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The International Covenants on Human Rights in the Practice of the Polish Ombudsman

TADEUSZ ZIELIŃSKI

Omnes populi qui legibus
et moribus reguntur, partim
suo proprio, partim omnium
hominum iure utuntur.

(Gaius: *Institutiones, commentarius primus 1*)

The famous citation of the Roman jurist (117–180) is in no case a mere decoration of the text or an attempt to display the erudition of the author. Human rights recognized by the international community form an eternal *ius gentium*, which, according to Gaius, originated from the natural reason of people (*naturalis ratio inter omnes hominis constituit*).

The international covenants on human rights are specially in the centre of interest of the two institutions dealing with the protection of the rights of citizens – namely of the Ombudsman and the Constitutional Court. It is so despite the lack of any provisions authorizing them to examine if the law of the state is in conformity with the covenants or other international human rights instruments (like the European Convention of Human Rights or International Labour Organization conventions).

Article 1 of the Act on the Constitutional Court reads that the Court is to examine the constitutionality (conformity with the Constitution) of acts of the Parliament, and the constitutionality and the legality (conformity with acts of Parliament) of other normative acts. The first article of the Act on the Ombudsman provides that his major duty is to protect the rights and freedoms of citizens as determined in the Constitution and other normative acts.

No provision emphasizes that the Ombudsman is to protect the rights of men (human rights). While Article 1(3) of the aforementioned Act obliges the Ombudsman to check if activities or omissions of organs, organizations and institutions do not result in breaches of law, the latter in the context of Article 1(2) of this Act means only municipal (Polish) law and not international law.

There is however an exception from the principle that the Ombudsman is to protect only the rights of the Polish citizens (nationals). Namely, Article 18 of the Ombudsman Act provides that the Ombudsman is to take care of the rights and freedoms

of aliens and stateless persons domiciled in Poland. The rights of these two categories are not dependent on nationality, they are just rights inherent to humanity. There is no doubt that the Covenants and other human rights instruments should be applied with respect to these persons. The rights attributed to nationals may not contradict these universal rights as well.

I. The Views of the First and the Second Polish Ombudsmen with Respect to the Application of the International Covenants on Human Rights

According to the first Ombudsman in the history of Poland – Prof. Ewa Łętowska – “Ombudsman is such an organ that it must – *nollens vollens* – promote human rights as such, at least to a certain degree.” It is so as the Ombudsman Act obliges this institution to take into consideration not only legal regulations but also requirements of the social justice (justice tout court as Mrs. Łętowska put it). So, “if acts contrary to the requirements of justice are to put into motion the response of the Ombudsman and if we assume that justice does not contradict law but only correct it, we conclude that justice is to be found in the values protected in the constitution and in the international human rights instruments.” Mrs. Łętowska was convinced that the promotional activities of the Ombudsman should consist of the following:

- 1) the educational activities with respect to human rights – especially through the contacts with media,
- 2) the pointing at individual cases of infringements of human rights by the Polish authorities.

The latter took place in the form of the Ombudsman pronouncements addressed to ministers, the Constitutional Court and other institutions. Mrs. Łętowska was the author of several pronouncements referring not only to different activities of the administrative authorities but also to the ones of the legislature and the judiciary.

The author himself – as the second Polish Ombudsman – continued the promotional activities of his predecessor. The ratification by Poland of the European Convention for the Protection of Human Rights and Fundamental Freedoms prompted the Ombudsman to put more emphasis on international law instruments in his formal pronouncements.

The importance of the Ombudsman in this respect was recognized by the doctrine. A. Bisztyga wrote that “due to the wide scope of his competence, the Ombudsman can play the role of the propagator of the international standards of human rights” (the preface to the Polish edition of the European Convention of Human Rights, Almaprint, Katowice 1992). According to the author, despite the non-binding character of the pronouncements, they must be recognized as official statements of a public organ.

The second Ombudsman took human rights into consideration in several forms. Not only his oral statements and publications in the media, but also his lectures presented at the international conferences and the meetings with other Ombudsmen were devoted to them. The Bureau of the Ombudsman published several materials – some

of them dealt expressly with the rights as enshrined in the Covenants on Human Rights, the European Convention and the ILO conventions ratified by Poland.

Infringements of these rights were the subject of several pronouncements of the Ombudsman (like it was before). In several requests to the Constitutional Court the Ombudsman invoked, however only as a subsidiary justification, infringements of treaties on human rights standards. It was in line with the opinion of the Constitutional Court that despite its lack of competence to rule on constitutionality of treaties, the references to them may serve as additional argumentation, important for the proper implementation of the Polish law.

What is specially important – a new idea of human rights emerged at the time of office of the author of the present article. According to this idea, the Ombudsman defends human rights *de lege lata* – as the majority of human rights are just rights of citizens as determined in the Constitution. So the very basis for the activities of the Ombudsman in the field of human rights is the Ombudsman Act itself. Actually the scopes of the two terms: “human rights” and “rights of citizens” do not exclude completely each other.

II. Human rights and the rights of citizens in the Polish Constitution – the catalogue of rights under the protection of the Ombudsman

Chapter 8 of the 1952 Constitution (kept in force by the Provisional Constitution from 17 October 1992) regulates basic human rights referred to as well in the Universal Declaration of Human Rights, the Covenants on Human Rights, the European Convention of Human Rights and the ILO conventions.

I. The following rights named in the Covenant on Economic, Social and Cultural Rights are also provided for in the Polish Constitutional Provisions:

1) the right to work – Art. 68 of the Constitution, Art. 6 of the Covenant. This right has been prescribed in detail in the European Social Charter from 1961 (signed by Poland, but not ratified yet),

2) the right to rest – Art. 49 of the Constitution, according to Art. 7(d) of the Covenant this right is part of the “right of everyone to the enjoyment of just and favourable conditions of work,”

3) the right to health care and assistance in cases of disease or inability to work, including the right to social security – Art. 70 of the Constitution, Art. 9 and 12 of the Covenant,

4) the right to form and join trade unions – Art. 84 of the Constitution, Art. 8 of the Covenant,

5) the right to education – Art. 72 of the Constitution; Art. 13 of the Covenant attributes this right to everybody,

6) the right to use the achievements of the culture and to participate in the formation of the national culture – Art. 73 of the Constitution, its equivalent is Art. 15 of the Covenant.

Article 11 of the Covenant obliges the states to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.” The Constitution does not recognize the right of everyone to housing, it however obliges the state to improve the housing situation, through support of different forms of building activities and rational management of the housing resources (Art. 79(5)).

Such norms were of little help for the Ombudsman as they only indicate a program to be followed in the future and do not impose any unequivocal obligations.

II. The rights defined in the Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms have always been in the very centre of interest of the Polish Ombudsman. The following provisions are at stake in this context:

1) the equality before the law (including equality of men and women, and legitimate and illegitimate children) – Articles 67(2), 78 and 79(4) of the Constitution; these rights form also the basic right of any human being, as according to Art. 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights,”

2) the right to freedom and personal security – Article 87 of the Constitution, Art. 9 of the Covenant and Art. 5 of the European Convention,

3) the freedom of conscience and religion – Art. 82 of the Constitution, Art. 2 of the Universal Declaration and Art. 2 of the European Convention,

4) the freedom of expression (orally or in print), assemblies, processions and manifestations – Art. 83 of the Constitution, Art. 19 and 22 of the Covenant and Art. 9, 10 and 11 of the European Convention.

The Constitutional Provisions do not mention expressly the right to access to the courts, recognized in Art. 5 of the European Convention. In the light of Art. 63 of the Constitutional Provisions, however, there is no doubt that Polish nationals have been accorded this right.

The above list of rights illustrates perfectly the double role of the Ombudsman’s activities – while defending constitutional rights, he takes care of human rights as provided for in the international instruments. Human rights as such have their counterparts in the catalogues of the rights of citizens. The latter are regulated as a rule in constitutions of different states. The Polish law has incorporated almost all basic human rights. The Polish nationality is not a pre-condition of the protection of these fundamental rights, which are attributed to all human beings and which are to be respected according to international commitments of Poland. According to Article 18(2) of the Ombudsman Act, the Ombudsman is to take care of the rights attributed to foreigners in Poland.

III. Infringements of the Human Rights as Indicated in the Official Pronouncements of the Ombudsman

1. The Universal Declaration of Human Rights

Art. 7 (the principle of equality before the law and the right of equal protection of the law).

This principle was invoked by the Ombudsman in the reasoning to his request to the Constitutional Court from 16 April 1992. The Ombudsman requested the Court to declare the unconstitutionality of the provision according to which unemployment benefits were denied for those who lived together with a partner having an income exceeding more than twice the average income (case RPO/94115/92/III/311/JM).

Art. 13 (the principle of the free movement and residence within the borders of each State and the right to leave any country, including one's own and to return to one's own country).

This right was invoked (as a subsidiary argument) by the Ombudsman in his request to the Constitutional Court of 7 July 1992. The Ombudsman opposed the act of Parliament according to which pensions or retirement benefits were suspended in the case of their recipient's leaving of Poland and permanent stay in another country (case RPO/97815/92/VI/Z). In the opinion of the Ombudsman the right to leave one's own country would be undermined had it been connected with negative consequences.

Art. 14 (the right to seek and to enjoy in other countries asylum from persecution).

This very right was the topic of a lecture presented in Helsinki in 1993 during the conference of Ombudsmen, which was devoted to human rights as applied to aliens.

2. The International Covenant on Civil and Political Rights

Art. 2 (the principle of equal rights of all individuals without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national and social origin, property, birth or other status).

In 1990 the Ombudsman pointed at the illegality of discriminatory treatment of the officials of the former communist party and the former communist youth organizations with respect to employment. This pronouncement was addressed to both the Minister of Education and the Minister of Culture (case RPO/R/3128/90) Mrs. Łętowska found that the resolution of "Solidarność" (a famous Polish trade union) of May 1990 appealing that such persons should not be employed in the field of education and culture infringed the principle of equality before the law.

Art. 3 (equal rights of women).

This provision was invoked (though as a supplementary argument as well) by the Ombudsman in several cases:

1) No. RPO/43271/89/I, in which she opposed discriminatory treatment of a woman with respect to employment as an engine-driver,

2) Case RPO/60469/90/II dealing with different treatment of wives of men-workers as compared with the treatment of husbands of women-workers (in this case a request to the Constitutional Court was issued),

3) Case RPO/43020/89/III, in which the Ombudsman questioned the very identity of the time-periods provided for men and women working as miners and necessary for the acquisition of special privileges. In the opinion of the Ombudsman such a unification was not in conformity with the general principle differentiating time-periods of men and women with respect to the social security rights.

4) Art. 8 (the prohibition of compulsory work).

This very provision was the basis of several pronouncements of the Ombudsman when the Polish law provided penalties for people abstaining from work (spongers) (case RPO/54/304/89/II).

Art. 9 (the right to freedom and personal security).

This provision was invoked by the Ombudsman in several individual cases and in an action for annulment of an act of the Parliament.

The Ombudsman protested *i.a.* against the fact of keeping of a minor germ carrier of HIV not in an establishment for minors but in a prison for the purpose of mere tests of the mental health (RPO/729132/91/IX).

As an infringement of Art. 9 the Ombudsman characterized a situation in which a person arrested is kept longer than it is provided for in the respective order, the latter being renewed later with a retroactive effect (RPO/62417/90/IX, RPO/66342/90/IX, RPO/5981/90/IX).

Art. 9 was found to be infringed in cases of illegitimate termination of a break (a kind of suspension) of the imprisonment (RPO/67810/90/IX).

Also the treatment of patients in hospitals provided several examples of breaches of Art. 9 of the Covenant. *E.g.* in case RPO/42773/IX/90 the irregularity consisted of keeping a person in a prison for a year while this person should have been placed in a mental hospital. During this time the court exchanged correspondence with institutions which denied turning the concerned person to the hospital.

In case RPO/54929/90/I the Ombudsman ascertained the infringement of Art. 9 of the Covenant consisting of a detention in a close mental hospital of a person with respect to whom the order of detention had been nullified for the time of mental tests.

Both the first and the second Ombudsman challenged the practice of taking persons without their consent to mental hospitals on the basis of a mere ministerial instruction (a kind of by-law with a dubious legal standing). It was only the Statute of 19 August 1994 on the Protection of the Mental Health that put an end to this practice – evidently conflicting the international obligations of Poland.

Also the practice of the excessive taking of fingerprints by the Police with no statutory basis was found to breach Article 9 of the Covenant (case RPO/5778/89/II, Report of the Ombudsman for the period 12 February 1994–12 February 1995, page 149).

This provision was also invoked in a very important request to the Constitutional Court from 1992. The Ombudsman held that certain provisions of the amendments to the 1963 Act on the Aliens were not in conformity with the Polish Constitution. The provisions in question made it possible for the police to keep a foreigner into a special arrest, when he could be suspected to neglect the order of deportation. What was found by both the Ombudsman and the Constitutional Court to infringe Art. 9 of the

Covenant was not the very existence of the right of the Police, but the lack of recourse to court for individuals concerned (case RPO/91292/91/II/JE).

Art. 10 (humanitarian treatment of persons serving a jail sentence, respect for their inherent dignity and the right to social rehabilitation).

This right has attracted much interest of the Ombudsman. Mrs. Łętowska characterized the following practices as breaches of this right:

- humiliating searchings of women prisoners – aimed at finding hidden cigarettes (RPO/14283/89/IX),

- the very practice of using with respect to some prisoners of the term “unruly recidivists”, what restricted their right to the social rehabilitation (RPO/54941/89/IX).

The second Ombudsman dealt *i.a.* with the following cases:

- congestion (over-crowdedness) of several prisons (case RPO/110751/92/IX),
- lack of canalization in several prisons, the result thereof being that prisoners have to inform prison authorities about their physiological needs (case RPO/R/18/92),

- shortage of jobs for prisoners what makes them stay idle in closed premises (case RPO/R/38/92),

- shortages of the medical care, specially with respect to diabetics and HIV carriers,
- ill-treatment of prisoners through a rude behaviour of prison-service (what belongs fortunately more and more to the past), searchings of their cells in a way resulting in damages for prisoners, limitations of the rights to walks and participation in cultural programs; turning prisoners from one cell to another in order to disturb them, informing other prisoners about specially despised crimes of other prisoners resulting in ostracism towards the latter.

- the lack of protection of imprisoned persons from aggression of the other prisoners,

- the unjustified keeping of prisoners and arrested persons in isolated cells (sound-absorbing ones),

- denial to the families of died prisoners of the right to dignified burial conforming to their religious requirements.

The activities of the Ombudsman under Article 10 of the Covenant are not, however, welcomed by the society. The Ombudsman himself attempted to induce the public to change view in this respect. He published an article “Dignity of Prisoners” in the daily “Rzeczpospolita” of 13 November 1993. The subject is also widely presented in the yearly reports of the Ombudsman.

Art. 12 (freedom of movement, free choice of the residence, the right of entry and repatriation).

This right, as well as Article 13 of the Universal Declaration, was invoked by the Ombudsman in two cases:

- in the abovementioned request to the Constitutional Court in connection with the suspension of pensions and retirement benefits for beneficiaries leaving Poland and permanently residing abroad (RPO/97815/92/VI/Z),

- in the pronouncements in favour of the repatriation of Poles from Kazakhstan. Such pronouncements were addressed to several Polish Prime Ministers and the Parliamentary commissions (cases RPO/118713/93/III, RPO/1981179/95/302/III/JM, RPO/108042/93/302/III).

The right to freedom of choice of the place of residence was invoked by the Ombudsman at the occasion of his defence of the rights of HIV-contaminated children from Łaski.

More on the rights from Art. 12 of the Covenant is to be found in the two lectures presented by the second Ombudsman during the conferences of Ombudsmans. The first of them was held in Madrid in 1992, the second – in Helsinki in 1993.

Ewa Łętowska invoked Art. 12 of the Covenant, when dealing with the denial of admission of a person who had left Poland because of political reasons (case 13940/88/I).

During the term of office of the second Polish Ombudsman such infringements were no longer to be found. However, the crises in the field of housing still results in a situation contrary to the right of free choice of residence.

Art. 14 (the right to a fair trial).

During the term of office of the first Ombudsman this very provision was the basis of her several interventions. The Ombudsman questioned:

- the then exclusion of administrative offences from the jurisdiction of the courts,
- the exclusion of the jurisdiction of the Polish courts with respect to crimes and damages resulting from activities of the Russian troops, then stationing in Poland (cases RPO/52851/90/I, RPO/59283/90/I),
- the lack of access to judiciary for the members of the Border Service (case RPO/72768/91/III, request to the Constitutional Court of 4 November 1991),
- the long duration of proceedings before courts and inquiries (*i.a.* in case RPO/33845/90/II and others indicated in the report for the year 1990),
- breaches of the right of defence (*i.a.* in cases RPO/694472/91/II, RPO/59370/90/II),
- irregularities in the rehabilitation proceedings of the victims of the Stalin regime. These irregularities manifested themselves in the discontinuance of the proceedings because of amnesty or prescription, instead of judgments on acquittals (declaration of not guilty) (case RPO/70201/91/III).

During the term of office of the second Ombudsman the protractedness of proceedings intensified and the access to justice was limited due to excessively high fees. The Ombudsman classified these phenomena not only as infringements of Article 14 of the Covenant but also of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the latter, the right to court encompasses a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Art. 15 (*nullum crimen sine lege*).

According to this article no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time when it was committed. This right was blatantly infringed under the rule of the Decree on the Martial Law of 13 December 1981 which incriminated activities taken before the promulgation of the very act. The first Ombudsman initiated the proceedings before the Supreme Court against one of sentences contrary to the principle *nullum crimen sine lege* (case RPO/54557/89/II).

As an evident example of the breach of this very principle the Ombudsman held the excessive forfeitures of cars used for the purposes of transmitting leaflets against the communist authorities and even attempts to forfeit houses or flats where these leaflets had been prepared (cases: RPO/4796/88/II, RPO/18371/97/II, RPO/57683/90/II, RPO/47953/89/II, RPO/25560/89/II and RPO/32655/89/II).

During the term of office of the second Polish Ombudsman the principle *nullum crimen* was not broken so evidently as it had been the case at the time of the struggle of the totalitarian state with the democratic opposition. There were, however, three cases that deserved special interest in this context.

The first of them was connected with a 1993 amendment to the Act on the Organization of the Courts. The amendment provided that judges might be dismissed for the breach of the principle of the judicial independence during the time of socialism. It meant that the Act was to have a retroactive effect. In his request to the Constitutional Court of 2 August 1993 (case RPO/127988/93/I/1/AM) the Ombudsman claimed that the general (not to say obscure) character of the above expression ("breach of the principle of the judicial independence") contradicted the principle *nullum crimen sine lege*. The incriminated activities have to be determined strictly at the time of their commission.

