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KRZYSZTOF SKUBISZEWSKI (1926–2010)
PAR JERZY KRANZ

On 8 February 2010 Professor Krzysztof Skubiszewski passed away. He was one of the most prominent theorists and practitioners of international law, the first Minister of Foreign Affairs of newly-free Poland, and the Chairman of the Iran-United States Claims Tribunal in Hague. We said good-bye to a great Man, a statesman scholar, great Pole and European. He was an authority, one of those who taught by the example of his life.

Professor Skubiszewski was born on 8 October 1926 in Poznań, in the family of Ludwik and Aniela Leitberg. His father was a professor at the Faculty of Medicine of the University of Poznań. In his youth, Krzysztof Skubiszewski was deported with his parents and siblings to the General Gouvernement and spent the war in Warsaw and Biała Podlaska. He attended underground courses, and immediately after the war he started his studies at the Legal-Economic Department of the University of Poznań.

His master thesis concerned the questions of immunities and privileges of the representatives of member states and officers of the League of Nations and the United Nations. His PhD thesis, defended in 1950, was entitled "Conditions of Admission of a State to Membership in the United Nations". However, the communist authorities held that he used the "wrong methodology," and his thesis was published only in 2004.[1] In 1960 he defended his habilitation thesis, entitled "Money in Occupied Territory. A Study in International Law with Special Reference to German Practice."[2] In 1957–1958 he received the Diploma of Higher European Studies of the University of Nancy and *Master of Laws* from the Harvard Law School.

Until 1973 Professor Skubiszewski was connected with the faculty of law of the University of Poznań, where he was a lecturer of public international law. Due

[1] K. Skubiszewski, Warunki uzyskania członkostwa Organizacji Narodów Zjednoczonych (Conditions of Admission of a State to Membership in the United Nations), Poznań 2004.

[2] K. Skubiszewski, *Currency in Occupied Territory and the Law of War*, 9 Jahrbuch für internationales Recht, 1959–1960, pp. 161–197.

to the pressure from political authorities, which blocked his professorship (owing to his criticism of the intervention of the Warsaw Pact troops in Czechoslovakia), he had to leave the university. He started to work at the Institute of Law Studies of the Polish Academy of Sciences in Warsaw.

The achievements of Professor Skubiszewski are impressive indeed.[3] His publications delight with their depth, precision of arguments, evidentiary basis and style. The main subjects of his interests included the legal consequences of the Second World War (e.g. two books about the western Polish border[4]), law of international organizations (and particularly the role, significance and legal effect of resolutions of these organizations, including the question of the creation of law by the European Communities),[5] selected issues related to the sources of international law,[6] as well as questions on the use of armed forces.[7]

An important part of his writing career is made up of numerous publications on the relationship between international and domestic law. We still remember reso-

[3] The list of publications and the vicissitudes of his life presented in: *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski* Jerzy Makarczyk (ed.), The Hague, London, Boston 1996, pp. 11–58. For remarks about his career as a scholar, see: W. Rudolf, *Laudatio*, in: *Ehrenpromotion Krzysztof Skubiszewski*. Johannes Gutenberg-Universität, Fachbereich Rechts- und Wirtschaftswissenschaften, Mainz, 26 April 1991.

[4] K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (Western Frontier of Poland in the Light of Treaties), Poznań 1975; *id.*, *Zachodnia granica Polski* (Western Frontier of Poland), Gdańsk 1969; *id.*, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, Archiv des Völkerrechts, Vol. 23, 1985, pp. 31–41; *id.*, *The Great Powers and the Settlement in Central Europe*, Jahrbuch für öffentliches Recht, Vol. 18, 1975, pp. 92–126; *id.*, *Gdańsk and the Dissolution of the Free City*, in: *Recht im Dienst des Friedens. Festschrift für Eberhard Menzel zum 65. Geburtstag*, Berlin 1975, pp. 469–485; *id.*, *Poland's Western Frontier and the 1970 Treaties*, American Journal of International Law, Vol. 67, 1973, pp. 23–43; *id.*, *The Western Frontier of Poland and the Treaties with Federal Germany*, Polish Yearbook of International Law, Vol. 3, 1970, pp. 53–68.

[5] K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych* [Law-Making Resolutions of International Organizations], Poznań 1965; *id.*, *Resolutions of the General Assembly of the United Nations*. Institut de droit international, Annuaire, Vol. 61, part I, Paris 1985; *id.*, *Les techniques d'élaboration des grandes conventions multilatérales et des normes quasi-législatives internationales* (en collaboration avec Hans Blix). Institut de droit international, Annuaire, Vol. 57, part II, Basel 1978.

[6] K. Skubiszewski, *Les actes unilatéraux des Etats*, in: M. Bedjaoui (ed.), *Droit international. Bilan et perspectives*, Paris 1991, t. 1er, pp. 231–251; *id.*, *Der Rechtscharakter der KSZE-Schlussakte*, in: Drittes Deutsch-Polnisches Juristen-Kolloquium, Baden-Baden 1977, Vol. 1, pp. 13–30.

[7] K. Skubiszewski, *Quelques remarques sur la notion de force dans la Charte des Nations Unies*, in: *Mélanges Georges Perrin*, Payot, Lausanne 1984, pp. 293–301 ; *id.*, *Use of Force by States. Collective Security. Law of War and Neutrality*, in: M. Soerensen (ed.), *Manual of Public International Law*, London–New York 1968, pp. 739–854.

lutions pertaining to this issue which were adopted upon his initiative and subsequently transferred to the communist authorities. Those publications constituted a great contribution to the struggle for human rights and played an important role in the recognition of independent trade unions, significantly influencing the future constitutional provisions.

He dedicated many of his scientific works to the German problem. He defended the Polish *raison d'etat,* but was free from nationalism. He was deeply engaged in the improvement of the Polish-German relationship, being confident that focus on a tragic history and fostering of hatred were not good for better future. The foreign policy of the Federal Republic of Germany (FRG) and German legal doctrine did not make this an easy task. He was also one of the main architects of the permanent meetings (from the beginning of 70s) of German and Polish lawyers. In 1984 he received the prestigious Aleksander von Humboldt Foundation research prize.

Professor Skubiszewski owed his scientific position to his hard work and fair writings, and he never worked under political dictation, which was one of the most important reasons for his international reputation. He was respected and trusted by many distinguished scholars. In 1963-64 he worked as a visiting professor at the School of International Affairs the Columbia University in New York, and between 1971 and 1979 at the Faculty of Law of the University of Geneve, in addition to teaching in 1971/1972 at the All Souls College (Oxford). At the beginning of the 60s he received an offer from the Secretariat of the UN in New York, about which he later commented in an interview: "The communist authorities did not agree because I was neither the man of the Ministry of Foreign Affairs nor of the Ministry of Internal Relations, and I refused to engage in cooperation, which was expected."[8]

Professor Skubiszewski was not a man of politics, although he did not hide his political opinions. He expressed his political motto synthetically as a minister: "The state was a tool in the hands of the communist party. It was the negation of a normally functioning statehood. Today we all feel the results of the lack of a normal state and this will continue for a long time."[9] Before 1989 he was engaged in a specific issues related to democratization of Poland and Polish-German relations. He was a member of the independent trade union "Solidarność" (from 1980) and a member of the Primatial Social Council (1981–1984). He also represented Poland in the Coordinating Committee of the Polish-German Forum, while between 1986 and 1989 he was a member of the Consultative Council at the chairman of the State Council.

[8] Głos Wielkopolski, 2-4.04.1994, p. 3.
[9] Rzeczpospolita (interview), nr 266, 16.11.1989.

From 12 September 1989 to 26 October 1993 Professor Skubiszewski was the first Foreign Minister of post-communist Poland.[10] His activities during his tenure may be characterized as responsible and farsighted. He defined the Polish *raison d'etat* as the process of recovering political subjectivity and security without Russian domination, combined with normal (not special) relations with Russia on this new basis. He also opted for joining the NATO and the EU structures and thus overcoming of the post-Jalta division of Europe, with its spheres of influence. This was not an easy task, not only due to the resistance of Moscow and post-communist circles in Poland, but also because of the conservative position of the West, which lacked a clear and determined strategy to deal with the changes in Europe.

Minister Skubiszewski left behind a great legacy, and the changes that we owe to him came into effect in an atmosphere of trust in Poland as a reasonable and reliable partner. As an example, one may recall Polish participation in the negotiations over the reunification of Germany (the "2 plus 4" talks with Poland in Paris, July 1990); the establishment of new treaty relations with all neighboring states; initiating (1990) the two-track eastern policy, which established – independently from the central authorities of the USSR – contacts with the republics fighting for independence; the dissolution of Comecon and the Warsaw pact in 1991; the establishment of initial relations with NATO (1990) and the European Communities (1991); signing of the Association Agreement between the European Communities and the Republic of Poland (1991); establishment of the cooperation between the states of the Central Europe as well as cooperation within the Weimar triangle with Germany and France; and last but not least, the withdrawal of all Soviet troops from Poland (1993). The Minister was also a chief negotiator of the government in the talks over the concordat with the Holy See (1993).

Poland as the first post-communist State accepted the compulsory jurisdiction of the International Court of Justice (1990) and signed the Optional Protocol to the International Covenant on Civil and Political Rights (1991). Poland also became a member of the Council of Europe (1991).

The German issue became an important item in the agenda of Minister Skubiszewski. He decided, among the other things, not to apply the agreement that had been concluded between People's Republic of Poland and the German Democratic Republic (GRD) and to provide assistance to refugees from the GDR, and almost six thousand people left Poland for the FRG (this was still during Honecker's government).

[10] For more about those activities: K. Skubiszewski, *Polityka zagraniczna i odzyskanie niepodległości. Przemówienia, oświadczenia, wywiady 1989–1993* (Foreign Policy and regaining independence. Speeches, Statements, Interviews), Warszawa 1997.

When the prospects for German unification became more real, Poland asked for unequivocal confirmation of its western borders. Germany was quite ambiguous, pointing to the laws of the four Great Powers and Article IV of the treaty between the People's Republic of Poland and the FRG from 7 December 1970). Minister Skubiszewski perceived the unification of Germany as a positive development and saw it as a stabilizing factor in the new international order and not only as a bilateral issue. He was supporter of the full membership of unified Germany in the NATO structures (which was strongly opposed by the Soviet Union).

In appreciation of his efforts in improve the Polish-German relationship, Minister Skubiszewski received in 1992 the *Wartburgpreis* (together with the Ministers of Foreign Affairs of France and Germany, Roland Dumas and Hans-Dietrich Genscher), and in 2005 the *Pomerania Nostra* prize awarded by the University of Greifswald and the authorities of Szczecin. We should also mention that he was an author of the concept of a Polish-German community of interests, which was formulated in February 1990, i.e. still before the unification of Germany.

This new direction in Polish foreign policy proved to be correct in subsequent years and brought benefits to both Poland and Europe. In 1993 his closest colleagues said goodbye to the Minister by giving him an album with the following inscription "For the man who dared to be wise" (*sapere auso*). After completing his mission, Professor Skubiszewski did not, however, receive in Poland any offer which would allow for taking advantage of his experience in a public domain. One should also add that during the ministerial term, as well as after its completion, he was frequently attacked by those in both the post-communist circles and the right – he turned out to be too independent, too pro-European, and above all too wise.

The recognition of his achievements was reflected in his appointments to international judiciary bodies. From 1994 he was continuously the Chairman of the Iran-United States Claims Tribunal in Hague – the biggest international arbitration in history. This function required great knowledge and a high degree of diplomatic intuition. He was selected as an *ad hoc* judge in two ICJ cases (*East-Timor* and *Gabčíkovo-Nagymaros*), he also chaired (2004) the Permanent Court of Arbitration is the dispute *Pays-Bas c. France*.[11]

We should also mention his dramatic decision (1993) to withdraw his candidacy for a judgeship in the International Court of Justice. This was supposed to

[11] *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la Protection du Rhin contre la Pollution par les Chlorures du 3 décembre 1976* (sentence arbitrale du 12 mars 2004).

be the crowning achievement of his legal carrier. Needless to say that his resignation was motivated by the need to keep the Polish government stable.

In the farewell addresses at his funeral one may find the following expressions: "an architect of independent foreign policy of the Third Republic of Poland" and "a cofounder of the Polish route to the West". In the opinion of the Poland's first post-communist Prime Minister, Tadeusz Mazowiecki, "Krzysztof Skubiszewski was a person full of charm, representative of the Oxford class, which he represented in Poland. The language of his speeches and writings was beautiful. Clear thoughts. He avoided great words." His closest collaborators remember him as "a boss that you can be proud of".

His life was full of work and dedication to public ideals and intellectual tasks. This was accompanied by setting up high expectations for himself and modesty in terms of his own needs. He was characterized by inner discipline, diligence and honesty. He was distinguished but accessible, and while he did not abuse praises he was able to express his respect and gratitude. He was a Polish patriot but at the same time European, rooted in the culture of the Old Continent.

His existential and political opinions were well balanced. His was independent and tolerant. His life motto consists in the statement *leben und leben lassen*.

He experienced the totalitarianisms of his times. He and his family suffered from both the Nazis and Communists. However, he did not complain about this fate and tendentious attacks on his person after 1989.

While he was a realist, in respect to fundamental matters he was always uncompromising both in science and politics. His independence was based on European and Christian principles. He did aim at compromise neither for his own profits, nor in the name of illusive ideologies.

Service to Poland was his life *credo*, learnt from the tradition of his family home. This was true despite the fact that for a long time he was not able to serve the Polish State, which programmatically marginalized such people as Professor Skubiszewski.

His achievements as the Minister of Foreign Affairs created the foundations for a free Poland and new European order. Was he appreciated? Probably not entirely, because in Polish politics such personalities as his are always underestimated.

Ecclesiastes asks "What does a person gain from all the toil at which they toil under the sun?" (Ch.1 v 3). If one were able to ask Professor Skubiszewski whether it was worth it to endure the pain, he would probably answer that it was, despite the fact that sometimes this did not pay off.

Krzysztof Skubiszewski was a knight of the Order of the White Eagle and Grand Cross of the Order of Polonia Restituta, Grand Officier de la Légion d'honneur, pontifical Gran Croce, Ordine Piano as well as Großkreuz des Verdienstordens der Bundesrepublik Deutschland.

He was a member of the Polish Academy of Sciences, Polish Academy of Learning, *Institut de droit international*, *Institut de France – Académie des sciences morales et politique*, *Pontifical Academy of Social Sciences*, Curatorium of the Hague Academy of International Law and numerous Polish and international scientific societies, including honorary membership of the American Society of International Law (since 1991).

He received honorary doctorates from University of Ghent, Liège, Torino, Mainz, Genève and Cardinal Stefan Wyszynski University in Warsaw.

He did not rest during his life. However, he can rest eternally with the words *non omnis moriar*.

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OVERCOMING THE PAST BY INTERNATIONAL LAW

Abstract

The efficiency of international law in resolving historical problems depends on the belief of States in law as an implement for ordering their mutual relations. States' uniformity of views concerning the past, as well as their common expectations for the future, are decisive in the formation of this belief. Common appreciation of the past is of particular significance, because international legal rules and norms are the result of historical experiences. Consequently, lack of common vision of the past is responsible in practice for the discrepancy between Sein and Sollen.

As Philip Allott pointed out, international law is a bridge between our past and future. However, unless there is a common consent on history by states and nations, this bridge is fragile. As a result, rules and norms of international law are not able to overcome the toxic past of nations, as is evident in, e.g., contemporary Polish-Russian relations. What is more, lack of a common understanding of history by states and nations connected by a common past can even lead to an exacerbation of unresolved historical disputes. Recently, this has been demonstrated in the case of Kosovo, where the weakness of international law is manifested.

INTRODUCTION: INTERNATIONAL LAW AND HISTORY

Throughout history international law has played a twofold role. On one hand it served to create order in relations between states and nations, or at least tried to

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do so, and on the other it was for a long time a factor in legitimizing the domination of the European Civilization throughout the world.

The period of a European hegemony in the history of international law lasted until almost the nineteenth century. Until that time one could view international law as two parallel histories: i) the history of legal relations between the European states, and later also between Europe and the United States of America; and ii) the history of legal relations between Europe and the "uncivilised" nations.

The role of international law as an "order-creating factor" should be viewed in two separate time perspectives, namely in the context of the future and of the past. Considering the future perspective, its role is to set up the required (expected) normative path for stable international relations, whereas its task, taking into account the past, is to overcome problems rooted in historical experiences. This can be illustrated by the following metaphor: it may be said that international law is expected to operate as both a "doctor" (past) and "preacher" (future). Both perspectives are mutually related, since it is difficult to create stable projections for the future if past problems have not been resolved. Healing the burden of the past is necessary for the making of plans for recuperation in order to implement effective scenarios for the future.

The metaphor of a "bridge" referred to by Philips Allott, illustrating the relation between international law and history, is quite illuminating. He writes that "International law [...] is a bridge between the social past and the social future through the social present. [...] It is a form of law which is generated by a lawmaking process which transforms past events involving all human beings into present legal relations affecting all human beings. [...] International law is an actual potentiality of the human future."[1] Twentieth-century international law, based on the United Nations Charter, is to a large extent an effect of the attempt to overcome the imperial history of modern international law, and the current transformations in international law are largely a result of overcoming the inheritance of the Cold War.

From the sociological point of view, as opposed to a normative approach, from the very beginning international law undoubtedly aimed at ordering the past. Its norms were developed to a large extent in response to past facts. The authors of laws, by virtue of the legal norms that they created, tried to neutralize the effects of the past. This means that at each stage of its development international law has been the result of particular historical processes, the understanding of which is essential so that an all-embracing exegesis is not prone to failure. A rhetorical question may be posed as to whether an exhaustive description and understanding

[1] P. Allott, *International Law and the Idea of History*, 1 Journal of the History of International Law 1 (1999), p. 1.

of the decolonization phenomenon is possible without reference to the colonial history of the law of nations. Whether international law is only a passive consequence of the past, or is a factor capable of transforming the present and the future in a constructive way, depends on the expectations accompanying this process. And these are varied. International law is quoted both by those attempting to maintain the *status quo* as well as those attempting to change it.

This study aims to assess the potential and actual capability of international law to overcome past problems, taking into account its aims, principles, methods and measures. This "capability" to overcome problems of the past – at the universal, regional, and bilateral levels – constitutes the essential identity of international law; the *raison d'etre* for its existence. The presently-existing norms, institutions, and mechanisms – whose origins must be sought in the past – have come into being as a by-product of this *raison d'etre*. Actual or planned reforms of international law occur in response to the need to overcome its own past. At this point the focus of this article is on the main, systemic problems of international law that have grown up around its past and on the attempts to overcome them. And one of the first problems that needed to be overcome was the Europocentric beginnings of common international law, which may be deemed responsible for the imperial period in its history.

1. THE ORIGINS OF INTERNATIONAL LAW AND PROBLEMS ASSOCIATED WITH OVERCOMING ITS OWN PAST

International community is a phenomenon that is chronologically and logically a prerequisite to international law as understood today. Relations between the first states were governed by principles different from those presently creating international law. Hence the difficulty in tracing the beginnings of international law, where even generally accepted findings in this respect are not unquestionable. For instance, the oldest international agreements known today, namely the treaty between the Mesopotamian city-states of Lagash and Umma dating back to 3100 BC and the Peace and Alliance Treaty concluded between Ramesses II and Hattusilis of 1292 BC, were religiously sanctioned; the gods of the parties were the guarantors of those treaties. A similar practice was applied also in "younger" antiquity, e.g. relations between Greek *poleis* and extending into the Middle Ages.

Another type of difficulty in determining the origins of international law arises from the configuration of legal and political relations between the then-states, which was absolutely different from the contemporary paradigm. First, in antiquity and in the Middle Ages there was no single, universal international community; instead the world was divided into several regional international communities.

Therefore by definition there was no universal law of nations. Secondly, relations between states were not based on the principle of equality but rather on the privileged position (hegemony) of one entity. This was characteristic for ancient international relations in the Mediterranean area dominated by the Roman State, for Medieval Europe organized around the feudal system, for the Islamic world, and for the Far East, which until the nineteenth century was based on the hegemony of the Chinese Empire. It is essential to keep these historical facts in mind in order to establish the origins of international law, since the characterisation of legal relations between nations was based on the prerogatives, orders and privileges of a sovereign who enjoyed the position of a hegemonic ruler in certain cultural and political circles (respectively: in the Roman Empire, feudal Europe, the Muslim world, and the Far East). These relations were certainly not based on international law as it is understood today. The problems indicated above show that, as Onuma Yasuaki[2] rightly notes, the issue of establishing the origins of international law may not ignore the problem of the notion of international law as such.

Looking at the history of international law from a descriptive perspective, the law regulating relations between even unequal entities may be qualified as international law. From a normative perspective, in which attempts are made to define the nature of "internationality" of law, normative systems binding at particular stages in the development of international relations should not be reduced to a single common denominator. In fact, every historic era had its international law, which in the European civilization is reflected by the names given to it in subsequent eras: *ius fecialis*, *ius gentium*, *ius inter gentes*. Therefore, earlier phases in the development of the law of international communities should not be equated with contemporary international law, which is based on the principle of equality of its subjects, i.e. states.[3] Currently the equality of states as regards ideas and norms is manifested in their sovereign equality. The development and integration of the concept of sovereignty in international relations creates a boundary line separating the pre-modern law of nations from the law culminating in the modern system

[2] O. Yasuaki, *When was the Law of International Society Born? – An Inquiry into the History of International Law from an Intercivilizational Perspective*, 2 Journal of the History of International Law 1 (2000), pp. 1, 2.

[3] *See e.g.* H. Steiger, *From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law*, 3 Journal of the History of International Law 180 (2001), pp. 180–181. Also Arthur Nussbaum, in the preface to his classic treatise on an history of the law of nations, draws attention to the essential difference between the ancient or medieval *ius gentium* and contemporary international law. A. Nussabaum, *A Concise History of the Law of Nations*, rev. ed., Macmillan Company, New York: 1961, p. ix.

of international law. This boundary should be sought at the end of the Middle Ages; at least it may be said that in the sixteenth century the idea of sovereignty was well established in international relations, even though in the doctrine it is said that it the Peace of Westphalia marked a breakthrough in this respect.[4]

An additional difficulty in establishing the origins of international law is connected with the "European" history of that law, which today makes it a 'heritage' for some and a 'burden' for others. Europocentrism has undoubtedly played a decisive role in the historical development of international law. Its significance, among other things, is reflected in the equation of the principles of European civilization with general civilizational standards at the time when a common international community was forming, i.e. in the nineteenth century. Nations which in the opinion European states were unable or did not want to comply with these standards were deemed "uncivilized". It is no coincidence that the statute of the elite Institute of International Law, established in 1873, referred in art. 1(2) to the "legal consciousness of a civilized world" (*conscience juridique du monde civilisé*). In the nineteenth century international law was strongly perceived as a European phenomenon and *ius publicum Europaeum* was considered as superior to analogical law in other parts of the world.[5]

At present Europocentrism is often viewed as demeaning to other cultures. The appellation itself of European international law is *ipso facto* offered as proof of prejudice and chauvinism, the result of a belief in the racial, cultural and religious superiority of Europe.[6] It is true that the European point of view, tending to present European values as universal, can raise reservations. However, it should be kept in mind that although civilizations other than European ones created law regulating

[4] However, it is worth pointing out recent attempts to revise the meaning of certain – as it would seem – commonly accepted facts in the history of international law. This also applies to questioning the significance of the peace of Westphalia to establishing the idea of a state sovereignty and for placing its origins in later period. *See e.g.* S. Beaulac, *The Westphalian Legal Ortodoxy – Myth or Reality?*, 2 Journal of the History of International Law 148 (2000), *passim*.

[5] This view was commonly accepted in almost all then-contemporary science of international law. It may be found in the treatises of Wheaton, Lorimer, Westalk, von Martens, Blumtschli, Heffer, Rivier, Nys or Oppenheim. *See generally* M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge: 2002, pp. 11–97.

[6] *See e.g.* O.V. Butkevych, *History of Ancient International Law: Challenges and Prospects*, 5 Journal of the History of International Law 189 (2003), pp. 208–217; M. Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16(1) European Journal of International Law" 113 (2005), pp. 114–118; Yasuaki, *supra* note 2, pp. 22–27, 39–50; A. Orakhelashvili, *The Idea of European International Law*, 17(2) European Journal of International Law 315 (2006), *passim*.

mutual relations, no institutions or principles capable of developing international law were established by them. The accession of non-European nations to the universal international community on principles created by the European legal culture is not a matter of opinion, but a fact.[7] A number of the present legal international institutions and principles have their roots in this culture and the works of Europeans – Vlodkowic, Vitoria, Gentil, Suárez, Grotius, Puffendorf, Wolff or Vattel – have been the source of inspiration and constitute milestones in the intellectual panorama of international law. Although it is true that until common international society was established, Europe had created only one of several normative systems in international relations (in this sense Europocentrism aspiring to universalism is a false cognitive position), the European system turned out to be the strongest and most influential. Therefore any lectures on international law and its science which marginalized or omitted European accomplishments would be essentially incomplete.[8]

As a consequence of the domination of European values and legal institutions, the present day universal nature of international law appears somehow problematic. The question poses itself: Is international law an expression of real or only of "false" universalism?[9] This issue gives rise to a related question concerning the necessity of revising the history of international law from the inter-civilization perspective, as is postulated by Onuma Yasuaki.[10] In any event the debate over the capability of modern international law to overcome its own past remains open.

[7] This was emphasized by *e.g.* S. Hubert, *Zarys rozwoju nowoczesnej społeczności międzynarodowe* (An Outline of Development of Modern International Society), Biblioteka Szkoły Nauk Politycznych UJ, Kraków: 1949, p. 9. It is also confirmed by Onuma Yasuaki (*supra* note 2, pp. 54–57), who points out the traps of Europocentrism – particularly the one connected with projecting the legal state of the times into the universal international community in the past. Therefore he postulates re-writing international law history again, but from the inter-civilization perspective. *See also* a discussion concerning Onuma's thesis: *Symposium. Onuma Yasuaki's "When was the Law of International Society Born?"*, 6 Journal of the History of International Law 1 (2004), pp. 1–149.

[8] *Cf.* W.G. Grewe: *Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des 'europazentrischen' Bildes der Völkerrechtsgeschichte*, 42 ZaöRV 449 (1982), pp. 449 *ff*; J.M. Kelly, *A Short History of Western Legal Theory*, Oxford University Press, Oxford: 1992 [Polish translation: *Historia zachodniej teorii prawa*, trans. D. Pietrzyk-Reeves *et al.*, WAM, Kraków: 2006, pp. 178–180]; S.C. Neff, *A Short History of International Law*, in M.D. Evans (ed.), *International Law*, Oxford University Press, Oxford 2003, pp. 31 *ff*; Steiger, *supra* note 3, p. 180; J.H.W. Verrzijl, *Western European Influence on the Foundation of International Law*, in id., *International Law in Historical Perspective*, vol. 1, Sijthoff, Leyden: 1968, pp. 435 *ff*.

[9] *See* Koskenniemi, *supra* note 6, p. 116; id., *What is International Law for*, in Evans, *supra* note 8, pp. 108–109.

[10] Yasuaki, *supra* note 2, pp. 61–66.

Therefore let us try to determine the origins of a legal framework for a universal international community and clarify certain areas of modern international law. Above all this concerns the phase of development of the law of nations, in which European states attempted to create a legal framework for the relations between states and nations from other parts of the world. In this respect it will be helpful to track the idea of the law of nations on the eve of modern times in terms of its scientific principles, since often ideas are more useful that an examination of practices in discovering and explaining already established social reality.

If we draw attention to the idea of the law of nations as reflected in the thought of its modern "founding fathers", we will trace its roots to the Christian intellectual heritage. Its influence on the science of the law of nations varied over time; starting from the apologetic approach to theology and catholic dogmatism of the fifteenth century Polish school and the sixteenth century Spanish school, and ending with clear attempts to secularize the science of the law of nations in Gentil and Grotius. The Catholic doctrine was the source of a belief in the cultural inferiority of non-Christian nations, and later in the nineteenth century of the conviction that they were incapable of accepting the "civilized" law of nations. In this sense Christian Europocentrism remains responsible for the exclusion of non-Christian nations from the circle of beneficiaries of the law of nations. As a result Europoentrism constituted an essential impediment to treatment of the international community based on the principle of pluralism.

This exclusiveness of the European law of nations was visible even in the thought of Francisco de Vitoria, who is considered one of the most important founders of its inter-civilization perspective. Vitoria, it must be stressed, did not perceive the law of nations from the perspective of divine law as contemporary tradition held, but he did place it within the scope of natural law. According to him the law of nations was what "natural reason established among all the nations."[11] At first glance this definition points to the universalism of the law of nations, which would in fact be significant considering the development of Vitoria's views in the context of the presence of Spaniards in the New World. Unfortunately Vitoria's argument led to a different conclusion, because it points to the application of differing standards to "civilized" (Spaniards) on the one hand, and the autochtonic nations of America on the other. In fact the emphasis put by Vitoria on civilizational differences excluded universalism in the law of nations. His law was based on medieval Christian principles recognized by Vitoria as universal standards. This is particularly visible in the part of his treatise on *ius ad bellum*. On the one hand

[11] F. de Vitoria, *De Indis et de Iure Belli Relectiones*, The Classics of International Law, Carnegie Institution of Washington, Washington, DC: 1917, p. 151.

Vitoria denies American Indians as non-Christians the right to unleash and wage "just war", whereas on the other hand he recognizes as just the war conducted by the Spaniards, as "ambassadors of Christianity", to protect the Indians "against themselves" and convert them to Christianity.[12] As a result Vitoria, applying the criterion of affiliation to Christian society, denied the autochtonic people the status of a legal entity equal to Spaniards.[13]

The pursuit of equality of nations, including those other than from European civilization, may be deemed as the real beginning of universal international law. The origins of this equality may be observed in views of the fifteenth century Polish school. Stanislaw from Skarbimierz and Pavel Vlodkovic explicitly supported the right of all nations to coexist in peace. Similar views were expressed by Bartoloméo de Las Casas, contemporary to Vitoria. It is to the Polish school and the treatise of the "father of Indians", and not the more famous Vitoria, where one should look for the origins of contemporary international law as a law in which pluralism and equality of entities creating the international community are essential values. In this context it is worth noting that the views of the authors mentioned above are strongly rooted in the Catholic doctrine. This would prove after all the ability of Christian thought to justify the universalism of the international community.

Seventeenth and eighteenth century classics also emphasized, at least literally, the universal character of the law of nations. This resulted from the considerable influence of the natural law doctrine on contemporary thinking about international law. As natural law was recognized as universal, so too the law of nations was presented in an analogous way. And in this manner Gentili based his lecture on the law of war on the axiomatic assumption that this law was applicable to "a community formed by the entire world and the whole human race."[14] Grotius defined the law of nations as the law applied in relations between all states or their considerable parts. According to Grotius it derived its binding force from the will of nations or their "large number" and was to be beneficial for the whole international community.[15] Francisco Suárez, a Jesuit, considered that law which "all peoples and various nations should observe in mutual relations" as the law of nations.[16] Similar

[12] *Ibidem*, pp. 155–157, 186.

[13] For more on Vitoria's views in this respect, *see* A. Anghie, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge University Press, Cambridge: 2005, pp. 13–31.

[14] A. Gentili, *De Iure Belli Libri Tres*, The Classics of International Law, Clarendon Press-Humphrey Milford, Oxford-London: 1933, I.2.

[15] H. Grotius, *De Iure Belli ac Pacis Libri Tres*, Scientia-Verl., Aalen: 1993, prol. 17; I.I.14.

[16] F. Suárez, *De Legibus ac Deo Legislatore*, The Classics of International Law, Clarendon Press, Oxford: 1944, 2.19.8-9.

opinions were presented by Samuel Pufendorf[17] and Emer de Vatell, the latter of whom defined the notion of the law of nations in the title of his main treatise.[18] However the question arises whether the declared universalism of the law of nations of the time was not merely a false universalism, i.e. Europocentrism aspiring to be universal. In other words, did the modern European law of nations serve only to justify the imperial policies of European states? Considering the practices followed at the time, a number of arguments may be found in favour of an affirmative answer to the questions posed.

In the beginnings of the development of the law of modern community, the treaties ending the Thirty Years' War are considered as a breakthrough, as the law established therein served a regulative function in international relations from the perspective of order, defined through the prism of privileges and interests of great empires. In this context it is worth noting that this diagnosis also applies to international law under the regime of the United Nations Charter. In this sense the so-called Westphalia system, based on the hegemonic position of empires, is not only the relic of the past as it is sometimes assumed to be. Just as the Holy Alliance and the Concert of Europe were the institutional embodiments of this system, so too was the position of so-called allied and associated powers after World War One, and the institution of permanent members of the Security Council at present.[19]

At this point the differences between modern and twentieth century international law are not essential. What is critical is the state-centralism of the modern international legal order, which raises the question whether this feature of international law will allow it to be capable of performing the function of overcoming the past. This issue will be discussed below. However, the initial conditions that must be met by international law if it is to serve this function need to be mentioned

[17] S. Pufendorf, *Elementorum jurisprudentiae universalis libri duo*, The Classics of International Law, Clarendon Press, Oxford-Washington, DC: 1931, XIII.24.

[18] E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, vol. 1-3, Carnegie Institution of Washington, Washington, DC: 1916. It is worth recalling that Vattel's view on the law of nations were largely inspired by Christian Wolff's ideas. *See* Ch. Wolff: *Ius gentium methodo scientifica pertractatum*, The Classics of International Law, Clarendon Press, Oxford-Washington, DC: 1934.

[19] *Cf.* R. Bierzanek, *Stanowisko wielkich mocarstw w prawie międzynarodowym* (A Position of Great Powers in International Law), 5-6 Państwo i Prawo 57 (1946); K. Wolfke, *Great and Small Powers in International Law from 1814 to 1920*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 1961, *passim*; G. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge: 2004, *passim*; U.K. Preuss, J. Schmierer, P.-T. Stoll, *Rola prawa międzynarodowego w zglobalizowanym świecie* (The Role of International Law in Globalized World), Fundacja Heinricha Bölla w Polsce, Warszawa: 2006, pp. 11–15.

at the outset. These include stability and predictability of law, which as history demonstrates are often disturbed when states abuse their central position in the international legal order.

Modern international law has created a legal framework for relations between European states and other parts of the world which may be dubbed a "toxic history of international law." This should be kept in mind, particularly in the context of the function of international law to overcome the past. If international law is capable of overcoming its own history, this would give credence to its role as a critical player in solving the problems of its entities' past histories and facing up to what is euphemistically termed "new challenges". Thus the most important aspects of this "toxic history of international law' need to be examined.

The modern law of nations was *lex imperfecta* for a number of reasons. Two of them require special attention. First, this law in fact created no barrier for the superpower aspirations of European states in Europe itself. The configuration of mutual relations between them was not determined by norms prohibiting certain acts, but only by the "equitable balance of powers", first referred to in the Treaty of Utrecht (1713) which ended the War of the Spanish Succession. The balance of powers in connection with the privileged positions of certain states became the main vector of the modern international order. There was no place for equality of all states vis-à-vis their sovereignty. A second imperfection of the modern law of nations was manifested in relations based on the unequal rights of European and non-European states. This situation, and overcoming it, are of particular significance for the development of universal international law. Therefore its most important aspects should be considered.

The political and legal hegemony of Europe in modern international relations may be illustrated by the practice of so-called capitulation agreements. They provided for unilateral rights for European states, including privileged treatment of persons and possessions on the territory of the other party. At the beginning such agreements were concluded with Turkey, and gradually they expanded to the east to include the unquestionable hegemonic leader of the Far East i.e. the Empire of China.[20] Such agreements also existed at the beginning of the twentieth century.[21] Any attempts by states to release themselves from such obligations were perceived by European powers as *casus belli* and therefore as a cause for imposing further

[20] *See* Yasuaki, *supra* note 2, pp. 51–54.

[21] *See* Treaty of Friendship and Trade of 10th January 1908 between the Empire of Ethiopia and the Republic of France in *Wybór źródeł do nauki prawa międzynarodowego* (A Selection of sources for learning of international law), ed. by B. Winiarski, Kasa im. Mianowskiego, Warszawa: 1938, pp. 129–130.

obligations. They had the form of international agreements, but in no way overcame the past. Rather, they created favourable conditions for the exacerbation of unresolved problems.[22]

Even less creditable was the practice adopted by Europeans with regard to the peoples inhabiting the lands discovered in America, Africa and South Asia. It was based on the principle, according to which any discovery was treated as legal title to a given territory. Discovered land was perceived and acknowledged as *res nullius*, and as a result the autochthonic population was denied any right to territorial sovereignty. Acts characteristic for the era of colonization, and which conventionally established its time frame, include the bull issued by Pope Alexander VI in 1493 that divided discovered America between Spain and Portugal and the General Act of the 1885 Congress of Berlin dividing Africa.[23] The General Act of the Congress of Berlin was adopted by the forum at "a closed congress" session, which was typical of almost the entire nineteenth century international relations, first directed by the Holy Alliance and then the Concert of Europe.

2. THE POTENTIAL OF INTERNATIONAL LAW TO OVERCOME THE PROBLEMS OF THE PAST

The dominant hegemonic approach in modern international law gave birth to a past history which international law had to overcome in order to become universal, meaning that not only the hegemonic powers but all states would benefit from it. Changes in this respect were clearly marked by the principle of the equality of states under the law, a principle which was under development already in the nineteenth century.

The beginning of this process should be sought in the formation of the first universal international organizations: the International Telegraphic Union, Universal Postal Union, International Bureau of Weights and Measures. The international congresses convened to establish these organizations applied the principle of equal rights for all participants. It is also worth noting that the phenomenon of universal

[22] *See e.g.* Final Protocol to the Agreement of 7th September 1901 between Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, Netherland, Russia, Spain, United States and China on the Settlement of the Disturbances of 1900, which was humiliating for China. Available at http://en.wikisource.org/wiki/Boxer_Protocol.

[23] The Act of the Congress of Berlin was later replaced by the Convention concerning subtropical Africa of 10th September 1919, which is a sign of the continuation of the colonization process into the twentieth century. On the international legal aspects of colonialism, *see e.g.* Anghie, *supra* note 13, pp. 32–114.

participation of states in diplomatic conferences aimed at codifying international law also began to develop during this time. Among them, those conferences that should be mentioned include the Geneva Conferences on the laws of war (1864, 1868, 1906) and of course the Hague Peace Conferences in 1899 and 1907. The latter was universal in the full sense of the word, as all the then-existing states (44) took part in it.

The phenomena mentioned above went far towards establishing a universal international community. At the Second Peace Conference in Hague the term "sovereign equality of states" was officially used;[24] without this notion it would be difficult to imagine the present-day international community. It was also at this Conference that a very important agreement against political expansion of the European states was signed, namely the Convention of 18th October 1907 Respecting the Limitation of Employment of Force for Recovery of Contract Debts.[25] Another important step in overcoming the past was marked by the founding of the League of Nations – the first universal organization entrusted with certain general powers. Wilson's speech to the Congress delivered on 8th January 1918, which ideologically initiated the founding of the League, expressed an unshakeable belief in the role of international law in international relations. Paragraph fourteen of the speech declared "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." Although Wilson's grand idea was never carried into pracatice in its entirety by the League of Nations, the Statute of the League of Nations afforded the opportunity to enforce and equalize the legal positions of all states. Thereby it may be considered as a turning point in overcoming the history of the law of nations, which previously protected the rights and interests of only the great powers. Equality before the law as an element of overcoming "toxic" history started to play the role of "a weapon in the fight for the justice". This was expressed by the Permanent Court of Arbitration, which in one of its judgments during this period emphasized that "International law and justice are based upon the principle of equality between States".[26]

[24] P.J. Baker, *The Doctrine of Legal Equality of States*, 4 British Yearbook of International Law 1 (1923–1924), p. 1.

[25] This convention was based on the so-called Calvo-Drago doctrine, questioning the legality of foreign armed interference in order to execute payment of foreign debts. This doctrine originated in connection with the intervention of Great Britain, Germany and Italy in Venezuela in 1902.

[26] *Norwegien Shipowners' Claims*, 1 RIAA 331 (1922), p. 338. For more on the development and importance of the equality principle, *see generally* P.H. Kooijmans, *The Doctrine of the Legal Equality of States. An Inquiry into the Foundations of International Law*, Sijthoff, Leyden: 1964, *passim*.

The establishment of the principle of equality under the law failed to fully compensate for the past, owing in large part to the ineffective operation of the League of Nations. However this principle has been accepted by the United Nations Organization with the "benefit of inventory". The Charter and the Declaration of the Principles of International Law (1970) recognized this principle as fundamental for the international legal order, which augmented the position of international law as a factor in overcoming the past. Significantly, without recognition of the legal equality of parties which use legal measures in establishing mutual relations, both on a universal and bilateral scale, the tenacious resolution of historical problems is doomed to failure.

It should be kept in mind that the League of Nations started the incredibly important process of decolonization. The mandate system provided for in Art. 22 of the Covenant of the League of Nations was meant to allow the earlier colonies of Germany and Turkey to change their legal status, i.e. to eradicate an effect of the "imperial" past of the law of nations. While the effects of decolonization efforts in the League of Nations were rather poor – only one colony became a state, i.e. Iraq – the UN activities in this respect led to the wholesale decolonization of so-called trust territories, including the mandated territories of the League and almost all dependent territories. International law under the Charter regime, owing to its norms (the right of self-determination), institutions (General Assembly, Trusteeship Council) and court mechanisms (advisory opinions and judgments of the International Court of Justice) proved its ability to face its rather disgraceful history. The question whether, as regards the colonial heritage, it has been fully overcome cannot yet be unequivocally answered. On one hand, the decolonization process may be acknowledged as completed, but on the other hand it created new legal and political problems. Two of them are worthy of mention: 1) the *uti possidetis* principle was originally supposed to offer stability and the inviolability of frontiers to the newly emerged post-colonial states, but it resulted in establishing frontiers which were often artificial or which ignored historical and cultural factors, which is particularly visible in Africa. This has given rise to disputes and conflicts between those new states which came into being as a result of decolonization; 2) the principle of the right to self-determination, which served as the legal and political basis of the decolonization process, over time began to be invoked by various secessionist movements in various parts of the world which viewed this principle as justification for state-formation processes not connected with decolonization. As a result in some cases internal problems may become international, Kosovo being a spectacular example of such a situation today.

Attempts to overcome the colonial history of international law show that legal norms alone are insufficient for international law to be an effective order-making

factor in international relations. It also depends on the context in which these norms exist and what entities apply them. These norms have been interpreted very differently by, for example, those states administering colonial territories, and liberation movements or states which came into being as a result of decolonization.

At this point we return to question of the influence of state-centralism in international law on its role in overcoming the past. This issue raises the question whether states do not appropriate the past to protect or even to strengthen the *status quo*. If so, then the function of international law as a link between the past, the present and the future, expressed in the metaphor of a "bridge" quoted at the beginning of this analysis, is undermined.

The sticking point is that the past is not perceived or assessed by entities creating and applying international law in the same way. For one set of entities the past is a burden and international law should cut off from it and in this sense overcome it, while for another set of entities it is a heritage that should be preserved. The function of international law as a fixed system of norms becomes of secondary importance when taking into account subjective evaluations of the past and trying to reach consensus on which parts of history need to be overcome. One may venture the thesis that international law can be effective only if it is created and established by entities which evaluate the past in the same way. Only in this sense can international law be recognized – as Thomas M. Franck[27] defined it – as an expression of communication among various states which share common views on expected future behaviour. With no consent on the evaluation of the past, common beliefs concerning the future are not possible. Only after entities bound up in a common past reach a common perspective can norms, institutions and legal measures for the settlement of disputes be capable of serving the function of preventing the problems of the past from exerting a negative impact on the present and future. A consensus on the evaluation of the past is a thus a necessary condition required for overcoming it, both on a universal and bilateral scale. The broader and more comprehensive the consensus is, the greater the chances for overcoming the past by international law.

Let us now consider a couple of well known examples in order to illustrate the theses presented above. The Preamble to the United Nations Charter reflects a consistent evaluation of certain aspects of the past by all members of the United Nations: "We the peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the

[27] Th.M. Franck, *The Power of Legitimacy among Nations*, Oxford University Press, Oxford-New York: 1990, p. 39.

dignity and worth of the human person, in the equal rights of men and women and of nations large and small...". The excerpt from the Charter quoted above expresses a consistent evaluation of the past, which was not only a motive for establishing the United Nations but also a sign of belief in the capability of international law to overcome the past through new regulations aimed at eradicating the "mistakes of the past". The Preamble should be considered as agreement on the fundamental reasons for such aims and objectives of the Charter as: the maintenance of international peace and security; settlement of international disputes and problems by peaceful means; promotion of human rights; and achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character. According to the Charter, international law was to be the main factor civilizing the relations between nations. However, its full potential has not been brought into play due to differing expectations with regard to this law by the entities construing and applying it. One should also not underestimate the quantity and quality of changes in international society which have occurred as a result of the enlargement arising out of decolonization, and the status of the permanent members of the Security Council and their role in applying the Charter.

Another example of a unanimous evaluation of the past is the above-mentioned decolonization principle. The UN Charter is not the manifestation of its recognition. Special attention should also be drawn to the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which in its preamble expresses, among other things, the belief of the General Assembly that "increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples (...) constitute a serious threat to world peace" and "the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace".[28]

A similar unanimous view on the "toxic" past can be found in the major international law acts on the protection of human rights, or in other areas in which attempts are made to eliminate negative phenomena arising from the past, e.g. in the area of environmental protection. This reinforces the conclusion that a common position on the evaluation of the past on a universal scale is a necessary condition for establishing peremptory norms of international law. Such a unanimous evaluation should be seen as the cause for the existence of such

[28] Available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement.

norms as the prohibition on use of force or on the threat to use force, prohibition on intervention in matters which are, according to international law, within the domestic jurisdiction of any state, prohibition on colonial dominance, prohibition on violation of fundamental human rights, and the prohibition against the violation of the territorial integrity of a state.

In considering the role of international law in overcoming the past one should also bear in mind mechanisms for the settlement of disputes, and above all the court procedures that accompany such mechanisms. In this respect the role of the international judiciary system remains ambiguous. On one hand, the very fact of the establishment and operation of international and "mixed" criminal courts needs to be appreciated. Holding perpetrators of war crimes, genocide and crimes against humanity responsible for their deeds is also a factor that contributes to overcoming the past, without which it would not be possible for feuding states to develop favourable prospects for the future. On the other hand, we have to recognize the unused potential of the International Court of Justice. Its jurisdiction is recognized as mandatory only by a third of all states. Moreover a number of declarations made under Article 36 (2) of the Statute of the International Court of Justice contain reservations which in practice exclude cases of "vital" importance to states from its jurisdiction. It is precisely the exclusion of these cases of "vital" importance that does not allow for an objective evaluation of the past, and as a result international law is often not capable of playing the role of a factor in overcoming the past, neither in the universal nor bilateral dimensions. Is it really possible to posit that the history of "third world states" has been overcome, without considering the disputes on the causes of their economic backwardness and measures adequate to reduce it? Is it not an expression of the powerlessness of international law that, as a resulting of divergent evaluations of the past and *raison d'État,* disputes on the legal classification and moral evaluation of crimes such as the Armenian Genocide or Katyn massacre cannot be adjudicated?

The comments made above may have an appearance of generality, and thus a kind of abstractness, if they are not viewed in concrete contexts. Thus the successes and failures in overcoming the past will be presented against the background of selected problems involving the entire international community, as well as problems relating directly to bilateral relations. These will include two law-making processes that drew the attention of international community at the time, namely East Timor and Kosovo, and relations between Poland and Germany and Poland and Russia.

3. STRENGTHS AND WEAKNESSES OF INTERNATIONAL LAW IN OVERCOMING THE PAST IN THE UNIVERSAL DIMENSION. CASE STUDIES: EAST TIMOR AND KOSOVO

3.1. East Timor

The East Timor case, similarly as the case of Kosovo, combines a few core principles of international law, namely those connected with decolonization, the right to self-determination, and the creation and recognition of a new state. In the analysis which follows, the legal interpretation of the problems discussed above is not the most important aspect. Rather, it is essential to demonstrate the unequivocally positive role played by international law in eliminating the effects of the illegal occupation of Timor.

The incorporation of East Timor into Indonesia in 1975 was not accepted by the international community, and hence Timor *de iure* remained non-self-governing territory under Portuguese administration. This may be confirmed even by the complaint submitted to the International Court of Justice, in which Portugal alleged that Australia had brought into question the right to self-determination of the Timorese population by concluding an agreement with Indonesia on the delimitation of the Timorese continental shelf.[29] In 1999 the legal status of Timor began to emerge from its limbo state. On 5th May 1999 two agreements on universal consultations on the future status of Timor were concluded: one being the agreement between Indonesia and Portugal, and the other an agreement between the UN on the one hand and Indonesia and Portugal on the other. On 25th October 1999 the Security Council, under Chapter VII of the Charter of the United Nations, adopted resolution 1272 establishing a United Nations Transitional Administrator in East TIMOR (UNTAET).[30] This body was entrusted with a mandate for temporary administration of Timor, including the right to enact and apply laws (sections 2, 3, and 6 of the Resolution).[31] The date originally planned for the completion of the UNTAET operation (31st January 2001) was postponed until the election in Timor, held in May 2002. In that election the people chose independence,

[29] See *East Timor* (Portugal v. Australia) [1995] ICJ Rep 90.

[30] S/RES/1272 (1999).

[31] In this context, the question arises of a lack of judicial control over the legal acts enacted by international transitional bodies administering Timor and Kosovo, and of its effect with respect to protection of human rights in administered territories. *See generally* J. Werzer, *The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor*, 77(1-2) Nordic Journal of International Law 105 (2008) *passim*.

and as a result Timor gained the status of a state. UNTAET was replaced by a United Nations Mission of Support in East Timor (UNMISET), established under Security Council resolution 1410 of 17th May 2002.[32] The mandate of the mission included assistance in establishing state administrative structures.

In the context of overcoming the past, it is worth noting that UNTAET established special panels of judges with jurisdiction over serious criminal offences committed on the territory of Timor in 1999, including genocide, war crimes, crimes against humanity, murder, sexual offences and torture (section 14 of the UNTAET Regulation no 2000/15).[33] It was rightly acknowledged that individual criminal responsibility for the crimes enumerated above would contribute to stability in Timor. Although the Timorese panels of judges were not typical international courts,[34] but rather so-called "hybrid" courts (established under international law but applying domestic law and of domestic-international composition), their existence confirmed the large degree of flexibility of international legal measures in responding to "emergency needs". The criticism concerning the operation of the panels of judges expressed by international society did not seem to weaken their importance, and the Timorese panels of judges served as a model for the process of creating mixed criminal courts (in Kosovo, Sierra Leone, Iraq, Bosnia and Herzegovina, Cambodia), which in territories affected by conflicts have come to be considered as an important factor in settling accounts with the past.

The mechanisms and institutions outlined above show that international law has a large potential to eliminate negative effects of the past. At the same time the case of East Timor shows that the effectiveness of international law in overcoming the past is conditioned upon the consent of the entire community of states to a specific legal solution. A unanimous evaluation of the past is a necessary condition. Without a consensus on ending the illegal occupation of Timor, it would not have been possible to set up an international administration there or to establish panels of judges, nor to stop the colonization of this territory.

The case of Timor also reveals a new feature of international law which is of great significance in overcoming the past, the so-called *ius post bellum. The Responsibility to Protect* – a well-known report of 2001 issued by the International Commission on Intervention and State Sovereignty calls it "the responsibility to rebuild".

[32] S/RES/1410 (2002).

[33] *See also* Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59, para. 153.

[34] *See generally e.g.* S. de Bertodano, *East Timor: Trials and Tribulations*, in C.P.R. Romano, A. Nolkaemper, J.K. Kleffner (eds.), *Internationalized Criminal Courts*, Oxford University Press, Oxford: 2004, p. 79 *ff.*

These terms are understood as a set of international legal measures allowing the international community to undertake stabilizing and supportive actions on territories where armed conflict took place, without regard to its legal qualification (international, internationalised, internal). It should be noted however that the involvement of the international community alone does not guarantee that the past will be overcome successfully. In this respect a concord of the state communities involved on the future status of the conflict-prone territory is a decisive criterion. While such a consensus was obtained in the case of East Timor, it was not reached with regard to Kosovo, a case which reveals the structural weakness of international law resulting from its state-central character.

3.2. Kosovo

The case of Kosovo requires more extensive commentary because of its relevance, controversy and importance for the whole international legal order. It reveals both the strengths and weaknesses of international law in responding to historical problems.

The armed intervention by NATO in Kosovo in 1999 raised well-known legal and political controversies from its inception. Even so, it led to notable legal effects: the territory of Kosovo was excluded from effective control of the authorities of the Federation of Serbia and Montenegro, a result of the establishment of an international administration conducted by the United Nations Transitional Mission in Kosovo (UNMIK) under the auspices of UN resolution 1244 of 10th June 1999.[35] It is worth mentioning that in 2000 UNMIK – similarly as in the

[35] S/RES/1244(1999). The UNMIK was empowered to issue legal acts defining the system and structure of Kosovo's government. *See* particularly Regulation No. 2001/9 – A Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK/REG/2001/9); Regulation No. 2008/9 on an Amendment to the Constitutional Framework for Provisional Self-Government (UNMIK/REG/2008/9). On the UNMIK legal status and mandate, *see generally:* T. Irmscher, *Legal Framework of the Activities of UNMIK*, 44 German Yearbook of International Law 353 (2001) *passim*; T. Garcia, *La Mission d'Administration Intérimaire des Nations Unies au Kosovo*, 104(1) Revue Générale de Droit International Public 61 (2000), *passim*. In this context, it is worth quoting an opinion concerning the UNMIK operation with regard to its compliance with peremptory norms of international law, prepared before the status of Kosovo was yet determined: "[T]he legality of the arrangements like UNMIK – writes A. Orakhelashvili – has to do with their temporary nature, which by itself guarantees that these arrangements are not intended to violate the territorial integrity of States. If such an arrangement were imposed in perpetuity, serious problems of their validity would arise". A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford: 2007, p. 454.

case of East Timor – established mixed panels of judges, considering their operation as an essential factor in the settlement of the toxic Albanian-Serbian past.[36]

On 17th February 2008 the Assembly (known as *Kevendi* (Albanian) and *Skupština* (Serbian) – a parliamentary body established within the framework of the provisional authorities of Kosovo – adopted a declaration of independence.[37] This declaration, in which Kosovo was declared "an independent and sovereign state", formally marked the beginning of the secession process of Kosovo from the Republic of Serbia.

While the international transitional administration in the Balkans was perceived as an important stabilizing factor, the unilateral declaration of independence of the authorities of Kosovo stirred a new wave of legal and political controversy concerning this region. External conditions favourable for the adoption of the declaration of independence were created owing to the UN administration of Kosovo from 1999, and the presence of NATO armed forces on the territory of this part of Serbia. However, the declaration of independence was adopted by the parliament of Kosovo in an atmosphere of political tension resulting from the lack of agreement between the authorities of the Republic of Serbia and the provisional authorities of Kosovo on the political and legal status of Kosovo. During the negotiations conducted under the auspices of the UN, the authorities of Serbia consistently rejected the proposed solutions contained in so-called Ahtisaari's Plan.[38] The Kosovo side accepted them entirely, which is confirmed by the reference to Ahtisaari's proposal in the preamble to its declaration of independence.

The opinions of state communities on the legitimization of this process are divided, which may be illustrated by the fact that less than half of the existing states have recognized Kosovo as a state. As of 30th April 2010 Kosovo's independence was recognized by 66 states.[39] Neither the member states of the European Union nor the permanent members of the United Nations Security Council have been unanimous in recognizing Kosovo. The refusal of Russia and China to recognise Kosovo postpones the moment of Kosovo's membership in the UN for an indefinite period of time.

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[36] *See* UNMIK/REG/2000/6 i UNMIK/REG/2000/64. *See also* J.C. Cady, N. Booth, *Internationalized Courts in Kosovo: An UNMIK Perspective*, in Romano, Nollkaemper, Kleffner (eds.), *supra* note 34, p. 41 *ff.*

[37] Text of the declaration available at www.assembly-kosova.org/common/docs/declaration_independence.pdf.

[38] *See* Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council: Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add. 1.

[39] Data from www.kosovothanksyou.com (accessed 30 April 2010).

Following Kosovo's adoption of its declaration of independence, the EU took responsibility for stabilizing the situation there. On 4th February 2008, even before Kosovo's independence was declared, the EU had approved two joint actions forming the legal basis for EU engagement in Kosovo: a joint action on the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO)[40] and a joint action appointing a European Union Special Representative in Kosovo.[41] Even so, member states of the European Union did not manage to reach agreement with respect the recognition of Kosovo. On 18th February 2008, at a meeting of the EU Council, the ministers of foreign affairs only adopted a declaration in which they left the decision on relations with Kosovo to individual member states. As a result several EU member states have not recognized Kosovo as a state.

