appropriate.

The execution of judgments. When the Court delivers a judgment finding a violation, the Court transmits the file to the Committee of Ministers of the Council of Europe, which confers with the country concerned and the department responsible for the execution of judgments to decide how the judgment should be executed and how to prevent similar violations of the Convention in the future. This will result in general measures, especially amendments to legislation, and individual measures where necessary.

The consequences of a judgment finding a violation. In the event of a violation being found, the State concerned must be careful to ensure that no such violations occur again in the future, otherwise the Court may deliver new judgments against them. In some cases the State will have to amend its legislation to bring it into line with the Convention.

The just satisfaction. When the Court finds against a State and observes that the applicant has sustained damage, it awards the applicant just satisfaction, that is to say a sum of money by way of compensation for that damage. The Committee of Ministers ensures that any sum awarded by the Court is actually paid to the applicant. The Court may also require the State concerned to refund the applicant's expenses. If no violation is found, the applicant does not have to pay any additional costs (e.g. those incurred by the respondent State).

A pilot case. Over the past few years the Court has developed a new procedure to cater for the massive influx of applications concerning similar issues, also known as “systemic issues” – i.e. those that arise from non-conformity of domestic law with the Convention. The Court has thus recently been implementing a procedure that consists of examining one or more applications of this kind, whilst its examination of a series of similar cases is adjourned (in other words, postponed). When it delivers its judgment in a pilot case, it calls on the Government concerned to bring the domestic legislation into line with the Convention and indicates the general measures to be taken. It will then proceed to dispose of the other similar cases.

A separate opinion. Judges may wish to draft an opinion concerning a case in which they have sat and their opinions will be appended to the judgment. In general they explain why they voted with the majority (concurring opinion) or, on the contrary, why they did not agree with the majority of judges (dissenting opinion).

3. Implementation of the European Court of Human Rights’ adjudication in domestic legal orders

3.1. Methods of implementation of the European Court of Human Rights’ adjudication in domestic legal orders

ECHR system bases on two fundamental principles: subsidiarity and solidarity. According to the principle of subsidiarity, domestic authorities bear main responsibility for realization of rights and freedoms contained in the ECHR. Failure to respect its resolutions results in appropriate decision of the Court. The principle of solidarity shows that judicature of the Court is a part of the Convention and legally binding element of the ECHR *erga omnes*, so it carries legal consequences for all states that are sides of the ECHR, regardless of the fact which of them the judicature refers to⁴⁰.

40 J. Jaskiernia, Uwarunkowania skuteczności wykonywania orzeczeń Europejskiego Trybunału Praw Człowieka, „Humanistyczne Zeszyty Naukowe” 2002, no. 8, p. 50.

According to Art. 46 ECHR, verdicts of the Court have a binding, definite, and final character, thus they have the attribute *res iudicata*⁴¹. Member states of the Council of Europe must take possible implications of verdicts on other cases and their consequence for their legal orders and legal practice into consideration⁴². As it can be seen, the adjudications of the Court do not only settle a specific case, but also express crucial views on compatibility of certain law or practice with the Convention and shape commonly used standard implemented in all states belonging to the Council of Europe. This is where the authority of its adjudications in all states of the Convention comes from and not only states against which a specific adjudication was given (authority of interpreted matter).

The order to respect the Court's verdicts by the signatory states, given on cases in which the countries are the sides (Art. 46), gives the signatory state a choice of method of realization of this order in accordance with the principles of the international law. Thus, in specific cases it can be carried out differently. Before an attempt to answer the question about the methods of implementation of the Court's adjudication in domestic legal orders, it could be a good idea to briefly characterize kinds of decisions taken by the Court.

Most settlements of the Court are negative for the complainants. They either take the form of decision that the complaint was deemed inadmissible (Art. 28, Art. 35 ECHR), or negative for the complainant on the adjudication of the Court (which settled that in a given case there was no infringement of the conventional law). Some percentage of cases get crossed out from the complaint list by the decision of the Court (it takes the form of a sentence⁴³) after amicable settlement of a case by the sides, as a result of initiated negotiations (Art. 39 ECHR), or after an agreement between the sides that the Court verifies and accepts.

41 Res iudicata – case that was legally finished and creates the state of the tried object; S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2003, p. 62.

42 H. Petzold, *The System of Convention and the Principle of Subsidiarity*, (in:) R.St.J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System of the Protection of Human Rights*, Dordrecht 1993, p. 44.

43 According to Art. 44 Act 2 of the Court's Regulations, the decision to remove a complaint deemed inadmissible is issued in form of a judgement.

Finally, there is the category of complaints that ended with a binding verdict of the Court which confirmed legitimacy of some or of all charges presented in individual complaint and about infringement of the ECHR⁴⁴.

It must be stressed that any international legal consequences in responsibility of states for infringement of the ECHR may only be caused by adjudications of the Court, which find conventional infringements or accept possible out-of-court agreements, and not the ones that find that there was no infringement of the Convention. Both types of adjudications create states' obligation to eliminate infringements of the ECHR in accordance with the sentence of the adjudication.

The European Court of Human Rights was created in order to "ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention" (Art. 19 ECHR). There arises a question, then, about the method of control of the observance of the engagements by the signatory states.

Possibility of individual complaints on infringement of the ECHR's conventional right, acknowledgement of jurisdiction of the Court and consequently settlement of an disagreement with the announcement of the adjudication (Art. 44 Act. 3 ECHR) – this is already a lot. Casting a shadow of doubt on compliance of the domestic law with the ECHR, or its practical application is considered highly diminishing for the state's authority. However, if ECHR had only such tool for enforcing observance of the ECHR, then, obviously, the enforcement of obligations and its ratifications would exist only on paper.

That is why the member states are obliged to "abide by the final judgment of the Court in any case to which they are parties" (Art. 46, ECHR), and the state is free to choose the means for the best fulfilment

44 The sentences can be further divided into two sub-categories according to the Court's criteria on the ways of compensating the loss caused by the state and suffered by the complainant: the Court may state that the recognition of infringement is satisfactory enough for the complainant; the Court may also state that the adjudication itself will not compensate the loss caused by the state and adjudge proper financial compensation for the loss of the complainant (Art. 41 ECHR). See more: A. Bojańczyk, Podważenie prawomocnego wyroku sądu karnego przez Europejski Trybunał Praw Człowieka w Strasburgu (ETPC). Próba zarysu zagadnienia, part. I, "Palestra" 2001, no 6, p. 153–154.

of resolutions of the final verdict of the Court. Such conclusion results from Art. 46 ECHR. The clause is further reinforced by transfer of control competences over execution of the sentence to the Committee of Ministers of the Council of Europe (Art. 46, ECHR).

It is assumed that fulfilment of obligation given by Art. 46, ECHR 1 lies in restoration of current legal state to the state compatible with the conventional law, according to the recommendations of the final adjudication of the Court. It could accept the following definition of obligation stated in Art. 46 ECHR: “execution of the Court’s verdict corrects the infringement. In specific case this may mean overruling of binding regulation, act or modification in agreement with the sentence; other forms of infringement compensation that are in agreement with the ECHR are also possible”⁴⁵.

Means of repair of infringement in conventional law in cases with the final verdict of the Court can be divided into two categories: compensation⁴⁶ and agreement.

If the Court adjudicated **compensation** or the verdict says about payment of compensation, then the state guilty of infringement is bound by specific resolutions of the Court and is obliged to pay the adjudicated amount.

It should be noted, though, that in this case the state cannot choose repair means of the ECHR’s infringement. Legislations of the member states of the Council of Europe provide for the duty of fulfilling such international obligation or, as in case of Poland, payment *de lege lata* of appropriate compensation adjudicated by the Court (or compensation granted by the agreement signed as a result of out-of-court

45 A. Bojańczyk, Podważenie prawomocnego wyroku sądu karnego przez Europejski Trybunał Praw Człowieka w Strasburgu (ETPC). Próba zarysu zagadnienia, part I, „Palestra” 2001, no. 5/6, p. 154.

46 Adjudication of proper financial compensation by the Court on the strength of Art. 41 of the ECHR takes place only in situation when the internal law of the state allows only partial removal of consequences of infringement recognized by the Court. It must be noticed that the Court in most instances will adjudicate financial compensation when the loss has already occurred and overruling of the verdict of a domestic court and reopening of the case, pardon or quashing of detention will only be half measure repair or will not be a method of compensation for loss caused by infringement of the Convention’s regulations at all. The court adjudicates compensation for material loss or moral loss.

agreement and approved by appropriate verdict) takes place in conditions similar to a legal vacuum where there are no legal regulations. In such situation, the only legal basis regulating payment of compensation, though in a very abstract way, is Art. 46 Act 1 ECHR, which seems barely sufficient.

In case of **agreement** between the complainant and the state there is a rule that the agreement is always approved by the Court's verdict and is under legal protection provided for adjudications of the Court. In most cases the agreement will be connected with compensation paid by the state and it seems that such solution is pragmatic, as it shortens the whole procedure of possible case proceeding before the Court. Signature of an agreement between the sides is a kind of *plea bargaining*⁴⁷. The agreement must be confirmed by the Court with a final verdict which states that it was based on "principles of human rights respect provided by the ECHR and its Protocols" (Art. 38 Act 2b ECHR, Art. 44 Act 2 of the Court's Rules.) Apart from brief presentation of facts, the sentence also gives adopted solution, which in practice means exact, word for word, repetition of the whole or part of the agreement signed by the sides). It is too early now to talk about established practice of signing agreements by the complainant and the state. However, in all cases the agreement is signed in writing.

Execution of binding adjudication of the Court depends on: a) type of complaint (individual or interstate), b) character of act infringing conventional resolutions (article, verdict, or administrative decision), c) character of the infringement and d) possibilities offered by the domestic legal system⁴⁸. Regardless of obligation provided by the adjudication, in each case the state is obliged to provide the Committee of Ministers with information on specific measures taken towards realization of the adjudication.

47 The sides balance their chances before the court predicting that the direction of adjudication on a given case was already taken and resort to more rapid settlement without carrying out full proceedings.

48 According to Art. 33 of the ECHR, the states that are sides of the ECHR May file complaints about infringements of the Convention by other states (so called inter-state complaints). In such case and when additionally it was found that the article was infringed in abstracto, the culprit state is obliged to change or to overrule the article contradictory with the ECHR.

As C. Mik⁴⁹, points out, obligations of a state that was found guilty of infringement of the ECHR fall into two categories. The first one, when the proceedings started with individual complaint, does not oblige the state to change or overrule the act, if the infringement had a specific character, then the obligation to terminate the infringement and repair the damage for the victim is also specific. State's freedom will be considerably limited if: 1) the act itself (without executive acts) is the immediate source of infringement (the case abstract and potential infringement); 2) the immediate source of infringement is an act of an article, but it infringes ECHR as executive act towards the article, in conflict with the ECHR (as a matter of fact, the source is in the article); 3) the state obliges itself to change the act (e.g. in out-of-court agreement); 4) the act is in immediate contradiction with the ECHR, which actually means that the European bodies will handle a case that will be resolved unfavourable for the state, which will force it to change the act.

Another category are adjudications of the Court about infringement of the Convention, especially in relation to contradiction of final verdict of a domestic court (formally or financially binding)⁵⁰ or invalid one. If in the first case the domestic order does not provide extraordinary means of appeal (lack of legal possibility to sue valid adjudication), the obligation of the state boils down to payment of compensation, if such was adjudicated by the Court. In this case, the state decides if it should, for example, change the law, grant pardon, or use other *ex gratia* means.