Another request of the Ombudsman concerned the 1991 Act on Combatants and Certain Persons Persecuted during and after the War. This statute took away the combatant benefits from members of some communist and pro-soviet formations, among them from persons not involved directly in repressions of the Polish patriots. The Ombudsman asked the Constitutional Court to declare this act of Parliament to be contrary to the Constitution (case RPO/116957/93/316/III/JM). The very deprivation of certain persons of certain benefits was recognized as a form of responsibility which according to the principle *nullum crimen sine lege* must be not only individual and not collective but also provided for by the law at the time of the commission of incriminated acts. Repressing any persons for unproved acts or omissions only because of their membership in a given formation (mainly the former communist secret service and police) would amount to an example of collective responsibility.

The third case emerged in 1995. In his letter of 23 June 1995 the Ombudsman suggested the Senate Commission of Legislation to bring about an amendment of the criminal law statute. The Ombudsman opposed one of the provisions of this statute, which put aside with a retroactive effect the prescription of crimes committed by the communist public officials in the years 1944–1989.

Art. 16 (the right to respect for one's personality).

This provision was invoked in a case of a transsexual who demanded the indication of her sex in her official documents to be changed by the court order (RPO/660049/90/II). The Ombudsman initiated a special review procedure before the Supreme Court, which however did not share the view of the Ombudsman, according to which a proper determination of sex in the documents of a given person is a very important aspect of the personality of this person.

Art. 17 (the right to privacy).

In 1992 the Ombudsman intervened in the case of access of the members of Parliament to personal files of individuals held by the municipalities. In his opinion, such a right is not attributed to the members of Parliament by the respective statute, as it provides only for their right to access to information about individuals (case RPO/102449/92/I).

The Ombudsman has received and still receives several claims concerning violations of the right of secrecy of correspondence of prisoners or arrested persons. As a rule, the scope of intervention of the Ombudsman in this field is very narrow because of the statutory limitations of the right to freedom of correspondence of these two categories of persons. The Ombudsman can however address any attempts of the prison authorities to check any letters of prisoners addressed to the Ombudsman himself (case RPO/R/45/90). Several prisoners claimed that their right to privacy is infringed during visits of their relatives in the prisons (case RPO/142772/94/VII).

The Ombudsman has also paid attention to the expediency of keeping secret the very fact of the imprisonment of a given person. The right to secrecy is infringed for example when the documents from the prison are sent to the place of work of the imprisoned person (case RPO/31144/ 88/III) or to the place of inhabitation (case RPO/137080/94/VII/4-190).

A considerable number of infringements of the right to secrecy of the personal data was the reason of the communication of the Ombudsman to the Minister of Interior.

In two cases the Ombudsman dealt with alleged examples of transfer of secret data concerning the behaviour of a member of a crew and indicating the possibility of his mental disease (RPO/123164/93/I, RPO/127492/93/I). Both claims turned out to be unjustified.

In case RPO/114868/93/I the Ombudsman succeeded in his struggle against one of the provisions of the Rules of Employment of one of the Polish municipalities which obliged its employees to keep secret their remuneration. This provision was deleted. What was involved here was the positive right of privacy.

The second Ombudsman no longer dealt with claims concerning interference with people's home life by the secret police, though such cases had been encountered by Mrs. Łętowska (as it was in the case RPO/1195/90/V).

On the contrary, there were more allegations of infringements of the right to privacy by the media.

The Ombudsman found that the right to privacy was infringed several times in the context of the activities of the so called Advisory Commissions for Medical Benefits Abroad. They operated on a basis of a mere ministerial order of 1985. The Ombudsman held the opinion that these commissions illegitimately entered the sphere of activities covered by the professional secret of doctors (RPO/160918/94/I).

In his letter to the Minister of Interior the Ombudsman appealed that the preparatory works on the Act of Parliament on the Protection of the Personal Data should be accelerated (RPO/162613/94/IX).

Also the out-dated personal questionnaires to be filled in by the newly employed persons were found to encroach upon their right to privacy. Such questionnaires re-

quired persons applying for a job in the Police to inform about any fact of their stay abroad (RPO/3/90). On the other hand, young teachers were requested to declare their religion.

Also the practice of several building cooperatives which published names of their tenants not paying their rents was found to infringe Art. 17 of the Covenant (RPO/124963/93/V/ST).

Art. 18 (freedom of thought, conscience and religion).

The Ombudsman has taken several measures against practices infringing this right. Two requests to the Constitutional Court were prepared. In the first of them the Ombudsman questioned the reintroduction of lessons of religion to the public schools on the basis of a mere ministerial instruction (as a rule a non-normative act) (RPO/66885/90/I and RPO/67161/90/I).

In the second request the Ombudsman claimed illegality of the Ministerial Order on the Organization of the Lessons of Religion in the Public Schools. This author recognized that the order was in conflict with Art. 82 and three acts of Parliament of Constitution (an equivalent of Art. 18 of the Covenant).

According to Art. 18 of the Covenant the right to freedom of thought and religion comprises the freedom to have religion and to manifest it in practice. The latter was defended by the Ombudsman in 1992 when he questioned the imposition of fees for entry to certain religious establishments in the Tatra mountains (RPO/96813/92/I).

In 1995 the Ombudsman drafted a letter to the authorities of the ZHP (the Polish Scout Organization) in which he suggested that they reconsidered the necessity of preserving the religious form of the scout oath – referring *inter alia* to God (RPO/193566/95/I). The Ombudsman respected the right of each association or organization to adopt its own statute (which determines the text of the oath). What he suggested was a mere indication that “the service to God” from the scout oath is not equivalent to the practice of religion. In the opinion of the Ombudsman, such an indication would make the ZHP open for the young people of different religions.

Also the freedom of thought was infringed in the above-mentioned case of the personal questionnaires for teachers.

Art. 21 (the right of assembly).

The 1993 intervention of the police against a demonstration before the Royal Castle in Warsaw (4 June 1993) prompted the Ombudsman to request the Constitutional Court to give a binding interpretation of two provisions of the 1990 Polish Statute on Assemblies and of one provision of the 1983 Statute on Road Traffic (RPO/127990/93/I/JS). In the reasoning to his request the Ombudsman emphasized that the right of peaceful assembly is a fundamental human right and may be limited only to the extent necessary and established by the statutes (Art. 19 of the Covenant and Art. 9(2) of the European Convention).

Art. 22 (right to freedom of association).

Several claimes were addressed to the Ombudsman in connection with the obligatory association of doctors and solicitors in self-governmental organizations. The

Ombudsman had however to take into consideration the self-governmental, public character of these organizations and their functions of control over the associated persons. In consequence he did not find their existence to infringe the freedom of association (RPO/19882, RPO/40845/90/I, RPO/54675/90/I, RPO/55775/90/I, RPO/62781/90/I, RPO/57502/90/I).

The Ombudsman however objected the practice of making several rights or privileges dependent upon the participation in certain organizations. For example, the reduction of TV fees for deaf persons was reserved for members of the Association of Deaf Persons; only associated artists were entitled to leaves (RPO/7055/88/III); sport weapons were sold exclusively for members of the Polish Sport Shooting Organization (RPO/149629/94/I).

Art. 23 (the right of a family to protection by the society and the state).

The rights of families were in the very centre of interest of the Ombudsman.

In 1994 the Ombudsman appointed his Deputy for the Matters of Children and Family. But also before 1994 the Ombudsman actively protected the rights of children and mothers breeding small children to social assistance and protection.

The Ombudsman ascertained several breaches of the 1990 Statute on the Social Assistance and the 1993 Governmental Regulation on Social Assistance for Pregnant Women and Women Breeding Children (see: cases RPO/154875/94/I, RPO/158956/94/I, RPO/162932/94/I, RPO/160028/94/I and others invoked in the Report for the third year of the term of office of the second Ombudsman). The interventions of the Ombudsman resulted in the reduction of the number of infringements of the respective provisions of the Covenant.

The Ombudsman dealt twice with the freedom to marry and to found a family (Art. 23(3) of the Covenant). The Ombudsman held that this right was breached by the denial of the director of a prison to let two prisoners marry (RPO/57931/90/IX).

The more general aspect of the freedom to marry was discussed in the Ombudsman in his opinion on the Concordat addressed on 26 April 1994 to the chairmen of the both houses of Parliament (RPO/147648/94/I).

The Ombudsman turned two requests to the Constitutional Court in which he questioned the reservation of preferential tariff calculation only for two parents breeding a child and not for a single parent with a child. In the request of 16 July 1993 the Ombudsman claimed that incomplete families had been deprived of equal protection of their financial situation (RPO/1217473/93/VI). For the same reasons the Ombudsman opposed on 11 October 1995 the exclusion of the possibility of cumulating profits for tariff calculation purposes for single parents with children learning in schools higher than primary schools (RPO/187264/95/VI/AB).

In connection with the ratified Convention on the Protection of the Rights of the Child the Ombudsman on 6 September 1995 claimed unconstitutionality of:

- the limitations of the right to child benefits for learning children under the age of 20,
- the denial of the child benefits for healthy babies (RPO/191096/95/310/III/KZ, RPO/193243/95/308/III/KZ).

The basis of the request was Art. 79(1) of the Constitution – an equivalent of Art. 23(1) of the Covenant.

Art. 24 (the right of any child, with no discrimination, to protection by the family, the society and the state).

The equality of all children was invoked by the Ombudsman with respect to children kept in establishments for juvenile offenders and establishments for demoralized children. The differentiated situation of these groups of children was focused on in the special 1994 Ombudsman Report published in the Ombudsman Bulletin – Materials No. 23 (specially pages 76–77 of the Report).

Discrimination of youth on the grounds of religion or thought was mentioned in the Ombudsman's letter to the Minister of Education of 28 March 1994 (RPO/150505/94/I). The author has pointed out that the lessons on ethics (as a substitute of lessons of religion) are not organized in practice and this fact may give rise to intolerance.

One year earlier, on 20 March 1993 the Ombudsman wrote to the Minister of Education (RPO/125128/903/II):

“the assistance for children bred in the ‘substitute families’ should be equal with no regard as to whether the function of ‘substitute families’ is given to the relatives of the child or to other persons.”

Also the limitations of the volume of assistance for these families was opposed by the Ombudsman before the Constitutional Court (RPO/182455/95/I/GR).

Art. 25 (voting rights, participation in the public life).

The Ombudsman claimed the unconstitutionality of the Statute on the Presidential Elections, according to which Polish citizens residing abroad were not entitled to vote in the second tour of elections (RPO/70428/90/I). This provision was found to contradict Art. 95 of the Constitution and Art. 25(b) of the Covenant.

The same problem was the subject matter of the letter of the Ombudsman of 29 March 1995 to the Chairman of the Parliament (RPO/184031/95/I), but no proceedings were initiated as a result of this pronouncement.

Also any projects of “decommunization” were furiously opposed by the both Ombudsmans. Decommunization was expected to ban the access to the public service of some persons connected with the “ancien regime”, without the exact determination of persons covered by such a ban and their right to defence (RPO/70306/90/I, RPO/70463/91/III, RPO/69817/90/I). Also the project of internal lustration in the trade union “Solidarity” was opposed by the Ombudsman (RPO/106218/92/I) in a letter to the Chairman of this trade union.

Several doubts have been expressed by the Ombudsman in connection with some verification decisions made in the years 1990–1991 in the branches of the internal affairs, the fire service and the education (see: Report of the Ombudsman for the period 1 December 1990–1 December 1991, page 36–40). It was the lack of respect for the norms of procedural justice that was specially opposed by the Ombudsman.

The infringements of the right to vote occurred also at the level of municipalities. The Ombudsman was informed about the resolution of one of municipalities according to which the voting rights were reserved for those who had inhabited a respective

countenance for more than 2 years before the day of elections. Though the Ombudsman found himself incompetent in this case, he informed the interested persons about their right to turn the case to the Human Rights Committee (RPO/183694/95/X/PP).

Art. 26 (the equality before law, the right to equal protection and the prohibition of any discrimination).

The breach of the principle of equality has been the subject matter of numerous activities of the Ombudsman. The following should be mentioned here:

- 1) discrimination on the grounds of political opinion:
 - RPO/135133/93/I – the Ombudsman objected the use of discriminatory questionnaires for teachers,
 - RPO/121264/93/I – the Ombudsman defended a police officer dismissed for political and religious opinion,
 - RPO/90199/92/I, RPO/97906/92/I, RPO/100108/92/I – the Ombudsman referred to discrimination based on the membership in the former communist party,
 - in more than 30 cases the Ombudsman dealt with the alleged discriminatory activities connected with the election of directors of schools (*i.a.* RPO/98426/92/I, RPO/102132/92/I and others).
- 2) on the grounds of sex:
 - RPO/135587/93/III – the Ombudsman called the attention of the Minister of Labour on the discrimination of women resulting from the preference for men in numerous offers of job,
 - RPO/15286/94/III – the Ombudsman called the attention of the Chairman of the Parliament to the discrimination of women as regards remuneration for work and inequality of men and women with respect to leaves for children custody (Art. 188 (2) of the Labour Code was changed fortunately by the statute of 23 November 1995),
 - RPO/90180/91/I – the Ombudsman requested the Constitutional Court to rule on the unconstitutionality of the unequal treatment of father and mother as regards the right to financial benefit for children as provided for in Art. 36 of the 1974 Statute on Disease and Maternity (this provision was deleted only in the Statute of 2 December 1994).
- 3) on the grounds of nationality:
 - RPO/195289/95/I – the case of discrimination of persons of German nationality in access to higher offices in public service in one of the provinces of Poland,
 - RPO/164388/94/I – the case of religious practice in the Polish army and the sacral blessing of the army banners by the catholic bishops,
 - RPO/135133/93/I – see above point 1).
- 4) on the grounds of the place of registered residence:
 - RPO/110047/92/I – the Ombudsman called the attention of the Minister of Labour to the fact of discrimination of persons without a registered residence as regards employment and social security benefits.

The Ombudsman interpreted the right to equality in the same way as the Constitutional Court. In the reasons to the request of 7 November 1991 (RPO/74666/91/III/8/JM) the first Ombudsman wrote:

“the equality before law means that the same criteria are used with respect to subjects possessing the same or analogous characteristics covered by a given legal norm.”

The Ombudsman demanded in this very request that the unequal treatment introduced by Art. 27 of the Statute on the Social Security of Farmers should be eliminated.

Art. 27 (respect for the rights of ethnic, religious and language minorities).

The first Ombudsman invoked the Covenants in the case RPO/72741/91/I to explain that “the majority should not discriminate minorities, which have the right to preserve their cultural, linguistic and educational identity.”

The second Ombudsman dealt with the cases of ethnic minorities (RPO/172738/94/I), religious minorities (RPO/166687/94/I concerning religious sects) and linguistic (the right to education in the Belarussian and the Ukrainian languages). He dealt with the problem of the German minority in Silesia and the Polish minority in Lithuania (see: Bulletin of the Ombudsman – Materials No. 25, 1995).

In the case no RPO/154028/94/I the Ombudsman examined the problem of Greek catholics who encountered problems with obtaining leaves from work (or education) on the days of their religious holidays.

3. The International Covenant on Economic, Social and Cultural Rights

The collapse of the communist system in Poland brought about the strengthening of the guarantees of the economic rights of citizens but also a deep crises of the realization of the social and cultural rights.

The Constitution as amended in December 1989 introduced a guarantee of freedom of economic activity with no differentiation according to the form of property (Art. 6). Article 7 provided for the protection of property and rights of heirs and the full guarantee of the personal freedom. In this way the protection of the private property has been fully guaranteed. The Polish constitutional law was harmonized with Article 3 of the Covenant on Economic, Social and Cultural Rights which obliged the States Parties to ensure the equal right of men and women to the enjoyment of rights (among them the economic ones) provided for in the Covenant. The respect for the private property was the main subject regulated in the First Optional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The transformation from the centrally planned economy to the market economy was however connected with a considerable regres of the practical realization of several social and cultural rights like *e.g.* the right to work, to house, to the health care and to education. According to pessimists, Poland is not really the state of social justice, though it should be one according to Art. 1 of the Polish Constitution. What is

more – thousands of Polish citizens write in their letters to the Ombudsman that they find themselves citizens of neither the state of law nor the state of the social justice.

It is the very awareness of the weakness of the realization of this group of rights that makes several representatives of the Polish political scene to insist upon the abstention of the future Polish Constitution from the provisions on the rights to social benefits.

The Ombudsman has however defended the constitutional regulation of social rights, at least in form of programmatic *i.e.* non-directly enforceable norms. One of the arguments in favour of this solution was the very fact of ratification by Poland of several international law instruments dealing with economic and social rights, among them the International Covenant on Economic, Social and Cultural Rights.

The opponents however defend the view that it is not reasonable to insert non-self-executing norms (*i.a.* norms which give no rights that could be defended before courts) into the Constitution.

The Ombudsman concedes that the Constitution may not serve as a collection of wishes and declarations, but it does not change the very fact that also programmatic norms determining the tasks of the state have their room in the constitutions. It is specially so when a given state has incurred international obligations with respect to the progressive striving at the full realization of such social and economic rights. This is the case of the right to work, to house, to health care and to the satisfaction of the cultural needs. These rights are regulated in the Covenant on Economic, Social and Cultural Rights.

The experience collected by the Ombudsman does not let him equalize social rights as regulated in the Constitution with mere wishes. The following cases are the best evidence thereof (references to the Covenant will mean here the Covenant on Economic, Social and Cultural Rights).

Art. 6 of the Covenant (right to work).

It was provided for in Article 68 of the Constitutional Provisions which is almost identical with Art. 6 of the Covenant.

The interventions of the Ombudsman concerned:

- the access of women to employment (RPO/135587/93/III, RPO/135690/93/III, RPO/152826/94/III),
- the protection of stability of employment (RPO/122124/94/III). In this case the Ombudsman referred to the practice of circumvention of the Labour Code by the way of private law contracts and short-term employment contracts,
- the protection from dismissal of women during pregnancy or maternity leaves (RPO/185047/95/III, RPO/198487/95/III),
- the liberalization of employment of pensioners and retired persons (RPO/13579/93/III, vide Bulletin of the Ombudsman – Materials No. 26, p. 58–59,
- the protection of the rights of unemployed persons (status of an unemployed person, registration of benefits and other matters described in Bulletin of the Ombudsman – Materials No. 26, p. 97–126.

Art. 7 (the right to the just and favourable conditions of work).

The interventions of the Ombudsman concerned the following problems:

- the protection of the right to remuneration for work (RPO/104625/92/III, RPO/145858/94/III, RPO/130849/93/III, RPO/173524/94/III, RPO/173208/94/I),
- secure and favourable conditions of work (RPO/168932/94/III, RPO/1489/94/III),
- equal rights of promotion on the bases of the period of employment and the qualifications (cases cited in the context of Art. 26 of the Covenant on Civil and Political Rights).

Art. 8 (the right of association in trade unions).

This provision has its counterpart in Art. 84 of the Constitution, which was invoked by the Ombudsman in the following cases:

- RPO/2554/88 – the limitation of the trade union pluralism,
- RPO/100767/92/I – a breach by the Government of the Trade Unions Act through the lack of consultations of the draft statutes on the social policy with the trade unions,
- RPO/96825/92/I – repressing teachers for the participation in a legal strike,
- RPO/131213/93/I – sanctions applied by the trade union “Solidarność” to its members acting as candidates from other lists than the “Solidarność” one.