For obvious reasons, the validity of the secession of Kosovo is most strongly opposed by its state of origin, i.e. Serbia. Serbian authorities, apart from political reprisal against some states which recognized Kosovo, also took steps to prove that the secession of Kosovo violated binding international law. In this context it is important to note that on 8th October 2008 the UN General Assembly, at the initiative of the Republic of Serbia, adopted a resolution in which it requested the International Court of Justice to issue an advisory opinion on the following issue: "Whether the unilateral declaration of independence of Kosovo is in accordance with international law?"[42] Such an advisory opinion may help to clarify legal questions relating to the binding force of a unilateral declaration of independence in international law. Nevertheless its effectiveness in overcoming the past may be questioned, due to irreversible facts and their consequences that have already occurred, and which have to be accepted and neutralized by the international legal order.

The attempt to make a legal assessment of the unilateral declaration of independence adopted by the provisional authorities of Kosovo will require taking a position on the importance and relationship between long-established major principles and institutions of contemporary international law, such as the principle

[40] 2008/124/CFSP, L 42/92. The role of the EULEX KOSOVO is to support authorities in Kosovo, judicial authorities, and law enforcement agencies, and also to provide assistance in developing a judicial system (art. 2). EULEX began to operate after the then-international administration handed over its power exercised by the United Nations Interim Administration Mission in Kosovo (UNMIK) in Kosovo.

[41] 2008/123/ CFSP, L 42/88. The role of the Special Representative is, in principle. to provide guidance in the name of the EU and support for the political process.

[42] Resolution 63/3 adopted by the General Assembly: Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, 63. session, A/RES/63/3.

of territorial integrity of states, the right to self-determination, the institution of secession by a territory, and recognition of a state.

State-formation processes are often legally explained by the right to self-determination. However, while this principle is unquestionably established in international law – e.g. both the United Nations Charter (1945) and the Convention on Human Rights (1966) refer to it – its scope and juridical character are a matter of dispute.[43] In particular its relation to the principle of the territorial integrity of states is unclear, and the question when it may legally justify secession raises controversy.

In the era of the UN the origins and the importance of the right to self-determination were connected with the process of decolonization. The application of this right in the process and practice of decolonization did not give rise to legal controversy. The most important resolution of the UN General Assembly i.e. the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14th December 1960 [Res. 1514(XV)][44] explicitly referred to the right to self-determination. However, decolonization did not involve the so-called right to secession, because the colonial territories, whether trust or dependent, were not a part of the territory of any state-metropolis. They did not come into being as a result of the separation of their territories from existing states. In addition, it is worth noting that the Declaration referred to above also emphasizes the importance of the principle of territorial integrity. Paragraph 6 therein reads as follows "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

[43] *Cf. e.g.* L. Antonowicz, *Zasada samostanowienia narodów we współczesnym prawie międzynarodowym* (Principle of Self-determination in Modern International Law), 8 Sprawy Międzynarodowe 30 (1963) *passim*; L. Antonowicz, *Państwa i terytoria. Studium prawnomiędzynarodowe* (States and Territories. International Legal Study), PWN, Warszawa: 1988, pp. 82 *ff*; A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, Oxford University Press, Oxford: 2004, pp. 331 *ff*; W. Czapliński, *Aktualne problemy prawa do samostanowienia* (Current Issues on Right to Self-Determination), Toruński Rocznik Praw Człowieka i Pokoju 3 (1994–1995); W. Czapliński, *Zmiany terytorialne w Europie Środkowej i Wschodniej i ich skutki międzynarodowoprawne (1990–1992)* (Territorial Changes in Central-Eastern Europe and their international legal consequences (1990–1992), Scholar, Warszawa: 1998, pp. 50 *ff*; K. Knop, *Diversity and Self-Determination in International Law*, Cambridge University Press, Cambridge: 2003, *passim*. It is also worth pointing out the importance of this principle in the decisions of the ICJ. *See* advisory opinion in the *Western Sahara* case ([1975] ICJ Rep 12) , judgment in *East Timor* case ([1995] ICJ Rep 90) and advisory opinion concerning the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ([2004] ICJ Rep136). In the two latter judgments the ICJ clearly qualified the right to self-determination as an *erga omnes* right.

[44] Available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement.

In these circumstances, the Kosovo case seems a *sui generis* case. It is different from cases of the most recent states coming into being – namely East Timor or Montenegro, mentioned above. East Timor, which from 1975 was actually administered by Indonesia, came into being as a result of decolonization, and Montenegro as the result of a secession that did not raise any legal doubts inasmuch as it was accepted by its state of origin, that is the Federal Republic of Yugoslavia. The secession of Kosovo – where there is strong opposition on the part of the state of origin – is a controversial and, in a sense, a borderline example of the practical role and effect of the so-called right to self-determination.

International practice, and to a large extent international legal doctrine as well, does not allow for justification of the so-called right to secession in reliance on the right to self-determination, granting priority to the principle of territorial integrity of a country.[45] The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, of 24th October 1970, clearly excludes the possibility of reliance on the right to self-determination to account for any action which would "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States"[46]. This is also confirmed in Opinion no. 2 of 1992 of the Arbitration Commission for Yugoslavia.[47]

The principle of territorial integrity is one of the major norms of international law protecting the legal-political entity and sovereignty of a state. This principle is the source of the prohibition against intervention, recognized and respected in international law. Hence, violation of the territorial integrity of a state is the equivalent to violation of the sovereignty of a state prohibited by international law.

Although often controversial, secession is recognized as a process by which states may come into being.[48] It is not the declaration itself of an entity, but the effectiveness of the secession process that makes a new state come into existence. However, this effectiveness should not be interpreted as contradicting, but rather

[45] *See especially* Czapliński, *Zmiany...*, *supra* note 43, pp. 50–60.

[46] Available at http://www.un.org/esa/socdev/unpfii/en/drip.html

[47] Conference on Yugoslavia, Arbitration Commission, *Opinion No. 2*, 31 International Legal Materials 1497 (1992). An excerpt from this opinion, as relevant to the problem discussed above, reads as follows: "The Commission considers that international law as it currently stands does not spell out all the implications of the right of self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".

[48] *See especially* J. Crawford, *The Creation of States in International Law*, 2 ed., Oxford University Press, Oxford: 2006, pp. 374–448.

as complementing, legitimacy. There must be a situation in which two traditional principles fundamental to the formation of international law coexist: *ex factis ius oritur* and *ex iniuria ius non oritur*.[49] Thus the effectiveness of the secession process, understood this way and measured by common international recognition, is conditioned upon the coexistence of the following factors: 1) the centrifugal nature of the secession process; 2) respect for the *uti possidetis* principle; 3) earlier or later recognition on the part of a state of origin. The criteria mentioned above were met by, e.g., by the secession of Montenegro. The situation of Kosovo is different because first, its secession from the Republic of Serbia was not solely a centrifugal process, but occurred with considerable support from international organizations (UN, NATO, EU) and a large number of their member states. Secondly, this process was and still is opposed by its state of origin.

The authorities of the Republic of Serbia consistently claim that the declaration of independence of Kosovo is in contradiction not only to the principles of universal international law, and in particular with the principle of territorial integrity, but also to the Security Council resolution 1244 of 10th June 1999. This resolution points to the urgent necessity for resolving the status of Kosovo. It also emphasizes the obligation of all UN member states to "respect sovereignty and territorial integrity of the Republic of Yugoslavia" (at present the Republic of Serbia) (paragraph 1 in connection with Annex 1). The Declaration of the G8 Foreign Ministers of 9th May 1999, attached to resolution 1244 as Annex 2, also underlines that a political process aimed at establishing self-government for Kosovo should take into consideration "the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region" (Annex 2, paragraph 8).

It is significant that both direct parties to the conflict, i.e. the Republic of Serbia and the authorities of Kosovo, seek legal justification for their positions in resolution 1244. The declaration of independence of Kosovo clearly emphasizes the willingness to operate according to the principles of international law and resolutions of the Security Council, including resolution 1244 (paragraph 12). The authorities of Serbia, as has already been mentioned, question the legality of the declaration of independence by Kosovo by, among other things, claiming that it violates the same resolution. Such an allegation appeared in documents of Serbian authorities prepared in response to the announcement of the declaration of

[49] *Cf. e.g.* Antonowicz, *Państwa...*, *supra* note 43, pp. 39–40; J. Symonides, *Zasada efektywności w prawie międzynarodowym* (Principle of Effectiveness in International Law), Wyd. UMK, Toruń: 1967, pp. 13–14; J.H.W. Verzijl, *Effectiveness* versus *Legality*, in *idem*, *supra* note 8, p. 293.

independence, namely: in the speeches of the President and the Foreign Minister of the Republic of Serbia presented at the UN session,[50] in the decision of the Serbian parliament of 18th February 2008 on the annulment of the declaration of independence of Kosovo,[51] and in earlier acts of the Serbian authorities: Resolution of the National Assembly of the Republic of Serbia of 14th February 2007 rejecting the so-called Ahtisaari's Plan[52] and Resolution of the National Assembly of 26th December 2007 on the protection of sovereignty, territorial integrity and constitutional order of the Republic of Serbia.[53]

Security Council resolution 1244 clearly plays an important role in the legal assessment of Kosovo's declaration of independence. Among other things, it provided for an international civil and military presence in Kosovo upon the consent of Serbian authorities, establishment of an international interim administration in Kosovo, and the development – under the auspices of the UN – of a political solution concerning the future status of Kosovo based on an agreement between the Serbian authorities and Kosovo interim administration with respect to the principles quoted above of "sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region."[54]

A political dialogue between Serbia and Kosovo, stimulated by the significant involvement of the UN and its special Envoy Martti Ahtisaari, did not result in a coordination of positions. Serbian authorities consistently rejected the solution proposed in so-called Ahtisaari's Plan. While references to the legal status of

[50] Serbian President's Speech at the UN SC Session (April 21, 2008), available at www.srbija.gov.rs/vesti/vest.php?id=45388; Speech of Serbian Minister of Foreign Affairs Vuk Jeremic at the UN SC Session (November 26, 2008), available at www.srbija.gov.rs/vesti/vest.php?id=51112.

[51] Decision on the annulment of the illegitimate acts of the provisional institutions of self-government in Kosovo and Metohija on their declaration of unilateral independence, available at www.srbija.gov.rs/kosovo-metohija/index.php?id=43159.

[52] Resolution of the National Assembly of the Republic of Serbia Following UN Special Envoy Martti Ahtisaari's "Comprehensive Proposal for the Kosovo Status Settlement" and Continuation of Negotiations on the Future Status of Kosovo-Metohija, available at www.srbija.gov.rs/vesti/specijal.php?id=31679.

[53] Resolution of the National Assembly on the Protection of Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia, available at www.srbija.gov.rs/kosovo-metohija/index.php?id=42050.

[54] *See* Ch. Tomuschat, *Yugoslavia's Damaged Sovereignty over the Province of Kosovo*, in G. Kreijen (ed.), *State, Sovereignty, and International Governance*, Oxford University Press, Oxford: 2004, pp. 323 *ff.* One of the Tomuschat's theses reads as follows: "[...] the legal consequences of the recognition of a right to self-determination drawn in Resolution 1244 appear to be rather modest. What has been promised to the Kosovars is not independent statehood, but simply self-government, a framework of governance of lesser substance" (p. 341).

Kosovo never use the term "state" in this document (it refers to Kosovo as to "multi-ethnic society" (article 1.1), it nevertheless attributes important features of a state to it, in particular: the capacity to enter into treaties, the right to be a member of international organizations, and to a constitution (art. 1.3.; art. 1.5.). There would be nothing unusual in this as there are, in the history of international relations, other examples of compound states, components of which had some scope of capacity to undertake legal-international actions. However, Ahtisaari's Plan did not include any provision that Kosovo would remain an integral part of Serbia. Serbian authorities viewed and still view this as a violation of its territorial integrity and sovereignty.

It is also significant that there is no reference to the right to self-determination in Kosovo's declaration of independence. It may be presumed that this was an intentional omission. In fact any attempt to legally justify the secession of Kosovo in reliance on the right to self-determination seems risky and prone to failure. This stems from the two arguments quoted above. First, the process of establishing Kosovo in fact was not a self-determination process inasmuch as it was not a centrifugal process. It arose out of international involvement, especially of the UN; which was serious enough to allow the parliament of Kosovo to adopt a constitution which was actually *a constitution octroyée,* considering the fact that the legal system of Kosovo had been defined in the so-called Ahtisaari's Plan (Annex I in connection with article 1.3); and secondly the state of origin (the Republic of Serbia) did not accept the secession of a part of its territory. In this context it is worth noting that the authors of the declaration of independence were aware of the controversial legal nature of their act, and in its preamble they declared that the case of Kosovo was exceptional and should not be treated as a precedent for any other situation ("Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation.")

In addition, it would appear that the question of the binding nature of Kosovo's declaration of independence cannot be examined separately from the response of third states. Since the adoption of the declaration itself is not based on any specific legal act (SC resolution 1244 does not provide for the status of a state for Kosovo), in view of international law it is neutral and does not, in and of itself, create a new state. In the history of international relations there have been a number of declarations of independence to which there was little or no international response, and which in consequence did not change the status of the entities which adopted them. It is worth mentioning that already in 1991 the provisional authorities representing the Albanian population of Kosovo announced their declaration of independence, as a result of which Kosovo was recognized only by Albania. The real importance of any declaration of independence is determined by the response

of the international community, expressed either in acts of recognition or by refusal to recognize an aspiring entity as a state. Thus the constitutive effects of a declaration of independence in terms of creation of a new state come to play only if it is recognized by third states and its state of origin.

In international law theory a dispute concerning the effects of the recognition of a state may take place over a long period of time: some scholars adhere to the doctrine of a declaratory effect of recognition, whereas others are in favour of its constitutive effect, in other words they accept that a new entity may not obtain the status of a state unless it is recognized by the existing states.[55] The prevailing practice in international law application rather points to the constitutive nature of recognition of an entity as a state. Without such recognition the declaration of independence itself, while perhaps beginning a process of secession, has no effect in terms of forming a new state. The declaration of independence of Kosovo should be assessed in this context. Taking into account the constitutive nature of the recognition of an entity as a state, the main problem associated with the case of Kosovo may be expressed as follows: Is recognition of Kosovo as a state in conformity with the international law?

Views concerning the legal validity of the declaration of independence and the recognition of Kosovo are divided in the international community. This split may be illustrated by the result of voting on the UN General Assembly resolution of 8th October 2008 concerning the application to the ICJ to issue an advisory opinion on the conformity of the declaration of independence of Kosovo with international law (77 states supported the application the ICJ, 6 were against it, and 74 abstained from voting).[56] States which recognized the independence of Kosovo either abstained from voting or voted against the resolution.

Recognition of a state is controversial not only with regard to its effect, but also as regards the obligation to recognize or to deny recognition to a state. It may be argued that contemporary international law imposes a legal obligation to recognize as a state new independent territorial entities for which the state-formation process and the existence of elements of statehood (population, territory, effective

[55] For opinions concerning the effects of a recognition of an entity as a state, *see generally:* Antonowicz, *Państwa...*, *supra* note 43, pp. 95–104; Crawford, *supra* note 48, pp. 19–28; H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, *passim*; *Oppenheim's International Law*, ed. R. Jennings, A. Watts, vol. 1, Longman, London-New York: 1992, pp. 126–146; S. Talmon, *The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?*, 75 British Yearbook of International Law 101 (2004), *passim*; C. Warbrick, *States and Recognition in International Law*, in Evans (ed.), *supra* note 8, *esp.* pp. 236–262.

[56] *See* 63rd session, Agenda item 71, A/63/PV.22.

power) are unquestionable.[57] If a new entity is not recognized as a state, its participation in international legal transactions and therefore its actual establishment as a state is not possible. At the other extreme, it is prohibited by law to recognize a state in a situation inconsistent with the principles of universal international law. This prohibition – the origins of which are related to the General Treaty for the Renunciation of War of 1928 and to the so-called Stimson doctrine of non-recognition of international territorial changes executed by force – is well established in international law under the regime of the United Nations Charter.[58]

The circumstances preceding the declaration of independence of Kosovo also contributed to the legal assessment of this act and international community's responses to it. On the one hand, the behaviour of the authorities of the Republic of Yugoslavia in the 1990s with respect to the Kosovo population of Albanian origin justified the involvement of the international community in ensuring autonomy to the population of Kosovo. On the other hand, it may be questioned whether there were any legal prerequisites or provisions justifying any international action, even under the auspices of the UN, aimed at implementation of the right of self-determination of the Albanian population of Kosovo at the expense of the territorial integrity of the Republic of Serbia. In both the doctrine and practice of international law, which is manifested in, e.g., ICJ jurisprudence,[59] respect for territorial sovereignty is viewed as a fundamental legal basis for international relations. In other words, a state's territory is given special protection under international law. Therefore third states are prohibited from taking any action affecting another state's territory unless it is legally justified. It is difficult to point out to any such legal basis for recognizing Kosovo as a state, and if there is none, then recognition of Kosovo's independence is an act which violates the territorial integrity of the Republic of Serbia, and ergo violates universal international law. Acts of recognition also go beyond the mandate provided for in resolution no. 1244. As a result states that have recognized Kosovo as a state[60] have diminished

[57] I share the opinion of H. Lauterpacht in this respect (*supra* note 55, pp. 26–36, 75–76). *See also* I. Brownlie, *Principles of Public International Law*, 6 ed., Oxford University Press, Oxford: 2003, pp. 89–90; J. Combacau, S. Sur, *Droit International Public*, 4 éd., Montchrestien, Paris: 1999, pp. 285–288.

[58] *See generally e.g.* Ch. Rousseau, *Droit International Public*, vol. III: *Les Compétences*, Sirey, Paris: 1977, pp. 518–526.

[59] Already in the *Corfu Channel* case (*UK v Albania)* [1949] ICJ Rep 4 the ICJ emphasized: "[...] between independent states, respect for territorial sovereignty is an essential foundation of international relations" (p. 35).

[60] Resolution no. 38/2008 of the Polish Cabinet of 26th February 2008 on the recognition of Kosovo by the Republic of Poland (RM 111-32-08 reads as follows: § 1. The government of the Republic of Poland recognizes Kosovo as a state. § 2. The implementation of this

the importance of the principle of territorial integrity in international law. Although for nearly two decades the circumstances connected with the political situation in Kosovo were exceptional, they do not justify any division of a sovereign subject of international law without its consent.

Finally it is worth examining the effect of recognition of Kosovo as a state on international law, in particular on its role in overcoming the past. Since Kosovo has not been recognized universally, and in particular by all permanent members of the Security Council, its recognition cannot qualify as *erga omnes*, but only as *inter partes*. This means that Kosovo is a state only in its relations with states that have recognized it, but not in its relations with states that have not recognized it. Therefore in relations with the latter it may not benefit from the principle of sovereign equality. Considering the fact that Kosovo has not been universally recognized and therefore is kept out of the UN, its status in universal international law is still uncertain.[61] Such a state of limbo does not enhance the transparency of the international legal order and undermines its ability to produce permanent and unambiguous legal effects.

For the development of international law, the case of Kosovo is dangerous for more fundamental reasons. It challenges its stability and predictability, and thereby it proves its susceptibility to revolutionary rather than evolutionary changes. These dangers are not neutralized by the reservations of a number of states and Kosovo's own declaration that its case should not be seen as a precedent. Such declarations have an effect contrary to that intended, because they implicitly demonstrate that the that entities making such a declaration are aware of the fact that the legal solution they have adopted, i.e. in this case as regards Kosovo, is inconsistent with the international law. The political implications of such reservations are rather insignificant, as reliance on the case of Kosovo may not be treated as a source of law prohibiting secession movements in Europe or in other parts of the world. It is clear that this is not the first situation that brings about legal effects in a case where there is no, or only a doubtful, legal basis for an action. In the history of international law changes have also occurred according to the *ex factis ius oritur* principle. In the final analysis, the case of Kosovo again proves the state-central character of international law and the constitutive role of state recognition.

However it should be emphasized that the recognition of Kosovo by a considerable number of states, despite the legal defect inherent in this act, i.e. its

Resolution is entrusted to the Minister of Foreign Affairs. § 3. The Resolution enters into force on the day of its adoption". The content of the Resolution clearly shows that the recognition of Kosovo by Poland is de iure recognition that is unconditional and final.

[61] *See* M. Shaw: *International Law*, 6 ed., Cambridge University Press, Cambridge: 2008, p. 453.

inconsistency with the principle of territorial integrity, has brought about two significant legal and international effects: it has decreased the territory of Serbia and created a new state – the Republic of Kosovo, at least in relations with regard to those states that recognized it. Such types of transformations in the international community and in the international legal order undermine international law as a factor effectively and transparently overcoming the problems of the past between states and nations.

4. STRENGTHS AND WEAKNESSES OF INTERNATIONAL LAW IN OVERCOMING THE PAST IN A BILATERAL DIMENSION. POLISH-GERMAN AND POLISH-RUSSIAN RELATIONS

4.1. Polish-German relations after 1990

The Protocol of Paris of 17th July 1990,[62] the Treaty of 12th September 1990 on the Final Settlement with Respect to Germany,[63] and the Treaty of 14th November 1990 between the Republic of Poland and the Federal Republic of Germany reaffirming the existing common border[64] finally removed any remaining legal doubts on the shape of the Polish-German border. Parties to the so-called 2+4 treaty pointed out (art. 1 section 2) the necessity of reaffirming the Polish-German border "in a treaty binding under international law". This may be interpreted as an embodiment of their belief in the guaranty and regulatory function of international law.

While the last decade of the twentieth century seemed to indicate an enduring normalization in Polish-German relations, the first years of the twenty-first century have brought about some visible, if not spectacular, tensions. As Jerzy Kranz[65] described it figuratively: the "shadows of the past" appeared again in Polish-German relations. This showed that Poland and Germany have not overcome the historical burden connected with World War II and its legal, political and social effects. Mutual prejudices and sensitivity about historical questions still prevent

[62] The text, with a legal analysis, appears in J. Barcz, *Protokół paryski z 17 lipca 1990 r. a granica Polski ze zjednoczonymi Niemcami* (Paris Protocol of 17th July 1990 and Polish-German Frontier), in *Prawo międzynarodowe. Księga pamiątkowa prof. Renaty Szafarz* (International Law. Liber Amicorum of Prof. Renata Szafarz), ed. by J. Menkes, WSHP, Warszawa: 2007, pp. 44 *ff.*

[63] 3 Zbiór Dokumentów Polskiego Instytutu Spraw Międzynarodowych (Set of Documents of Polish Institute of International Affairs) (1991).

[64] Dz.U. 1992, nr 14, poz. 54 (Polish Journal of Laws 1992, no. 14, item 54).

[65] J. Kranz, *Polsko-niemieckie cienie przeszłości* (Polish-German Shadows of the Past), 1 Sprawy Międzynarodowe 5 (2005).

them from developing relations based on real partnership. The activities of small, rather unknown and politically insignificant German compatriots putting forward claims against Poland concerning the displacement of Germans after World War II was enough to cause the issue of war reparations to be officially raised in Poland again.[66]

It now appears that the treaty regulations on mutual relations from the beginning of the 1990s may not be fully effective measures for overcoming the past. Moreover these regulations include oblique and ambiguous statements which are exploited by political groups on both sides to support certain versions of their mutual history. Therefore the past still divides both states and nations, and the mutual legal-international obligations they accepted appear insufficient to overcome this division.

Differences over legal issues and positions concerning the effects of World War II can be found in both Polish and in German circles.[67] The international German-Polish legal regulations of the first decade of the twenty-first century did not manage to finally overcome the divisions, in particular with reference to the displacement of Germans. This issue was fundamental for the so-called legal positions of the Federal Republic of Germany which, while being strictly legal concepts in their origins, became almost official political doctrines in Germany.[68] This German stance, which dates back to post World War II and the remains of which still survive in some circles, has led to escalation of those problems of the past that were not clearly solved by legal regulations.

Under the pressures resulting from exacerbating tensions, in 2004 the governments of both states took actions aiming at clarifying ambiguous legal issues. In this

[66] *See especially* the resolution of the Polish Sejm of 10th September 2004 on Polish rights to German war reparations and on illegitimate claims against Poland and Polish citizens put forward in Germany (M.P. 2004, nr 39, pos. 678 (Polish Gazette of Laws 2004, no. 39, item 678). For more on tensions in Polish-German relations, *see e.g.* Kranz, *supra* note 55, *passim.*; K. Ziemer, *Polska i Niemcy – jaka przeszłość, jaka przyszłość?* (Poland and Germany – what Past, what Future?), 1 Sprawy Międzynarodowe 48 (2005), pp. 48 *ff.*

[67] As far as the Polish doctrine is concerned, *see* S. Dębski, W.M. Góralski (eds.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004* (The Problem of Reparations, Compensations and Benefits in Polish-German Relations 1994–2004), vol. I – *Studia* (Studies), PISM, Warszawa: 2004; W. Czapliński, *Pojęcie reparacji wojennych w prawie międzynarodowym* (The Concept of War Reparations in International Law), 1 Sprawy Międzynarodowe 66 (2005), pp. 74–78.

[68] *See* J. Barcz, *Zachodnioniemieckie doktryny prawne i ich rola w podtrzymywaniu rewizjonizmu polityczno-terytorialnego w stosunkach dwustronnych PRL-RFN* (West-German Legal Doctrines and Their Role in Supporting of Political-Territorial Revisionism in Polish-German Bilateral Relations), 1(2) Zeszyty Niemcoznawcze PISM 5 (1986), *passim*; Kranz, *supra* note 55, pp. 36–45.

context, the announcement made by Chancellor Gerhard Schröder on 1st August 2004 is of special significance, as it was a unilateral international legal act binding Germany for the future.[69] It reaffirmed that at the level of inter-state relations the question of compensation claims resulting from World War II did not exist. It is also worth noting the position presented by experts appointed by both sides.[70]

Although the German government cut off any claims of German citizens against Poland and its citizens, full normalization of relations did not take place owing to, among other things, the claims of German citizens filed against Poland in the European Court of Human Rights. The fact that the ECHR considered the first claim as inadmissible,[71] and also the slight chances for success of the other German claims filed in other international and domestic courts – all which is convincingly illustrated by the expert analysis prepared by Professors J. Barcz and J.A. Frowein – highlight the usefulness and effectiveness of international legal measures in overcoming the Polish–German past. However, this is only a relative effectiveness, and simultaneously exposes the weakness of international law. It confirms that international law may be effective in overcoming the past only if the societies bound by it agree in its assessment. In this respect, Poles and Germans still differ from each other, especially with regard to the assessment of the so-called forced expulsion of Germans, which has turned out to be a more persistent problem than that of the common border. After 1990 successive German governments took a stance on this issue, presented in so-called legal standpoints of the Federal Republic of Germany. It is based on a declaration expressed in the 1990s by the German Minister of Foreign Affairs, Klaus Kilkel, and the Bundestag, and recently re-affirmed by then-Chancellor Gerchardt Schröder, stating that the displacement of the German population from formerly German east areas was inconsistent with international law.

[69] *See* M. Frankowska, *Oświadczenie kanclerza Gerharda Schrödera złożone 1 sierpnia 2004 r. w Warszawie w świetle prawa międzynarodowego* (The Statement of Chancellor Gerhard Schröder of 1st August 2004 Submitted in Warsaw under International Law), in W.M. Góralski (ed.), *Tranfer. Obywatelstwo. Majątek. Trudne problemy stosunków polsko-niemieckich. Studia i dokumenty* (Transfer. Citizenship. Wealth. Difficult Problems of Polish-German Relations), Warszawa: 2005, pp. 201 *ff.*

[70] J. Barcz, J.A. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen in Zusammenhang mit dem Zweiten Weltkrieg*, 65(3) ZaöRV 631 (2005), Polish version: 1 Sprawy Międzynarodowe 110 (2005). *See also Stanowisko Doradczego Komitetu Prawnego przy Ministrze Spraw Zagranicznych w sprawie roszczeń reparacyjnych Polski wobec Niemiec w związku z drugą wojną światową* (The Position of Legal Advisory Committe attached to the Minister of Foreign Affairs concerning Polish Reparation Claims towards Germany in connection with Second World War), 1 Sprawy Międzynarodowe 139 (2005).

[71] Decision of 7th October 2008 in the case *Preussiche Treuhand GmbH & Co. KG A.A. v. Poland* (claim no. 47550/06).

The legal evaluation by Poland, as well as by the US and Great Britain, was and still is different. Therefore Germans speak about forced expulsion (which is to say illegitimate) whereas in Poland the term displacement is used, understood as an unavoidable effect of the end of World War II. For this reason German governments still do not declare private legal claims of their citizens against Poland as unfounded, even though by Schröder's statement they disassociated themselves from supporting them officially.

The difference of opinions on displacement of Germans gained also another, symbolic meaning in the context of the German initiative of the Federation of Expellees to pay tribute to these events. From the very beginning the idea to pay tribute to the displacement in an institutional manner was criticized by successive Polish governments. Originally it was not welcomed by German governments either. However, during the last two years the German government has supported this initiative by establishing a museum in Berlin devoted to the displacement of Germans.[72] These events show that any unanimous assessment of Polish-German common history is *in statu nascendii*. Divergent attitudes in this respect prevent international law from neutralizing the negative effects that history exerts on current and future Polish-German relations.

4.2. Polish-Russian relations after 1990

While Polish-German relations may be perceived as not fully satisfactory due to dissenting opinions over the assessment of certain aspects of the common past, Polish-Russian relations are even worse in this respect.

In Polish-Russian interactions the official treaty relations, along with diplomatic and consular and trade contacts of varying degrees of intensity, are not complemented with good neighbourly relations, without which the foundation necessary for the establishment of legal measures to overcome the past will not come into being. Even in the 1990s the willingness of official representatives of both sides to reach a mutual understanding of common history was rather doubtful. When comparing the main political treaties concluded by Poland with Germany with those concluded with Russia, it is worth noting that in the preamble of the Treaty between the Republic of Poland and the Federal Republic of Germany of 16th June 1991 on Good Neighbourly relations and Friendly Cooperation[73] the states pointed to "the endeavour to close the painful chapters of the past," whereas the Treaty

[72] The matter becomes still more complicated considering the candidacy of Erika Steinbach to the board of the Foundation "Flight, Expulsion, and Reconciliation", supposed to manage the future museum.

[73] Dz.U. 1992, nr 14, poz. 56 (Polish Journal of Laws 1992, no. 14, item 56).

between the Republic of Poland and the Russian Federation of 22nd May 1992 on Friendly and Good Neighbourly Cooperation[74] refers in its preamble only to "positive values in the heritage of relations between Poland and Russia for the development of a firm understanding between the nations of both countries". There is no mention of any past dividing either the countries or the nations, any approach to which is hindered by the deliberate manipulation by sides during the period of communism.

Since there has been no honest political dialogue on sensitive moments in its history, in Polish-Russian relations no foundation has been laid for international law to serve as a bridge between the past and the present, or the future. The actual state of these relations is confirmed by the fact that unresolved disputes continue to build up. In consequence any attempt to raise a sensitive issue by the one party results in an almost allergic response by the other.

For obvious reasons, for Polish people the litmus test regarding the normalization of Polish-Russian relations is the Katyn Massacre. Both sides present divergent positions regarding its legal characterisation. Poland classifies it as a crime within the meaning of international law,[75] whereas Russia treats it as a "normal" crime prosecutable under criminal law and now falling outside the statute of limitations.[76] Naturally they also differ in their moral and political assessment of this crime. So long as such a discrepancy of opinions exists, Katyn will present an insurmountable burden to Polish-Russian relations. The diagnosis put forward more than thirty years ago by Stanislaw Swiniewicz, one of the few prisoners-of-war who survived the Kozielsk camp, still remains sound. He said that "Katyn is a festering ulcer that may poison Polish-Russian relations for ages. If these relations are to develop on healthy basis, this ulcer must be cut. The number of Jews murdered by the Gestapo is considerably larger that the number of Poles murdered or tormented to death by the NKVD, but the relations between them [Germans] and [Jews] have been normalized. This has happened because post-war German governments absolutely and uncategorically condemned the massacres, which the Nazis committed on an

[74] Dz.U. 1993, nr 61, poz. 291 (Polish Journal of Laws 1993, no. 61, item 291).

[75] A detailed qualification of this crime raises doubts in Poland. According to the Institute of National Remembrance it was a crime of genocide. This qualification seems inaccurate, as the crime of genocide was unknown in international law at the time the Katyn Massacre took place. The Katyn Massacre, under law binding at the time, was a war crime. *See e.g.* M. Flemming, *Jeńcy wojenni: studium prawno-historyczne* (Prisoners of War: Historical-Legal Study), Bellona, Warszawa: 2000, p. 324.

[76] On the history of the Katyn case before Soviet and Russian courts, *see generally* T.A. Kisielewski, *Katyń. Zbrodnia i kłamstwo* (Katyn. Crime and Lying), Rebis, Poznań: 2008, pp. 199–273.

unprecedented scale in a number of European countries. In contrast hardly anyone is aware of how many Soviet neo-Stalinists view the decision to carry out the Katyn massacre as a manifestation of Stalin's wisdom as a statesman."[77] And continuing, Swianiewicz, as if foreseeing the course of events wrote: "the way out of this poisoning atmosphere of lies would be to create a Polish-Soviet commission that would examine available documents concerning this case and determine responsibility. Determining responsibility does not mean that cases must be filed before courts in order to punish those guilty of the massacre. [...] the Katyn case will be closed only if the whole Russian nation condemns this awful crime, committed with malice aforethought by the NKVD, and takes the appropriate measures."[78]

The recently established Polish-Russian Group for Difficult Issues gives hope for a real dialogue on the common past. In the opinion of the Polish co-chairman of the Group, Adam D. Rotfeld, the creation of this Group has improved the political climate between Poland and Russia, and "creates an atmosphere for solving difficult and sensitive problems inherited from history."[79] So far, the Group has been focusing above all on the Katyn massacre. In a joint message on this matter issued on 28th October 2008, the Group emphasized the need to "intensify efforts aimed at providing a satisfactory explanation of the Katyn massacre committed by Stalin's regime."[80] Yet on 29th January 2009, the Military Unit of the Supreme Russian Court dismissed a complaint filed by Russian lawyers representing the families of ten victims of the Katyn massacre appealing the decision denying the victims rehabilitation.[81]

In such an atmosphere of political controversy, international law will not serve as a factor normalizing mutual relations. The lack of political consensus does not help eliminate divergent opinions on the legal interpretation of the past, which causes the provisional *status quo* to remain in place. It is not possible to repudiate the historical burden unless a unanimous assessment of sensitive historical issues is agreed upon. Without this there is no place for the friendly atmosphere in international law which allows it to effectively perform the role of a bridge between the past and the future.

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[77] S. Swianiewicz, *W cieniu Katynia* (In the Shadow of Katyn), Czytelnik, Warszawa 1990, p. 361.

[78] *Ibidem*, p. 362.

[79] Speech of 14th June 2008, citation after www.rp.pl/artykul23,148502_Polsko_ rosyjska_ komisja_od_spraw_trudnych.html.

80 Citation after *Komisja polsko-rosyjska: wyjaśnijmy Katyń* (Polish-Russian Commission: Let's explain Katyn), Gazeta Wyborcza 28.10.2008.

[81] *See* J. Prus, *Do Strasbourga za Katyń* (For Katyn, to Strasbourg), Rzeczpospolita 30.01.2009, p. A10. *See also* P. Kościński, *Polska walczy o sprawę Katynia* (Poland fights for Katyn), Rzeczpospolita 14.02.2009, p. A9.

CONCLUSIONS

International law can be effective in the international environment only if states, or at least their representative majority, expect it to function as an important order-creating factor in their mutual relations. For this purpose, entities creating international law must essentially share similar axiological sensitivities, both with respect to the assessment of the past and expectations for the future. Without this foundation international law will be an instrument serving only a façade function in relations between states and nations, and will be subordinate to *Realpolitik* purposes. The discord between "is", meaning a specific actual state of affairs, and "shall be", as expressed by legal norms, then becomes extremely evident.

International law is a consequence of the past and a response to expectations for the future. Repeating the metaphor quoted at the beginning of this treatise, it may be viewed as a bridge connecting these two time perspectives. The effectiveness of modern international law in connecting the past with the future has always depended and still depends on whether it can overcome its own imperial history. This is a precondition for the subjects of international law to overcome the shadows of their past.

A unanimous assessment of the past in all spheres of the operation of international law – universal, regional and bilateral – is necessary if it is to effectively neutralize the negative effects of historical problems. Law is only one necessary condition for overcoming the past, and is not sufficient on its own. The lack of a consensus about the past will reduce the law to a provisional regulatory instrument in relations between its subjects, hardly a guarantee against recurrence of the problems of the past. An even less optimistic scenario is possible, as illustrated by the case of Kosovo. International legal effects that come into being without voluntary participation of all entities bound by a common history may not only fail to neutralize a "toxic" past, but might even strengthen historical divisions thus further antagonize states and nations.

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THE CASE OF KOSOVO AND INTERNATIONAL LAW+

Abstract

The author focuses on the question of the independence of Kosovo. The matter of the Kosovo's independence has been and remains very controversial. International law is the only universally acceptable language for discussing such a controversial issue, one where the international community of states at large, as well as the smaller and closer communities of the EU and NATO member states, seem to be deeply divided. It is important to admit the failure of the UN Security Council, its subsidiary bodies, and in particular some permanent members of the SC, as well as other States which encouraged or at least made possible the legal morass by recognizing the unilateral declaration of independence by Kosovo. We can hope that the International Court of Justice, as the principle judicial organ of the United Nations, will remedy the failure of other UN bodies and bring international law back on the scene. The Court is not able to change the factual situation in Kosovo, but it can provide legal guidance for a sustainable solution.

INTRODUCTION

The subject of this conference is extremely topical. Since 17 February 2008, both the legality and the political opportunism involved in Kosovo's declaration of independence have become highly disputed issues. Additionally, events from the last

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week make this conference even more relevant. On 8 October 2008, the UN General Assembly adopted a resolution drafted by Serbia to seek an advisory opinion from the International Court of Justice on "whether the 17 February 2008 unilateral declaration of independence of Kosovo is in accordance with international law".[1]

The matter of the Kosovo's independence has been and remains very controversial. Nevertheless after almost eight months, when legal arguments have been so used or misused in the shadows of "Realpolitik", it is time to bring international law on the stage again. International law is the only universally acceptable language for discussing such a controversial issue, one where the international community of states at large, as well as the smaller and closer communities of the EU and NATO member states, seem to be deeply divided.

This division is evident event from the record of the vote within the UN General Assembly (GA) on the formal request for an advisory opinion of the ICJ: Seventy-seven Member States voted in favour (including 5 EU members: Cyprus, Greece, Romania, Slovakia and Spain) to six against (Albania, Marshall Islands, Micronesia, Nauru, Palau and United States), with seventy-four abstentions (including all remaining EU states).[2] In spite of this close result and many statements made by the member states' representatives in the GA, the resolution was adopted and the Court will have to deal with the question. The question, which was aimed at being as simple and politically neutral as possible, turns the mostly political problem into a real legal challenge for the International Court of Justice. Now, and for a time which could foreseeably extend for at least one year from the request, many international lawyers will have the unique opportunity to test the validity of some of the basic concepts of international law. These include such concepts as the legal criteria of statehood, the recognition of a state, the legal effects of the Security Council resolutions, and perhaps also the responsibility of international organizations.

It now rests with the distinguished judges of the ICJ to live up to the expectation that the advisory opinion will succeed in answering such questions and also provide politically neutral and judicially authoritative guidance to many countries still deliberating over their approach to Kosovo's unilateral declaration. This modest contribution aims only at highlighting certain problems surrounding the interpretation of international legal norms relevant to the issue.

[1] See: UN doc. A/63/L.3 (2008)

[2] Backing Request by Serbia, General Assembly Decides to Seek International Court of Ruling on Legality of Kosovo's Independence, DPI, News and Media Division, New York, Sixty-third General Assembly, Plenary, 22nd Meeting (DPI News).

1. PARAMETERS OF THE LEGAL ARGUMENTS IN THIS DIFFICULT CASE

There is no doubt that this issue, whether looked at as an academic debate or examined for the purpose of judicial resolution, creates a difficult case. Both advocates and opponents of the independence of Kosovo will employ teams of lawyers armed with a number of powerful arguments. It is feasible to take any stance in this debate (and most of us probably have our own personal, political and legal opinion). However, the adversarial nature of legal argument (even in a dispute of lesser importance than this one), which was quite well explained by M. Koskenniemi, calls for the combination of two possible approaches. One can be based on "pure facts", the other on legal rules.[3] Unfortunately, both parties in this dispute may take advantage of both sets of legal arguments. The dichotomy of facts and rules, politics and law, power and legitimacy, operates here on the inter-state level. Why? Because traditionally, both the declaration and recognition of one's statehood have been a matter of political choice of the individual states and entities claiming the status of a sovereign state.

No matter how antagonistic the arguments of states may be in a specific case, they are able to agree (together with the doctrine) on certain minimum elements. These are recognized as criteria based on state practice or even customary international law. Even while observing these rules, however, states enjoy a wide latitude of freedom of interpretation and freedom of action. They are free to do anything that is not prohibited by law. The traditional approach towards secessions and declarations of independence of new entities in general international law may be called that of "legal neutrality" (neutralité juridique).[4] In other words, it is not forbidden for a secessionist movement to declare unilaterally its independence and it is not forbidden (outside the context of decolonization) for the State authorities to suppress this attempt at secession.

The situation seems to be quite different, however, where other international legal entities such as the United Nations are involved. The UN as an international intergovernmental organization is created by an instrument of international law (treaty) and must act strictly on the basis of international law, in particular

[3] *Cf.* M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument, Reissue with a new Epilogue*, Cambridge University Press, Cambridge: 2005, pp. 272–282.

[4] *See* O. Corten, *Déclarations unilatérales d'indépendance et reconnaissances prématurées: du Kosovo à l'Ossétie du sud et à l'Abkhazie*, 112 (4) RGDIP (2008), p. 729; *cf.* J. Salmon (dir.), *Dictionnaire de droit international*, Bruylant, Bruxelles: 2001, p. 1022.

in accordance with the principles embodied in the United Nations Charter.[5] In other words, any organization (including the UN) may act only within the framework of its legal powers, which arise expressly or implicitly from the rules of law. This is true also for the Security Council.[6] Hence, the matter of Kosovo's independence must be evaluated with respect to the relevant resolutions of the Security Council.

1.1. Certain generally accepted premises and legal criteria regarding statehood

As a point of departure, we can share the view that the existence of a State is a matter of fact, but it is not a mere matter of fact. As it was rightly pointed out by J. Crawford, "a State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which a treaty may be said to be a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules."[7] However, it is possible to agree that "the legal qualities which make an entity a State are principally matters of fact, from which a legal conclusion is drawn – an entity like this is a State".[8]

In other words, there is a distinction between a descriptive concept of a State (as a fact) and a prescriptive concept of a State or of statehood (as a legal status granted to an entity based on certain factual elements). It is a matter of fact whether or not an entity meets the qualifications of a State. What are the criteria of statehood, however, is a matter of law.

The widely used definition of State is provided in Article 1 of the Montevideo Convention on the Rights and Duties of States (1933): "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."

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[5] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 28 May 1948, ICJ Reports 1947–1948, p. 64.

[6] *See* ICTY, Decision on the defense motion for interlocutory appeal on jurisdiction, Prosecutor v. Duško Tadić, Case No. IT-94-AR72, 2 October 1995, para. 28: "The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law)."

[7] J. Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford: 1979, p. 4.

[8] *Cf.* C. Warbrick, *States and Recognition in International Law*, in M.D. Evans (ed.), *International Law*, Oxford University Press, Oxford: 2003, p. 220.

The definition of State, and in particular the first three criteria, are of an objective nature and have been considered as part of customary law. This was reflected also in the Opinion No. 1 of the Arbitration Commission of the European Conference for Peace in Yugoslavia (the so-called Badinter Commission).

A corollary but different question is that of recognition of a State. In spite of two competing theories of recognition (constitutive vs. declaratory), there is a minimum common understanding that recognition is a unilateral act of one State which recognizes an entity as State. The act of recognition is not a legal obligation of the recognizing State. On the contrary, it is an act of discretion (involving. mostly political considerations) which has however very important legal consequences in both international and domestic relations.

The theory of declaratory effects seems to be the prevailing theory today (disclosure: I also adhere to this theory). It posits that the existence of State-creating elements should be established first. The recognition (a legal act) thus follows the fact of the emergence of a State. This concept of purely declaratory recognition was also asserted by the Badinter Commission in its Opinion No. 1 (1991).

However, this theory does not fully explain all situations relating to the existence and recognition of a new State. On the one hand, the recognizing States have to respect both the facts and law, otherwise their act may be considered at least unfriendly, if not illegal. In certain circumstances, "if an entity emerges onto the international scene through acts which are illegal under international law, no matter how effective it might be, its claim to statehood could not be maintained." In such a case, States may even have an obligation not to recognize this entity as a State.[9]

On the other hand, acts of recognition create a new situation, both in terms of fact and law. In relations between a recognizing State and a newly recognized State, the act of recognition has created a new situation. The recognizing State accepts that relations between them are governed by international law on a State-to-State basis. This also has important implications in the field of public law (e.g. citizenship, passports, visas, etc.), as well as private international law (e.g. recognition of foreign judicial decisions, etc.).

Recognition of a State may have constitutive effects even in cases where the objective criteria of statehood are not sufficient or simply absent. In particular it

[9] *Cf.* N.L. Wallace-Bruce, *Claims to Statehood in International Law*, Carlton Press, New York: 1994, p. 54; M. Kollár, *Niekoľko úvah k vhláseniu nezávislosti a (ne)uznaniu Kosova ako nezávislého štátu z pohľadu medzinárodného práva*, Slovak Yearbook of International Law, 2008, p. 30.

may affect the effective control of the government over the territory. This was explicitly spelled out in respect of the recognition of Bosnia and Herzegovina.[10]

1.2. Arguments for the statehood of Kosovo

Arguments for the statehood of Kosovo may be, and probably are, both factual and legal in nature. Both types of arguments were presented in the debate in the General Assembly both before and after the vote on the request for an advisory opinion of the ICJ. It is not surprising that the States which had already recognized Kosovo either voted against the draft resolution or abstained, advancing arguments mainly based on "facts".

For example, the representative of the United Kingdom said that "Kosovo's independence is, and will remain, a reality". He also noted that Kosovo's independence had been recognized by 22 of the 27 European Union member states.[11]

The representative of the United States repeated that 48 countries recognized Kosovo's independence, including 22 of the 27 European Union members. She said that "under democratically elected Government, Kosovo was at peace. The Government in Pristina had followed a proposal developed by the Special Envoy and had enacted 41 pieces of legislation to implement that proposal."[12] While this has a clear political message, the last sentence is striking to an international lawyer in that it seems to undermine rather than to support the argument that Kosovo really has an independent government.

The representative of France said that Kosovo's declaration of independence had ended the violent dismemberment of Yugoslavia. Kosovo's independence constituted a *sui generis* case, and did not call into question territorial integrity and sovereignty issues.[13] Again, the latter postulations may raise some doubts of a legal nature.

It is worth noting that the "sui generis" argument was also used by the representative of Albania, who said that Kosovo was a unique case, both in its historical and political developments.[14]

Pro-recognition States also forwarded some legal arguments in favour of Kosovo's independence. For example, both the British and French statements pointed

[10] *See* Judge ad hoc Kreca, Dissenting Opinion, ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, [1996] ICJ Rep 626; *cf.* Warbrick, *supra* note 8, pp. 258–259.

[11] DPI News, *supra* note 2, p. 4.

[12] *Ibidem*, p. 6.

[13] *Ibidem*, p. 8.

[14] *Ibidem*, p. 5.

out that Kosovo's independence was the result of the process of defining Kosovo's status under Security Council resolution 1244 (1999).[15] The US representative also referred to this resolution. This seems to be a purely legal argument. However, interpretation of the meaning of the resolution 1244 is highly political, as the final status process has not been completed in conformity with the SC resolution, as will be demonstrated in Chapter 3.

A mixture of both political and legal arguments appears in the statement of Albania describing Kosovo as a unique case, where the international community intervened nine years ago to put an end to an "ethnic cleansing enterprise and genocide run by the State".[16]

To complete the picture, one can also add arguments based on the principle of self-determination of peoples. This general principle has been embodied in several international documents, such as Article 1 (1) of the 1966 International Covenant on Civil and Political Rights or the 1970 Friendly-Relations Declaration, UN GA Resolution 2625 (XXV). The doctrine of self-determination has sometimes been labelled an "all-or-nothing proposition". Today, however, self-determination is a concept with more than one meaning. In actual practice in the recognition of states, self-determination as a positive entitlement has been applied only to classical colonial cases.[17]

1.3. Arguments against the statehood of Kosovo

It seems to be quite logical, in the light of the above analysis, that most arguments against the statehood of Kosovo are based on "law" rather than "facts". Nevertheless, the framework of legal debate may also reveal some relevant arguments of a factual nature.

The opponents of an independent Kosovo claim, first of all, the principle of the sovereign equality of States. This principle, as it appears in the 1970 Declaration, postulates, *inter alia*, that "the territorial integrity and political independence of the State are inviolable". In addition, even the principle of self-determination is not considered as an absolute principle, but involves limitations and exceptions. The establishment of a sovereign and independent State constitutes only one of several possible modes of implementing the right of self-determination by a people.

[15] *Ibidem*, pp. 4 and 8.
[16] *Ibidem*, p. 5.
[17] *Cf.* M. Weller, *Settling Self-determination Conflicts: Recent Developments*, 20 (1) European Journal of International Law (2009), pp. 112–113.

Since the Kosovo problem is a part of the dissolution of the former Yugoslavia, one should also emphasise the relevant documents adopted on the European level. In particular, the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975) lists among other principles the principle of inviolability of frontiers of all States in Europe and the principle of territorial integrity of States. This document also reiterates the right of peoples to self-determination, however "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States".

Next, it is interesting to recall that the (Badinter) Arbitration Commission in its Opinion No. 2 (1992) also rejected the claims of Kosovo (part of the Republic of Serbia) and of Krajina (part of the Republic of Croatia) as not being units entitled to self-determination.[18] These people were to find their protection under the minority law of the new States.[19]

Last but not least, all these legal arguments may be complemented by arguments based on facts, in particular on the lack of effective government in Kosovo. In fact this province was, in February 2008 and still is, a territory where the local Kosovar institutions have developed under the supervision of the international administration (UN Mission in Kosovo) and KFOR troops. Another new international actor present on the territory of Kosovo is the European Union Rule of Law Mission in Kosovo (EULEX).[20] One can have serious doubts whether such entities fulfil all the criteria of statehood and entitle Kosovo to recognition as a State.

At the same time, it is not surprising that the States supporting the resolution requesting an advisory opinion of the ICJ did not present many substantive legal arguments. Instead, they stressed the right of every Member State to seek an advisory opinion from the Court, and the right of the General Assembly to grant this request. They also expressed their belief in the Court's ability to enhance the rule of law.

Even Serbia, as sponsor of the resolution, took a politically moderate and law-oriented position. Its Minister of Foreign Affairs said that Serbia had decided to defend its sovereignty and territorial integrity through diplomacy and international law. He believed sending the question to the ICJ "would prevent the

[18] Opinion No. 2, 3 January 1992, in 3(1) European Journal of International Law (1992), p. 183.

[19] *Cf.* Warbrick, *supra* note 8, p. 257.

[20] *Cf.* E. de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, 103 (1) American Journal of International Law (2009), pp. 83 ff.

Kosovo crisis from serving as a deeply problematic precedent in any part of the globe where secessionist ambitions are harboured".[21]

Probably the most important legal argument was referred to in the statement of Argentina. Its representative stated that the whole of the security system was based on the fact that United Nations Members were bound to fulfil relevant resolutions. The Security Council resolution 1244 (1999), which his country had voted in favour of, had established the legal and political parameters regarding the Kosovo matter.[22]

Since the legal arguments, based only on competing principles of international law as interpreted by different actors in the debate, do not seem conclusive, a specification of general principles into more concrete rules is needed. Therefore it is important to analyze the SC resolution 1244 itself and the regime of international administration arising under this resolution.

2. THE ROLE OF THE UNITED NATIONS

There can be no doubt that international territorial administration, established in particular in post-conflict territories by the UN, is a new phenomenon in international law.[23] This is an important reason why the problem of statehood and the recognition of Kosovo should not be addressed only on the horizontal, inter-state level. The adoption of resolution 1244 (1999) by the UN Security Council has created a new international regime. In order to facilitate a political process, the Council introduced a special regime of international administration, involving several international organizations authorized to act under the auspices of the UN. Since the adoption of resolution 1244 on 10 June 1999, the situation in Kosovo has been governed not under general international law principles, but by the special regime established by the resolution. From that moment on, the powers and competences of the institutions of Kosovo arise from the legal delegation by the UN authorities, and not on the basis of "facts" or "effectiveness".[24]

It is worth noting that this resolution has not been revoked, so it is still binding on all UN Member States. The resolution and UNMIK regulations issued on its basis seem to provide the following legal picture:

[21] DPI News, *supra* note 2, p. 1.

[22] *Ibidem*, p. 10.

[23] *Cf. e.g.* B. Knoll, *United Nations Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in 'Internationalized Territories'*, 7 Austrian Review of International and European Law 3 (2002).

[24] *Cf.* Corten, *supra* note 4, p. 732.

Firstly, resolution 1244 has preserved the sovereign claim of Serbia to the territory of Kosovo, by "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal republic of Yugoslavia and the other States of the region".[25] This means that the sovereign title of Serbia to the territory (*dominium*) has not been ceded to the United Nations.[26]

Secondly, resolution 1244 has transferred the exercise of sovereign powers or jurisdiction (*imperium*) over Kosovo to UNMIK. In fact, the resolution "authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia".[27] Resolution 1244 and the first implementing UNMIK regulation transferred to the Special Representative of the Secretary General and UNMIK all legislative and executive authority, including the judiciary administration over the territory and people of Kosovo.

Thirdly, resolution 1244 stresses the provisional nature of the international administration it has established, and emphasizes the necessity to resolve the question of Kosovo's future status. According to its Annex 1, this future settlement will have to take "full account of principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[28] This seems to evoke "substantial autonomy" of Kosovo within the Federal Republic of Yugoslavia rather than its independence, as was expressly stated in the operative paragraph 10 and in Annex 2 of the resolution.

Lastly, the implementation of resolution 1244 continued with the adoption of the Constitutional Framework for Self-Government by UNMIK in 2001.[29] This document has defined Kosovo as an entity under interim international administration. The Constitutional Framework established the Provisional Institutions of Self-Government. Since the general elections in autumn 2001, UNMIK has begun to transfer administration of certain parts of its competences to local institutions. However, the Constitutional Framework leaves the issue of Kosovo's future status unresolved.

Even the most comprehensive proposal on Kosovo's status, the Ahtisaari Plan of 2007, fell short of expressly assigning independence to Kosovo, and included

[25] Security Council Resolution 1244, S/RES/1244 (1999), p. 2, Preamble, par. 10.
[26] *Cf.* Knoll, *supra* note 23, p. 51.
[27] Security Council Resolution 1244, *supra* note 25, p. 3.
[28] *Ibidem*, p. 5.
[29] Interim Administration Mission in Kosovo, *On a Constitutional Framework for Self-Government*, 15 May 2001, UNMIK/REG/2001/9.

continued international involvement in the governance of Kosovo.[30] Therefore this solution can be called "supervised independence".[31]

Just how complicated the process of transfer of powers is, and the crucial role still played by resolution 1244, can be seen by examining the problems relating to the creation, deployment, and operation of the EU mission EULEX. This mission aimed at replacing UNMIK. However, the precarious nature of the EULEX mandate – from the point of view of international law – arises from the fact that it was created at the initiative of the EU itself, and was at first only implicitly acknowledged by the Secretary-General and not initially endorsed by the Security Council. The Council endorsed the UNMIK reconfiguration only after the Secretary-General report through the Presidential Statement on 26 November 2008. In reality, because of Serbia and Kosovar Serbs, as well as some powerful members of the Security Council, EULEX is not able to act as an independent-standing mission, but only under the overall authority of the United Nations and in coexistence with UNMIK.[32]

To conclude, it seems that the international legal regime under SC resolution 1244 and implementing regulations, which are based on Chapter VII of the UN Charter, has imposed important restrictions on the exercise of sovereign rights by Serbia. Nevertheless, Kosovo has not ceased to be part of Serbia. The very object and purpose of the interim administration of Kosovo is hardly compatible with a unilateral declaration of independence by Kosovo. Resolution 1244 and the subsequent legal acts aimed at reaching the future status of Kosovo by a form of devolution. Both the status of independent State or substantial autonomy would be a possible solution. It would presuppose, however, the adoption of a new binding legal instrument (agreement and/or SC resolution).