In case of adjudications that are not legally binding the situation, from the point of view of the proceedings, is simpler because the binding court verdict is not undermined, which is significant for the legal stability and legal security. The only condition for further judicial pro-

49 C. Mik, *Koncepcja normatywna europejskiego prawa praw człowieka*, Warszawa 1994, p. 285.

50 Material validity – means that valid adjudication that settles the master of the case binds the court and the participants and basically excludes judicial proceeding in the same case after it was validly settled in its subject master. Formal validity – involves inability to change the settlement made by judicial adjudication by means of common appeal measures, that is inability to sue adjudication during the proceedings. W. Siedlecki, Z. Świeboda, *Postępowanie cywilne*. Zarys wykładu, Warszawa 2003, p. 288–289.

ceeding recognizing adjudication of the Court is existence of proper appeal law which in the face of new facts or in good interest of law could question adjudication of the Court.

Each state of the Council of Europe adopted different legal solutions in this area and some states of the ECHR made the effort, though in most of them there are no legal instruments that would allow to overrule or change court's verdict. For example, code of penal procedure was amended in Austria in 1996 introducing Art. 363a, which provides for appeal measures, if the infringement cannot be assessed by the Strasbourg court as negative for the interest of the accused in the penal proceedings, and consequently on the sentence itself. The condemned can also appeal for instituting a trial de novo the usual way, if he put forward evidence that could lead to an acquittal or more a lenient sentence⁵¹.

In Spain, execution of a verdict found contradictory with the Convention is perceived as violation of constitutional order. Reopening is adjudicated by the Court on application of one side.

In Polish Code of Criminal Procedure there is Art 540 § 3, providing for reopening for the benefit of the accused, if it is necessary after settlement done by international body acting by the power of international agreement ratified by Poland.

3.2. Refusal to execute adjudication of the European Court of Human Rights as an infringement of the European Convention on Human Rights and the Statute of the Council of Europe

Legal issues on effectiveness of the Court's adjudications were the subject of report prepared by the Committee on Legal Affairs and Human Rights, of the Parliamentary Assembly of the Council of Europe⁵². It

51 Before that the only possibility was the appeal of the general attorney to the Supreme Court for invalidation of the verdict due to infringement or improper application of the letter of law. If the Supreme Court approved the application, it changed the Verdict but only for the benefit of the accused. In all other cases it would overrule it passed the case to another examination; see: M.A. Nowicki, *Wokół Konwencji Europejskiej*, Kraków 2000, p. 71.

52 See: Execution of judgements of the European Court of Human Rights, Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, The Netherlands, Socialist

served as basis for approval of both the resolution (Resolution (2000) 1226)⁵³, and the recommendation (Recommendation (2000) 1477)⁵⁴ on the same issue by the Assembly.

Also, the Committee of Ministers of the Council of Europe adopted crucial recommendations on re-examination or reopening of some cases on the domestic level, which are the result of the adjudication of the European Court of Human Rights⁵⁵. These documents deserve to be analyzed, since they relate to one of the key mechanisms that affect effectiveness of the whole European system of human rights protection of the Council of Europe⁵⁶. They are a reflection on critical assessment that accompany effectiveness analysis of the execution of adjudications, their implementation in the domestic orders.

As about the rule, the regulation of Art. 46 Act 1 of the European Convention states that “any of the High Contracting Parties may at any time declare that it recognizes as compulsory ‘ipso facto’ and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention”. It was also settled that the “final verdict of the Court is transferred to the Committee of Ministers which monitors its execution” (Art. 46 Act 2). Conventional normalization contains clear indication of the scope of state’s responsibility in this area, that is the obligation to respect the adjudication of the Court⁵⁷.

The Parliamentary Assembly of the Council of Europe points out that the weakness of the system lies in the fact that the Convention does not provide international legal sanctions in case

Group, Strasbourg – 12 July 2000, Doc. 8808.

53 See: Resolution 1226 (2000), Execution of judgements of the European Court of Human Rights. Assembly debate and text adopted by the Assembly on 28 September 2000 (30th Sitting).

54 See: Recommendation 1477 (2000), Execution of judgements of the European Court of Human Rights. Assembly debate and text adopted by the Assembly on 28 September 2000 (30th Sitting).

55 See: Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following of judgements of the European Court of Human Rights (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Minister’ Deputies).

56 J. Jaskiernia przez „przestrzeganie wyroku” rozumie jego wykonanie w formie adekwatnej do treści. See: J. Jaskiernia, Uwarunkowania skuteczności wykonywania orzeczeń Europejskiego Trybunału Praw Człowieka, „Humanistyczne Zeszyty Naukowe” 2002, no. 8, p. 49.

57 *Ibidem*, p. 50.

when the state does not carry out the adjudication of the Court. One can only refer to general rules provided by Art. 8 of the Statute of the Council of Europe⁵⁸, which claims that “any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine”.

Article 8 of the Statute of the Council of Europe clearly indicates that it refers to the final means connected with the general situation when a member state fails to fulfil its obligations towards the goals and values of the Council of Europe⁵⁹. The system gives signs of inflexibility of reaction to situation where the execution of the Court’s adjudications gets delayed or even neglected.⁶⁰ It is impossible to assume that in such situation it would be rational to resort to final disciplinary measures, such as exclusion of a member state from the Council of Europe⁶¹.

In the system of the Council of Europe there is analysis of domestic practice on the scope of execution of adjudications of the Court. As it was already mentioned, according to authorization contained in Art. 46 of the ECHR, the Committee of Ministers is responsible for control of adjudications carried out by the Court. Since this body is devoid of special competences in application of means of compulsion on observance of adjudications of the Court, it uses the so called system of resolutions. They are legally non-binding opinions which are directed to the states obliged to carry out the adjudications of the Court. The resolutions affecting the ex-

58 See: Statute of the Council of Europe, 5 May 1949 r., European Treaty Series No 1; Journal of Laws from 1994. no 118, position 565.

59 C. Schneider, *Le contrôle des engagements du Conseil de l’Europe revisité par l’histoire*, (w:) B. Haller, H.Ch. Krüger, H. Petrolid (eds.), *Law in Greater Europe. Towards a Common Legal Area. Studies in Honour of Heinrich Klebes*, The Hague–London 2000, p. 131.

60 A. Reidy, F. Hampson, K. Boyle, *Gross Violations of Human Rights: Invoking the ECHR in the Case of Turkey*, „*Netherlands Quarterly of Human Rights*” 1997, vol. 15, p. 163.

61 J. Jaskiernia, *Uwarunkowania skuteczności wykonywania orzeczeń Europejskiego Trybunału Praw Człowieka*, „*Humanistyczne Zeszyty Naukowe*” 2002, no. 8, p. 50.

ecution of the adjudications of the Court can be divided into four categories.

The first one encompasses resolutions that inform about taken and predicted actions and point out when appropriate reforms should be initiated. For example, the resolution on adjudication of the Court about the cases *Quinn, Heaney and McGuinness v. Ireland*⁶², points out actions of the authorities to reform the penalty code, specifically the right to remain silent, right to not accuse oneself, presumption of innocence (the object of infringement found by the Court). The resolution analyses taken steps and points out the term (1 year) in which the Committee of Ministers will put forward another opinion on the changes introduced under the influence of specific adjudications of the Court.

Another category are resolutions that suggest and support specific reforms that annul reasons of law infringement. For example, resolution from 2002 about Turkey, outlining direction of changes expected in the judiciary system (e.g. education of judges on the ECHR and the Court, changes in material and procedural penalty law)⁶³.

The third group is made up of resolutions expressing opinion of the Committee of Ministers on the execution of adjudications of the Court. For example, resolution from 2002 about Turkey⁶⁴, on infringe-

62 Resolution DH (2003) 149 concerning the judgments of the European Court of Human Rights of 21 December 2000 (final on 21 March 2001) in the *casus* of *Quinn and Heaney and McGuinness against Ireland*. See also: for example, on lengthy proceedings: Resolution DH (2003) 123 concerning the judgments of the European Court of Human Rights of 15 July 2002, final on 15 October 2002 in the case of *Kalashnikov against the Russian Federation*.

63 Resolution DH (2002) 98 Action of the security forces in Turkey Progress achieved and outstanding problems. General measures to ensure compliance with the judgments of the European Court of Human Rights in the *casus* against Turkey listed in Appendix II (Follow-up Ti Interim Resolution DH (99) 434). See also on the lengthy proceedings: Resolution DH (1999) 437 Human Rights Excessive lengths proceedings before the civil courts in Italy: supplementary measures of general character.

64 Resolution DH (2002) 59 concerning the judgments of the European Court of Human Rights of 17 July 2001 in the case of *Sadak, Zana, Dicle and Dogan against Turkey*. See also: resolution on the right to remain silent, right to not accuse oneself, and the right to the attorney: Resolution DH (2002) 85 *Quinn* against the United Kingdom, Interim Resolution DH (1998) 214 *Murray Kevin* against the United Kingdom, Interim Resolution DH(1998)156 *Magee* against the United Kingdom, judgment of the European Court of Human Rights of 6 June 2000, final on 6 September 2000, *Murray John* against the United Kingdom, judgment of the European Court of Human Rights of 8 February 1996, Interim Resolution DH(2000)26 *Averill* against the United Kingdom, judgment of the European Court of Human Rights of 6 June 2000, final on

ments of impartiality and independence of the court, sufficient time till the presentation of charges to the accused, and appropriate time for and possibilities of preparation of defence. The Committee of Ministers expressed the opinion in which Turkey uses all available resources and takes proper action to liquidate the reasons for the infringement of the ECHR.

The last type of resolution are opinions on lack of activity of States in execution of the Court's adjudications. For example, resolution from 1996 about Greece, where in a case about infringement of the reliability of proceedings, the Committee of Ministers indicated non-payment of adjudicated by the Court compensation⁶⁵.

The principles of states' responsibility and the means that the Council of Europe has at its disposal on execution of the Court's adjudications do not seem enough to condition effectiveness of the Court's adjudications in the domestic orders of member states. Both the Parliamentary Assembly and the Committee of Ministers clearly confirm limited effectiveness in observance of the Court's adjudications. In resolution⁶⁶ from 2000, the Parliamentary Assembly stresses that the problem connected with the implementation of verdicts has existed for a long time (pt. 8) and adds that some adjudications have never been carried out at all (pt. 5). It lists six reasons that account for this situation in the member states of the Council of Europe (pt. 8): a) political; b) relating to the scope of reform; c) relating to legislative procedures; d) budget issues; e) public opinion; f) Court's adjudications which are casuistic in its content and vague.

The Parliamentary Assembly points out in the resolution that the solution of this issue should occur on two level: domestic and the Council of Europe (pt. 9). The resolution on domestic actions includes (pt. 10): assurance of standards in compliance with the ECHR; under-

6 September 2000 (Adopted by the Committee of Ministers on 11 June 2002 at the 798th meeting of the Ministers' Deputies).

65 Resolution DH (1996) 251 concerning the judgment of the European Court of Human Rights of 9 December 1994 in the case of Stran Greek Refineries and Stratis Andreadis against Greece.

66 Resolution 1226 (2000), Execution of judgements of the European Court of Human Rights. Assembly debate and text adopted by the Assembly on 28 September 2000 (30th Sitting).

taking by the state authorities all necessary actions in order to execute the Court's adjudications and avoidance of infringements caused by negligence of these adjudications, proper domestic legislature, which should provide for possibility of an appeal of judicial proceedings in cases that were adjudicated by the Court; the state authorities should ensure propagation of information on the judicature of the Court; in case of planned reforms, the authorities should implement short-term means enabling adjudication of the Court.