Art. 9 (the right to social security).

The Ombudsman has defended this right several times (vide: Report of the Ombudsman for the second period of the term of office – the Bulletin of the Ombudsman – Materials No. 16, p. 71–76, Materials No. 21, p. 175–198, Materials No. 25, p. 253–267).

The most important cases dealt with by the Ombudsman included:

- RPO/91640/91/VI – certain rules of the valorization of pensions,
- RPO/103125/92/III/JM – the determination of family benefit beneath the statutory minimum,
- RPO/97825/92/VI – the suspension of the right to pension or retirement benefit in cases of the permanent leaving of Poland by the beneficiary,
- RPO/120381/93/III – the lowering in the 1993 budget of the index of valorization of pensions and retirement benefits from 100% to 91%,
- RPO/191096/95/310/III/KZ, RPO/193243/95/308/III/KZ – inequality of treatment of farmer families with respect to family and nursing benefits,
- lowering of the age of children, for whom a family benefit is granted.

The Ombudsman defended also the right to social security of combatants, artists and their families, farmers, employees of railway enterprises and miners. He also dealt with the problem of taxation of foreign pensions.

Art. 10 (the right of family to protection and assistance; the protection of mothers before and after childbirth, the right of children and young persons to protection and assistance – with no discrimination on any grounds).

The pronouncements of the Ombudsman presented in the context of Art. 23, 24 and 26 of the Covenant on Civil and Political Rights concerned the above-mentioned rights as well. See also case RPO/203598/95/I/AA *infra*.

Art. 11 (right to appropriate housing conditions).

This right is regulated in Art. 79(5) of the Constitutional Provisions as a right to get the assistance from the state for the satisfaction of the housing needs. This right

cannot be regarded as a basis of any claim. Both Art. 11 of the Covenant and Art. 79 of the Constitution are so called programmatic norms – they determine mere directions of the policy to be pursued. This is how these rights are understood by the Ombudsman who however takes activities to defend citizens from breaches of concrete provisions of the Acts on the Building Activities, on Rental of Flats and so on.

The first Ombudsman questioned the shortages of legislation – namely the lack of appropriate implementing provisions. This state of affairs brought about unrevocable effects for the realization of the right to the appropriate housing conditions (RPO/70522/91/V, RPO/48344/91/V, RPO/69773/91/V).

The pronouncements of the Ombudsman in this field concerned:

- the valorization of deposits on the so called flat-books and of the guarantee bonuses (RPO/115162/93/VI),
- the credits for construction of houses (RPO/140129/94/VI, RPO/143479/94/I, RPO/14007490/94/VI),
- the tied flats and the factory flats (RPO/70522/91/V, RPO/104823/92/V, RPO/1117586/93/V),
- the comunal flats (RPO/105459/92/V),
- the infringements of the rights of owners and leasees during the time of transformation (the Report of the Ombudsman on the State of the Housing Law, Bulletin of the Ombudsman – Materials No. 20),
- the legislative errors in the 1994 Statute on the Property of Houses (RPO/184436/95/V/ST, RPO/174624/94/VI),
- the disputes on the application of 1994 Statute on the Lease of Houses and Housing Benefits (RPO/173824/94/X),
- the places of work of artists (RPO/145348/94/VI, RPO/174812/94/V).

Art. 12 (the right to protection of physical and mental health).

Art. 70 of the Constitutional Provisions precises this right in more detail. The Ombudsman has undertaken several activities to defend this right. The main interventions concerned:

- the imposed non-benevolent fees for medical services (RPO/96852/92/I, RPO/96805/92/I, RPO/105523/92/I, RPO/134831/93/I, RPO/122706/93/I, RPO/129764/93/I, RPO/139504/93/I, RPO/137570/93/I, RPO/118171/93/I, RPO/128315/93/I, RPO/146957/94/I, RPO/155372/94/I),
- the breach of the right to the health care by several provisions of the 1991 Code of Ethics for Doctors (RPO/99761/92/I, RPO/102809/92/II, RPO/99981/92/II),
- the lack of respect for the right of disabled soldiers to free medicaments and sanitary articles (RPO/113050/92/I, RPO/114079/93/I, RPO/130576/93/I, RPO/12403/93/I, RPO/129382/93/I, RPO/122771/93/I, RPO/132047/93/I, RPO/130263/93/I, RPO/124033/93/I, RPO/143702/94/I, RPO/152274/94/I),
- the rises of the prices of medicaments (RPO/123973/93/I, RPO/132633/93/I, RPO/119034/93/I),
- the right of patients to the care from persons being in close relations with them (*i.e.* the family, friends etc.) (RPO/117576/93/I, RPO/140945/93/I, RPO/135354),

- the administrative prohibition of admission of patients with cancer to some medical establishments (RPO/162811/94/I),
- the right of children to rehabilitation (RPO/203598/95/I/AA), according to information acquired by the Ombudsman about 70% of children do not undergo any rehabilitation due to the lack of appropriate medical establishments and sufficient resources of the Public Fund for Rehabilitation.

The Ombudsman has undertaken several activities aimed at the protection of mental health of citizens. Before the adoption of the 1994 Statute on the Protection of Mental Health the Ombudsman opposed the procedure of placing patients in mental hospitals without their consent on the basis of a mere ministerial instruction from 10 December 1952. He pointed at the requirements of Art. 5 and 6 of the European Convention of Human Rights (Bulletin of the Ombudsman – Materials No. 16, p. 116) and Art. 9 of the Covenant on Civil and Political Rights.

In 1994 the Ombudsman undertook direct inspections of mental hospitals and presented their results in the voluminous report on the rights of patients of mental hospitals (the Bulletin of the Ombudsman – Materials No. 26, p. 127–158).

Art. 13 (the right to education).

The Ombudsman has vigorously defended this right. The following cases merit special mention in this context:

- the case of fees for education in high schools (RPO/92372/92/I, RPO/137386/94/I),
- the case of the unequal access to education in different regions of the country (RPO/128425/93/I),
- the unequal access to the lessons (RPO/168832/94/I),
- the non-respect for the rules of transfer of kindergartens and schools to the municipalities (RPO/142832/94/I, RPO/174057/94/I, RPO/159469/94/I),
- the limitations of the right to education of mentally disabled children (RPO/168780/94/I/GR)

Art. 15 (the right to take part in the cultural life, to enjoy the benefits of the scientific progress and the freedom of scientific research and creative activity).

The activities of the Ombudsman in this respect were based on Article 73 of the Constitutional Rules and concerned specially:

- the prices of books and grants for their publication (RPO/140850/93/III/310/EA),
- the remunerations of artists,
- the rents for the places of work of artists (RPO/174812/94/I),
- the imposition of VAT – tax upon the rent on ateliers of artists (RPO/145348/94/VI, RPO/145348/94/VI/AB),
- the remuneration of employees of libraries and the transfer of cultural establishments to the municipalities (RPO/140850/94/ III/310/EA),
- the infringements of the rights of film directors (RPO/203885/95/III),
- the protection of the employees of the TV (RPO/199160/95/III),
- inequality with respect to the use of TV programmes (RPO/177662/95/VI).

Conclusions and Proposals

The present survey displays that the Ombudsman, while defending the constitutional rights of citizens is also a promotor of human rights as such – enshrined in the Covenants.

The Ombudsman has also played an important role in the popularization of the international instruments on human rights as models for a democratic state of law (Rechtsstaat) governed by the principle of the social justice.

What we can see now is a dispute about the possibility of direct applicability of international law in the internal legal order. What is more, even primacy of international law is defended by some publicists. If the views about the direct applicability of international norms win a wide acceptance, it will be possible for the Ombudsman to invoke the Covenants directly, without the need of the intermediary in the Constitution. So far, the well-established opinion of the Constitutional Court is that the Constitution is the highest source of law in Poland, what makes it impossible to examine the activities of legislature, executive and judiciary from the point of view of international agreements as such. It remains, however, still to be seen if the Ombudsman cannot directly invoke breaches of self-executing international norms which are binding and effective *ex proprio vigore* without the need of transformation into the municipal law. There is no doubt that one should include in this group such norms which directly prohibit certain activities *e.g.* the prohibition of compulsory labour, of discrimination in such fields as employment or trade union membership or the prohibition of tortures.

All the same, recognizing that Poland is bound by the Covenants as a result of its own decision, we must admit that generally recognized international norms are to be treated as norms of natural law. The signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms recognized this in Art. 7(2) of the Convention, referring to the general principles of law recognized by civilized nations which are binding in states *per se*. And such a conclusion is quite optimistic from the point of the defenders of human rights.

The International Covenants on Human Rights in the Case Law of the Polish Supreme Court, the Constitutional Court and the High Administrative Court

RENATA HLIWA, LESZEK WISNIEWSKI

1. The Period before 1989

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were both adopted by the United Nations General Assembly on 16 December 1966 and ratified by Poland on 3 March 1977.

At this time the courts generally adopted a restrictive view as to the possibility of international law being applied directly by municipal courts. This view was later expressed in a synthetical way by the Supreme Court in its ruling of 25 August 1987. It read *inter alia*: “Unless transformed into municipal law, the norms of international law as such do not form a part of municipal law and are not binding for courts. (...) Trade unions are registered by courts on the basis of the Polish Law on Trade Unions and not on the basis of conventions ratified by Poland. (...) The very possibility of conflict between these provisions is of no significance for the solution of this case.”¹

The following reasons were invoked to justify such a point of view:

1) The Polish Constitution of 1952 did not determine the position of treaties in the internal legal order of Poland. This was true for human rights instruments as well. What was more, the 1952 Constitution did not even intercept the provisions of the former Polish constitutions (the one of 1921 and of 1935) which made ratification of certain kinds of treaties dependent on the prior consent of the Parliament. After 1952 the consent of the Parliament (Sejm) for ratification of treaties was expressed in a form of an act of Parliament, published in the Official Journal of the Polish Republic (Dz.U.). The case law identified this procedure with the transformation of international treaties into the Polish legal order (into respective acts of Parliament).² The present constitutional law still does not determine the status of international law in the Polish legal order, though in 1989 the constitutional requirement of the Parliamentary consent for certain

¹ *Orzecznictwo Sądów Polskich* (hereafter *OSP*) [Judgments of Polish Courts] 10/1988, p. 447, 449.

² K. Skubiszewski: “Prawa jednostki, umowy międzynarodowe i porządek prawny PRL” [Human Rights, International Treaties and the Legal Order of Poland] 42 *Państwo i Prawo* (hereafter *PiP*) | the State and the Law) No. 7, p. 11 (1987).

kinds of treaties was restored. On the basis of this provision the Parliament agreed (in a form of an act of Parliament) in 1990 on the ratification of the Convention on the Rights of the Child³ and, two years later, of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴ and other treaties.

2) Since 1952 till now the Constitution has provided for the subordination of judges exclusively to acts of Parliament. It was construed as meaning that the direct application of international law by judges themselves is prohibited.

The Law on the Establishing and Competence of the Constitutional Court contains a provision according to which the judges of this Court are subordinated exclusively to the Constitution. Neither this act nor the Constitution gave the Constitutional Court the power to rule on the consistency of Polish law with ratified treaties.

Despite the above arguments and the official statements, several publicists advocated the view according to which direct effect of ratified treaties in Polish law resulted from their own power (*ex proprio vigore*). This view was presented already before the Second World War and was popularized by Stefan Rozmaryn in the 1960's?

At the time of socialism this view was however recognized only in a few judgments, as it was not welcomed by the then rulers of the state.⁶ What was necessary for the change of this situation was the mere change of the state regime. It was the monopoly of one trade union that could not be compromised with the direct applicability of ILO Convention No 87 ratified in 1956; it was the monopoly of one communist party that blocked the way to direct application of the Covenant on Civil and Political Rights. The latter would imply political pluralism, the other changes of the political system and the collapse of the totalitarian system in consequence.

The above-mentioned political premises are obvious, but cannot determine the merits of the legal opinions expressed on the subject.

Nowadays, when a democratic order has replaced the former totalitarian one, it is worthwhile to assess the legal arguments, that were used to justify the denial of direct application of Human Rights Covenants. This assessment will be made from the point of view of the contemporary constitutional law.

In the acts of ratification of the both Covenants the following formulas was signed by the then Head of State: "Having taken cognizance of the present Covenant, the Council of State has recognized and recognizes that the whole thereof and all individual provisions thereof are just; the Council declares that the present act is accepted, ratified and approved. The Council of State pledges that this act will be respected."⁷

The Council of State - the author of the above statement - was then competent to ratify treaties. The promise to follow the whole of the Covenant and individual provi-

³ *Dziennik Ustaw* (hereafter *Dz.U.*) (Official Journal of the Polish Republic) 1991, No. 16, Item 71.

⁴ *Dz.U.* 1992, No. 85, Item 427.

⁵ S. Rozmaryn: "Skuteczność umów międzynarodowych PRL w stosunkach wewnętrznych" (The Effectiveness of International Agreements in Internal Legal Order of Poland), 17 *PiP* No. 12, pp. 951, 956, 959 (1962).

⁶ K. Skubiszewski: "Konstytucyjne ujęcie stosunku prawa polskiego do prawa międzynarodowego" (Constitutional Regulation of Relation of International and Municipal Law), 42 *PiP* No. 10, p. 139 (1987).

⁷ *Dz.U.* 1977, No. 38, Item 167, 169.

sions thereof applies of course to Article 2(1) of the Covenant on Civil and Political Rights which reads as follows: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (...).

The doctrine of international law is at accord as to the fact that it was the intent of the parties to the both Covenants that civil and political rights were applied unconditionally and immediately after ratification of the treaty, while economical and social rights were only to be introduced progressively, reflecting the achievement of appropriate economical conditions in the states concerned.⁸

At the same time the Constitution imposed on all organs an obligation to respect law and take all measures on the basis thereof.

Here one may ask whether an international treaty ratified in accordance with the Constitution by the superior organ of the state and published as an act of law (normative act) in the Official Journal⁹ with a formula binding the state to respect this act should not be recognized as a source of law. In our opinion, it should be recognized as such. What is more, the binding effect thereof results from the Polish constitutional law as well.

In support of the latter argument one may invoke the judgment of the Constitutional Court of 7 June 1989. It ruled *inter alia*: "The Constitution as amended has determined the character of the Polish system of sources of law. It was widely disputed before the amendments of the Constitution as to whether the Polish system of sources of law was a close one (*numerus clausus*) or an open one. The Constitution in the present form does not exclude the direct applicability of other sources than those which are expressly named therein."¹⁰ We should add that the Constitution does not devote any special article to the sources of law as such. They are only indicated at the occasion of defining the competences of different organs. In this context we can find acts of Parliament, decrees with the force of acts of Parliament (as normative acts of the Parliament and the then "Council of State"), regulations, resolutions and ordinances - as normative acts based on acts of Parliament and intended to implement the latter.

As to the second argument against direct applicability of ratified and published treaties - the subordination of judges exclusively to acts of Parliament - the very argument seems to be based on a misunderstanding. It seems difficult to its adherents to distinguish "subordination" and "application".

Subordination means that the judge may not rule contrary to any act of Parliament, while there is such a possibility with respect to other norms (by-laws), when they are illegal (i.e. not in conformity with any acts of Parliament). It does not mean that judges are allowed to ignore such regulations or ordinances that are in conformity with acts

⁸ A. Michalska: "Podstawowe prawa człowieka w prawie wewnętrznym a Pakty Praw Człowieka" [Fundamental Human Rights in Municipal Law and the International Covenants], 1976, pp. 221-222.

⁹ According to Art. 1(1) and (2) of Act of 30 December 1950 on the Publication of the Official Journal of the Polish Republic and "the Polish Monitor" - *Dz.U.* 1950, No. 58, Item 524.

¹⁰ Case U.15/88, *Orzecznictwo Trybunału Konstytucyjnego* (hereafter OTK) [Jurisprudence of the Constitutional Court], 1989, p. 146.

of Parliament. On the contrary, they must be applied by judges, despite the lack of their subordination thereto. What is more, there is no provision on the subordination of judges to the Constitution, though there is no doubt that they have to apply Constitution while deciding cases before them.

The above-mentioned arguments indicate clearly that there are no obstacles from the part of the constitutional law against direct application of treaties, that have been ratified and published in the Official Journal. The norms of these treaties must, however, be self-executing - *i.e.* they must state clearly respective rights and obligations.

The rule of subordination of judges exclusively to acts of Parliament might not remain without influence on the application of international law. Its consequence is namely the impossibility of putting aside an act of Parliament incompatible with international law. In such a situation judges have to apply an act of Parliament.

This consequence is contrary to the rule *pacta sunt servanda*. This lack of conformity is to be removed according to the draft Polish constitution - being the subject of an essay by Prof. Renata Szafarz.

The afore-mentioned restrictive judgment of 1987 (so called "Solidarność" case) was strongly criticized as it eliminated from the Polish legal system the concept of international agreements binding and effective *ex proprio vigore*."

It was only the High Administrative Court - created in 1980 - that initiated a struggle for an appropriate position of ratified treaties in the Polish legal order. It was already in its judgment of 28 November 1986 that the Court ruled:

"any sanctions of administrative law provided for any offence may be applied only if they were in force when acts or omissions concerned were committed. (...)The other solution would be contrary to the fundamental rule *lex retro non agit*. Making such sanctions dependent upon the prior court judgment finding the guilt of a given person (...) calls our attention to Article 15 of the Covenant on Civil and Political Rights which reads: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.' Consequently, if the administrative penalty of withdrawal of concession was not provided for by law at the time when the offence was committed, the application of such a penalty would be contrary both to municipal and international law."¹²

In the other judgment of 12 August 1987 (III SA 344/87) the High Administrative Court ruled: "Article 13 of the Customs Law (Act of Parliament of 26 March 1975) amounts to a serious limitation of both the constitutional freedom of expression (by words and by print) and the "right to receive and impart information and ideas of all kinds regardless of frontiers" recognized in the Covenant on Civil and Political Rights ratified by Poland in 1977."¹³

¹¹ K. Skubiszewski in a comment to this ruling - 44 PiP No. 6, p. 144—145 (1989)

¹² Case IV SA 751/86, *Orzecznictwo NSA* (hereafter *ONSA*) [Jurisprudence of the High Administrative Court], No. 2, Item 65, p. 113-114.