In the meantime, it is important that all Member States of the UN abstain from acting in a way which may frustrate the regime under resolution 1244. This is not only a politically advisable course of conduct, but also a legal obligation, as according to Article 103 of the UN Charter their obligations under the present Charter shall prevail over any other international agreement.

[30] Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, encl. to Letter from the Secretary-General addressed to the President of the Security Council, S/2007/168/Add.1.

[31] *Cf.* Weller, *supra* note 17, pp. 149–151.

[32] *Cf.* de Wet, *supra* note 20, pp. 88–91.

CONCLUSIONS

It would not be fair to blame either the Kosovo Albanians (for declaring independence) or Serbia (for defending its sovereignty and territorial integrity) for the present impasse. However, it is important to admit the failure of the UN Security Council, its subsidiary bodies, and in particular some permanent members of the SC, as well as other States which encouraged or at least made possible the legal morass by recognizing the unilateral declaration of independence by Kosovo. These actions and omissions may be understandable from the point of view of politics and, in consequence, considered as good or bad according to one's political preferences.

But even from the traditional perspective, it is at least open to doubts whether the unilateral declaration and speedy recognition of Kosovo's independence would be in conformity with international law. In view of the fact of the massive military and civil international presence in the territory of Kosovo and the ultimate control of the UNMIK and the UN Special Envoy over all acts of the local self-government, one could certainly conclude that Kosovo, at the time of declaration (and probably up to now), has failed to satisfy the traditional legal criteria of statehood. As a consequence the recognition of Kosovo by some States can be considered as premature, and therefore as at least an unfriendly act, and even under certain conditions as arguably unlawful.[33]

From the point of view of modern international law, the way of reaching Kosovo's independence is clearly detrimental to the trust in international institutions (in particular in respect of the UN administration and so-called "State-building" in post-conflict regions), as well as to the rule of law. Moreover, the case of Kosovo risks creating a dangerous precedent for separatist movements in other parts of Europe and of the world.

As proclaimed in resolution 1244 and in later UNMIK documents (namely "Standards for Kosovo", 2003), as well as in the very title and purpose of EULEX, one of the main objectives of the international presence in Kosovo has been to restore or rather to introduce the rule of law (or l'Etat de droit).[34] However, this noble aim should not be limited to internal (intra-state) relations. The principles of rule of law must govern also acts of international organizations within the territories under international administration, and at the international (inter-state) level.

[33] In the case where such recognition amounts to a violation of the principle of non-intervention; *cf.* Corten, *supra* note 4, pp. 751–757.

[34] *Cf.* P. Klein, *L'administration internationale de territoire: quelle place pour l'Etat de droit?* in *L'Etat de droit en droit international.* SFDI. Colloque de Bruxelles, Pedone, Paris: 2009, p. 388–389.

Otherwise there is a risk that the international rule of law (état de droit) could be sacrificed in the name of some presumed or desired rule of law (Etat de droit) at the internal level.[35] And this policy can and should be, quite correctly, criticized as burdened by "manageralism", a new version of the "civilizing mission".[36]

One can hope, therefore, that the International Court of Justice, as the principle judicial organ of the United Nations, will remedy the failure of other UN bodies and bring international law back on the scene. Instead of a new, fashionable language of governance and manageralism, the classical legal vocabulary of normative analysis is needed. Of course, the Court is not able to change the factual situation in Kosovo, but it can provide legal guidance for a sustainable solution. And last but not the least, it could and indeed should shine light on the shadowy area of State-building in contemporary international law.

[35] As it was expressed in the debate at the colloquium of Société Française pour le Droit International on "l'Etat de droit" in Brussels (5 to 7 June 2008).

[36] *Cf.* M. Koskenniemi, *The Politics of International Law – 20 Years Later*, 20(1) European Journal of International Law 7 (2009), pp. 15–18, and cited literature.

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THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL

Abstract

This article considers the possible roles to be played by the United Nations Security Council (SC or Council) with regard to the permanent International Criminal Court (ICC). The power of the SC to react to international crimes threatening international peace and security has been acknowledged in the Rome Statute creating the ICC. In this article, the provisions of the Statute are compared with the decisions of the main political organ of the UN. The SC's impact on the Court occupies central place in the analysis, as the Council may undermine the independence and impartiality of the ICC. Without proper coordination between the two bodies the traditional dilemma of peace versus justice could gain a new dimension.

INTRODUCTION

The creation of the permanent International Criminal Court (ICC) has been the crowning achievement to date in the construction of an emerging system of international criminal justice. In this development, a very active role has been played by the United Nations Security Council (SC). The engagement of this main political organ of the United Nations might be explained as the establishment of a critical balance between combating impunity on the one hand and

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the maintenance of international peace and security on the other.[1] International crimes constitute, at least in part, a threat to international peace and security and therefore they may be addressed by the SC.

The Security Council's concern with international crimes is not new. International Criminal Tribunals for the former Yugoslavia and for Rwanda were created as subsidiary organs of the SC itself. Although the Tribunals are comprised of powers delegated by the SC, they preserve their judicial independence and impartiality. The Council has played a very active role in the establishment of a system of hybrid criminal justice of mixed (i.e. both international and domestic) composition and jurisdiction. Such tribunals were established in Kosovo and East Timor as a part of the transitional administration by the UN over those regions. Other examples include Sierra Leone or, in the most recent case, Lebanon.

The analysis presented here, however, concentrates on the role and significance of the SC with respect to the permanent ICC. The latter can also be regarded as an instrument for the maintenance of international peace and security.[2] Thus, both the Council and the ICC undertake to effectuate restorative measures in that field. Hence, coordination between these two political and judicial institutions is required. Neither peace nor justice should be achieved at the cost of the other. The old Roman maxim *fiat iustitia pareat mundus* should not apply here.[3] Otherwise, the result could be total chaos which undermines the respective actions of both institutions. From the formal point of view, the essence of the problem lies in the analysis of the relationship between the Charter of the United Nations and an international treaty, the Rome Statute, which ascribes some functions to the SC.[4] The role of the Council and its influence on the ICC is scrutinized below.

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[1] Ph.P. Kirsch, J.T. Holmes, M. Johnson, *International Tribunals and Courts*, in D.M. Malone (ed.), *The UN Security Council: from the Cold War to the 21st Century*, Lynne Rienner Publishers, Boulder: 2004, p. 281.

[2] D. McGoldrick, *Legal and Political Significance of a Permanent ICC*, in D. McGoldrick, P. Rowe, E. Donnelly (eds.), *The Permanent International Criminal Court. Legal And Policy Issues*, Hart Publishing, Oxford and Portland Oregon: 2004, p. 471. Similarly Sir Francis Berman, *The Relation between the International Criminal Court and the Security Council*, in H.A.M. von Hebel, J.G. Lammers, J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, T.M.C. Asser Press, The Hague: 1999, pp. 174 and 179.

[3] *Cf.*, G.W.F. Hegel, Grundlinien der Philosophie des Rechts, Berlin: 1821, p. 125: *fiat justitia soll nicht pereat mundus zur Folge haben.*

[4] Rome Statute of the International Criminal Court, UN Doc. No. A/CONF.183/9 (July 17, 1998), reprinted in 37 International Legal Materials (1998), pp. 999 ff.

1. THE ICC AND THE UN

Despite many initial proposals, the ICC was created outside the UN system. The idea to create an international court for penal matters has a long tradition, to mention only the proposals by Vespasien V. Pella.[5] It was later proposed to create a penal chamber within the Permanent Court of International Justice.[6] During the Cold War this work was continued, *inter alia*, by the International Law Commission (ILC). Its attempts were intensified at the end of the previous century. One of the options under consideration was an amendment of the UN Charter which would include the ICC as another principle organ of the United Nations.[7] Due to the rigid amendment requirements this was not an viable solution. The same was true for the creation of the court by an international treaty. Owing to these difficulties some other options were considered, among them the creation of the court by the General Assembly or by the SC. According to D. Krieger, the second-best solution (after the amendment of the Charter) would be to for the SC to establish the ICC, however without special privileges for the permanent members of the SC.[8]

As an argument against the creation of the Court by the SC, one could point out that the SC as a creator of the Court could also terminate its existence. This would contradict its permanent character. Besides, one should also pay attention to the distinction, voiced by the ILC as well as some scholars, between the competence to create an *ad hoc* tribunal and the power to establish a permanent court with general powers and competences.[9] The latter would 'stretch the powers of the Council close to or beyond the breaking point'.[10]

Eventually, the above-mentioned discussions lost significance due to the establishment of the ICC. On this basis, an integrated judiciary organization (and

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[5] *See*, by Pellar, *La criminalité collective des états et le droit pénal de l'avenir*, Bucarest: 1925 or *Towards an International Criminal Court*, 44 American Journal of International Law (1950), p. 37 ff.

[6] *See*, K. Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford: 2001, p. 16; J. Kolasa, *Origins and sources of procedural law of international courts: Ubi jus, ibi remedium*, in V. Epping, H. Fischer, W. Heintschel von Heinegg (Hrsg.), *Brücken bauen und begehen. Festschrift für Knut Ipsen zum 65. Geburtstag*, C.H. Beck, München: 2000, fn. 17, p. 194.

[7] R.S. Clark, *The Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations*, 8 Criminal Law Forum (1997), pp. 415-6, considers it to be 'the tidiest and most prestigious' way to create the ICC.

[8] D. Krieger, *A permanent International Criminal Court and the United Nations system*, in N. Al-Naumi, R. Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law*, Martinus Nijhoff Publishers, The Hague *et al.*: 1995, pp. 773-4.

[9] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, para 25, p. 9.

[10] Clark, *supra* note 7, p. 416.

not merely an *ad hoc* tribunal) was created. It is organically separated from the United Nations[11] and has an international legal personality.[12]

While the permanent ICC is independent in its relationship with the United Nations system, it is bound with the Purposes and Principles of the UN Charter.[13] Hence, it has been recognized that both the UN and the ICC share common values.[14] This reaffirmation in the Rome Statute of the Charter's principles seems to justify the opinion that the Statute is 'a supplement to the UN Charter'.[15]

Furthermore, the Preamble to the Statute acknowledges that grave crimes within the jurisdiction of the ICC threaten the peace, security and well-being of the world.[16] Such a wording might, as envisaged by some authors, provide the SC with an "open-ended license to meddle".[17] Opinions of that kind seem to be exaggerated, although it is a fact that the Court might be regarded as a very valuable instrument at the disposal of the Council in its responsibilities to maintain international peace and security.[18] This led to the conclusion of a relationship agreement (the Negotiated Relationship Agreement) as foreseen in Article 2 of the Rome Statute.

Despite the initial proposals by the Preparatory Committee,[19] such an agreement should not be treated as similar to the agreements with specialized agencies under Articles 57 and 63 of the Charter. Although the Court is "established by intergovernmental agreement" and has "wide international responsibilities", they do not encompass "economic, social, cultural, educational, health, and related fields".[20] Therefore those agreements might not be regarded as a suitable model in this regard.[21]

[11] L. Condorelli, S. Villalpando, *Relationship of the Court with the United Nations*, in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of The International Criminal Court: A Commentary*, Vol. 1, Oxford University Press, Oxford: 2002, p. 221.

[12] Rome Statute, Article 4.

[13] See Preamble of the Rome Statute, paras. 7 and 9.

[14] M. Bergsmo, *Preamble,* in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Nomos Verlag, Baden-Baden: 1999, p. 13.

[15] Ch. Tomuschat, *Das Statut von Rom für den Internationalen Strafgerichtshof*, 73 Die Friedens-Warte (1998), p. 337.

[16] Rome Statute, Preamble, paragraph 3.

[17] N. Elaraby, *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections*, in M. Politi, G. Nesi Giuseppe (eds.), *The Rome Statute of the International Criminal Court: a challenge to impunity,* Ashgate, Aldershot *et al.*: 2001, p. 45.

[18] Kirsch *et al.*, *supra* note 1, p. 290.

[19] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals)*, UN Doc. A/51/22 (1996), p. 4.

[20] See UN Charter, Art. 57 (1).

[21] A. Marchesi, *Article 2*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Nomos Verlag, Baden-Baden: 1999, p. 69.

The Negotiated Relationship Agreement between the International Criminal Court and the United Nations[22] was initiated in June 2004 and then approved by the Assembly of State Parties and entered into force on 4 October 2004 upon its signature by the Secretary General of the United Nations and the President of the ICC. Not only does the Agreement binds the Court with the UN, but it also establishes the legal obligations of the UN vis-à-vis the Court.[23] It provides that the United Nations and the Court respect each other's status and mandate, being under the mutual obligation to cooperate closely.[24] Of utmost importance is Article 3, which stipulates: "[t]he United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute."

On the other hand note must be made of the emphasis which is put in the Agreement on the independence of the Court. Under Article 2(1) of the Agreement, the United Nations recognizes the Court as an independent permanent judicial institution, which has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. However, a tendency to subject the ICC to the UN can also be identified. The Court itself also recognizes the responsibilities of the United Nations under the Charter.[25] On its part, the Statute might conversely be regarded as yet another attempt to subject the SC to judicial control – at least partially, limited to the field of international criminal law.[26]

The relationship between the ICC and the SC should not be analysed however merely on the basis of the Preamble to the Statute, nor on the provisions of the Relationship Agreement. It is crucial to examine the specific provisions of the Rome Statute. They demonstrate that the Security Council plays a multifold role with regard to the ICC, the details of which are analyzed in the following sections.

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[22] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, available at http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf

[23] L. Condorelli, S. Villalpando, *Relationship of the Court with the United Nations*, in A. Cassese, P. Gaeta, J.R. W.D. Jones (eds.), *The Rome Statute of The International Criminal Court: A Commentary*, Vol. 1, Oxford University Press, Oxford: 2002, p. 223.

[24] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Arts. 2 and 3.

[25] *Ibidem*, Article 2(2).

[26] A. Zimmermann, *Function of International Criminal Law in the International System After the Entry into Force of the Rome Statute of the International Criminal Court*, German Yearbook of International Law 2002, p. 45.

2. SUBJECT-MATTER JURISDICTION

The permanent ICC has jurisdiction over "the most serious crimes of international concern". The Draft Statute proposed by the International Law Commission also included treaty-based crimes.[27] The ICC has jurisdiction over genocide, crimes against humanity, war crimes and crimes of aggression. Articles 121 and 123 dealing with amendment of the Statute are rigid and preclude the SC from extending the jurisdiction of the ICC. Only States may alter the jurisdiction *ratione materiae*. Their role in extending the jurisdiction in that regard is exclusive. The SC may not even introduce proposals.[28]

A special role of the SC should be noted with respect to the crime of aggression. The inclusion of this crime within the subject matter jurisdiction of the ICC was contentious. Some commentators considered it a "Trojan horse" or even "a time bomb within a treaty structure".[29] Eventually, because of the Nuremberg legacy, it was recognised as one of the crimes falling within the jurisdiction of the Court. However, one may still hear opinions that the crime of aggression should be deleted from the Rome Statute.[30]

The inclusion, in any case, is only partial in reality. In practical terms, the ICC may not exercise jurisdiction over the crime of aggression until the adoption of a provision amending the Rome Statute that defines the crime and sets out the conditions under which the Court shall exercise jurisdiction with respect to it.[31] Such a provision needs to be adopted and enter into force in accordance with Articles 121 and 123 of the Rome Statute.

It is not easy to define aggression, labelled the "most controversial word in modern international law".[32] A crime of aggression presupposes an act of aggression committed by a State. It is a paradigmatic crime of a State.[33] That is the main

[27] *Compare* Resolution E adopted at the Rome Conference, referring to terrorism and drug trafficking to be included in the subject-matter jurisdiction of the ICC after the Review Conference.

[28] *Further see* Ch. Junck, *Die Gerichtsbarkeit des Internationalen Strafgerichtshofs. Vorbedingungen und Auslösemechanismen nach dem Römischen Statut vom 17. Juli 1998*, Peter Lang Verlag, Frankfurt am Main *et al.* 2006, p. 283.

[29] *See*, M. Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 Criminal Law Forum (2003), p. 17, fn. 120; R. Wedgwood, *The International Criminal Court: An American View*, 10 European Journal of International Law (1999), p. 105.

[30] Schuster, *supra* note 29, pp. 43, 51.

[31] Rome Statute, Article 5(2).

[32] T.W. Bennett, *Linguistic Perspective of the Definition of Aggression*, 31 German Yearbook of International Law (1988), p. 48.

[33] J. Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 American Journal of International Law (1994), p. 147.

difference between it and other crimes within the jurisdiction of the ICC. Yet, even a definition of the crime in the Statute would be merely – as in the case of the General Assembly definition of 1974 – a set of factors recommended but not binding for the Council in the exercise of its primary responsibility for the maintenance of international peace and security. The SC would not be bound by the definition.

Of greater importance for the sake of our analysis are the conditions under which the ICC may exercise its jurisdiction in relation to the crime of aggression. As in the case of a definition, the amendment must be consistent with the relevant provisions of the United Nations' Charter. The crucial question in that regard is whether the Court, in order to commence proceedings, needs to rely on a determination by the SC. The other important question is whether the SC is the only authority to make such finding.

At first sight, at least theoretically, the clearest scenario for the ICC would be to have a prior determination by the SC that an act of aggression has taken place. In the view of numerous international lawyers this power of the SC is exclusive.[34]

However, such a scenario is hardly realistic considering that SC determinations in that regard are scarce. Even in the most obvious cases the SC has refrained, for the sake of international peace and security, from adopting resolutions of that kind.[35] Such a finding could easily lead to exacerbation of the hostilities between the States involved. Even more importantly, it could affect the future proceedings before the ICC, given the fact that the respective Council resolution would at least implicitly suggest that some of the leaders of the 'aggressor' State should be held responsible for a specific act of aggression.[36] Hence, if the jurisdiction of the Court over crimes of aggression was to rely on the determinations made by the SC, this would undermine the judicial character of the ICC.[37] In addition, this reliance would encroach upon the independence and integrity of the Court. Rights of the accused

[34] *See e.g.* T. Meron, *Defining Aggression for the International Criminal Court*, 25 Suffolk Transnational Law Review (2001), p. 14; P. Gargiulo, *The Controversial Relationship between the International Criminal Court and the Security Council*, in F. Lattanzi, W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Sirente, Roma: 1999, p. 92, *but cf.* D.D. Ntanda Nsereko, *Aggression under the Rome Statute of the International Criminal Court*, 72 Nordic Journal of International Law (2002), p. 505.

[35] *See e.g.* SC resolution 660 (1990) condemning "the Iraqi invasion of Kuwait".

[36] G. Gaja, *The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression*, in M. Politi, G.Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate, Aldershot: 2004, p. 124.

[37] J.N. Boeving, *International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 Columbia Journal of Transnational Law (2005), p. 583. M. Lehto, *The ICC and the Security Council: About the Argument of Politization*, in M. Politi, G.Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate, Aldershot: 2004, p. 146.

might be also put at risk. This would particularly include the presumption of innocence. Another issue that would arise is what to do if, in the course of the court proceeding, the determination would be questioned in the face of new evidence. Should the situation be referred back to the Council? Those are only a few of the possible controversies related to any reliance by the ICC on a prior determination of aggression by the SC.

Consequently one may argue that the ICC should act independently and does not need to be dependent on any determination of the Council. Yet another alternative is to consider a proposal under which the Prosecutor may start a case but then – for its further conduct – a confirmation from the SC would be needed.[38] This option, that the SC give a "green light"[39] to the Court, is worth-noting.

The above analysis has been based on an assumption that the power of the Council to determine aggression is exclusive. This view is, however, disputed. To support the opposite opinion some parallels might be drawn with relations between the Council and the ICJ. As underlined by the judges of the ICJ in several judgments, the responsibility of the Security Council under Article 24 of the Charter for the maintenance of international peace and security is 'primary', not exclusive.[40] One may extend that conclusion also to the ICC. The lack of a Council determination does not necessarily mean the lack of aggression itself. In some of the options under consideration, only after an explicit statement by the Council that aggression has not occurred would the ICC be prohibited from proceeding.[41] This option would have the advantage of respecting the position of the SC while treating all crimes in a uniform way.

A variation of that option would be to give the SC some time to make the respective determination. If the SC has not adopted such a resolution, the ICC

[38] *See* M.S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to determine Aggression?*, 16 Indiana International and Comparative Law Review (2005), p. 34.

[39] Compare draft Article 15 bis (4), ICC-ASP/7/SWGCA/2, p. 12.

[40] *See, Certain Expenses of the United Nations,* [1962] ICJ Rep 162; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility,* para 90, [1984] ICJ Rep 432. This view was confirmed by the ICJ in the Advisory Opinion on the Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, para 26.

[41] M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression: Historische Entwicklung, Geltung und Definition im Hinblick auf das Statut des Internationalen Strafgerichtshofes,* Nomos Verlag, Baden-Baden: 2001, p.237. This negation could flow from art. 16 of the Rome Statute or take a form of a special resolution – so called 'red-light option' – see ICC-ASP/7/SWGCA/2, p. 5.

could then proceed with the case.[42] Some opponents of this proposal argue, however, that it equates inaction by the Council with a determination that an act of aggression has taken place. And the establishment of a deadline for the Council would almost certainly be contrary to the Charter.[43] Without authorization by the Council, the proceedings before the Court might escalate the conflict and make the Council's task even harder.[44]

In order to enable the ICC to fulfil a goal in common with the SC, i.e. to maintain international peace and security, some other options were also considered. One was that the Court could rely on an external determination by the General Assembly or the International Court of Justice (ICJ).[45] Another possibility would be to use the advisory jurisdiction of the ICJ.[46] If the SC does not make a determination of an act of aggression within 12 months, nor makes use of Article 16, then it may notify the General Assembly of the situation before the Court and invite the General Assembly to request the International Court of Justice to give an advisory opinion on the legal question of the existence of an act of aggression by the State concerned. Later the time limit included in the proposal was shortened to 6 months. Even more importantly, the ICC might proceed to exercise its jurisdiction also when the ICJ makes a finding in a contentious procedure, i.e. while hearing a dispute between States.[47]

Some serious objections might be raised against these options. Relying on the General Assembly would mean dependence on the political organ of the UN. Serious problems might also be associated with engaging the ICJ, owing to its lengthy proceedings. While awaiting a position by the ICJ, some important pieces of evidence might be destroyed. To solve those problems another suggestion has been made, allowing the Pre-Trial Chamber to authorize the proceedings before the ICC if an external determination is lacking.[48] Such an option would give the Court the necessary independence when asserting its jurisdiction in this regard, while also safeguarding, at least to some extent, the position of the SC.

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[42] *See* Proposal by Cameroon, UN Doc. A/CONF.183/C.1/L.39, 2.7.1998, Proposal submitted by Greece and Portugal, PCNICC/2000/WGCA/DP.5.

[43] Meron, *supra* note 33, p. 12-3.

[44] A. Zimmermann, *Creation of a Permanent International Criminal Court*, 2 Max Planck Yearbook of United Nations Law (1998), p. 203.

[45] See Annex ILC Discussion paper 2: *The conditions for the exercise of jurisdiction with respect to the crime of aggression*, ICC-ASP/4/32, p. 387.

[46] PCNICC/2001/WGCA/DP.1: Proposal Submitted by Bosnia and Herzegovina, New Zealand and Romania.

[47] PCNICC/2001/WGCA/DP.2/Add.1.

[48] ASP/6/SWGCA/INF.1, 25.07.2007, p. 20.

The conditions for the exercise of jurisdiction over the crime of aggression, as well as the very definition of the crime, belong to the most controversial topics under discussion before the Review Conference.

3. REFERRAL OF A SITUATION TO THE ICC

There are three ways to trigger the jurisdiction of the Court. According to the Rome Statute, the SC may, acting under Chapter VII of the Charter of the United Nations, refer to the Prosecutor a situation in which one or more of such crimes appears to have been committed. Besides, the Court may exercise its jurisdiction if such a situation is referred to the Prosecutor by a State Party, or if the Prosecutor *proprio motu* has initiated an investigation. In the latter cases it is necessary that the State in whose territory the crime was committed or the State of nationality of the accused have ratified the Statute or consented to the jurisdiction of the Court. This requirement does not apply in case of referral by the SC, whereby the Court may proceed even without such acceptance. Such "erosion" of state consent represents a serious and relevant exception to the consensual basis of the Court's jurisdiction.[49]

The object of a referral, i.e. what constitutes a "situation", is worth discussing. Quite deliberately it was decided during the Rome Conference to "minimize prejudicing of the Court".[50] The wording ("a situation" rather then a specific "case") preserves the independence of the Court.[51] The final arbiter on the opening of an investigation is the Prosecutor. The Pre-Trial Chamber may review the decision but may not replace it. In such a case the Prosecutor is to reconsider his or her previous decision, but may still make the same decision as to whether or not to open the investigation.[52]

The power of the Council to trigger the jurisdiction of the ICC has been heavily criticized.[53] However, if the SC may establish jurisdiction by means of creating

[49] Gargiulo, *supra* note 33, p. 81.

[50] See M.H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in H.A.M. von Hebel, J.G. Lammers, J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, T.M.C. Asser Press, The Hague: 1999.

[51] However, when applying *a maiori ad minus* rule an opposite conclusion might be drawn. If it is possible to refer a situation, it should also be possible to rely on some of its elements only.

[52] See Article 53 (3) of the Rome Statute and rules 107 *et seq.* (in particular rule 108(2)) of the Rules of Procedure and Evidence).

[53] See e.g. Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court (17.7.1998, www.un.org/icc/speeches/717ind.htm): "The power to refer is now unnecessary. The Security Council set up ad hoc tribunals because no judicial mechanism then existed to try the extraordinary crimes

a separate tribunal, it should be also empowered to take part in initiating proceedings in front of a permanent institution of that kind, i.e. the ICC. This is simply the 'logical culmination of this programme'.[54] Article 13(b) of the Rome Statute does reflect the competence of the Council under the Charter, and, additionally empowers the Court to take up the case.[55]

A view has been expressed that inasmuch as the Statute allows the SC to trigger proceedings before the Court, it thereby "puts at the Council's disposal a judicial instrument for the prosecution of international crimes, accessible in any and all future situations without the need to create new tribunals."[56] In this vein, the Court would act like quasi-ad hoc organ[57] or "a permanent ad hoc tribunal".[58] Therefore one can appreciate the assessment by Carsten Hollweg, who foresees a double function for the ICC: on the one hand as a court of law, on the other as a subsidiary organ of the SC.[59]

Other scholars go so far as to claim that when acting under a mandatory SC referral, the ICC becomes an altogether different entity. It becomes, it seems, a judicial

committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and the States Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable".

[54] G.P. Fletcher, J.D. Ohlin, *The ICC – Two Courts in One*, 4 Journal of International Criminal Justice (2006), p. 432. See also G.-J.A. Knoops, *International and Internationalized Criminal Courts: the new face of international peace and security?*, 4 International Criminal Law Review (2004), p. 535.

[55] M. Bergsmo, *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relation between the Court and the Security Council*, 69 Nordic Journal of International Law (2000), p. 94.

[56] L. Condorelli, S. Villalpando, *Referral and Deferral by the Security Council*, in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of The International Criminal Court: A Commentary*, Oxford University Press, Oxford: 2002, p. 628.

[57] A. Bruer-Schäfer, *Der Internationale Strafgerichtshof: Die Internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik*, Peter Lang Verlag, Frankfurt am Main *et al.*: 2001, p. 247.

[58] L. Condorelli, *La Cour pénale internationale: Un pas de géant (pourvu qu'il soit accompli...)*, 103 RGDIP (1999), p. 17. See also R.B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 Criminal Law Forum (1999), p. 65. In the similar vein: Clark, *supra* note 7, p. 416.

[59] *Doppelfunktion als Hilfsorgan des Sicherheitsrats der UNO* – zob. C. Hollweg, *Vom Jugoslawientribunal der UNO zum allgemeinen Internationalen Strafgerichtshof? Der schwierige Prozess der Schaffung einer internationalen Strafgerichtsbarkeit*, 112 Schweizerische Zeitschrift für Strafrecht 112 (1994), p. 281.

organ of the UN, subject to the prosecutorial discretion of the Security Council, not its own prosecutor, and funded by the UN through the budgetary authority of the General Assembly.[60] Then, the ICC would become "a court called to order in the service of international peace, an instrument to advance the security objectives of the Council".[61] However, such a distinction seems harsh and unfounded. Prosecuting international crimes and bringing their perpetrators to justice contributes to the maintenance of international peace and security no matter who initiates the proceedings and under what procedure. At the same time, the ICC may lose its independence and become dependent on the SC, even upon the Council's referral.

The referral is subject to some strict conditions that may not be amended by the Council.[62] In any case before it, the Court may exercise its jurisdiction "in accordance with the provisions of [the] Statute". The SC may not interfere. Under Article 53, it is the Prosecutor who initiates investigation after careful evaluation of the available information. As provided in Article 42 of the Rome Statute, the Prosecutor shall act independently as a separate organ of the Court. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for prosecution, because of either the lack of sufficient legal grounds or factual basis, inadmissibility of evidence, or if a prosecution is not in the interests of justice,[63] he or she shall inform the Pre-Trial Chamber, as well as the SC if it has previously referred the situation to the Prosecutor, of his or her conclusions and reasons. At the request of the SC, the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.[64] Nevertheless in the end, the decision rests within the discretion of the Prosecutor and the Pre--Trial Chamber may not replace it with its own, even if the review procedure under Article 82 is started.[65] Quite exceptionally, a decision of the Prosecutor not to proceed based on the interests of justice would be effective only after confirmation by the Pre-Trial Chamber.[66] This procedure, however may not be initiated by the SC.

[60] Fletcher, Ohlin, *supra* note 54, p. 430.

[61] *Ibidem.*

[62] Condorelli, Villalpando, *supra* note 56, p. 628.

[63] The Prosecutor is to take into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator(s), and his or her role in the alleged crime.

[64] Rome Statute, Article 53(3).

[65] Under Article 82 (1)(a) either part may appeal a decision with respect to jurisdiction and admissibility. Such an appeal needs to be consistent with the Rules of Procedure and Evidence. The final decision on opening the investigation rests with the Prosecutor.

[66] Art. 53(3)(b).

In light of the above, one may conclude that the SC cannot interfere in the further stages of the proceedings triggered on its own initiative. Eventually, the final decision whether to initiate a proceeding rests with the Court.

4. DEFERRAL OF PROCEEDINGS

A potential conflict between combating impunity and the maintenance of international peace and security might be seen particularly in the power of the Security Council to defer proceedings before the ICC.

Correlating the acts of the permanent ICC with those of the Council is much more problematic here, especially if one takes into consideration that the price for achieving peace may be quite high. The Council may well decide that the saving lives by conclusion of a peace accord is more important than the prosecution of the perpetrators of the most serious international crimes. For these reasons it was clear to the drafters of the Statute that some provisions addressing this issue needed to be included.

Initially, the ILC recommended an automatic bar on initiating a prosecution arising from a situation being dealt with by the SC, unless the latter organ decides otherwise.[67] The provision of Article 16 that was finally adopted stipulates that "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

Article 16 could be regarded as one of the most dangerous and sensitive provisions in the ICC Statute.[68] According to P. Gargiulo, it is the most controversial aspect of the role of the Security Council in the Statute.[69] He considers it a source of the greatest difficulty when it comes to ensuring the establishment of an independent and impartial mechanism.[70] It is the first time that States have expressly agreed to allow a political body, such as the Security Council, to influence the

[67] *See*, *Draft Statute for an International Criminal Court, Report of the International Law Commission*, UN GAOR, 49th Session, Supp. No. 10, UN Doc. A/49/10, Article 23 (3).

[68] *See*, M. El Zeidy, *The United States dropped the atomic bomb of Article 16 of the Rome Statute*, 35 Vanderbilt Journal of Transnational Law (2002), p. 1509.

[69] Gargiulo, *supra* note 33, p. 85.

[70] *Ibidem*.

affairs of a judicial body to such an extent.[71] However, seen from a different perspective, Article 16 of the Rome Statute can be regarded as the vehicle for resolving conflicts between the requirements of peace and justice where, in the view of the Security Council, the peace efforts need to prevail over international criminal justice. However, some serious problems relating to the selectivity and political control over the judicial process might appear here, which need to be addressed in a way that does not affect the credibility of the ICC.[72] In addition, one must not lose sight of the consequences, which could significantly and negatively affect the detention of suspects, collection of evidence, protection of witnesses etc.

The above provision does not specify any grounds upon which the Security Council's request to the ICC must be based. Inclusion of such grounds would enable some control of the Security Council's powers.[73] t the same time, it is clear that the Council must act according to the provisions of the Charter. Some commentators argue that the SC should state, in an explicit way, that the investigation or prosecution constitutes a threat to international peace and security.[74] In the view of other authors, the Council might refer to a larger factual or political background and, accordingly, decide that a proceeding before the ICC does not constitute a threat to peace, and its suspension would not effectively contribute to the preservation or restoration of peace.[75]

5. ENFORCING COOPERATION WITH THE ICC

The SC also plays an important role with regard to States that fail to comply with the obligations concerning international cooperation and judicial assistance. The Rome Statute provides a general obligation to cooperate fully with the Court.[76] The further provisions specify the modalities of such cooperation. The system is based on requests for cooperation of the ICC to State Parties. According to Article 87(7), should a State Party fail to comply with the request to cooperate by the

[71] G.H. Oosthuizen, *Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council*, XLVI Netherlands International Law Review (1999), p. 330.

[72] M. Bergsmo, J. Pelić, *Article 16*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden: 1999, p. 378.

[73] Berman, *supra* note 2, p. 176.

[74] A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10(1) European Journal of International Law 144 (1999), p. 163.

[75] Condorelli, Villalpando, *supra* note 56, p. 647.

[76] Rome Statute, Article 86.

Court, thereby preventing the Court from exercising its functions and powers, the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the SC has referred the matter to the Court, to the Security Council. A similar mechanism has been foreseen for States nor party to the Rome Statute (hereinafter referred to as 'non-party States') that nevertheless accept the jurisdiction of the Court.[77]

The power of the SC in that regard seems rather limited; a central role is to be played by the Assembly of State Parties (ASP), a body consisting of representatives of States that have ratified the Rome Statute and thus are friendly to the ICC. An action by the ASP would be easier to accept rather than an analogous step by the SC.

The wording of Articles 87(7) and (5) seems to preclude the scenario of the Court informing the SC when the respective situation has not been referred by the Council.[78] However, nothing prevents the ASP from referring a case on to the SC.[79] One could even imagine an independent action of the SC. Such a situation, although not provided in the Rome Statute, is possible. The rationale behind it is the expected action of States, as requested by the Court and endorsed by the SC.

6. SECURITY COUNCIL'S PRACTICE

Already during the drafting of the Rome Statute some attempts were made to exclude the troops operating under a Security Council mandate from the jurisdiction of the projected ICC. In particular, France favoured the inclusion of such a provision in the text of the Statute.[80] Moreover, soon after the entry into force of the Rome Statute, some attempts were made within the Council to use the mechanisms envisaged in the treaty, mainly in Article 16.

As the Security Council met in June 2002 to discuss a renewal of the United Nations mandate for the peacekeeping operation in Bosnia, the USA warned that

[77] Rome Statute, Article 87(5)(b).

[78] C. Kreß, K. Prost, *Article 87*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlag, Baden-Baden: 1999, pp. 1063 and 1068.

[79] K. Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation*, DJOF, Copenhagen: 2000, p. 71.

[80] A. Zimmermann, *"Acting under Chapter VII (...)" – Resolution 1422 and Possible Limits of the Powers of the Security Council*, in J. A. Frowein et al. (Hrsg.), *Verhandeln für den Frieden/Negotiating for Peace. Liber Amicorum Tono Eitel*, Springer, Berlin *et al.*: 2003, p. 257. Then France proposed to include in the Statute the following provision: "Persons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it shall not be criminally responsible before the Court" UN Doc. A/AC.249/1998/L. 13, art. 26.

its personnel would not participate in UN peacekeeping operations unless granted immunity by the Security Council. The US representative consequently proposed a draft resolution granting immunity from the ICC jurisdiction to all (both military and civilian) personnel engaged in the peacekeeping operations under the auspices of the United Nations. The proposal gained no support since the other members of the Council thought that the Rome Statute was sufficiently balanced so as not to undermine the idea of peacekeeping. In ovder to allow for further discussions on immunity of the peacekeeping members, the Security Council agreed on the 21 of June 2002 to extend the mandate of the Bosnian mission for nine days.[81] As the negotiations gave no result, the United States vetoed a resolution aiming at extension of the UN peacekeeping operation in Bosnia for another six months and accepted a resolution extending the mandate for only three days.[82] On the day the ICC was established, 1 July 2002, the US withdrew its three military observers from the UN peacekeeping force in East Timor. As a solution, the United States proposed to make use of Article 16 of the Rome Statute. The Council passed an additional resolution extending the UN mandate in Bosnia for another 12 days. Finally, after a heavy debate, the Council unanimously adopted resolution 1422.[83]

The first operative paragraph of the resolution 1422 provided: "The Security Council [r]equests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."

What resolution 1422 implicates is that jurisdiction of the ICC over peacekeepers from States which are not parties to the Rome Statute may constitute a threat to international peace and security. That is hardly the case. The resolution seems to send the message that peacekeepers from non-party States are more 'equal' before the law than peacekeepers from party States because they benefit from a 12-month exemption from the charges under the Rome Statute. This distinction is clearly of discriminatory character.[84]

If jurisdiction of the ICC constitutes a threat to international peace and security in general, then the exemption given by a resolution should be much broader

[81] UN Doc. S/Res/1418 (2002).
[82] UN Doc. S/Res/1420 (2002).
[83] UN Doc. S/Res/1422 (2002).
[84] C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 European Journal of International Law (2003), p. 86.

in its scope, not limited to peacekeepers from non-party States. There is no reason to believe that ICC jurisdiction over peacekeepers from the states that have not ratified the Rome Statute is more likely to constitute a threat to international peace and security than ICC jurisdiction over peacekeepers from state parties. Thus, the scope of the resolution appears to be either too narrow or simply misdirected.[85]

Resolution 1422 did in fact create a bad precedence. It called for a renewal for a further 12-month period.[86] This is in direct contradiction to the view that Article 16 should be applied only in particular cases and not to an entire class of individuals. A new discussion within the Council began in June 2003, when the US again wanted to exclude peacekeeping troops from the non-party States from ICC jurisdiction. Finally, with 12 votes in favour, none against and 3 abstentions, the Council adopted resolution 1487, whose text was identical with that of its predecessor.[87]

Another attempt to renew was made in May 2004 but eventually abandoned because of the devastating impact of resolution 1497 (see below).[88] The lack of support for further deferral resolutions could also, at least to some extent, be explained by the revelations concerning the situation in the Abu Ghraib prison.[89]

While resolutions 1422 and 1487 were not based on the clear determination of the existence of threat, the situation which led to the adoption of the resolution 1497[90] was completely different. This resolution was passed in response to the conflict in Liberia, which beyond any doubt did constitute the threat to international peace and security. Under this resolution, the jurisdiction of the ICC was excluded, but not by invoking Article 16 of the Rome Statute. The operative paragraph 7 of the resolution provides for exclusive jurisdiction of the contributing states over the acts of their personnel, unless expressly waived by the contributing state.[91]

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[85] C. Fritsche, *Security Council Resolution 1422: Peacekeeping and the International Criminal Court*, in J. A. Frowein *et al.* (eds.), *Verhandeln für den Frieden/Negotiating for Peace. Liber Amicorum Tono Eitel*, Springer, Berlin: 2003, pp. 114-5.

[86] UN Doc. S/Res/1422 (2002), operative par. 2.

[87] UN Doc. S/Res/1487 (2003).

[88] S. Zappalà, *Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC*, 1 Journal of International Criminal Justice (2003), p. 677.

[89] *See* A. Abbas, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 Texas International Law Journal (2005), p. 265.

[90] UN Doc. S/Res/1497 (2003).

[91] *Ibidem*, operative par. 7 states: "The Security Council decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State".

The resolution specifies no time limit for this exclusion. The situation is therefore different. Instead of a mere deferral, the resolution terminates ICC jurisdiction on a permanent basis. Of course, the conferral of exclusive jurisdiction on non-party States is inconsistent with the complementarity regime under Article 17 and the rules on immunities contained in the Rome Statute. Not only does resolution 1497 deprives the ICC of jurisdiction but also other states are excluded, including a state on the territory of which the crime was committed as well as a state of which the victim is a national.

Compared to the previous resolutions which suggested that non-party States were obliged to effectively prosecute international crimes,[92] resolution 1497 remains silent as to the responsibilities of such states with regard to prosecution. This could be regarded as a huge step backwards. Not only does this resolution exclude the ICC by means of establishing the exclusive jurisdiction of the sending state, but it also deprives a state on the territory of which a crime has been committed of its inherent right to prosecute such a crime. The assessment of this resolution is therefore, not surprisingly, quite critical.

Ironically, some reference to the deferral of ICC proceedings occurred in the first resolution *referring* a case to ICC.[93] The Security Council adopted it under Chapter VII of the UN Charter by a vote of 11-0, with four abstentions from Algeria, Brazil, China and the United States. Having determined that the situation in Sudan continued to constitute a threat to international peace and security, the Council decided "to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court".[94] Interestingly enough, the Council did not mention Article 13 of the Rome Statute dealing with referral. Instead, there was an express reference to Article 16[95] and note taken of the existence of agreements referred to in Article 98(2) of the Rome Statute.[96]

Paragraph 7 of said resolution went somewhat further, stating that "none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily". This position, however,

[92] See the preamble paragraph 5 of resolutions 1422 and 1487: "determining that States not Party to the Rome Statute will continue to fulfill their responsibilities in their national jurisdictions in relation to international crimes".

[93] UN Doc. S/Res/1593 (2005).

[94] *Ibidem*, operative para. 1.

[95] *Ibidem*, preamble para. 2.

[96] So-called Article 98 agreements or bilateral immunity agreements; see preamble para. 4 of the resolution 1593 (2005).

contradicts Article 115(b) of the Rome Statute, which provides that expenses of the Court shall be borne by the United Nations, in particular in relation to the expenses incurred due to referrals by the Security Council. In addition, they should be approved by the General Assembly and not by the SC.

Apart from limitations in financing there were more critical provisions in the resolution which undermine the functioning of the ICC. In paragraph 6 the Council "decides that nationals, current or former officials of personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State". Note that introducing limitations on the exercise of jurisdiction affects not only to the ICC (undermining its complementarity regime), but also the domestic courts of all states with the sole exception of the national state of the alleged offender. Such a provision of immunity from jurisdiction "runs counter to the spirit of the Rome Statute".[97]

Here again, as in resolution 1497, the jurisdiction of the ICC has not been merely suspended but indefinitely terminated. The latter point provokes some doubts on the reference in the resolution's preamble to Article 16 of the Rome Statute. While invoking that provision, the Council at the same time ignored its requirements. This is even more astonishing when we recall that the Security Council is an organ of the United Nations and thereby under an obligation to respect the status and mandate of the ICC under the Negotiated Agreement.[98]

As can be seen, the cost paid for avoiding a veto from US was very high. Otherwise there would not have been any referral at all. Thus the only SC resolution to date referring a situation to the ICC has simultaneously shown how difficult it can be to reach a consensus within the Council over the role of the ICC.

CONCLUDING REMARKS

The SC has played an important role in international criminal justice. Its influence on the ICC may be both positive and negative. The permanent Court, given international legal personality, is independent from the United Nations and

[97] As assessed during the debate by Mr. Adechi of Benin – see UN Doc. S/PV. 5158, p. 10.

[98] L. Condorelli, A. Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 Journal of International Criminal Justice (2005), p. 597.

its political organs. However, the ICC Statute fully recognizes the pre-eminent role of the Security Council in the maintenance of international peace and security under the Charter.

The provisions of the Rome Statute define the effects of actions by the Council for the Court, which vary between having a non-binding character, as in the case of referral, and the absolute rigidity of deferral. The role of the Security Council under the Rome Statute should in general be appreciated. The provisions of the Statute provide a solid basis for balancing the interests of international peace and justice. These values, albeit connected, are not always identical.

A different assessment, however, should be given to the application of the said provisions in practice. The resolutions adopted so far have suspended and even excluded the members of UN peacekeeping troops from the jurisdiction of the ICC. One needs, at the same time, to also take note of the positive developments, especially the referral of the situation in Darfur.

The above analysis clearly shows that it is necessary for both the ICC as a judicial body and the SC to join and coordinate their reactions to international crimes. International peace and international criminal justice are closely related, not mutually exclusive. Their attainment, however complex and tricky, must be promoted as the former cannot be completely achieved at the cost of the latter and *vice versa*.

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UNILATERAL ACTS IN POLISH-GERMAN RELATIONS[1]

Abstract

The paper is devoted in fact to two unilateral acts. The first of them is the statement of chancellor Schröder made in Warsaw on 1 August, 2004. The second is the statement of the Polish government on the waiver of payments of German reparations made on 23 August, 1953.

The first statement is generally believed to be an act of legal importance. The element that attaches the utmost importance is the promise of the German government to present before international courts the critical evaluation of individual claims of former owners of land on the territories that came under the Polish sovereignty after the Second World War. The elements of that evaluation embrace the conclusions according to which: "there could be no room for the restitution claims from Germany", such claims would "put the history upside down", "proprietary problems connected with the Second World War are no longer a subject for the two governments" and "neither the federal government nor any serious political force in Germany support such claims if they are nevertheless put". There could be no room for doubt as to the legal force of that statement. Its descriptive style or inclusion of elements upon which the government has only limited or no influence at all (the behavior of political parties or individuals) cannot change the binding force of statements relating to the German state as such. In fact the statement is not only a promise. I contains also the elements of waiver and recognition (as to the fact that there is no longer a subject of claims and that they would put the history upside down). The waiver results from the same sentences. It is limited to claims made on the state level

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only. The individual ones are not cancelled as such. If they are however made and not satisfied there is no longer a possibility to put them on the level of states.

The second act made in 1953 is also quite general. Although from the historical perspective there could be no doubt regarding the interrelationship between that act and the USSR-GDR agreement, the statement of the Polish government did not refer to the latter expressly. The author analyses critically the arguments aimed at the justification of the nullity of the act presented in the previous literature. In his opinion it would be very difficult (if possible at all) to put into question the legal force of the act. The author however is not prepared to accept the erection of the Chinese wall between the waiver and other international acts giving rise to the obligations of the author. In that context he refers to the rebus sic stantibus argument according to which the presentation of claims on the side of Germany could justify the new evaluation of the results of the war for the Polish state and nation. That solution would not be happy for any party nor for the stability of law, but it could be perceived as an extreme solution for the most extreme course of events.

INITIAL COMMENTS

It is not possible to find a common denominator for all aspects of Polish-German relations (even for their legal substrate). Therefore, it is not surprising that we search for elements which may serve to describe at least certain common aspects of these relations. It is worth examining whether the notion of a "unilateral act" qualifies as such an instrument. In this context it is should be noted that this notion has been examined since the end of the 19th century, and since the turn of the 21st century efforts have been undertaken by the International Law Commission to codify the law of unilateral acts.[2] While it would be difficult to describe this

[1] The author of this text refers principally to the results of his research work on unilateral acts included in his treatise "*Akty jednostronne państw w prawie międzynarodowym*" (Unilateral acts of states in international law) (FORTHCOMING). At present it is difficult to determine whether the treatise mentioned above or this article will be first available to readers. For this reason there are no detailed references, with page numbers to the treatise mentioned above (and *vice versa* – no references to this article in the treatise).

[2] At its 48th meeting, the International Law Commission (ILC) considered the issue of unilateral acts as requiring codification and its further gradual development within the framework of international law, see Official Records of the General Assembly, Fifty-first Session, Supplement No 10 (A/51/10). In 1997 the ILC appointed an ILC Special Rapporteur for Unilateral Acts – V. Rodriguez-Cedeno. On 5th March 1998 he presented the First report on unilateral acts of states A/CN.4/486. ILC Fiftieth session, Geneva, 20 April – 12 June 1998. Over the next few years he presented eight more reports, the last (ninth) was presented in 2006.

endeavour as successful,[3] the codification efforts have contributed to a considerable extent to the clarification of theoretical and practical issues connected with unilateral acts.

Interestingly enough, there is no difficulty finding examples of unilateral acts in Polish-German relations. We will consider two: the waiver by Poland of its war claims made in 1953, and the declaration of Chancellor Gerhardt Schroeder made on 1st August 2004. Despite the chronology we would like to dwell first on the more recent act, as it will better serve as a basis for pointing out fundamental principles concerning unilateral pronouncements which impose obligations on their author-states. In any event the act of 2004 did not arise out of the act of 1953, and therefore it is not necessary to examine the two acts chronologically.

1. CHANCELLOR GERHARDT SCHROEDER'S PRONOUNCEMENT OF 1 AUGUST 2004

1.1. The content of the pronouncement

On 1 August 2004 in Warsaw, on the occasion of the 60th anniversary of the Warsaw Uprising, Chancellor Gerhardt Schroeder issued a historic statement. It was to some extent overlooked by the commentators. It drew no comment from the editors of even such a prestigious publication as Keesing's International Records, and was not mentioned in the regular reviews of international practice in "Sprawy Międzynarodowe" (International Affairs). However, this early omission was compensated for when shortly afterwards it became the subject matter of an expert treatise prepared by J. Barcz and J. Frowein.[4] Their work is quoted frequently in this article, both as regards to the content of the pronouncement as well as the opinions of the authors.

As quoted by J. Barcz and J. Frowein, Chancellor Schroeder's pronouncement reads as follows:

> "We, the Germans, have a full awareness of the facts regarding who generated the War and who its first victims were. That is why, today, there can no longer be any place for compensation claims from Germany that distort

[3] In 2006 the ILC presented a very short document entitled Guiding principles. Those neither covered the problem in its entirety (which would be rather impossible), nor the part that became the subject matter of the reports of the special rapporteur.

[4] The treatise was published in German in ZaöRV 65(2005) pp. 625–650. The author of this article used the Polish translation of the expertise made available to him by J.Barcz (a typescript). Therefore in this article particular paragraphs instead of pages will be cited. Any references to "the treatise" are made to this document unless stated otherwise.

history. Property issues associated with World War II are, for the two governments, not an issue in German-Polish relations. Neither the Federal Government nor other influential political forces in Germany will support such individual claims, should such claims be filed. The Federal Government will also take such a stance before the international tribunals."[5]

The authors of the treatise have no doubts regarding the binding nature of this statement.[6] Neither do the authors of other articles referring to the pronouncement of Gerhardt Schroeder, i.e. J. Kranz[7] i M.Frankowska.[8] In view of the later declarations made by the German government, this issue does not seem to raise any doubts. However, it is not clear if the later German declarations add anything to the Chancellor's pronouncement. It should be remembered that the main rule relating to the interpretation of unilateral acts formulated by International Court of Justice (ICJ) in the Anglo-Iranian Oil Company case says that a declaration[9] "must be interpreted as it stands, having regard to the words actually used."[10] In the dispute between Spain and Canada on fisheries, the ICJ clarified that the declaration must be interpreted as a single whole.[11] The court also added that "it cannot be based on a purely grammatical interpretation of the text"[12] but "must seek the interpretation which is in harmony with a natural and reasonable way of reading the text". This analysis of the content of pronouncements and of the various possibilities of their interpretation must be kept in mind throughout our examination.

It would be difficult to qualify the pronouncement of the Chancellor of 1st August 2004 as a spontaneous speech made under the influence of emotions.

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[5] See para.1.2 of the expert treatise: http://www.accessmylibrary.com/coms2/summary_0286-12833888_ITM.

[6] See: para 2 of the expert treatise.

[7] J. Kranz, *Polsko-niemieckie cienie przeszłości* (Polish German relations in the shadows of the past), Sprawy Międzynarodowe 1/2005, p. 46.

[8] M. Frankowska, *Oświadczenie kanclerza Gerharda Schroedera złożone 1 sierpnia 2004 r. w Warszawie w świetle prawa międzynarodowego* (The Statement of Chancellor Gerhard Schröder of 1st August 2004 Submitted in Warsaw under International Law), in W.M. Góralski (ed.), *Transfer. Obywatelstwo. Majątek. Trudne problemy stosunków polsko niemieckich* (Transfer. Citizenship. Wealth. Difficult Problems of Polish-German Relations). PISM, Warszawa: 2005, pp. 202 and 218.

[9] In this case the declaration on the acceptance of the ICJ jurisdiction was meant, that is an act which may not be *sensu stricto* considered as a unilateral act. However, there are no reasons why this rule should not be applied to them.

[10] *Anglo-Iranian Oil Company*, [1952] ICJ Rep 105. The ICJ repeated this first expression in the case of *Norwegian loans*, [1957] ICJ Rep 27.

[11] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court (Judgment) [1998] ICJ Rep 454.

[12] [1952] ICJ Rep 104.

Nor can it be treated as a diplomatic courtesy speech, deliberately deprived of elements giving rise to legal consequences. Certainly it produces legal effects, and these legal effects must have been carefully assessed beforehand. It is clear that all the sentences uttered had been analyzed before being spoken, taking into account their legal effects.

Thus it seems worth scrutinizing particular sentences of the cited speech, although it should be noted that this method does not yield satisfactory results in all cases.

The pronouncement consists of five sentences. The first – "We, the Germans, have a full awareness of the facts regarding who generated the War and who its first victims were." – *prima facie* is a statement of a fact or rather an assessment. Its political importance is unquestionable. It may also form a context assessing other possible obligations resulting from other parts of the pronouncement. However, it would be difficult to derive any legal obligations arising out of this sentence, although investigation into the issue should continue.

Undoubtedly the second sentence of the pronouncement is the most intriguing. The part of the sentence – "That is why, today, there can no longer be any place for compensation claims from Germany that distort history" – seems promising insofar as its legal effects are concerned. However, an alternative interpretation could suggest that the government of the Federal Republic of Germany (FRG) expresses only its critical approach to and assessment of such claims.

The third and the fourth sentences are similarly of a "descriptive" nature. It is not possible to reach conclusions about their binding nature without reference to the other parts of the pronouncement.

Finally, the last sentence of the pronouncement announcing that "The Federal Government will also take such a stance before international tribunals" is, in our assessment, a unilateral obligation having an international legal effect. It is clearly structured as an international promise. It refers to the future behaviour of the author state (i.e. the FRG). This behaviour is precise enough to exclude the thesis that this part of the pronouncement might be only a statement of a political nature. It is also necessary to stress its unconditional character.

It is worth noting that that M. Frankowska describes the whole pronouncement as an international promise.[13] She examines the pronouncement with regard to the two requirements set forth by the cases, jurisprudence, and doctrine for this type of international unilateral act, i.e. its public character and the existence of an intent by the author-state to assume a binding obligation.[14] The public component

[13] Frankowska, *supra* note 8, p. 218.
[14] *Ibidem*, pp. 220–222 on intent and p. 222 on public character.

does not give rise to any doubts. As M. Frankowska rightly emphasizes, the ICJ in its jurisprudence takes a position in favour of the binding force of declarations made also in forms and forums different than those typical for classical diplomacy (so long as a given statement meets other requirements of the validity, including the intent to assume an obligation, capacity to make such statements, etc.).[15] Since promises may result even from statements made at press conferences or interviews, certainly an official speech of the head of the government of one state, made during an official ceremony in another state, could constitute a source of legal obligation so long as the other requisite requirements are met.

As far as the intent to assume a binding obligation is concerned, this is clearly discernable in the fifth sentence. However, other components of the declaration also require further analysis in this respect. Therefore the question of the categorisation of the pronouncement as a whole should be treated as raised rather than answered. This applies in particular to sentences, the binding force of which can be neither negated nor confirmed at this stage of our analysis.

1.2. Analysis of the pronouncement of 1 August 2004

The last, and clearly binding, sentence of the pronouncement incorporates as well the remaining "descriptive" sentences contained therein. Their content will influence the assessment of the nature and scope of the promise resulting from the fifth sentence, which indicates that the government will present in the future "such a stance", i.e. a stance consistent with that outlined in the four previous sentences. Although (as will be demonstrated) the fifth sentence will have a considerable impact on the four earlier sentences, it would not go so far as to automatically transform non-binding statements into binding ones. The status of each of the previous sentences needs to be clarified after laborious analysis.

In our opinion, the third sentence is the most important. According to it, "Property issues associated with World War II are, for the two governments, not an issue in German-Polish relations." We have already pointed out the descriptive form of this sentence. In principle, a descriptive form of a pronouncement is an element weighing against its binding nature. Nobody can deny states a right to assess or describe reality, and it would be an abuse to automatically connect any such statement with legal obligations. Just as people change their opinions on certain issues, so also states may change their views. The fact of pronouncing a certain opinion in public cannot, as such, be interpreted as an obligation to stick invariably to the statement

[15] *Ibidem*, p. 210.

made and all the consequences arising there from. For instance, Poland for 45 years during its period of real socialism did not hide its views on various questions. However, it is hardly possible to imagine that anybody would claim that Poland is obliged to consistently maintain the same views. On the other hand, states may not change their opinions freely, which accounts for the importance of establishing whether a certain statement has a binding effect upon its author or not.