On the level of the Council of Europe, actions to improve execution of the Court's adjudications will aim to (pt. 11): provide ability to ask the Court questions on interpretation of its adjudications, use legal restrictions provided by the Art. 8 of the Council of Europe, ensure taking more effective measures on the control of execution of the Court's verdicts (especially on issued resolutions), inform the Parliamentary Assembly on the scope of executed verdicts, and to appoint the General Secretary of the Council of Europe to organize trainings for lawyers and domestic judges on the activity of the Court.

In case of the Court, the actions will aim to provide clear and coherent judicature, provide solutions that will improve execution of the Court's verdicts, and to provide information in the verdicts about total, partial, or outstanding lack of execution of previously made legal decisions.

The Parliamentary Assembly, according to the issued resolution and in order to improve the mechanism of execution of the Court's verdicts, would organize regular debates about this issue, would listen to state's representatives about the reasons for the delay of execution of verdicts, will consider opening monitor procedures in the states that do not implement the adjudications of the Court, and in case when the above actions prove ineffective, the Parliamentary Assembly will put forward motions to apply procedures connected with application of Art. 8 of the Statute of the Council of Europe.

The above methods and potential international legal consequences do not guarantee effectiveness in cases of failure to execute the Court's adjudications. Actions taken by the bodies of the Council of Europe, as the practice shows, do not always yield satisfactory results. It is more

than certain that responsible for this is the lack of principled sanctions in the catalogue of the ECHR and the Statute of the CE. On the other hand, this organization consists of states that want to promote and fulfil the rule of law, which fulfilment should not be enforced with especially severe international legal sanctions. Definitely, tolerance of long-standing delays in execution of verdicts leads to a situation where the effectiveness of the whole European system of human rights protection based on the Convention can be and sometimes is questioned⁶⁷.

4. The Court's activity 2000–2010

With numerical analysis of present Strasbourg judicature, it must be recalled, that since the transformation start in 1989, the number of member states of the Council of Europe has more than doubled. In 1989 there were 22 member states. In the course of next twenty years 25 other states were accepted, which has already been discussed in this paper.

As a result, the ECHR gained geographical dimension exceeding the boundaries of Europe (Turkey and especially Russia extend far into the Asia Continent) and became binding law for 47 states and over 800 million of their inhabitants⁶⁸. This caused a very rapid growth of complaints directed to the Court, and a growth in number of adjudications issued by the Court.

In years between 1955 and 1991 more than 60.000 complaints were recorded and the Court issued 397 verdicts altogether. The situation changed drastically in 1992 (“new democracies” were not present in the system yet) when 6456 complaints were recorded. Later, when the states of the Central and Eastern Europe became active in the Council of Europe, the number has risen in 1997 to 14 166 complaints⁶⁹.

67 P. Leuprecht, *The Execution of Judgements and Decisions*, (in:) R.St.J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System of the Protection of Human Rights*, Dordrecht 1993, p. 793.

68 L. Garlicki, *Nowe demokracje przed Europejskim Trybunałem Praw Człowieka*, [in:] Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009 (science ed. J. Jaskiernia), Toruń 2010, p. 167.

69 *Ibidem*, 2006.

Years 2000–2010 mark continual growth of complaints addressed to the Court. Analysis of each period shows growth tendency among complaints and verdicts of the Court in Stasbourg. In 2000 there were over 30 000 complaints and in 2010 over 14 000 which suggests that individuals are interested in adjudicative activity of the Court, because a great deal of complaints is rejected as failing to meet formal requirements for admissibility (90%).

The length of recognition of cases by the Court is not satisfactory, although the Court does its best to increase the speed of judicative work from a couple of hundred of verdicts at the beginning of the XXI century, to the average 1500 annual verdicts in years 2006–2010.

Year	Number of complaints	Number of verdicts issued by the Court	States against which there was the biggest number of the Court's verdicts	Most frequent violations (articles ECHR and Additional Protocols (P))
2000	30 069	695	Italy (233), France (49), Turkey (23), United Kingdom (16), Greece (15), Austria (13)	Art. 5,6,8, P1 –1.
2001	31 228	889	Italy (359), Turkey (169), France (32), United Kingdom (19), Poland (17), Greece (14), Austria (14)	Art. 2,3,5,6,8, 13, P1 –1.
2002	34 509	844	Italy (325), France (61), Turkey (54), United Kingdom (30), Romania (26), Poland (20)	Art. 2,3,5,6,8, 13, P1 –1.
2003	38 810	703	Italy (106), France (76), Turkey (76), Poland (43), Romania (24), Greece (23)	Art. 3,5,6,8, 10, P1 –1.
2004	44 128	718	Turkey (154), Poland (74), France (59), Italy (36), Greece (32), Czech Republic (27)	Art. 2,3,5,6,8, 13, P1 –1.
2005	41 510	1 105	Turkey (270), Ukraine (119), Greece (100), Russia (81), Italy (67), France (51).	Art. 2,3,5,6,8, 13, P1 –1.
2006	51 300	1 560	Turkey (312), Slovenia (185), Ukraine (119), Poland (107), Russia (96), Italy (96)	Art. 2,3,5,6,8, 13, P1 –1.
2007	79 400	1 503	Turkey (331), Russia (192), Poland (111), Ukraine (109), Romania (93), Italy (67).	Art. 2,3,5,6,8, 13, P1 –1.
2008	97 300	1 543	Turkey (264), Russia (244), Romania (168), Poland (133), Ukraine (110), Italy (82).	Art. 2,3,5,6,8, 13, P1 –1.

2009	119 300	1 625	Turkey (356), Russia (219), Romania (199), Poland (141), Ukraine (126), Greece (75)	Art. 2,3,5,6,8, 13, P1 –1.
2010	139 650	1 499	Turkey (278), Russia (217), Romania (143), Ukraine (109), Poland (107), Italy (98)	Art. 2,3,5,6,8, 13, P1 –1.

Adapted from “Annual Report” of the European Court of Human Rights from 2000–2010, www.echr.coe.int

**Applies exclusively to all 47 states of the Council of Europe*

As it can be seen from the review of the Court’s judicature, the biggest growth in complaints occurred in 2005–2010, from 41 510 in 2005 to 139 650 in 2010. The number of verdicts also increased from 1 105 in 2005 to the average of 1500 in next years. It is worth pointing out that the increase in the number of issued adjudications by the Court in 2005–2010 doubled in comparison with verdicts issued in years 2000–2004.

States that produced biggest number of complaints in years 2005–2010 are: Russia, Turkey, Ukraine, Romania, Poland, France, Italy, Czech Republic. Most frequently violated regulations of the ECHR in the last nine years are: the right to life, prohibition of torture, right to freedom and personal security, right to a proper court trial, right to respect of private and family life, right to effective means of appeal and the right to protection of private property. Other rights and freedoms of the ECHR are also violated by the member states of the Council of Europe but in much lesser extent.

Bearing in mind huge number of cases addressed to the Court, new way of classification of cases was introduced and implemented, giving priority to those that, due to their urgent nature, should be examined by the Court before others.

In accordance with an amendment to its Rules of Court, the European Court of Human Rights (Court) will now hear cases based on the urgency of a violation, as opposed to the chronological order of receipt. The change will ensure urgent claims are not lost in the Court’s

massive caseload, but such expediency may come at the expense of lesser violations, which may never be heard⁷⁰.

As part of its new Priority Policy, the Court will place each pending claim into a category – numbered I through VII – based on the level of importance. Claims that detail particular risk to life or health of the applicants will be given highest priority. Claims that deal with matters of admissibility receive the lowest priority. While the Priority Policy actually went into effect in July 2009, the Court only recently made public its grading criteria. The Court sometimes gave priority to particularly urgent cases prior to 2009, but the new policy establishes a clear order of adjudication at a time when the Court’s pending caseload exceeds 130,000 applications. The categories are as follows:

- I – Urgent applications that show a particular risk to life or health of the applicant; other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue
- II – Applications capable of having an impact on the effectiveness of the European Convention on Human Rights
- III – Applications that raise complaints under Article 2 (right to life), 3 (protection from torture), 4 (protection from slavery) and 5 § 1 (right to liberty and security)
- IV – Potentially well-founded applications based on other Articles
- V – Applications raising issues already dealt with
- VI – Applications identified as giving rise to a problem of admissibility
- VII – Applications which are manifestly inadmissible

The Priority Policy’s aim is clearly to ensure the most serious cases and the cases which disclose the existence of widespread problems capable of generating large numbers of additional cases are dealt with more rapidly. However, while the policy should ensure the most im-

70 See: <http://hrbrief.org/2011/03/european-court-institutes-priority-policy-for-hearing-claims/>

portant cases are heard without delay, it could have a fatal effect on claims of lower priority. The Court will admittedly hear fewer cases because its most urgent claims often are its most time consuming, requiring complex analysis of the nuances within the Convention's articles to be applied to the facts at hand.

The policy is yet another stab at efficiency for the Court, which has been under pressure to reduce its caseload by narrowing its reach. While human rights advocate Christos Pourgourides stressed the need for subsidiarity as a reduction tactic, the Priority Policy may be a more feasible solution. When it becomes clear that the Court refuses to address certain topics due to their level of priority, the submission of those claims will eventually cease. Repetitive cases and applications that give rise to the problem of admissibility will be heard only when cases in priority levels I–IV have been adjudicated, allowing the Court to focus on only the most serious violations.

However, the subjective nature of labelling priorities raises concerns regarding the introduction of bias into the process, and could possibly encourage violators to commit low–priority offences with no fear of punishment. A number of serious questions must be asked and continually monitored as the Court transitions to its Priority Policy. Should a petitioner who was deprived a fair and public hearing be any less aggrieved because his claim falls fourth on the spectrum? What about those who have been denied their rights to free speech and religion, who now may wait years or decades behind those whose claims are deemed “more urgent?” The Court reserved an important right by granting the Chamber or its President the opportunity to decide that an individual case should be treated outside the parameters of the Policy, but it is uncertain how often that right will be invoked.

COOPERATION OF THE COUNCIL OF EUROPE WITH THE EUROPEAN UNION. INSTITUTIONAL AND LEGAL ISSUES

1. The Council of Europe's relations with the European Union

1.1. Legal foundations of the cooperation

Since its beginning, the Council of Europe was based on community of values, especially community of the law, and aimed at harmonization of the law of member states according to principles such as democracy, law and order, human rights, peaceful solution of social issues and common cultural identity. Apart from the wide scope of actions taken by the member states, the Council of Europe propagates its statute goals, also in relations with other international organizations, acting as a cooperation coordinator, especially of European inter-government and non-government organizations. For this purpose it signed cooperation agreements with most of mentioned organizations, which involve mutual consultations, exchange of information, and delegation of observers to the meetings organized by its bodies¹. Additionally, strong and gradually developing cooperation with the European Union is of particular significance for the Council of Europe².

The Council of Europe and the European Union (EU) have a long tradition of cooperation which draws on their shared values: human

1 E. Dynia, Współpraca Rady Europy z Unią Europejską i jej wpływ na rozwój i spójność standardów europejskich, [in:] Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009, Toruń 2010, p. 126.

2 *Ibidem*

rights, democracy and the rule of law. Each benefits from the other's respective strengths and comparative advantages, competences and expertise, whilst avoiding unnecessary duplication.

Equally important in the institutionalized operations that tighten the cooperation of the Council of Europe with the European Union is the development of legal relations between the organs of both organizations. As early as in 1974, the Committee of Ministers in the report called "On the Future Role of the Council of Europe" stated that mutual complement of various international organizations and institutions, especially of the Council with European Communities, is of particular significance. The report politically stimulated the Council of Europe to create the European Community Bureau of Reference in Brussels. In 1985 the Committee of Ministers of the Council of Europe supported closer cooperation of both organizations with distinction for the differences in their characters and procedures³.