¹³ *ONSA* 1987, Item 59, p. 101,

The High Administrative Court could not however distance itself too much from the view presented by the Supreme Court in its 1987 judgment. Consequently, it concluded that the mere inconsistency of administrative decisions with treaties ratified by Poland was not sufficient to declare the act concerned null and void. In its judgment of 26 August 1988 the High Administrative Court ruled:

“The Constitution does not determine the position of international law in internal legal order of Poland. Treaties signed and ratified by Poland are respected by it, but their implementation is effected through the intermediary of municipal law. Though the case law is not unequivocal on the subject, the indirect and not direct applicability of international law is generally accepted. The mere ratification of treaties by the Council of State does not amount to their transformation into municipal law but only makes such transformation obligatory upon the state. The exceptions from this principle (*e.g.* Art. 1096 of the Code of Civil Procedure, Art. 541 of the Code of Criminal Procedure) does not include Covenants or ILO Conventions. In practice, there is no possibility of effective claiming in proceedings before municipal courts infringements of international law by municipal acts concerned. Even in cases of conflict between treaties and acts of Parliament, the latter must be followed by judges.”

In the same judgment the Court held that law providing for compulsory work was contrary not only to Article 19 of the Constitution but also to ILO Conventions No 29 and 105 and Article 3 (3) of the Covenant on Civil and Political Rights. “It would be also contrary to the heritage of human rights - common to all civilized nations.”¹⁴

It was already in the judgment of 29 November 1988 that the Court ruled that any acts incompatible with international obligations of Poland with respect to the freedom of expression may be held to contradict the constitutional rules governing foreign relations of the state.¹⁵

Such interpretation meant that any act contrary to international law would be held automatically as an unconstitutional one, which could not form the basis of valid administrative decisions.

Not only judgments of the Administrative Court were of importance from the point of view of the position of international law in the domestic legal order. The Court presented several legal questions on this subject to the Constitutional Court and the Supreme Court. *E.g.* in 1987 the President of the Administrative Court addressed the case of limits of women students admitted for medical studies. Such limits were introduced by the respective Minister. The President asked the Constitutional Court to rule on the legality of the measures in question, turning attention to their conflict with Art. 26 of the Covenant on Civil and Political Rights, Art. 13 of the Covenant on Economic, Social and Cultural Rights and Art. 10 of the Convention on the Elimination of All Forms of Discrimination against Women. All those international instruments had been ratified by Poland before the emergence of the case.

The Constitutional Court ruled on the legality of the limits and devoted a passage of its judgment to international obligations of Poland with respect to equal treatment

¹⁴ OSP 1990, No. 10, p.

¹⁵ OSP 1990, No. 9, p. 695.

of men and women. It referred to all three above-mentioned treaties and stated that “by their signature and ratification Poland supported the equal treatment of women, what was fully consistent with the prior constitutional rules”.¹⁶

2. The situation after 1989

After the collapse of “real socialism” the courts have returned to the doctrine of binding force of international law *ex proprio vigore*, this being understood that only self-executing norms could be directly applied by courts.

It was the High Administrative Court that was once again the most decisive on the matter. In its judgment of 23 November 1990 it ruled as follows:

“it is a generally accepted view that treaties ratified and published in the Official Journal need neither transformation nor incorporation and are binding *ex proprio vigore*. What is more, they prevail over municipal law when there is any conflict between them.”¹⁷

The view about the superiority of international law has found no general acceptance - either in doctrine, or in case law. Courts, including the High Administrative Court itself, ruled on the basis of municipal law, international law serving only as an additional argument in favour of decisions made.

In its judgment of 5 June 1991 the Administrative Court ruled that its general (*i.e.* not limited as it was before) jurisdiction with respect to validity of administrative acts was the fulfillment of international standards. “It was already provided in Article 10 of the Universal Declaration of Human Rights that ‘everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations (...)’. This principle was intercepted by Article 14(1) of the International Covenant on Civil and Political Rights adopted on 16 December 1966. These international norms are characterized as self-executing. Consequently, state servants, judges and other officials may not ignore such norms, while deciding cases before them. Basic norms of international law dealing with human rights must be recognized as important interpretative rules of municipal law. The latter applies as well to (...) the scope of jurisdiction of administrative court with respect to policemen.”¹⁸

Similar attitude was presented by the Supreme Court in its judgment of 17 October 1991. The case concerned a person sentenced on the basis of the famous decree on the martial law, which according to its Article 61 entered into force on the day of its publication but with effect as from the date of its adoption (the latter being earlier). This was contrary to Article 1 of the Criminal Code - the principle *lex retro non agit*. However several judgments from the period following December 1981 this exception was found to be justified in the light of Article 121 of the Code, according to which

¹⁶ OTK 1987, No. 2, Item 2, p. 23, 30 (P2/87).

¹⁷ Case II SA 759/90.

¹⁸ ONSA 1991, No. 3-4, Item 64, p. 107.

general principles of penal law (*i.a. lex retro non agit*) are applied to types of crimes not regulated in the Code only if the respective general matters are not regulated in a different way by these other acts themselves. The Supreme Court found however that there had been an infringement of Article 15 of the Covenant on Civil and Political Rights (principle *lex retro non agit*) and Article 4 thereof (which excludes the possibility of suspending this prohibition even during military state). According to the Supreme Court: "The prohibition contained in Article 15 of the Covenant is self-executing, *i.e.* can be applied directly in internal legal orders of signatories thereof."¹⁹

Also the Constitutional Court in the judgment of 7 January 1992 ruled: "As a result of ratification, Poland is bound by respective agreements, so they should be applied by courts directly and on the basis of *ex proprio vigore* principle, unless the wording of the agreement itself makes evident non-self-executing character of its provisions."²⁰

In this judgment the Constitutional Court found Art. 36(2) of the Act on Border Guard to be incompatible with *i.a.* Art. 14 and 26 of the Covenant on Civil and Political Rights. It however pointed at its lack of competence to rule on conformity of domestic law instruments with international ones. That is why lack of conformity with the Covenant was only a supplementary argument (the basic one was incompatibility with Article 1 of the Constitution), invoked not in the ruling itself but in the reasons thereof.

The Constitutional Court was less cautious a few months later when it ruled on the illegality of the resolution of the Parliament obliging the Minister of Interior to make a list of persons cooperating with communist secret police in the years 1945-1990. The resolution was passed on 28 May 1992 and applied to persons holding important positions - members of Parliament, government officials on the level of provinces (*województwo*) and above (including ministers), prosecutors, barristers, members of local authorities. In the judgment of 19 June 1992 the Court found that the resolution was contrary to Art. 1 of the Constitution, Article 23 of the Civil Code (personal rights) and Article 17 of the Covenant on Civil and Political Rights.²¹

Subsequent rulings of the High Administrative Court strengthened the position of Covenants in the Polish legal order.

On 26 November 1991 the Court ruled that "we must exclude any interpretation of law that would infringe constitutional rights of citizens, ratified international treaties or other norms of binding acts. (...) Prohibition of discrimination based on belief is provided for in almost all international acts signed and ratified by Poland dealing with individuals (*e.g.* Art. 18 of the Covenant on Civil and Political Rights). Consequently, the practice of the Ministry of Internal Affairs not only infringed norms of Constitution and ratified international treaties (...) but also could be qualified as a crime."²²

¹⁹ Case II KRN No. 274/91, *Prawo i Życie* 1992, No. 13, p. 15.

²⁰ Case K.8/91, *OTK* 1992, Part I, p. 84.

²¹ Case U. 6/92, *OTK* 1992, Part I, p. 197. It was perhaps the only ruling of the Constitutional Court invoking international law.

²² ONSA 1993, No. 1, Item 10, p. 86.

In the case SA/Wr 678/92 a man who was denied the possibility of military service in a form of work for public purposes invoked Article 18 of the Covenant on Civil and Political Rights to be infringed. The Administrative Court ruled on 5 August 1992: "It seems to be necessary to check as to whether Art. 18 of the Covenant has been actually infringed. It was ratified by Poland in 1977 and publicated in an appendix to the Official Journal from the same year (...). It is a generally accepted view that ratified international treaties should be treated like a part of Polish legal order. Art. 18 of the Covenant provides for a freedom of thought, conscience and religion. No exception is provided for, so there is no possibility to exclude soldiers from the scope of this provision. The plaintiff is however not right, when he claims that the Covenant obliges the State to turn him to military service in the form of work (supplementary military service) and not in the ordinary form. Such a conclusion is not justified by the wording of the Covenant itself. Signatories thereto are not obliged to create special forms of military service for people of a given religion or without any confession. Such an exception would amount to the infringement of the principle of equal treatment, that is regulated in Article 26 of the Covenant which reads: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."²³

What merits special mention, the Court examined first of all the relation of contested acts with international law and only later with municipal law.

Three factors affected this direction of jurisprudence:

1) in April 1989 Article 32(g) was added to the Constitution. It provided for the requirement of Parliamentary consent for ratification of certain treaties. This provision was intercepted by the Provisional Constitution from 1992.

2) in December 1989 Poland became a democratic state of law (Rechtsstaat).

3) the Vienna Convention on the law of Treaties was ratified and entered into force for Poland on 1 August 1990.²⁴

All these factors were in favour of direct application of the norms of treaties ratified by Poland with the consent of its Parliament, publicated in the Official Journal. This applied exclusively to norms which were unambiguous as to duties, freedoms and rights regulated in them.

On 15 June 1993 the Supreme Court ruled:

"The State based on law must fulfill international obligations incurred by it. In consequence, the norms of treaties ratified by such a state can and should be applied directly in internal legal order and do not require any prior transformation. Of course, the latter applies exclusively to international conventions and bilateral agreements, in which the parties, at least in a tacit way, expressed their will of such an application or when the wording of international instruments or circumstances of their adoption point at the mere possibility of such application. This being accepted, it seems obvious that the very approval of human rights instrument has no

²³ ONSA 1994, No. 1, Item 13, pp. 117-118.

²⁴ Dz.U. 1990, No. 74, Item 439, 440.

other objective than direct application of rights concerned and not making them conditional upon the will of administration or other state organs.”²⁵

The Supreme Court invoked Article 27 of the Vienna Convention of the Law of Treaties according to which no state may invoke its municipal law to justify the lack of compliance with its international obligations.

A few months earlier a similar decision was made by the Supreme Court with respect to the European Convention on Human Rights. On 11 February 1993 the Court ruled that the Convention was binding directly and did not require any transformation.²⁶

We should remind here of the ruling of the Constitutional Court of 30 November 1994. It concerned the consequences of Article 33(2) of the Provisional Constitution in connection with the power of the Constitutional Court to examine the constitutionality of acts of Parliament ratifying treaties. Three points of the ruling must be emphasized:

- 1) the Court ruled that an act of Parliament empowering the President to ratify a treaty is an act apt to be controlled as to its conformity with the Constitution,
- 2) the Court may control the legality of acts of Parliament concerning ratification of treaties containing self-executing norms contrary to the Constitution,
- 3) the Court must not declare void an act of Parliament concerning ratification of a given treaty only because of the conflict between the latter and the prior international obligations of Poland, the Constitution itself or the coherence of the legal system as such or parts thereof.

The third point cannot be accepted. The Constitutional Court may not abstain from examining effects of the ratification of treaties for the coherence of the system of law, while examining the validity of an act of Parliament empowering the President to ratify a treaty in question. When the treaty concerned is contrary to the prior obligations of Poland or obliges it to change its legislation in a way contrary to the Constitution, the act of Parliament concerning its ratification is to be declared incompatible with the Constitution. It is the act and not treaty itself that is examined from the point of view of conformity with the Constitution. The Constitutional Court must however take cognizance of the provisions of the treaty. The other interpretation of the competence of the Constitutional Court with respect to acts on ratification of treaties would make this competence simply illusory.

The case law of the Polish courts indicates that until the adoption of constitutional rules on the position of international law in the Polish municipal system the following principles are applied:

Treaties concerning human rights will be applied directly when:

- a) they have been ratified with the prior consent of the Parliament (in the form of an act of Parliament) and promulgated in the Official Journal. Such a treaty is to be regarded as an act of Parliament according both to the recent and pre-war case law and

²⁵ Case I PRN 54/93 with a gloss by L. Wiśniewski in. 49 *PiP* No. 2, pp. 107-110 (1994).

²⁶ Case III AZP 28/92, OSN 1993 No. 7-8, pp. 7-22.

doctrine, and b) their norms state precisely the rights, duties and freedoms so that they may be implemented (self-executing norms).

These conditions are fulfilled by human rights instruments: the Convention of the Rights of Child and the European Convention on the Protection of Human Rights and Fundamental Freedoms. Both Covenants were ratified without the prior consent of the Parliament in 1977. As such a consent was not compulsory then, the lack thereof may not serve as an argument against their direct applicability, as the other above-mentioned conditions have been fulfilled. The direct applicability of the Covenants was confirmed as well in the judgment of the Supreme Court of 15 June 1993.

²⁷ Case W 10/94, *OTK* 1994, Part II, p. 236.

Overview of Council of Europe Standards on the Status of Aliens, Including Refugees and Asylum-Seekers¹

MARC BOSSUYT

The most relevant Council of Europe² standards on aliens, including refugees and asylum-seekers, can be found in the European Convention on Human Rights (1950), the European Convention on Establishment (1955), the European Social Charter (1961), the European Convention on the Legal Status of Migrant Workers (1977) and, with respect to refugees and asylum-seekers, in recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.

1. The European Convention on Human Rights³

The European Convention on Human Rights⁴ of 4 November 1950 does not make a distinction between the citizens of the States Parties and aliens. Article 1 of the European Convention states that:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

The normative articles of that Convention contained in its Section I apply to all persons regardless their citizenship. The expressions used ("Everyone" of "No one") do not allow for any distinction on the basis of citizenship.

¹ Conference given in the framework of a Council of Europe Seminar on the "Legal Status of Aliens: European Standards and Unification Trends and their possible impact on central and Eastern European countries" held at Warsaw, from 7 to 9 November 1995. See also: K. Oellers-Frahm: "The Contribution of the Council of Europe to the Legal Position of Aliens", in: J. Frowein, T. Stein: *The Legal Position of Aliens in National and International Law 1725-1773* (1986).

² The 36 Member States of the Council of Europe are: the 15 Member States of the European Union, 9 other West-European States (Andorra, Cyprus, Iceland, Liechtenstein, Malta, Norway, San Marino, Switzerland, Turkey) and 12 East-European States (Albania, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia, Slovenia). Status of ratification as of 1 November 1995.

³ See also: A. Drzemczewski: "The Position of Aliens in Relation to the European Convention on Human Rights: A General Survey", in: *Human Rights of Aliens in Europe: Proceedings of the Colloquy on "Human Rights of Aliens in Europe"* (Funchal, Madeira 17-19 October 1983, Nijhoff, Dordrecht 351-427, 1985).

⁴ As of 1 November 1995, all Member States of the Council of Europe are parties to the European Convention with the exception of Albania, Moldova and the three Baltic States (Estonia, Latvia and Lithuania).

Moreover, Article 14 of the European Convention prohibits any discrimination in the enjoyment of the rights and freedoms set forth in the Convention:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A notable exception on the general applicability of the European Convention on citizens and aliens alike is its Article 16:

“Nothing in the Articles 10 (freedom of expression), 11 (freedom of peaceful assembly and of association with others) and 14 (prohibition of discrimination) shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.”

According to the “travaux préparatoires” of this article, its aim

“is to make provision for the fact that, in accordance with a universally admitted practice, the exercise of the fundamental rights by foreigners (non nationals) may be subject to certain restrictions not applicable to nationals. These restrictions, however, must not violate the general principles of law as recognized by civilised nations.”

This exception is clearly limited to “the political activity” of aliens. Moreover, it has not give rise to case law of the European Commission and the European Court of Human Rights and several writers consider this provision “anachronistic”.

Article 5, para. 1, al. f, of the European Convention contains an exception to the prohibition of deprivation of liberty in case of “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition” and in accordance with a procedure prescribed by law.

Article 8 of the European Convention may be of particular importance in the case of the refusal of aliens to stay in the territory of a State party to the European Convention. This article provides that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

Article 8 comes only into operation when family life is entirely impossible and not merely when it is impossible within a chosen State. According to the European Commission, it depends on whether it is reasonable to expect the family to move to where family life is possible, with reference to the economic consequences inherent in such a move, the existing ties to the country in question as well as the duration of the stay in the country where the family reunification is desired to take place.

In several judgments (in the cases *Abdulaziz, Cabales and Balkandali vs. the United Kingdom* of 28 May 1985, *Berrehab vs. the Netherlands* of 21 June 1988, *Moustaquim vs. Belgium* of 18 February 1991 and *Beldjoudi vs. France* of 26 March 1992), the

European Court has stated that the decisions of the Contracting Parties taken in exercise of their right to control the entry, residence and expulsion of aliens

“must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”

Such an interference implies the existence of “certain links” between the members of the family concerned taking into account whether they “in fact lived together and whether they were financially dependent on one another.” According to case law of the European Commission, cohabitation is not an indispensable factor for the existence of family life between parents and minor children.

Article 8 is not violated when no legal or other obstacle prevents a spouse or family members from settling in another country as long as the only residence which they can find is not in a country unconnected with either of them.

As far as expulsion is concerned, Article 4 of the Fourth Protocol⁵ provides that “Collective expulsion is prohibited.”

In the case *Becker v. Denmark*, the European Commission made it clear in 1975 that

“‘collective expulsion of aliens’ means any measure of the competent authority compelling aliens as a group to leave the country, *except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.*”

In its Article 1, para. 1, the Seventh Protocol⁶ adopted on 22 November 1984 provides that

“An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- a. to submit reasons against his expulsion,
- b. to have his case reviewed, and
- c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.”

The Seventh Protocol was intended to bring about comparability between the rights contained in the European Convention and those contained in the International Covenant on Civil and Political Rights⁷ adopted by the General Assembly of the United Nations on 16 December 1966.

⁵ The 23 States parties to the Fourth Protocol are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Sweden.

⁶ The 17 States parties to the Seventh Protocol are: Austria, Czech Republic, Denmark, Finland, France, Greece, Germany, Hungary, Iceland, Italy, Lithuania, Luxembourg, Norway, Romania, Slovakia, Slovenia, Sweden, Switzerland.

⁷ That Covenant contains Article 13 which reads as follows: “A alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance

According to the second paragraph of the same article,

“An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interest of public order or is grounded on reasons of national security.”

The expulsion or extradition of an individual may give rise to an issue under Article 3 of the European Convention “where *substantial grounds* have been shown for believing that the person concerned” if delivered to the State of destination “faces a *real risk* of being subjected to torture or to inhuman treatment” in the requesting country.

In its *Cruz Varas* judgment of 20 March 1991, the European Court noted that

“In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*;

(...) the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion” (...).

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.”

The Court added in its *Vilvaraijah* judgment of 30 October 1991, that its

“examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.

Nevertheless, the Court hold also in this case that there had been no violation of Article 3.

2. The Recommendations of the Council of Europe with Respect to Refugees and Asylum-seekers

The European Convention on Human Rights itself contains no provision in relation to a right of asylum. Nevertheless, as well the Consultative Assembly – later called the Parliamentary Assembly – of the Council of Europe as well as the Council of Ministers of the Council of Europe have adopted several recommendations with respect to refugees and asylum-seekers.

Recommendation 293 (1961) of the Consultative Assembly of the Council of Europe recommended to the Committee of Ministers to include in the Second Protocol to the European Convention an article on the right to asylum stating that

with against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

"Everyone has the right to seek and to enjoy in the territories of High Contracting Parties asylum from persecution."