However, in the case discussed hereinabove, the descriptive form of the sentences is of lesser importance. A statement according to which an issue directly involving the international legal rights or claims of an author-state, where such issue is or could be problematic and where the statement may have the effect of resolving the problem, is by its nature not a "neutral statement" in terms of international law. It is not difficult to identify some legal principles and institutions based on the idea that when a certain issue, which might give rise to divergent opinions, loses its controversial nature by virtue of a statement or conduct, that statement or conduct may be given legally binding effect. Such a situation occurs in the case of a clear waiver of claims, as well as in cases of recognition, acquiescence or any conduct that may provide the other party with grounds for claiming estoppel. Therefore, the fact that a statement is formulated in the simple present tense does not weaken the strength of an obligation resulting from the analyzed speech. The present tense may weaken a speech if there are grounds to consider it as only information on actions taken, and not a legally effective promise to undertake them in the future. Thus, for example, a statement that "we are opening a refugee camp" is no guarantee that this camp will be in operation six months later. However, the greater is the resemblance of a particular statement to a recognition or other dispositive action, the less important is the fact of formulating the pronouncement in the present tense. At the same time, there is no doubt that the Poland has consistently excluded the possibility of paying reparations to those so-called "displaced persons" in issue. The removal of this matter from the list of "issues" in mutual relations can hardly mean anything else other than a recognition that the refusal to pay damages by Poland does not violate international law, and even if it is so perceived by Germany, the FRG will not file any such claims.

The fourth sentence – "Neither the Federal Government nor any other influential political force in Germany will support such individual claims should such claims be filed" – is a source of serious problems with interpretation. It has been formulated in a very sophisticated way. The legal effects of this sentence may be challenged due to its descriptive character and the fact that a present tense is implicated in it. If the sentence quoted above refers to the present conduct of the government and of the political forces currently in operation, one may argue that the government cannot or clearly is not willing to assume any obligations concerning the future

conduct of the latter, raising doubts as to whether the government itself has undertaken any binding obligation.

The last issue appears also in the context of the second sentence of the pronouncement, which refers generally to "claims from Germany". There is no denying that "claims from Germany" means possible claims of German citizens as well as of the German state itself. Those who would like to draw far-reaching conclusions from the Chancellor's pronouncement could argue that if a legal effect is to be attributed to the cited sentence, then *lege non distinguente* it should apply to such claims of both the state and individuals

In playing the role of *advocatii diabolic,* let us first reduce the meaning of Chancellor Schroeder's statement to zero. Its reconstruction would be interpreted as follows "In 2004 the Chancellor of the FRG negatively assessed German claims. He denied support for these claims. However, he neither waived them not made any *expressis verbis* promise to abstain from initiating such proceedings in the international arena. He imposed an obligation on Germans to present such a stance before international courts. However, this does not mean that Germans would be deprived of a possibility to pursue these damages in different proceedings. Moreover, the critical assessment of the claims expressed in 2004 did not create any obligation for the future, and this assessment has undergone a change. At the present time Germans recognize such claims as justified, and even if they do not want to or cannot initiate a case in court, they can demand that Poland pay damages".

There is no doubt that the above formulation cannot be accepted, for several reasons. Firstly, one must address the possibility of the change in the German assessment of claims. This is connected with the fact that the first four sentences are formulated in simple present tense. As we have already pointed out, this issue is irrelevant as regards the third sentence. However, it would theoretically be able to play some role as regards the second and fourth sentences. Their final interpretation must, however, take into consideration the last sentence of the pronouncement – referring manifestly to the future conduct of Germany. If the government of the FRG declares that it will keep its present approach to possible future claims put before international courts, this approach should be seen as a an obligation for the future, and any change of it would not be enforceable against Poland.

Secondly, the reference to international courts is clearly motivated by the prospect of possible proceedings initiated by entities other than the German government. Therefore in practice claims brought before the ECHR in Strasburg or preliminary questions lodged to the Court of Justice of the European Union in Luxemburg are envisioned here. In our opinion this provision, based on the principle of *a minori ad maius,* excludes the possibility of Germans bringing claims against Poland, and also of initiating such claims in an international forum. It would be an absurdity to

conclude that although in a case filed by an individual German the German government would oppose the claim, at the same time it may itself enforce such claims filed in outside courts. Even more absurd would be a situation in which Germany (leaving aside the question of the jurisdiction of an international court) would be permitted to file such a claim to such a court and at the same time confirm that it has "a full awareness of the facts who generated the War and who its first victims were," and that "today, there can no longer be any place for compensation claims from Germany that distort history" and "property issues associated with World War II are, for the two governments, not an issue in German-Polish relations" and finally "neither the Federal Government (...) will support such individual claims" for damages. By reason of the aforementioned, the government would have to repudiate the object of its claim to the court.

Therefore the last sentence of the pronouncement brings about far-reaching consequences for Germans relating to the possibility of enforcing claims against Poland arising from their displacement following World War II.

1.3. Classification of Chancellor Schroeder's pronouncement

The attempt to classify Chancellor Schroeder's pronouncement into a certain category of unilateral effects leads to interesting conclusions.

The most far-reaching one would be that the pronouncement constitutes an international waiver, and therefore this possibility must be first considered. It is true that the word "waiver" itself is absent in the pronouncement, but this is not a prerequisite to a waiver taking place. This issue is connected with the form of a waiver, about which there is much serious dialogue in the scholarly and professional literature.

A number of authors emphasize that any waiver must be express,[16] while others are equally insistent that a waiver may be either express or implied/tacit.[17]

[16] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (International Public Law: Systemic issues), CH Beck Warszawa: 1999, p. 93; in support, see also R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* (International Public Law), Lexis Nexis, Warszawa: 1994, p. 101.

[17] L. Oppenheim, *International Law. A Treatise. Vol. I – Peace*, Third edition, edited by R.F. Roxburgh, Longmans, Green & Co London: 1920, p. 651; D. Anzilotti, *Cours de droit international*, traduction française par G. Gidel, Paris, 1929, p. 350; W. Levi, *Contemporary International Law. A Concise Introduction*, Westview Press Boulder, San Francisco, Oxford, 1991, p. 200; A. Cassese, *International Law*, Oxford University Press, Oxford 2001, p. 150; O. Kimminich, S. Hobe, *Einführung in das Völkerrecht*, UTB Tübingen, Basel, 2000, p. 199; E. Suy, *Les actes juridiques unilatéraux en droit international public*, Librairie générale de droit et de jurisprudance Paris, 1962, p. 157.

The latter opinion is certainly acceptable. International law is not formalized and it would be absurd to make the existence of a waiver dependent on the use of the word "waive" in a given statement or behaviour. What is essential is that a waiver raises no doubts, therefore it is generally accepted that a waiver may not be presumed.[18]

It is true that a negative obligation results from Chancellor Schroeder's pronouncement. This fact alone is not sufficient to decide about the existence of a waiver. However, as it will be shown this constitutes an argument rather in favour of a waiver than against such a qualification.

The pronouncement concerns claims, and as it is generally known, a claim is one of the major and most common subjects of a waiver.[19] Admittedly, the term "waiver of claims" appears in a number of documents, both unilateral and contractual. This term itself presents interesting theoretical legal issues. They are well illustrated by the fact that, for example, G. Venturini presents an opinion that only a right can be an object of a waiver, and that the waiver of a claim (prétention) would only mean that an entity advancing claims (prétentions) admits that they are groundless (in other words, that it does not have any rights relating to that particular matter).[20] Venturini could see in such "waivers" at the most "an ascertainment of the legal situation" or "negative recognition," which leads to estoppel, but "no abdicative effect, which on the other hand is characteristic of a real waiver."[21]

It should be added that, first of all, a waiver and the latter classifications (estoppel and so on) do not have to be in conflict. As we will show, usually they are not. Secondly, any doubts in this respect to a high degree arise from the ambiguity of the very term "claim".

There are a number of reasons for this ambiguity. The first originates from the distinction of claims based on unquestionable rights, claims raising doubts, and

[18] F. Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerrecht*, Schulthess & Co. Zürich: 1936, p. 269; R. Bierzanek, J. Symonides, *supra* note 16, p. 101; G. Dahm, *Völkerrecht*, 2. völlig neu bearbeitete Auflage von J. Delbrück, R.Wolfrum, Berlin 2002, Band I/3, p. 771; J.-M. Arbour, *Droit international public*, Yvon Blais Cowansville (Québec): 1997, p. 127, V.-D. Degan, *Unilateral act as a source of particular international law*, The Finnish Yearbook of International Law, vol. V, 1994, p. 227; G. Venturini, *La portée et les effets juridiques des attitudes et des actes unilatéraux des États*, RCADI, 1964-II (t.112), p. 416; K. Skubiszewski, *Unilateral Acts of States*, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Nijhoff Publishers Paris, Dordrecht, Boston, London: 1991, p. 229; D. Ruzié, *Droit international public*, Dalloz Paris: 1992, p. 50; 4. Raport specjalnego sprawozdawcy (Special report), p. 19, para 87.

[19] As far as a list of subjects of waivers, including claims, see: A. Hold-Ferneck, *Lehrbuch des Völkerrechts*, Leipzig, 1930, v. II, p. 12; Ch. Rousseau, *Droit international public*, Sirey Paris: 1970, p. 429; Dahm, *supra* nota 18, B.I/3, pp. 770–771; Suy, *supra* note 17, p. 169.

[20] G. Venturini, *supra* note 18, p. 415.

[21] *Ibidem*.

claims which are clearly groundless. The waiver of an unquestionable claim is clearly an international act, whereas the waiver of the latter-mentioned claims does not deserve to be referred to by this term. There may be doubts only in the case of claims which are neither clearly groundless nor clearly well-founded. However, this issue is only of theoretical relevance. In our opinion, denying the existence of a waiver in such cases, based on the alleged quality of a legal act, would be an expression of exaggerated rigorism. In practice, after a waiver has occurred discussion whether a certain right really existed loses its *raison d'etre* (at least in the majority of cases).

At this point we are more interested in the second issue – the one connected with the distinction between individual claims and the claims of a state itself. There is no doubt that the waiver of the claims of individuals is neither the subject nor the objective of Chancellor Schroeder's pronouncement. No contrary opinion has ever been presented by the Polish political forces, and in any case such a conclusion would be unjustified. With respect to unilateral acts (at least the ones producing obligations for an author-state) a restrictive interpretation is generally recommended. In the case of an international waiver this is particularly strongly emphasized, as has already been mentioned with regard to the inadmissibility of the presumption of a waiver. Therefore, although individual claims were criticized by the author of the pronouncement, they were not the subject of the waiver as such. The question of these claims will need further detailed analysis after the legal effects of the Chancellor's pronouncement are analysed.

At the same time there is no denying that in the case of a bundle of rights, or of closely connected rights, one may not rashly come to a conclusion concerning the waiver of all rights owing to the waiver of one of them. However, this conclusion can also be reversed, i.e. to show that if a waiver does not include one right, it does not mean that a waiver was not made with respect to another right or other rights.

In spite of what may be expected, it is even more difficult to determine whether the pronouncement of Chancellor Schroeder constitutes an international recognition. Certainly the last sentence of the pronouncement (*nota bene* the most important one) concerning the future conduct of the FRG before international courts, is not a recognition as such. As has already been mentioned, it is a classical promise creating obligations effective *ex nunc*. It is unquestionable that this obligation introduces an absolutely new element in mutual relations. The same applies to the fourth sentence, according to which "Neither the Federal Government nor any other influential political forces in Germany will support such individual claims should such claims be filed." As we have already pointed out, it is not possible to interpret this in isolation from other parts of the pronouncement. But no matter whether

it is analyzed in isolation from the other sentences or in their context, it still does not allow for a finding of an international recognition.

And this issue, in turn, is absolutely relevant in the case of the three other sentences of the pronouncement. And so at first sight the sentence "We, the Germans, have a full awareness of the facts who generated the War and who its first victims were." seems to be a recognition, However, it concerns a notorious fact. If we can talk about a recognition here, then this would be a recognition that does not have any legal effects, and hence may not be referred to as an "international legal action". In any event we are not able to indicate such effects, except perhaps an obligation not to question the fact that in was not Poland (as Hitler claimed) that attacked Germany in 1939.

However, the question whether the two remaining sentences may be qualified to the category of acts of recognition requires serious analysis. In the case of the first – "That is why, today, there can no longer be any place for compensation claims from Germany that distort history." – *prima facie* it would be possible to speak in terms of a recognition. It expresses a view on a certain matter that is tightly connected with rights and obligations. This view is clearly negative, even if in a qualified manner, as we learn that German claims would "distort history" and that "there can no longer be any place for" them. It is rather improbable that Germany would be entitled to change its opinion and state that such claims are admissible. Uncertainties with regard to this qualification may be the result of the specific connection between a recognition and a waiver. This has already been discussed in academic literature, which points out that a waiver is (or at least may be) a consequence of a recognition. K. Gareis wrote that the recognition of a new state by the contemporary sovereign was "a waiver of the right exercised until that time, of the claim to restore the previous state of affairs (Restitutionsanspruch), of the claims raised until that time (Prätension) and other similar things."[22] There are no reasons why this statement should not be extended to other cases of a recognition, and in particular to a recognition of rights. The recognition of another state's right to certain territory clearly constitutes a waiver of a competitive claim.

In view of our earlier comments concerning a waiver, it appears doubtful that it would be possible to reconcile the following two statements: "Germany recognized that the restitution claims are groundless, including the individual claims of their citizens"; and "Germany has not waived the claims of its individual citizens".

[22] K. Gareis, *Institutionen des Völkerrechts*, Giessen, 1901, p. 65. On this renounciation see also: E.von Ullmann, *Völkerrecht*, Tübingen, 1908, p. 127; F. von Liszt, *Das Völkerrecht systematisch dargestellt*, zwölfte Auflage bearbeitet von M. Fleischmann, Berlin, 1925, p. 91.

This, however, is only a surface paradox. The institutions of a recognition and a waiver are flexible enough to allow for such paradoxes. It is sufficient to point out that due to the fact that the claims were recognized as groundless on 1 August 2004, Germany may no longer effectively raise arguments concerning the displacement of its nationals, and it is only a matter of academic discussion whether it first had to have this right in order to waive it. Certainly Poland would maintain that Germany did not have such a right and therefore the claims were groundless, which Germany itself recognized. However, as we have already pointed out, the institutions of a recognition and a waiver shift such questions to the theoretical sphere. In practice they eliminate rather than create problems.

The same commentary may be applied to the following sentence: " Property issues associated with World War II are, for the two governments, not an issue in German-Polish relations."

Undoubtedly, pronouncements of a state which are evaluative in nature and which concern its own legal claims, or the legal or factual grounds for these claims, by their very nature are not neutral vis-a-vis the claims themselves (and the possible rights connected with them). Moreover, questioning somebody's own rights by the very nature of things influences them. Thus a state concerned (in this case Poland) may invoke the pronouncements of the author-state and treat any later contrary statements as non-supportable.

Thus the pronouncement of Chancellor Schroeder includes both a promise and a waiver, and also a recognition. Each of these legal institutions standing alone would make any attempt to question the content of this pronouncement as a result of a change in government or a change in German policy inadmissible.

There would also be no specific objection to express this effect in the form of an estoppel, which would read as follows: "Germany is estopped from questioning its statement of August 1, 2004". However, proving estoppel in the technical meaning of this word would not be easy. The difficulty lies in the fact that in the technical sense we deal with estoppel only when one state makes certain pronouncements concerning facts, another state suffers damage because it relies on these pronouncements of the first state, and the latter benefits from that situation.[23] W. Czapliński and A. Wyrozumska, referring to the ICJ judgment in the North Sea Shelf case, formulated the following four conditions which allow for the application of estoppel in a particular case: 1) there is actual conduct of a state, 2) this conduct is clearly accepted by a third state, 3) a third state relies on this conduct, 4) these

[23] D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 British Yearbook of International Law 1957, p. 176.

actions result in a change of an international legal situation of that third state or cause it a detriment.[24]

One may have doubts whether these conditions have been met in the case of Chancellor Schroeder's pronouncement. The assessment of displacement and expropriation without compensation is of legal nature. It also cannot be considered as finally settled law. It focuses more on the fate which results from a specific historical situation, that is on the claims of specific parties involved, and usually only on a certain part. At the present time it is also difficult to identify the detriment which Poland could suffer in consequence of relying on the Chancellor's pronouncement. However, it is not necessary to locate the legal effects of the pronouncement in the category of estoppel in order to support a finding of binding effect.

1.4. Claims of a state and claims of individuals

The waiver resulting from the pronouncement of 1st August 2004 reveals a specific selectivity. As we have already stressed, a waiver of certain claims is by definition not accompanied by a waiver of others. This element deserves more attention.

Undoubtedly, the question of the displacement of Germans after World War II and the seizure of their property without compensation were subject to divergent opinions of a legal nature. The fact is that the expellees tried to satisfy their claims before Polish and international courts. Therefore the existence of individual claims is beyond question. However, the fact of their existence does not mean that they are well-founded. In this respect the nature of a claim is called into question. The doctrine of international law has not yet worked out a satisfactory definition of a claim, and the question whether claims are legal, legal and factual, factual and legal, or only factual in nature is a matter of dispute. Certainly it must refer to one or another specific law, but in principle the owner of a claim (and similarly the defendant) is not an impartial observer and a reference to one or the other may be either justified or unjustified. The doctrine of international law deals with claims in two areas. The first is the field containing principles of international responsibility connected with diplomatic protection, whereas the other includes the previously-mentioned discussion concerning the legal nature of a waiver.

Certainly the German government did not intend to waive claims of individuals (regardless of whether any legal measures were available to them). However, in our opinion there was a waiver of Germany's right to pursue them. The idea of diplomatic protection is based on the principle that in cases where individual claims

[24] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (International Public Law: Systemic issues), 2nd edition, CH Beck Warszawa: 2004, p. 103.

are not satisfied a state will pursue them on its citizen's behalf. In this context R.Jennings and A.Watts note that "an injured alien will usually first seek redress from the state which has caused him injury, and if adequate redress is not forthcoming the state of which the alien is a national may seek redress on his behalf. In such cases, and also in those where a state has caused injury directly to a foriegn state, action will in the first place usually take the form of representations and negotiations through the diplomatic channel. If this does not result in a satisfactory settlement, the injured state may take the matter up more formally, presenting an international claim against the other state and having recourse to such judicial or arbitral proceedings as are available (...)".[25] In this context attention was drawn mainly to the doctrine of the so-called nationality of claims principle.[26] This question was addressed in articles on international responsibility prepared by J. Crawford. Article 44 therein concerns the admissibility of claims and refers to conformity with applicable nationality of claims principles and to the exhaustion of national remedies.

In turn the case law of international courts has clarified the nature of claims raised on the basis of diplomatic protection. The judgment in Mavrommatis concession includes the statement that: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law in persons of its subjects." This statement has been incorporated into prevailing legal doctrine,[27] and without any considerable risk of error it may be treated as an expression of binding law.

This question is of vital importance. It must be assumed that Chancellor Schroeder, when making the pronouncement on 1st August 2004, was aware that Germany was surrendering the possibility to raise claims under diplomatic protection. The counterargument, that he was not referring to claims which have not materialized yet and could appear in the future, would not be convincing at all. Although legal doctrine recognizes the idea that certain rights may not be waived, there is not a single enumeration of such rights (leaving aside very critical opinions) which include a right to raise claims on behalf of citizens. In addition, the moment at which an individual attempts to satisfy a claim in another state is not decisive,

[25] R. Jennings, A. Watts, *Oppenheim's International Law*, ninth edition, vol. I, Oxford University Press London, New York, 1997, pp. 536–537.

[26] *Ibidem*, p. 511 and following.

[27] *See eg* M. N. Shaw, *International Law*, Cambridge University Press, Cambridge, 1997, p. 563.

but the moment when the event forming the basis for a possible claim occurs. Therefore in the case of displaced Germans the years 1945-48 come into play.

As we have also pointed out, the fact that the word "waives" is not used is irrelevant. A right or a claim, or any expected right or claim, may be lost either by waiver, by recognizing the same as being groundless, or by a promise not to raise it. Some scholarly articles concerning the responsibility of a state go even further and, apart from a waiver they also see "valid acquiescence in the lapse of the claim" as the basis for not enforcing claims.[28] The last aspect may result from the passivity of a state; there is no need that a state should make any pronouncement in this respect. All the more thus a pronouncement which does not include the expression "to waive claims", but specifically excludes such claims, causes their expiry (or in the case of groundless claims – guarantees that they will not be raised in the future). An additional fact of particular importance (for Poland) is that the Chancellor's pronouncement influences a myriad of formal issues concerning that act, including the competence to make it.

The question of competence and possible challenges to a unilateral act will be, however, discussed after the presentation of the waiver of claims of 1953, discussed hereinbelow.

2. THE POLISH WAIVER OF COMPENSATION CLAIMS AGAINST GERMANY

2.1. Contents of the 1953 declaration:

The contents of the "declaration of the People's Republic of Poland concerning the decision of the Government of the USSR concerning Germany" of 23 August 1953 is included in one of the volumes of the Collection of Documents of 1953 (Zbiór Dokumentów). This declaration is too long to be quoted here.[29] It may be divided into three parts. The first part is an opinion approving the decision of the USSR "concerning the German case". At no point does the declaration clarify *expressis verbis* what decisions are referred to. But we learn that they "aim to ensure long-lasting peace in Europe, to stand in the way of imperialistic machinations (...), that they "are of essential importance to all nations", etc. However, in the circumstantial context there is no doubt that the declaration concerns the Agreement between the USSR and the Democratic Republic of Germany concluded in Moscow

[28] See also: article 45 of articles.

[29] Zbiór Dokumentów 1953 (Collection of documents 1953), no. 9, p.1830.

on 22nd August 1953. Its official name is "The Protocol on termination of the collection of reparations and other measures aimed at relieving the financial and economic obligations of the German Democratic Republic resulting from the war."[30] In Point I it states that "the Soviet Government, with the consent of the Government of the People's Republic of Poland (with regard to its share of reparations) totally terminates collecting reparations from the German Democratic Republic, either in form of deliveries of goods or in any other form".

The most interesting issue for our purposes is the second part of the Polish declaration, including the actual waiver. It reads as follows: "Considering the fact that Germans largely fulfilled their obligations to pay compensation and that improvement of the economic situation in Germany lies in the interest of its peaceful development, the Government of the People's Republic of Poland – willing to contribute to further settlement of the German problem in a peaceful and democratic way, and respecting the interests of the Polish nation and all peace-loving nations – has decided to waive the collection of compensation payments for Poland from 1 January 1954."

The final part of this declaration includes a comment that "the government of Poland entirely shares the belief of the USSR that the decisions made will considerably help the German nation not only to strengthen its economy, but also to create the circumstances necessary to restore its unity and to establish a united, peaceful and democratic German state, in which the Polish nation is vitally interested".

The first and the last parts of the declaration are examples of socialistic rhetoric which may be considered worthy of omission. However, as we will show, their legal meaning is much more significant.

At this point we will focus on the second part of the declaration and on its legal effects.

There may be no doubts as to the legal classification of the declaration. The word "waive" is specifically used, therefore it is obvious that in this case we are dealing with an international waiver. The subject of the waiver is "the payment of compensation to Poland". Hence we may speak about the waiver of a certain right (a right under international law). There are no particular reasons why this waiver should not be included in the category of a waiver of compensation claims, except for the earlier-mentioned ambiguity of the term "claim" itself. Quite often neither the entity renouncing claims nor the beneficiary of the waiver makes any statements about the chances of the claim itself. However, in this case there is no doubt that after World War II Poland was entitled to compensation. Any existing doubts

[30] *Ibidem*, p.1805.

concerned only the amount of damage suffered by Poland and the elements which could have been recognized and taken into account in determining the compensation. We may wonder if the territorial changes and/or property left by people of German nationality were not parts of this compensation. It is enough to say that in 1953 neither Poland, nor the four powers, nor the two German states questioned Poland's right to war compensation.

We may conclude that a waiver of a right results in its expiry, a position supported by the judgment of the ICJ in the case of nationals of the US in Morocco. Therein the ICJ distinguished between "a surrender or renunciation of all the rights and privileges arising out of the capitulatory regime" and mere "temporary undertakings not to claim those rights or privileges (...)."[31] In the particular case the ICJ regarded the acts under consideration as an out-and-out renunciation of the rights and privileges arising out of the capitulatory regime.[32] Using this terminology, we may conclude that in the case we are considering we are dealing with "an out-and-out renunciation" of the payment of war compensation. The expiry of a right is therefore accompanied by the right of a beneficiary of the waiver (USSR, GDR and possibly united Germany) to deny satisfaction of possible demands for payment if they are put forth despite the waiver. A separate issue is the admissibility of questioning the waiver, and this issue will have to be addressed in a further part of our discussion.

2.2. Intent and public character of the unilateral act of 1953

The ILC in its cases has emphasized the intent to cause legal effects and public character of a pronouncement as having fundamental significance for the existence of a unilateral act. It is worth verifying whether these requirements are fulfilled in the case of the waiver of 1953.

Undoubtedly this pronouncement was made with an intent to cause a legal effect. We have already shown that pronouncements of states concerning an international legal right or obligation which may be classified as either a recognition or a waiver are not neutral with regard to their effects. In any event, it would seem that any attempt to show that the intent of a state which declares a waiver of certain rights does not include the waiver of these rights would be a sort of mission impossible. Its accomplishment would mean nothing but legal nihilism. It should also be added that in view of the ICJ jurisprudence a detailed analysis of intent is justified only in the case of pronouncements concerning future conduct. Only such

[31] *Case concerning rights of nationals of the United States of America in Marocco*, (Judgment of August 27th 1952) [1952] ICJ Rep 176, 194.

[32] *Ibidem*, p. 195.

pronouncements are a source of doubt as to whether they are constitute an obligation, information, or only wishful thinking. This may be also extended (with some caution) to certain evaluative utterances when considering the possibility of classifying them as acts of international recognition. However, certainly it is not necessary in the case of statements of the following type – "I waive this right". Examination of intent in this respect resembles an examination of the intent of a state-party to an agreement as regards its intent to assume the obligations resulting there from.

More doubts may be raised by the assignation of a public character to the pronouncement. In the light of the work of ILC there are no doubts that a statement is public either when it is actually accessible to everybody (e.g. in media), or when it reaches the addressee (e.g. by confidential mail). The question whether the waiver was actually delivered to both German states would require the execution of a query in the Archive of the Ministry of Foreign Affairs. This seems rather implausible in the case of the FRG, as no diplomatic relations were maintained between Poland and the FRG at that time. However, there is no doubt that the pronouncement was not confidential. The fact that it was published in a public Collection of Documents (Zbiór Dokumentów) is distinct proof of this. Information about the waiver may also be found in a review in International Affairs (Sprawy Międzynarodowe).[33] It is unquestionable that this pronouncement reached the governing bodies in the GDR. This may be confirmed by the declaration of the People's Chamber of 26th August 1953 on the establishment of an interim whole German nation government,[34] which expresses gratitude to the Polish People's Republic "for renouncing further reparations from Germany for Poland" (Verzicht auf weitere Reparationen Deutschlands na Polen).[35] Therefore it seems that as regards this aspect it would be impossible to question the validity of the pronouncement of 1953.

2.3. Attempts to prove the invalidity of the pronouncement

Until the turn of the 21st century, Polish academic literature paid scant attention to the pronouncement of 1953. But in the last decade the pronouncement has been the subject of a number of press articles and two scientific studies[36] on its validity. At this point the views on its validity are of most interest to us.

[33] See: *Sprawy Międzynarodowe* (International Affairs) 5/1953, p. 155. It is interesting that this mention dates the waiver to the 26th of August.

[34] Zbiór Dokumentów 1953 (Collection of documents 1953), no. 9, p. 1839.

[35] *Ibidem*, p. 1843.

[36] By J. Sandorski and M. Muszyński; see below.

In principle all unilateral acts are subject to assessment with regard to their validity, but certainly such assessment is required in the case of a promise, a recognition, or a waiver. At present there is no official act or law which enumerates the conditions of validity of unilateral acts or – *a contrario* – the grounds for their invalidity. However, the prevailing legal doctrine (either referring to unilateral acts as such or more often to the general category of international legal acts) does not raise any doubts as to the existence of a number of conditions to establish validity. Sometimes they are reduced to conditions concerning: 1) the author of the act; 2) declaration of intention; and 3) subject and purpose of the act.[37] More often four conditions are mentioned: the capacity of an entity or entities, the proper object, the correctly expressed intent, and the adequate form.[38]

The absence of any of these conditions results in invalidity of the act. In the second report of a special rapporteur of the ILC on unilateral acts, Article 7 of the Draft Articles on Unilateral Acts concerns the grounds for invalidity unilateral acts.[39] It identifies the following causes for invalidity: error, fraudulent conduct, corruption, coercion of a state's representative, coercion against a state, conflict with a peremptory norm of international law, and clear conflict with a peremptory norm of fundamental importance to the issuing state's domestic law. These grounds are unquestionably similar to those contained in the Convention on the Law of Treaties of 1969 (CLT), except for last-mentioned ground, which is an exception. It must be added that the conclusions formulated in this respect by prevailing legal doctrine are largely founded on the analogy to the law of treaties. At the same time *a fortiori* reasoning is possible, which may point towards a more liberal, than in the case of agreements, application of these grounds to unilateral acts as creating obligations only for their author. Since other states benefit from a unilateral act without an equivalent obligation, in such a situation they certainly do not deserve wider protection than the issuing party. In fact in practice there are a number of positive examples of situations in which the grounds of invalidity have been invoked. While the same may be said about the majority of grounds enumerated in the CLT, this does not constitute a basis for questioning their existence in customary international law.

Most of the arguments postulating the invalidity of the pronouncement of 1953 in fact referred to one ground, namely a threat against a state. In this context,

[37] J.-P. Jacqué, *Eléments pour la théorie de l'acte juridique en droit international public*, Paris: 1972, p. 72.

[38] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie* (Public International Law in brief), Warszawa: 1989, p. 166, Degan, *supra* note 18, pp. 187–188.

[39] 2. raport, add., par. 109.

J. Sandorski quotes the press commentary of W. Gontarski, who points to "a psychological threat used against the Polish authorities and to the issue that the Soviet authorities coerced Poland into expressing its consent for a unilateral act against its national interest."[40] Sandorski points out the economic threats and, in particular, the connection between the waiver and the supplies of Polish coal to the USSR.[41] However, he does not present any proof for this connection, instead focusing his efforts on proving that economic threats are also a form of coercion justifying the invalidation of agreements. As it has already been mentioned, if it appears that the use of force or the threat to use force against a state, within the meaning of the CLT, may be invoked only with regard to armed force, then at this point it seems absolutely justified to refer to the *a fortiori* principle in the case of unilateral acts. One may seriously consider whether, since it is admissible to refer to force connected with a military element in the case of agreements, it is not all the more reasonable and possible to refer to another state's pressure in the case of a unilateral act. It must be added that the establishment of such a principle would be a very interesting precedent, which could lay the foundation for further evolution of international law in the area of unilateral acts (without deciding at this point whether such would be consistent with other law). Certainly there would be a number of opponents of such an extension of the scope of application of this ground for invalidity. It seems enough to say that under the CLT not just any use of force gives rise to invalidity, but only use that is in conflict with the goals and principles of the UN Charter. In addition, during the course of the work of the ILC on the topic of unilateral acts, no idea to extend the notion of a threat against a state beyond the scope specified in the CLT has been presented, or at least none has been reflected in any of the reports of the special rapporteur. Therefore, if Poland had such an intention to introduce such an extension of the concept, it did not take advantage of the best opportunity it had.

The above issue is further complicated by the fact that, even provisionally accepting the argument that in certain cases economic threats may result in the invalidity of unilateral declarations, proving the invalidity of the pronouncement

[40] W. Gontarski, Uchwała, której nie było (The resolution which didn't happen), Rzeczpospolita 17.09.2004; W. Gontarski, *Polsko-niemieckie stosunki absurdalne* (Polish-German absurd relations), Rzeczpospolita 23.09.2004, p. C 3, citation after: J. Sandorski, *Zrzeczenie się w 1953 r. przez Polskę reparacji wobec Niemiec w świetle prawa międzynarodowego*, (Poland's renuncition of its reparation rights against Germany in 1953 in the light of international law) in: W.M. Góralski (ed.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004* (The Problem of Reparations, Compensations and Benefits in Polish-German Relations 1994–2004), v. I, PISM Warszawa: 2004, p. 128, footnote 10.

[41] J. Sandorski, *ibidem*, p. 147 and further.

of 1953 on such grounds would still remain a quite difficult problem. It would not be a demanding task to find counterarguments to the arguments of W. Gontarski and J. Sandorski mentioned above.

In addition, it would not be easy to pretend that a dispute on this issue is mainly of a legal nature. Certainly the political risk resulting from questioning the stability of achievements in the field of law of a certain part of (quite painful or even shameful) Polish history is of paramount importance. It is not surprising that the government of the Republic of Poland has been disinclined to take this risk. In this situation utmost caution is demanded. If it appeared that Poland might question an unfavourable act of its authorities, then who would be able to guarantee that other states would not do the same with regard to acts favourable to Poland? It is hard to deny that there are such acts.

In this article it is not our task to praise or question the independence of Poland in the years 1944–1956, or even 1945–1989. This issue is a subject for historians rather than lawyers. However, several elements cannot be omitted.

First, the existence of certain benefits and costs does not mean that the latter are the result of a threat. If this were the situation, then every agreement of package-deal type would be subject to the risk of amendment or even nullification. Secondly, lack of equilibrium in bargaining position does not *ipso facto* constitute a threat. In a similar vein, awareness of dependence on another state does not constitute acting under a threat. A threat is an extraordinary situation, whereas conditionality, imbalance of powers, and awareness concerning various constraints are inherent features of states (at least other than superpowers).

As far as the pronouncement of 1953 is concerned, it is worth noting that it was accepted in double-click time. It referred to the agreement between the USSR and the GDR of the previous day. Therefore if threat was used, then the Polish side did not show any special determination in opposing it. What is more it did not express even the slightest care aimed at minimizing the importance of the act. How much easier would be the task faced by present legal opponents of the pronouncement if it included the following: "The government of the People's Republic of Poland agrees that reparations from the territory of the GDR due under the Potsdam Agreement will not be paid". Certainly a scrupulous advisor of the German Chancellor would have proposed such a reading if he had been advising the Cabinet of the Polish People's Republic. It is doubtful whether such approach to the resolution would have resulted in "turning off the taps" and other repercussions from the Soviet Union.

Although an authoritative answer concerning this issue requires the opinion of a really independent historian, from the perspective of a layman it would be difficult not to notice that in 1953 no one in the "Polish" government expected

that communism would collapse in forty years, that the USSR would fall apart, that Germany would unite, and that the issue of the wording used in 1953 will bear any future importance.

2.4. Unilateral character of the pronouncement and its legal validity

In academic literature a view can also be found according to which, the fact that the pronouncement of 1953 is an act entirely independent of the USSR-GDR agreement, has significance in assessing the validity of the pronouncement.[42] M. Muszyński uses as a starting point arguments according to which "a waiver itself is a classical unilateral act *sensu stricto* and hence causes legal effects", to postulate that a unilateral act *sensu stricto* "must be 'really unilateral' that is with no contractual obligations."[43] In the opinion of this author the connection between the pronouncement and the agreement between the USSR and GDR excluded the possibility to classify this pronouncement as a unilateral act *sensu stricto.* Ergo, he continues, it should be considered as a unilateral act *sensu largo.*[44] While in principle the latter qualification seems acceptable, one may have serious doubts whether the expressions *sensu stricto – sensu largo* are sufficient to reflect the abundance of possible legal and factual scenarios. In principle acts are considered as *sensu largo* if their legal existence depends on an agreement (obligatory or optional notification). One may also imagine a unilateral promise that a certain third state shall behave in a certain way. Is this an act *sensu stricto* or *sensu largo*? It seems this question is only an academic one. What counts is that a state assumes autonomous obligations for the content, strictly specified in an agreement, and is not a party to it. In any event the terms *sensu stricto* and *sensu largo* are the terms introduced by the doctrine of law to describe legal reality, and the mere assigning of a certain name to an act does not imply its properties. Those have to be determined separately.

As regards the waiver of 1953, it is clear that the agreement between the USSR and the GDR was the underlying reason for its issuance, as in fact the USSR was withdrawing from collecting property components from which Poland was to be satisfied. Thereby the agreement was concluded to the detriment of Poland. However, Poland immediately expressed its consent, although it expressed it in rather general wording.

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[42] M. Muszyński, *Skuteczność oświadczenia rządu PRL z 23.8.1953 r. w sprawie zrzeczenia się reparacji Rozważania w świetle prawa międzynarodowego* (The legal effect of the PRL's renunciation of reparations of 23.8.1953. Considerations in the light of international law), Kwartalnik Prawa Publicznego 3/2004, p. 62 and the following.

[43] *Ibidem*, pp. 62, 63.

[44] *Ibidem*, pp. 63, 64.

Without undermining the importance of arguments concerning the existence and legal position of the GDR, it must be stated that there are no reasons to exclude a situation in which when a third state expresses its consent to an agreement concluded between other states to its disadvantage, the third state assuming a rather autonomous obligation by virtue of its declaration of will. Therefore one should pay more careful attention to the question of interpretation of the pronouncement of 1953.

2.5. Interpretation of the pronouncement of 1953

The most important element of the pronouncement, which is visible on its face, is its wide scope and the far-reaching effects of the terms used therein. Even the most intuitive attempt to narrow those effects encounters a number of serious obstacles.

First, the subjects to which the waiver was addressed were not reduced to include only the GDR. Quite the opposite, there were references to Germany as a whole. Therefore it is rather impossible to persuade an impartial observer that although as a matter of fact Poland relieved Germany from a certain obligation, it retained its claims against FRG (either in 1953 or in 2009) (but consider the objections expressed below). Certainly that was not clearly stated in the pronouncement.

Secondly, the word "waiver" is expressly used in the declaration, which by definition creates legal effects (especially if it concerns an existing right, which in the event does not raise any doubts). It is difficult to imagine a wording that could go any further in scope.

Thirdly, the word "compensation" used in this pronouncement is also very broad. It seems rather impossible to argue that e.g., the waiver concerned only compensation but not reparations.

Certain hopes in terms of restricting the effects of the pronouncement could be raised by the fact that the subject of the waiver did not include "compensation claims" or "a right to obtain compensation" but rather referred to "payment of compensation". However, the chances of implementing this distinction should also be rated as very poor. International law is deformalized enough to be able to attribute the same legal effect to different actions and various wordings in pronouncements. What would in fact be the result of a waiver of payment of compensation with no waiver of the right to compensation? Certainly this action was seen as definite relief to a state making payments arising from that obligation. Therefore building any legal concepts on this condition would be like building castles in the air.

However, the use of the expression "waiver of payments" also leaves no doubts that the pronouncement referred only to the rights of a state as such. It was not the

objective of the pronouncement of 1953 to refer to possible rights of an individual. Those rights were not an object of interest to states, and it is quite possible that they did not consider them at all. Past prisoners of concentration camps, their families, past forced labourers and their families and also an uncountable number of persons aggrieved by the Third Reich retain their rights, despite the fact that they do not have any chance to enforce their claims before Polish courts because of the sovereign immunity of a state. The pronouncement of 1953 has not been published in the Journal of Laws and therefore it cannot be directly applied with respect to an individual.

On the other hand, it is difficult to accept the opinion of M. Muszynski, who claims that as the declaration is an executive act corollary to the agreement between the USSR and GDR, then the provisions of the latter are reliable (much more favourable for Poland). It includes provisions about "relieving GDR from the obligation to pay the remaining amount of the reparation sum from 1st January 1954" and about "termination of the collection of reparations from the GDR."[45] However, it would be difficult to persuade any impartial observer to adopt such an interpretation, as in fact it would be in contradiction of the clear provisions of the Polish declaration. M. Muszyński is also not right in pointing to a connection between the existence of an act *sensu stricto* and a waiver.[46] He writes that "a pronouncement has a number of features of an international act *stricto*, but on the other hand it does not fulfil its requirements entirely, which must disqualify it as a waiver of reparations by Poland."[47] A waiver may take the form of either a unilateral act or an agreement. A unilateral act may, but does not have to be, a "purely" unilateral act. A given pronouncement may be either valid or not, but its validity is not conditioned by being qualified as a purely unilateral act. That condition is established for the purpose of nothing but systematization. Therefore in this respect there are no grounds for questioning the pronouncement of 1953 or even for narrowing it.

2.6. Doubts concerning the pronouncement

M. Muszyński points to a number of doubts concerning the pronouncement. He poses the question why, despite the waiver of the war damages, the war damages were being estimated.[48] This question is in fact absolutely justified. These estimates were the subject of an excellent monograph by A. Eberhardt, M. Gniazdowski,

[45] *Ibidem*, p. 68.
[46] *Ibidem*, p. 71.
[47] *Ibidem*.
[48] *Ibidem*, p. 65.

T. Jaskułowski and M. Krzysztofowicz.[49] As the authors point out, such estimates were prepared in the Polish Ministry of Finances until 1974.[50] It would be a task for historians to establish whether it would be possible to prove that Poland considered the problem of compensation as open in its relations with the FRG. As will be shown, this direction of argument seems to be the most important and the most promising.

M. Muszyński also notes that in 1970 the FRG suggested that the following provision – "Neither Party raises any claim against the other which derives from World War II" – should be included in the normalization treaty.[51] In the end this clause was not included in the Treaty and Germany took a bizarre step, referring to a part of the negotiations during which Poland was said to have confirmed the binding force of its pronouncement of 1953.[52]

The tendency itself to replace unilateral acts with agreements is a natural phenomenon, and it is difficult to prejudge that each such change annuls the binding force of a unilateral act. It is absolutely certain that Poland would be satisfied if the content of Chancellor Schroeder's pronouncement were included in a bi-lateral agreement. However, this fact alone would not be a proof that that Chancellor Schroeder's pronouncement is not binding. The fact that unilateral acts in principle are not published in official publications and that a considerable part of unilateral acts are covered by customary norms which cause potential disputes (especially with regard to the possibility of revoking such a unilateral act), may constitute a motive for seeking subsequent contractual provisions covering such subjects. In any event, the test of the beneficiary's "belief" in the binding force of a unilateral act may not be treated as a component of the unilateral obligation, as this would introduce a two-party or multi-party element and thereby it would negate the ability of a state to undertake obligations in the form of unilateral acts.

On the other hand the act of referring to Polish pronouncements made during negotiations raises fundamental questions concerning the truthfulness of these references. This question cannot be decided without an analysis of the content of archives. The only facts are that while Poland did not make compensation claims,

[49] A. Eberhardt, M. Gniazdowski, T. Jaskułowski, M. Krzysztofowicz, *Szkody wyrządzone Polsce podczas II wojny światowej przez agresora niemieckiego. Historia dociekań i szacunków* (Polish damages caused by the German aggressor during World War II: a history of waiting and assessing), in: W.M. Góralski (ed.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004* (The Problem of Reparations, Compensations and Benefits in Polish-German Relations 1994–2004), v. I, Polski Instytut Spraw Międzynarodowych Warszawa: 2004, p. 11–54.

[50] A. Eberhardt et.al., *ibidem*, p. 34.

[51] Muszyński, *supra* note 42, p. 65.

[52] *Ibidem*, p. 65.

neither did it agree to place the clause set forth above in the agreement of 1970. It is also a fact that the government on many occasions repeated the statement concerning the waiver of claims against Germany.

It can be seen that, similarly as in the case of Chancellor Schroeder's pronouncement, we are dealing with later statements made by an author-state concerning an earlier declaration. In order to rely on them it would be necessary to review all archival television or radio recordings and newspapers from recent years. The breakthrough occurred in the year 2004, when the Polish parliament called on Polish government to take steps in order to collect "relevant financial compensation and war reparations" from Germany.[53] As a result, on a number of occasions the Minister of Foreign Affairs referred to the waiver of claims of 1953 and its confirmation of 1968.[54] The above discussion on unilateral acts leads to a conclusion that such types of statements are not neutral with respect to the obligations of a state. Even if we find that the minister was referring to acts from the past, and he cannot be imputed with an intent to complement them or to eliminate their legal defects, it does not change the fact that these statements are certainly scrupulously collected by the other party so that they could be used should a case (let us add that is rather improbable) be filed in court. In any event they would contribute to the circumstances taken as a whole and considered in construing the act. For a court or an arbitrator, it is important how a given act or a situation was assessed by its author in contexts other than the proceedings before the court. In any event, a court or an arbitrator would not be willing to treat seriously the claims of a state which, in one situation considers an act as valid, whereas before the court denies its binding force.

In fact the minister, when asked about the waiver of claims, does not have much room for manoeuvre. He may confirm the claims (thus exacerbating relations with a very important partner, with no real benefits) or deny them (thereby weakening the hypothetical number of arguments available for a hypothetical court dispute, to which neither party would probably agree). One may only wish that the minister chose a less disruptive method of argumentation. In any event, the statement of the Polish Prime Minister, M. Belka that claims (meaning both Polish and German, and both of a state and of individuals) belong to the past from a legal point of view is much more well-thought-out.

[53] Resolution of 10th September 2004, cited after: Sandorski, *supra* note 40, p. 125.
[54] See: Sandorski, *supra* nota 40, p. 126.

3. THE ABILITY TO REVOKE A UNILATERAL ACT

The issue of the ability to revoke a unilateral act is one of the most disputed issues in the field of law. It has been analyzed mainly on the grounds of a unilateral act being interpreted as a promise. A number of authors favour the view that promises are irrevocable,[55] while others show much greater caution. And so J.P. Jacqué claims that it is clear that a unilateral promise cannot be revoked in a situation where *estoppel* has occurred, that is when another entity has already taken certain steps relying on that promise and would therefore suffer damages in the event that it was revoked.[56] Other authors accept that in principle revoking unilateral promises is admissible.[57] In our opinion the latter view should be accepted. It would be an error to suggest that unilateral acts aim to create obligations for centuries to come.

However, acts of recognition or waiver may be viewed differently. In practice we have not encountered any author who would claim that a recognition may be revoked, and in fact this issue is hardly considered at all. Even if the expression "revocation of a recognition" is used, it applies only to a recognition with respect to a change of government, and particularly to a recognition of an operative government rather than a government in exile. From the latter perspective it may be perceived as a revocation. But this situation is incomparable to the question of a recognition of rights.

In both academic literature and in practice the prevailing opinion is that it is not possible to revoke a waiver.[58] K. Skubiszewski points out that by definition a waiver results in the expiry of the right, and when this effect is implemented it becomes irrevocable.[59]

As both the acts discussed in this article are in the nature of a waiver, the view that they are irrevocable should be supported. At the same time it should be borne in mind that the waiver of 1953 seems very inadequately formulated. Although in this thesis we questioned the arguments presented by M. Muszyński, it is difficult to resist the impression that the principle of good faith requires that the pronouncement should be perceived above all as a consent for the agreement, which was unfavourable to Poland. It would be an absurdity to take this pronouncement

[55] Czapliński, Wyrozumska, *supra* nota 16,1999, p. 93.

[56] Jacqué, *supra* note 37, p. 256.

[57] W. Fiedler, *Zur Verbindlichkeit einseitiger Versprechen im Völkerrecht*, GYIL 1976, p. 58; A. Rubin, *The International Legal Effects of Unilateral Declarations*, AJIL, 1/1977, p. 10; F. Villagrán Kramer, *Les actes unilatéraux dans le cadre de la jurisprudence internationale*, in: *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission*, UN New York 1997, p. 157.

[58] Degan, *supra* nota 18, p. 231; Pfluger, *supra* nota 18, p. 255; Suy, *supra* nota 17, p. 185.

[59] Skubiszewski, *supra* nota 18, p. 229.

out of the context and imply Poland's willingness to pay compensation for expropriated properties while waiving compensation claims resulting from World War II. In this situation one may only expect that Polish authorities would not seek to strengthen the legal power of the pronouncement, nor to give it "a second life", but to indicate that raising any possible pecuniary claims (which are legally inadmissible, considering Chancellor Schroeder's pronouncement) will require the re-estimation of profits and losses. In our opinion World War II was such a unique phenomenon in the history of mankind that it would justify a departure from the principle of inviolability of waivers discussed above.

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INTERNATIONAL ORGANISATIONS, CLIMATE CHANGE EXPECTATIONS, AND THE REALITY OF INSTITUTIONALISATION – AN ANALYSIS OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

Abstract

Environmental protection constitutes arguably the most important field in international law, where common cause requires adjustment of the international cooperation paradigm based upon the sovereign equality of States. Corrective measures and differentiation of treatment are required, as substantial inequalities between States would otherwise hinder effective cooperation. But any provisions aimed at reintroducing equilibrium between parties to a Convention need to be very carefully drafted, so that environmental protection provisions are not overshadowed by political claims. The United Nations Framework Convention on Climate Change, the normative ground for international cooperation in climate protection, risks breaking that balance, with the disproportionate economic claims of developing countries putting common environmental goals in peril.

INTRODUCTION

Faced with challenges that cannot be dealt with alone, limited by the territorial scope of their competences, States undertake international cooperation as

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a subsidiary means for realisation of their functions. The efficiency of such cooperation often requires institutionalisation thereof. This process, observed for at least the last 200 years, reflects the social rationality of its participants. Although States exceptionally follow other rationality criteria, not founded upon social utility considerations, this does not undermine a rational assessment of their actions. Institutionalisation, including the establishment of international institutions/organisations, provides States, international organisations and other international actors an opportunity to overcome barriers stemming from the political borders between States. Cooperation covers various areas involving global challenges for the international community, in respect of which international organisations can provide much more than merely regulatory mechanisms for handling the technical aspects of cooperation.

This paper illustrates that the institutionalisation of international environmental cooperation – for instance in terms of climate change that is discussed here – constitutes a choice based upon rationality criteria relating to the functions of international institutions.

This hypothesis is verified through analysis of the United Nations Framework Convention on Climate Change (UNFCCC), focusing in particular upon tasks of institution(s) in formation.[1]

First some general remarks are offered concerning the conditions for international environmental protection; then the normative basis and institutionalisation of the subject-matter cooperation is discussed.

1. INTERNATIONAL COOPERATION FOR ENVIRONMENTAL PROTECTION AND SOVEREIGNTY

Analysis of the actions undertaken by the subjects of environmental law – States, intergovernmental organisations, NGOs, and individuals – for protection of the environment, consisting of both biotic and abiotic factors surrounding living organisms,[2] can help identify important regularities, verified over the long term.

On one hand, the international community acknowledges the utter importance of the environment and its components amongst other commonly shared

[1] United Nations Framework Convention on Climate Change, 9 May 1992, available at http://unfccc.int/essential_background/convention/background/items/1349.php.

[2] "Ensemble des éléments (biotiques ou abiotiques) qui entourent un individu ou une espèce et dont certains contribuent directement à subvenir à ses besoins", Dictionnaire Larousse <http://www.larousse.fr/dictionnaires/francais/environnement>, accessed 28 March 2010.

values, and acts for its protection and renewal. The environment is considered as one of three pillars of sustainable development (alongside society and the economy), which arguably constitutes the most important manifestation of its appreciation. The importance of the sustainable development principle in the area of international environmental law and climate law has been reaffirmed under UNFCCC Articles 2 and 3, where it is referred to as a fundamental norm. Social awareness and vigilance in the struggle against environmental threats, including climate change, is yet another sign of the general commitment to the status and needs of environment.[3]

On the other hand, there is no coherent and consistently realised strategy for law-making and institutionalisation in this subject-area. While debate over promotion of environmental protection is widely supported, the capacity for undertaking actions to this end is limited (or at least such actions appear highly inefficient). For instance, no common accord on the international law definition of the environment has yet been achieved which, quite obviously to any lawyer, impedes the adoption and implementation of environmental laws.

Fluctuations in the debate on the environment result in swinging from one extreme to another: from a sector-specific to an integrated protection; from a single international institution to institutional plurality, from consistent and systematic legislation to faith in soft-law regulations. Disparities among discussion participants have reached their heights: while on one hand a return to sector-specific protection can be observed, on the other hand participants in the discussion on climate change call for an integrated approach to environmental matters, referring to it as to a common heritage ("a common concern of humankind").[4]

The evolution of the debate and constant development of environmental law constitute examples of the changing approach to the environment, arguably the most important of which is the institutionalisation of cooperation in the area. The most common periodisation of the development of international environmental law distinguishes three periods, divided by two international conferences called under the UN auspices:

- the 1972 UN Stockholm Conference on the Human Environment, which ended the "prenatal" era of international environmental law;
- the 1992 UN Conference in Rio de Janeiro on Environment and Development marks the beginning of the contemporary phase of its development.[5]

[3] For instance, note the Greenpeace information campaigns.

[4] See UNFCCC, Preamble and Article 3(1).

[5] "Most common periodasation" does not imply it is the only one. For instance Przyborowska dates the transition between the first and second period for 1996 (A. Przyborowska-Klimczak, *Ochrona przyrody. Studium prawnomiędzynarodowe* (Protection of a nature. Study in international law), UMCS, Lublin: 2004, p. 37). Ciechanowicz distinguishes only two periods

The recognition of the United Nations' key role – or broadly that of international institutions – in the development of international environmental law is not surprising. This should not, however, be confused with multilateral or transnational thinking. Appreciation of the complexity of environmental regulation implicates the institutionalisation and internationalisation of said subject-matter cooperation, hence the growing importance and participation of international institutions in the struggle for environmental protection. The establishment in 1978 of the International Ornithological Committee (IOC) – the first ecological NGO, conceived for protection of insectivorous birds useful to agriculture – marks the beginning of the institutionalisation process. The IOC was preceded by the 1902 Convention for the Protection of Birds useful to Agriculture[6], which was neither a proof nor a fruit of the "spontaneous initiative of States".[7] Rather, multilateralism was compelled by the States reluctance to renounce their national egoisms, and only after unilateral and bilateral measures proved ineffective. The Convention as such was adopted only after 35 years of preparatory works for securing the protection of birds from insects, although throughout this period neither the diminution of the bird population nor its negative consequences – an increasing number of insects wreaking havoc in agriculture – were contested. State governments were even willing to counteract the phenomena through national legislation and, more reluctantly, through narrow subject-matter coordination treaties, yet, despite ineffectiveness of those means, they persistently rejected the possibility of establishing a regulatory body and institutionalisation of their cooperation, dreading any restraint on their sovereignty. Not the century of debates since the first International Ornithological Congress in 1884 in Vienna, nor even different historical experiences – tragic ones proving that global challenges require trans-national cooperation to overcome sovereignty constraints – were sufficient to change attitude of certain States. Faced with subsequent challenges States continued to maintain the "yes, but..." attitude, i.e. support for cooperation, but with full respect of national sovereignty. This is also how the future, as yet uncertain, cooperation for climate change prevention was retooled at the very beginning. One may quote here an emblematic statement

(J. Ciechanowicz, *Międzynarodowe prawo ochrony środowiska (*International environmental law*)*, LexisNexis, Warszawa: 1999, p. 13), while Sands recognises "at least" four (P. Sands, *Principles of international environmental law*, Cambridge University Press, Cambridge: 2003, pp. 25–26, quoted by J. Brunnée, H. Kindred, P. Saunders, *International law, chiefly as interpreted and applied in Canada*, Emond Montgomery Publications, Toronto: 2006, p. 1014).

[6] Convention for the Protection of Birds useful to Agriculture, 19 March 1902 http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE000067.txt.

[7] *See* Przyborowska-Klimczak, *supra* note 5, p. 37.

in the UNFCCC: "recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, *reaffirming the principle of sovereignty of States in international cooperation to address climate change*" (emphasis added).[8]

However, social movements by farmers and ornithologists compelled governments to adopt new environmental policies. Even though it was insufficient to save partridges, pheasants or black grouses, which perhaps wasn't possible at all due to ongoing urbanisation, the movement considerably contributed towards the creation of the contemporary ecology paradigm, where the paramount significance of international institutions is commonly acknowledged.[9]

Once the negative impact of climate change was widely recognized, its consequences could have been considered as "a concern of mankind". As international cooperation and its instrument – international organisations – appeared as the most appropriate solution available ("acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response"[10]), the UN was deemed as the most appropriate forum for the commencement and coordination of such cooperation.[11]

The United Nations approach was based on the following initial axiomatic assumptions: (i) a direct relation between the increase in the emission of greenhouse gases and human conduct; (ii) intensification of the greenhouse effect as a result of the increasing amount of greenhouse gases; and (iii) contribution of the greenhouse effect towards augmentation of the Earth's surface and average atmospheric temperature.[12] Those assumptions imply the need for counteractions, even though they are not scientifically certain ("Given the *uncertainty* (emphasis added) of the impact of climate change on resources and ecosystems ...)."[13]

[8] UNFCCC, Preamble.

[9] *Further see* J. Menkes, *Kształtowanie prawa międzynarodowego zasobów wodnych* (Formation of international water resources law), Polska Fundacja Spraw Międzynarodowych, War-szawa: 2000, pp. 8–9.