Fundamental cooperation on the institutional basis between the Council of Europe and European Communities (at present European Union) was initiated by exchange of letters establishing and specifying cooperation framework of the two organizations. They were two letters: The Letter of General Secretary of the Council of Europe to the Chairman of Commission of European Communities from 16.06.1987 and the Letter of the Commission of European Communities to the General Secretary of the Council of Europe from 16.06.1987. On the basis of these two documents it was decided that it was possible for the European Commission to take part in Conferences of Ministers, in Committees created by the Committee of Ministers, and in sessions of Delegates of Ministers in case of meetings on the treaty project. Each new project of convention or agreement was to include appropriate clause which would enable the accession of the Community. It allowed for participation of the European Commission in meetings of the Committee of Ministers and for the principle of consultation⁴. Both letter exchanges are deemed as international agreements forming the

3 *Ibidem*

4 „Arrangement" between the Council of Europe and the European Community concluded on 16 June 1987, [in:] Compendium of texts governing the relations between the Council of Europe and the European Union, 4th ed., Strasbourg 2001, p. 4 and 6.

legal foundation for the cooperation between the Community and the Council of Europe in accordance with Art. 302 and 303 of the Roman Treaty⁵.

Initially, the cooperation was unequal since the Council of Europe rarely participated in meetings of working bodies of the Council of the European Union, although the Commission was frequently present at meetings of Committee of Ministers. Nevertheless, with the passage of time the lack of balance gradually diminished⁶.

Next stage that aimed at strengthening the cooperation between the Council of Europe and the European Union was another exchange of correspondence from 5.11.1996, which served as a base for enabling the European Commission to participate in the sessions of the Committee of Ministers, though without the right to a vote and without the ability to make any decisions⁷.

Since 1989 four party meetings have been held (The Chairman of the Committee of Ministers, The General Secretary, Chairman of the Council of Europe and of the European Commission). The meetings are important not only politically, they also have a crucial practical goal of realizing numerous joint projects⁸. They are held twice a year with the participation of the Chairman of the Committee of Ministers and the General Secretary – from the Council of Europe, and the Chairman of the Council and the Chairman of the Commission (in reality the appropriate Commissioner) – from the Union. What is more, the civil servants of various levels of both organizations take part in many technical meetings (for example, on protection of personal information, fight with corruption, organized crime, terrorism, or the use of genetic modification technology)⁹.

5 E. Dynia, *Współpraca Rady Europy z Unią Europejską...*, p. 128.

6 *Ibidem*

7 Exchange of letters between the Secretary General of the Council of Europe and the president of the Commission of the European Communities on 5 November 1996 supplementing the „Arrangement” between the Council of Europe and the European Community concluded on 16 June 1987, [in:] *Compendium of texts governing the relations between the Council of Europe and the European Union*, 4th ed., Strasbourg 2001, p. 9–11.

8 F. Benoit-Rohmer, H. Klebes, *Prawo Rady Europy. W stronę ogólnoeuropejskiej przestrzeni*, Warszawa 2006, p. 145.

9 F. Jasiński, *Karta Praw Podstawowych Unii Europejskiej*, Warszawa 2003, p. 241.

Another crucial stage in development of mutual relations between the Council of Europe and the European Union was the signing of the Joint Declaration on Co-operation and Partnership between the Council of Europe and the European Commission, which took place in Strasbourg on 03.04.2001, and which confirmed mutual priorities of the organizations in relation to the protection of human rights. According to its resolutions: "(...)the European Commission and the Council of Europe have engaged in active cooperation in many areas including human rights, democratic institution-building, legal affairs, social and health matters, education and culture, heritage and the environment, local government and the protection of national minorities (...). The Council of Europe and the European Community share the same values and pursue common aims with regard to the protection of democracy, respect for human rights and fundamental freedoms and the rule of law. (...) Experience has shown that, by combining forces in this way, we have enhanced the complementarity of our activities and ensured maximum benefit for the countries concerned. (...) we confirm our determination to deepen our partnership and enhance our cooperation taking into account recent developments in our continent and the evolving priorities in our respective activities. Henceforth we will endeavour to intensify our dialogue with a view to identifying those countries and objectives where joint action will add value to our respective activities. We will aim to jointly identify mid-term priorities for this cooperation while maintaining the necessary flexibility to respond to new development (...)"¹⁰.

In the Annex to the Declaration, both organizations expressed readiness to help the states that aspire to integration structures in achieving European standards, especially in the domain of social integrity, research development, and ethical issues. They defined the framework of cooperation realized by the Secretariat of the Council of Europe and appropriate departments of the European Commission. They acknowledged the necessity to hold annual high-rank meetings in order

10 Joint Declaration on cooperation and partnership between the Council of Europe and the European Commission, [in:] Compendium of texts governing the relations between the Council of Europe and the European Union, 4th ed., Strasbourg 2001, p. 26.

to set specific goals, to determine one-year and long-standing plans, to monitor common programs and assess their implementation¹¹.

The establishment of cooperation between the Council of Europe and the European Union resulted in more and more frequent participation of the latter in the workings of institutional structures of the Council of Europe. The Commission takes part in various activities and debates in COE by the invitation of host bodies. It may also take part in sessions and workings of the Committee of Ministers and all their supportive structures. The Committee of Ministers of the Council of Europe may invite the European Commission to take part in a discussion, put forward its suggestions, invite to consultations, conferences, but also to enter into agreements accepted under the auspices of the Council of Europe, counting on mutuality from the European Commission¹². The meetings held by the Council of Europe and the European Union aim to discuss various issues that are in the sphere of interest of both organizations, to establish common priorities, and to stress the necessity for new project which would strengthen democracy, law and order and human rights. In order to reinforce law and order, the Council of Europe and the European Commission engage in many programmes financed by the European Union and subsidized by the Council of Europe¹³.

New phase in cooperation was connected with the Third Summit of Heads of States and Governments of the European Union, which took place on 16–17 May 2005. It was decided then in Warsaw Declaration that there would be created “new framework of reinforced cooperation and mutual influence between the Council of Europe and the European Union within spheres of common interest, especially of democracy and the rule of law”¹⁴. The Plan of Action announced strengthening of

11 G. Michałowska, *Ochrona praw człowieka w Radzie Europy i Unii Europejskiej*, Warszawa 2007, p. 172.

12 E. Cała-Wacinkiewicz, *Charakter prawny Unii Europejskiej w świetle prawa międzynarodowego*. Warszawa 2007, p. 244.

13 E. Dynia, *Współpraca Rady Europy z Unią Europejską i jej wpływ na rozwój i spójność standardów europejskich*, [in:] *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009*, Toruń 2010, p. 134–135.

14 *Trzeci Szczyt szefów Państw i Rządów Rady Europy*, Warszawa, 16–17.5.2005. Deklaracja Warszawska, www.coe.int

relations with the Union in the sphere of human rights, democracy, the rule of law, and the creation of memorandum of agreement¹⁵.

Annex 1 to the document, which refers to the relation between the Union and the Council, points out the vital role of the Council of Europe in the protection of human rights, stresses necessity to draft documents connected with the accession to European Convention on Human Rights and other mechanisms of the Council of Europe, and to reinforce the cooperation in the spheres of human rights, bioethics, cyber crime, and human trade. Additionally, great importance is given to organization of common consultations and actions¹⁶. Special attention is given to continuation of common efforts to ensure fulfilment of obligations relating to accepted common standards. The effectiveness of monitoring procedures will undoubtedly be detrimental for the effectiveness of the Council of Europe as an international organization¹⁷. The Warsaw Summit, known also as The Summit of European Unity, led to considerable political partnership of the Council of Europe and the European Union.

Next high-rank meeting of the representatives of the organizations took place in Strasburg in March 2006. Its effects are included in the Memorandum of Understanding between the COE and EU, which specifies greatest priorities of further cooperation¹⁸. “The participants expressed their determination to join forces and cooperate better in order to provide a stronger answer to the new challenges and threats which citizens in Europe and the two organisations are confronted with in the XXIst century. Recalling the clear message of the (...) Heads of State and Government of the Council of Europe – to which all the EU Member States belong – on the need to ensure complementarity between the work of the Council of Europe and the other organisations involved in building a democratic and secure Europe, they are committed to the creation of a new framework for enhanced cooperation and partnership

15 H. Machińska, *Przystąpienie UE do EKPCz. Relacje instytucjonalno-prawne Unii Europejskiej i Rady Europy*, [in:] *Ochrona praw podstawowych w Unii Europejskiej*, Warszawa 2008, p. 259.

16 III Szczyt Szefów Państw i Rządów Rady Europy. Plan Działania. Załącznik nr I. Wytyczne dotyczące stosunków pomiędzy Radą Europy a Unią Europejską, CM (2005) 80, 17 May 2005.

17 J. Jaskiernia, *Rada Europy po 60 latach istnienia*, Państwo i Prawo 2009, vol. 5, p. 11.

18 Ministers' Deputies Information documents: 22nd Quadripartite Meeting Council of Europe/European Union, Strasburg, 15 March 2006, CM/Inf(2006)16.

between the two organisations”¹⁹. They also acknowledged the importance of good neighbourhood policy in Europe²⁰.

The shape of the future agreement and its signature was considerably influenced by the Juncker Report from 11 April 2006²¹. The Report pointed out areas of cooperation: human rights, democracy, the rule of law, education, culture, inter-cultural dialogue and the institutional dimension. According to Juncker, the Council of Europe should be the main organization responsible for creation of system of standards. All actions, creation of new institutions like, for example, the Fundamental Rights Agency, should be subordinate to assurance of the cohesion of the human rights system and mobilization of all institution, regardless of their affiliation, towards creation of an effective system of human rights protection²².

The Third Warsaw Summit resolutions and propositions included in the Juncker Report²³ resulted in Memorandum on Agreement from 11 May 2007²⁴. The Agreement specifies the aims, principles and outlines the main framework of cooperation: "(...) The Council of Europe and the European Union will develop their relationship in all areas of common interest: in particular the promotion and protection of pluralistic democracy, the respect for human rights and fundamental freedoms, the rule of law, political and legal co-operation, social cohesion and cultural interchange. (...) On the basis of enhanced partnership and complementarity, the Council of Europe and the European Union will take all the necessary measures to promote their co-operation by exchanging views on their respective activities and by preparing and

19 Ministers' Deputies Information documents:..., p. 3.

20 G. Michałowska, *Ochrona praw człowieka w Radzie Europy i Unii Europejskiej*, Warszawa 2007, p. 174.

21 Council of Europe – European Union: "A sole ambition for the European continent". Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg, to the attention of the Heads of State or Government of the Member States of the Council of Europe, http://www.coe.int/t/der/docs/RapJuncker_E.pdf

22 H. Machińska, *Przystąpienie UE do EKPCz...*, p. 259.

23 In November 2007 the Parliamentary Assembly and the European Parliament signed an agreement on strengthening of cooperation, which aims to eliminate unnecessary duplication of work and better coordination in the sphere of human rights, justice, and democracy in Europe and the world.

24 Memorandum of Understanding between the Council of Europe and the European Union 10-11.5.2007, http://www.coe.int/t/der/docs/MoU_EN.pdf

implementing common strategies and programmes for the priorities and areas of shared interest set out below” (...)”²⁵.