Such an article has not been included in any of the protocols to the European Convention.

In another Recommendation [434 (1965)], the Consultative Assembly considering that Article 3 of the European Convention, which prohibits inhuman treatment, binds Contracting Parties "not to return refugees to a country where their life of freedom would be threatened" recommended "the elaboration of an international instrument designed to give full legal recognition to the practice of granting asylum in member States".

In its Resolution (67) 14 adopted on 29 June 1967, the Council of Ministers recommended that member Governments

"should act in *a particular liberal and humanitarian spirit* in relation to persons who seek asylum on their territory"

and that they should

"ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion."

On the basis of Parliamentary Assembly Recommendation 787 (1976) on harmonisation of eligibility practice under the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol, an "*Ad hoc* Committee on Legal Aspects of Territorial Asylum and Refugees (CAHAR)" was established by the Committee of Ministers. Since then, recommendations of the Council of Ministers in matters of asylum and refugees have been prepared by that Committee.

In its Recommendation N° R (81) 16, on the Harmonisation of National Procedures relating to Asylum, adopted on 5 November 1981, the Committee of Ministers recommended the governments of member states to apply the following principles in their law and administrative practice:

- a) decisions on asylum requests, which shall be dealt with objectively and impartially, shall be taken only by a central authority;
- b) pending that decision, the applicant shall be allowed to remain in the territory of the state;
- c) there shall be provision for appeal to a higher administrative authority or to a court of law and in the meanwhile the applicant shall be allowed to remain in the territory;
- d) the applicant shall receive the necessary guidance as to the procedures to be followed and shall have the right to be heard, when necessary with the guidance of an interpreter;

e) the intervention of a lawyer shall be permitted at an appropriate stage of the procedure as well as the possibility to communicate freely with the office of the UNHCR an to approach a voluntary agency working for refugees.

In the last decade, the Parliamentary Assembly of the Council of Europe, while further insisting on the need for fair and effective asylum procedures, became progressively aware of the abuse of the right of asylum.

In its Recommendation 1016 (1985) the Parliamentary Assembly expressed awareness of “increasing restrictive practices applied to counteract the arrival of the growing number of refugees from outside Europe” as well as of “the abusive recourse to the right of asylum, which is detrimental to persons in real need of protection” and “the fact that criminal individuals or organisations in certain cases ruthlessly exploit human distress and the desire to leave for a European receiving country of populations who are seeking asylum and, in other cases, encourage their victims to emigrate illegally with promises, notably involving to an unjustified right of asylum.”

In its Recommendation 1088 (1988), the Parliamentary Assembly expressed concern “about the tremendous increase since the beginning of the 1980s in the number of persons asking for asylum in the Council of Europe” as well as “about rising xenophobia in a number of Council of Europe member states and the influence that might have in refugee policies.”

The Parliamentary Assembly recommended that the Committee of Ministers

- a) adopts a coherent asylum policy;
- b) sets up a system of permanent consultation among European states;
- c) continues work on the harmonisation of the legal rules in respect of territorial asylum in Council of Europe member states.

In a recent Recommendation 1236 (1994), the Parliamentary Assembly stresses the “important developments and considerable changes” which have taken place in the last five years in respect of the right to territorial asylum. As reasons for this development are given “the fall of communist regimes in Eastern Europe, the civil war in the territories of the former Yugoslavia, the economic disparity between the industrialised countries and the poorer ones, and ongoing human rights abuses, both in Europe and the world at large.”

Concerning asylum procedures, the Parliamentary Assembly recommends

- a) to rely more on pan-European co-operation,
- b) to take particular care with the processing of applications classified as “manifestly unfounded”,
- c) “to ensure that the notion host third country” is interpreted in a restrictive fashion,
- d) to insist that asylum procedures provide for the following minimum legal guarantees:
 - asylum-seekers shall be informed of their right to legal advice and, if appropriate, to linguistic assistance;
 - notification of the decision to grant asylum shall be given in writing together with the grounds for the decision;

- in the event of rejection, the decision notification shall set out the possibilities of appeal;
- while appeals are being processed, asylum-seekers may not be deported.

In its most recent Recommendation 1278 (1995) on refugees and asylum-seekers in Central and Eastern Europe, adopted on 25 September 1995, the Parliamentary Assembly calls upon the member states to strictly oppose the increasingly noticeable abuse of the right of asylum without impeding a fair and equitable examination of all requests for asylum, not only because of financial reasons, but because everything must be done to counteract the reasons which give rise to xenophobic sentiments in individual countries, notably by firmly and clearly combating the abuse of the right of asylum.

On 23 September 1991 the Parliamentary Assembly had adopted its Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports recommending *inter alia* that the Committee of Ministers invite the governments of member states “to provide sufficient accommodation and acceptable humanitarian treatment for asylum-seekers awaiting the first decision on their request.”

On 21 June 1994 the Committee of Ministers adopted its Recommendation N° R (94) 5 containing a number of guidelines to inspire practices of the Member States of the Council of Europe concerning the arrival of asylum-seekers at European airports. More particularly in respect to asylum-seekers, reference should be made to the following guidelines:

- a) pending a decision, the asylum-seeker staying at the border shall be received and accommodated in an appropriate place under the conditions and for the maximum duration provided for by law;
- b) the asylum-seeker shall be informed about the procedure to be followed, and about his rights and obligations, including the right to the assistance of a qualified and impartial interpreter during the interview with the competent authority;
- c) a representative of the UNHCR shall be allowed to contact the asylum-seeker at the airport, who himself shall be allowed to contact a legal counsellor or a lawyer after the first interview with the competent authorities;
- d) the responsible authority shall provide medical and social assistance as well as sufficient accommodation and food and, to the extent possible in case of a prolonged stay, recreational facilities.

3. The other Council of Europe Conventions

The other Council of Europe Conventions particularly relevant for the legal status of aliens are the European Convention on Establishment⁸ of 1955 (in force since 1965),

⁸ The 12 States parties to the European Convention on Establishment are: Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, United Kingdom.

the European Social Charter⁹ of 1961 (in force since 1965) and the European Convention on the Legal Status of Migrant Workers¹⁰ of 1977 (in force since 1983).

3.1. The Right to Entry and to Residence

As a prerequisite to the right to enter, Article 2, para. 2, of the Fourth Protocol to the European Convention on Human Rights, adopted on 16 September 1963, guarantees the right to leave:

“Everyone shall be free to leave any country, including his own.”

The same right is guaranteed by Article 18, para. 4, of the Social Charter (“the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties”) and in Article 4, para. 1, al. 1, of the Migrant Workers Convention (“the right to leave the territory of the Contracting Party of which they are nationals”).

However, this right does not entail a corresponding right to enter whatever country except its own. Indeed, according to Article 3, para. 2, of the Fourth Protocol,

“No one shall be deprived of the right to enter the territory of the State *of which he is a national*.”

As far as citizens of the Member States of the Council of Europe are concerned, they are entitled under the European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe¹¹ of 13 December 1957 to enter the territory of those States *for a stay of up to three months without production of a visa or passport*. This does not apply for stays of longer duration or for persons wishing to enter gainful employment even for a period of less than three months.

According to the Establishment Convention, each Contracting Party shall

“facilitate the entry in its territory by nationals of the other Parties for the purpose of temporary visits and shall permit them to travel freely within its territory”

and

“to the extent permitted by its economic and social conditions, facilitate the prolonged or permanent residence in its territory of the other Parties” (Article 2).

⁹ The 20 States parties to the European Social Charter are: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom.

¹⁰ The 8 States parties to the European Convention on the Legal Status of Migrant Workers are: France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey.

¹¹ The 13 States parties to this European Agreement are: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Switzerland, Turkey.

According to Article 19, para. 2, of the Social Charter, the Contracting Parties undertake

“to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey.”

According to Article 4, para. 1, al. 2, the Migrant Workers Convention guaranteed

“the right to admission to the territory of a Contracting Party in order to take up paid employment *after being authorised to do so* and obtaining the necessary papers.”

For citizens of Council of Europe member states, entry formalities for short stays have largely been abolished. For longer stays and entry for the purposes of gainful employment they are – as any other alien (except citizens of the European Union) – subject to the national regulations of the individual States.

The Migrant Workers Convention provides in its Article 9, para. 1, for

“residence permits to migrant workers who have been authorized to take up paid employment.”

Such a residence permit shall be “renewed for a period as a general rule at least as long as that of the work permit” and “for a period of at least one year” when the work permit is valid indefinitely” (Article 9, para. 2). Those provisions “also apply to members of the migrant worker’s family who are authorized to join him” (Article 9, para. 3).

Article 9, para. 4, further states that “if a migrant worker is no longer in employment,” he shall be allowed to remain on the territory of the receiving State “for a period which should not be less than five months. Nevertheless, no Contracting Party shall be bound (...) to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance.”

As far as the reunion of the family is concerned, the Protocol to the Establishment Convention [Section III, (b)], provides that

“The Contracting Parties undertake, in the exercise of their established rights, to pay due regard to family ties.”

In Article 19, para. 6, of the Social Charter the Contracting Parties undertake

“to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.”

According to the Appendix to the Social Charter,

“the term ‘family of a foreign worker’ is understood to mean at least his wife and dependent children under the age of 21 years.”

The Migrant Workers Convention authorizes in its Article 12, para. 1,

“the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker (...) to join the migrant worker in the territory of a Contracting Party.” A possible waiting period “shall not exceed twelve months.”

3.2. The Resident Status

According to Article 10 of the Establishment Convention,

“Each Contracting Party shall authorise nationals of the other Parties to engage in its territory in any gainful occupation on an equal footing with its own nationals, unless the said Contracting Party has cogent economic or social reasons for withholding the authorisation.”

As stated in Section I, (a), (2) of the Protocol to that Convention:

“Each Contracting Party shall have the right to judge by national criteria (...) ‘the economic and social conditions’ which may prevent the admission of nationals of other Parties to prolonged or permanent residence or the exercise of gainful occupations in its territory.”

However, according to Article 12 of that Convention, the restrictions referred to the above-mentioned Article 10 do not apply to those nationals if

- “(a) they have been lawfully engaged in a gainful occupation in that territory for an uninterrupted period of five years;
- (b) they have lawfully resided in that territory for an uninterrupted period of ten years;
- (c) they have been admitted to permanent residence.”

Under Article 18 of the Social Charter, the Contracting Parties undertake

“with a view to ensuring the effective exercise of the right to engage in gainful occupation in the territory of any other Contracting Party” (...)

- 1. to apply existing regulations in a *spirit of liberality*;
- 2. to *simplify* existing formalities (...);
- 3. to *liberalise*, individually or collectively, regulations governing the employment of foreign workers.”

As far as the right to organise is concerned, Article 18 of the Establishment Convention guarantees the right to take part

“on an equal footing with its own nationals as electors in elections held by bodies or organisations of an economic or professional nature.”

Under Article 19, para. 4, al. b, of the Social Charter, the Contracting Parties undertake to secure for migrant workers treatment not less favourable than that of

their own nationals in respect of “membership of trade unions and enjoyment of the benefits of collective bargaining.”

Under Article 28 of the Migrant Workers Convention,

“Each Contracting Party shall allow to migrant workers the right to organise for the protection of their economic and social interests on the conditions provided for by national legislation for its own nationals.”

As far as social security is concerned, particular reference should be made to the *European Convention on Social Security*¹² of 14 December 1972 which adopts the principle of equal treatment of aliens and nationals with the possible exception for “non-contributory schemes” and to the *European Convention on Social and Medical Assistance*¹³ of 11 December 1953, which ensures that aliens from other contracting States who are legally resident within the host State and without sufficient resources are entitled to social and medical assistance.

Article 13, para. 4, of the Social Charter and Article 19 of the Migrant Workers Convention refer explicitly to the European Convention on Social and Medical Assistance.

As far as education is concerned, Article 20 of the Establishment Convention provides that

“In so far as access to education is under State control, nationals of school age of any Contracting Party lawfully residing in the territory of any other Party shall be admitted, *on an equal footing* with the nationals of the latter Party, to institutions for primary and secondary education and technical and vocational training.”

Article 14, para. 1, of the Migrant Workers Convention provides that

“Migrant workers and members of their families officially admitted to the territory of a Contracting Party shall be entitled, *on the same basis and under the same conditions as national workers*, to general education and vocational training and retraining and shall be granted access to higher education according to the general regulations governing admission to respective institutions in the receiving State.”

* * *

While examining the standards of the Council of Europe, it is important to be aware of the different legal value of the legal instruments containing those standards. Some are contained in an instrument legally binding on all Members of the Council of Europe as is the case with the European Convention on Human Rights. Others are contained in instruments which are only legally binding on some members of the Council of Europe.

¹² The 8 States parties to this Convention are: Austria, Belgium, Italy, Luxembourg, the Netherlands, Portugal, Spain, Turkey.

¹³ The 17 States parties to this Convention are: Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom.

Finally, some standards, particularly those concerning asylum-seekers, are contained in recommendations which are as such not legally binding. It is also obvious that recommendations adopted by the Committee of Ministers are more likely to be put into effect by the governments concerned than those adopted by the Parliamentary Assembly.

Particularly in the field of immigration, it should be recognized that, as far as some instruments elaborated in the initial years of the Council of Europe are concerned, the factual and political environment has considerably changed. The enlargement of the European Union (from originally 6 Members to the present 15) shifted the center of interest of those States – in matters of mutual co-operation in the field of freedom of movement within this community of States – from the Council of Europe to the European Union. Moreover, the degree of integration of the European Union increases continuously.

Compared with the situation 25 years ago, the membership of the the Council of Europe also has doubled to more than 30 member States nowadays. From a purely West-European Organisation, the Council of Europe itself has enlarged its membership to several central and East-European States, such as Bulgaria, Hungary, Lithuania, Poland, Romania, Slovenia, Slovakia and Czechia. Others are likely to become members of Council of Europe in a near future. As a result, the standards of the Council of Europe in the field of immigration apply at present to a situation which is substantially different from the one that existed at their elaboration.

This has no effect on the “hard” norms contained in an instrument legally binding on all members of the Council of Europe, such as the European Convention on Human Rights, but may influence the effect given to the “soft” norms that are not legally binding as well as the extent to which Contracting Parties resort to permissible restrictions or national discretion.

Legal Status of Aliens in Poland in the Light of International Obligations

MIECZYŚŁAWA ZDANOWICZ

Persons present in the territory of a given country may be divided into citizens of that country and aliens. The regulation of individual rights is traditionally considered as a matter in the exclusive jurisdiction of the state. However, can the state arbitrarily determine the principles for the entry of foreigners to its territory, their stay and exit? This paper containing an analysis of current Polish legislation concerning aliens and of international obligations entered into by Poland is an attempt to answer this question. The author aims to determine whether the changes taking place in Poland, resulting in the admission of Poland to the Council of Europe and association with the European Communities, or accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,¹ the Convention relating to the status of Refugees of 1951,² and the Protocol relating to the status of Refugees of 1967,³ have brought about a change in the legal status of aliens in Poland. The problem of the status of aliens is very complex, involving many legal issues. This paper is necessarily limited to an analysis of certain aspects connected with entry and exit, and restrictions during the stay of aliens in Poland.

Entry

First of all, it is necessary to establish whether the right of the individual to participate in international passenger traffic and the obligation of the state to admit foreigners to its territory exist. S. Sawicki, on the basis of analysis of the practice of states – as defined by international agreements and domestic law – and the writing in international law, draws the conclusion that: 1) the individual has the right to participate in international passenger traffic, subject to the consent of the mother state and the state which he intends to go to; 2) no customary norm has developed which would impose the obligation of admitting foreigners to one's territory.⁴

¹ Dz. U. 1993, No. 61, Item 284.

² Dz. U. 1991, No. 119, Item 515.

³ Dz. U. 1991, No. 119, Item 517.

⁴ S. S a w i c k i: *Prawo państwa do regulowania międzynarodowego ruchu osobowego*, 1986, pp. 29–50.

J. Nafriger observes that in the modern world, the state has a limited obligation to admit aliens if they do not constitute a serious threat to public order, security, or the fundamental institutions of the state.⁵

K. Libera underlines that the conflict between the sovereign rights of the state and individual freedom of movement is one of the most difficult problems to resolve.⁶

None of the international agreements binding on Poland of themselves guarantee the right of aliens to enter Polish territory. A report prepared as part of the Demo-Droit Programme concerning the situation of aliens on the basis of the jurisdiction of the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms emphasises that refusal of entry to an alien to the territory of one of the High Contracting Parties may cause problems regarding the exercise of certain rights and freedoms guaranteed therein and result, in certain circumstances, in the violation of these rights and freedoms.⁷

Certain regulations concern refugees only. From Article 31 of the Convention relating to the Status of Refugees, it follows that Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life of freedom was threatened. N. Robinson points out that such a situation applies only to cases where: 1) a person is, or fulfils the conditions for consideration as, a refugee; 2) is compelled to enter the territory of the state directly from the state of persecution (this does not have to be his mother state or state of permanent residence); 3) his life or freedom must be threatened or he must have well-founded fear of such events; 4) he must report without delay to the relevant authorities; 5) and shows good cause for his illegal entry or presence. However, as the author goes on to stress, this article does not impose on a state the obligation to allow the refugee to stay, nor does it prohibit expulsion, but only prevents the imposition of penalties for illegally crossing the border.⁸ Also G.S. Goodwin-Gill underlines that Article 31 does not include any obligation that the refugee is allowed to stay. This article only obliges the Contracting State not to punish such persons.⁹ Similarly, A. Grahl-Madsen states that Article 31 does not oblige a Contracting State to admit a refugee to its territory.¹⁰

⁵ J.A.R. Nafriger: "The General Admission of Aliens under International Law", 77 *AJIL* 841, 847 (1983).

⁶ K. Libera: *Międzynarodowy ruch osobowy*, 1969, p. 126.

⁷ It is stated in the report that refusing entry to an alien may, specifically, cause a violation of his right to respect for his private and family life (Article 8 of the Convention), violate the principle of non-discrimination contained in Article 14 or even constitute treatment in contravention of Article 3 (degrading treatment). In certain cases, it may violate the right to found a family (Article 12). Situation of aliens. Report presented by J. Madureir. Office of Documentation and Comparative Law, Office of the General Prosecutor, Republic of Portugal. March 1994, working paper, unpublished, pp. 5–16. See also: M.A. Nowicki: *Wokół Konwencji Europejskiej*, 1992, pp. 86–87.

⁸ N. Robinson: *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, 1953, pp. 151–153.

⁹ G.S. Goodwin-Gill: *The Refugee in International Law*, 1985, p. 84.

¹⁰ A. Grahl-Madsen: *The Status of Refugees in International Law*, Vol. II, (1972), p. 201.

Article 31 of the Convention regulates only one aspect of the entry of persons applying for refugee status, namely prohibition of punishment in the event of illegal entry and stay.