[10] UNFCCC, Preamble.

[11] Goal 7 Ensure environmental sustainability, United Nations, The Millennium Development Goals Report 2009, <http://www.un.org/millenniumgoals/pdf/MDG_Report_ 2009_ ENG.pdf>, accessed 28 March 2010, pp. 40–41, 44.

[12] *Ibidem.*

[13] *Ibidem.*

Both the debate and action against climate change are subject to legal analysis. Even though it is difficult to scrutinise environmental law in relation to climate according to the classical principles of international law research, as it is a regime *in statu nascendi,* the contribution of lawyers towards the adoption of international documents (of differing normative character), and discussions on the prospective development of law and control of its implementation is a fact. Lawyers and, even more importantly, other participants of the process must never forget that legal statements do not and cannot have a verificatory, but only an argumentative significance. That assumption must be kept in mind when proceeding with the analysis.

2. NORMATIVE BASIS

As compared to the difficulties described above in relation to environmental law-making and implementation, documents on climate change adopted within the UN framework (regardless of their normative character) positively distinguish themselves. The UNFCCC, a fundamental set of legal norms on climate change, is no exception. The Convention begins with a dictionary of notions delimiting the subject-matter scope: climate system, climate change, adverse effects of climate change, emissions, greenhouse gases, reservoir, sink and source, etc.[14] This is all the more significant given that climate – for the purposes of law-making – reveals certain particular features. Climate is characterised by its (objective) coherence and unity, which influence the adoption and implementation of law.[15] The physical characteristic of climate, in relation to which neither State borders nor political independence can be fully recognised, influences its legal status. In particular the physical and biological unity of territory and climate cannot be ignored in the process of adoption and implementation of climate law. Objective (universal) laws of nature transposed into legal norms require referring to a coherency doctrine and the acknowledgement of climate as a common heritage of humanity.[16] The notion of climate is based upon the assumption, common to other "shared resources",

[14] In this context, the lack of an adequate definition of "regional economic integration organization" is even more striking, raising doubts in terms of the international community's capacity to legally define international organisations at all.

[15] *See* E. J. Manner, *The Present State of International Water Resources Law*, in M. Bos (ed.), *The Present State of International Law and other Essays*, Kluwer, Deventer: 1973, p. 134.

[16] *E.g.* Ch. C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35(1) International and Comparative Law Quarterly 1986, pp. 190–200.

that there is no coincidental overlay between the environment and States' frontiers, as expressed in the so-called principle of coherence (*Prinzip des Zusammenhanges – der Kohaerenz-Prinzip*).[17] In terms of climate this principle describes the interdependence of States and range of actions that may be taken in respect of climate, given its coherence and consistency.[18]

States have accepted that legal protection of the climate shall be primarily based upon the UNFCCC, which seemingly laid foundations for the prospective development of a climate law sub-system (restricted to the subject-matter). Their goals are to be achieved through a framework convention, well known in environmental law.[19] This decision raises, however, legal concerns. A framework convention is an invitation for the adoption of particular subject-matter treaties according to particular needs and circumstances. It is supposed to identify and reaffirm commonly shared values and provide uniform legislative techniques, leading to a unity in plurality. For the purposes of realisation of the UNFCCC (i.e. filling out the framework), it has been decided that "States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply".[20] These proscriptions do not resemble what is usually considered as a framework treaty. Accordingly, it is not clear how one could take advantage of that sort of a framework agreement in relation to such a coherent factor as climate, or what diversity of conduct/solutions could be acceptable.

Given concerns relating to the very structure of the UNFCCC, a legal analysis focusing on the legislative quality of the Convention seems indispensable.

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[17] This principle was formulated by an Austrian lawyer; E Hartig, *Ein neuer Ausgangspunkt für internationale wasserrechtliche Regelungen*, Das Kohaerensprinzip, 1-2 Wasser-und Energiewirtschaft (1958), pp. 8 ff. This doctrine allowed to breach the gap between the political and economic aspects of river basins and their geographical unity; E. Hartig, *Internationale Wasserwirstschaft und internationales Recht*, Springer-Verlag, Wien: 1955, *passim*.

[18] For instance in international water resources law "*Zusammenhang*" term refers to natural unity of rivers, E. Manner, *Diversion of Waters and the Principle of Equitable Utilization: A Short Outline of a Complex Problem* in M. Bos & I. Brownlie (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce, PC, CMG, OBE, QC*, Oxford University Press, Oxford: 1987, p. 55.

[19] Defined by Kiss as: "une technique juridique caractéristique du droit international de l´environnement ... un instrument conventionnel qui énonce les principes devant servir de fondement a la coopération entre les Etats parties dans un domaine détermine, tout en leur laissant le soin de définir, par des accords séparés, les modalités et les détails de la coopération, en prévoyant, s´il y a lieu, une ou des institutions adéquates a cet effet´, A. Kiss, Les traités-cadres: une technique juridique caractéristique du droit international de l´environnement," AFDI, vol. XXXIX, 1993, p. 793.

[20] UNFCCC, Preamble.

The Convention reveals the axiological and political conservatism of its drafters in relation to the separation of man and nature (the world's dualism).[21] It seems therefore that the international community has permanently renounced, at least for the foreseeable future, a holistic approach to the environment.

In its substantive provisions, the UNFCCC grants beneficiary treatment to "developing countries and States geographically defavourised"[22] (recognised as a principle of the Convention under article 3). While beneficiaries/developing States are not required to bear the costs of climate protection from dangerous anthropogenic interferences (article 2), they enjoy the benefits of very costly[23] transfers of technologies (article 4(3) and 4(9)).[24] Furthermore, they do not contribute towards the implementation costs of monitoring (article 4 (3)).

It seems that placing the operational costs of UNFCCC implementation upon the developed States marks only the beginning of politically-motivated and virtually unlimited financial claims by the "Third World", appealing to the climate change prevention programme. The extent of possible financial claims was revealed by the African Union during negotiations over positions for UNFCCC Copenhagen

[21] This is yet another example of the prevalence of Chinese and the "G-77" position over Western postulates; for instance see the Canadian initiative UN Doc. A/CONF./151/PC/WG.III/L.23 (1992), p. 1.

[22] "(... low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems (also fragility mountainous ecosystems depends on political system) are particularly vulnerable to the adverse effects of climate change" (Preamble, UNFCCC), and also: "a) small island countries; b) countries with low-lying coastal areas; c) countries with arid and semi-arid areas, forested areas and areas liable to forest decay; d) countries with areas prone to natural disasters; e) countries with areas liable to drought and desertification; f) countries with areas of high urban atmospheric pollution; g) countries with areas with fragile ecosystems, including mountainous ecosystems; h) countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and i) land-locked and transit countries." (*ibidem*, article 4(8)).

[23] Both the technologies and the transfer itself are costly.

[24] 13. "A significant achievement of the Poznan Conference was the adoption of the "Poznan strategic programme on technology transfer" of the Global Environment Facility. The programme was initiated in response to the request of the Conference of the Parties at its thirteenth session, held in Bali, and is a first step towards scaling up the level of investment for technology transfer to help developing countries address their needs for environmentally sound technologies. To this end, a programme was recently launched to provide $60 million in financing for technology transfer projects submitted by developing countries and to support the conduct and update of their technology needs assessments", Implementation of United Nations environmental conventions. United Nations, Note by the General Secretary, A/64/202.

2009 summit (a claim was formally adopted during Addis Adebe meeting).[25] Legal acknowledgment of the "free rider" status marks a change in the international cooperation paradigm.[26]

Already during the Rio de Janeiro conference it was agreed that the developed States shall bear the implementation costs of Agenda 21. They were obliged to allocate 0.7% of their national gross income to the financing of sustainable development.[27] Controversies between "North and South", as well amongst the "North", arose in relation to the financing of the cooperation. By a letter circulated on October 28, 2009 during the EU summit in Brussels, Archbishop Desmond Tutu joined an internal EU discussion on climate change prevention funding, accusing the Member States, in particular Poland,[28] of renouncing climate protection and lack of solidarity with the poor.[29] The EU Member States could not reach an agreement on

[25] "Africa will veto any climate change deal that does not meet its demand for money from rich nations to cut the impact of global warming on the continent, Ethiopian Prime Minister Meles Zenawi said on Thursday. Meles did not say how much money Africa would be looking for in Denmark but some experts have said the continent should ask for up to $200 billion a year". Africa may veto climate change deal: Ethiopian PM. Barry Malone, Africa may veto climate change deal: Ethiopian PM <http://www.reuters.com/article/latestCrisis/idUSL3510909>, accessed 29 March 2010.

[26] Whereas one can identify firm grounds for differential treatment in international environmental law, its application to other areas of international law raises legal concerns. Differential treatment constitutes an attempt of introducing corrective measures, where substantial inequalities (as opposed to formal differentiation) between States subsist. Both differential treatment and equality, depending on circumstances, arguably bring equity to international law, though it is the latter principle, commonly referred to as a sovereign equality of States or reciprocity of obligations, which is considered as a fundamental principle of "general" international law. Even though examples of non-reciprocity can be traced in international law, just to mention institutional structure of the United Nations and the World Bank, such distribution of costs and benefits appears somewhat unusual. Further on differential treatment, *see* P. Cullet, *Differential Treatment in International Environmental Law*, Ashgate Publishing Ltd, Hants: 2003, pp. 21–36.

[27] *See further* K. Bzdawka, *Globalne dylematy a zrównoważony rozwój* (Global dilemmas and sustainable development), in A. Budnikowski, M. Cygler (eds.), *Ochrona środowiska a procesy integracji i globalizacji* (Protection of environment and integration and globalization processes), SGH, Warszawa: 2009, pp. 32–34.

[28] "The rich world is historically responsible for the emissions causing climate change and they have a moral obligation to provide the means for countries on the front line to survive and prosper", S. Africa's Tutu criticises world leaders on climate <http://af.reuters.com/article/topNews/idAFJOE59T0F620091030>, accessed 29 March 2010.

[29] "World leaders are backtracking, mumbling about domestic difficulties and lack of time whilst the EU, previously progressive champion for action on climate change, is paralysed by the unseemly bickering amongst its member states over who will pay the bill", M. Grajewski, P. Harris, EU agrees on climate deal, fails to choose president <http://www.reuters.com/article/idUSLU584151>, accessed 29 March 2010.

distribution of costs. An initiative to provide funding in proportion to pollution emissions was rejected, and it was provisionally accepted to relate contributions to the wealth of each State.[30] Decisions concerning implementation were, however, to be adopted at a later stage in accordance with European Council decision-making procedures.[31]

All this is not surprising, since political (sometimes extreme) left-wing rhetoric, including claims of beneficiary treatment of developing States as a form of

[30] "16. All countries, except the least developed, should contribute to international public financing, through a comprehensive global distribution key based on emission levels and on GDP to reflect both responsibility for global emissions and ability to pay, with a considerable weight on emission levels. The weight on emissions should increase over time to allow for adjustments of economies. The EU and its Member States are ready to take on their resulting fair share of total international public finance. 17. The European Council stresses that fast-start international public support is important in the context of a comprehensive, balanced and ambitious Copenhagen agreement. The purpose should be to prepare for effective and efficient action in the medium and longer term and avoid delay of ambitious action, with a special emphasis on least developed countries. Taking note of the Commission estimatethat a global financing of EUR 5-7 billion per year for the first three years is needed following an ambitious agreement in Copenhagen, the European Council underlines that a figure will be determined in the light of the outcome of the Copenhagen conference. The EU and its Member States in this context are ready to contribute their fair share of these costs. The European Council stresses that this contribution will be conditional on other key players making comparable efforts", Council of the European Union, Brussels, October 29–30 October, 2009, Presidency Conclusions (15265/09), <http://register.consilium.europa.eu/pdf/en/09/st15/st15265.en09.pdf>, accessed 29 March 2010.

[31] "8. The European Union is at the forefront of efforts to fight climate change. It is committed to take a decision to move to a 30% reduction by 2020 compared to 1990 levels, as its conditional offer to a global and comprehensive agreement for the period beyond 2012, provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities. 9. Action by the European Union alone will not be enough. A comprehensive and ambitious agreement can only be reached if all parties contribute to the process. Other developed countries should also demonstrate their leadership and commit to ambitious emission reductions and step up their current pledges. Developing countries, especially the more advanced, should commit to appropriate mitigation action, reflecting their common but differentiated responsibilities and respective capabilities. The European Council underlines the need for measuring, reporting and verification (MRV) of mitigation actions in all countries. (...) 12. A deal on financing will be a central part of an agreement in Copenhagen. A gradual but significant increase in additional public and private financial flows is needed to help developing countries implement ambitious mitigation and adaptation strategies. 13. The EU is ready to take its fair share of the global effort by setting an ambitious mitigation target, allowing for offsets and providing its fair share of public support. The European Council endorses the Commission estimate that the total net incremental costs of mitigation and adaptation in developing countries could amount to around EUR 100 billion annually by 2020, to be met through a combination of their own efforts, the international carbon market and international public finance" (*ibidem*).

distributive justice, have been observed since the very beginning of international environmental cooperation. Roots of that policy may be traced back to the political views of founders and activists of the "green" movement, widely represented in the public, most notably academic, debate.[32] The policy adopted during the Stockholm conference, enunciated in Rules 6 and 7 of the Rio de Janeiro declaration, lead to the artificial introduction of normative statements unrelated to the subject-matter into international documents. Numerous Rules, adopted at both conferences, express the "Third World's" approach towards social, economic and political challenges.[33]

The right to an increased allowance in the emission of the world's gases, granted to developing States by reason of their social and economic development needs, is consistent with this approach.[34] This leaves two possible methods of implementation:

- either certain actors, i.e. the developing States, may increase their greenhouse gas emissions at the cost of others – since the Convention aims at reducing overall global gas emissions while allowing some to increase their emissions, thus multiplying the burden to be borne by the others;
- or developing States will not increase emissions, with the entire cost of reduction borne by others.

Both possibilities amount to a tacit assumption, contrary to ecological theories, that an increase in greenhouse gas emissions is a necessary part of the only developmental model leading to social and economic growth. In other words, highly developed States shall agree to a social and economic regress for the sake of environmental protection and development of "Third World" States, while continuing to provide assistance within the UN Development Decades framework and according to the Convention.

This politically-left form of ecology reaches its heights when obliging States party to the Convention to adopt effective environmental protection laws reflecting "the environmental and developmental context to which they apply", which means a retreat from granting priority status to the environment, while stipulating that "standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".[35] It appears that the Convention's drafters, adopting this approach, opted

[32] For instance see: S. Czaja, *Wpływ współczesnego neokolonializmu ekologicznego na globalizacje problemów środowiskowych* (Impact of the new ecological neo-colonialism on the globalization of environmental problems), in A. Budnikowski, M. Cygler (eds), *Ochrona środowiska a procesy integracji i globalizacji* (Protection of environment and integration and globalization processes), SGH, Warszawa: 2009, pp. 10–11.

[33] *See* Menkes, *supra* note 9, pp. 162–164.

[34] UNFCCC, Preamble.

[35] *Ibidem.*

for a remarkable imbalance of rights and obligations and distribution of costs. Suddenly laws adopted by some States may not only be "inappropriate" in others, but such disparity may be sanctioned by the international community. Whether or not environmental protection provisions are appropriate to a particular State is to be decided upon based on economic and geopolitical grounds, hence States are no longer bound by climate change protection duties (whereas one could assume that where such norms are found "unsound", they could be rejected by the entire international community, as they constitute a manifestation of "a common concern of humankind"). Similarly, climate change prevention costs are to be carried only by some States.

Furthermore, the UNFCCC acknowledges particular difficulties relating to prospective restrictions on greenhouse gas emissions for States dependant on the production, exploration and exports of fossil fuels. Privileged States may thus be exempted from the obligations to reduce industrial energy consumption rates and/or work towards the limitation or substitution of petroleum-based fuels in cars, as this would diminish the demand for fossil fuels. Ideally therefore developed States should purchase petrol from developing States and not use it afterwards, since it would contribute towards greenhouse gas emissions. This sort of interventionism reflects the lack of internal coherency of the Convention. Departing from strictly ecological issues, it provides a basis for international cooperation for the promotion of "a supportive and open international economic system", restraining climate protection capacity by stipulating that "measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade" (article 3(5)).[36]

Finally an anticipatory, prior to legislating, assault on the international law principle of equality of responsibilities constitutes an example of the most flagrant treatment differentiation. The appeal for adoption of international liability rules for

[36] While pursuit of environmental goals may be complementary to realisation of States' economic functions, or even mutually beneficial through a synergy effect, on numerous accounts a choice of priority is inevitable. For instance, according to Marrakesh Agreement sustainable development and protection and preservation of the environment are fundamental goals of the WTO, though they merely "complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations" (compare WTO, *Trade and environment,* <http://www.wto.org/english/tratop_E/envir_e/envir_e.htm>, accessed 29 March 2010). The WTO contributes towards environmental protection through its objective of market openness, without prejudice to the latter (see for instance mandate of the WTO's Committee on Trade and Environment). Accordingly there is not an inherent, or inevitable, conflict between climate protection and equitable economic system, though same legal status between fair trade and climate change is contrary to the very purpose of the UFCCC.

environmental damage (the 'polluter pays' principle) – formulated under UN auspices – appears to have had only declaratory significance. Principle 13 of the Rio de Janeiro Declaration on Environment and Development obliges States to undertake cooperation to eventually lead to the adoption of international law norms on "liability and compensation for adverse effects of environmental damage caused by activities within (States) jurisdiction" according to the "polluter pays principle" (PPP). Effectiveness of the PPP was, however, restricted even before the principle of liability was implemented by differentiation of the latter under article 3 of the UNFCCC, which stipulates that "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities".

At the same time it is posited that "the developed country Parties should take the lead in combating climate change and the adverse effects thereof", which is yet another expression of paternalism. The two standards of treatment stipulated by the Convention blur the distinction between differentiation of climate protection costs according to the economic potential of each State and introducing *de facto* another goal to the UNFCCC, that of bringing a new equilibrium to the international economy.

3. INSTITUTIONALISATION WITHIN INSTITUTIONS

Institutionalisation, one of the manifestations of international cooperation, can be achieved through a variety of means, including the establishment of an institution by cooperating parties. Within specific areas of cooperation a preference is often given to certain institutional frameworks. Such a tendency cannot, however, be observed in the field of environmental cooperation, where the entire spectrum of institutions is applied.[37]

According to classical rules, available institutional solutions vary from renouncement of any permanent cooperation framework to the creation of an intergovernmental organisation. Climate advocates may legitimately reject institutionalisation, even at the price of reduced operative capacity, based on an assessment that institutionalisation costs exceed expected benefits, and in order to safeguard the field for a future organisation competent in all ecological issues.[38] By contrast however, the

[37] On the catalogue of the environmental law subjects, *see* Menkes, *supra* note 9, p. 198 ff.

[38] Such approach was initially adopted, though later dropped, by State Parties to the African Convention on the Conservation of Nature and Natural Resources (Algiers 15 September 1968).

cooperation experiences which led to creation of the International Whaling Commission or the Commission for the Conservation of Antarctic Marine Living Resources encourage institutionalisation. Between these extremes are spread numerous possibilities of recourse to already existing institutions. This middle way enables a quick reaction to climate challenges, as the amount of necessary preparatory works in the procedural sense would be minimal, and offers the benefits of a synergy effect (particularly important given the financial costs of environmental protection). The latter solution was adopted when FAO's functions were broadened to cover implementation tasks stemming from the 1951 International Plant Protection Convention, and when granting to UNESCO competences in relation to the International Convention for the Protection of the World Cultural and Natural Heritage.[39]

UNFCCC Contracting Parties agreed to implement the Convention through a system of autonomous institutions,[40] which as usual includes a Conference, i.e. a meeting of the Parties, a secretariat, and at least one specialised organ.[41]

Accordingly, the Conference of the Parties was established (article 7[42]), whose competences include: monitoring implementation of the Convention (although the Conference's powers are limited to publishing national reports, the application of similar methodologies makes possible the comparison of national data), and participation in technology transfers and undertaking actions for education, training and raising public awareness to climate change issues (article 4 (1) and (6)). The Conference's functions and competences are narrowly defined, while the weakness of UNFCCC State parties, mirroring the limitations of the Convention itself, is exposed as decisions at the Conference and of other subsidiary bodies in financial and procedural matters may only be adopted by consensus. Any two-thirds of the States party to the Convention may oppose the presence, as an observer, of a body or an agency, national or international, governmental or non- governmental, competent in matters covered by the Convention (article 7(6)), at a Conference. At the same time, the Conference of the Parties is also entitled to collect information

[39] *Further see* Przyborowska-Klimczak, *supra* note 5, pp. 281–286. On the IPPC's gradual institutionalisation see: J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne* (International organizations. Institutional law), Wolters Kluwer Polska, Warszawa: 2006, pp. 83-84.

[40] This solution is recently often used in international environmental cooperation.

[41] *See generally*, Menkes, Wasilkowski, *supra* note 39, pp. 83–84.

[42] "1. A Conference of the Parties is hereby established. 2. The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention" (UNFCCC).

from other sources than national reports (article 7(2)(e)) and it is not forbidden to adopt decisions by a majority-vote in matters not covered by Convention decision-making procedures (article 7(3)[43]).

Under article 18 (decision-making procedure), States party to the Convention recognize the participation in international economic cooperation of a new type of international organisation/actor: regional economic integration organisations (REIO).[44] In matters belonging to its competences[45] regional economic integration organisations are attributed a subsidiary right of vote, tantamount to an aggregate of the votes of its Members States/parties to the UNFCCC. This voting right may only be exercised once, either by an organisation or by a State.[46]

[43] "3. The Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision- making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions" (UNFCCC).

[44] Participants of UN debates are fully aware of challenges related to development of international organisations and unity cleavage amongst them. For instance, during works on the ILC Draft Articles on State Responsibility the problem was signalled by the European Commission, which analysed particular features of the European Community in comparison to "classical" structures ("The EC is often described as differing from the "classical" model of an international organization in a number of ways". A/CN.4/545, p. 5). The Commission noticed differences between: (I) a "classical" international organisations which constitute a forum of international dialogue and an organisation-actor of international relations, realising its own goals with autonomous competences (*ibidem,* p. 5); (II) laws adopted within international organisations framework and laws passed by organisations-actors, here the EC (*ibidem*). The European Commission considered that in the light of those differences regional economic integration organisations shall be recognised in a catalogue of international law subjects independently from States and "classical" international organisations ("In that respect we submit that established notions such as "regional economic integration organization" reflected in modern treaty practice may require special consideration when dealing with substantive questions in the subsequent ILC draft articles", *ibidem*).

[45] The Convention does not provide who decides in matters related to REIO's scope of competence, nor what are the consequences of *ultra vires* acts. As yet the EU (EC) is the only REIO that signed the UNFCCC. Amongst other Multilateral Environmental Agreements (MEA) that convey similar model provisions entitling a regional economic integration organisation to exercise voting rights of its Members States – parties to both treaties, the Convention on Biological Diversity, Aarhus Convention (article 11(2)) and Espoo convention (article 12(2)) can be indicated. MEAs are not, however, the only area to which regulations on REIOs apply (see for instance the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment).

[46] For further discussion see P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford University Press, Oxford: 2004, pp. 199–209, 219–220, J. Scott, *EC Environmental Law*, Longman, London and New York: 1998, pp. 86–106.

The possibility of further, functional institutionalisation of the cooperation is available under the provision requiring a three-fourths majority vote of the Parties present and voting at the Conference in order to adopt amendments to the Convention, if consensus cannot be reached.[47]

Under UNFCCC article 8 a "classical" subsidiary organ, a Secretariat, was established. For the purposes of its creation, Parties made recourse to the UN practice of granting appropriate powers to a "temporary secretariat" first, using structures created under UN General Assembly Resolution 45/212 (article 21(1) and (2)).[48]

Two subsidiary bodies were also established: a "Subsidiary Body for Scientific and Technological Advice" (article 9) and a "Subsidiary Body for Implementation" (article 10). The techniques referred to on both accounts merit attention, as they may have far-reaching future consequences.

Establishment of the "Subsidiary Body for Scientific and Technological Advice"[49] created the conditions for a scientific debate on climate issues – grounds for a cooperation between governments and intergovernmental organisations, on the one hand, and NGOs on the other. This is significant because NGOs currently tend to monopolise ecological discourse, occasionally presenting one-sided or insufficiently documented opinions. (Despite establishment of the organisation however, an emotional attitude on the part of participants still hinders scientific discussion on the merits). The establishment of an expert advisory organ should be welcomed inasmuch as different opinions upon such a controversial matter as climate change are commonplace. For instance the Polish Institute of Meteorology and Water Management, commonly respected for its scientific reputation, states that "climate changes

[47] For further discussion see R. R. Churchill, G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94(4) American Journal of International Law 2000, pp. 628–629.

[48] Further see: Menkes, Wasilkowski, *supra* note 39, pp. 84, 206.

[49] "1. A subsidiary body for implementation is hereby established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention. This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change. It shall report regularly to the Conference of the Parties on all aspects of its work.

2. Under the guidance of the Conference of the Parties, this body shall:

(a) Consider the information communicated in accordance with Article 12, paragraph 1, to assess the overall aggregated effect of the steps taken by the Parties in the light of the latest scientific assessments concerning climate change;

(b) Consider the information communicated in accordance with Article 12, paragraph 2, in order to assist the Conference of the Parties in carrying out the reviews required by Article 4, paragraph 2(d); and

(c) Assist the Conference of the Parties, as appropriate, in the preparation and implementation of its decisions" (UNFCCC).

may occur both due to natural causes and anthropogenic conduct. Climate changes always reveal characteristic features: long-lasting effects and complicated interdependence between climate, environmental, economic, political, social and technological processes. They influence various States and generations, while any forecasts are very uncertain and at considerable risk of mistake. Drawing conclusions on the basis of current climatic trends should be done with utmost care, as changes may be non-linear and result in irreversible changes in the environment".[50]

The establishment of the "Subsidiary Body for Implementation" leads to different conclusions.[51] Its functions are inherently in conflict (or at least in competition) with the powers of the permanent Secretariat. The contracting Parties not only weakened its position, usually very strong in "classical" international organisations, but also accepted wastage of scarce resources by duplicating their functions and competences.

A new generation organ was introduced with the establishment of the Financial Mechanism (article 11[52]): a hybrid quasi-organ equipped with mixed institutional--functional duties and competences.

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[50] Climate Encyclopaedia ESPERE, republished on official webpage of the Polish Institute of Meteorology and Water Management <http://www.imgw.pl index.php?option=com_ content& view=article&id=245&Itemid =279>, accessed on 29 March 2010.

[51] "1. (...) to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention. This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change. It shall report regularly to the Conference of the Parties on all aspects of its work".

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(c) Assist the Conference of the Parties, as appropriate, in the preparation and implementation of its decisions" (UNFCCC).

[52] "1. A mechanism for the provision of financial resources (...), including for the transfer of technology, is hereby defined. It shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention (...).

2. The financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance.

3. The Conference of the Parties and the entity or entities entrusted with the operation of the financial mechanism shall agree upon arrangements (...), which shall include the following: (a) Modalities to ensure that the funded projects to address climate change are in conformity with the policies, programme priorities and eligibility criteria established by the Conference of the Parties; (b) Modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria (...)" (*ibidem*).

The UNFCCC also provides an innovative dispute resolution system, distinguishing between disputes relating to implementation (article 13) and disputes *sensu stricte* (article 14). For settlement of the former a multilateral consultative process was established, as it was rightly considered that implementation of the Convention may raise problems to which institutionalisation provides the best solution.[53] For the purposes of the settlement of substantive disputes, the entire range of classical international mechanisms is available, including institutionalisation within the UNFCCC framework.[54] As it is presently limited to States only, the scope of the ICJ jurisdiction constitutes an important challenge to the Convention. As one party to the Convention – the European Union[55] – cannot take part in the proceedings instituted before the Court, it must rely upon international arbitrage or other non-judiciary means of dispute settlement.

One may conclude that disputes are to be settled through peaceful means, while choice of particular instruments belongs to the Parties concerned. The Parties may also adopt a catalogue of rules governing such choice, and the Convention provides numerous suggestions to this end. Such regulations are consistent with trends in the development of international law and the growing importance of direct negotiations, with recourse to the ICJ constituting a *sui generis* last resort. This approach stems from a growing apprehension that the judicial settlement of disputes often aggravates conflicts and adversely influences bilateral relations between States. It also reflects a conviction that negotiations not only positively influence conflict management (a process broader than dispute resolution), but affect all relations between the parties concerned. A solution adopted in a non-judiciary way contributes towards subsequent cooperation both within and outside a Convention's scope.

[53] "The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention" (*ibidem*).

[54] Article 14(2)(b): "Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration" and article 14(7): "Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation" (*ibidem*).

[55] As yet the EU has not been a party to any dispute settlement procedure, Responsibility of international organizations – Comments and observations received from international organizations, A/CN.4/545, p. 18.

CONCLUSIONS

Contesting or diminishing the scale of dangers arising from climate change is hardly justifiable. It is equally difficult to indicate scientific grounds for any ranking of environmental challenges, even though climate change undoubtedly constitutes one of the gravest contemporary concerns. The importance of the climate change issue is confirmed by the correlation between the personal stance of the former Vice President Al Gore, whose post-modernistic crusade for climate protection won him the Nobel Prize and rendered him an icon of the campaign,[56] and the growing social sensitivity to climate change. Arguably even more meaningful as confirmation of the importance of the climate challenge was making it one of the major topics of the UN General Assembly debate on September 22–23, 2009 (64th Session), which hosted an unprecedented number of 122 State representatives.[57]

As the environment's coherence requires global cooperation, no climate challenges of lesser or greater importance may be distinguished. Accordingly the adoption of climate change regulations according to fashion, focusing upon certain chosen aspects of the ecological debate and environmental protection actions, should be discouraged. After four decades of ecological debates – initiated at the Stockholm conference – within the United Nations and its specialised institutions and other international organisations, during which period virtually each environmental law subject expressed its view, resources should not be wasted any longer for fruitless discussions, random actions and empty gestures.

However, in facing environmental challenges, general issues of international relations do need to be addressed. Without a new, general paradigm it is impossible to change an environmental paradigm, whereas a politically-oriented ecology – pertinently criticised as "green on the outside but communist red to the core" – cannot be accepted in the long term. Any public choice, including ecology, requires honesty among the debate participants. Environmental cooperation cannot be based upon an asymmetry of rights and duties, and ecology should not be perceived any longer as a field of assistance to developing States. Each subject is equally entitled, currently and in future (through an intergenerational deposit), to benefit from the environment and therefore must accept the duties binding upon it.

[56] His message was presented through a documentary film, released in 2006, *An Inconvenient Truth*.

[57] See: *Le climat et le désarmement nucléaire au cśur de l'Assemblée générale de l'ONU*. Le Monde 21.09.2009 <http://www.lemonde.fr/international/article/2009/09/21/le-climat-et-le-desarmement-nucleaire-au-coeur-de-l-assemblee-generale-de-l-onu_1243324_3210.html>, accessed 29 March 2010.

The UNFCCC legal regime includes both primary norms, stipulating a legal duty of undertaking or abstaining from certain actions, and secondary norms, which render applications of (new and old) primary norms possible by the establishment of implementation and monitoring mechanisms or by introducing new rules of conduct.[58]

Both the substantive and procedural institutionalisation provisions of the Convention confirm the necessity to adopt further treaty regulations in the field of international environmental law. Arguably, each adopted treaty creates a new regulatory demand, a *sui generis* consequence of treaty adoption. Implementation of the Convention requires the adoption of both primary and secondary norms, calling for acceleration of both the works of international organisations and the rules governing their responsibility, as well as those relating to environmental liability (beginning with secondary norms[59] and then moving to primary norm legislation).[60] "Rules of recognition" constitute primary norms, while "rules of adjudication" are referred to as secondary.

The need for the institutionalisation of international environmental cooperation is widely recognised, though such agreement has not, as yet, led to action. Institutional solutions are still under discussion, *inter alia*:

– establishment of one "specialised" organisation (the use of quotation marks relates to the technical and operational difficulties of the United Nations to grant such status to a new organisation), similar to UNESCO or, more recently, the WTO. Such a solution raises several problems: financial and political costs, risk of duplication of competences with other institutions and the unknown degree of contributions (and renouncement of other ecological initiatives) needed to obtain the necessary support of the UN Member States;

[58] We refer here to Hart's distinction of primary norms and three categories of secondary norms. This allows understanding and assessing influences between different sections of international law and the relationship between primary and secondary norms of the international law system, as broadly defined. H. L. A. Hart, *The Concept of Law*, Oxford University Press, Oxford: 1961, pp. 78–79.

[59] *Further see* J. Crawford, *The International Law Commission's Articles on State responsibility*, Cambridge University Press, Cambridge: 2002, pp. 14 ff. and pp. 74 ff.

[60] Recalling Ago one may distinguish "(...) the principles which govern the responsibility of States for internationally wrongful acts, maintaining strict distinction between this task and the task of defining the rules that places obligations on States, the violation of which may generate responsibility. (...) It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation", Yearbook of the International Law Commission 1970, vol. II, p. 306, par. 66 (c).

– creation of numerous separate organisations for the implementation of each agreement. This, *prima facie* easier solution can be applied only to matters enjoying the wide support necessary for adoption of an agreement. Downsides to this solution include: the restricted character of such institutions, institutional fragmentation, multiplication of costs and institutional weakness. Most importantly though, institutions limited to a particular subject-matter do not provide a forum, not to mention lack of an actor, for debate on controversial issues, nor does it increase the probability of establishment of an organisation competent in the field of liability. Nevertheless, UNFCCC Contracting Parties, abstaining from decisions on development prospects, maintained the pre-existing model of institutional plurality, even at the risk of coordination hurdles or multiplications of costs: "(...) the Parties shall: (a) support and further develop, as appropriate, international and intergovernmental programmes and networks or organizations aimed at defining, conducting, assessing and financing research, data collection and systematic observation, taking into account the need to minimize duplication of effort".[61]

Any debate regarding further institutionalisation will have to incorporate awareness of the past, that is of the United Nations Environment Programme (UNEP), created in 1972 as a result of the Stockholm Conference. This institution reflects the revolutionary, not only in terms of the environment, ideals of its creators. An assessment of its activity, however, is ambiguous: important legislation achievements[62] contrasted with failed expectations (fully exposed by comparison with the evolution of GATT). Finally, location of the UNEP in Nairobi is symbolic of the costs and dangers of political ecology. It is an symbol both of the sense of mission of the founders as well as the scale of failure due to the logistic drawbacks of the choice.

Therefore while institutionalisation appears indispensable for the development and implementation of environmental law, its failures result in wastage of resources, scarce as compared to goals, and limited achievements.

Follow up notes

Difficult negotiations initiated before and carried on throughout the Copenhagen Conference led to the adoption on December 18, 2009 of the Copenhagen

[61] UNFCCC, article 5(a).

[62] See: UNEP, *A Brief History of UNEP. A Milestones 1972–2005.Organization Profile*, <http://www.unep.org/PDF/UNEPOrganizationProfile.pdf>, accessed 28 March 2010.

Accord,[63] which constitutes yet another step towards a full-scale legal framework for international cooperation in climate protection matters. Subsequent agreements shall be adopted during the UN 2010 Climate conference in Mexico City.

Under the Copenhagen Accord States agreed to hold the increase in global temperature to below 2 degrees Celsius,[64] to provide financial assistance to developing States in order to facilitate adjustments of their national economies to meet the requirements necessary to climate change prevention,[65] and last but not least to internationalise monitoring of the Accord's implementation.[66] Non-financial provisions

[63] Proposal by the President, *Copenhagen Accord*, FCCC/CP/2009/L.7 18 December 2009, <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf>, accessed 29 March 2010.

[64] "2. We agree that deep cuts in global emissions are required according to science, and as documented by the IPCC Fourth Assessment Report with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius, and take action to meet this objective consistent with science and on the basis of equity. We should cooperate in achieving the peaking of global and national emissions as soon as possible, recognizing that the time frame for peaking will be longer in developing countries and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-emission development strategy is indispensable to sustainable development" (*ibidem*).

[65] Developed States agreed to provide USD 30 billion for the period 2010–2012 to "jointly mobilize" and USD 100 billion dollars by 2020. During the first 2010–2012 period the European Union shall contribute with USD 10.6 billion, Japan USD 15 billion and the U.S. with USD 10 billion M. Scott, *Dispatch from Copenhagen: The Final Day Countdown* <http://www.businessweek.com/globalbiz/blog/europeinsight/archives/2009/12/dispatch_from_c_3.html>, accessed 28 March 2010.

"8. Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer and capacity-building, for enhanced implementation of the Convention. (...) Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa. (...) This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund" (Proposal by the President, *supra* note 63).

[66] "5. Non-Annex I Parties to the Convention will implement mitigation actions (...). Least developed countries and small island developing States may undertake actions voluntarily and on the basis of support. (...) Mitigation actions taken by Non-Annex I Parties will be subject to their domestic measurement, reporting and verification the result of which will be reported through their national communications every two years. Non-Annex I Parties will

of the Accord are yet to be judged through practice analysis. They may provide new, groundbreaking instruments for the internationalisation of the cooperation in the field of environment protection, though the scepticism manifested by NGOs reflects the low scale of social expectations. The experiences of international cooperation in arms control justifies, however, moderate optimism, as an agreement for internationalisation of control mechanisms reflects a true will to implement commonly declared values.

communicate information on the implementation of their actions through National Communications, with provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected. Nationally appropriate mitigation actions seeking international support will be recorded in a registry along with relevant technology, finance and capacity building support (...)" (*ibidem*).

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STATE RESPONSIBILITY FOR CYBER-ATTACKS ON INTERNATIONAL PEACE AND SECURITY

Abstract

This article discusses international law mechanisms for dealing with electronic threats generated from the territory of one state and directed against a foreign sovereign. It analyses the possibility to recognize a cyber-attack as an act of international aggression and shows existing difficulties at the present state of the international debate. It then turns to the traditional notion of state responsibility for lack of due diligence as a source of state's responsibility for cyber-attacks. Such due diligence should be guaranteed through sufficient criminal law regulations that are properly executed in order to effectively prevent and prosecute electronic attacks. In this context the article posits that an international debate is required with the aim of establishing international guidelines. The results of such a debate should than allow for the harmonization of national criminal law regulations. Although the author points to the need for an international debate on the system for protection against cyber-attacks on states' key electronic infrastructure, she also emphasizes already existing international obligations for states to take responsibility for attacks conducted from their territory.

1. INTERNATIONAL ATTACKS IN CYBERSPACE

The 21st century has brought with it new forms of international aggression. One of the reasons for this inglorious evolution has been the creation and expansion of the world wide electronic network – the Internet. Global international

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development has resulted not only in e-administration and e-government, but also in computer-controlled power plants, computer operated flight and airport control systems, and the massive popularity of on-line banking, both for private individuals and international companies. Therefore the security of such crucial elements of national infrastructure as state airports and power supplies has become only as secure as the information technology used to operate them. States are now vulnerable in new ways, thus new means of state protection are called for.

This new category of risks to state security has been integrated into an already existing definition of the term Information Warfare (IW). This term has historically been used to describe actions undertaken in order to "disrupt the communications of an opponent" and give him a false image of reality,[1] however the 21st century has now given this term a whole new meaning, with a wider and more diverse scope than ever before.[2]

Recent attacks conducted with the use of the internet (cyber-attacks) onto the key information structures of sovereign states, such as 2007 attack on Estonia[3]

[1] D. Delibasis, *The Right to National Self-defence: In Information Warfare Operations*, Arena Books, Bury St Edmunds: 2007, p. 25.

[2] Electronic attacks were a crucial factor in the Gulf War in 1991 (*Ibidem*, p. 31 ff.). However, IW took on a new, more comprehensive shape after the 9/11 attacks. According to the US Defence Department plan by the codename of Virtual Battlefield, all actions and attacks can be initiated with the use of an advanced electronic system (*Ibidem*, p. 35 ff.). What is more, presently the most advanced and comprehensive system of defence against cyber-attackers belongs to the US Department of Defence, due to the fact that the US military security system that is the target of most cyber-attacks worldwide. The average number of cyber-attacks upon US national defence system computers grew from slightly over 200 in 1994 up to over 40.000 by the end of 2002. That data however may not be regarded as accurate, since according to the U.S. Defence Information Systems Agency only one out of 150 attacks can actually be identified (*Ibidem*, p. 38 ff.). The cost of repairing the damage caused by cyber-attacks grew to over 100 million USD in the second half of 2009, as estimated by the US Defence Department (see *100 milionów dolarów za naprawę szkód wyrządzonych przez cyberprzestępców* (100 million dollars to repair damages caused by cyber-criminals), Gazeta Wyborcza 04.04.2009, <http://technologie.gazeta.pl/technologie 1,85253,6478435,100_milionow_ dolarow_za_ naprawe_szkod_wyrzadzonych.html> accessed 28 April 2010).

[3] Before April 2007 Estonia prided itself on being one of the most "wired" countries in the world (due to which it was nicknamed eStonia). In April 2007 the electronic infrastructure of Estonia became the target of a synchronised attack by hackers, operating primarily from Russian territory. Estonia blamed Russia for initiating and supporting those attacks (I. Traynor, *Russia accused of unleashing cyberwar to disable Estonia*, The Guardian, 17.05.2007 <http://www.guardian.co.uk/world/2007/may/17/topstories3.russia> accessed 29 April 2010). According to Russian authorities, the attacks were a civil initiative; although coordinated by a youth organisation, supported by the Kremlin, called "Nashi" ("Ours"), who claimed credit for the attack, stating however that it had no support from national authorities

or the increasing number of intrusions into the United States' electronic infrastructure, attributed to both state authorities[4] and nationals,[5] show the gravity of the danger brought about by this new category of IW – cyber-warfare. In the electronic era, the global community is therefore only as safe as the technology it uses. Since the development of the international community is aimed at building an international information society (that goal is explicitly recognized by, e.g. the European Union in its 2010 agenda),[6] the issue of cyber-security and legally permitted self-defence against cyber-attacks is of growing and urgent importance. Its meaning is enhanced by the alarming declarations of the authorities of some countries regarded as most probable targets or authors of such an attack. For example Russian government representatives expressly declare they feel authorised to use nuclear force in response to cyber-attacks. Also both the Clinton and Bush administrations compared the threats caused by cyber-attacks to those resulting from the use of traditional weapons of mass destruction.[7]

(Ch. Clover, *Kremlin-backed group behind Estonia cyber blitz*, Financial Times, 11.03.2009 <http://www.ft.com/cms/s/0/57536d5a-0ddc-11de-8ea3-0000779fd2ac.html> accessed 29 April 2010). The recent statement of one of Prime Minister Putin's closest colleagues could be regarded as claiming credit for the attack also by Russian authorities (R. Coalson, *Behind The Estonia Cyber-attacks*, Radio Free Europe, 06.03.2009 <http://www.rferl.org/Content/Behind_The_Estonia_Cyber-attacks/1505613.html> accessed 29 April 2010). For a thorough analysis of facts and legal implications of the Estonia attacks, see: S. J. Shackelford, *From Nuclear War To Net War: Analogizing Cyber* Attacks In International Law, <http://works.bepress.com/context/scott_shackelford/article/1004/type/native/viewcontent> accessed 29 April 2010; a detailed description of the Estonia attacks timeline: J. Davies, *Hackers Take Down the Most Wired Country in Europe*, Wired Magazine 21.08.2007 <http://www.wired.com/politics /security/magazine/15-09/ff_estonia> accessed 29 April 2010.

[4] Synchronized attacks under the codename "Moonlight Maze" were initiated from the Russian Academy of Sciences, closely bound with the Russian Ministry of Defence and army. These attacks were aimed at Pentagon databases and the confidential information contained therein. Again Russian authorities distanced themselves from the attacks (Delibasis, *supra* note 1, p. 40).

[5] The codename Solar Sunrise was adopted for a series of attacks conducted in February of 1998 aimed at secret electronic data of the United States. Using sniffers (programmes searching electronic records without the awareness of the database administrators) on US Air Force computers, unknown culprits broke into the databases. IP analysis traced all the attacks to a service provider in Texas. Further investigation however showed, that that Texas provider was himself a victim of an attack, initiated from Israeli territory. Israeli authorities initiated a criminal investigation against the attackers, which resulted in identifying and punishing the perpetrators (Delibasis, *supra* note 1, p. 41).

[6] i2010 is the EU policy framework for the information society and media. It promotes the positive contribution that information and communication technologies (ICT) can make to the economy, society and personal quality of life, i2010 EUROPA <http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm> accessed 29 April 2010.

[7] Shackelford, *supra* note 3, p. 5.

Since the main parties in the information battlefield are the world's most influential powers, often equipped with a nuclear arsenal, such as the United States, Russia[8] or China,[9] it is of key importance to clearly establish the limits of self-defence allowed by international law against cyber-attacks on national databases and security systems.[10]

The aim of this article is to look at the present legal order governing the international responsibility of states and try to apply it to cyber-attack actions. The author attempts to define the legal character of cyber-attacks, in particular whether such attacks may be regarded as constituting acts of international aggression. Should they constitute "armed attacks", they would allow a recourse to measures foreseen by the international legal order, including armed self-defence as envisioned by Article 51 of the United Nations Charter (UNC).[11] It is also important to establish whether the attacked sovereign is entitled to reparations, and if so – when a cyber-attack can be attributed to a state and its authorities. Since there is not yet any particular international regulation on that matter, presently one has to apply already existing international law mechanisms to this new and unique situation. The author attempts to identify possible new mechanisms as well as required modifications to existing ones.

[8] Russia, next to China, is the country most often accused of cyber-attacks, recently also against Georgia (R. Synovitz, *Georgian Government Accuses Russia Of Waging «Cyberwarfare»*, Radio Free Europe, 12.08.2008 <http://www.rferl.org/content/Georgian_Government_Accuses_Russia_Of_Cyberwar/1190477.html> accessed 29 April 2010; N. Shachtman, *Top Georgian Official: Moscow Cyber Attacked Us – We Just Can't Prove It*, Wired Magazine 11.03.2009 <http://www.wired.com/dangerroom/2009/03/georgia-blames/> accessed 29 April 2010. Russian authorities continuously refuse to take action against the perpetrators.

[9] China's role in cyberwarfare in rapidly increasing. According to the US Congress Committee, China is the sole national power able to threaten US cybersecurity defences, causing therefore a real threat to all other states, not in possession of the technology and infrastructure to withstand a potential attack (*2008 Report To the Congress Of the U.S.-China Economic And Security Review Commission*, p. 9, November 2008, http://www.uscc.gov). China is also alleged to be the initiator of most breaches of national database protection systems and stealing protected data. Chinese authorities however deny any responsibility for the attacks or any connection with the hackers.

[10] According to Shackelford, over 120 states are investing in electronic infrastructure which allows for the exercise of cyberwarfare (Shackelford, *supra* note 3, p. 12).

[11] Charter of the United Nations, 26 June, 1945, available at <http://www.un.org/en/documents/charter/>

2. DEFINITION OF AGGRESSION AND CYBER-ATTACKS

According to Article 2 Paragraph 4 of the UNC "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state". Although interfering with national databases, archives or electronic infrastructure may certainly be qualified as "using force", the general nature of the prohibition in Article 2 Paragraph 4 contains very few practical means of protecting one's sovereignty against attacks by another state. The narrow scope of responses is established in to Article 51 UNC, which confirms the right of states to resort to self-defence only if they are subject to "an armed attack." Therefore the legality of an armed response in self-defence against a cyber-attack would be determined based on the legal possibility to qualify cyber-attacks as "armed attacks".

The UNC does not provide a definition of "an armed attack". The term closest to "an armed attack" as defined by the UN is "aggression", therefore when attempting to define "an armed attack" the definition of "aggression" must be examined. According to the definition of aggression in the UN in resolution 3314,[12] in principle both invasion and an attack against a state's territory may be qualified as an act of aggression. A state may also be subject to a counter-attack when it opens its territory to the armed forces of an aggressor or supports the sending of armed bands or groups exercising armed force. The above indicates that Resolution 3314 cannot be relied on to qualify an attack on a state's key infrastructure through its electronic network as an act of international aggression, since it does not constitute a physical invasion of state territory with the traditional means of armed force. Such a conclusion is confirmed by indications made in the General Assembly *travaux preparatoires* accompanying resolution 3314, where it was explicitly said that any other act outside the scope defined, such as ones resulting in economic consequences, may not be regarded as acts of international aggression.[13]

The scope of the legal exercise of "armed force" allowed by international law may be defined only when using the definition of "aggression". As shown above "aggression" is defined very narrowly and the allowed use of armed self-defence

[12] Article 3 of the Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression.

[13] According to Czapliński and Wyrozumska, such a narrowing of the scope of the definition was intentional and resulted from the rejection of Brazil's proposal to include economic attacks as part of the definition of international aggression (W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (Public international law. Systemic issues), CH Beck, Warszawa: 1999, p. 486).

is excluded against any attacks outside its scope. Since cyber-attacks fall outside this narrow scope, they may not be relied on as grounds for an internationally legitimate armed self-defence, contrary to the numerous statements made by national authorities.

However, the term "use of force", prohibited by Article 2 Paragraph 4 of the UNC, has been defined extensively in a sequence of other UN documents and its scope is much broader. When categorizing cyber-attacks in the context of international law this definition may prove very useful.

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[14] recognizes any acts of intervention, direct or indirect, "for any reason whatever, in the internal or external affairs of any other State" as a violation of international law. It explicitly defines as illegal not only armed intervention, but "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements"[15]. According to its terms, "no State may use or encourage the use of economic political *or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind"[16] (emphasis added). A similar requirement is provided by the Charter of Economic Rights and Duties of States,[17] which in Article 32 stipulates that "no State may use or encourage the use of economic, political *or any other type of measures* to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights" (emphasis added).

These documents would allow for an interpretation that interference with a state's critical electronic infrastructure would fall within the "any other type of measures to coerce another State" and therefore constitute a breach of a legally binding international obligation. Such a breach may be demonstrated especially when the measures used were aimed at "coercing another State in order to obtain from it the subordination" (in the case of attack against Estonia, such subordination would mean the reversal of the decision relocating the Red Army soldiers monument from the centre of Tallinn to its outskirts) or "to secure from it advantages of any kind" (e.g. the "advantages" to any state flowing from the theft of another state's secrets).

Therefore a cyber-attack may easily be regarded as a breach of an international obligation, but at the same time it cannot be regarded as an act of armed

[14] UN General Assembly Resolution 2625 (XXV) from October 24, 1970.
[15] *Ibidem*, Preamble, point 1.
[16] *Ibidem*.
[17] General Assembly Resolution 3281 (XXIX) from December 12, 1974.

aggression justifying the self-defence measures foreseen by the UNC (such an interpretation explains the response of the NATO countries to the Estonia attacks, when no action[18] against Russia was undertaken in 2007). However, the opposite conclusion may be drawn from the statements of some U.S. legal scholars,[19] as well as U.S.[20] and Russian authorities,[21] who declare the availability of all self-defence mechanisms, including a nuclear response, to any cyber-attack.

3. PRINCIPLES OF STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS – A BRIEF SUMMARY

As explained above, while cyber-attacks can hardly be regarded as constituting "acts of aggression," they may be regarded as breaches of universal international obligations, resulting in state responsibility therefore.

The principles for state responsibility for internationally wrongful acts were initially established by the Permanent Court of International Justice in 1927 in the

[18] The only action taken by the NATO parties in reaction to the Estonia attack was the creation of a Cyber Defence Centre of Excellence, the actions of which are headed by Estonia (M. Chudziński, *Estonia poprowadzi NATO do cyberwojny* (Estonia will lead NATO into cyberwar), Gazeta Wyborcza, 2.04.2008 <http://technologie.gazeta.pl/technologie/1,90339,5081266.html> accessed 29 April 2010).

[19] Some arguments to the contrary are presented by D. Delibasis, showing that the character of an armed attack should be defined rather by the consequence it brings than the sort of weapons used to conduct it (Delibasis, *supra* note 1., p. 17 ff., *see also*, D. Delibasis, *State Use of Force in Cyberspace for Self-Defence: A New Challenge for a New Century*, 8 Peace Conflict and Development: An Interdisciplinary Journal 13 (2006), where the author analyses the application of the law of war to conflicts in cyberspace).

[20] Such an extensive interpretation of Article 51 of the UNC was presented by the one of the officials from the US Defence Department, who believes that a wide scale cyber-attack may be regarded as justification for a traditional armed response (Department of Defence, Office of General Counsel, *An Assessment Of International Legal Issues In Information Operations*, May 1999, p. 20 <http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf> accessed 29 April 2010). The Department representative went on to say that there is no certainty regarding the application of international law principles in cyberspace. He referred to Article 51 of the UNC and stated that according to its provisions a cyber-attack would have to be regarded as an "armed attack" in order to allow for an armed self defence. However regarding the scale of a cyber-attack, even if it does not constitute an armed attack, it always endangers state security. Therefore the consequences of a cyber-attack are much more important than the means used for conducting it (*Ibidem*, p. 22).

[21] "An attack against the telecommunications and electronic power industries of Russia would, by virtue of its catastrophic consequences, completely overlap with the use of weapons of mass destruction. (...) Russia reserves the right to respond to an information warfare attack with nuclear weapons" (see, Shackelford, *supra* note 3, p. 28).

Lotus case.[22] The Court asserted that international law acknowledges the rule of state responsibility for breach of international obligations and the duty to indemnify for any damage resulting from such breach. Over time international law practice elaborated a set of framework principles establishing states' responsibility under international law. These principles require the ascertainment of three prerequisites.[23] First, there must be a breach of an international obligation and harm to a state interest protected by law.[24] Second, the harmful result must be attributable to a state and its authorities.[25] International law foresees a number of exceptions to this principle, the occurrence of which allows a state to free itself from any responsibility. Therefore in order for a state to be held responsible, a third negative prerequisite must be met: none of these particular exceptions can apply.[26]

Article 3 of the International Law Commission (ILC) Draft Articles describes in more detail the elements of an internationally wrongful act of a state. An act may be regarded as internationally wrongful when the harmful action or omission is attributable to the a state under international law and at the same time that conduct constitutes a breach of an international obligation. The term of "constituting a breach of an international obligation" was further defined by the International Court of Justice in the Barcelona Traction decision.[27] The Court distinguished two groups of international obligations of a state. The first category consists of *erga omnes* obligations, which in principle result from peremptory norms (*jus cogens*), or in other words, norms that the state is obliged to fulfil towards the international community as a whole. The second group of international obligations are those which bind states bilaterally – *inter partes* – and result only from a consensual agreements (usually written, but sometimes also customary) among or between the particular parties involved.

[22] *France v. Turkey (the Lotus Case)*, PCIJ [1927], PCIJ Reports, series A, No. 10.

[23] It has to be emphasized that that there is no international, global organization safeguarding these principles. These rules, as all of international customary law, are the result of the common practice of states and it is the states themselves that decide on the way to resolve disputes resulting from the differences in their perception or application. So far these principles have only been reduced to writing in a draft of an international treaty done by the International Law Commission: Of the Draft Articles on State Responsibility: Titles and texts of articles adopted by the Drafting Committee, International Law Commission, A/CN.4/L.472; further referred to as the ILC Draft Articles.).

[24] *Ibidem*, Art. 3.

[25] *Ibidem*, Art. 5.

[26] *Ibidem*, Chapter V.

[27] *Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain*, [1970] ICJ Rep 174.

Article 3 the ILC Draft Articles also stipulates that an act may be attributed to a state when it is conducted by a representative of a state organ[28] or a person acting on its behalf.[29]

As mentioned above, the mechanism of international state responsibility also involves a negative prerequisite. A state may escape international responsibility for particular reasons foreseen by international law, and in order to be held responsible, no such reasons may appear. Those grounds, enumerated in Chapter V of the ILC Draft Articles include: consent validly given by a state (article 29), countermeasures in respect of an internationally wrongful act (article 30), force majeure and fortuitous events (article 31), extreme distress, required for the purpose of saving human life (article 32), state of necessity (article 33) and self-defence, in accordance with Article 51 of the UNC (article 34).

Consequently, in order to establish the international responsibility of a state for executing or ordering the execution of a cyber-attack it is necessary, as a first step, to show the international rule that such an attack violates. The second step of the analysis consists in attributing such an action to a particular state.

Linking a cyber-attack to the breach of an international norm is rather simple. As explained above, Article 2(4) of the UNC prohibits the use of force in international relations and is regarded as a peremptory norm. On the basis of the already cited UN documents (i.e. the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Charter of Economic Rights and Duties of States) one may qualify attacks on key state infrastructures conducted through electronic means as "*any other type of measure* to coerce another State" (emphasis added), therefore constituting a breach of international law.