The Memorandum represented a new phase of the co-operation, highlighting the complementarity between the two organisations and giving a framework for developing relations and promoting human rights, democratic stability and the rule of law throughout the European continent. What seems especially important is that the Council of Europe was recognized as an organization defining the standards of human rights. Thus, it has become “a point of reference” on human rights for the European Union. Memorandum calls for cohesive actions, extensive consultations, mutual participation in work, development of common programmes. It is the first document of this type that organizes institutional relations in Europe, also in the sphere of human rights. This new agreement not only harmonized functioning of the Council of Europe and the European Union in relation to human rights, but also brought closer institutions (by for example common meetings of Tribunals) such as European Parliament, Parliamentary Assembly, Congress of Regional Authorities, Committee of Regions. As a result, the political dialogue was strengthened (meetings within the “quadrangle”)²⁶. Both the Juncker report and the Memorandum of Understanding marked the beginning of a new dynamism in the Council of Europe – European Union relations.

Meetings of representatives of the Council of Europe and the European Union take place regularly (at least twice a year). Observing accomplishments of both organizations it can be seen that mutual cooperation in at an advanced level. It could be worthwhile to quote the summary of one of the last reports of the Committee of Ministers for the Council of Europe²⁷. “The Council of Europe and the European Union are strategic and complementary partners. They share the common aim: to protect and promote pluralist democracy, the rule of law, human rights and fundamental freedoms, and democratic stability in Europe. Since the signature of the Memorandum of Understanding in 2007, relations

25 Memorandum of Understanding between the Council of Europe and the European Union 10–11.5.2007, p. 3 http://www.coe.int/t/der/docs/MoU_EN.pdf

26 H. Machińska, *Przystąpienie UE do EKPCz...*, p. 259.

27 See: report on the cooperation of the Council of Europe with the European Union: http://www.coe.int/t/der/eu_EN.asp?

between the two organisations have further intensified both qualitatively and quantitatively, covering a wide variety of fields of activities of the Council of Europe. In 2009, the election of a New Secretary General on the Council of Europe side and the entry into force of the Lisbon Treaty on the European Union side gave a new dimension to relations between the Council of Europe and the European Union, leading to increased political contacts. The entry into force of the Lisbon Treaty and the Charter of Fundamental Rights has also created New opportunities and called for increased co-operation and coordination between both organisations, first and foremost for the benefit of European citizens. In particular, it has increased the need to ensure coherence between Council of Europe standards and European Union law. The importance for both organisations to cooperate in support of a strong system of human rights protection in Europe Has therefore become more evident. In addition to its symbolic value, the European Union's accession to the European Convention on Human Rights (ECHR) will be the most concrete expression of both organisations' readiness to work together towards this objective. 2009 was also marked by continuous development of co-operation between both organisations with respect to the countries participating in the Eastern Partnership of the European Union. (...) A stronger partnership between the Council of Europe and the European Union is also increasingly instrumental in promoting Council of Europe standards beyond Europe's borders. The Committee of Ministers will continue to give priority to the implementation of the Memorandum of Understanding and, in particular, to the early completion of negotiations and a rapid accession of the European Union to the ECHR. (...) the activities shows that the objective of intensifying co-operation and coordination of actions between the two organisations has been successfully achieved so far on the basis of the existing Memorandum of Understanding. For the future, it is recalled that a decision will need to be taken by common agreement, not later than 2013, as to a possible revision of the document if necessary (§ 55 of the Memorandum of Understanding)²⁸.

28 Ministers' Deputies: Co-operation between the Council of Europe and the European Union – Report for the 120th Ministerial Session, 120th Session of the Committee of Ministers (Strasbourg, 11 May 2010), CM Documents, CM (2010)52, 6.5.2010, p. 1 and 9.

The framework of cooperation between the European Union and the Council of Europe has been defined in the first exchange of correspondence from 16.6.1987. The Union is represented by the European Commission and the European Council by the Committee of Ministers. On the operational level the cooperation also encompasses the European Parliament, the Parliamentary Assembly of the Council of Europe, Committee of Regions and Congress of Local and Regional Authorities of the Council of Europe. The scheme of cooperation with appropriate institutions of the European Union will also include specialized bodies of the Council of Europe, such as Commissioner on Human Rights, Committee for the Prevention of Torture and other similar bodies²⁹.

This general overview of institutional relations is an indicator of closer and closer cooperation of the Council of Europe with the European Union and its bodies. Its aim is to bring about better cohesiveness in actions on human rights protection and strengthening of individual's rights within European Commission on Human Rights. One necessary step in this process is obviously accession of the European Union to the Convention. It seems that the concept that assumes Union's accession to the Council of Europe would make a natural institutional guarantee that would ensure full involvement of the European Union in legislative processes³⁰. For over 20 years, the Council of Europe and the European Union have implemented numerous joint programmes to promote respect for human rights and the rule of law, and to address education, youth issues, and social affairs in a Europe without dividing lines.

To sum up, both organizations have been gradually tightening their cooperation, which resulted in creation of standards respected in many fields. Today the principle of democratic legitimism, based on free elections and respect of human rights, has become the basis of regional legal order. All European organizations acknowledge that democratic political system is a prerequisite for its accession. They also acknowledge democratic practice as obligatory and treat it as a crucial element of

29 M.M. Kenig-Witkowska, *Współpraca Unii Europejskiej z Radą Europy: wybrane zagadnienia instytucjonalno – prawne*, [in:] 60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych (ed. H. Machińska), Warszawa 2009, pp. 49–50.

30 H. Machińska, *Przystąpienie UE do EKPCz...*, p. 261.

European heritage. This is reflected in numerous documents accepted not only by the Council of Europe, but also the European Union and OSCE³¹.

1.2. Objectives, principles and areas of cooperation

Objectives, principles and areas of cooperation between the Council of Europe and the European Union were mentioned in almost every document relating to cooperation, including the above mentioned correspondence. Final systematization came in Memorandum on Understanding and Cooperation between the Council of Europe and the European Union from 2007, which included important, from the point of view of mentioned competitiveness in some areas, agreement that the standards of the Council of Europe shall remain as point of reference for accepted standards of human rights, rule of the law, and democracy in Europe³².

The Preamble defines the most crucial axiological foundations of cooperation between the Council of Europe and the European Union. Firstly, it stresses the broad concept of pan European cooperation: “Seeking to achieve greater unity between the states of Europe through respect for the shared values of pluralist democracy. the rule of law and human rights and fundamental freedoms as well as through pan–European co–operation. thus promoting democratic stability and security to which European societies and citizens aspire”³³.

Secondly, both organizations indicated the indisputable role of ECHR and European Court on Human Rights, as well as the whole heritage of the Council of Europe for the protection of human rights. Additionally, they recognized positive aspects of the Charter of Fundamental Rights and regulation of Article 6.2 of the Treaty on

31 E. Dynia, *Współpraca Rady Europy z Unią Europejską i jej wpływ na rozwój i spójność standardów europejskich*, [in:] *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009*, Toruń 2010, p. 136.

32 M.M. Kenig–Witkowska, *Współpraca Unii Europejskiej z Radą Europy: wybrane zagadnienia instytucjonalno – prawne*, [in:] *60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych* (red. H. Machińska), Warszawa 2009, p. 46.

33 Memorandum of Understanding between the Council of Europe and the European Union 10–11.5.2007, p. 3, http://www.coe.int/t/der/docs/MoU_EN.pdf

the European Union: “Recognising the unique contribution of the Convention for the Protection of Human Rights and Fundamental Freedoms, of the European Court of Human Rights, as well as of other Council of Europe standards and instruments for the protection of the rights of individuals. and taking into account the importance of the Charter of Fundamental Rights of the European Union, as well as Article 6.2 of the European Union Treaty”³⁴.

Thirdly, in the Preamble was made a reference to “strategic” vision of cooperation of the Council of Europe and the European Union from the Juncker Report and documents of the IIIrd Summit of the Council of Europe from 2005: “Bearing in mind the strategic vision contained in the report on the relations between the Council of Europe and the European Union prepared in his personal capacity and at the request of the Heads of State and Government by Jean–Claude Juncker, Prime Minister of Luxembourg; (...) Bearing in mind that the Heads of State and Government at the Third Summit of the Council of Europe in Warsaw decided that all activities of the Council of Europe must contribute to its fundamental objective. i.e. preserving and promoting human rights democracy and the rule of law, and adopted an Action Plan which defines areas where the role of the Council of Europe as an effective mechanism for pan–European co–operation should be enhanced (...)”³⁵.

The aims of strengthened cooperation between the Council of Europe and the European Union have been defined quite generally and encompass the development of mutual relationships in all areas of common interest, especially in the domain of pluralistic democracy, respect of human rights and fundamental freedoms, rule of the law, political cooperation, social cohesion, and cultural exchange. These goals will be realized on the basis of partnership cooperation, complementarity in exchange of views in

34 Memorandum of Understanding between the Council of Europe and the European Union 10–11.5.2007, p. 3, http://www.coe.int/t/der/docs/MoU_EN.pdf

35 Memorandum of Understanding between the Council of Europe and the European Union 10–11.5.2007, p. 3, http://www.coe.int/t/der/docs/MoU_EN.pdf

appropriate areas of activity of both organizations, and in preparation and implementation of common strategies and programs³⁶.

According to the resolutions of the Memorandum, the Council of Europe and the European Union have set the following areas of cooperation:

- 1) human rights and fundamental freedoms,
- 2) rule of law legal co-operation and addressing new challenges,
- 3) democracy and good governance,
- 4) democratic stability,
- 5) intercultural dialogue and cultural diversity,
- 6) education, youth and promotion of human contacts,
- 7) social cohesion.

Other areas of shared priorities and common interest may be defined on the basis of mutual consultations³⁷.

Ad. 1 “The Council of Europe and the European Union will base their co-operation on the principles of indivisibility and universality of human rights, respect for the standards set out in this field by the fundamental texts of the United Nations and the Council of Europe. (...) The European Union regards the Council of Europe as the Europe-wide reference source for human rights.(...) The European Union will develop co-operation and consultations with the Commissioner for Human Rights with regard to human rights.(...) This does not prevent Community and European Union law from providing more extensive protection. (...)Early accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms would contribute greatly to coherence in the field of human rights in Europe.

36 M.M. Kenig-Witkowska, Współpraca Unii Europejskiej z Radą Europy: wybrane zagadnienia instytucjonalno – prawne, [w:] 60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych (ed. H. Machińska), Warszawa 2009, p. 47.

37 Memorandum of Understanding between the Council of Europe and the European Union 10-11.5.2007, point 4 p. 4, http://www.coe.int/t/der/docs/MoU_EN.pdf

Ad. 2 The Council of Europe and the European Union will endeavour to establish common standards thus promoting a Europe without dividing lines, without prejudice to their autonomy of decision. Bearing this in mind, legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules. To this end and to the extent necessary the Council of Europe and the European Union will consult each other at an early stage in the process of elaborating standards (...).

Ad. 3 The Council of Europe and the European Union will draw on each other's expertise and activities to promote and strengthen democracy and good governance (...). They will explore ways of working more closely in the field of regional and transfrontier co-operation. (...) They will endeavour to promote local democracy in view of the contribution which it can make to the achievement of their shared objectives. They should make good use of the Council of Europe Congress of Local and Regional Authorities and the Committee of Regions of the European Union, as well as the Centre of Expertise on Local Government Reform.

Ad. 4 Bearing in mind the common aim of promoting and strengthening democratic stability in Europe, the Council of Europe and the European Union will increase their common efforts towards enhanced pan-European relations, including further co-operation in the countries participating in the European Union's Neighbourhood Policy or the Enlargement process (...). This co-operation, in order to promote democracy and citizens' participation, will also include states aspiring for membership of the Council of Europe (...).