Asylum has until now been subject to very limited regulation by international agreements. This regulation concerns mainly diplomatic asylum granted in the states of Latin America.¹¹ Due to the fact that this asylum is granted primarily in diplomatic premises, the institution of entry to the territory of a state does not apply. In relation to territorial asylum, however, there is a lack of binding universal international regulations, whilst existing documents (Universal Declaration of Human Rights of 1948, Declaration on territorial asylum of 1967, or the draft convention on territorial asylum of 1977) are not legally binding. The institution of asylum is thus left to domestic regulation. In essence, however, it includes the granting of the rights of entry and stay to aliens.¹² As G.S. Goodwin-Gill observes, the position of accused of or sentenced for political crimes is far less clear in international law than the position of refugees, as political considerations always accompany and compete with humanitarian ones.¹³ J. Boratyński observes that in contemporary Europe, asylum is practically identified with refugee status as defined by the Geneva Convention and is an institution applied by a given country with the objective of fulfilling the obligations resulting from this agreement. Under Polish law, however, the situation is different, as the institution of asylum is not connected with international norms but it is embodied in internal legislation.¹⁴

Diplomatic and consular law is subject to international legal regulation: the Convention on Diplomatic Relations of 1961 and the Convention on Consular Relations of 1963, as well as many bilateral agreements regulating consular matters. G.S. Goodwin-Gill points out that the issuing of agreement to the head of a diplomatic mission, the reasons for the refusal of which the host state is not obliged to state, is in effect the first right of the state in refusing admission and entry.¹⁵ The conventions also allow for a wide range of privileges concerning the entry of diplomatic and consular personnel (exemption from customs duties and inspections, exemption from the obligation of registration and obtaining permission to stay).

Entry of an alien takes place on the basis of a passport and a visa. A passport is a document attesting to the identity of a given person and entitling him to cross the state frontier. A visa, however, signifies permission for the alien to enter the territory

¹¹ For further information see: J. Sutor: *Prawo dyplomatyczne i konsularne*, 1993, pp. 164 and following; J. Symonides: "Prawo do azylu", in: *Prawa człowieka. Model prawny*, Wrocław, Warszawa, Kraków, pp. 618–622; B. Wierzbicki: *Pojęcie przestępstwa politycznego w prawie międzynarodowym*, 1979, pp. 89–93, 98 ff.

¹² For further information see: B. Wierzbicki: *Pojęcie przestępstwa politycznego w prawie międzynarodowym*, 1979, p. 122 ff.; J. Symonides stresses that asylum is more than merely admission of an alien to one's territory or refusing his extradition, J. Symonides: "Prawo do azylu...", p. 628.

¹³ G.S. Goodwin-Gill: *International Law...*, p. 142.

¹⁴ J. Boratyński: "Uchodźcy w Polsce", *Uchodźcy* 1996, No. 1, p. 10.

¹⁵ G.S. Goodwin-Gill: *International Law...*, p. 148.

of the state.¹⁶ W. Góralczyk rightly notes that the visa is treated by some states only as a promise of admission to their territory.¹⁷

How, then, is the issue of entry of aliens to the territory of Poland regulated in the light of domestic legislation? The present Aliens Act stipulates that an alien may cross the border of the Republic of Poland on the basis of a valid passport or other appropriate document after obtaining permission called a visa, unless specific regulations state otherwise.¹⁸ On the basis of this authorisation, Poland operates visa-free traffic with many states.

An alien can be refused a visa if:

- 1) he has acted against the interests of the Republic of Poland,
- 2) he has been convicted in the Republic of Poland or abroad of a felony or misdemeanour,
- 3) he has violated the regulations of the Aliens Act or regulations issued under it, or other regulations concerning the protection of state frontiers or customs or currency regulations,
- 4) other circumstances indicating that his stay is undesirable with regard to the public interest.

For these same reasons, a visa already granted may be annulled and entry to the territory of the Republic refused.

The Act provides for two types of visa: transit visas and visitor's visas.

The Act regulates matters concerning refugees only to a very limited extent. It merely refers to the definition of a refugee contained in the Convention and provides that decisions concerning the granting of refugee status are taken by the minister of internal affairs in consultation with the minister of foreign affairs. A serious shortcoming of Polish legislation is the lack of executive regulations governing the entry of refugees and detailed procedure for granting refugee status.¹⁹ The undertaking of legislative work on the text of the new Aliens Act was fully justified, not to say essential.²⁰

The draft introduces additional conditions which an alien should satisfy on crossing the border. He should demonstrate that he possesses the means necessary to cover the costs of his entry to, stay in and exit from the territory of the Republic of Poland and permission to enter another country or return to his country of origin. The keeping

¹⁶ These are universally accepted definitions. See: L. Ehrlich: *Prawo międzynarodowe publiczne*, (1958), fourth edition, p. 602; S. Sawicki: *Prawo państwa...*, pp. 94–102; K. Libera: *Międzynarodowy ruch...*, pp. 268, 288.

¹⁷ W. Góralczyk: *Prawo międzynarodowe publiczne w zarysie*, 1996, p. 261.

¹⁸ This requirement applies to all aliens crossing the border of the Republic, including diplomatic and consular personnel of foreign states and other persons of equal status on the basis of laws, agreements, or universally agreed international procedures, on condition of reciprocity. Diplomatic and consular personnel constitutes the most privileged group of aliens and apart from this provision, the Aliens Act does not apply in relation to them. Their legal status is mainly defined by the following agreements binding on Poland: Convention on Diplomatic Relations of 1961, Convention on Consular Relations – 1963, and bilateral agreements.

¹⁹ See Z. Galiński: "Prawnomiędzynarodowa ochrona uchodźców a polskie prawo wewnętrzne", in: *Prawo i prawa uchodźcy w Polsce*, 1994, p. 20; B. Wierzbicki: *Uchodźcy*, 1993, p. 45.

²⁰ The governmental draft Aliens Act was submitted to Parliament on 15 September 1995, Document No. 1245.

of records of invitations by the Voivode is also planned. The draft alters the list of conditions for issuing a visa.²¹ Alongside transit and visitor's visas, a visitor's visa with the right to employment is to be introduced.

As indicated above, the international agreements binding on Poland do not contain detailed regulations concerning the entry of aliens. The only exception is the entry in the Convention relating to the Status of Refugees, which prohibits punishment in the case of illegal entry. Thus, definition of the principles of entry of aliens lies within the jurisdiction of the state. Comparison of the regulations laid down in the Aliens Act of 1963 with the draft of the new act shows a tendency to create more restrictive conditions. As underlined in the preamble to the draft aliens act, this has its rational economic and social justification, connected with the growing number of aliens entering Poland. It also aims to reduce the number of refugees entering Poland for purely economic reasons, and to restrict the growing number of people entering the country illegally.²² A shortcoming of the draft under discussion is that according to Article 35, paragraph 2, an alien applying for refugee status is liable for crossing the border of the state without the required permission. This would constitute a violation of Article 31 of the Convention relating to the Status of Refugees. The draft act also stipulates that the arrival of an alien applying for refugee status directly from his country of origin or a safe third country disqualifies him from applying for refugee status in the territory of Poland. The Geneva Convention of 1951 gives no basis for automatically excluding such persons from the procedure of granting refugee status. A more appropriate solution would be to create a separate, automatic, accelerated procedure.

Stay

General principles

International agreements binding on Poland do not lay down detailed, distinct principles regarding the treatment of aliens during their stay in the territory of the state. Article 1 of European Convention for the Protection of Human Rights stipulates

²¹ Article 12 of the draft stipulates that an alien shall be refused a visa if: 1) he has been deported from the territory of the Republic of Poland, and less than 2 years has passed since the date of the deportation ruling, or 5 years if the costs were borne by the State Treasury; 2) he has been sentenced in the Republic of Poland or abroad for a wilful crime to at least 3 years imprisonment; 3) there is well-founded suspicion that he is conducting activity with the objective of subverting independence, separation of part of the territory, violent overthrow of the political system, or weakening the defensive capabilities of Poland, or participates in or organises such activity or is a member of an organisation conducting such activity; 4) there is well-founded suspicion that he is conducting terrorist activity or participates in such activity or is a member of an organisation conducting such activity; 5) there is well-founded suspicion that he is transporting or carrying across the border, without the required permit, weapons, explosives, radioactive materials, or intoxicating or hallucinatory substances, or participates in or organises such activity, or is a member of an organisation conducting such activity; 6) there is well-founded suspicion that he is engaged in activity consisting in enabling other persons to cross the border of the Republic of Poland without the required permission, or participates in or organises such activity, or is a member of an organisation conducting such activity; 7) there is well-founded suspicion that the purpose of his entry and stay in the territory of the Republic of Poland is other than declared; 8) his stay would endanger public health; 9) his entry and stay is undesirable for other important reasons.

²² Comment to the Draft Aliens Act, document No. 1245, pp. 1-2.

that Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms contained in the Convention. As M.A. Nowicki notes, the state has the obligation to protect the rights of citizens and aliens to the same extent, and this obligation extends to all situations in which the individual is under the jurisdiction of a given state.²³ An analogous provision is contained in Article 2 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which oblige Contracting States to uphold the rights contained therein in respect of all persons present in their territory and under their jurisdiction without regard to any distinction.

The present Aliens Act includes no clause on the treatment of aliens. The draft of the new act, however, states in Article 24 that an alien during his stay in the territory of the Republic of Poland has the same rights and duties as a Polish citizen, insofar as the regulations of the Aliens Act or other acts do not proclaim otherwise. This is, as L. Antonowicz²⁴ states, the most often used system of partial equality of rights, in which equality of rights embraces fundamental areas while at the same time there are restrictions in other areas.

The aliens act allows an alien to stay in the territory of Poland for the period of validity of his visa or permanent residence card. Article 11 imposes the requirement to register within 3 days of crossing the border. Registration is carried out by the proper Voivode for the place of residence of the alien. An alien may apply for permission for permanent residence in the form of a permanent residence card, issued by the proper Voivode for the intended place of permanent residence, after consulting the relevant voivodship chief of police.

As J. Jagielski states, the situation of an alien with a permanent residence card differs from that of groups of aliens not possessing permission for permanent residence in Poland. For example, an alien with a permanent residence card obtains registration for permanent residence in Poland, can take up employment (with the exception of certain positions) and in connection with this is subject to national insurance and taxation, and may take advantage of social security and education.²⁵

T. Zieliński emphasizes that aliens avail themselves of the right to move within the borders of a given state, understood as: 1) freedom of movement within the territory and 2) freedom to choose their residence. However, the right to freedom of movement in these two senses is conditional on the legality of their presence in the territory, of the state.²⁶ This condition is formulated in Article 12 of the International Covenant on Civil and Political Rights, stating that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. These rights can only be restricted in order to protect national security, public order, public health or morals or the rights and freedoms of others.

²³ M.A. Nowicki: *Wokół Konwencji...*, p. 14.

²⁴ L. Antonowicz: *Podręcznik prawa międzynarodowego*, 2nd edition, 1994, p. 111.

²⁵ J. Jagielski: "Wiza oraz karta stałego pobytu cudzoziemca", in: *Prawo i prawa uchodźcy w Polsce*, 1994, p. 41.

²⁶ T. Zieliński: "Pojęcie cudzoziemca i prawo do swobodnego przemieszczania się", *Biuletyn Rzecznika Praw Obywatelskich – Materiały* 1992, No. 14, pp. 36–39.

A new solution introduced in the draft Aliens Act is the institution of permission to reside for a specified period (Chapter 3).²⁷ The draft act states that such permission can be granted if the period of residence of the alien is to be longer than a year and is justified by the obtainment of a work permit, or permission to take up other gainful employment, self-employment, study, or to marry a Polish citizen or alien with permission to settle. Permission to reside for a specified period, together with the temporary residence card, is issued by the proper Voivode for the intended place of residence for a period of 2 years, with the possibility of extension up to a maximum of 10 years. The proposal to introduce a rigid upper limit of 10 years may in future give rise to a situation without resolution in the act. What will be the status of an alien whose ten-year period of permission to reside for a specified period has expired, and who does not want or has failed to obtain a settlement permit? Another proposed change is to transfer the authority to issue settlement permits to aliens from the Voivode to the Minister of Interior (Article 71, paragraphs 5 and 6). This is to avoid the situation in which an alien refused a permanent residence card applies for one in a subsequent place or places.

Refugees have special legal status, laid out in the agreements binding on Poland: the Convention relating to the Status of Refugees of 1951 and the Protocol relating to the Status of Refugees of 1967. The Convention introduces three standards in the treatment of refugees:

1) treatment as nationals; *i.e.* granting the same rights as citizens of the country (*e.g.* Article 14 – artistic rights and industrial property, Article 16, paragraph 2 – access to courts in the state in which the refugee has his habitual residence, Article 20 – rationing of scarce goods, Article 22 – elementary education, Article 24 – labour legislation and social security);

2) treatment as other aliens (*e.g.* Article 19 – practising of liberal professions, Article 22 – right to education other than an elementary one);

3) most favourable treatment – *i.e.* granting rights which are or will be possessed in future in the same circumstances by foreign nationals (*e.g.* Article 15 – right of association, Article 17 – right to engage in wage-earning employment).²⁸

Chapter 5 of the draft Aliens Act, regulating the status of refugees, mainly determines the principles and procedure for granting refugee status in Poland without mentioning the rights to which refugees are entitled. Only Article 38 states that an alien, in relation to whom proceedings for granting refugee status are in progress, can be provided with accommodation, board, medical care, and material and financial aid. Such a person may also be placed in a centre for refugees.

Yet another privileged group of aliens are persons enjoying asylum. Poland is not bound by any international norms defining the concept and principles of granting

²⁷ The institution of permission to reside for a specified period is familiar to the legal systems of other states. In most cases, possession of permission to reside for a specified period is one of the prerequisites for granting the right to settle (*e.g.* in Norway, Holland, Austria and Hungary).

²⁸ For further information on this subject see: Z. G a l i c k i: "Prawnomiędzynarodowa ochrona uchodźców a polskie prawo wewnętrzne", in: *Prawo i prawa uchodźcy w Polsce*, 1994, pp. 14 ff.; B. W i e r z b i c k i: *Uchodźcy w prawie międzynarodowym*, 1993, pp. 108 ff.; B. W i e r z b i c k i: *Uchodźcy*, 1993, pp. 62 ff.

asylum. Article 10 of the present Aliens Act specifies only that decisions with respect to the granting of asylum to aliens are taken by the Minister of Interior in consultation with the Minister of Foreign Affairs. Unfortunately, the draft of the new act also fails to define the principles of granting asylum and the status of asylees. And whilst the standard for the treatment of refugees, even with a lack of specific internal regulations, is defined by international norms and the extent of its use should be beyond doubt, it will be problematical to define the status of asylees.

Aliens present in the territory of Poland do not constitute a homogenous group. We can distinguish persons present on the basis of permanent residence permits, refugees and asylees, and the draft act introduces the category of persons residing for a specified period. Only the principles in relation to refugees are defined by international obligations.

Restrictions on the Rights of Aliens

The rights to which aliens are entitled are by nature more limited in scope than the rights to which nationals of a given state are entitled. These restrictions concern mainly the areas of political rights, practising certain professions, acquiring real property, self-employment, trade in ships and aircraft and service in the armed forces of the state of their stay. The fundamental restrictions on the rights of aliens with regard to the international legal obligations of Poland are discussed below. A detailed analysis of Polish substantive law in this area is, however, omitted.

a) Restrictions in the Field of Political Rights

The International Covenant on Civil and Political Rights in Article 25 confers the right to take part in the conduct of public affairs, either directly or through freely elected representatives, to vote and be elected, and to have access to public service, only on citizens. This is a consequence of the legal and political relationship of the individual with the state whose citizenship he possesses.

All individuals, and thus both citizens and aliens, are entitled to other political rights guaranteed in the Covenant on Civil and Political Rights, *e.g.* the right to hold opinions and freedom of expression, the right of peaceful assembly, or the right to freedom of association with others. However, these rights may be subject to certain restrictions, which should be provided by law, and which are necessary for respect of the rights or reputation of others, or for the protection of national security or of public order, or of public health or morals (Article 19, paragraph 3, Article 21 and Article 22, paragraph 3).

The Convention relating to the Status of Refugees, in matters relating to non-political and non-profit-making associations and trade unions, accords refugees lawfully staying in a territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances (Article 15). Thus the Convention refers to the most favourable treatment of foreign nationals, without creating a separate system for the treatment of refugees in this area.

On the basis of Polish law, electoral law for the Sejm²⁹ and Senate³⁰ and also the act concerning election of the President of the Republic of Poland³¹ confer the right to vote on Polish citizens only. However, the right to vote for the Sejm, Senate and President is also accorded to persons who cannot prove their Polish citizenship and who are not citizens of another state, if they have been permanently resident in the territory of the Republic of Poland for at least five years.³²

Similarly, the right to vote for local councils (self-government bodies) is also accorded to persons who cannot prove their Polish citizenship, if they are not citizens of another state and have been permanently resident in Poland for at least two years.³³

L. Wengler concludes that this refers to stateless persons lawfully present in the territory of Poland, and thus permanently resident in the country for a period of at least two years, whose stay has been accepted by the Polish state in the manner set out in the current regulations. This refers to obtainment by the stateless person of permission to reside permanently in Poland in the form of a permanent residence card.³⁴

The act concerning local referendums³⁵ states that the right to take part in a referendum is accorded to persons permanently resident in the territory of a given local district and possessing active electoral rights. Thus, in keeping with the provisions of local electoral law, stateless persons permanently resident in Poland for a period of at least two years are also entitled to participate in local referendums.

Polish legislation in the area of the entitlement of aliens to political rights adopts the traditional position of refusing this group the right to engage in political activity. The only exception concerns elections to local councils and participation in local referendums. However, concerning activity in the area of associations, trade unions or the right of assembly, Polish domestic legislation allows the participation of aliens without making any distinctions.

b) Restrictions on Practising Certain Professions and Employment of Aliens in Poland

The international agreements binding on Poland do not include any obligation to treat aliens in the same way as its own citizens in the area of employment. The ILO Convention ratified by Poland concerning discrimination in employment and practising professions³⁶ understands by the term "discrimination" distinctions based on race, colour, sex, religion, political opinions, nationality, and social background (Article 1). Therefore, in accordance with this definition, the separate regulation of the legal situation of Polish citizens and aliens in the area of employment is not discrimination.

²⁹ Dz. U. 1991, No. 59, Item 252 – Articles 6, 8.

³⁰ Dz. U. 1991, No. 72, Item 319 – Article 1.

³¹ Dz. U. 1990, No. 67, Item 398 – with later amendments – Article 2, paragraph 1.

³² Article 6, paragraph 2 of electoral law for the Sejm, and Article 2, paragraph 2 of the Act concerning election of the President of the Republic of Poland.

³³ Dz. U. 1996, No. 17, Item 85, Article 2, paragraph 2.