What is more difficult, however, is the attribution of a cyber-attack to a particular state, i.e. one that initiated it or permitted it. As mentioned above, a state may be held responsible for its own actions (actions of its organs) as well as the actions of private persons acting on its behalf or order. Given the present state of technological development, determining the physical localization of a computer from which a cyber-attack was conducted is not extensively difficult. However, the very

[28] Art. 5 of the ILC Draft Articles. Traditionally acts of state were regarded as those executed directly by its government or head of state, or on their direct order. Presently a state may be held responsible also for acts of its parliament or judicial branch. When responsibility for the acts of its legislative body is considered, a state may be held responsible for its actions as well as omissions (e.g. not providing a sufficient protection of the rights of state nationals or residents).

[29] *Ibidem*, Articles 7 and 8.

fact of physical localization of a computer used for a cyber-attack does not (and should not) allow for attributing that cyber-attack to a particular state. Such an assumption would be unwarranted, since a state cannot be held responsible for the actions of all its residents operating hardware or software located within its territory. In the traditional notion of state responsibility, a state is only be responsible for those of its residents it explicitly authorizes to act on its behalf. Proving a formal link between a state resident and a state authority in the case of cyber-attacks might be exceedingly difficult and thus negate the possibility of any reparations.[30]

However, a state can also be held responsible for a breach of an international obligation not only for its actions but for its omissions, i.e. for not preventing a particular attack to take place.

4. ATTRIBUTION OF A CYBER-ATTACK TO A STATE

Both the legal doctrine and judicial interpretation make clear that a state may be held responsible not only for its actions, but also for its omissions, in particular for the failure to exercise due diligence.[31] Such an interpretation finds support in the wording of Article 14(3) of the ILC Draft Articles, which provides that a state may be held responsible for the conduct of organs of an insurrectional movement, if such an attribution is legitimate under international law. As explained by Crawford in his commentary to the ILC Draft Articles,[32] this article refers to a situation in which a state is in "breach of its obligation to prevent a given event". Such an obligation is usually formulated as an obligation to render best efforts, calling for a state to take all "reasonable and necessary" measures in order to prevent a given event, however, without warranting that such an event will not occur.

[30] Both Russian and Chinese authorities consistently deny any formal links with the cyber-attackers.

[31] Czapliński and Wyrozumska give an example of breach of the due diligence standard via neglect to take up measures aimed at protecting particular persons or objects from attacks, combined with refusal to punish the perpetrators of such attacks and an explicit support of such acts aimed at harming the interests of third states or persons (Czapliński and Wyrozumska, *supra* note 13, p. 436). All these prerequisites are fulfilled in the case of the Estonia attacks, particularly in the light of the recent announcement by Russian authorities admitting their initial support for the actions of the "Nashi" organization; see also I. Brownlie, *System of the Law of Nations, Part I, State responsibility*, Oxford University Press, Oxford: 1983, p. 45), where the author points to a legal mechanism for the establishment of state responsible for an act based on its omission and a breach of international law resulting from it.

[32] J. Crawford (ed.), *The International Law Commission's articles on state responsibility: introduction, text, and commentaries*, Cambridge University Press, Cambridge: 2002, p. 140.

This doctrine identifies state responsibility for actions of quasi-legal persons as an example of such a situation.[33] This may be also directly applied to the action of the "Nashi" organization in the case of the Estonia attacks, where the state of Russia did not prevent the attacks and took no measures to prevent them.[34]

In international jurisprudence this mechanism is best reflected in the ICJ case concerning the United States diplomatic and consular staff in Teheran.[35] In its decision the ICJ found, that although the storming of the U.S. embassy in Teheran may not be attributed to Iran, such finding does not free that state from responsibility. According to the ICJ decision, Iranian authorities may be held responsible for having "failed to take appropriate steps", where such steps were evidently necessary. The Court found that the "inaction" of Iranian authorities was contrary to its international obligations to protect the US diplomatic personnel. This inaction constituted therefore a breach of an international obligation of Iran towards the USA, resulting from the Vienna Convention on Diplomatic Relations.[36] As correctly pointed out by Bratspies and Miller, the Court found that the due diligence standard must be unfulfilled in order to attribute state responsibility to the actions of natural persons.[37]

The very same legal construction could be used in the case of a state not providing sufficient international protection from cyber-attacks conducted by its residents from its territory. A *jus cogens* norm obliging governments to protect the sovereignty and integrity of other states results not only from Article 2 (4) UNC, but also from a peremptory customary principle of the same substance. Such an obligation may be understood as encompassing both an intolerability of any active intrusion into the internal affairs of another state, as well as a due diligence requirement to prevent such an intrusion into foreign sovereignty from one's own territory. As correctly pointed out by Vark, this produces an obligation on the part of any state from whose territory an internationally wrongful act is conducted to cooperate with the victim state in a manner necessary to eliminate the harmful act, or – if it may not be prevented – its consequences.[38] Therefore if a state itself is not capable of protecting the interests of another sovereign, it may not allow for private persons acting from within its territory to inflict damage or create danger to that sovereign while protected by the inflicting state's

[33] Brownlie, *supra* note 31, pp. 162–163.

[34] See also footnote 3.

[35] *United States of America v. Iran (Diplomatic and Consular Staff in Tehran)*, [1980] ICJ Rep 3.

[36] *Ibidem*, p. 29.

[37] M. Bratspies, A. Miller, *Transboundary harm in international law: lessons from the Trail Smelter arbitration*, Cambridge University Press, Cambridge: 2006, p. 233.

[38] R. Vark, *State Responsibility for Private Armed Groups in the Context of Terrorism*, Juridica International XI/2006, p. 192.

immunity. Under such an interpretation Russia's refusal to prosecute the perpetrators of the attack against Estonia would constitute an internationally wrongful act, while Israeli involvement and punishment of the actors behind the Solar Sunrise incident exonerates that state from international responsibility.

5. THE NEED FOR INTERNATIONAL REGULATION OF STATE RESPONSIBILITY FOR CYBER-ATTACKS

In the light of the above considerations, the practical solution to the urgent problem of legal categorization of attacks on state sovereignty conducted with the use of internet would be to initiate an international debate on the applicability of traditional state responsibility principles to this new category of threats to international peace and security. In light of the statements made by national authorities from countries that are susceptible to if not subject to cyber-attacks (i.e. allowing for nuclear response to cyberwarfare), such a debate seems to be essential. In particular there is a need for an international consensus on the criteria which have to be fulfilled by a state in order to avoid international responsibility for lack of due diligence in protecting other sovereigns from cyber-attacks.[39] Such an accord would alleviate the possibility of dangerous reactions by particular states in response to cyber-threats to their sovereignty. Such a debate should be initiated by determining the legal character of cyber-attacks and categorizing them, while stipulating the countermeasures available to the states attacked. In the course of such a debate, the principles for allowable self-defence against cyber-attacks should be set (e.g. would preventive measures be allowed? If so, of what character?). The second crucial issue would be to establish the standards for releasing a state from international responsibility for not providing due diligence: would the adoption of specific provisions in national criminal laws be sufficient, or rather would state authorities be required to effectively initiate a criminal investigation? It should be also clarified whether a due diligence standard can be set *post factum* – after an attack has already taken place.

The analysis provided in this article may serve as a starting point for such a debate. It seems clear that state responsibility must be based on a due diligence requirement rather than the obligation to show a formal link between the state authorities and the actions of actual perpetrators. An important element of any international accord on international responsibility for cyber-attacks would be

[39] Within such a discussion the principle of proportionality might also be discussed in order to ascertain the scope of counter-measures permitted to a state.

a debate on the international jurisdiction principles to be applied to acts conducted through the Internet.[40] Only such an accord will prevent reliance on far-fetched analogies to existing international regimes and contradictory national regulations.[41] Such an international consensus could provide the basis for a wider international agreement on the limits of state jurisdiction and competence in cyberspace. An international regulatory framework for cyberspace already falls within the scope of some international organizations, including the UN, through its agenda the Internet Governance Forum (IGF). The IGF could be used as a forum for elaborating a satisfactory consensus on the issues discussed herein.[42] Without a functioning mechanism for state responsibility for attacks conducted from its territory through the internet against other sovereigns, the worst case scenario is the unilateral interpretation of the self-defence clause of the UNC by each state, resulting in real-world armed conflict. Such a potentially catastrophic event should be prevented by all means possible.

[40] As with all activities in cyberspace, resort to traditional jurisdictional principles is bound to result in legal chaos, particularly should authorities decide to call upon the effects or the protective principle. For more on the issue of the application of traditional jurisdiction principles to cyberspace and its consequences, see: J. Kulesza, *Internet Governance and the Jurisdiction of States; Justification of the Need For an International Regulation of Cyberspace; third annual meeting of the Global Internet Governance Academic Network (GigaNet)*, Hyderabad, India, December 2008 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445452> accessed 29 April 2010.

[41] An example of such a far-reaching analogy was presented by Shackelford, (Shackelford, *supra* note 3, p. 27 ff), e.g. through drawing a parallel with the diplomatic law regime, law of the sea, or telecommunications regulations. Even though those regimes may provide a good example of how a consensus on the issue discussed may be shaped, their analogical application could lead to unpredictable results.

[42] This would, however, require serious organisational changes, as the present, open forum scheme has not fulfilled the tasks assigned to it. More on the summary of IGF efforts: J. Malcolm, *Appraising the Success of the Internet Governance Forum, Internet Governance Project 2008* <www.internetgovernance.org/pdf/MalcolmIGF Review.pdf> accessed 29 April 2010.

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THE 2009 AMENDMENT OF THE SLOVAKIAN STATE LANGUAGE LAW AND ITS IMPACT ON MINORITY RIGHTS

Abstract

Language is not only a way of communicating; it bears the culture, identity, history and a sense of belonging to a society of those who use it. Therefore language needs protection, especially if it is a language of a minority. With Slovakia's 2009 amendment of its State Language Law, the internationally recognised rights of every 7th citizen of Slovakia are endangered. The new law has not only caused a major source of international conflict between Hungary and Slovakia but has been the subject of intervention by the OSCE High Commissioner on National Minorities. Despite being a party to the Framework Convention on the Protection of National Minorities and the European Charter for Regional or Minority Languages, Slovakia is slowly detouring from its path towards recognition of the rights of those of its citizens who happen to belong to a minority group. This paper analyzes the main changes brought about by the newly amended law, which entered into force on 1 September 2009. It gives a concise overview of international conventions on language protection, followed by an in-depth analysis of the new provisions of the State Language Law in Slovakia and its impact on the status of minorities in the country.

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INTRODUCTION

Language is not only a way of communicating; it bears the culture, identity, history and a sense of belonging to a society of those who use it. Therefore language needs protection, especially if it is a language of a minority.

There are more than six thousand languages in the world. The sad fact, however, is that every second week one of these languages dies out. As a consequence, it is estimated that by the end of the twenty-first century over 90 percent of these languages will have disappeared. At present there are about 500 languages that are spoken by less than 10 people.[1]

In Europe, every seventh European is a member of an ethnic or national minority, as there are more than 300 minority groups numbering about 100 million people. In the countries of the European Union (EU) alone there are 37 official state languages with 3 alphabets, and 53 so-called "stateless" languages, i.e. regional or minority languages.[2] However, only 23 languages are recognized as official languages of the EU.

Taking into account the above, it is not surprising that regional international organizations, the Council of Europe and the EU, all consider the language issue as important. In order to save a language from extinction the state, or rather the ruling majority, has to acknowledge the right of the minority to use the language. It is, however, not enough to allow the minority to establish and run schools where all students are taught in the minority language. Why would a child spend up to 20 years in school using a language he/she will not be able to make use of in everyday life? Why give a Polish child in Lithuania or a Hungarian child in Slovakia an opportunity to learn his/her mother tongue if he/she will be only using it at school and at home?! The recognition of one's right to use his or her own language not only in private, but also in official communications, is a vital step towards assuring the rights of minorities.

In this paper we will analyze the main changes brought by the 2009 amendment of the 1995 State Language Law (SLL), the amended version of which entered into force in Slovakia on 1 September 2009. This law has significantly changed the legal framework applicable to language use in Slovakia. In our opinion this new law is not only a step back in the standard of protection of minorities in Slovakia, but a breach of international conventions binding upon the country as well.

[1] Zuchowicz, Katarzyna, *Co dwa tygodnie ginie język* (Every two weeks a language disappears), Rzeczpospolita 06.02.2010.

[2] Charter for the autochtonous national minorities in Europa, Bautzen/Budyšin 2006, p. 6: http://www.fuen.org/pdfs/20060525Charter_EN.pdf, accessed 20 February 2010.

In the following sections we offer a concise overview of international conventions on language protection, followed by in-depth analysis of the new provisions of the State Language Law in Slovakia and its impact on the status of minorities in the country.

1. THE LEGAL FRAMEWORK CONCERNING MINORITY RIGHTS

The Slovak Republic is one of the youngest countries of Europe: it was established on 1 January 1993 by secession from the Czech-Slovak Federative Republic. Historically, its territory was part of the Kingdom of Hungary and the Habsburg Empire until the end of World War I, which is reflected in the country's ethnic diversity. According to the 2001 census, persons of Slovak ethnicity constitute 85.8% of the population, Hungarians 9.7%, Roma 1.7%[3], and others (mostly Czechs, Ruthenians, Ukrainians, Germans, Poles, Croats and Serbs) 1.9%.[4]

According to Article 6(1) of the Constitution, Slovak is the "state language" of the country. The rights of national minorities to develop their culture and use their language "under conditions established by law" are guaranteed by Article 34 of the Constitution. Slovakia has ratified a number of international human rights treaties, including the International Covenant on Civil and Political Rights,[5] the International Convention on the Elimination of All Forms of Racial Discrimination,[6] the European Convention on Human Rights,[7] the Council of Europe's Framework Convention on the Protection of National Minorities,[8] and European Charter for Regional or Minority Languages.[9] Slovakia has also concluded a number of

[3] The number of Roma is assumed to be much higher than the official figure. According to the London-based Minority Rights Group there are 480,000 to 520,000 Roma in Slovakia, which amounts to 8.8-9.6% of the total population (Jean-Pierre Liégeois and Nicolae Gheorghe, Roma/Gypsies: A European Minority, London, Minority Rights Group, 1995).

[4] The ethnicity of 1% of the population was unidentified. The results of the census are available on www.statistics.sk.

[5] Czechoslovakia ratified the Covenant on 23 December 1975; Slovakia became a successor on 28 May 1993.

[6] Czechoslovakia ratified the Convention on 29 December 1966; Slovakia became a successor on 28 May 1993.

[7] Czechoslovakia ratified the Convention on 19 March 1992; Slovakia became a successor on 1 January 1993.

[8] Slovakia ratified the Convention on 14 September 1995.

[9] Slovakia ratified the Charter on 20 July 2001.

bilateral international treaties that include provisions on minority protection, for example with Ukraine,[10] Poland,[11] Hungary[12] and the Czech Republic.[13]

The creation of an independent Slovak state was accompanied by heightened nationalist sentiments, and the protection of the Slovak language was an important political goal already during the Czech-Slovak federation.[14] The first law on the official language in the Slovak Republic was adopted shortly after the fall of the Communist regime in 1990.[15] This was replaced in 1995 by Law on the State Language of the Slovak Republic (SLL),[16] which recognised Slovak as the only state language, and required its use in all official communications. It did not provide for the use of languages of national minorities. In addition, Article 10 of the law contained monetary sanctions for the breach of its provisions. However, Article 3(5) of the law, which required all written submissions to public bodies to be in Slovak, was annulled by the Constitutional Court as contrary to Article 34 of the Constitution.[17]

The SLL was fiercely contested by representatives of national minorities, and was subject to significant international criticism.[18] Following the 1998 elections, the new government decided not to amend the existing law, but instead proposed the Law on the Use of the Languages of National Minorities to fulfil the prescription of Article 34 of the Constitution.[19] This law was adopted in 1999 against the votes of the parliamentary representatives of the Hungarian minority. The 1999 law annulled the SLL's provision on monetary sanctions.

[10] Treaty between the Slovak Republic and Ukraine on Good Neighbourliness, Friendly Relations and Co-operation, signed in Kiev on 29 June 1993.

[11] Agreement between the Government of the Slovak Republic and the Government of the Republic of Poland on Cross-border Co-operation, signed in Warsaw on 18 August 1994.

[12] Treaty on Good Neighbourliness and Friendly Co-operation between the Slovak Republic and the Republic of Hungary, signed in Paris on 19 March 1995.

[13] Agreement between the Government of the Slovak Republic and the Government of the Czech Republic on Crossborder Co-operation, signed in Bratislava on 2 November 2000.

[14] F. Daftary and K. Gál, *The new Slovak Language Law: Internal or external politics?*, ECMI Working Paper # 8, September 2000, p. 4.

[15] Zákon o úradnom jazyku v Slovenskej republike (Law on the Official Language in the Slovak Republic), č. 428/1990 Zb.

[16] Zákon o štátnom jazyku Slovenskej republiky (Law on the State Language of the Slovak Republic), č. 270/1995 Z. z.

[17] Nález Ústavného súdu (Decision of the Constitutional Court), dated 26 August 1997, č. 260/1997 Z. z. It was literally a one-sentence ruling, without any explanation or justification whatsoever about why the article was unconstitutional.

[18] Daftary and Gál, *supra* note 14, p. 32.

[19] Zákon o používaní jazykov národnostných menšín (Law on the Use of the Languages of National Minorities), č. 184/1999 Z. z.

2. THE 2009 STATE LANGUAGE LAW

2.1. The adoption process of the 2009 Act

The 2009 Act is an amendment[20] of the 1995 SLL. It replaces large parts of it and thus significantly changes the legal framework applicable to language use.[21] It entered into force on 1 September 2009.

The new proposed act, immediately after its presentation in the Parliament, drew significant criticism from the representatives of the Hungarian minority in Slovakia and the Slovakian liberal media and political circles.[22] After its adoption, it also became a major source of international conflict between Hungary and Slovakia, prompting the intervention of the OSCE High Commissioner on National Minorities (High Commissioner).[23]

In response to domestic and international criticism, the Slovak government adopted the "Principles of the Slovak Government applicable to the Law on the State Language" (hereinafter "Principles of Interpretation"), aimed at clarifying and limiting some of the laws' most controversial provisions.[24] The legal status of these "principles" is unclear. The law itself does not foresee any implementing by-laws. Therefore the Principles of interpretation do not have the form of an official regulation or ordinance, and as a consequence seem to lack legal force. Moreover,

[20] The amendment, drafted by the Ministry of Culture, was submitted to the Government of the Slovak Republic on 12 November 2008. After being adopted by the Government on 11 March 2009, it was submitted to the National Council, and was passed on 30 June 2009 as Law No. 318/2009 Coll. It was signed by President Gašparovič on 17 July 2009.

[21] In the article we will refer to the 2009 act interchangeably as "new act" or "amendment".

[22] http://www.sme.sk/c/4976686/mikolasik-jazykovy-zakon-je-ako-slotove-nejapne-vtipy.html , accessed 10 February 2010

[23] As Knut Vollebaek, the OSCE High Commissioner on National Minorities noted, "the Parliament adopted the text rather quickly... before receiving the requested opinion of the HCNM", contrary to good practice. See Opinion and Recommendations of the OSCE High Commissioner on National Minorities on amendments to the "Law on the State Language of the Slovak Republic", Organization for Security and Co-operation in Europe, High Commissioner on National Minorities, The Hague, 22 July 2009, p. 2.

[24] The "principles" were drafted by the Ministry of Culture and adopted by the Government without consulting the political representatives of the Hungarian minority in Slovakia or taking into account the Hungarian government's comments, despite the High Commissioner's recommendation. See http://www.kulugyminiszterium.hu/kum/hu/bal/Aktualis/Szovivoi_nyilatkozatok/SK_kozl_091217.htm, accessed 15 February 2010 and http://www.osce.org/item/39377.html, accessed 15 February 2010.

as they contradict a number of the SLL's provisions, rather than clarifying it they bring even more legal uncertainty and confusion into its implementation.[25]

2.2. The legislative aim of the 2009 act

The 2009 amendment has had a significant impact on the linguistic rights of minorities in Slovakia. Its stated aim, however, bears no relation to curtailing the linguistic rights of minorities. The amendment's explanatory report refers to the "deterioration of linguistic culture" as the main reason prompting its adoption, evidenced by violations of the codified grammatical rules of the Slovak language and excessive takeover of foreign expressions (especially Anglicisms and Americanisms).[26] The source of these problems is found to be the inadequate legal regulation, which did not provide enough competences to state authorities to regulate and punish the "incorrect" use of the Slovak language.[27] The aim of the amendment is therefore declared as an improvement of the linguistic culture.[28]

However, in our opinion this was not the real motivation behind adopting the new SLL. As detailed below, the act significantly increases the areas where the "official" Slovak language must be used, which obviously has and will have a detrimental effect on the use of minority languages. In particular, the newly introduced sanctions do not seem to be proportionate to the stated aim. With regard to many provisions of the act, it is impossible to imagine situations where a person could be sanctioned for using a dialect of the Slovak language or foreign terms, leaving no doubt about the real addressees of the sanctions – the users of minority languages.

[25] The High Commissioner welcomed the adoption of the principles on 4 January 2010, expressing its expectation that the authorities will "closely monitor and evaluate the implementation of the State Language Law". The High Commissioner reiterated his concerns about the law, stating that "It is essential that steps taken to promote the State Language Law do not undermine linguistic rights of persons belonging to national minorities." See http://www.osce.org/item/39377.html, accessed 16 February 2010. This sentence was mis-translated by the Slovakian Ministry of Foreign Affaires to Slovak not as a warning, but as an affirmation that the steps in fact do not undermine minorities' linguistic rights, and was explicitly referred to as an evidence of the High Commissioner's satisfaction with the law. See http://www.foreign.gov.sk/servlet/content?MT=/App/WCM/main.nsf/vw_ByID/ID_C0B1D004B5A332B2C125, accessed 10 February 2010.

[26] Explanatory report to the amendment of Law no 277/1195 Col. L. on the State Language, No. MK-3972/2008-10/15844, p. 3.

[27] *Ibidem.*

[28] *Ibidem.*

3. THE MAIN CHANGES INTRODUCED BY THE 2009 ACT

3.1. The personal scope of the Act

The amendment increases the circle of persons and organs which are bound by its provisions. It applies not only to state organs, organs of territorial self-governmental bodies at all levels and other bodies of public administration, but also to "legal persons, natural person-entrepreneurs and private individuals" (Article 1(5)). The law thus confers obligations on purely private bodies and persons, making them subject to penalties.

3.2. Competence in codifying the "official" state language

In accordance with Article 2(3) of the SLL, the Ministry of Culture will approve and publish on its website the "codified version of the state language". As a result, a state organ becomes responsible for solely linguistic matters, leaving the Slovakian Academy of Science or other linguistic institutions, which had an advisory role in the codification process leading to the amendment, without any role.[29]

3.3. The use of the state language in official communications

The amended law lists the bodies which must use the state language in official communications (Article 3(1)). These include all public bodies. The Principles of Interpretation list a number of examples of legal persons bound by the law, such as banks, universities, the Railways of the Slovak Republic, state funding organisations, etc. All these bodies and their employees have a duty to use the state language in official communications. Article 3(2) extends this duty to members and employees of the army, fire protection services, police forces, transportation, telecommunication and postal services. Private persons also have a duty to use the state language in official communications with the bodies listed in Article (3)1.

The amended SLL refers to the Law on the Use of Languages of National Minorities as constituting an exception to the above rules. However, that law has a much narrower scope of application than the SLL. It allows for the use of minority languages only in municipalities where minorities constitute at least 20% of the population.[30] Members of minorities living outside of minority areas therefore must

[29] See Article 2(2) of the State Language Law before the 2009 amendment.

[30] The following number of municipalities meet the 20% threshold: Hungarian: 504; Ruthenian: 92; Romani: 54, Ukrainian: 6 and German: 1..See: Addendum 2 to the Initial

not use their language even if an office clerk, postman or policeman whom they need to address speaks it (for example, if it is their family member), because in such situations the SLL applies, and not the Law on the Use of Languages of National Minorities. In minority areas, private persons can address public bodies in the minority language, but the employees of the public bodies have no obligation to understand and use the minority languages. Even if they do, members of public bodies cannot use the minority language in communication with each other, but only in communications with a private person, since the Law on the Use of Languages of National Minorities applies only to the latter.

If these rules were applied scrupulously, they would have profound implications for language use, especially among the Hungarians in Slovakia. As Hungarians, contrary to other minorities, tend to live in compact areas with overwhelming Hungarian majorities, it is common for most public employees in those areas to speak Hungarian with their colleagues. This does not mean that any Slovak persons living in those areas, whether they speak Hungarian or not, would have to use Hungarian against their will. The obligation on all public employees to know the state language and to use it if a client so wishes has existed since 1995, and in practice has never posed a problem. Now however, all minority members will have to use the state language outside of the very narrowly defined area of exceptions. There seems to be no reason other than harassment of minorities to require two Hungarian-speaking policemen in a Hungarian majority municipality to speak with each other in Slovak, or to oblige a Hungarian-speaking postman or bus driver outside of the minority areas to address his wife in the state language.

The already ambiguous legal provisions are further confused by the Principles of Interpretation, which state that in minority areas employees of public bodies may use a minority language in official communication only if they are members of a national minority, and there are no other persons present who do not speak the minority language.[31] If this refers to use of the minority language among employees of public bodies, it goes against the conventional reading of the law. If it refers to communication with private persons, it introduces an additional obstacle to the use of the minority language, which is in any case very ambiguous. Would, for example, the presence of persons not speaking the minority language in the room

Periodic Report of the Slovak Republic under the European Charter for Regional or Minority Languages, Strasbourg, 20.9.2004.

[31] Zásady vlády Slovenskej republiky k zákonu Národnej rady Slovenskej republiky č. 270/1995 Z. z. o štátnom jazyku Slovenskej republiky v znení neskorších predpisov (Principles of the Government of the Slovak Republic to Law no. 207/1995 Col. L. on the State Language of the Slovak Republic, as amended) č. 933/2009, p. 11.

preclude the use of the minority language between two persons wishing to use it in a separate communication? The Principles of Interpretation provide no clear answer.

Since foreign languages which are not recognised as minority languages in Slovakia do not fall under any of the exceptions provided by the law, it becomes illegal for public servants to speak with foreigners in a foreign language they might both understand, such as English or French. The Principles of Interpretation recognise this problem, and provide an exception for the use of foreign languages in official communication for some public bodies (police forces, post offices, fire protection services, etc.) if their client does not speak Slovak.[32] This very complicated provision (its various conditions and modalities stretch the one-sentence-rule over 16 lines!) only underlines the deficiencies of the law without remedying it, since the Principles have no force of law and therefore cannot overrule the statute's provisions.

The amendment does not change the rules concerning written communication, as this already takes place almost exclusively in Slovak - also in minority areas. Public documents (such as birth and marriage certificates, etc.) are required to be written exclusively in Slovak. School diplomas in minority schools constitute an exception, they can be bilingual. Internal pedagogical documentation of minority schools could be written in the minority language only before the 2009 amendment; since then they have to be bilingual as well (Article 4(3)).

3.4. Use of the state language in public communications

The SLL not only regulates official communications, but also various aspects of 'public communication", widely understood. Article 5(1) requires foreign television and radio programs to be subtitled or re-broadcast in the state language[33] (with the exception of minority-language radio programs).[34] Local public announcements must be released in Slovak first, and can be repeated in a minority language according to Article 5(3).[35] Periodical, non-periodical and occasional (such as catalogues of museums, libraries, programs of cinemas, theatres, etc.) publications must be published in the state language, or bilingually in the case of minority languages (Articles 5(4) and 5(5)).[36]

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[32] *Ibidem.*

[33] The Committee of Experts viewed this provision as introducing restrictive requirements for private television and radio broadcasters offering programmes in minority languages which should be removed. See: Application of the European Charter for Regional or Minority Languages in the Slovak Republic, 2nd monitoring cycle, Strasbourg, 18.11.2009, p. 55.

[34] Article 5(1)f) of the State Language Law.

[35] The 1995 Act did not apply to local oral public announcements.

[36] As a consequence, for example, cinema offerings in English are illegal under this provision.

One of the most bizarre provisions of the law, Article 5(7), requires that scriptures on monuments, memorials and memorial tables be written in the state language. Other language versions may be present if they are equal in content, are of the same or smaller size, and come after the Slovak text. Texts not in compliance with the law must be changed within one year of the entry into force of this provision, and the costs of the change are born by the owners (Article 11(2)). Historically protected monuments constitute an exception. However, there are a number of historical memorial engravings around Slovakia which are of local importance but are not on the list of protected monuments. If this provision is thoroughly implemented, the owners of these engravings must change them or face sanctions under the law. It is also unclear whether tombs are covered by this obligation. The Principles of Interpretation claim they are not, however, courts or state authorities might have a different opinion, which would have a devastating impact on all minority communities.

The 2009 amendment does not change the rules concerning language use before courts. The proceedings are conducted and all documents are delivered in the state language, and only persons who do not understand Slovak can use their language, with the help of a court interpreter.[37]

The 2009 amendment introduces a requirement that all healthcare and social care providers communicate with their patients and clients in the state language. There is an exception for persons who do not understand the state language, and for institutions placed in minority areas. However, the exception is of little use to minorities, since typically they do speak Slovak, and hospitals are often placed in regional centres outside of the minority areas. There seems to be no reason other than harassment to explain why, for example, a Ruthenian doctor and her Ruthenian patient should not be allowed to speak Ruthenian, if they both prefer, in a hospital placed in a city with less than 20% Ruthenian population.

3.5. Sanctions

The re-introduced[38] monetary sanctions are one of the most contentious issues of the 2009 amendment. The Ministry of Culture can impose a fee ranging from 100 to 5000 Euros on public bodies, legal persons and natural person-entrepreneurs who violate the Law's provisions (Article 9a(1)). Sanctions cannot be directly imposed on employees of these bodies, on private persons, and on healthcare

[37] Article 7 of the State Language Law.

[38] Monetary sanctions were provided for in Article 10 of the 1995 State Language Law, but this provision was annulled by the 1999 Law on the Use of National Minority Languages.

and social care providers. Nevertheless, according to general administrative law provisions if a legal person is sanctioned, it can take action against its employee responsible for the violation of the law.

The law provides no guidelines as to which offence should be punished by sanctions of what magnitude. The Principles of Interpretation list 21 factors which should be taken into account (such as scope of the illegal activity, its character, repeat offences, etc.), but provides no further clarification as to what sanctions various acts "deserve". The Ministry of Culture will therefore have unfettered discretion is punishing persons for using unofficial words in public announcements, or for failing to change the text of a 300-year-old memorial table in accordance with the regulations.

Simultaneously with issuing the sanction, the Ministry specifies a time limit by which situations contrary to the law must be remedied. If this does not take place, it issues another sanction, double the first one (Article 9a(2)).

Sanctions can have a gravely disabling effect on the use of languages other than Slovak. As the amendment's explanatory report states, the reason for their reintroduction is the fact that many of the original SLL provisions have not been implemented in practice.[39] That is probably true, as many provisions of the law simply do not make any sense. Hungarian or Ruthenian municipalities in Slovakia quite likely have not re-written their centuries old chronicles in Slovak, nor replaced a hundred year old memorial stone table with a Slovak one, because there was simply nobody who could have benefited from such a measure. The sanctions, however, make the performance of these unreasonable provisions much more probable.[40]

4. THE NEW LAW'S IMPLEMENTATION

The amendment entered into force only recently, and therefore not many steps to implement it have been taken so far. Above all, no sanctions have yet been imposed.

[39] Explanatory report to the amendment of Law no 277/1195 Col. L. on the State Language, No. MK-3972/2008-10/15844, p13.

[40] The High Commissioner was highly concerned about the sanction, noting the "too wide range in the amount of the fine", the need to "avoid arbitrary interpretation", and warning about "the potential impact (even if it is only a perception) of a system of sanctions directed also at persons belonging to national minorities". As he explained, sanctions "should be handled with extreme care", and they "should be exceptional, clearly defined and regularly monitored". See Opinion and Recommendations of the OSCE High Commissioner on National Minorities, *supra* note 23, p. 8. The amended State Language Act hardly satisfies any of these criteria, and it is not difficult to see that the sanctions are directed mostly or solely at persons belonging to national minorities.

After the amendment's entry into force, post offices in the town of Moldava nad Bodvou (with almost equal Hungarian and Slovakian populations) were ordered by an internal ordinance to use the Slovak language exclusively in internal and external communications.[41] This was based on an erroneous interpretation of the law, since Hungarians constitute more than 20% of the town's population, therefore persons living there have a right to talk to postmen in Hungarian. After the ordinance was exposed by the media, the directorate of post offices apologized for the mistake and replaced it with another one which allows postmen in the town to use Hungarian with customers who request it.

Newspapers also reported an alleged internal ordinance issued by higher police authorities, ordering members of the police force in the district of Dunajská Streda, which has 80% Hungarian population, to use Slovak in internal communications.[42] The existence of the ordinance has not been confirmed, and it was apparently later revoked, but the incident revealed that there is much confusion, even among officials of the Ministry of Justice, as to what the law requires and what it does not. Similar incidents of confusion have been exposed by the media. For example, a high official of the ruling party stated that the new law forbids weddings to be performed in Hungarian, since a wedding is a public act, while the Minister of Culture responded to journalists that such weddings are not forbidden under the law.[43] The question whether tombstone engravings and memorials are covered by the law and should be replaced by Slovak ones has similarly been interpreted differently by various officials of the Ministry of Culture. It is also unclear whether historical municipal chronicles should be translated to Slovak entirely, or only the parts starting from 1996, when the first SLL entered into force.

The initial experiences have highlighted a highly problematic feature of the law, namely its lack of clarity.[44] Coupled with the unfettered discretion to impose high sanctions in enforcement of the ambiguous provisions, the amendment can

[41] *Poštárom kážu slovenčinu* (Postmen ordered to speak Slovak), Sme, 4.9.2009, http://www.sme.sk/c/5003738/postarom-kazu-slovencinu.html, accessed 20 February 2010.

[42] *V Dunajskej Strede mali zatýkať po slovensky* (In Dunajská Streda arrests allegedly take place in Slovak), Sme, 7.10.2009, http://trnava.sme.sk/c/5050866/v-dunajskej-strede-mali-zatykat-po-slovensky.html, accessed 20 February 2010.

[43] *Jazykovému zákonu nie je rozumieť* (The language law is unintelligible), Sme, 23.7.2009, http://www.sme.sk/c/4945169/jazykovemu-zakonu-nie-je-rozumiet.html, accessed 20 February 2010.

[44] As the High Commissioner also noted, the "amendments have not improved the clarity of the State Language Law", opening the possibility of divergent interpretations. See Opinion and Recommendations of the OSCE High Commissioner on National Minorities, *supra* note 23, p. 1.

have a significant chilling effect on the use of languages other than Slovak. If the provisions are so vague and conflicting that even the author of law, the Ministry of Culture, comes up with contradictory interpretations, ordinary citizens will have great difficulty adjusting their conduct to it. The fear of sanctions may result in more caution on their side than necessary, leading to less frequent use of minority languages even in situations where such use in not forbidden. That this is a very real possibility is shown by the above examples form Moldava nad Bodvou and Dunajská Streda, as well as by similar experiences from the period after 1995, when the sanctions contained in the original version of the SLL resulted in fear and over-cautiousness on the part of minorities.[45]

Article 1(2) of the SLL states that the "state language has priority over other languages on the territory of Slovakia". It seems that the main purpose of the amendment was to strengthen this principle over any other stated aims. The amendment has a significant negative impact on minority languages above all by expanding the scope of the obligation to use the state language.[46] The new amendments also destroy the balance of linguistic rights created by the 1999 Law on the Use of National Minorities and causes frustration among minorities and tensions at the international level, without improving anybody's situation.

5. LANGUAGE AND PROTECTION OF MINORITIES IN REGIONAL INTERNATIONAL LAW

In Europe there are two main international organisations which have long considered the protection of minorities and minority languages as an important issue, namely the Council of Europe and the EU. The former, as an older organisation which was set up to promote democracy and protect human rights and the rule of law in Europe, has prepared two very important international treaties significantly

[45] I. Lanstyák, *A Magyar nyelv Szlovákiában* (The Hungarian language in Slovakia), Kalligram, 2000.

[46] As the High Commissioner noted, the rather strict initial State Language Law of 1995 was complemented by the 1999 Law on the Use of National Minority Languages, and the "interplay between these two pieces of legislation has always been crucial for striking the right balance between the promotion of the State language and the protection of the linguistic rights of persons belonging to national minorities in Slovakia". While the situation has never been satisfactory for minorities, the "recent years have marked a significant improvement in striking the required balance". Opinion and Recommendations of the OSCE High Commissioner on National Minorities, *supra* note 23, p. 1.

improving the situation of minorities and their languages: the European Charter for Regional or Minority Languages (CRML or the Charter)[47] and the Framework Convention on the Protection of National Minorities (FCNM or the Convention).[48] The EU, as an international organisation *sui generis*, has developed different mechanisms and tools, like directives.[49] With the entering into force of the Lisbon Treaty[50] and the Charter of Fundamental Rights of the European Union[51] the role and competences of the EU in the field of minority protection have even increased.

However, for the purpose of this article only the main provisions of the CRML and the FCNM will be subjected to brief analysis in order to determine whether the revised SLL in Slovakia is compatible with them.[52]

By ratification of both the CRML and the FCNM, states have agreed not only to improve the situation of their minorities but to restrain from any measures which would lower the already existing standards. With the implementation of the amended SLL in 2009, the freedoms and rights, as concerns the use of their minority language in speech and writing, of minorities living in Slovakia have been significantly limited. By passage of the new SLL, Slovakia has breached the provisions of both the CRML and the FCNM.

5.1. The European Charter for Regional or Minority Languages

The Slovak Republic signed the CRML on 20 February 2001 and ratified it on 5 September 2001. It entered into force with respect to Slovakia on 1 January 2002. With the ratification of the Charter, Slovakia submitted 7 declarations concerning Articles 1, 2, 3, 8, 10, 12 and 13.

[47] European Charter for Regional or Minority Languages No. 148, Strasbourg, 5.XI.1992. The convention was open for signatures since 1992 and entered into force on the 1.3.1998. As for the 01.03.2010 there were 24 ratifications of the convention. The last ratification was finalised by Poland on 1.6.2009

[48] Framework Convention for the Protection of National Minorities No. 157, Strasbourg, 1.II.1995.

[49] E.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

[50] The new Art. 2 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Lisbon Treaty) includes "rights of persons belonging to minorities" as an additional value on which the Union is founded.

[51] Art. 21 of the Charter of Fundamental Rights of the European Union prohibits any discrimination based on any ground such as ... ethnic ..., language, religion or belief, ..., membership of a national minority....

[52] The role and competences of the EU in the field of minority protection cannot be covered in this article for space reasons.

The ratifying countries are obliged to follow certain objectives and principles[53] with respect to regional or minority languages: recognition of the regional or minority languages as an expression of cultural wealth; respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question; recognition of the need for resolute action to promote regional or minority languages in order to safeguard them, as well as the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life. Slovakia as a ratifying party has bound itself to take into consideration the needs and wishes expressed by the relevant language groups while determining its policy with regard to regional or minority languages.

Pursuant to Article 10 of the CRML, as regards the use of regional or minority languages within the sphere of administrative authorities and public services, Slovakia has to ensure that the administrative authorities of a district[54] allow the right to use the regional or minority languages; that administrative texts and forms for the population are available in the regional or minority languages or in bilingual versions; as well as allow the administrative authorities to draft documents in a regional or minority language. For the local and regional authorities the threshold was set higher as the law should: encourage the use of regional or minority languages within the framework of its regional or local authorities, allow for submissions and applications, both oral and written, in the minority language, as well as provide publications of regional and local official documents in the relevant regional or minority languages. The Charter also provides the possibility for using the minority language in assemblies, and the retention of traditional and correct forms of place-names in regional or minority languages. As already mentioned, its provisions also cover public services provided by the administrative authorities. In that respect it has to be ensured, *inter alia*, that the regional or minority languages are used in the provision of such services.

In accordance with Article 3(1) of the CRML, Slovakia recognises the following regional or minority languages: Bulgarian, Croatian, Czech, German, Hungarian, Polish, Romany, Ruthenian, and Ukrainian. As concerns the territorial dimension in which the regional or minority language is used (Article 1(b)

[53] Art. 7 of the European Charter for Regional or Minority Languages No. 148, Strasbourg, 5.XI.1992.

[54] Slovakia is divided into 79 districts, a distric being the basic administrative unit of the country. The 79 districts constitute 8 regions.

and Article 10), Slovakia decided to uphold its rules that had been implemented earlier.[55] Pursuant to the provisions of the Government Ordinance, only municipalities that are inhabited by a national minority representing at least 20 % of the population fulfil the legal requirements to use regional or minority languages.[56] In 2001 there were 657 such communities.[57]

The 20% threshold has been criticised several times by the Committee of Experts.[58] Already in the First Evaluation Report it was noted that the 20% threshold was incompatible with the Charter. The report concluded that Article 10 of the CRML applies also to those municipalities where the regional or minority language speakers do not attain the 20% threshold, but represent nevertheless a sufficient number of speakers.[59] The Committee of Experts observed that the 20% threshold deprived the Bulgarian and Polish minorities of their rights. Additionally it was underlined that this provision was an obstacle for the Croatian and German minorities.[60] Subsequently in the Second Report the Committee of Experts urged the Slovak authorities to determine in which additional municipalities, other than those qualifying under the 20% threshold, minorities could make use of provisions of Article 10.[61]

In one of the Committees of Ministers of the Council of Europe recommendations, the Committee of Ministers recommends that the Slovak authorities review

[55] Section 2 of the National Council of the Slovak Republic Act of 10 July 1999 on National Minority Languages Use.

[56] The list of the municipalities was determined by the Government Ordinance No. 221/1999 Coll., issuing the list of settlements in which citizens belonging to a national minority constitute at least 20 per cent of population as of 25 August 1999.

[57] Initial Periodical Report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter for Slovak Republic, Strasbourg 2003, p. 7.

[58] The Committee of Experts on Issues relating to the Protection of National Minorities is an inter-governmental committee of experts on national minority issues, established by the Committee of Ministers of the Council of Europe and acting under the aegis of the Steering Committee for Human Rights. One of its tasks includes drawing on the results of the monitoring mechanism of the Framework Convention. For more information consult: http://www.coe.int/t/dghl/monitoring/minorities/5_intergovwork/dh-min_intro_EN.asp, accessed 19 March 2010.

[59] Recommendation RecChL(2007)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Slovakia, p. 1.

[60] Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by Slovakia, Strasbourg, 21 February 2007, p. 9. See also: Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on the Slovak Republic, Strasbourg 2005, p. 22.

[61] Application of the European Charter for Regional or Minority Languages in the Slovak Republic, 2nd monitoring cycle, Strasbourg, 18.11.2009, p. 5.

the restrictions on the use of regional or minority languages arising as a consequence of the SLL.[62]

Furthermore, as concerns the SLL, the Committee of Experts in its report from 2007 highlighted a number of instances where the law expressly imposes the use of Slovak, thus discouraging the use of regional or minority languages. The report stressed the need to amend the SLL to bring it into conformity with the obligations of the Charter. Slovak authorities were encouraged to take the necessary steps to remove clauses which could lead to unjustified distinctions, exclusions, restrictions or preferences relating to the use of regional or minority languages in Slovakia.[63] Additionally, the Committee of Experts encouraged the authorities to eliminate from their legislation any provision prohibiting or limiting, without justifiable reasons, the use of regional or minority languages in documents relating to economic or social life.[64] It also urged the Slovak authorities to take the necessary measures to allow and to encourage local and regional authorities to publish their official documents in the relevant regional or minority language.[65] Even the 2007 Report stated that following the interpretation of the SLL would make the usage of any language other than Slovak in the contacts with public services (including public law authorities) impossible.[66] In the second periodical report on the CRML from 2008, the Slovak authorities had the opportunity to comment on the above mentioned remarks and recommendations. As concerns the 20% threshold, the Slovak government pointed out that the Slovak Republic made a declaration pursuant to Article 1 (b) of the Charter. This threshold is supposed to be "adequate" and to "take due account of the interest of persons belonging to national minorities to use their minority languages in official communication, the situation of individual minority languages, and the real need to protect them from extinction, as well as of the duties, legitimate interests, needs, economic efficiency and other criteria that are of concern for the state."[67] In the opinion of the Slovak authorities this high 20% level reflects the large number of national minorities in Slovakia and their high percentage

[62] Recommendation RecChL(2007)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Slovakia, p. 1.

[63] Recommendation of the Committee of Ministers of the Council of Europe on the application of the Charter by Slovakia, Strasbourg, 21 February 2007, p. 6.

[64] *Ibidem*, p. 36.

[65] *Ibidem*, p. 47.

[66] *Ibidem*, p. 49.

[67] Second periodical report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the European Charter for Regional or Minority Languages, Strasbourg, 2008, MIN-LANG/PR(2008)5, p. 26.

representation in the population, as well as the countries' administrative classification structure (a high number of municipalities with a low population).

The Slovak Government did not agree with the recommendation to review the restrictions on the use of regional or minority languages resulting from passage of the SLL, emphasizing that it "does not regulate the use of minority languages, and its application in practice does not restrict the right of persons belonging to national minorities to use their mother tongue in official communications provided for under the Slovak legislation in force"[68]. It was even posited that Slovakia went further than some of the requirements of the Charter, introducing the use of minority languages in court proceedings in the entire territory.[69]

However, despite the 2007 recommendations[70] and the above-mentioned assurances of the Slovak authorities that the existing legislation on safeguarding and strengthening the status of the state language (Constitution, SLL and related regulations) is not in conflict with the right of persons belonging to national minorities to use their mother tongue in official communications,[71] the Committee of Experts noted in its 2009 findings that the SLL expressly imposes the use of Slovak, thus discouraging the use of minority languages in the relevant areas.[72]

5.2. The Framework Convention on the Protection of National Minorities

The FCNM is the first legally binding regional multilateral instrument aimed at the protection of national minorities and specifying the legal principles which ratified states have to undertake in order to ensure their protection of national minorities.[73] Even though the FCNM was agreed upon three years later than the CRML, it came into force earlier. The FCNM has been ratified by 39 states,[74] 15 more than the CRML. The Slovak Republic signed the Framework Convention on 1 February 1995 and ratified it on 14 September 1995. It entered into force on 1 February 1998.

[68] *Ibidem*, p. 26–27.

[69] *Ibidem*.

[70] Recommendation RecChL(2007)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Slovakia, p. 1.

[71] Application of the European Charter for Regional or Minority Languages in the Slovak Republic, 2nd monitoring cycle, Strasbourg, 2009, ECRML(2009)8, pp. 10–11.

[72] *Ibidem*.

[73] Explanatory report to the Framework Convention on the Protection of National Minorities.

[74] The convention has been open for signatures since 1995 and entered into force on 1.2.1998. As of 1.3.2010, 39 states ratified the convention, the last being Georgia on 01.04.2006.

The FCNM acknowledges that the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights (Art. 1). The Framework Convention guarantees several important rights to national minorities, *inter alia*: equality before the law (Art. 4), preservation of the essential elements of their identity, namely their religion, language, traditions and cultural heritage; and prohibition of assimilation (Art. 5), freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion (Art. 7), right to manifest religion or belief and to establish religious institutions, organisations and associations (Art. 8), right to use freely and without interference their minority language, in private and in public, orally and in writing. Slovakia agreed to ensure the possibility to use the minority language in relations between those persons and the administrative authorities in areas inhabited by persons belonging traditionally to national minorities, or in substantial numbers (Art. 10). Minorities are guaranteed the recognition of their surnames (patronyms) and first names in the minority language and the right to have them officially recognised; the right to display, in their minority language, signs, inscriptions and other information of a private nature visible to the public in areas traditionally inhabited by substantial numbers of persons belonging to a national minority, as well as the right to display traditional local names, street names and other topographical indications in their minority language (Art. 11).

It is worth noting that Articles 10 and 11 of the FCNM partially cover the ratio materiae of the CRML and are therefore essential to the analysis of the new SLL. The SLL was already a subject of concern in the first opinion, adopted in 2000 by the Advisory Committee,[75] on the implementation of the FCNM by Slovakia. Although the Advisory Committee had not, to that date, observed any widespread negative impact on minority languages of that law, it pointed out that there were provisions in the SLL, which "could lead to undue limitations on the freedom to receive and impart information and ideas in minority languages."[76] The Committee stressed that such an ambiguous legal situation is unsatisfactory from the point of view of legal certainty and that it may give rise to negative consequences for persons belonging to national minorities. Moreover, it underlined that "even in the

[75] The Advisory Committee is the independent expert committee responsible for evaluating the implementation of the Framework Convention in State Parties and advising the Committee of Ministers.

[76] The first Opinion on Slovakia adopted by the Advisory Committee on the Framework Convention for the Protection of National Minorities in 2000 (ACFC/INF/OP/I(2001)001), points 33–35.

absence of sanctions imposed by the authorities for non-compliance, the law in its current form can produce a "chilling effect" extending to legitimate activities of minorities."[77] The opinion's conclusion was that an amendment of the SLL might be necessary to ensure that the rights of persons belonging to minorities are protected in a clear and comprehensive manner in both law and practice.[78] The Government of the Slovak Republic did not agree with the above-mentioned comments of the Advisory Committee and opposed the "pertinent proposal" giving, in its opinion, priority to minority languages over the State language. The Slovak Government underlined that by signing the CRML Slovakia confirmed its commitment to ensure the protection and development of minority languages without prejudice to the use of the state language. It added that "when necessary, appropriate legislative measures will, undoubtedly, also be adopted" indicating that a change of the SLL might be needed with the ratification of the new Convention.[79]

The third report on the implementation of the FCNM submitted by the Slovak Republic in 2009 raises the possibility of the draft amendment to the SLL. According to the government the proposed law was supposed to "widen the possibility of using languages other than the state language (including national minority languages) in certain areas". Additionally, the Slovak government asserted that the amended SLL fully respects the legal *status quo* in the area of the implementation of linguistic rights of persons belonging to national minorities and ethnic groups. It underlined that none of the provisions of the act narrow down or interfere with any rights belonging to national minorities. The government went even further, suggesting that that the "proposed legislation expands the scope of rights of persons belonging to national minorities by introducing certain new statutory rights in the economic and social field which, since the adoption of the CRML, have not yet been incorporated into the Slovak legislation" and that "certain changes have been proposed to benefit persons belonging to national minorities".[80]

Unfortunately, the Slovak government proceeded in a different direction, as the amendment mentioned in the third report is the one which was approved by the Government in March 2009 and is the subject of this publication and international discussion. The new act took neither the recommendations of the Committee

[77] *Ibidem.*
[78] *Ibidem.*
[79] Comments of the Government of Slovakia on the opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities in Slovakia, 2001 (GVT/COM/INF/OP/I(2001)001), point 7.
[80] Third report submitted by the Slovak Republic pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 2009 (ACFC/SR/III(2009)008), p. 25.

of Experts into account, nor the recommendations of the Committee of Ministers of the Council of Europe. It worsened the position of its own citizens who belong to a minority group.

CONCLUSIONS

The linguistic rights of the Slovak-speaking majority had already been guaranteed to a high degree before the adoption of the 2009 amendment. Because of the widespread use of Slovakian and its knowledge by minority populations, it is difficult to imagine situations in which Slovak persons would be unable to use their language in official or other public communications, including entirely minority-populated municipalities. The purpose of the amendment therefore was not to improve the position of Slovak speakers. Instead, it aims at restricting the use of minority languages by members of the minorities *among themselves*. Slovakian is certainly not an endangered language in Slovakia, as evidenced by the high rate of assimilation of minorities, manifested by the decrease in their numbers, both in absolute terms and in terms of the number of municipalities where they constitute more than 20% of the population.[81] If anything, it is the languages of the minorities which require more stringent protection. The findings and recommendations of the Committee of Experts and of the Committee of Ministers of the Council of Europe leave no doubt that the SLL, even before being amended in 2009, not only restricted and discouraged the use of regional or minority languages but also limited, without justifiable reasons, the use of regional or minority languages in documents relating to economic or social life, thus worsening the position of Slovakian citizens belonging to a minority group.

Even if it is still too early to determine the impact and potential damage for democracy that the amended SLL will have, it is clear that the new law is a significant step backwards from the agreed-upon and accepted international standards established by the CRML and the FCNM. There is no doubt, in our opinion, that Slovakia is in breach of both the CRML and the FCNM provisions. One may also expect that the new SLL will be one of the main issues elaborated in future monitoring reports for these two treaties.

[81] Between 1991 and 2001, the number of Slovaks in Slovakia grew by 95,000 persons, while the number of Hungarians decreased by 49,000 persons.

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INTERNATIONAL LEGAL ISSUES IN THE CASE OF THE PRUSSIAN TRUST (PREUSSISCHE TREUHAND) AGAINST THE REPUBLIC OF POLAND BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract

On 7th October 2008 the ECHR declared inadmissible an application submitted by Preußische Treuhand GmbH & Co. KG a. A. against Poland. The applicant company claimed – on behalf of 23 individual applicants – that Poland violated Article 1 of the Protocol No 1 to ECHR by illegal expropriation of German property located within the former German territories east from the Oder-Neisse line which after the World War II were transferred to Poland. This paper examines the essential questions of international public law that arise from this case as to the admissibility of the claim.

1. INTRODUCTION

On 23rd November 2006 the Prussian Trust,[1] representing 23 German citizens, submitted a claim to the European Court of Human Rights (hereinafter ECHR

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[1] Prussian Trust (full original name Preußische Treuhand GmbH & Co. KG a. A.) is a German legal entity – a limited partnership founded in 2000 by German "expellees" as "the self-help organization of displaced persons from private German properties in the expulsion territories", source: www.preussische-treuhand.org. See also the expert treatise of W. Góralski, Przejęcie własności niemieckiej przez Państwo Polskie po drugiej wojnie światowej na Ziemiach

– Court) claiming that the Republic of Poland breached Article 1 of Protocol 1 to the European Convention of Human Rights (hereinafter ECHR – Convention),[2] in connection with Article 14 of the Convention, by the illegitimate seizure of their property and failure to enact any laws – before the claim was filed – providing for rehabilitation and restitution, and first of all restitution as compensation, i.e. return of the property subject to claim, located on the territory of the Republic of Poland, to the claimants; with the option to retain the right to claim material compensation in the event restitution does not take place.

This was not the first attempt of the German "expellees" to raise material claims before the Strasbourg Court with respect to possessions left on territories that, after World War II, became part of the territories of other states, and their claims mainly concern real property situated there. Since the 1970s individual claims brought to the ECHR (Court) against, among other entities, the FRG and the Czech Republic,[3] have been consistently dismissed, and since a similar argumentation was used in all such cases, the Court has worked out a consistent stance in its approach to them. As a result one could posit that to a large extent the decision in the cases filed against Poland are a foregone conclusion. However, owing to the fact that, despite the established line of jurisprudence of the ECHR (Court), such a large number of claims have been submitted in a relatively short period of time,[4] the Court came to the conclusion that it is dealing with an essential problem which is both connected with the application of the Convention and at the same time a serious political problem. As a result, further explanation and clear definition of the ECHR's (Court's) position is required.

Zachodnich i Północnych a niemieckie roszczenia odszkodowawcze (Seizure of German property by the Polish State after the Second World War on the Western and Northern Territories and German compensation claims) , Warszawa 2004, http://www.msz.gov.pl/docs/90/roszczenia_de.pdf> accessed 10 May 2010, p. 5.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November 1950, Dz. U. 1993, Nr 61, poz. 284, amended by Protocol no. 11, Dz. U, 1998, Nr 147, poz. 962; Protocol no. 1 of 20th March 1952.

[3] E.g. cases: *X., Y. and Z. v. Germany* (7655/76, 7656/76 and 7657/76) Decision, ECHR 4 October 1977; *Mayer and others v. Germany* (18890/91, 19048/91, 19342/92 and 19549/92) Commission decision, 4 March 1996; *Malhous and others v. the Czech Republic* (33071/96) Grand Chamber, ECHR 13 December 2000; *Bergauer and others v. Czech Republic* (17120/03) Decision, 13 December 2005; *Von Maltzan and others v. Germany* (71916/01, 71917/01 and 10260/02) Decision, 2 March 2005, available at: www.echr.coe.int.

[4] E.g. cases *Bergauer, Von Maltzan,* and also 7 claims against Poland filed after the claim of the Trust had been submitted, with the same allegations (*Fenske, Heuer, Marrek, Stumpe, Toscano, Von Loesch* and *Zimmermann*), all of which were recognized as inadmissible based on the decision in the Trust case.

Therefore the decision on the inadmissibility of the claim was issued by the Chamber[5] without communicating the claim to the Polish government, on 7th October 2008.[6]

The aim of this study is to present and assess certain essential problems of international law which appear in this case with respect to the admissibility of such a case.[7] At the same time, it must be emphasized that we will limit the discussion to legal questions, in isolation from political, historical and ethical problems.