Ad. 5 The Council of Europe and the European Union will co-operate in order to develop intercultural dialogue and cultural diversity with a view to promoting respect for human rights and mutual understanding among cultures in Europe. This dialogue is an important element in the fight against all forms of discrimination, racism and xenophobia. The European Union will examine its participation in

the inter-institutional open platform of co-operation for intercultural dialogue initiated by the Council of Europe and UNESCO at the Faro Ministerial Conference (...).

Ad. 6 The Council of Europe and the European Union will co-operate in building a knowledge-based society and a democratic culture in Europe (...). They will support the Bologna process³⁸ (...). The Council of Europe and the European Union will strengthen their co-operation in the youth field by developing and taking part in programmes and campaigns to empower young people to participate actively in the democratic process and by facilitating youth exchange (...).

Ad. 7 The Council of Europe and the European Union will co-operate in the field of social cohesion on the basis of the Council of Europe Social Charter and the relevant European Union texts. On the basis of their respective frameworks, they will support the efforts by member states to exchange good practices on social cohesion and solidarity – in particular in combating violence, poverty and exclusion and in protecting vulnerable groups – and to develop more efficient policies in this field”³⁹.

Memorandum states meetings and mechanisms for strengthening cooperation. According to its text “ The Council of Europe and the European Union will pursue their regular “Quadripartite” meetings devoted to the most important aspects of co-operation and strategic issues. Ways of enhancing the parliamentary contribution to this process will be examined. In addition, ad hoc consultations at a high political level could be held on topical matters of common interest”⁴⁰.

38 About The Bologna process see generally: J. Lonbay, reflections on Education and Culture in EC Law, [in:] Culture and European Union Law, Oxford 2004, p. 251 and other.

39 Memorandum of Understanding between the Council of Europe and the European Union 10-11.5.2007, p. 3-6, http://www.coe.int/t/der/docs/MoU_EN.pdf

40 *Ibidem*, p. 7.

2. European Union Charter of Fundamental Rights in European system of human rights protection

2.1. Charter of Fundamental Rights in the Lisbon Treaty

The question of consolidation of the fundamental rights protection in the framework of the European Communities and later in the European Union was growing and becoming more and more urgent together with the expansion of these competences and with the growth of the union's common aquis, becoming one of the main challenges of legitimization of democratic European Union⁴¹.

As the fundamental rights system based on principles created by TEA (Treaty of Maastricht on European Union), there were no suitable legal acts in EU that would bind EU bodies and member states and, of course, there were no cohesive procedures that would serve their protection. The problem could be resolved in two ways – either by creation of a new treaty which would comprehensively regulate fundamental rights in the union law, or by EU's accession to the European Convention on Protection of Human Rights and Fundamental Freedoms. Over half a century experience in their application would help to avoid many inconsistencies connected with the implementation of new legal regulation⁴². At the beginning a third solution was chosen – The Charter of Fundamental Rights (hereinafter CFR or charter)⁴³.

Announcement of the Charter of Fundamental Rights⁴⁴ at the summit in Nice on 7.12.2000 was an important step towards solution of this problem. The Charter was then not included on by the power of the Treaty of Nice to the Treaties forming the Union and remained only

41 J. Barcz, Odniesienia do karty Praw Podstawowych w toku procedury ratyfikacyjnej Traktatu z Lizbony w Polsce, [in:] 60 lat Rady Europy. Tworzenie i stosowanie standardów prawnych (ed. H. Machińska), Warszawa 2009, p. 63.

42 See more: R.R. Babayev, EU Charter of Fundamental Rights: what is the legal impact of being chartered?, Romanian Journal of European Affairs Vol. 6, No. 4, 2006.

43 B. Banaszak, Zalety i wady Karty Praw Podstawowych Unii Europejskiej, Przegląd Sejmowy, No. 2(85)/2008, pp. 9–10.

44 When the Charter was drawn up in 2000, the Convention which drafted it drew up a text of "explanations", which purport to show how the rights in the Charter are derived from existing treaties.

political document, without any immediate legal effects in the light of the law. Accepted by the European Commission and by the European Parliament, it had an inter-institutional character and was not a legally binding document⁴⁵. At the Summit of the European Council in Nice, the Charter was defined as “a declaration of European morality”. It meant that although the CFR was not legally binding, the standards of protection it guaranteed should be taken into consideration in creation of law of the European Union⁴⁶.

Next years witnessed an attempt to incorporate the CFR during the reform of the European Union into the original law of the European Union. By the force of the Constitutional Treaty, the Charter was to be incorporated into the same Treaty as its part. However, due to abolishment of the “constitutional” concept, it was the Treaty of Lisbon that on 13.12.2007 gave the Charter’s resolutions legal validity. On 12 December 2007, the day before the signing of the Lisbon Treaty, the Presidents of the European Parliament and the European Commission, and the current President of the Council of Ministers of the EU, signed and ‘solemnly declared’ a revised version of the Charter, which was published in the Official Journal together with the official Explanations⁴⁷. By the force of Art. 6, when the Treaty is put into effect, “the Charter has the same legal force as the Treaties”. Its resolutions were not directly incorporated into the same text of the Treaty of Lisbon, because the Charter is a separate document which belongs to the primary law of the EU.

The Charter of Fundamental Rights contains political, social, and economical rights catalogue written in seven chapters: Dignity (I), Freedom (II), Equality (III), Solidarity (IV), Civic Rights (V), System of Justice (VI)

45 See: F. Deloche–Gaudez, The Convention on a charter of fundamental rights: a method for the future?, Research and Policy Paper No. 15, 2001.

46 A. Florczak, Ochrona praw człowieka w systemie prawa wspólnotowego, [in:] Prawa człowieka. Wybrane zagadnienia i problemy, (ed. L. Koba, W. Waclawczyk), Warszawa 2009, p. 112. See generally: J. Wouters, The EU Charter of Fundamental Rights. Some reflections on its external dimension, *Maastricht Journal of European and Comparative Law*, 2001/1; S. Grigolli, ‘The EU Fundamental Rights Charter in current debate: Origins, Positions, Future Prospects’, *The European Legal Forum* 2000/1.

47 A guide to the Treaty of Lisbon. European Union insight, The Law Society 2008, p. 17.

and general Resolutions on Interpretation and Implementation of Law (VII)⁴⁸.

Each of the CFR's 54 articles, which set out individuals' rights and freedoms, is taken from a precursor text. Most of the rights are contained in other documents, such as the ECHR, Universal Declaration of Human Rights the constitutional traditions of the EU member states, the Council of Europe's Social Charter and other international conventions to which the EU or its member states are signatories. Moreover, the Charter contains rights guaranteed by the legal order of the European Union and previously unknown and new laws, but only in the sense of their absence in compact international documents, relating to, for example, ban on human cloning, the trade of human organs, the use of eugenic practices, or the freedom of artistic expression.

Thanks to the CFR, for the first time the European Union comprehensibly approaches the issue of human rights protection which spreads on all categories of the rights: not only personal and political freedoms, but also broadly understood social, cultural, and economical rights. The way the specific rights are regulated adds to the comprehensiveness of CFR. "Although some rights or freedoms are formed in a way which allows their direct application, many others serve as guidelines for the policy of the community bodies. Avoiding difficulties connected with finding a legal formula which allows application of rights by the courts, such a method confirms that all rights and freedoms are binding. It means that everyone can demand their realization, though in some cases it may not be possible through the judicial proceeding"⁴⁹.

The Preamble of the CFR gives the axiological and legal foundation for its regulation. "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its

48 The text of the Charter of Fundamental Rights, [in:] Law Gazette of EU C 303/1 from 17.12.2007.

49 Stanowisko Rady Doradczej do spraw praw człowieka przy Ministrze Spraw Zagranicznych, [in:] Karta Praw Podstawowych Unii Europejskiej, Warszawa 2001, p. 62.

activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”⁵⁰.

Title I of the CFR is by no means controversial. The Chapter is opened by an Article stating that human dignity is inviolable and is the source of all other rights mentioned in CFR. The position of this article as first differentiates the CFR of the EU from other treaties of international public law of human rights, which usually included human dignity in the preamble without its legal prescription. It lists all known rights and prohibitions, like the right to life, prohibition of torture and degrading or inhuman treatment or punishment, prohibition of slave trade and compulsory work. Another novelty is also regulation concerning human rights to physical and psychical integrity, which involves prohibition of eugenic practices, reproductive cloning of human beings, or prohibition of the trade of human organs⁵¹.

Part II of the CFR contains a much longer catalogue of rights. Among them, the most controversial proved to be Art. 9 which guarantees the right to marriage and to start a family. Comparing versions of this right on the grounds of the ECHR and the CFR, only a man and a woman at suitable for a marriage age are entitled to the right of marriage. The CFR of the EU omits the subjects entitled to marriage (a woman and a man) and the suitable age so this right is guaranteed to everybody at every age, so this right is guaranteed to everybody at every age. The rest of the articles do not arouse any doubts. Most of them are identical to their equivalents included in ECHR or attached protocols.

What is more, the discussed chapter guarantees the right to freedom and security, to respect of privacy and family life, to protection of personal information, to marriage and to start a family, the right to freedom of thought, conscience, denomination, to freely express one’s views, to information, to public assembly and affiliation, to education, to choose one’s profession, to employment in every member state of

50 *Ibidem*

51 R. Mazur, *Karta Praw Podstawowych UE*, [in:] *Ochrona praw podstawowych w Unii Europejskiej. Wybrane zagadnienia* (ed. A. Florczak), p. 46; T. von Danwitz, *The Charter of Fundamental Rights of the European Union between Political Symbolisms and Legal Realism*, *Denver Journal of International Law and Policy*, 29, 2004, p. 297.

EU, to entrepreneurship, to property, to refuge, and to protection in case of deportation and extradition⁵². An interesting curiosity is a separate article with the guarantee of freedom of art and speech.

Title III of the CFR, which relates to equality, begins with article 20 that points out that in law all people are equal. Moreover, this chapter regulates the following rights: prohibition of discrimination, the right to cultural, religious and language variety with special attention to the respect of member states national identity. Next are: equality of women and men, rights of a child, rights of the elderly⁵³ (to independence and to participation in social and cultural life), and the integration of the disabled⁵⁴.

Title IV, called “Solidarity”, contains numerous guarantees on worker’s rights which are identical with the resolutions of the European Social Charter. The title mentions the following: the right of workers to information and counselling, the right to negotiation and collective agreements, access to free employment service, the right to protection in case of unjustified dismissal, and the right to proper and fair work conditions. Attention was paid to children employment and their protection at the place of work. Next resolutions of the Charter define the conditions of social security, that is legal, economical and social protection of the family, the right to free maternity leave, to support package and social help. The Charter also secures the right to preventive health protection and to treatment in conditions guaranteed by internal legislation of EU states. The Charter finishes with resolutions on securing high level of environmental protection and protection of consumer rights⁵⁵.

Title V treats about civic rights and majority of them are identical with civic rights resulting from EU citizenship regulated in the Treaty

52 Articles 6–19 of The Charter of Fundamental Rights, Law Gazette of the EU C 303/1 from 17.12.2007.

53 R.R. Babayev, EU Charter of Fundamental Rights: what is the legal impact of being chartered?, *Romanian Journal of European Affairs* Vol. 6, No. 4, 2006, p. 69.

54 R. Wieruszewski, *Postanowienia Karty Praw Podstawowych w świetle wiążących Polskę umów międzynarodowych i postanowień Konstytucji RP z 1997r.*, [in:] *Ochrona praw podstawowych w Unii Europejskiej* (ed. J. Barcz), Warszawa 2008, p. 128 and 131.