³⁴ L. W e n g l e r: "Sytuacja prawna osób nie posiadających stwierdzonego obywatelstwa polskiego w świetle polskich ustaw samorządowych", *Samorząd Terytorialny* 1994, No. 1–2, p. 68.

³⁵ Dz. U. 1991, No. 110, Item 473 with later amendments, Article 2.

³⁶ Dz. U. 1961, No. 42, Item 218.

The Convention relating to the Status of Refugees in the area of wage-earning employment adopts the principle of most favourable treatment (Article 17), whilst in relation to self-employment in agriculture, industry, handicrafts and commerce and the liberal professions, treatment not less favourable than that accorded to aliens generally in the same circumstances is accepted (Articles 18, 19). The regulations cited do not contain an obligation to grant aliens equal rights with citizens, neither do they treat refugees in a privileged manner.

The act concerning employment and unemployment of 1991³⁷ stipulates the necessity of obtaining permission for employment of an alien (Article 50, paragraph 1). As W. Sanetra notes, this requirement does not apply to self-employment, or to the rendering of services. Permission should be obtained by the firms or individuals employing workers. The requirement to obtain permission applies to both Polish employers and other Polish subjects employing or commissioning the paid rendering of services, as well as to foreign corporate entities and individuals.³⁸

J. Hejno states that a person who possesses a permanent residence card, is not treated as an alien in the understanding of the act concerning employment and counteracting unemployment, and thus an employer does not have to apply for permission for employment. Similar principles apply to persons who have been granted the refugee status in Poland.³⁹

Aliens cannot practise certain professions, *e.g.* judge, public prosecutor, which are only open to Polish citizens, or which require the permission of the proper organs (*e.g.* the medical profession).⁴⁰ They are also unable to occupy positions in services connected with the maintenance of security and public order, and with defence (*e.g.* the police, the army).

Restrictions on the practising of certain professions apply equally to all aliens with no distinction or separate treatment of certain groups, *e.g.* refugees or persons in possession of a permanent residence card.

c) Restrictions on the Acquisition of Real Property

States adopt various regulatory principles in the area of the acquisition of real property by aliens. Poland belongs to the group which introduces certain restrictions (similarly to Denmark, Sweden and Switzerland). Among countries with a lack of general restrictions are Belgium and Luxembourg.

The fundamental principles of the acquisition of real property by aliens are defined in the Act concerning the acquisition of real property by aliens of 1920.⁴¹ The text of the act and the ambiguities in its application have been extensively discussed in the writing,⁴² thus I will restrict myself to a discussion of the changes implemented in this area.

³⁷ Dz. U. 1991, No. 106, Item 45 and Dz. U. 1992, No. 21, Item 84 and No. 78, Item 394.

³⁸ W. Sanetra: *Zasady zatrudniania cudzoziemców w Polsce*, 1993, pp. 34–36.

³⁹ J. Hejno: "Zasady zatrudniania cudzoziemców w Polsce", *Śłużba Pracownicza* 1995, No. 12, p. 8.

⁴⁰ *Ibidem*, pp. 10–11.

⁴¹ Dz. U. 1933, No. 24, Item 202 with later amendments.

The act of 15th March 1996 concerning amendments to the act concerning the acquisition of real property by aliens⁴³ generally upholds the requirement to obtain permission from the minister of interior with the consent of the minister of defence, and in the case of agricultural real property, the consent of the minister of agriculture and food. The act defines acquisition as the acquisition of the right of ownership or perpetual usufruct on a property, by whatever legal event. It also introduces the institution of the promise to grant permission. The act stipulates the requirement for an alien to obtain permission for the acquisition or entering into possession of stocks or shares in a commercial company with headquarters in the territory of the Republic of Poland, which has the right of ownership or perpetual usufruct on real property, if as a result of the acquisition or entering into possession of stocks or shares, the company becomes a controlled company in the understanding of Article 1, paragraph 3, or the company is already a controlled company, and the stocks or shares are acquired or taken into possession by an alien who is not a stockholder or shareholder in the company. The act also introduces cases in which permission is not required. This applies to: 1) the acquisition of an independent residential unit; 2) the acquisition of real property by an alien resident in Poland for at least five years from the date of obtaining his permanent residence card; 3) the acquisition by an alien, being the spouse of a Polish citizen and resident in Poland for at least two years from the date of obtaining his permanent residence card, of real property which will constitute statutory common property of the marriage partners; 4) the acquisition by an alien of real property if on the day of acquisition he is entitled to statutory inheritance from the seller of the property, and the seller has been the owner or perpetual leaseholder for at least five years; 5) acquisition by a corporate body with headquarters in the territory of Poland, controlled directly or indirectly by an individual not possessing Polish citizenship, or a corporate body with headquarters abroad, for its statutory aims, undeveloped real property in towns, with total area in the whole country not exceeding 0.4 ha.

The act under discussion is, as stressed in the preamble to the draft, only an adaptation of the old regulations for a transitional period. The changes are limited to three fundamental problems: 1) restriction of the scope of the act by waiving the requirement to obtain permission in certain cases; 2) simplification of the procedure associated with the issuing of permission for the acquisition of real property; 3) adaptation of the existing regulations of the act to the present legal system and the elimination of legal loopholes.⁴⁴

⁴² See: M. P a z d a n: "O nabywaniu nieruchomości położonych w Polsce przez cudzoziemców", in: *Księga pamiątkowa. I Kongres Notariuszy Rzeczypospolitej Polskiej*, pp. 173–193; S. P i k u l s k i, J. J. S k o c z y l a: "Nabywanie nieruchomości przez cudzoziemców w Rzeczypospolitej Polskiej", *Radca Prawny* 1995, No. 4, pp. 7–16, No. 5, pp. 5–14; R. S z t y k: "Nabywanie nieruchomości przez cudzoziemców", *Rejent* 1991, No. 4, pp. 89–108.

⁴³ *Dz. U.* 1996, No. 45, Item 198.

⁴⁴ Preamble to the draft act concerning changes to the act concerning the acquisition of real property by aliens, p. 1.

It is necessary to refer to the principles concerning the acquisition of real property contained in the Europe Agreement.⁴⁵ The fundamental principle adopted in this area is the national treatment clause,⁴⁶ that is granting the same rights as to one's own citizens or companies. The Agreement contains separate regulatory principles for the acquisition of real property of a non-agricultural character and different principles for the acquisition of real property of an agricultural and forest character.

With regard to the first category, Poland is obliged to guarantee Community nationals and companies a treatment not less favourable than that accorded to Polish citizens in the area of the setting up and operation of firms in the territory of Poland. This will be realised in three stages (Article 44, paragraph 1, I): 1) from entry into force of the Agreement – with regard to construction and most sectors of manufacturing industry; 2) gradually, and at the latest by the end of the first stage of the transitional period – to most sectors of the economy; and 3) gradually, and at the latest by the end of the transitional period – to the financial services sector (banking and insurance). A. Lichorowicz points out that in practice, difficulties may arise in determining whether the acquisition of a specific item of real property is connected with the setting up of a business in Poland by a national or company from the European Union.⁴⁷

With regard to the second group of agricultural land and forestry, however, the Agreement excludes the principle of equal treatment, even with regard to acquisition connected with setting up a firm in Poland (Article 44, paragraph 6). Thus, the acquisition of agricultural land and forestry by nationals and companies from the states of the Union is subject to the same principles as for other aliens, thus the regulations of the Act concerning the acquisition of real property by aliens of 1920 apply in full.

Analysis of the Europe Agreement alongside Polish legislation leads to the conclusion that even the amended Act of 15 March 1996 does not contain regulations according natural and legal persons of the EU states the same rights enjoyed by Polish citizens in regard to the setting up and operation of firms in the territory of the RP in regard to construction and certain sectors of manufacturing industry. It does not exclude them from the scope of application of the 1920 Act. The Act in its amended version contains only liberalisations as to the acquisition of undeveloped real property with total area not exceeding 0.4 ha in towns.

Article 44, paragraph 7 stipulates that, notwithstanding the provisions of Article 44 (discussed above), Community companies established in the territory of Poland shall have, from entry into force of the Agreement, the right to acquire, use, rent and sell real property, and as regards natural resources, agricultural land and forestry, the

⁴⁵ For further information on this subject see: A. L i c h o r o w i c z: "Nabywanie nieruchomości położonych na terenie Polski przez cudzoziemców z obszaru Unii Europejskiej w świetle układu stowarzyszeniowego", *Rejent* 1994, No. 6, pp. 24–37; R. S k u b i s z: "Nabywanie nieruchomości w Polsce przez cudzoziemców a Układ Europejski", in: *Problematyka prawna nieruchomości w praktyce notarialnej. I Ogólnopolska Notarialna Konferencja Naukowa*, Lublin 1995, pp. 161–175.

⁴⁶ Article 44 of the Treaty of Europe instituting the association between the Republic of Poland and the European Communities and their member states. *Dz. U.* 1994, No. 11, Item 38 appendix. The treaty came into force on 1 January 1994.

⁴⁷ A. L i c h o r o w i c z: "Nabywanie nieruchomości...", p. 27.

right to lease, where these are directly necessary for the conduct of the economic activities for which they are established.

A. Lichorowicz observes that the purpose of adopting such wording in Article 44, paragraph 7 was to guarantee nationals and companies from the EU states the right to acquire real property in Poland as soon as the Agreement came into force, without waiting for the legislative equalisation of European and Polish companies. This article, however, limited the right to cases where acquisition of real property is directly necessary for a firm established in Poland to conduct business. The author is, however, of the opinion that European individuals or firms must obtain consent, in accordance with the requirements of the 1920 Act, for the purchase of real property other than agricultural land and forestry.⁴⁸

An opposite view is presented by R. Skubisz. Adopting the concept of the existence of self-executing norms, he states that the European Agreement, being properly ratified and announced in *Dziennik Ustaw*, enacts rights and obligations on its recipients, and should be applied by Polish courts and state agencies. In the event of conflict with domestic law, the self-executing norm has priority. Such norms annul conflicting regulations in domestic law. Article 44, paragraph 7, has the character of a self-executing norm.⁴⁹

Differing positions on the matter of realising the norms of international law in the Polish domestic system arise due to the fact that there is no existing norm defining the relation between the two legal systems. It is true that over recent years a certain evolution can be observed in jurisdiction and reference by the Constitutional Court and the Supreme Court to the binding nature of norms of international law in Polish internal law *ex proprio vigore*, without the requirement of transformation.⁵⁰ It seems, however, that until the role of norms of international law in the domestic system is defined in the new constitution, the application of the norms of international law *ex proprio vigore* will not be a widespread practice, particularly with regard to the acquisition of real property by aliens, where non-application of the 1920 Act would result in the absolute invalidation of the act of conveyancing real property.

Analysis of the regulations of internal law in the area of acquisition of real property by aliens and the obligations of Poland in international law provokes several comments:

1) individuals and firms from the EU states should have a different status from other aliens in Poland. Article 44, paragraph 7 additionally prescribed different treatment for Community companies set up in the territory of Poland, for which the acquisition of real property is directly necessary for the conduct of the economic activities for which they were established;

⁴⁸ A. Lichorowicz: "Nabywanie nieruchomości...", p. 35.

⁴⁹ R. Skubisz: "Nabywanie nieruchomości ...", pp. 169–170, 173 ff.

⁵⁰ W. Czaplinski: "Miejsce prawa międzynarodowego w porządku prawnym RP pod rządami Małej Konstytucji", in: *Prawa Człowieka – Wymiar Sprawiedliwości, Biuletyn Centrum Europejskiego Uniwersytetu Warszawskiego* 1995, No. 3, pp. 41–47.

2) the purpose of the Europe Agreement is to gradually accord the national treatment with regard to nationals and companies of the Union in the area of the setting up and operation of companies;

3) current Polish legislation (even the amended act of 1920) does not take these provisions into account, thus we should expect further new provisions in this area, or the adoption in the new constitution of a clause giving priority to international agreements ratified by Poland over conflicting acts of lower rank.

Exit

An alien usually leaves the territory of a foreign state within the limits of his lawful stay. Exceptions to this are situations where the alien is expelled. Expulsion may take the form of an order to leave the territory or deportation.

G.S. Goodwin-Gill stresses that the function of expulsion is to protect the fundamental interests of the state and maintain public order. The objective of expulsion will be fulfilled if it is executed in good faith and, in addition, if it is justified.⁵¹

From the international agreements binding on Poland, the institution of expulsion of aliens is regulated in agreements in the area of diplomatic and consular law,⁵² the International Covenant on Civil and Political Rights, and agreements on readmission.

Article 13 of the Covenant, as Z. Kędzia notes, constitutes the right to protection from unlawful expulsion but not from expulsion in general. This minimum standard of the right of an alien to protection from unlawful expulsion has the following content: 1) municipal law should express the principle that an alien lawfully present is not subject to expulsion; 2) the decision to expel an alien lawfully staying has an exceptional character; 3) such a decision may be taken only in the event of circumstances indicated in the act and by the competent authority; 4) expulsion may not violate other human rights and should be a step proportional to its reason; 5) the recipient of an expulsion order should be guaranteed the right to submit the reasons against his expulsion and the right to appeal, with the intention of revoking the decision, personally or through a representative; these guarantees may be suspended exclusively with regard to important national security considerations; 6) the state bears responsibility for the issue of an unlawful expulsion order.⁵³

Agreements on readmission define the procedures for the return and renewed admission of individuals (with the exception of extradition).⁵⁴ Poland signed the first such agreement with the states of the Schengen Group. On the basis of the agreement,

⁵¹ G.S. Goodwin-Gill: "The Limits of the Power of Expulsion in Public International Law", 47 *BYBIL* 47, 77 ff., 154–156 (1974–75).

⁵² A particular form with the aim of terminating the stay in the territory of a host state is declaring a member of diplomatic or consular personnel *persona non grata*, or undesirable. This, however, relates to a very small group of aliens.

⁵³ Z. Kędzia: "Prawo cudzoziemca do ochrony przed wydaleniem z kraju legalnego pobytu", in: *Prawa człowieka...*, pp. 492–496.

⁵⁴ Report on the Theme of Readmission Agreements, prepared by the Czech Republic in the framework of the Expert Group of the Budapest Group, made available by the Headquarters of the Border Guard.

each Contracting State, on the application of another Contracting State, admits to its territory without any unnecessary formalities every person who does not fulfil, or has ceased to fulfil, the conditions for entry to or stay in the territory of the Contracting State submitting the application, if the person is a citizen of the Contracting State called upon. An analogous obligation applies to the State through whose borders the person entered the territory of the Contracting State submitting the application.⁵⁵

The Convention relating to the Status of Refugees of 1951 contains in Article 33 a prohibition of the return or expulsion of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

B. Wierzbicki stresses that the principle of *non-refoulement* applies to refugees irrespective of whether they are present legally or illegally in a given country.⁵⁶

There is, however, disagreement on whether or not this principle includes refusal of admission at the border.⁵⁷

The Aliens Act of 1963 provides for the expulsion of an alien, on the basis of a ruling from the Voivode, on the same criteria as for the refusal to issue a visa. The act also provides for the possibility of deportation. The institution of detention centres for aliens provided for in the act has not been implemented, as the Constitutional Court questioned the legality of placing aliens in such centres during purely administrative proceedings.⁵⁸

The draft of the new act also provides for the expulsion of an alien, but the list of criteria has been changed. An alien may be deported if: 1) this is deemed necessary on the grounds of defence, national security or the protection of public order, or; 2) he did not leave the territory of the RP by the date specified in the expulsion order. In exceptional circumstances, an alien may be placed in a detention or remand centre on the decision of the district court. The draft act provides that an alien possessing refugee status may be deported only after this status has been withdrawn, which is in accordance with one of the fundamental principles in the Convention relating to the Status of Refugees – *non-refoulement*.

The proposed changes eliminate the measure questioned by the Constitutional Tribunal, and also regulate the protection of the privileged group of refugees in the area of possibilities for their expulsion.

⁵⁵ Articles 1 and 2 of the Agreement concerning the admission of persons present without permission, signed in Brussels on 29 March 1991. Poland has signed similar agreements with Bulgaria, the Czech Republic, Romania, Slovakia, the Ukraine, Croatia, Moldova, Greece, and Hungary.

⁵⁶ B. Wierzbicki: *Uchodźcy w prawie...*, p. 81. Similarly N. Robinson: *Convention Relating...*, p. 163.

⁵⁷ See further: F.P. Feliciano: "Non-refoulement: Some reflections on the content, function and status of principle and rule", in: *Synposium on the promotion, dissemination and teaching of fundamental human rights of refugees* – pub. UNHCR (1981, 1982), p. 20 ff.; N. Robinson: *Convention Relating...*, p. 163 ff.; G.S. Goodwin-Gill: *The Refugee...*, p. 69 ff.; B. Wierzbicki: *Uchodźcy w prawie...*, p. 76 ff.

⁵⁸ Decision by the Constitutional Court, 20 October 1992 (Case K.1/92) *Orzecznictwo Trybunału Konstytucyjnego w 1992 r.*, part II, p. 27 ff.

* * *

Presentation of the legal status of aliens in Poland and the international obligations binding on Poland forms a basis for drawing conclusions of a general character.

1) There is a clear tendency towards differentiation in the treatment of aliens. New categories have appeared of persons present on the basis of permission to stay for a specified time, refugees, and nationals and companies from the European Union, which have not been recognised in Poland before.

2) The process of defining the status of aliens in Poland is not yet completed. Further legislative changes are to be expected, mainly with regard to nationals and companies from the European Union.

3) Definition of the status of aliens is in most respects left to individual states. There are no international agreements regulating the detailed principles of the treatment of aliens. It is also difficult to speak of a uniform practice or defined standard of treatment developed by the EU states. An example of this is the case of the Schengen Agreements, which introduce uniform procedural principles for the granting of asylum and visas, referring, however, to the substantive law of the individual states. It is worth noting that not all the EU Member States signed Agreements of Schengen. We cannot speak of the existence of a uniform model to which Poland should aspire in the area of treatment of aliens.

4) The principles concerning aliens currently being introduced in Poland (*e.g.* the requirement to possess currency, deportation, readmission, penalties for aiding illegal immigrants) correspond with the regulations and tendencies adopted by other European states.