2. PROBLEMS CONNECTED WITH SUBJECTIVE COMPONENT OF THE CASE

As has already been mentioned, Prussian Trust is the principal applicant, and represents 23 individual applicants (as the Court names them), who consider themselves victims (either in their own right or as legal successors) affected by a breach by Poland of their ownership rights protected by Article 1 of Protocol nr. 1 to the ECHR (Convention), as well as by a breach of Article 14 of the Convention. The individual claimants are comprised of three categories of individuals: 1) Polish citizens of German nationality who lived on the territories which after World War I became a part of the reborn Polish state; 2) German citizens who lived on the former territories of the German Reich according to the borders of 1937, which became territories of Poland after World War II; and 3) citizens of the Free City of Danzig.[8] This group does not include persons who were displaced later, whose situation might be viewed differently under Polish, ECHR (Convention), and international law.[9]

[5] Instead of a committee composed of three persons, which is a principle in the case of individual claims.

[6] See the decision in the case of *Prussian Trust v. Poland* (47550/06) Decision, ECHR 7 October 2008 (hereafter referred to as the ECHR (Court) Decision). See also the commentary to this decision M. Krzyżanowska-Mierzewska, *Skarga Powiernictwa Pruskiego – glosa do orzeczenia ETPCz z 7.10.2008 r. w sprawie Preussische Treuhand GmbH & Co. KG A. A. przeciwko Polsce* (Complaint of the Prusian Trust – a commentary on the judgment of the ECHR of 7.10.2008 in the case of Preussische Treuhand GmbH && Co. KG A.A. against Poland), Europejski Przegląd Sądowy 2/2009, pp. 44–47.

[7] Since the Decision of the ECHR (Court) finds the case inadmissible, this analysis will not focus on arguments presented in the material part of the reasons for the claim.

[8] See part A, p. 5 of the claim.

[9] For more on this issue, see: M. Krzyżanowska-Mierzewska, *Problem wywłaszczonej własności w orzecznictwie Europejskiego Trybunału Praw Człowieka i jego odniesienie do niemieckich roszczeń majatkowych wobec Polski* (Problems of seizured property in the case law of the European Court of Human Rights and its relevance for the German property claims against Poland) [in:] W. Góralski (ed.), *Transfer – Obywatelstwo – Majątek. Trudne problemy stosunków*

The Prussian Trust presents all applicants as expellees (German: *Vertriebene*), who either themselves were or their legal predecessors were Germans, and who were "collectively, without being convicted by a court or by an administrative act, non-judicially punished by the Polish authorities, and expelled from their homeland, which made them victims of ethnic cleansing – if indeed not genocide – and which had already in 1945 been qualified as a crime against humanity if not as a homicide under international law";[10] and who as a result of these actions were deprived of their possessions – the ownership of real property situated on the territory which after the World War II became a part of Poland, and thereby found themselves expelled beyond its borders. The entire justification of the claim in the case of all individuals is based on the same assumption, suggesting that their legal situation is identical, and the major part of such justification includes a general description of the drastic circumstances surrounding the displacement of German population and all the sufferings connected with the fate of all "expellees", as they refer to themselves, rather than setting forth information concerning the legal basis of the applicants' claims.

However, their description of events does not reflect the reality. The applicants do not constitute a uniform group; and the circumstances pursuant to which they lost their property and left the territory of Poland (in terms of its post-war borders) in the cases of particular claimants are highly diversified. At this point we will not describe in detail the facts concerning each of the applicants, which as a matter of fact have not been presented in a way allowing for a clear reconstruction of the events. For these findings one may refer to the ECHR (Court) Decision.[11] However, it is worth emphasizing that even on the basis of such fragmentary information only, it may be established beyond doubt that only a few of the applicants were displaced by Polish authorities. The others were displaced by Soviet authorities or the Soviet army, and a number of them left their property and moved into Reich territory before the territories they left became occupied by the Allies, either escaping of their own free will or in planned evacuations carried out by the German authorities or the German army from July 1944 until April 1945 in order to protect the German population against the approaching Red Army.

These facts are of key importance to the issue of attributing to Poland conduct which, in the view of applicants, violated the Convention and therefore justifies

polsko-niemieckich (Transfer – Citizenship – Property. Difficult problems of the Polish – German relationship), PISM, Warszawa: 2005, p. 341 et. al.; P. Madajczyk, *Wysiedlenia i przesiedlenia popoczdamskie ludności niemieckiej z Polski* (Expulsion and resettlement of the post-Potsdam German Population from Poland), *ibidem*, p. 41 et. al.

[10] See part A, p. 5 of the claim.

[11] See: ECHR (Court) Decision, pp. 7–29.

the admissibility of their claims. According to fundamental, universally accepted principles of international legal liability, the possibility of attributing certain conduct to a state is one of the two necessary conditions creating its liability; the other is that such conduct violates international law.[12] These principles form the basis for the system of the European Convention of Human Rights and the jurisdiction of the Strasbourg Court:[13] the possibility to attribute to a state party that conduct which qualifies as a violation of the Conventions is a *ratione personae* condition of the admissibility of the claim to the ECHR (Court). In its analysis, the Court of Human Rights applies classical rules of international law, according to which one may attribute to a state the conduct of its agencies, conduct of other entities entrusted with certain functions related to elements of state authority, and the conduct of a person or a group of persons operating on instructions under the state's supervision.[14]

The Court, considering the circumstances in which the applicants had abandoned their properties, and in view of those rules, found the claim inadmissible for subjective reasons applicable to the claimants, who had not been displaced by Polish authorities but as they admitted themselves they had escaped in fear of the approaching victorious Red Army.[15] The Court also referred to the crowning allegation of the applicants, which in their opinion proved they had been illegitimately deprived of their possessions in favour of the Polish state and the continuity of the violation, namely the fact that "they had been forced to leave their property (...), in circumstances that had amounted to ethnic cleansing and were similar, if not

[12] See Art. 2 of the Draft Articles on Responsibility of States for internationally wrongful acts, ILC Report 53rd Session, 2001 (U.N. Doc. A/56/10), pp. 43–59, with commentary approved by the General Assembly of the UN in Resolution 56/83 of 12th December 2001 (hereinafter referred to as ILC Draft).

[13] They are expressed in Article 1 of the Convention outlining the scope of obligations of the state-parties ("The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention." – emphasis added), art. 33 ("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.*" – emphasis added), and Article 34 ("The Court may receive applications from any person, non-governmental organization 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.*" – emphasis added).

[14] These are the rules regarding attributability, which are essential for the practice. Aart from them international law also regulates more specific situations, for instance the problem of attributing the acts of insurrectionists or of "borrowing" the agencies of a one state by another. For more on this subject, see chapter II, Articles 4-11 of the ILC Draft and the commentary to it, and also W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne – zagadnienia systemowe* (Public international law – systemic issues), CH Beck, Warszawa: 2004, pp. 590–593.

[15] See ECHR (Court) Decision, pp. 51–52.

tantamount to, genocide,"[16] assuming along this line of argument that the violation of the Convention in the case of the Trust as a single entity lies in the deprivation of ownership rights in extraordinary circumstances, assisted by a number of repressive acts that in the opinion of the applicants made up ethnic cleansing, crimes against humanity or even violation of peremptory norms of international law (*ius cogens*). Therefore in order to acknowledge that Poland committed the alleged breach of the ECHR (Convention), it must be possible not only to attribute an act of property deprivation to a state but also other acts which in fact fall within the scope of Article 2 (right to life) and Article 3 (Prohibition of torture) of the Convention.[17] In this context it seems worth drawing attention to two aspects: first, despite the fact that the case is based on such argument, the applicants allege "only" a violation of ownership rights (Article 1 of the Protocol no. 1) in connection with Article 14 of the ECHR (Convention) (Prohibition of discrimination); secondly the Court does not develop the thread that these acts are breaches of Articles 2 and 3 of the Convention.

Considering the situation of particular applicants, the Court notes that at the time when a few persons were actually abandoning their possessions, the Polish state exercised neither legal nor actual control over the territories to the east from the Oder-Neisse line; at that time they were still the territories of the Reich, gradually being occupied by the Red Army.[18] They were formally placed under Polish control only under the provisions of the Potsdam Agreement of 2 August 1945.[19] Therefore, in the case of these applicants, it is not possible to attribute the acts of violence or other conduct which fulfil the requirements necessary to be qualified as ethnic cleansing or other serious breaches of international law. The same applies to a special situation of one of the applicants – J. Nikowski, who indeed claimed for lost real property which belonged to his parents, situated in Silesia (in what was then Beuten (*Bytom*), but he pointed out that during the war they lived in Königsberg[20]

[16] *Ibidem*, p. 49. This argument, along with an extensive description of "inhuman" circumstances of the displacement, is repeated over and over throughout the eighty-page claim.

[17] *Ibidem*, para. 50.

[18] In the case law of the ECHR (Court) it has been established that an applicant falls under the jurisdiction of a state against which it files a claim in the meaning of Article 1 of the Convention if a state exercises "effective control" over the territory. See the judgment in the *Loizidou v. Turkey* (15318/89) Judgement, ECHR 18 December 1996, available at: www.echr.coe.int.

[19] Official Gazette of the Control Council for Germany 1945, Suppl., p. 13; ZD PISM 1946, p. 3.

[20] Earlier German Königsberg, today's Russian Kaliningrad – essential sequence of changes of names.

(*Królewiec*) and stayed there after it had finished,[21] which means that they fell not under Polish but under Soviet jurisdiction.

In this situation the only conduct that might be attributed to Poland with respect to the first group of applicants and the real property referred to in their claims includes formal expropriation on the grounds of legal acts approved of by Polish authorities in regulating the legal status of "post-German" properties.[22] On the other hand, the Court examines its *ratione personae* jurisdiction in view of the concept of a composite act in the meaning of the "Draft Articles on Responsibility of States",[23] upon which the argument included in the claim concerning the possible violation is based.[24] According to this principle, only actions defined in aggregate as making up a "composite act" constitute a violation of law; the impossibility to attribute certain components of that act to a given entity negates the possibility of attribution of a composite act. The Court reaches this conclusion in this case with regard to a group of the applicants, owing to impossibility to attribute to Poland those repression acts "accompanying" the deprivation of properties.

However, in that group of persons with regard to whom the Court does not exclude the possibility of attributing a breach to the Polish state, there are two cases which deviate considerably from the standard of "expellee" and require a more individual approach, which is not undertaken by the Court. These are the cases of I. Ziebold (no. 1)[25] and Ch. Heinrich (no. 9).[26] In the first case we deal with the question of Jewish property taken by the Polish state as abandoned after the death of the applicant's parents, the Goldschmidt family, who before the war were German citizens of Jewish origin and after the war stayed in Wroclaw (German Breslau).[27]

The applicant, their daughter, of her own accord left the city when it was under Soviet occupation and escaped to West Berlin, from where she moved to the United States of America and later to Israel, and finally after many years she returned

[21] See paragraph 20 of the ECHR (Court) Decision.

[22] Probably these properties were taken over as abandoned – we do not have detailed information in this case.

[23] See Article 15 of the ILC Draft with a commentary.

[24] This is developed under point 3.

[25] The spelling of the name as in the claim, in the Decision of the ECHR (Court) – Ziebolt, see paragraph 7 of the decision.

[26] See paragraph 15 of the ECHR (Court) decision.

[27] The case of Ziebold was probably included in the claim of the Prussian Trust for political and propaganda purposes, in order to give the impression of equalizing Jewish and German victims of war. The claim of Mrs. Ziebold would probably have had more chances for success if she had filed it individually and not as a German "expellee," and if she had referred to other arguments after she had exhausted legal measures available under domestic law.

to Germany.[28] The actual circumstances described in the claim are not quite clear since once it is said that the property was forfeited after the death of the applicant's mother, whereas at some other point it is mentioned that "since the applicant's parents were forcibly prevented from exercising the right of ownership of their property"[29] the Polish State became the owner of the real estate, even though that "forcible prevention" might have been the effect of repressive measures of the Nazi German Authorities against Jewish people, and property expropriated by Germans might have been later taken as such by Polish authorities.

There is no doubt that in this case we are dealing neither with "expulsion" nor forced displacement (the parents of the applicant did not leave the territory of Poland), nor repressive measures used by the Polish authorities. The only act that may be attributed to Poland, as in the case of the group described above, is the formal take-over of ownership rights. In fact the Court notes that Mrs. Ziebold, in contrast to the other applicants, admits that the property had been forfeited later, neither during the displacement procedure (nor in connection therewith – comment by the Author), but it does not either draw conclusions from this situation nor expressly exclude its *ratione personae* jurisdiction, thereby denying the logic of its own argument.

The other case mentioned above, that of Ch. Heinrich, also seems problematic. The applicant and her mother were displaced from their farm in 1945 by Polish militia, which was later taken over by a new owner. However, they did not leave the territory of Poland. At the beginning they were taken in by their neighbours and later they returned to a rented room in their former house, where they lived until 1956. Afterwards they moved to another place in Poland where they lived until 1989; it should be assumed that at least until that time they were Polish citizens. With the passage of time hostile behaviours ceased. The applicant left Poland (it is not clear if she left alone or with her mother) in 1989 and she went to the FRG on a tourist visa and stayed there. Therefore, similarly as in the case of Ziebold, we are not dealing with "expellees" even in the meaning of German law; the applicant and her family do not qualify as so-called "late-displaced persons". Considering the facts of the case (presented more precisely than in the case of other applicants) it can be said that in the period just after the war, the applicant and her mother were persecuted and treated with hostility, but they were not

[28] The applicant admits that due to her Jewish origin she was victimized by Nazi Germany, but during Soviet occupation she managed to escape as a German citizen, in turn her parents were not deported exactly because of their Jewish origin.

[29] Literally: "(...) forcibly prevented from exercising the right of ownership (...)", see paragraph 7 of the ECHR (Court) decision.

victims of that repression which is an element of ethnic cleansing or similar violations of international law. Indeed the expropriation was carried out by Polish authorities, but no circumstances characteristic for crimes against humanity accompanied it, upon which the common argument of the Trust is based. So once again, if the Court wanted to be consistent it should also in this case exclude *ratione personae* jurisdiction.

The above discussion shows that the different situations of individual applicants determines the possibility of attributing to Poland conduct in violation of the Convention. It seems very difficult or even impossible to treat the claim used by the Trust as a uniform argument when each case is analysed individually, whereby it immediately appears clear that a number of them *prima facie* do not qualify as victims the alleged ECHR (Convention) violation, as no expulsion may be attributed to Poland. What is more, the fact that the differences between applicants were not taken into account by the Trust in its argument in support of its claim actually turns against them, as it raises doubts as to the correctness of the argument concerning the existence of a composite act and continuity of the violation.

Despite the criticism as to the lack of consistency of the ECHR (Court), at least in both cases presented above, one should appreciate however the individual approach taken by the Court in evaluating the facts concerning the applicants, contrary to the suggestion of the Trust that their legal situation was identical. Even with the limited information on each of them that it had, the Court managed to identify a group for whom it excluded any possibility of attributing to Poland any acts in violation of the Convention. To some extent the above mentioned inconsistency of the Court, owing to the lack of detailed information concerning the situation of each applicant, may be justified by the Court's cautiousness not to exclude its own jurisdiction rashly.

3. PROBLEMS ENCOUNTERED BY THE APPLICANTS IN SUBSTANTIATING EXPROPRIATION AND CONTINUITY OF BREACH

According to the principles of the European Convention of Human Rights, the jurisdiction of the European Court of Human Rights includes *ratione temporis* only for the time after the Convention or its Protocols entered into force with regard to a particular state (in other words after the Convention was ratified by them).[30]

[30] Article 59 paragraph 3 of the ECHR (Convention) and paragraph 55 of the ECHR (Court) Decision.

This means that the state-parties may bear responsibility under the Convention only with regard to events that took place after that date. This regulation reflects a fundamental principle of international law, according to which a state may only be held responsible for violating an international obligation which was binding upon it at the time the violation was committed.[31] Therefore the claims in which the alleged violations took place before the Convention came into force must be dismissed by the Court as inadmissible. In the case of the Prussian Trust against Poland this time limit is 10th October 1994 – the day on which Poland ratified the Protocol no. 1 to the ECHR (Convention).

However, prevailing practice in the application of the Convention shows that in certain special circumstances a case that is based on former events, i.e. those which took place before the ECHR (Convention) came into force (and sometimes even before it was created, as in the case discussed) may become a subject of the Court's decision, if the events that took place before the ratification created a situation "going beyond" that date.[32] The Court accepts the construction of so-called continuous breach, i.e. when an event which is a source of a violation occurred before the Convention entered into force, but its effects extend to the period after this date, therefore constituting a continuation of the violation.[33]

In cases concerning the violations of ownership rights having their origin in events from before the entry into force of the Convention, the ECHR (Court) is very cautious in its approach concerning the continuity of breaches. In principle it recognizes deprivation of ownership as a one-time act which does not create a continuous state, as the expropriated person ceases to be an owner in possession of rights protected by Article 1 of Protocol no. 1.[34] This provision states that one may be deprived of his possessions exclusively "in the public interest and subject to the conditions provided for by law and by the general principles of international law", and therefore cases of expropriation inconsistent with the requirements of the Convention may be brought before the court. However, these requirements are also binding upon a state only from the moment of ratification, and may not serve as criteria for evaluating the legitimacy of an expropriation that took place before that date. Therefore if the expropriation act took place before the ECHR (Convention)

[31] Articles 2 and 13 of the ILC Draft with commentary.

[32] Paragraph 55 of the ECHR (Court) Decision, which repeats the well-established stance of the Court, expressed earlier in case no. 31443/96 *Broniowski v. Poland* (decision), see paragraph 55 of the ECHR (Court), paragraph 74 and following.

[33] See: *Loizidou*, p. 41 and following.

[34] For more on this subject, see Krzyżanowska-Mierzewska *supra* note 9, p. 335 and following.

entered into force with respect to a given state, the Court will not have cognizance of a claim against that state based on such act.[35]

The ECHR (Court) only exceptionally declares the existence of a continuous breach in cases concerning the deprivation of possession, namely in situations where, due to special circumstances in the legal sense, it may not be assumed that an applicant ceased to be the owner of his/her possessions and from the very beginning the expropriation could not have been legally effective. In such cases the applicant is still entitled to his/her ownership rights, but cannot execute these rights owing to the state's continuing violation;[36] or alternatively he/she is entitled (or should be entitled) to material claims (e.g. for damages) based on his/her "legitimate expectations" to execute ownership rights.[37] The Court decides whether to deal with such situations by examining each case *ad meritum*.

Therefore in the case of the Prussian Trust the applicants had to show a continuity of the breach. In order to achieve this goal they resorted to arguments from selected areas of international law. Both their argument and the manner in which the Court approached it require more in-depth reflection and comment.

The starting point for the Trust and persons represented by it is the assumption that the deprivation of possession in their case was illegitimate under international law, and moreover that that law was binding at the time the expropriation took place, that is at the end and just after World War II.[38] And not only do "regular" violations of norms of international law come into play, but their "qualified" form. According to the applicants deprivation of possessions is only one of the elements of the conduct that, along with massive deportations carried out in inhumane circumstances, forced labour, and other repressions connected with physical and mental abuse, persecution, and homicides, along with preventing the "expellees" from coming back to their "homeland",[39] constitute a composite act as defined by Article 15 of the ILC Draft (which has already been mentioned in the previous part of this paper).[40] In such a case these actions seen in aggregate – both

[35] *Ibidem*.

[36] See: *Loizidou*, paragraph 41 and following.

[37] In a similar vein, see Krzyżanowska-Mierzewska *supra* note 9, p. 338. We deal with such a situation in the *Broniowski* case.

[38] The applicants write about events that took place in 1944–1948, see part C.II of the claim, paragraph 52.

[39] This enumeration should exhaust the actions alleged to Poland in the claim.

[40] "***Article 15***

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or, omissions, is sufficient to constitute the wrongful act.

actions and omissions – make up a violation of international law extending over the whole period beginning from the first event in the series of such actions and lasting as long as they are repeated and remain in conflict with international law. The comment to Article 15 of the ILC Draft specifically points to genocide, apartheid, and other crimes against humanity as typical examples of "composite acts".

The applicants, owing to the nature, subject and factual and historical context of the alleged actions, claim that these actions should be qualified as the crime of genocide, or at least as crimes against humanity in the form of "ethnic cleansing," carried out by the Polish authorities against the German nation.[41] It is argued that these crimes, at the time they were committed, already qualified as a serious violation of peremptory norms (*iuris cogentis*) of international law. Therefore, in accordance with the extensive interpretation of Article 53 of the Vienna Convention on the Law of Treaties[42] presented by the applicants, all these actions of Poland, along with legal acts regulating the question of seizure of "post-German" possessions[43] and actual appropriations from German citizens on the basis of those acts, were absolutely invalid and legally ineffective under international law. As a result, according to the applicants, they could not have led to their loss of ownership rights even if they were not, as a result, able to exercise their rights effectively. Thereby in

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

[41] In the opinion of the applicants, this is proved even by Article 6 of the Statute of the International Military Tribunal of 8th August 1945 (http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/ NurembergIndictments.html Polish Journal of Laws of 1947, no 63, item 367), defining "crimes against humanity" as one of the categories of crimes for which the members of the Third Reich were supposed to be judged.

[42] Vienna Convention on the Law of Treaties of 23rd May 1969, Polish Journal of Laws of 1990, attachment to no. 74, item 439 (hereinafter referred to as the CLT).

[43] See, among other things, ustawa z dnia 6 maja 1945 r. o majątkach opuszczonych i porzuconych (The Act of 6 May 1945 on left or abandoned property), Dz. U. 1945, Nr 17, poz. 97; dekret z dnia 8 marca 1946 r. o majątkach opuszczonych i poniemieckich (The Decree of 8 March 1946 on abandoned and post-German property), Dz. U. 1946, Nr 13, poz. 87; dekret z dnia 6 września 1946 r. o ustroju rolnym i osadnictwie na obszarze Ziem Odzyskanych i byłego Wolnego Miasta Gdańska (The Decree of 6 September 1946 on the agricultural system and settlement on the area of Regained Lands and former Free City of Danzig), Dz. U. 1946 Nr 49, poz. 279; dekret z dnia 15 listopada 1946 r. o zajęciu majątków państw pozostających z Państwem Polskim w stanie wojny w latach 1939-1945 i majątków osób prawnych i obywateli tych państw oraz o zarządzie przymusowym nad tymi majątkami (The decree of 15 November 1946 on the seizure of property of states remaining in a state of war with the Polish state in years 1939–1945 and of property of legal persons and citizens of those states and on forced management over that property), Dz. U. 1946, Nr 62, poz. 342.

the case of the Trust we deal with "a continuity of a violation" in the meaning presented in the ECHR (Court) Decision in the case of *Loizidou v. Turkey*, in which the jurisdiction of the court is substantiated by *ratione temporis*, even though the events which were the source of the violation took place before it was evoked, and also long before the accused state became bound by the Convention.

However, while the applicants analogise their situation and the *Loizidou* case with regard to illegitimacy and ineffectiveness of expropriation, they are quite aware of the differences between them. They themselves point to the fact that in the *Loizidou* case the international legal ineffectiveness of the deprivation of the applicants of their possessions, in consequence of which they retained their ownership rights, resulted from the fact that expropriation was carried out by an entity (so-called Turkish Republic of the Northern Cyprus) which was not recognized by the international community, which was not a sovereign state, and thereby in principle was unable to take effective legal actions at either the international or domestic level.[44] The Prussian Trust claims, on behalf of the applicants, a similar illegitimacy and ineffectiveness of the expropriation carried out by authorities of sovereign Poland inconsistent with *iuris cogentis* norms, thereby leaving the individual applicants in retention of their ownership rights.[45]

The applicants refuse to recognize those earlier decisions of the ECHR (Court) in cases connected with claims of German "expellees" which referred exactly to this argument for the "continuity of a violation" (*Bergauer v. the Czech Republic* and *von Maltzan v. FRG*), the argument being rejected by the Court, which held the claims inadmissible. They maintain that the Court, in accordance with its decision in the *Loizidou* case, is obliged to construe the European Convention on Human Rights under the interpretation rules expressed in the CLT,[46] and hence it should consider any applicable norms of international law when it decides the question of its jurisdiction.[47] Thus, according to the Prussian Trust, the Court errs by failing to refer to international law regulating the issue of such violations of peremptory norms in its evaluation of the argument for the continuity of a violation based on its inconsistency with *ius cogens*. In the Trust case the claimants refer chiefly to Article 53 of the CLT, applying the previously-presented very broad interpretation,

[44] See: *Loizidou*, pp. 44–47; references in the claim of the Prussian Trust, part C.II, p. 52 and others.

[45] *Ibidem*, pp. 55–56.

[46] In particular in Article 31 paragraph 3, letter c of the CLT: "There shall be taken into account, together with the context: (...)(c) any relevant rules of international law applicable in the relations between the parties."

[47] See: *Loizidou*, p. 43.

and to principles included in the ILC Draft on international responsibility of states, in particular to Articles 40 and 41. Since, in the opinion of the applicants, the actions alleged to have been perpetrated by Poland display the features of "a serious breach (...) of an obligation arising under a peremptory norm of general international law" within the meaning of Article 40 of the ILC Draft, along with the "regular" consequences of international legal responsibility,[48] the particular consequences provided for in Article 41 also arise; in fact arose and still continue to exist. They argue that third states are obligated to cooperate in order to put such a breach to an end, should absolutely deny recognition as lawful of a situation created by a serious breach and not render aid or assistance in maintaining such a situation. The applicants are of the opinion that the aforementioned obligations *a fortiori* apply to the ECHR (Court) as an international court (sic!).[49] In consequence, the Court itself violates the principles of international law resulting from Article 53 of the CLT and the ILC Draft by denying its jurisdiction based on temporal restraints, without accepting the argument of the continuity of a breach in cases of German "expellees" as was done, for instance in *Bergauer* or *Von Maltzan* (where the argument of genocide or crimes against humanity was already raised). In view of the applicants, the change in the stance of the ECHR (Court) in the Prussian Trust case would amount to an action aimed at putting an end to the situation in which a *ius cogens* norm is violated.

This argument has not convinced the Court, which finally has found the case inadmissible *ratione temporis*. However, in the reasoning to its decision the Court has not expressed its position with regard to the principal allegations raised by the applicants in support of their argument for the continuity of a breach. The Court limits itself to stating that the events upon which they base their claim, among other things: individual acts of aggression, expulsion and deprivation of possessions – in fact, not all of which may be attributed to Poland[50] – if they are assessed as a whole cannot be regarded as anything other than more than instantaneous acts that happened and ended at a certain moment in time and do not give rise to grounds for claiming a continuity of a breach.[51] The ECHR (Court) neither explains its position nor develops this reasoning into a counter argument opposing the concept of expropriation as an element of "a composite act" showing the features of genocide or at least of crimes against humanity, as argued by the applicants. At the

[48] The triad: ceasing the violation, guaranteeing its non-repetition, and reparation of the effects of the violation.

[49] Claim, part C.II, paragraph 61.

[50] For more on this subject, see point 2 of this Article.

[51] ECHR (Court) decision, paragraph 61.

same time it is easy to notice a certain discrepancy in the Court's approach to this issue, considering the fact that the Court when examining its *ratione personae* competence excludes it with regard to certain applicants precisely because of the inability to attribute to Poland not only expropriation itself,[52] but also certain "repressive actions". To conclude, applying a very favourable interpretation it might be assumed that the ECHR (Court), by this wording, rejects the argument of the applicants that the breach was of "a composite act" nature.

The reference of the Court to the *Loizidou* case and its comparison of it with the situation in the case of the Prussian Trust creates an even bigger problem. The Court repeats its position expressed in former case law, without addressing the heart of the argument presented by the applicants in this case. The ECHR (Court) states that in the *Loizidou* case the unlawfulness of the measures upon which the expropriation was made resulted from the fact that they had been undertaken by an entity which was not recognized in international law as a state and therefore did not have any legal title to the territory or to its administration, as a result of which the expropriation could not legally come into effect. In turn in the case of the Trust the situation is different; the Court finds that former German lands were legally handed over to the Polish state under the Potsdam Agreement, and the course of the Polish-German border was later confirmed in a number of subsequent border delimitation treaties concluded with both German states individually and finally with a united Germany.[53] A few paragraphs earlier the Court points to the fact that Polish acts of law regulating the issue of expropriation of German people were adopted as a consequence of settlements of the Yalta Conference, the Potsdam Agreement, and agreements of the three Allied Powers concerning war reparations for Poland, which according to these international measures were to be made from German possessions (both state and private) situated on the territory of Poland and also on "the Regained Territories."[54]

In conclusion the ECHR (Court) argues that as a consequence of its reasoning the arguments of the applicants concerning the existence of a violation of international law, which violation resulted in the illegality and ineffectiveness of the

[52] See point 2 above and paragraphs 50–53 of the ECHR (Court) decision.

[53] Układ z dnia 6 lipca 1950 o granicy państwowej Polska-NRD (The Border Delimitation Treaty between Poland and GDR of 6 July 1950), Dz. U. 1951, Nr 14, poz. 106; Układ z dnia 7 grudnia 1970 o podstawach normalizacji stosunków wzajemnych Polska-RFN (The Agreement concerning the basis for normalisation of the mutual relations of Poland-FRG of 7 December 1970), Dz. U. 1972, Nr 24, poz. 168 and 169; Układ z dnia 14 listopada o potwierdzeniu istniejącej granicy państwowej Polska-RFN (the Treaty on the confirmation of the Poland-FRG border of 14 November 1990), Dz.U. 1992, Nr 14, poz. 54. See paragraph 61 of the ECHR (Court) decision.

[54] ECHR (Court) decision, paragraph 59.

expropriation acts enacted by Polish authorities and substantiate the continuity of a breach, should be rejected.[55]

This conclusion of the Court is right; but the problem is that it is based on inadequate premises. In this part of its reasoning the Court responds to an allegation that is not raised by the applicants. As we have already emphasized, they are absolutely aware of the difference between the *Loizidou* case and the situation of the German "expellees", they even point out this difference themselves. They do not question the fact that when the alleged violations "were committed" Poland was a sovereign state, recognized by the international community and with legal "administration" of the former German territories (no matter whether we assume the German interpretation as 'management of the territory' or the Polish interpretation, based on the wording of the Potsdam Agreement, of 'territorial sovereignty'); and do not question the course of the border.[56] The heart of their argument is not the allegation that a given entity (Poland) was not able to exercise its competence over the territory effectively owing to a lack of grounds in international law, but that it exceeded this competence and thereby violated peremptory norms of international law – *ius cogens*, which constitute a line which may not be crossed in the execution of sovereign rights by a state.[57]

Meanwhile the Court seems not to notice this essential evolution of the argument of the "expellees". In the entire text of the decision the notion of a peremptory (*ius cogens*) norm of international law[58] – genocide, crimes against humanity – appears only when the allegations of the applicants are discussed, and often in an unacceptable "simplified" form (e.g. "serious violations of international law" instead of " a serious breach (...) of an obligation under peremptory norms of general international law.[59] The applicants' allegations are not addressed in the reasoning of the Court's decision. There are two possible explanations for this position: either the ECHR (Court) misses the heart of the problem in the argument presented by the Trust and mechanically "copies" its established line of jurisprudence, assuming that further claims of the "expellees" are based on the same allegations; or it consciously avoids taking a stance on this issue. No matter which explanation is correct, the lack of reference in the decision of the Court to key arguments of the applicants for admissibility of the claim

[55] *Ibidem*, paragraph 61.
[56] Claim, part D, p. 63.
[57] *Ibidem*, p. 56.
[58] It is astonishing that the expression *mandatory rules of international law* is used instead of the conventional phrase *peremptory norms*, which is universally accepted by doctrine; see: paragraph 42 of the ECHR (Court) decision.
[59] ECHR (Court) decision, paragraph 58.

does not speak well for the Court. Actually one may even find fault with the decision of the Court, that by failing to refer to the peremptory norms of international law indicated by the applicants, the Court cannot interpret its competence rightly.

At the same time there is no risk that, had the Court addressed the arguments of the applicants concerning the violation of a *iuris cogentis* norm, the final conclusion on the inadmissibility of the claim *ratione temporis* would have been affected in any way. Just the opposite, it would even strengthen the argument for the position of the Court.

The argument of the applicants based on allegations of serious breaches of peremptory norms of international law cannot pass muster, since it contains a fundamental error as to the interpretation of intertemporal issues and the application of international law. The applicants present events from the years 1944–1948, which were the source of a violation, as genocide or crimes against humanity and claim that they constitute violations of a *iuris cogentis* norm binding at the time of those events. It should be recalled that the concept of a *ius cogens* norm is a treaty concept, which appeared in international law only in the 1960s and was expressed for the first time in Article 53 of the CLT. Moreover, the idea of a norm classified by the entire international community as a norm from which no departure is allowed, at the time of work on the codification of the law on treaties was not a customary norm but a *de lege ferenda* regulation allowing for the further development of international law; the authors of the Draft expressed their belief concerning the existence of such norms, but as an example they quoted only the prohibition on the use force under the UN Charter – still controversial even today.[60] The violations alleged to have been committed by Poland cannot be assessed in view of a concept unknown to international law at the time these violation were alleged to have been committed. Therefore they cannot be categorized as serious breaches of *ius cogens* norms of international law which form the grounds for the applicants' argument for the continuity of a violation of Article 1 of Protocol no. 1 to the ECHR (Convention).[61] In this way their principal argument is refuted, and such a finding would suffice to recognize the claim of the Trust as inadmissible.

[60] See the commentary to Article 50 in the ILC Draft: *Draft Articles on the Law of Treaties* of 1966, ILC Report, ILCY 1966, vol. II, pp. 187–94. See also W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe ...*, pp. 20 and following.

[61] See also W. Czapliński, *Polskie pozycje prawne wobec Niemiec popoczdamskich w świetle prawa międzynarodowego. Agresja – Terytorium – Obywatelstwo* (Polish legal positions towards post-Potsdam Germany in the light of international law. Agression – Territory – Citizenship) [in:] W. Góralski (ed.), *Polska – Niemcy 1945–2007 Od konfrontacji do współpracy i partnerstwa w Europie* (Poland – Germany 1945–2007. From confrontation to cooperation and partnership in Europe), PISM, Warszawa: 2007, p. 43.

The argument of the applicants also contains other serious errors as regards the scope they apply to an issue of international law. Firstly, the alleged violations cannot be qualified as genocide or crimes against humanity. Even if we disregard the intertemporal problems (the crime of genocide was legally defined only in 1948,[62] the notion of a crime against humanity evolved from the adoption of the IMT in 1945[63]), an examination of the particular elements of features characterizing these crimes clearly reveals one element missing in the conduct of Polish authorities as far as displacement of German people is concerned, that is the intention to commit a crime as an objective of the state's policy.[64] It should be remembered that the displacement and expropriation were founded in international law – in the Potsdam Agreement and in the settlements of the victorious powers, which had been "imposed" in an almost similar way as in the case of Germans. The actions of Polish authorities that the applicants consider as violations were taken in order to execute these settlements. The objective of these expropriations was to satisfy the reparation claims of Poland against Germany,[65] and the aim of the displacement was actually to ensure the stability of a new political and territorial order in Europe. The displacement of the German population from the territory of former Germany in the post-Potsdam borders was designed to avoid, on one hand, ethnic conflicts on the territories attached to Poland, thereby ensuring safety to the displaced persons, and on the other hand it was to serve to ensure political stability by resolving the problem of German minorities in Poland (and not only in Poland), so blatantly exploited in the then-recent past by the Germans in order to intervene into matters of other states and justify territorial expansion.[66] These actions were not aimed to exterminate, destroy, prosecute or humiliate the German nation. Moreover, the division between expropriation and displacement of German people, having regard to the objective to be attained, overturns the thesis of the

[62] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, Dz.U. 1952, Nr 2, poz. 9,10, see also: http://www.un.org/millennium/law/iv-1.htm.

[63] See footnote 41.

[64] See e.g. the Statute of the International Criminal Court of 17th July 1998, Articles 6 and 7, and Czapliński, Wyrozumska, *supra* note 14, p. 460 and following; Madajczyk, *supra* note 9, p. 43 and following.

[65] For more on this subject, see W. Góralski, *Podstawy prawne, przedmiot i program przewłaszczenia własności niemieckiej na ziemiach zachodnich i północnych na podstawie i w ramach Umowy Poczdamskiej* (Legal grounds, a subject and an agenda for transfer of German ownership on the Western and Northern Territories on the basis of Potsdam Treaty), [in:] W. Góralski (ed.), *Probem odszkodowań, reparacji i świadczeń w stosunkach polsko-niemieckich 1944–2004* (Problems of compensation, reparation and payments in Polish – German relations 1944–2004), PISM, Warszawa: 2004, pp. 189–238; Czapliński, *supra* note 65, p. 45 and following.

[66] *Ibidem*, pp. 235–236.

applicants classifying them and all other actions accompanying them as elements of a "composite act" within the meaning of Article 15 of the ILC Draft on the international responsibility of states.

The fact that the applicants refer to principles included in the ILC Draft is also problematic and is used to suggest that we are dealing with binding and even universally binding international law. Meanwhile, from a formal point of view the Draft, adopted as a Resolution of the General Assembly of the United Nations, is not a binding act; on one hand it codifies certain customary rules of international responsibility, and on the other hand it presents a number of proposals of legal solutions *de lege ferenda*, which embody the creative development of international law. Such is the nature of the Draft Articles on serious breaches of *iuris cogentis* norms and the consequences resulting there from.[67] The applicants instead refer to the Draft as though it was an international agreement, the provisions of which had to be considered in the interpretation of the ECHR (Convention) by the Court, or were even directly binding upon the Court.[68]

In a similar manner, the interpretation of Article 53 of the CLT urged by applicants concerning the consequences of a conflict with a *ius cogens* norm also seems to go too far. In the Convention the effect of invalidity is connected only with an international agreement which is in conflict with such a norm of international law, although the doctrine and practice allows for the possibility to extend it to other types or sources of international law such as customs or unilateral acts.[69] But the applicants make the blanket assumption that the sanction of invalidity resulting from a conflict with peremptory norms of international law also affects instruments of domestic law, causing their ineffectiveness *ab initio*. This view raises much controversy, and it was expressed only in one decision of the International Criminal Court for former Yugoslavia in the Furundzija case in 1998,[70] in which it confused the effects of a violation of a *ius cogens* norm with regard to a state on the one hand and an individual on the other by treating it as characteristic grounds or requirements conditioning responsibility.[71] Since that time no confirmation of such an effect has been encountered; and both legal doctrine and practice remain very cautious and sceptical as to the scope of the influence of international law on domestic order. However, even if we allow for the effect of invalidity of domestic

[67] See the comments to Articles 26, 40 and 41 of the ILC Draft.

[68] In this manner e.g. they accuse the ECHR (Court) of violating an obligation provided for in Article 41 to cooperate in order to put such a breach to an end and in its absolute denial of recognizing as lawful its consequences, in case their claim is recognized as inadmissible.

[69] See Czapliński, Wyrozumska, *supra* note 14, p. 21.

[70] Case of Furundzija, ICTY (IT-95-17/1), see: http://www.icty.org/case/furundzija/4

[71] See Czapliński, Wyrozumska, *supra* note 14, pp. 23–24.

legal acts in the case concerned, it would not be possible to apply it due to intertemporal issues: the acts that are alleged by the applicants to be invalid were adopted by Poland chiefly in 1946 and at the latest in 1949, whereas the Convention on the Law of Treaties entered into force in 1980. In addition, the previously-mentioned Article 53 of the CLT does not codify customary law, but is an element of the progressive development of the law of treaties; the transformation of this provision into a customary norm and approval of its extensive interpretation are part of a process lasting another twenty years and still not finished. As a result, under no circumstances can one assess the validity of acts issued at the end of the 1940s under norms that came into force thirty or forty years later.

Notwithstanding the critique concerning certain aspects of the ECHR (Court) decision presented in this Article, or actually its omissions, its legal and political importance needs to be appreciated. First of all we fully agree with the conclusion of the decision recognizing the claim of the Prussian Trust as inadmissible owing to intertemporal issues, despite the fact that it is based on the established jurisprudence of the Court instead of the argument relating to actual allegations of the applicants. There are also two other significant statements made by the Court in its reasoning: first, confirming that Polish expropriation acts concerning both German state and private property were issued in order to execute the settlements of the victorious powers and served to satisfy Polish reparation claims against Germany;[72] and secondly emphasizing the legitimacy of Polish authority over the former German lands under the Potsdam Agreement, further confirmed by the border delimitation treaties with both German states and later with united Germany in 1990.[73] Both of these statements, which are consistent with the well-established position of Poland, question the fundamental assumptions of "the doctrine of the expellees". The decision of the ECHR (Court) is a further clear signal from the Court that it has neither legal competence nor political willingness to deal with cases relating to material claims originating from events of the World War II and immediately following it.

CONCLUSIONS

In the case of the Prussian Trust against Poland we can identify a surprisingly large number of problems relating to international law and involving a myriad of issues: principles of international legal responsibility, law of treaties, the scope in

[72] ECHR decision, para. 59.
[73] *Ibidem*, para. 61.

which laws are binding upon a state, *iuris cogentis* norms and their legal consequences, and intertemporal problems connected with application of the law. The whole claim is based on the argument that it falls within the scope of international law, but it is structured in an erroneous manner.

Unfortunately, the European Court of Human Rights does not refer to the international legal problems raised by the case, except for its examination of the admissibility *ratione personae* of the claim. An adequate approach to the aforementioned issues would only strengthen the final conclusion on the inadmissibility of the claims of the Trust.

Nevertheless, one should appreciate the consistency of the Court in its approach to material claims originating from the events that took place before the European Convention of Human Rights came into force, and in particular claims resulting from the events surrounding World War II. Owing to such a position, the ECHR (Court) guarantees that the Convention will only be used as an effective instrument for protecting fundamental human rights, rather than as a means allowing for "opening" a legal status that has already been closed, both on the international and national levels.

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BOOK REVIEWS

Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, Oxford University Press, 2009, pp. 419;

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This book is interesting attempt to systematize and analyze methods used by the Appellate Body of the World Trade Organization (WTO) in its interpretation of WTO agreements. Although the subject is not new (see, e.g. Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreement*, 5(1) JIEL 17 (2002) and Asif H. Quereshi, *Interpreting WTO Agreements. Problems and Perspectives*, CUP, Cambridge: 2006), Van Damme's work is probably the most in-depth and up-to-date study on the subject. Moreover, the analysis she presents is illustrated with a number of examples from WTO jurisprudence, showing the actual impact of specific interpretative principles on the outcomes of disputes. This constitutes a great advantage, as other positions tend to discuss the issue of interpretation in abstract terms without fully explaining how the application of alternative methods have influenced the scope of specific obligations of the WTO Members.

The book is composed of three parts. The first part (Chapters 1 to 5) provides the reader with introductory information on the WTO dispute settlement system, as well as on the process of treaty interpretation. This includes a discussion on principles of interpretation in general international law, and their formal position within WTO law (i.e. the applicability of international law in the context of WTO). Particularly interesting is Van Damme's analysis on the question of *non liquet* and problems posed by the incompleteness of WTO arrangements.

The second part (Chapters 6 to 9) is the central section of the book. It starts with the analysis of the WTO approach towards Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (VCLT), provisions that are regarded as basic guidelines for the process of interpretation of WTO agreements. As Van Damme recognizes, the text of a treaty plays a predominant role in WTO practice. A specific provision is normally contextualized with a text, preamble and annexes of a partic-

ular WTO agreement, as well as an agreement or instrument related to the treaty. A part of the contextualization is also provided by the purpose and object of a treaty. Both elements may be sought in the preamble of a particular agreement, but also in the Marrakesh Agreement, which is an umbrella treaty for other WTO agreements (Chapter 6). WTO case law also recognizes the relevance of the good faith principle in the process of interpretation. In practice, this translates into the requirement of effective treaty interpretation, which asks an interpreter to read different provisions in a harmonious way as to give the meaning to all of them (Chapter 7). On its face, WTO case law, in line with the normative prescription of Article 31.3 of the VCLT, also accepts the relevance of extrinsic materials in the process of treaty interpretation. This includes subsequent agreements made in connection to the treaty as well as subsequent practise. The WTO dispute settlement bodies have also sometimes referred to Article 31.3(c) of the VCLT. In particular, the case law has clarified that the rules of international law applicable in the relations between the parties include general principles of international law and rules of international customary law. Nevertheless, the exact scope of Article 31.3(c), as shown by the panel report in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, remains controversial (Chapter 9). WTO practice, again in line with the VCLT, makes recourse to Article 32 in those cases when the application of primary rules leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable (e.g. Panel Report, *Japan – Taxes on Alcoholic Beverages*). Moreover, the reference to supplementary means of interpretation is made in order to confirm the results obtained on the basis of Article 31. The supplementary means include the *travaux preparatoires* and the circumstances of the conclusion of WTO agreements (Panel Report, *US – Gambling*) (Chapter 8).

The third part of the book summarizes the previous discussion. Van Damme correctly concludes that the approach of the Appellate Body, which recognises Articles 31–33 of the VCLT as a codified version of international customary rules of interpretation and accepts their applicability in the context of WTO law, should be appreciated. Although some calls have been made in the literature to develop more specific rules of interpretation which would reflect the special character of WTO obligations and which may diverge from the VCLT principles (e.g. Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO – Addressing Institutional Challenges in the New Millennium* (WTO, Geneva: 2004), para. 235), the proponents of this position have failed to offer any coherent and comprehensive alternatives. On the other hand, as explained by the WTO Director-General Pascal Lamy, the reliance of WTO dispute settlement bodies on VCLT rules constitutes "a clear confirmation that the WTO wants to see itself as being as

fully integrated into the international legal order as possible" (Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order* 17(5) European Journal of International Law 969 (2006)). Such an approach definitely contributes to unification of the international legal system. This is true not only on the methodological level but also with regard to substantive rules, as use of the same methodological devices by different international tribunals (including panels and the Appellate Body) probably will lead to a greater convergence in their interpretative results, or at the very least it will create a common ground for a judicial dialogue between various international bodies.

One drawback of the book is its limited analysis with respect to other interpretative principles that are used by WTO dispute settlement bodies. This catalogue is broad and includes, among others, the principle *in dubio mitius* (if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation), the presumption of consistency (different terms are understood as having different meaning), and the concept of evolutionary meaning (generic terms may be interpreted in an evolutionary manner). In which situations are such rules are invoked? How do they relate to the VCLT interpretative guidelines? What is their precise meaning? Van Damme is silent on these issues.

What also remains unappreciated in Van Damme's analysis are those cases where dispute settlement bodies favour some elements of Articles 31-33 of the VCLT over others. There are at least two types of such situations: interpretation that is dominated by the textual analysis (and which may be labelled as extended textualism) and interpretation that tends to limit the relevance of non-WTO rules. Although she admits that the early WTO case law showed overreliance on the text of the treaty and explains that this "initial ... excessive use of dictionaries ... was probably instigated by the need to assert its judicial function against the backdrop of a not fully developed institutional model and under-developed procedural rules in the DSU", her view on the current practice seems to be overoptimistic and insufficiently investigated. In particular, one would expect to have a more elaborated discussion on the question of the legitimacy of WTO decisions and accountability problems (WTO dispute settlement bodies *vis-ŕ-vis* WTO Members). Employment of strictly textual methods may be seen as a way which helps to defend against charges of having exceeded their acting powers (particularly if a dispute is highly politically contagious such as *EC – Hormones*). Deciding disputes at a technical level, with text playing the central (or even exclusive) role in the interpretative process allows, at least on its face, to depoliticize the controversy. Such an approach denies the relevance of policy considerations in the dispute settlement process, since it assumes that a particular issue is decided on the basis

of a neutral text and does not require the dispute settlement bodies to take difficult normative decisions.

Despite those critical remarks, Van Damme's book is definitively an obligatory position for everyone interested in the developments taking place in the field of international trade law.

Łukasz Gruszczyński

Michael J. Perry, Toward a Theory of Human Rights. Religion, Law, Courts, Cambridge University Press, 2007, pp. 253;

ISBN 978-0-521-86551-7

This book consists of three parts. Part One (chapters 1–3) includes a discussion on morality and human rights. Part Two (chapters 4–7) examines the relationship between morality and the law of human rights. Part Three (chapters 8–9) inspects the role of the courts in enforcing human rights law.

In Chapter 1, the author sketches the complexity of problems relating to moral-rights discourse. He shares the view that morality reinforces the law of human rights. The author considers morality the starting point of a process which leads to a formulation of human rights in the language of the law. He reminds us of the well-known paradigm that modern human rights law is founded on the assumption that every human being has inherent dignity, which is inviolable. The author emphasises that the origin of this paradigm is deeply rooted in morality. Morals are as different as people are. Some consider themselves moral, even though they may deny that humans have any innate dignity. Others behave as if only a few other human beings, for example those of the same race, have this innate dignity. More important is finding an accurate answer to the question of the source of a normative model of morality. There are religious and non-religious grounds for the inviolability of human dignity. Chapter 2 elaborates the former. The author concentrates on Jerusalem-based religions, mainly Christianity, since by his own admission he is most familiar with them.

Having regard to the Hilary Putnam's metaphor, the author postulates that the moral image central to human rights stresses the equality and fraternity of all women and men as sisters and brothers, who in union form one family. He agrees that the most deeply satisfying way of life which people are capable of is to love each other as God loves them. The reasoning common to John Finnis, Ronald Dworkin and Martha Nussbam, examined in Chapter 3, does not convince the author. According to them, human dignity should be respected out of a basic social emotion, namely compassion. However, they have failed to provide a good explanation of who we are. The evolutionary biology to which those doctrines refer, lacks credibility in the author's opinion. Doing away with Rorty's call to abandon human rights fundamentalism, the author properly observes that the violation of a human being does not offend certain sentiments but transgresses the normative order of the world. Therefore, he doubts whether the morality of human rights can stand up without theological support.

In Chapter 4 the author asserts that all those who acknowledge the morality of human rights, whatever the grounds, should take all steps necessary to prevent human dignity from being violated. In particular, he finds it crucial to urge elected representatives of nations to pass and implement laws and policies intended to prevent people from abusing each other or otherwise causing unnecessary suffering. It is necessary that they do not rely on any law or policy which is in breach of principles defined in this way. Chapters 5 to 7 follow the transition from the morality of human rights to the law of human rights in cultural struggles on capital punishment, abortion and same-sex unions.

The author argues that there are no conditions in which it is morally acceptable to punish a man by depriving him of life. The moral impermissibility of executions is unconditional. It will always involve treating a human being as if he lacks any inherent dignity. Regardless of what atrocities have been committed, the perpetrator still has his inherent dignity. The author ascertains that ignoring this unconditional principle translates into the acceptance of something less than the morality of human rights demands. While it would be unreasonable to dispute the basis of the author's ethics, nonetheless, it is incoherent. He accepts the unintentional killing of a human being, but not the foreseeable killing of someone. A foreseeable killing means for the sake of another, for example to save his inherent dignity, given that an alleged wrongdoer will die otherwise. Does not a judge who sentences a serial killer to death respect the inherent dignity of the actual as well as likely victims? Is the Iraqi court which decided to execute Chemical Ali for the massacre of Kurds, moral or immoral? Neither the hypothetical judge nor the court violates human rights law, since the prohibition of capital punishment is not absolute. It seems that even the morality of human rights law takes into account the utmost wickedness. However, the concept of foreseeable killing allows the author to justify the morality of later pre-viability abortion. When a pregnancy threatens a woman's life or health she morally may terminate it in self-defence. She can do the same if the fetus has a serious genetic abnormality to rescue him from a life of grievous suffering. The author considers it futile to introduce a ban on early abortions, which in his opinion is more than the morality of human rights law requires. This is one of but many interpretations. Indeed, the law of human rights does not refer to abortion. But the statistics show that in the USA, the homeland of the author, thousands of women a year have abortions since the sexual revolution. The calculation is simple but pretty terrifying. This point provides no better way to expand a discussion on preventing early abortions than to close it.

The last chapter of Part Two deals with same-sex unions. The author surprisingly derives this right from the inherent dignity principle and turns his attention to the non-discrimination rationale. There is an obvious liaison between

them. As the death penalty put to question whether human beings forfeit their inherent dignity, it may be said that abortion turns to its acquisition, and the same-sex unions issue preserves it. Thus, it would be proper to follow the initial line of argument. The book does not really contribute to the debate in this regard. It echoes the well-established position of human rights law.

Part Three inquires into the role domestic courts in determining public policy with respect to controversial topics like capital punishment, abortion and same-sex unions. The author elaborates extensively on the way the US Supreme Court should take into account the reasoning on these concerns. It could judge against the death penalty, applying the Eighth Amendment to the American Constitution which forbids cruel and unusual punishments. As far as abortion and same-sex unions are concerned, the Fourteenth Amendment could be used in arguing that any person within the US jurisdiction should enjoy equal protection of laws. The author concludes that citizens of liberal democracies may perhaps cede the power to protect human rights, but it should be a restricted judicial penultimacy. The elected representatives of the people must have the last word. He is correct. This doctrine accommodates both the importance of empowering courts to protect human rights and the power of argument in a democracy.

Although the book is interesting, it does not really succeed in its presumed purpose. It rather expands widely existing opinions on the subject-matter in both philosophy and ethics. It does not mention the legal theories of human rights, despite the author's immersion in the world of lawyers, which is emphasised throughout the book. The book explores to the largest possible degree extracts from other authors' works, offering quotations and large fragments from them. This considerably impedes the reader in identifying the author's original ideas, and sometimes even makes it difficult to study.

Katarzyna Łasak

R. Allen, R. Crasnow and A. Beale, Employment Law and Human Rights, Oxford University Press, 2007, pp. 514;

ISBN 978-0-19-929963-8

The book under review is the product of comprehensive studies and extensive practice by the authors, who are barristers specialising in labour law as well as human rights. Their intention is to assist other practitioners in understanding the correlation between the 1950 Convention on Human Rights and Fundamental Freedoms (the Convention) and domestic law on employment. Their book is an interesting case study, which shows the way the Convention has influenced the British legal system in the field of employment law. Nevertheless, it does not pretend to be an all-embracing lecture on employment issues. The book rather aims to explain when and how the Convention might be applied in national context. As compared to the first edition, the second one examines developments that have taken place in jurisprudence and to which A. Beale, as a new co-author, has undoubtedly contributed.

The book focuses on these human rights which have had an acute impact on employment law. According to the authors, this category includes the prohibition of slavery and forced labour, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, prohibition of discrimination as well as the right to peaceful enjoyment of possession. Each of these is the subject of a separate chapter, except for non-discrimination, which discussed in two chapters. The possible relevance of the rights to education and to free elections is noted, but only in a few words. More than briefly the authors also observe that the right to marry may also be an issue, while a single person may also be discriminated against because of their marital status. They identify the significance of Article 3, which forbids torture and inhuman or degrading treatment or punishment and which is deemed applicable in the most severe cases of workers' persecution. Yet, lacking further explanation of this issue, the book disappoints in this regard. The authors successfully prove that the Convention has affected employment law in many ways. Nonetheless, the equality issue preoccupies the book. This is also a direction that I wish to follow.

British employment lawyers almost certainly perceive discrimination from the perspective of distinct statutory provisions. They recognise that the definition of discrimination will vary in any particular piece of legislation. The differences reflect on their different subject matter. The reason for the different approaches is that while in cases of discrimination based on race, religion, belief and sex, law assumes that a person's race, religion, belief and sex should be irrelevant to the

treatment she or he receives, in cases of discrimination based on disability, pregnancy or maternity, three examples reviewed in the book, these conditions are relevant to a treatment a person receives. The legislation allows that a disabled or pregnant woman may require special protection in order to achieve substantive equality.[1] Different situations may require different treatment. The Convention links these different concepts of discrimination, given that a particular context is decisive for the kind of treatment.[2] The great number of regulations in British law relating to discrimination reflects its grounding in the width of coverage of the Convention.[3] For this reason, it is necessary to outline the considerations that underlie some of them.

The authors point out that the HRA has advanced progress in the field of disability rights, especially in the area of mental health. It has enabled the handicapped to challenge workplace discrimination. Since the *Botta v. Italy* judgement, the state has a duty to enable access for the disabled to basic economic and social activities.[4] This decision has prompted British courts to take affirmative action in relation to the disabled. The book refers in this respect to *R (A, B, X and Y) v. East Sussex CC and the Disability Rights Commission (No.2)*[5] case. The court stated that physical and psychological integrity, as understood under the Convention, implies the right of the disabled to participate in the life of the community. This is marked by a positive obligation on the part of a state to take any appropriate measures to ensure that isolation will not prevent these individuals from the development of their personality. As this ruling is concerned with the lack of access policy adopted by the local authority, one may apply it only *mutatis mutandis* to employment disputes. Regrettably, the authors do not mention the more pertinent jurisprudence. On the other hand, they recognise an increasing number of cases where workers with HIV/AIDS have suffered adverse effects at work. Such persons are considered to be disabled whether having developed any symptoms or not, and therefore, the DDA applies to their claims. Furthermore, as ruled in *H v. N*, the Convention implies that careful attention must be paid to these workers.[6]

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[1] The book invokes here the case *of Archibald v. Fife Council*, UKHL 32, [2005] 1 ICR 954.