55 J. Sozański, *Prawa człowieka w Unii Europejskiej*, Warszawa–Poznań 2010, pp. 156–158.

on European Union. Among them are: passive and active right of participation in election to the European Parliament and in local elections, the right to proper administration, to access to documents on the EU bodies, the right to appeal to the ombudsman of the EU, the right to petition, freedom of movement and residence, and to diplomatic and consular protection⁵⁶.

Title VI of the Charter, the Judiciary, focuses on general trial guarantees. The rights are identical with the ECHR and do not arouse any reservations. They include guarantee to a proper trial, i.e. to effective legal means and access to objective trial, the right to presumption of innocence and to defence, the principle of legality and adequate punishment, the principle of only one trial or punishment for one punishable offence.

The Title VII states general provisions governing the interpretation and application of the Charter. The most important ones being that it applies to the European institutions and the Member States only when they are applying EU law and not otherwise (art. 51), and that the Charter in no way confers new competencies on the EU (art. 52). However it should be recalled that two Member States, Poland and the United Kingdom⁵⁷, have been granted exceptions from parts of the Charter and that the specific protocol annexed to the Lisbon Treaty provides that Title IV (Solidarity) does not apply to them⁵⁸.

The catalogue contained in CFR has a secondary character since most rights and freedoms are already featured in other documents binding member states of the EU. Thus, the Charter plays an organizational role. In the CFR there are rights subjectively limited to only citizens of the EU (e.g. the right to vote and stand as a candidate in elections to the European Parliament, the right to diplomatic care),

56 A. Florczak, *Ochrona praw człowieka w systemie prawa wspólnotowego*, [in:] *Prawa człowieka. Wybrane zagadnienia i problemy*, (ed. L. Koba, W. Wacławczyk), Warszawa 2009, p. 113.

57 The Protocol (no. 30) on application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. Annex to the Lisbon treaty includes the text of the protocol.

58 O. Zetterquist, *The Charter of Fundamental Rights and the European res Publica*, [in:] D.F. Giacomo (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, 2011, p. 4.

but also rights for all individuals⁵⁹. Thus, in terms of subjectivity, the Charter aims to protect not only EU citizens, but all persons who are on its territory. This is in accordance with the general trend of the joint legislation where legal acts of the Commonwealth (presently EU) expand its resolutions concerning individuals over all persons staying on the territory where the law of the EU applies⁶⁰.

As far as obligated subjects are concerned, the CFR's Article 51 of Act 1 states that "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity" and to "the Member States only when they are implementing Union law". In the same section there is further explanation that states "[...] shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers" and that "rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties." The Charter cannot be applied to the whole legal order of a member state, but only to actions and the law of member states within the range of the law of the EU, and more precisely, the law which executes the law of the EU⁶¹.

The Charter creates unified, autonomic mechanism for protection of fundamental rights encompassing both Union institutions and bodies, and member states. It bases on creation of certain standards and on assumption that the nature of specific rights implies instruments for their protection⁶². Mechanism of the protection of fundamental rights created by the Charter does not define the means for their pursuit in case of infringement. The Charter does not create its own protection procedures of guaranteed right, it does not extend the range of rights that can be pursued in the court of law, or does not reinforce present

59 A. Florczak, *Ochrona praw człowieka w systemie prawa wspólnotowego*, [in:] *Prawa człowieka. Wybrane zagadnienia i problemy*, (ed. L. Koba, W. Waclawczyk), Warszawa 2009, p. 114.

60 B. Banaszak, *Zalety i wady Karty Praw Podstawowych Unii Europejskiej*, *Przegląd Sejmowy*, Nr 2(85)/2008, p. 15.

61 A. Wyrozumska, *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie lizbońskim oraz Protokółu polsko-brytyjskiego*, *Przegląd Sejmowy*, Nr 2(85)/2008, p. 29.

62 B. Banaszak, *Zalety i wady Karty Praw Podstawowych...*, p. 16.

trial guarantees which would enable EU citizens their protection. As a result, it does not tend to extend forms of court protection that are more and more common on the international and internal level of present democratic countries⁶³.

The Charter, just like every document created by means of extensive compromise breeds numerous issues and is the subject of frequent criticism. The accusation concerns unnecessary accumulation of rights, especially in the domain of social regulations, and excessive, and at the same time impractical instruments of law enforcement. Other accusations concern the absence of crucial issues, for example, protection of minorities, and the fact that the Charter duplicates rights from the European Convention on the Protection of Fundamental Human Rights and Freedoms, and also the ability to settle similar cases on the basis of slightly different documents, which in consequence may give different verdicts of the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union in Luxembourg⁶⁴.

2.2. Standards of European Convention on Human Rights and Fundamental Freedoms vs. Fundamental Rights Charter

European Convention on Human Rights and Fundamental Freedoms (ECHR) is a special source of normative obligations that can be found in the Charter, where most regulations come directly from the text of the Convention and all the others modify or extend it⁶⁵ (e.g. Art. 9 of the Charter vs. Art. 12 of ECHR), or narrow down its application (e.g. Art. 3 Charter vs. Art. 8 ECHR)⁶⁶. It must be noticed, however, that the Charter of Fundamental Rights has got a wider and different scope of regulations in comparison with the Convention of the Council

63 *Ibidem*, p. 22–23.

64 G. Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, Warszawa 2007, p. 266.

65 Many regulations of the Charter has got a broader range, see: Note from the Praesidium, draft Charter of Fundamental rights of the EU Charte, 4473/00, Brussels, 11.10.2000.

66 See: comparison of articles of the Charter that are completely or partially in accordance with the ECHR prepared by the Secretariat of the Convention: CHARTER 4473/00 from 11.10.2000.

of Europe⁶⁷. Regulation of political and civic rights is connected with confirmation of rights included in ECHR. Initially, it was even suggested that regulations of the Convention should be incorporated into the text of the Charter – over time this was “replaced with more flexible rhetoric of bringing regulations of the Convention together with its Protocols and Strasburg Tribunal judicature into the Charter”⁶⁸.

Ultimately, the Charter contains the rights guaranteed by the ECHR, though without identical repetitions of its phrases⁶⁹. As a result, the formation of relationship between the Charter and the ECHR is of paramount importance.

Title VII called “General Provisions”, in Art. 53 forbids interpretation of the rights of the Charter in violation or limitation with international standards of human rights, with special attention to the European Convention on Human Rights⁷⁰. On the other hand, according to Art. 52, section 3, the rights of the Charter, which correspond to specific rights of the ECHR, meet standards of the convention with the proviso that they could create a wider range of protection⁷¹. It must be stressed that such reference to the Convention, making it a minimal standard, had an immense protective significance. The main aim of this regulation was to assure that the protection of the Charter rights that correspond to the conventional ones, even if they sound differently, will never be lower than the protection on the level of the Council of

67 J. Sozański, Europejskie standardy ochrony praw człowieka, Rozprawy i monografie, vol. 2, Warszawa 2004, p. 149.

68 F. Jasiński, Karta Praw Podstawowych Unii Europejskiej, Warszawa 2003, p. 259.

69 K. Lenaerts, E. De Smijter, A “Bill of Rights” for the European Union, “Common Market Law Review” vol. 38/2001, p. 292.

70 Article 53 of the Charter (“Level of Protection”) reads: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”, EU Law Gazette, C 303, 14.12.2007, p. 14.

71 Section 3 of Art. 52 (“Scope of guaranteed rights”) reads: In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection, *ibidem*, p. 13. See: Z.Kędzia, Relacje między Europejską Konwencją Praw Człowieka a Kartą Praw Podstawowych po przystąpieniu Unii Europejskiej do Konwencji, [in:] Ochrona praw podstawowych w Unii Europejskiej (ed.) J. Barcz, Warszawa 2008, pp. 233–234.

Europe⁷². Clear confirmation of the status of the Convention enables distancing from linguistic formulation of the rights that correspond to those in the ECHR, at the same time retaining the proper standard of protection⁷³.

Art. 52, section 3 of the Charter, which guarantees Charter's compliance with the minimal standard of ECHR, has been positively approved in the Council of Europe. The bigger issue appeared to be the appeal to Strasbourg Tribunal judicature. Observers of the Council of Europe, who were involved in drafting the Charter, stressed that the Charter needs to address not only to the text of the ECHR, but also to the entirety of the achievements of the Tribunal interpreting its resolutions. During unofficial discussions, they made it clear that they will not accept a document which will not mention the significance of ECHR's jurisprudence⁷⁴.

In the final shape, the Charter does not refer in specific articles to the European Court on Human Rights judicature but during its preparation there were suggestions of making direct reference to Strasbourg's case law in the text of the Charter itself⁷⁵. As a matter of fact, only the preamble does it expressis verbis in section 5, where it states that "The Charter reaffirms (...) the rights resulting from (...) judicature of European Court of Human Rights". What is more, the jurisprudence of conventional bodies appears in explanations to the text of the Charter, where there are numerous references to Strasbourg case law in commentaries to specific rights (Articles), and where in reference to section 3 or Art 52 the Secretariat of the Convention clearly stated that "references to European Convention of Human Rights include the Convention and its Protocols. The importance and the scope of guaranteed rights are defined not only by the texts of the documents

72 J.B. Liisberg, Does the EU Charter of fundamental rights threaten the supremacy of Community law?, "Common Market Law Review" vol. 38/2001, p. 1179.

73 *Ibidem*, p. 1172. As Paul Lemmens notices, „regardless of precise wording of the Charter, everything will be just as if the resolutions of the Convention were merely passed“; see: *idem*, p. 94.

74 F. Jasiński, Karta..., *op. cit.*, p. 260.

75 See more: J.B. Liisberg, Does the EU Charter of fundamental rights threaten the supremacy of Community law?, „Common Market Law Review“ vol. 38/2001, p. 1174 and the following.

themselves, but also the jurisprudence of the European Court of Human Rights⁷⁷⁶.

The final content of the Charter's text corresponded to the approach of the Council of Europe. However, its representatives did not manage to make the Charter's explanations legally binding⁷⁷. Although section 5 of the Preamble to the Charter of Human Rights refers *expressis verbis* to the European Court of Human Rights, it is quite meaningful that the Strasbourg jurisprudence has never been mentioned in the articles themselves⁷⁸. Thus, as some point out, the influence of the system of the Convention on the Union's acquis is, to put it formally, less significant than the text of Charter's explanations may indicate⁷⁹.

As far as the rule is concerned, Art. 52, section 3 of the Charter does not imply direct connection of TEU with the European Court of Human Rights judicature, which suggests that it may freely shape the scope of protection described by the Charter and consequently lead to differentiation of human rights protection by the two courts⁸⁰. As a result, although the list of corresponding rights from ECHR and the Charter is clear, it is possible that Court of Justice of the European Union will present a different viewpoint on a given resolution⁸¹. Although the section 4 of Art. 52 of the Charter does not refer to the Strasbourg Court case law, it does not mean that TEU may feel unbound to follow the approach developed by the bodies of the Convention⁸², as a matter of fact, it will at least feel "convinced" to do so.

76 M.Szuniewicz, Wpływ orzecznictwa strasburskiego na standard ochrony praw człowieka w Unii Europejskiej (taking into consideration the treaty changes from December 2007), *Studia Europejskiej z.* 1 2008, p. 106.

77 Raport końcowy przewodniczącego Grupy Roboczej – „Włączenie Karty Praw Podstawowych do traktatów/Przystąpienie Unii do Konwencji Praw Człowieka” dla Konwentu Europejskiego z 22.10.2002, [in:] J. Barcz, Przewodnik po traktacie konstytucyjnym, Warszawa 2005, p. 116).

78 R. Fordoński, The EU Charter 2000: purpose, impact, and legal status [in:] Księga Jubileuszowa profesora Tadeusza Jasudowicza, (ed.) J. Białocerkiewicz and others), TNOiK, Toruń 2004, p. 140 and R.A. Garcia, The general provisions of the Charter of Fundamental Rights of the European Union, „European Law Journal” vol. 8(4)/2002, p. 491.

79 F. Jasiński, Karta..., *op. cit.*, p. 259.

80 A. Wentkowska, Europejski Trybunał Sprawiedliwości a Europejski Trybunał Praw Człowieka – konkurencyjność kompetencji czy współdziałanie? [in:] Konstytucja dla Europy – przyszły fundament Unii Europejskiej, (ed.) S. Dudzik, Kraków 2005, p. 351.

81 I. Pernice, The Charter of Fundamental Rights in the Constitution of the European Union, (2003), [http://: www.whi.berlin/de/pernice-fundamental-rights.htm](http://www.whi.berlin/de/pernice-fundamental-rights.htm)

82 R.A. Garcia, *op. cit.*, p. 490.

What is more, the Art. 52 (3) of the Charter clearly states that the meaning and the scope of rights therein contained are the same as the corresponding rights in ECHR. Bearing in mind, though, that the European Court on Human Rights and its jurisdiction are based on the Convention and the Court interprets rights guaranteed by the Convention, it must be assumed that the judicature of the European Court on Human Rights creates an integral part of the meaning and scope of those rights⁸³. Thus, by interpretation of the Convention, it is the Court that specifies the level of protection within ECHR, which in turn was established as a minimal standard of protection as to the resolutions of the Charter⁸⁴. Consequently, the Strasbourg case law defines the borders of the conventional standard, at the same time defining the minimal level of protection provided and expected by the Charter. This is why while applying the resolutions of the Charter, the Luxembourg Tribunal will be obliged to accept and follow the interpretation developed by the European Court on Human Rights on corresponding rights guaranteed by the ECHR⁸⁵.

Strasbourg case law is a sort of complement of conventional regulations. The interpretation of the Convention creates one entirety⁸⁶, a living organism that requires interpretations in the changing conditions. The importance of interpretations of the European Court on Human Rights in defining the standards of rights included in the Convention is unprecedented – both in its scope and content.

To sum up, interpretation of rights included in the Charter, which have their counterparts in the ECHR, takes place “according to the European Court on Human Rights judicature”⁸⁷. Additionally, it must be noted that interpretation of the European Court on Human Rights had its righteous place in jurisprudence of the Court of Justice of the

83 K. Lenaerts, E. De Smijter, *op. cit.*, p. 296.

84 M. Lindfelt, The implications of the Proposed EU Charter of Fundamental Rights. A political declaration or legally binding instrument?, Institute for Human Rights, Abo Akademi University, 30.06.2001, pp. 93–94.

85 K. Lenaerts, E. De Smijter, *op. cit.*, p. 296.

86 F. Tulkens, Towards a greater normative coherence in Europe/The implications of the draft Charter of Fundamental Rights of the European Union, “Human Rights Law Journal” vol. 21(8)/2000, p. 329.

87 S. Hambura, M. Muszyński, Karta Praw Podstawowych z komentarzem, Bielsko–Biała 2001, p. 220.

European Union even before the emergence of the CHR. ECHR played an important part because of frequency and range of its application in Luxembourg Court judicature, which also aims at interpretation of its resolutions in accordance with the approach presented by the Strasbourg bodies. Although the text of ECHR was often quoted by the Court of Justice of the European Union as an evidence for the existence of a specific fundamental right that had to be included in general principles of the common law, until recently the judicature of the ECHR itself was not often quoted or taken into consideration⁸⁸. This way, the ECHR has now become not only a “minimal standard”, but “the standard of interpretation” according to which the resolutions of the Charter must be interpreted in the same way as their corresponding conventional norms⁸⁹.

3. Accession of the European Union to European Convention on Human Rights and Fundamental Freedoms

There are many examples showing that common values are an important binder for the operation of international organizations. The oldest European organization, the Council of Europe, which was created in 1949 and now encompasses almost the whole of Europe, features in its statute values that are widely accepted⁶. The Preamble to the Statute of the Council of Europe mentions attachment to the key moral values that are part of the national heritage of the involved countries, the source of personal freedoms, political freedoms, the rule of law, and democracy. Also, the Treaty on the European Union mentions solidarity, freedom, democracy and respect of human rights and peace.

Formally speaking, the position of ECHR in the Union law, at least until the time of the Amsterdam Treaty, was not different from other conventions on human rights. In practice, however, mainly due

88 Ch. Engel, *The European Charter of Fundamental Rights. A Changed Political Opportunity Structure and its Normative Consequences*, „European Law Journal” vol. 7(2)/2001, p. 154.

89 P. Lemmens, *The relationship between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects*, „Maastricht Journal of European and Comparative Law” vol. 8(1)/2001, p. 93.

to European Court of Justice judicature, it has attained *acqui* status. However, those individuals who thought that their rights guaranteed by the ECHR were violated, had no effective mechanism for pursuing their rights. This is why there was an ongoing debate about the ways of securing those rights⁹⁰. Quite common was the idea of ratification of the European Convention on Human Rights⁹¹.

It is often stressed that incorporation of the CHR into the original law of the EU and the accession of the EU to the ECHR are complementary processes⁹².

The accession of the EU to the ECHR became possible in the moment of Lisbon Treaty entry into force on 1 December 2009. In legal terms, the accession may be based on Art. 6, section 2 of the Lisbon Treaty, which is amended with the resolutions of Protocol No. 8 and the Declaration referring to Art. 2, section 2 of TEU. This way the EU gained legal opportunity to become the 48th party of the ECHR without attaining membership in the Council of Europe. The Lisbon Treaty confirmed Union's readiness to access the European Convention on Human Rights by stating that the fundamental rights of the ECHR and the rights resulting from constitutional tradition of the countries form the general law principles. At the same time, in the Council of Europe, there took place an adjustment process which enables Union's accession to the Convention. Enacted in May 2004, the Protocol 14 to the Convention⁹³ (which in Art. 17 states that "the European Union can access this Convention"⁹⁴) together with recommendations is a sign of the Council of Europe's full readiness to incorporate the European Union as a party of the ECHR⁹⁵.

90 R. Wieruszewski, Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka, *Przegląd Sejmowy*, No. 2(85)/2008, p. 54.

91 See also: Advisory Committee on Human Rights and Foreign Policy. "The European Union and Human Rights", advisory report, no. 21, The Hague, 1996.

92 See e.g.: Raport Końcowy Grupy Roboczej II – "Włączenie Karty Praw Podstawowych do Traktatów/Przystąpienie Unii do Konwencji Praw Człowieka" dla Konwentu Europejskiego, [in:] *Przewodnik po Traktacie Konstytucyjnym*, J. Barcz (ed.) Warszawa 2005, p. 106.

93 Entered into force on 01.06.2010.

94 Protokół 14 do EKPC, Council of Europe Treaty Series No. 194.

95 See more: Luzius Wildhaber, Lech Garlicki, Torując drogę dalekosieżnej wizji Europejskiej ochrony praw człowieka w XXI w. II Szczyt Rady Europy i Europejskiej Konwencji o ochronie Praw Człowieka i Podstawowych Wolności, [in:] *Polska i Rada Europy 1990–2005*, (ed.) H. Machińska, Biuro Informacji Rady Europy, 2005.

The accession of the European Union to the ECHR is conditioned from the procedural and objective sides. The accession of the European Union to the ECHR must happen via international agreement of the Union with the party states of the ECHR. On behalf of the Union the agreement will be signed by the Council with the unanimous approval of the European Parliament, and the agreement will also have to be ratified by all member states of the EU (Art. 218, Section 8 TFEU – Treaty on the Functioning of the EU)⁹⁶.

Objective restrictions aim to guarantee that in case of accession to the ECHR, the competences of the Union will not be violated⁹⁷ and that the accession agreement to the ECHR⁹⁸ “must reflect the necessity to retain the specific features of the Union and the law of the Union” (the point here is to ensure proper representation of the EU in control bodies of the ECHR, to ensure proper address of complaints issued by the non-member states or individuals against the Union, and also to agree on loyal cooperation between the Union courts and the European Court on Human Rights)⁹⁹. All of the above means that, firstly, negotiating the accession conditions, the European Union should act in accordance with the spirit of the treaty which is based on the principle of equality of all parties¹⁰⁰. Secondly, the accession of the EU to ECHR will not influence the specific situation of the member states in reference to the ECHR, especially its protocols, means taken with departures from the Convention by the member states in accordance with the Art. 15, and stipulations to the ECHR made by the member states in accordance with Art 57¹⁰¹.

The accession of the EU to the ECHR has crucial advantages. It shows that the EU is not “above the law” when it comes to the protection of an individual, the EU’s institutions are subject to independent external

96 Art. 218, Sections 6 and 8 TFEU.

97 Art. 6, Section 2 of TEU.

98 Separate protocol no. 8 to the Lisbon Treaty.

99 J. Barcz, *Traktat z Lizbony*. Przewodnik, Warszawa 2009, p. 14. This is an abridged version of the brochure – *Poznaj Traktat z Lizbony*, UKIE 2009.

100 Z. Kędzia, *Reakcje między Europejską Konwencją Praw Człowieka a Kartą Praw Podstawowych po przystąpieniu Unii Europejskiej do Konwencji*, [in:] *Ochrona praw podstawowych w Unii Europejskiej* (ed.) J. Barcz, Warszawa 2008, p. 232.

101 *Ibidem*. See: *A guide to the Treaty of Lisbon*. European Union insight, The Law Society 2008, pp. 17–18.

control. This means that the control of the EU's law by the Strasbourg Court must be changed – the control will be direct and not indirect as it happens now by control of the member states. Thus, the accession of the EU to the ECHR will enable introduction of additional judiciary control of fundamental rights protection in the EU. By accession to ECHR, the European Court on Human Rights in Strasbourg will gain the right to control acts of institutions, bodies and agencies of the EU, including adjudication of the Court of Justice of the European Union, especially its compliance with the regulations of the ECHR. Accession to the convention will also mean the ability to undertake appeal means by individuals. Each individual who thinks that they became the victim of fundamental rights violation, will have the right of appeal to the European Court of Human Rights and the right to defend its interests after using up all other means of appeal provided for by the internal law. What is more, the accession of EU to the ECHR will prevent divergence of adjudications of the CJEU and the ECHR, providing better stability of the law and increasing credibility of the EU towards third parties in the domain of fundamental rights protection¹⁰².

Accession of the EU to the ECHR will also help in creation of common culture of fundamental rights in the EU, will increase the creditability of the union system of human rights and of external politics of the EU. It will serve as a proof that EU supports the Strasbourg system of fundamental rights protection. What is more, the accession process to the ECHR is the most important step which ensures universal minimal level of fundamental rights protection in Europe, which makes the participation of the EU in the ECHR significant on the regional level. From the general European viewpoint, on the other hand, accession of the EU strengthens the role of the ECHR as “constitutional instrument of European legal order”. In this way, the system of fundamental rights protection in Europe definitely becomes more universal¹⁰³.

102 A. Wyrozumska, Umocnienie ochrony praw podstawowych – status Karty Praw Podstawowych i przystąpienie UE do EKPCz, p. 3. Report presented at conference on “Treaty on European Union Reform – Mandate of Intergovernmental Conference – Legal and Political Analysis – Conclusions for Poland” 11 July 2007, Warszawa.

103 *Ibidem*

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