[2] *See e.g. Thlimmenos v. Greece*, (2001) 36 EHHR 15, para. 44.

[3] There are 36 acts, 38 statutory instruments, 11 codes of practices, and 12 directives and recommendations. The principal are: the 1970 Equal Pay Act (EPA), the 1975 Sex Discrimination Act (SDA), the 1976 Race Relations Act (RRA), the 1995 Disability Discrimination Act (DDA) and the 1998 Fair Employment and Treatment (Northern Ireland) Order (FET), the 1998 Human Rights Act (HRA). The 2006 Equality Act, passed in order to consolidate previous legislation, in the opinion of the authors did not achieve its aim.

[4] (1998) 26 EHRR 241.

[5] [2003] EWHC 167.

[6] [2003] EWCA 195.

It is worth noting that subsequent to the last edition of the work under review, the 2003 Employment Equality (Sexual Orientation) Regulations (SOR) have come into force. They were enacted to ensure the proper interpretation of the Convention as it was accepted in the numerous cases of homosexuals.[7] According to these judgments, when an employer dismisses an employee because he or she has exhibited a particular sexual orientation at work, an employment tribunal could hold the infringement of the employee's right to respect of their private life as being relevant to the prohibition of discrimination. The SOR introduce a ban prohibiting employers from discriminating against workers by reason of their sexual preferences, whether directly or indirectly, or their victimisation or harassment. As the authors properly observe, it is a useful tool in facilitating workers' protection against discrimination on the grounds of sex.

Discrimination in the workplace also occurs on grounds of religion or belief. This is where Article 9 of the Convention may be engaged. Those who are members of public services (local authorities and central governments) have the possibility to assert Article 9 rights directly against their employers. Other workers will have to appeal to Article 9 indirectly. As the authors suggest, relying on *Malik and Mahmud v. BCCI*[8] and the HRA, it would be necessary to argue that the default term of trust and confidence has to be constructed in accordance with Article 9. The Court of Appeal dealt with the latter point in *Copsey v. WWB Devon Clays Ltd.*,[9] where a Christian worker was unwilling to work on Sundays on a regular basis and did not agree to a change in his contract of employment. The judges noted that if respect for the right to manifest one's religion is to have meaning in a democracy, it is not possible to say that an employer is acting justly when it simply ignores the need to seek a reasonable accommodation. However, the judges did not reach a consensus that the case could be decided solely on the basis of the Convention or employment law. Thus, the situation is unclear. In 2003 the Employment Equality (Religion or Belief) Regulations (RBR) were introduced in the Great Britain in order to implement the 2000 Employment Equality Directive. They forbid any form of discrimination in employment. There are close links between the RBR and Article 9 of the Convention. The term religion is to be defined broadly, as accepted in the case law of the Convention. The authors give the example of *Kokkinakis v. Greece*.[10] On the other hand, although the RBR offer antidiscrimination protection to those

[7] See, among many authorities: *Lustig-Prean and Beckett v. UK*, (2000) 29 EHRR 548; *Smith and Grady v. UK*, (2000) 29 EHRR 493.

[8] [1998] AC 20.

[9] [2005] ICR 1789.

[10] (1994) 17 EHHR 397.

who have faith in the supreme nature of the Jedi Knights,[11] they are not intended to cover political beliefs.[12] Only in the Northern Ireland there is explicit protection on the grounds of political convictions under the FET, which was a prerequisite of the peace process, as the authors rightly stress.

The book is well written and informative. It will have a great inpact on the dissemination of knowledge on Convention-related jurisprudence in the area of employment relationships. It enables all those who are interested, not only in the social and economic but also the political aspects of employment, to become acquainted with the most important European treaty in this regard. Readers will probably acknowledge that the Convention may influence employment relationships more considerably than is commonly recognised.

Katarzyna Łasak

[11] Hansard HL debates, col 1110 (13 July 2005).

[12] *Baggs v Fudge ET*, case no. 1400114/05, judgment, 23 March 2005. The claimant was refused a job interview due to his membership in the British National Party. The employment tribunal decided that the RBR did not apply as the organization involved, has a political not a religious or a philosophical ethos.

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POLISH PRACTICE IN INTERNATIONAL LAW

SELECTED JURISPRUDENCE OF THE POLISH SUPREME COURT INVOLVING QUESTIONS OF EXTRADITION AND THE APPLICATION OF THE INTERNATIONAL AGREEMENTS

DECISION OF THE POLISH SUPREME COURT, 3 FEBRUARY 2009, IV KK 367/08, OSNKW 2009/6/46

Facts:

A regional prosecutor in K., on the basis of Article 603 § 1 of the Polish Code of Criminal Procedure (CCP), applied for a permission to extradite to the United States of America the Polish and American citizen R.C., who was sought by the Court in Florida (USA) in order to conduct a trail proceeding related to the following crimes: fraud with the use of telegraphic transfer, postal fraud, false statements and perjury. The Regional Court in K. held that the extradition of R.C. in order to conduct the above trial was legally not available.

In the reasons for the judgement, the Regional Court in K. explained that its decision was taken as a result of the existence of the absolute and negative extradition prerequisite specified in Article 604 § 1 point 1 of the CCP. In particular, it observed that, despite the 2006 amendment to the Polish Constitution, its Article 55 § 1 and Article 604 § 1 point 1 of the CCP provide a general prohibition against the extradition of Polish citizens. Although the amendment added a new paragraph 2 to Article 55, which established exceptions to the above prohibition ("extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member"), this related only to execution of the European Arrest Warrant and fulfilment of international

obligations arising from the ratification by Poland of the Statute of the International Criminal Court.

The Court emphasised that the 1996 Extradition Treaty between Poland and the USA (Agreement of 10 July 1996, Journal of Laws of the Republic of Poland (*Dziennik Ustaw*) 1999, No. 93, item 1066) had not been ratified upon prior consent granted by statute and had to be regarded as a legal act of lower rank than the statute (i.e. CCP). Consequently, one could not apply the rule on conflict of laws provided by Article 615 § 2 of the CCP, which excluded applicability of the CCP to those cases where an international treaty to which Poland was a party provided otherwise. Thus according to the Court, the primacy of the CCP prohibited the extradition of a Polish citizen on the basis of the bilateral extradition agreement. In particular, Article 604 § 1 point 1 of the CCP, which established such prohibition, had priority over article 4 paragraph 1 of the Extradition Treaty between Poland and the USA. This treaty would exclude applicability of Article 604 § 1 point 1 of the CCP only if it had been ratified upon prior consent granted by statute. The court also added that vague and imprecise wording of article 4 paragraph 1 of the Extradition Treaty could not exclude the applicability of the constitutional norm, which prohibited Poland from extradition of its own citizens.

The Public Prosecutor General initiated a cassation appeal with the Supreme Court. He contended that the Extradition Treaty constituted an act of international law, which had been adopted in proper form and which bound Poland. Consequently, the Regional Court, in applying Article 604 § 1 point 1 of CCP, violated Article 615 § 2 of the CCP.

Judgement:

The Supreme Court observed that the Extradition Treaty was an act of international law, which had been adopted in proper form and which bound Poland. It added that the treaty constituted a specific source of domestic law. The Supreme Court criticized the Regional Court for not taking into account both the final and transitional provisions of the Polish Constitution, which regulated status of international treaties concluded before the entry into force of the Constitution. In particular, Article 241 § 1 of the Constitution provides that "international agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89 § 1 of the Constitution derives from the terms of an international agreement." As a result of this provision, the 1996 Extradition Treaty concluded with the

USA has the status of an international agreement ratified upon prior consent granted by a statute. The Supreme Court added that Polish law granted direct effect to such agreements, without the need to take any further action.

The Supreme Court explained that the treaty, by taking a different approach as compared to the CCP and in accordance with Article 615 § 2 of the CCP, excluded entirely or in part the applicability of domestic procedural provisions to the extent that such provisions were incompatible with the content, aim and application of the Treaty. The Supreme Court added that such a rule was conventionally labelled as the principle of subsidiarity of domestic law. Accordingly, if Poland was a party to the Extradition Treaty, any prohibition on extradition prerequisite had to be sought in such treaty. Although the application of domestic provisions was not entirely excluded, this was only possible within narrowly defined boundaries. In particular, it was possible to refer to domestic law when the agreement did not regulate some key issues essential for the cooperation between the parties. In case of such loopholes, a Polish court was obliged to apply those provisions of the domestic law which regulated such a specific issue. At the same time, the Supreme Court made clear that international agreements might exclude the application of domestic law if a particular form of cooperation is regulated in an exhaustive way. The Supreme Court observed that this was true in the case in front of it. The Extradition Treaty included independent regulation governing the extradition of own citizens. The Parties to the treaty defined precisely the catalogue of situations in which extradition in such cases was not permissible (e.g. political crimes). Consequently, other situations which were not included in the catalogue did not constitute grounds for the refusal of extradition.

The Supreme Court also added that, when deciding on extradition, article 4 paragraph 2 of the treaty itself had to be taken into consideration, which provides that if extradition is refused solely on the basis of the nationality of the person sought, the Requested State was obliged at the request of the Requesting State to submit the case to its competent authorities for a decision whether to prosecute. According to the Supreme Court, this clearly required the court to apply the principle *aut dedere aut iudicare*. In other words, in case of refusal to extradite Polish citizen R.C. on the basis of article 4 paragraph 1 of the extradition treaty, the treaty obliged Polish authorities to submit the case to its own authorities for prosecution. The Regional Court in K. failed to observe this obligation, which constituted a gross violation of the provisions of the international agreement.

Conclusion:

The Supreme Court annulled the judgment of the Regional Court and remanded the case for further adjudication.

DECISION OF THE POLISH SUPREME COURT, 21 JANUARY 2009 (V KK 231/08), LEX NR 486539

Facts:

Jaroslaw J. was extradited from Germany to Poland on the basis of decision of the court in Frankfurt am Main issued in response to the arrest warrant of a Polish district court as well as in order to execute a sentence of imprisonment issued by the same court. The Surrendering Party indicated in its decision that the extradition was granted in the simplified proceeding because pursued gave his consent and resigned from the principle of speciality of treatment.

The district court found Mr. Jaroslaw J. guilty of a number of different crimes, including the crime of misrepresentation as provided by Article 286 § 1 in connection with Article 12 of the Polish Criminal Code (CC), and sentenced him to three years imprisonment. Jaroslaw J. appealed. A regional court reduced the penalty but it did not change the scope of the judgement. Consequently, Jaroslaw J. initiated a cassation appeal in the Supreme Court. He contended, among other things, that a crime covered by article 286 § 1 of the CC was not included in the European Arrest Warrant on the basis of which he was extradited to Poland. In consequence, it was not possible for Polish courts to sentence him for such an offence.

Judgement:

The Supreme Court observed that pursuant to Article 596 of the Polish Code of Criminal Procedure (CCP), a person who has been extradited shall not be proceeded against, without the consent of a country which extradited him, for any offence committed prior to his surrender other than that for which he was extradited. This rule is compatible with Article 14 of the 1993 European Convention on Extradition (Journal of Laws of the Republic of Poland (*Dziennik Ustaw*) 1994, No. 70, item 307) to which Poland is a party. According to this article, a person who has been extradited shall not be proceeded against, sentenced, or detained with a view to the carrying out of a sentence (...) for any offence committed prior to his surrender (...)", except when the Party which surrendered him gives a separate consent or when that person, having had the opportunity to leave the territory of a particular country, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it." The Supreme Court found that this rule was not, however, absolute. Firstly, a country which surrenders a person might express its consent to include in the proceeding other offences unrelated to the extradition, although this was not found to have occurred in the case before it. Second, the Parties to the Convention could – in accordance with Article 28 § 2 "relax" the rigour of the classical principle of speciality as provided by the Convention, in particular in order to

facilitate application of its provisions. If the Parties so decided, they had to identify precisely the possible deviations from the principle (e.g. contained in the 1995 Convention on simplified extradition procedure between the Member States of the European Union)

This was a case for Germany and Poland, as they concluded, on 17 July 2003 in Berlin, an agreement supplementing and facilitating the application of the European Convention on Extradition (Journal of Laws of the Republic of Poland (*Dziennik Ustaw*) 2004, No. 244, item 2451), which entered into force on 4 September 2004. Pursuant to Article 7 paragraph 4, "a requested Party resigns from the right provided in Article 14 paragraphs 1 and 3 of the Convention if a person within an extradition proceeding give his consent to the protocol in front of a judge or prosecutor, after being properly informed about the legal consequences of such an act, to unlimited criminal prosecution or punishment. Such consent cannot be revoked (...)".

The Supreme Court, referring to the principle of the primacy of international agreements (subsidiarity of domestic law) expressed in Article 615 § 2 of the CCP (i.e. the provisions of Section XIII of the CCP do not apply if an international agreement to which Poland is a party provides otherwise), classified the consent of Jaroslaw J. in which he had accepted application of simplified proceeding and resigned from the principle of speciality as a consent to unlimited criminal prosecution or punishment as provided by Article 7 paragraph 4 of the above mentioned agreement. Consequently, a criminal prosecution against Jaroslaw J. was valid, even with regard to a crime which was defined in Article 286 § 1 in connection with Article 12 of the CC, because it did not go beyond the scope of the extradition. The Supreme Court added that the Parties to the European Convention on Extradition could resign from the rights provided in Article 14 paragraphs 1 and 3 of the Convention, subject to the consent of a pursued. In the case in front of it, Jaroslaw J. gave his consent. This meant that in accordance with Article 615 § 2 of the CCP, Article 596 of the CCP remained inapplicable. On that basis, the Supreme Court held that the courts of lower instance had not violated criminal procedural law.

Conclusion:

The Supreme Court dismissed the cassation appeal.

Prepared by Karolina Wierczyńska and Łukasz Gruszczyński

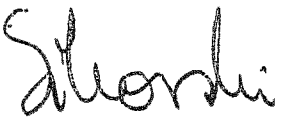
Republic of Poland
Minister of Foreign Affairs
Radosław Sikorski

Warsaw 14 April 2009

Sir,

Pursuant to the provisions of Article 66(2) of the Statute of the International Court of Justice and in accordance with the Order of the Court dated October 17th, 2008 I have the honor to submit herewith a written statement of the Republic of Poland on the request by the United Nations General Assembly for an advisory opinion on the accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo.

Please accept, Sir, the assurances of my highest consideration.



His Excellency
Mr. Philippe Couvreur
Registrar of the International Court of Justice
Peace Palace
The Hague

INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY
FOR AN ADVISORY OPINION ON THE

"ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT OF KOSOVO"

WRITTEN STATEMENT OF THE REPUBLIC OF POLAND

APRIL 2009

CONTENTS

I. INTRODUCTION

1.1 The International Court of Justice in its Order of 17 October 2008 invited States to submit written statements concerning the request of the General Assembly for an advisory opinion on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.*

1.2 The request was referred to the Court by the United Nations General Assembly resolution A/RES/63/3 of 8 October 2008 which was adopted by 77 votes in favour to 6 against, with 74 abstentions.

1.3 The Republic of Poland abstained from voting on that resolution as a country that recognized Kosovo as a State. The Republic of Poland has also viewed the Declaration of Independence of 17 February 2008 as an act that has not conflicted with any norm of international law. Nevertheless, the Republic of Poland did not oppose the adoption of the resolution A/RES/63/3, bearing in mind that one of the purposes of the United Nations is *"to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"* and that the access to the Court, *"the principal judicial organ of the United Nations"*, is an important factor in the development of friendly relations between nations.

1.4 In accordance with that resolution, the terms of the request made by the General Assembly of the United Nations are as follows:

> *"The General Assembly,*
> *Decides, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court to render an advisory opinion on the following question:*
> *»Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?«"*

1.5 The Government of the Republic of Poland, in accordance with the Order of the Court of 17 October 2008, decided to present this written statement to the Court. This statement deals with the legal issues pertaining to the General Assembly request.

II. SCOPE OF THE REQUEST AND PRELIMINARY CONSIDERATIONS

2.1 It is to be ascertained that the request is framed in a narrow way as it refers solely to the accordance with international law of the Declaration of Independence as such. Thus, the legal assessment of the statehood of Kosovo or the analysis of accordance with international law of the acts of recognition of Kosovo are beyond the scope of the request posed by the General Assembly.

2.2 It may be argued that international law does not contain norms that would apply to the question of declaring independence. It is a logical consequence of a stipulation that the existence of the state is a matter of fact, not that of law. As the Conference of Yugoslavia Arbitration Committee, on 29 November 1991, noted:

> *"The Committee considers:*
>
> *a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State; that in this respect, the existence of the State is a question of fact; that the effects of recognition by other States are purely declaratory;*
>
> *b) that a State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty ..."* (Conference of Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M., p. 1488 et. seq.; emphasis added).

2.3 Thus, a declaration of independence is an act that confirms these factual circumstances and it may be difficult to assess such an act in purely legal terms.

III. FACTUAL AND LEGAL BACKGROUND TO THE REQUEST

3.1 This part of the statement of the Republic of Poland purports to highlight the position of Kosovo within Socialist Federal Republic of Yugoslavia (SFRY), the context in which United Nations Security Council resolution 1244 (1999) was adopted, as well as the conditions in which the Declaration of Independence of 17 February 2008 was issued.

3.2 It is the opinion of the Republic of Poland that the abovementioned Declaration shall be viewed in the light of exceptional, *sui generis* situation that had led to the proclamation of the Kosovo's independence.

3.3 The Parliament of Serbia in 1945 recognized the political, ethnical and territorial distinctiveness of Kosovo and established in its territory two autonomous entities, including Kosovo (the Autonomous Kosovo-Metohian Area). That model of autonomy was preserved in the Socialist Federal Republic of Yugoslavia Constitution of 1946 (Article 2), on the basis of which the Autonomous Kosovo-Metohian Area was constituted. That situation did not change under the SFRY Fundamental Constitutional Law of 1953. That Law, however, determined more precisely the status of autonomous units within SFRY. It also provided that those units may establish their own statutes which shall form the basis of their system of government.

3.4 The status of autonomous regions was in principle sustained in the framework of 1963 SFRY Constitution. It confirmed the existence of two autonomous regions within the Republic of Serbia, namely the Autonomous Kosovo-Metohian Country and Vojvodina. The 1968 Amendment to the 1963 SFRY Constitution listed the grounds on which autonomous regions could have been established. These were the

regions that: (a) were created as a result of common struggle of nations and nationalities during the World War II and socialist revolution; (b) were, in factual terms, created and constituted on the basis of, *inter alia,* freely expressed will of the nations and nationalities of a given region; (c) constituted, due to common and freely expressed will of nations and nationalities of Serbia and given regions, part of Serbia which, in turn, is a part of SFRY.

3.5 The SFRY Constitution of 1974 upheld the institution of autonomous regions and a unique status of Kosovo and Vojvodina among them. These two entities enjoyed a "dual status". On the one hand, they were the subjects of the Federation (just as the republics), were represented in the Federation's Presidency and enjoyed full status of self-governance appertaining to the republic, including even their own central banks. On the other hand though, they were subordinated to the Republic of Serbia. (M. Weller, *Negotiating the final status of Kosovo,* Chaillot Paper, no 114, Institute for Security Studies, December 2008). According to the 1974 SFRY Constitution:

> Paragraph 6: "*The Socialist Republic of Serbia comprises the Socialist Autonomous Province of Vojvodina and the Socialist Autonomous Province of Kosovo, which originated in the common struggle of nations and nationalities of Yugoslavia in the National Liberation War and socialist revolution and united, on the basis of the freely expressed will of the nations, populations and nationalities of the provinces and Serbia, in the Socialist Republic of Serbia within the Socialist Federal Republic of Yugoslavia.*"
>
> Paragraph 7: "*The provinces are autonomous socialists self-managing democratic socio-political communities with a special ethnic composition and other specificities, in which working people and citizens, nations and nationalities exercise their sovereign rights...*" (H. Krieger, The Kosovo Conflict and International Law: An Analytical Documentation 1974–1999, Cambridge University Press, 2001, p. 5; emphasis added).

3.6 In 1981 the strive of Kosovars for attaining the status of the republic within SFRY intensified and manifested itself through massive protests that were repressed by central authorities of Yugoslavia. In the aftermath of these events, Serbia demanded that Kosovo shall be integrated into that country. That demand was opposed by other republics, notably Slovenia. (P. Radan, *The Break-up of Yugoslavia and International Law,* Routledge, 2002, p. 154).

3.7 One of the first steps taken by Slobodan Milosević after his rise to power in Serbia (1989) was to amend the Constitution of the Republic of Serbia in a way that practically eliminated the autonomy of Kosovo. Through the Amendments of February 1989 and of July 1990 to Serbian Constitution the main competences of Kosovo institutions were transferred to central government in Belgrade and the functioning of the Kosovo's parliament was suspended.

3.8 The above-described series of events triggered Croatia and Slovenia (on 25 June 1991) to announce their intention to secede from Yugoslav Federation which, in consequence, led to the dissolution of Yugoslavia. These developments were con-

firmed in the 1991 Opinion No. 1 of the Conference of Yugoslavia Arbitration Commission (Conference of Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M., pp. 1488 et. seq.): *"The Arbitration Committee is of the opinion that the Socialist Federal Republic of Yugoslavia is in the process of dissolution"*. Subsequently, both Macedonia (referendum held in September 1991) as well as Bosnia and Herzegovina (resolution adopted by Parliament on October 14th 1991) declared independence. Therefore, at that moment it were only Serbia, autonomous units (Kosovo and Vojvodina) and Montenegro that still found themselves in the framework of the then Yugoslavia.

3.9 Initially, two international conferences were convened in order to analyze the situation in the (former) Yugoslavia and to decide upon the next steps of the international community in that respect. One was held (on the initiative of the European Community) under the chairmanship of Lord Carrington in 1991 and, afterwards, the other took place in the period of 26–28 August 1992 (London Conference on Yugoslavia). It shall be pointed out that, for political reasons, the question of the status of Kosovo was not discussed during those conferences.

3.10 Simultaneously with the process of the dissolution of Yugoslavia, Serbian repressions towards Kosovo intensified. At the same time, Kosovo's strive for the status of a republic, initially within SFRY, strengthened. This strive manifested itself on 2 July 1990 when the Kosovo Assembly issued a Declaration of Independence in which Kosovo demanded to be recognized as an «independent and equal unit within the Yugoslavia» on the basis of «the sovereign right of the people of Kosovo, including the right to self-determination». On 19 February 1990 Yugoslav Constitutional Court found that Declaration to be inconsistent with the Constitution. The Serbian authorities, on 5 May 1990, dissolved the Kosovo Assembly and government.

3.11 September 7, 1990 marks the adoption by the majority of the delegates from the dissolved Kosovo Assembly of the Kačanik Resolution. That document underlined the right of peoples to self-determination and repeated the demands that had been earlier expressed on 2 July 1990 (concerning Kosovo's status as an equal member of the Yugoslav Federation). On the same date when the Kačanik Resolution was adopted, the dissolved Kosovo Assembly proclaimed the Constitution of the Republic of Kosovo. According to its provisions, Kosovo seceded from Serbia but still considered itself a part of SFRY. In the period of 26–30 September 1991 the referendum concerning the independence of Kosovo was held. As a result, 87% of Kosovars (eligible to vote), by the majority of 99,87%, voted "yes" in favor of independence. Kosovo declared its independence on 18 October 1991. The only country, however, that then recognized Kosovo was Albania (on 22 October 1991) and – as was mentioned above – the question of Kosovo was not subject to debate during the international conferences convened to deal with the dissolution of the (former) Yugoslavia. Pursuant to the Constitution of the Republic of Kosovo, on 24 May 1992 assembly as well as presidential elections took place and Mr. I. Rugova was elected President of Kosovo.

3.12 On the basis of what is stated above, it is possible to conclude that a parallel administration existed in Kosovo – the one of Kosovo and of Yugoslavia (Serbia). It is also of importance that Kosovo exercised such state – related functions, besides conducting elections, as: providing social insurance, education and cultural activities.

3.13 Simultaneously with the process of eliminating the (almost half of century long) autonomy and self-governance of Kosovo, the Serbian authorities launched aggressive campaign aimed at the people of the former. It did not take long time that the deteriorating humanitarian situation in Kosovo became the concern of the international community.

3.14 United Nations General Assembly (UN GA) in its resolution 47/147 expressed "*its grave concern at the report of the Special Rapporteur on the dangerous situation in Kosovo, Sandjak and Voyvodina*" urged all parties "*to act with utmost restraint and to settle disputes in full compliance with human rights and fundamental freedoms*" and called upon the Serbian authorities to "*refrain from the use of force, to stop immediately the practice of 'ethnic cleansing' and to respect fully the rights of persons belonging to ethnic communities or minorities*". Since that moment onwards, General Assembly in a consequent and strong manner condemned the Serbian authorities with regard to the degrading humanitarian situation in the region (see in particular UN GA resolutions: 48/153, 49/204, 50/190, 51/111, 52/139, 53/163, 53/164,54/183).

3.15 The United Nations Commission on Human Rights (UNCHR) also repeatedly drew the attention of the international community to the massive violations of human rights in Kosovo. UNCHR, similarly as the General Assembly, already in 1992 condemned the Serbian policy of ethnic cleansing (E/CN.4/1992/S-1/9), as well as deteriorating human rights situation in Serbia, police brutality, torture, ill-treatment of detainees, discriminatory measures and practices (see in particular: Commission resolution 1993/7 of 23 February 1993, Commission resolution 1994/76 of 9 March 1994, Commission resolution 1998/79 of 22 April 1998, Commission resolution 1999/2 of 13 April 1999).

3.16 In the context of the present considerations, it shall also be mentioned that, by the UN SC resolution 827 (1993), International Criminal Tribunal for the former Yugoslavia (ICTY), was established. One of the reasons that prompted the UN Security Council to establish such an international body was:

> "*grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia (...) including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of »ethnic cleansing«, including for the acquisition of and the holding of territory*" (emphasis added).

3.17 Since 1998, the situation in Kosovo was included in the agenda of the United Nations Security Council. UN Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999) underlined in particular the indiscriminative use of force by Serbian security forces, numerous civilian causalities, massive flow of refugees and rapid deterioration of humanitarian

situation throughout Kosovo. UN Security Council was also alarmed by the spreading humanitarian catastrophe there (SC Res. 1199 (1998) and 1203 (1998)).

3.18 Following the establishment of ICTY, the Security Council in its resolution 1160 (1998) urged the Office of the Prosecutor of the International Tribunal for the Former Yugoslavia *"to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction"*.

3.19 It can be concluded on the basis of the above considerations, that the humanitarian situation in Kosovo, especially in the period of 1998–1999, became disastrous. According to the statistical data contained in the United Nations High Commissioner for Human Rights Report (Report on Situation of Human Rights in Kosovo, HC/K224, 22 April 1999), there were nearly 600 000 refugees from Kosovo and almost 800 000 displaced persons within Kosovo. That report highlights also the instances of ethnic cleansing, forced displacement, arbitrary executions and detentions as well as enforced disappearances, all of which took place in Kosovo.

3.20 The detailed information concerning those events is well documented in a report prepared by the Organization for Security and Cooperation in Europe (OSCE) – Kosovo Verification Mission: *Kosovo/Kosova As Seen, As Told. An Analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999.* The introductory part of that report, in relevant parts, states:

> *"Violations of the right to life feature extensively in this report, from numerous single arbitrary killings to mass killings involving scores of victims. Particularly in the period after 24 March 1999, communities in Kosovo were subjected to a state of lawlessness precisely at the hands of those authorities charged with the maintenance of security and law and order, and those authorities demonstrated a sweeping disregard for human life and dignity. The loss of life by large numbers of Kosovo Albanian civilians was one of the most characteristic features of the conflict after 24 March and account for a very high number of reports and witness statements received by OSCE-KVM.* (...)
>
> *The mass killing at Racak/Recak (Stimlje/Shtime municipality) on 15 January 1999 was an event both definitive in terms of establishing international recognition that human rights violations were at the core of Kosovo conflict, and (together with two other incidents later that month in Djakovica/Gjakova municipality, at Rogovo/Rogove and Rakovina/Rakovine) indicative of what was to follow in the period from late March."*

3.21 Since 1990s the European Parliament in the series of resolutions strongly condemned the Serbian actions in the territory of Kosovo and expressed its deep regret as far as the humanitarian situation was concerned (see in particular: *Resolution on the situation in Kosovo,* OJ. C 328, 26.10.1998, p. 0182 and *Resolution on the situation in Kosovo, OJ.* C 115, 14.04.1997, p. 0170).

3.22 Under the auspices of North Atlantic Treaty Organization (NATO) a special conference was convened in order to stabilize the situation and attain peaceful and political solution in Kosovo. During the negotiations the so called *Rambouillet*

Accords: Interim Agreement for Peace and Self-Government in Kosovo (doc. S/1999/648, 7 June 1999) were elaborated, the provisions of which envisaged a broad autonomy for Kosovo. Serbian party did not accept the solutions under the *Rambouillet Accords* and(on 18 March 1999) the negotiations ended with a fiasco.

3.22.1 The relevant provision of the *Rambouillet Accords* is Article 1 (under the chapeau of Chapter I of the *Rambouillet Accords:* Constitution) which reads:
"Kosovo shall govern itself democratically through the legislative, executive, judicial, and other organs and institutions specified herein"

3.22.2 The above-characterized solutions were meant to be of a temporary nature only which is clearly reflected in Chapter VIII of the *Rambouillet Accords:*
"Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures". (emphasis added)

3.23 On 24 March 1999 NATO commenced its "Operation Allied Force" against Serbia. The campaign was intended to *"halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo (...). Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo"* (Press release 1999(040), 23 March 1999). It may be noted that already in 1998 NATO Member States reaffirmed that:

> *"We are deeply concerned by the situation in Kosovo. We deplore the continuing use of violence in suppressing political dissent or in pursuit of political change. The violence and the associated instability risk jeopardising the Peace Agreement in Bosnia and Herzegovina and endangering security and stability in Albania and the former Yugoslav Republic of Macedonia. It is particularly worrying that the recent resurgence of violence has been accompanied by the creation of obstacles denying access by international observers and humanitarian organisations to the affected areas in Kosovo"* (NATO Statement on Kosovo: Press Communiqué M-NAC-1 (98)61 issued at the Ministerial Meeting of the North Atlantic Council held in Luxembourg on 28th May 1998).

3.24 June 10, 1999 marks the adoption by the UN Security Council, acting under Chapter VII of the Charter of United Nations, of the resolution 1244 (1999). At the same time, the NATO Secretary General, after nearly three months of air campaign, decided to suspend "Operation Allied Force".

3.25 In the preambular part of the UN SC resolution 1244 (1999), Security Council stated that it was:

> *"determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes."*

and that it:

"Condemns all acts of violence against the Kosovo population as well as all terrorist acts by any party".

3.26 On the basis of that resolution an international civil and security presences, under United Nations auspices, were established. As a result, United Nations Interim Administration Mission in Kosovo (UNMIK) was created, composed of four pillars: Police and justice (led by United Nations), Civil Administration (United Nations), Democratization and institution building (Organization for Security and Co-operation in Europe), Reconstruction and economic development (European Union). It may be noted already at this stage of considerations that the establishment of UN administration in Kosovo significantly changed its legal status.

3.27 On the basis of UNMIK Regulation 1/1999 of 25 July 1999 (UNMIK/REG/1999/1):

"All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary – General".

3.28 In May 2000 UNMIK established Joint Interim Administrative Structure (JIAS) that included the following components: Interim Administrative Structure, Kosovo Transitional Council, Administrative departments and Municipal boards.

3.29 On 15 May 2001 the Special Representative of the Secretary General signed Regulation No. 2001/9 that promulgated *"A Constitutional Framework for Provisional Self-Government in KOSOVO"* (Constitutional Framework). The preamble to that document states:

"Acknowledging KOSOVO's historical, legal and constitutional development; and taking into consideration the legitimate aspirations of the people of Kosovo to live in freedom, in peace, and in friendly relations with other people in the region. (...) *Determining that, within the limits defined by UNSCR 1244 (1999), responsibilities will be transferred to Provisional Institutions of Self-Government which shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244(1999), take full account of all relevant factors including the will of the people"* (emphasis added).

3.30 In accordance with the regulations of the Constitutional Framework, *de facto* all authority over Kosovo was vested in the hands of Special Representative or in the institutions established under the Constitutional Framework, i.e. the Assembly, the President of Kosovo, Government and Courts. As far as the Kosovo's status is concerned, the relevant provisions of Chapter I of the Constitutional Framework provided that:

"7.7 Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.

1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities. 1.3 Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo."

It is also necessary to note that according to Chapter XIV of the Constitutional Framework:

"The SRSG shall take the necessary measures to facilitate the transfer of powers and responsibilities to the Provisional Institutions of Self-Government".

3.31 Mr. M. Steiner, Special Representative of the Secretary – General for Kosovo and Head of the United Nations Interim Administration Mission in Kosovo, in his report of 2002 stated that "*United Nations operation in Kosovo under resolution 1244 (1999) has entered a new phase, allowing us to make new proposals for the way ahead*" (doc. S/PV.4518, 24 April 2002, p. 2). In the very same report, Mr. Steiner informed that he was embarking on a benchmark process. *These benchmarks should be achieved before launching a discussion on status, in accordance with resolution 1244 (1999)* (supra, p. 4). This approach became to be known as "Standards before Status" policy (see: S/PRST/2003/1, 6 February 2003, p. 2) and the "benchmarks" referred to above included: (a) existence of effective, representative and functioning institutions; (b) reinforcement of the rule of law; (c) freedom of movement for all; (d) respect for the right of all Kosovars to remain and return; (e) development of a sound basis for a market economy; (f) clarity of property title; (g) normalized dialogue with Belgrade; and (g) reduction and transformation of the Kosovo Protection Corps in line with its mandate. Thus, the need to consider the future status of Kosovo was explicitly recognized. At the same time, it was thought that before embarking on that debate, certain standards of democracy had to be introduced and implemented in Kosovo.

3.32 After the riots that had taken place in Kosovo in March 2004, Ambassador Kai Eide, the then Permanent Representative of Norway to NATO, indicated that "*standards before status policy lacked credibility and should be replaced by a priority-based and realistic standards policy*", adding as well that "*raising a future status question soon seems – on balance – to be better option and is probably inevitable*" (M. Weller, op. cit, p. 20; see also: Letter dated 17 November 2004 from the Secretary – General addressed to the President of the Security Council, S/2004/932, 30 November 2004, Annex).

3.33 On 7 October 2005, Ambassador K. Eide, in his capacity as Special Envoy of the UN Secretary – General to undertake a comprehensive review of the situation in Kosovo, reported to the Security Council:

"The future status process must be moved forward with caution. (...) The end result must be stable and sustainable. Artificial deadlines should not be set. Once

the process has started, it cannot be blocked and must be brought to a conclusion" (Letter dated 7 October 2005 from the Secretary – General addressed to the President of the Security Council, S/2005/635, 7 October 2005, Annex; emphasis added).

3.34 The UN Security Council agreed with Ambassador K. Eide's conclusions and authorized, on 24 October 2005, the commencement of the process concerning the future status of Kosovo (Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005).

3.35 In November 2005 the UN Secretary – General nominated Martti Ahtisaari as his Special Envoy for the Future Status Process for Kosovo. Later on, Mr. Ahtisaari undertook a series of actions in order to settle the issue of the future status of Kosovo, with the agreement of both interested parties.

3.36 However, Mr. Ahtisaari in his 2007 report (UN doc. S/2007/168, 26 March 2007) concluded:

"1. *But after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status,*

(...)

3. It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

(...)

3. The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo 's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence (emphasis added).

(...)

6. A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs. This difficult relationship was exacerbated by the actions of the Milosevic regime in the 1990s. After years of peaceful resistance to Milosevic's policies of oppression – the revocation of Kosovo 's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life – Kosovo Albanians eventually responded with armed resistance. Belgrade's reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention

of the North Atlantic Treaty Organization (NATO), culminating in the adoption of resolution 1244 (1999) on 10 June 1999.

7. For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable (emphasis added).

3.37 The "*Comprehensive Proposal for the Kosovo Status Settlement*" (so called Ahtisaari's Plan) was annexed to that report. Its principal assumptions, although not pointing directly at the independence of Kosovo, defined it using the classic state "toolbox" like: authority, population, defined territory and capacity to conclude international agreements.

"1.1 *Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law, through its legislative, executive, and judicial institutions.*

(...)

1.3 *Kosovo shall adopt a Constitution (...).*

(...)

1.5 *Kosovo shall have the right to negotiate and conclude international agreements and the right to seek membership in international organizations.*

(...)

Annex IX, Article 1 *Kosovo shall be responsible for managing its own affairs, based upon the democratic principles of the rule of law, accountability in government, and the protection and promotion of human rights, the rights of members of all Communities, and the general welfare of all its people. Recognizing that fulfilling Kosovo's responsibilities under this Settlement will require a wide range of complex and difficult activities, an International Civilian Representative (ICR) shall supervise the implementation of this Settlement and support the relevant efforts of Kosovo's authorities.*"

3.38 Since the presentation of the report to the Security Council, it failed to adopt (or find alternatives to) Ahtisaari's Plan which, in turn, gave rise to further efforts of the international community to find consensual resolution to the question of the future status of Kosovo. In particular, the Troika (officials from EU, Russia and USA) facilitated a series of negotiation rounds as well as mediated between Serbia and Kosovo. Various options were inquired into, from the full independence of Kosovo, through supervised independence or autonomy to, eventually, "agreement to disagree". In the end though "*the parties were unable to reach an agreement on*

the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo" (Letter dated 10 December 2007 from the Secretary – General to the President of the Security Council, S/2007/723,10 December 2007, Enclosure).

3.39 In January 2008 the UN Secretary General in his periodical report on the United Nations Interim Administration Mission in Kosovo underlined:

> *"Expectations in Kosovo remain high that a solution to Kosovo's future status must be found rapidly. As such the status quo is not likely to be sustainable. Should the impasse continue, events on the ground could take on a momentum of their own, putting at serious risk the achievements and legacy of the United Nations in Kosovo. Moving forward with a process to determine Kosovo's future status should remain a high priority for the Security Council and for the international community."* (S/2007/768, 3 January 2008, para. 33; emphasis added)

What was underlined above, as the UN Security Council was not able to find consensus on the question on the status of Kosovo, events on the ground indeed took on momentum of their own.

3.40 On 17 February 2008 the Assembly of Kosovo (elected in the democratic elections held on 17 November 2007) adopted the Declaration of Independence that, *inter alia,* underlined the *sui generis* character of Kosovo case as well as confirmed the solutions earlier proposed in the Ahtisaari's Plan and main principles of the UN SC resolution 1244 (1999):

> *"Observing that Kosovo is a special case arising from Yugoslavia's nonconsensual breakup and is not a precedent for any other situation,*
>
> *(...)*
>
> *We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement. (...) We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)."*

3.41 It is worth noting that the Declaration of Independence derives from the will of people represented by the democratically-elected leaders not from, as it was phrased in the request incorporated in the UN GA 63/3, the decision of Provisional Institutions of Self-Government of Kosovo. In that regard it shall be underlined that the Council of Europe Election Observation Mission in Kosovo (CEEOM V) observed the electoral process leading up to the 17 November 2007 Kosovo Assembly, Municipal Assembly and Mayoral Elections and it concluded that:

> *"The elections were conducted generally in line with Council of Europe principles, as well as international and European standards for democratic elections, when*

considering the late call for elections and the particularity of running three elections concurrently in Kosovo 's still complex political and social environment. The elections took place in a peaceful atmosphere, despite the particularly tense political context at the approach of the deadline for the negotiation process on the future status of the province (...)".

IV. DEVELOPMENTS SINCE THE DECLARATION OF INDEPENDENCE

4.1 Since the adoption of the Declaration of Independence, 57 States, including 22 EU Member States, recognized Kosovo as a sovereign and independent State. It shall also be noted that recognizing States represent various geographical regions of the world, as well as multiple legal, cultural and religious traditions (e.g. Albania, Australia, France, Japan, Malaysia Maldives, Panama, South Korea, Turkey, United Arab Emirates, United Kingdom, United States of America).

4.2 Moreover, in its resolution of 5 February 2009, European Parliament called upon states, that have not already done so, to recognize the independence of Kosovo (European Parliament resolution of 5 February 2009 on Kosovo and the role of the EU, P_6TA_PROV(2009)0052, B_6-0063/2009).

4.3 Several states have established diplomatic relations with Kosovo. Also Kosovo has diplomatic representation in other states and it already concluded some international agreements.

4.4 On 9 April 2008 (effective from 15 June 2008) Assembly of Kosovo adopted the Constitution of the Republic of Kosovo, according to which:

> *The Republic of Kosovo is an independent, sovereign, democratic, unique and indivisible State.*
>
> *(...)*
>
> *The Republic of Kosovo shall have no territorial claims against, and shall seek no union with, any State or Part of any State.*
>
> *(...)*
>
> *The sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law'* (Articles 1– 2 of the Constitution).

The Constitution also provides that Kosovo *"will abide by all of its obligations under the Comprehensive Proposal for the Kosovo Status Settlement"* (Article 143 (1)) and envisages the international civilian and security presences on its territory (Articles 146, 147,153).

4.5 On 26 February 2009 the Trial Chamber of ICTY found Nikola Šainović, the former Yugoslav Deputy Prime Minister, Nebojša Pavković, a former General of the Yugoslav Army, and Sreten Lukić, the former Serbian Police General, guilty of crimes against humanity and violation of the laws and customs of war. Also Dragoljub Ojdanić, Chief of the General Staff was found guilty of deportation and forcible

transfer as a crime against humanity, and Vladimir Lazarević, the Commander of Pristina Corps was found to have aided and abetted the commission of a number of the charges of deportation and forcible transfer in the Indictment.

4.5.1 ICTY Trial Chamber – with relation to Kosovska Mitrovica/Mitrovica – found that:

> *"the events there amounted to attack upon civilian population of the town, that this attack was carried out in a systematic manner, and that it was part of the widespread and systematic attack against Kosovo Albanian civilians in at least 13 municipalities of Kosovo. (...) The chamber finds therefore that in relation to Kosovska Mitrovioca/Mitrovica town all the elements of deportations a crime against humanity (...) are satisfied. (..) Consequently the Chamber is convinced that the elements of the crime of other inhumane acts (forcible transfer) (...) are also satisfied. (...) The Chamber thus finds that in the village of Żabare/Zhabar, along with other neighboring villages in Kosovska Mitrovica municipality, all of the elements of deportation, as a crime against humanity (...) are satisfied."* (ICTY Case No. IT-05-87-T, 26 February 2009; paras. 1225–1231).

4.6 It should be also noted that the European Union launched a Rule of Law Mission in Kosovo (Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo; EULEX), indicating that:

> *"There is a need to prevent, on humanitarian grounds, possible outbreaks of violence, acts of persecution and intimidation in Kosovo, taking account, as appropriate, of the responsibility towards populations as referred to in Resolution 1674 by the United Nations Security Council on 28 April 2006."*

Moreover, EULEX assumed, under the auspices of UN administration, the majority of responsibilities of the latter. On 18 August 2008 UNMIK and EULEX signed a technical agreement on the sale of UNMIK surplus equipment and vehicles. On 26 June 2008 UNMIK formally announced the start of the reconfiguration process (Report of the Secretary – General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, paras. 21–25).

V. *SUI GENERIS* CHARACTER OF KOSOVO CASE

5.1 In the opinion of the considerable part of the international community, as well as of prominent representatives of the doctrine of international law, the situation of Kosovo has been exceptional. The Government of the Republic of Poland shares that view. The Declaration of Independence of Kosovo shall by assessed in light of that conclusion. It is to be added that the Declaration itself underlines that *"Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation"*. Finally, as Martti Ahtisaari, UN Special Envoy of the Secretary General on Kosovo's future status, put it: *"Kosovo is a unique case that demands unique solution"* (Letter dated 26 March 2007 from the Secretary – General addressed to the President of the Security Council, S/2007/168, para. 15).

5.2 The following elements constitute the *sui generis*, exceptional, character of Kosovo case:

5.2.1 Longstanding autonomy and self – governance of Kosovo, that dates back to, at least, half of the 20th century. Since the creation of SFRY in 1945, Kosovo enjoyed broad scope of autonomy, guaranteed by subsequent Yugoslav Constitutions (see in particular paras.: 3.3-3.12 above).

5.2.1.1 As a rule, Kosovo and its people enjoyed special rights within both SFRY and Serbia. It was expressed in particularly clear terms in the 1974 SFRY Constitution, where the will of Kosovo's people to exercise their rights within SFRY and Serbia is highlighted (see para. 3.5 above). After the political changes of 1980s and 1990s (aimed notably at the limitation and, afterwards, the elimination of all forms of Kosovo's autonomy), as well as in the result of deteriorating humanitarian situation in Kosovo, the will of its inhabitants evolved into achieving their own independence (initially, still in the framework of SFRY). Moreover, that will was consequently and repeatedly expressed, which took place against the background of the process of progressive "autonomization" of KOSOVO.

5.2.1.2 Gradually, together with the strengthening of the Serbian repressions against Kosovo, the will of its people to create their own state intensified – since Kosovars were deprived of the possibility to govern themselves autonomously. Notwithstanding the Serbian repressions, Kosovo in 1990s managed to sustain its – parallel to the Serbian ones – institutions (including the Assembly). It should be stressed that those institutions – characteristic for a state – were created entirely outside of Serbian authority and control. At a later stage those national institutions were strengthened and supported under the auspices of United Nations.

5.2.2 Second important feature decisive of Kosovo's *sui generis* character is the fact that **systematic and broad scale violations of human rights and humanitarian law by Serbia took place there.**

5.2.2.1 As indicated, 1980s and 1990s were marked by the spreading of ethnical cleansing, forced displacement, arbitrary executions and detentions as well as enforced disappearances and outbreaks of violence directed also against Kosovo's civilian population (see also ICTY Trial Chamber findings, para. 4.5 above). These events were also the main reason for the commencement of NATO air campaign and, later on, for the adoption of UN SC resolution 1244 (1999).

5.2.3 The third *differentia specifica* of Kosovo is the fact that **its status was "internationalized"** as a consequence of systematic and broad scale violations of human rights and humanitarian law which have been committed by Serbia there. International community introduced thus *de facto* and *de iure* protection of Kosovars against hostile and violent actions of Serbia.

5.2.3.1 Beginning with the adoption of UN SC resolution 1244 (1999), Kosovo was practically governed and supervised by international institutions – the United Nations, North Atlantic Treaty Organization, Organization for the Security and Co-operation in Europe and the European Union.

5.2.3.2 Under the UN Special Representative for Kosovo legislation was passed concerning a broad range of issues (e.g. customs, currency, taxes, banking system, telecommunication law, penal law or family law). At the same time public and municipal administration, economic, judicial and health care system were further developed, public safety institutions were organized and elections were held.

5.2.4 Since the commencement of NATO air campaign and the adoption of the UN SC 1244 (1999) resolution, **Serbia lost effective authority and control over Kosovo** which was assumed in full by the UN administration and Kosovo institutions. That situation existed since 1999 and within the next 9 years Serbia neither exercised nor resumed its control in Kosovo. In that sense, the adoption of the Declaration of Independence in 2008 only confirmed the reality.

5.2.5 All the above described factors treated together constitute the *sui generis* character of Kosovo's Declaration of Independence. It is also why the "Kosovo case" shall not be regarded as setting a general precedence for any other similar situation. If in a particular case only one or a few (but not all) of above mentioned *sui generis* conditions were fulfilled, it could not be legally assessed *per analogiam* to Kosovo's Declaration of Independence.

5.2.5.1 It shall also be reminded that the international community, at least since 2007 knew that there was no coming back to the autonomy of Kosovo within Serbia. As Mr. Ahtisaari stated *"independence is the only viable option for Kosovo"* (Letter dated 26 March 2007 from the Secretary – General addressed to the President of the Security Council, S/2007/168, para. 5).

5.2.5.2 In the situation where the UN SC was unable to take further steps in determining the future status of Kosovo on behalf of international community as well as after the exhaustion of all diplomatic means, those steps were taken, peacefully, by the people of Kosovo themselves on 17 February 2009.

VI. PRINCIPLE OF SELF – DETERMINATION

6.1 On the basis of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UN GA resolution 2625 (XXV), 25 October 1970) the following four forms of the right to self-determination may be singled out:

a) of people under the colonial dependence or under other form of domination;

b) of people under alien occupation;

c) of people inhabiting states that infringe the right to self-determination and, thereby, being prevented from effective exercise of that right (which could, in particular, take the form of those people being represented in the host state's government that would reflect, in a not discriminatory manner, the whole of a given state population);

d) of people inhabiting states that respect the principle of self-determination and, consequently, those people being adequately represented in the government of the host state.

6.2 In the situation (d) above, people of a given territory are not empowered to exercise their right to self-determination (e.g. through secession), unless such a right is guaranteed by a constitutional act and conditions to execute that right are fulfilled.

6.3 In the category (c) above, on the other hand, right to self-determination cannot be effectively exercised by people within a given country and, consequently, that right may under certain circumstances entail secession and be vindicated by all legal means.

6.4 It is possible to distinguish between the primary and remedial right to secession. (see e.g. A. Buchanan, *Justice, Legitimacy and Self-determination. Moral Foundations for International law,* Oxford University Press 2004, p. 271 and *subseq.*, J. Crawford, *The Creation of States in International Law,* Second Edition, Oxford University Press 2006, pp 119–128).

6.5 Remedial right to secession is based on a premise that a state gravely violates international human rights and humanitarian law against peoples inhabiting its territory. Those violations may include *inter alia:* genocide, crimes against humanity, war crimes and other massive violations of human rights and humanitarian law.

6.6 As the Supreme Court of Canada in Quebec Secession case put it:

> *"A right to external self-determination (which in this case potentially takes form of the assertion of a right to unilateral secession) arises in only the most extreme cases and, even then, under carefully defined circumstances. (...) Although this third circumstance* [of external self-determination] *has been described in several ways, the underlying proposition is that, when a people is blocked from meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. (...) Clearly, such a circumstance parallels the other two recognized situations in that the ability of people to exercise its right to self-determination internally is somehow being totally frustrated."* ([1998] 2 S.C.R. 217, paras 126–134; emphasis in original).

6.7 Therefore, remedial right to secession may only come into question as a last resort when it is necessary to protect the inhabitants of territories from wrongful acts of their host states (see also *The Implementation of the Right to Self Determination as a Contribution to Conflict Prevention,* Report of the International UNESCO Conference of Experts held in Barcelona, 21–27 November 1998, Dr. Michael C. van Walt van Praag with Onno Seroo (eds), pp. 22–28).

6.8 It is also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations itself that states explicitly:

> *"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."* (emphasis added; similar explanation may be found in: *United Nations Word Conference of Human Rights, Vienna Declaration and Programme of Action,* 25 June 1993, 32 I.L.M. (1993), p. 1665).

6.9 It may be inferred therefore that the subordination of the principle of self-determination to the principle of territorial integrity is by no means of absolute character. The latter does not always have priority irrespective of the particular conditions of a given situation.

6.10 In the light of the considerations presented, *inter alia,* in paras 6.1–6.7 and Chapter V of the present statement, the conclusion has to be drawn that Kosovo was entitled to exercise its remedial right to secession.

6.11 It shall be underlined once again that the exercise of the right to self-determination of Kosovo's people in Serbia was not longer possible and unattainable. That conclusion is validated by the scale of violations of human rights and humanitarian law by Serbia. In such a situation Kosovo could legitimately exercise its remedial right of secession from Serbia in order to protect and preserve most fundamental rights and interests of its people.

6.12 Therefore, the territorial integrity of Serbia – in the consequence of its own wrongful acts against Kosovo – eroded and was undermined already in 1999. That led to the situation where Serbia lost its effective authority and control over Kosovo and has not regained it within the next years. In the consequence of the Serbian violations of human right and humanitarian law, it may also be argued, that that State could no longer have recourse to the principle of territorial integrity as protecting Serbia from the exercise by the Kosovars of their remedial right to secession.

6.13 It is also beyond any doubt that certain norms of international law concerning, *inter alia,* the protection of fundamental human rights as well as self -determination of peoples have special legal value and meaning. These norms have been often referred to as peremptory norms (see e.g. A. Cassese, *International Law,* 2nd Edition, Oxford University Press 2005, pp. 64–67 and bibliography quoted therein; *Draft Articles on the Law of Treaties with commentaries,* YILC, 1966, Vol. II, p. 248; *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts,* YILC, 2001, Vol. II, pp. 110 *et. seq).* It corresponds to the view that in case of severe violations of certain fundamental human rights and humanitarian law norms,

the principle of self – determination may not be limited to its internal aspect (i.e. self – determination within a "host" state).

6.14 The International Court of Justice also affirmed on a number of occasions that certain norms or obligations have special nature. In the *East Timor* case, the Court said that:

> *"Portugal 's assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (...); it is one of the essential principles of contemporary international law"* (Case concerning East Timor, Portugal v. Australia, Judgment, I.C.J. Reports 1995, p. 102).

That assertion was repeated in the International Court of Justice's advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the Court referred also to its judgment in the Barcelona Traction case:

> *"The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33). The obligations erga omes violated by Israel are the obligation to respect the right of the Palestinian people to self determination (...)."* (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, para. 155).

In the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case, the Court also highlighted that:

> *"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the consistence of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such a odious scourge" (Preamble to the Convention)" (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion, I.C.J. Reports 1951, p. 23).

The Court sustained its reasoning in that respect in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, where it stated in particular that:

> *"The Court affirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning Armed Activities on the Territory of Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda), paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (jus cogens)."* (Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bośnia and Herzegovina v. Serbia and Montenegro, 26 February 2007, para. 161).

6.15 Serbia not only did not provide sufficient guarantees to the protection of fundamental human rights but was the one that violated these rights in Kosovo depriving it at the same time of autonomy. In such a situation people of Kosovo requested execution of their inherit rights that by no means could have been exercised within Serbia.

6.16 Finally, international law should be viewed as a dynamic, not as a static system. It is because that system changes and develops through, *inter alia,* the constant practice of states. Therefore the content of norms and principles of that legal system (even the ones of such a significance as territorial integrity and self -determination) are subject to continuous modifications and adjustments. For example, the political and legal system established on the basis of Potsdam and Yalta conferences and arrangements, supplemented by the CSCE/OSCE process, at that time was considered to be of a quasi-permanent nature. However, the so called "Spring of Nations" in the Eastern and Central Europe that commenced in Poland in 1980 brought about significant changes in the international system, including the independence of many states, the German reunification, fall of the Soviet Union or the dissolution of Yugoslavia.

VII. INTERPRETATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1244 (1999)

7.1 It is the view of the Republic of Poland that the Kosovo's Declaration of Independence is not contrary to the UN SC resolution 1244 (1999).

7.2 Though this resolution refers to the territorial integrity and sovereignty of the then SFRY, it does so only in a preambular language, not in the operational one. Moreover, that reference concerns solely the provisional phase of the UN administration in Kosovo. Hence, it does not predetermine the applicability of these principles to the future status of Kosovo. The relevant parts of the UN SC resolution 1244 (1999) read:

- [The Security Council] *"Decides that the main responsibilities of the international civil presence will include:*

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648). (...)" (op. para. 10; emphasis added).

- *"A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA."* (Annex 1, item 6; emphasis added).

Analogous formulations may be found in Annex 2, para. 8 of the resolution.

7.3 It may be inferred therefore that the Security Council, while deciding that the solution to the "Kosovo crisis" would be based upon general principles contained in Annex I and elaborated on in Annex II to the resolution, did not took the stance that such a solution may only be attained through its own decisions.

7.4 Consequently, the UN SC resolution 1244 (1999) needs to be interpreted in the light of the above presented considerations, as well as of *sui generis* character of Kosovo case.

7.5 As it was already stated above, the international community realized that independence is *"the only viable option"* which is expressed in the most comprehensive way in the Ahtisaari's Plan. The failure to implement that Plan and further development of the situation regarding Kosovo also constitute factors that need to be taken into account while interpreting the UN SC resolution 1244 (1999).

7.6 Moreover, the Security Council was not able to execute its functions envisaged in the UN Charter, to *"remain actively seized of the matter"* or to propose viable solutions for the future status of Kosovo that would be acceptable for the parties to a conflict and the international community as a whole.

7.7 The political impasse within the UN SC and, thus, the loss of its control over the situation in Kosovo catalyzed the exercise by the people of Kosovo of its remedial right to secession. It shall be also noted that the people of Kosovo only exercised that right after the UN-guided course of action in determining the Kosovo's future status came to a halt.

VIII. GENERAL CONCLUSIONS

8.1 The Government of the Republic of Poland is of the opinion that the Declaration of Independence of 17 February 2008 has not conflicted with any norm of international law.

8.2 The Government of the Republic of Poland respectfully asks the Court to respond to the question posed in the General Assembly resolution 63/3 taking into account considerations presented in this statement.

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