State Succession and Debts in the African States

OLUGBENGA SHOYELE

1. An Overview

There is hardly any gainsaying the fact that most countries of the Third World especially the African States are facing highly serious debt crises. Available data attest to the position of things that there is a net transfer of resources from these Less Developed Countries (LDCs) to the advanced creditor countries and the former are finding the burden of debt repayment quite unbearable. According to records available from the International Bank for Reconstruction and Development (I.B.R.I.) Secretariat,¹ the average debt service ratio for developing countries rose to about 56% in 1982, while the total outstanding debt was about \$ 180.4 billion dollars in the same year. In the IBRD official booklet, African States accounted for about 49% of this debt. Thus, by the year 1983 African States on the average were committing \$ 6.7 billion dollars to debt repayment. This amount has since been on the increase at an exponential rate up till the time of writing this work. Undoubtedly, this situation of things has affected adversely the economic performance of these countries. There are grave threats in industrial developments, dwindling of standards in the educational sector, apparent stagnation in agricultural outputs, decline in health-care facilities and quite a motley of deteriorations in social amenities available to the masses. In the words of an international agency's report on industry and external debt in Africa;

... the absence of foreign exchange has made itself felt in terms of plant closures and still greater deterioration in the degree of utilisation of fixed capacity. Both ways, therefore, the past three or four years have been marked by a definite deterioration in aggregate industrial performance in Sub-Saharan African, a deterioration closely associated with the chronic shortage of foreign exchange due in part to the debt-burden.²

A scholar in his examination of the debt crisis and the anti-imperialistic struggle, commented and observed that the Nigerian case study, which is a reflection of the general trend on the continent of Africa, has shown how the structure of debt has

¹ Culled in Okello Oculi (ed.): *Nigerian Alternatives*, a work published by the ABU Dept. of Political Science (1987), p. 122.

² See UNIDO, Summary Report on Industry and External Debt in Africa: A preliminary analysis. UNIDO/15.537, 20 June 1985, p. 4. Emphasis supplied.

changed in favour of financial markets and suppliers credits.³ By analytical extrapolations, debt due to financial markets and suppliers credits now account for more than 40% of the total continental debt as opposed to the 29 in 1972. Concessional bilateral loans from the developed, advanced countries (DACs) have dropped from 28.4 in 1972 to 10.1% in 1983. Multilateral loans as a percentage of the total has risen only modestly from 18.5% in 1972 to 23.1 in 1983.⁴

Recent data reveal that debts of the Sub-Saharan African countries increased from \$ 56.2 billion in 1980 (9.1% of total debts) to about \$ 153.1 billion in 1991.⁵

This changing character of the debt structure of developins countries has turned for the worse, since then up till the moment of this writing. Basically, these debts have so accumulated because of the initial configuration on which relationships were base between the imperial power and the dependent colonies. It is the ubiquity of neo-colonialism that is apparently behind this inestimable debt burder which remains intractable at the centre of North-South relationship.⁶

Without much ado, our subject-matter of investigation in this work concerns the problem of disposition of the public debt of a State or territory which is affected by change of sovereignty. It is our observation *ab initio*, that the issue is interestingly complex and subtle. This is so, given the background premise that the debt may have been contracted and secured from lenders who may be private lenders, or other governments, or international organisations.⁷ By way of preliminary observations, debts accrue to States in virtue of loans raised for some specific purposes. The loans oftentimes take the form of bondholding which may be categorised into:

i. 'Domestic' Bonds – which are bond that are issued for purchase within the borrowing State and which may be bought by aliens either on issue or from other holders, and

ii. 'International' Bonds – which are bonds issued in respect of loans floated on the international funds from alien investors.⁸

It is our commentary, at this juncture, that international law does not bother itself with 'domestic' bonds as such, but very particular about 'international' bonds. Nonetheless, if 'domestic' bonds have been purchased by aliens, the duty of international law to protect such rights cannot be abdicated or surrendered without remedy to an alien who falls a victim of an expropriation of such a rights. Clearly, however, if the loan is one between governments, or between the predecessor State and an international organisation, Professor O'Connel opines that,

³ Y. B a n g u r a: "The Politics of Nigeria's Debt Crisis", in: *Nigerian Alternatives*, p. 123.

⁴ IBRD, *The External Debt of Sub-Saharan Africa: Origins, Magnitude and Implications for Action* (K.L. K r u m m) World Bank Staff Working Paper No. 741, Table One.

⁵ See Y. B a n g u r a: *Nigerian Alternatives*.

⁶ *Ibidem*.

⁷ D.P. O'C o n n e l l: "State Succession in Relation to New States", 130 *RCADI* (1970–72).

⁸ Professor D.P. O'C o n n e l l used this taxonomy to facilitate ease of reference. See *ibidem*.

“...the question is not one of the application to successor States of the ordinary rules of international law respecting acquired rights, ... there must be a special rule of international law providing for succession if the successor State it to be liable for the debts of its predecessor.”⁹

Thus the scholar in a characteristically intelligent genre, distinguished rights from debts simpliciter, in international legal parlance; a salutary contribution, in our humble opinion.

2. Scope of Debts Obligations

The core of our investigations pertains to cases where a change of sovereignty has affected the instrumentalities or agencies of a State, which are specifically assigned the duties of servicing loans obtained and borrowed by the State. In the main, it is when the borrowing State loses its capacity for this loan-service, as a result of a change of sovereignty, that a creditor may start to think of instituting legal processes against a successor State to enforce the terms of the contract of loan. In effect, if the borrowing entity is a state government (under a federated system of government), a public department or parastatal, a central bank or other such corporate bodies and not the sovereign State, and such identified and distinct corporate body is unaffected in municipal law by the change of sovereignty, that agency will still be directly liable. International law however imputes certain responsibilities on the sovereign State to interfere and make such agencies live up to their expectations by settling their incurred debts.¹⁰

Furthermore, an interesting problem arises for State succession in a situation where the borrowing State merely loses part of its territory. The more prevalent view is that such a State remains a contracting party and is liable to repay the lender under the proper law of the contract. In certain situations however, the proper law of the contract may specifically make provision for a lapse of the contractual terms because the loan is in a way connected with the lost territory. If after every assessment and consideration of the circumstances, surrounding the contract of loan the predecessor State remains obliged to service the loan, a question is left still to be answered and this has to do with the ascertainment of whether the successor State may be required in international law to agree to a repartition of the debt.

This writer observes that the general notion adopted by States affected in debts settlement had been to hinge repayment on financial capacity and not legal liability. To this end, it is apparent that the entirety of the international community has agreed to a mode of settlement wherein the stability of the world's economic system will be guaranteed. This approach is borne out by the reality of the fact that failure to service debt is not quite a matter between the predecessor and the successor State only. Inevitably, lenders from many countries may be affected thus, and ultimately such a default to service a contract of loan will have adverse consequences on the foreign exchange

⁹ *Ibidem*, p. 147.

¹⁰ *Ibidem*.

situation, the economies of various other States and eventually the net flow of goods and services within the international community. In a similar vein, it is our opinion that failure to service loans made by international organisations will distract and undermine their funds thereby negatively affecting their abilities to function effectively to the detriment of States.

On thing is however glaring and this is the fact that a lender or creditor who has given out certain sums to a State would not be bothered in the least by who settles its claims, whether it is the predecessor State or the successor State. The main problem here for such a creditor is who is to be pursued for the purpose of repayment of such a loan. Apparently, if the predecessor State retains its legal personality after the territorial change, the contractual rights between it and the creditor subsist. Consequently, the creditor's claims should therein be directed against the borrower, predecessor State. However, what happens in a situation wherein the municipal law of the predecessor State provides that it is exonerated from paying out of secured revenue or assets over which the State has lost control?¹¹ The answer to this poser will appear to be that the creditor will then have no alternative than to pursue the successor State because the proper law of the contract creating the loan can no longer sustain that contract between her, the creditor, and the predecessor State. In the precise language of O'Connell;

"It is at this point that international law becomes significant, not only as protecting the rights acquired under the proper law but as creating the *vinculum juris* between the creditor and the successor State which must exist before diplomatic protection becomes possible."¹²

3. Categories of Debts

Prior to the Draft Articles on Succession of States in respect of matters other than Treaties,¹³ traditional theories of international law recognised three main categories of debts, these are, viz:

- (i) national debts
- (ii) localised debts and
- (iii) local debts

In addition to these, some subsidiary types are recognised by their nature in the form of political debts; war debts; administrative debts; and odious debts. However, for contemporary purposes, the Draft Articles prescribe the generic nomenclature of State debts for all debts which are chargeable to the State. Under Article 18 of the Draft Articles;

'State debts' means any (international) financial obligation which at the date of the succession of States, is chargeable to the State.¹⁴

¹¹ This question was framed appropriately in Professor O'Connell's article cited earlier.

¹² D.P. O'Connell, *ibidem*, p. 149.

¹³ UN Doc. A/32/183 of 30 Aug. 1977.

¹⁴ *Ibidem*.

In essence, all the recognised categories or types of debts identified above fall within the ambit of 'State debts' unmindful of whether they are strictly national, local or political debts in as much as they are chargeable on the State.

3.1. National Debts

This debt is wholly chargeable to the entirety of the sovereign State. One of the leading analysts of the theory of State succession articulated certain principles recognised in international law for the purposes of regulating the effects of change of sovereignty on debts, when he stated in his work that;

If the debtor is totally extinguished its international personality expires. If it retains its fiscal autonomy the debtor – creditor relationship is unaffected. If the debtor no longer has the capacity in law to service the debt, the successor State is obliged to discharge the equities attaching to the debt.¹⁵

Article 21 contains provisions relating to each types of succession of State. This states as follows:

Transfer of Part of the Territory of a State

1. When a part of the territory of a State is transferred by the State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, inter alia, the property, rights and interests which pass to the successor State in relations to that State debt.

From the foregoing, if a territory becomes incapacitated in the matter of debt amortisation because certain part of it from where the revenue is being generated has been transferred to another state territory, that predecessor State bearing the burdens of the debt involved, reserves the right to enter into an agreement with the successor State laying down fair basis for repartition. This will oblige the successor State to undertake an equitable proportion of the amortisation.

Even where an agreement had not been concluded, because international law recognises the practical fact. "It is obviously impossible and inequitable to preserve the formal debt relationship at the risk of national bankruptcy."¹⁶ Paragraph 2 of Article 21 of the Draft Articles¹⁷ expressly stipulates that where there was no agreement regarding the amortisation of a national debt, an equitable portion of such debts shall pass in virtue of the provisions of the Draft articles.¹⁸

¹⁵ D.P. O'Connell: op. cit., Vol. I (1967), p. 371.

¹⁶ *Ibidem*.

¹⁷ *Ibidem*.

¹⁸ It should be noted that the Draft Articles is not yet in force.

Our investigations reveal however that historical antecedents have recorded many cases of debt repartition in the past two centuries going by a review of almost every treaty relating to the transfer of territory within this period. In the treaties, agreements were reached to endeavour to mitigate the economic consequences of territorial transfers by assigning a portion of the debt to the successor State.

Some minor problems still bedevil this issue of repartition especially in cases of war debts and political debts. To this extent, a successor State which has attained her independence after a protracted war with the predecessor State where it (the successor State) had eventually defeated the predecessor State will be justifiably unwilling to share any portion of such a national debt incurred directly as a by-product of the war.¹⁹ This was the position of the successor States of the Austro-Hungarian Empire in 1919.²⁰ Similarly Great Britain refused to liquidate the war bonds of the Boer Republics. In the case of the United States, it refused outrightly to agree to any repartition of the Spanish national debt in 1898 contending that the debt has been contracted largely in the interests of Spanish colonization in so far as it relates to the ceded Spanish territories.

3.2. Localised Debts

These are debts with the sovereign State as a nominal debtor but which are nationally attached to specific territory and specific revenues or assets. The practical and often cited illustration of the localised debt is that which is secured in the form of mortgage or revenue pledge. In the proper law of the loan of contract here, a loss of the security does not exonerate the debtor from payment, as it were, because the rights *in rem* can be separated from the rights *in personam*, in this case. Some scholars have even argued in the extreme that it may be possible for the creditor to pursue a double set of rights²¹ in this situation; in which case, he may seek repayment from the predecessor State by virtue of the right in personam and from the successor State by virtue of the right in rem, thus meaning international law might protect the separate remedies.²² Generally, with regard to localised debts, the traditional law of State succession distinguishes between fiscal debts of the predecessor State which were partly or entirely spent in the territory affected by State succession and fiscal debts incurred by the territory itself or by the predecessor in its behalf.

3.3. Local Debts

These are debts contracted by a fiscally autonomous province, colony, city or 'state' (in a federation, for example) which in no way involve the central government of the State. We observe that the range of such debts is wide and the point where these

¹⁹ C a h n: "The Responsibility of the Successor State for War Debts", 44 *AJIL*, pp. 477-487 (1950).

²⁰ The Peace Treaties made after the war focused more on the preservation of economic stability rather than the relatively abstract issues of apportioning political cum war debts, by repartition.

²¹ Although the ends of law which is justice will hardly allow this.

²² D.P. O'Connell: *op. cit.*

local debts traverse into the national is quite indeterminable. Certainly, however, in international law would not create rights against the central government after it has lost the province, territory or any such subordinate government; in any event such an action would not have been available against that central government under the proper law of the contract of loan prior to the event of transfer or change of sovereignty. Nonetheless, if it is established against the central government that it had appropriated the loan capital for its use, the principle of unjust enrichment might become applicable to make it liable for repayment.

Oftentimes, a purely administrative debt incurred for the purposes of a lost territory may be aptly classified as local debts. This was the decision of the French Cour de Cassation in the case of Alsace-Lorraine. There it was held that debts incurred in the process of administering the territory by the predecessor State ceased to be its liability under the predecessor State's law.²³

On the flip side of the coin, if the successor State refuses to recognize the autonomy of the new, additional territory, especially in so far as fiscal matters are concerned, it (the successor State) must, in the view of international law, undertake the amortisation of the debt or at least the satisfaction of the arising equities.

Records attest to a clear fact and that is wherever it has proved economically practicable, the local debts of all ex-colonial territories which have attained independence since 1945 have followed the territories themselves. This assertion is intensively analysed in the subsequent segment of our discourse here.

4. Succession to Debts and the African States in Perspective

The general trend during the epoch of colonialism was that the fiscal separation of the dependencies from the metropolitan States was fundamentally guaranteed. To this effect, when Great Britain and France made their acquisitions of overseas territories, they did not repudiate their debts, which we must hasten to mention were extremely minimal in magnitude. These metropolitan governments continued the debts by localising them and hence charged upon the local revenue, with strict and lucid provisions prescribing that only those revenue would be affected. The arrangement was such that these colonies borrowed mainly within the framework of their own legal systems, although this could not be wholly severed from the influence or authorisation of the metropolitan legislation. Notwithstanding, this arrangement firmly ensured that the metropolitan governments were never liable for amortisation under the proper law of the contracts of loans, both before and after independence.

We observe that debt obligations have been largely transferred throughout history by agreements. Some of these agreements contain provisions in which the successor State accepts the entire public debt. For instance, Article 2 of the Protocol annexed to the Final Declaration of the International Conference of Tangier provides that "the Moroccan State will take over the debts and obligations duly contracted by the Inter-

²³ D. 1876, 3.84.

national Administration within the limits of the authority delegated to it by His Majesty, the Sultan.”²⁴ Also a similar approach was adopted in the Evian-Agreements between France and Algeria.²⁵ It is worthy of commentary that these agreements were relatively imprecise when juxtaposed with provisions in Article 4 of the American – Philippine Treaty of General Relations of 4 July 1946 which stipulated in a contrastingly clearer manner that;

The Republic of the Philippines agrees to assume and does hereby assume all the debts and liabilities of the Philippine and instrumentalities, which shall be valid and subsisting on the date hereof. The Republic of the Philippines will make adequate provision for the necessary funds for the payment of interest on the principal of bonds issued prior to 1 May 1934, under authority of an Act of Congress of the Islands, or any province, city or municipality therein, and such obligations shall be a first lien on the taxes collected in the Philippines.²⁶

This lucid draftsmanship is regarded, in our opinion as a standard one for a total transfer of public debt. The economic rationality of such, however, remains controversial and questionable for African States.

On the other hand, some of these agreements aimed at transferring these debt obligations are included in multipurpose instruments and display a characteristic lack of uniformity in their patterns. For example, the agreement between Belgium and the Congo had the primary aim of settling the public debt between the predecessor and successor States, the latter assuming responsibility only for the share assigned to it in the agreement.²⁷ The French and British imperialists fall within this category. France particularly, attempted the devolution of loans to its former French West Africa through co-operation agreements within the latter’s successor States, whilst the United Kingdom concluded treaties with States that left the Commonwealth, *e.g.* Burma and Cyprus; and in relation to those remaining within the Commonwealth, varied approaches were utilised. We intend a more detailed examination of the French and British approaches.

4.1. The Commonwealth States

Under the British system of colonial financing, the colonial service regulations prescribed ascertainable colonial procedures for colonial appropriations and strictly all borrowings had to be made within this context.²⁸

In the bulwark, our investigations identify four major ways by which borrowings were made and debts incurred directly and indirectly by the former dependent colonies of the United Kingdom.

²⁴ 263 U.N.T.S., p. 171.

²⁵ See *Journal Official of the French Republic*, 20 March 1962, p. 3026.

²⁶ 7 U.N.T.S., p. 6.

²⁷ F. O k o y e: *International Law and The New African States*, 1972, p. 120.

²⁸ *Supra*.

These are, viz:

- (a) Loans under the Colonial Stock Act of 1877.²⁹
- (b) Loans obtained from the World Bank.
- (c) Loans obtained under the Colonial Development Welfare Act.
- (d) Administrative Loans.

We intend to endeavour a detailed examination of these serially.

(a) Loans under the Colonial Stock Act of 1877

This statute provided that every prospectus inviting subscription for colonial stock, and every certificate and coupon, would state that the revenues of the colony alone would be liable in respect of the stock and dividends thereon, and that the Consolidated Fund of the United Kingdom would not directly or indirectly become liable. Sequel to the attainment of independence of each colony, separate Independence Acts were enacted to repeal the Colonial Stock Act. Consequently, the respective stock registers which were kept prior to independence in the United Kingdom, were transferred to the new government. In addition, the enabling Independence Acts repealed the grant of jurisdiction to United Kingdom courts to entertain certain actions against the colonial governments in respect of colonial stock. We noted that some African States like Sierra Leone³⁰ and Uganda³¹ enacted statutes which provide for the continued servicing of colonial stock securities.

By available records, the provisional Constitution of the abortive United Arab Republic (U.A.R.) revealed that neither Egypt nor Syria remained separated fiscal entities after the proposed merger of the provisional union. Accordingly, the U.A.R. accepted full responsibility for the previous loans of its members.³²

The Republic of Somalia presumably also succeeded to the public debt of Somaliland and Somalia, which were the predecessor States.³³

(b) Loans Obtained from the World Bank

The International Bank for Reconstruction and Development (I.B.R.D.), otherwise known as the World Bank, is an organisation that is of paramount importance to the new African States, going by interactions of these States with it right from the epoch of colonialism and up till contemporary times.

The bank's loans to dependent territories and colonies are usually made to the government of such territories directly. As a result, the territory is perceived, within the provisional regime of the loan agreement, as a person in international law who is

²⁹ (1877), 40 & 41 Vict. C. 59.

³⁰ See the Investment in Sierra-Leone Government Securities Ordinance 1961 (*Legislation of Sierra-Leone* 1961, No. 13).

³¹ Government Securities Ordinance 1962, Ordinance No. 51 or 1962.

³² See also *Contra*: "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States" (1959) 81 *J.C.L.Q.*, pp. 367-368.

³³ Refer *Contra*: "Legal Problems Arising out of the Formation of the Somalia Republic", 12 *J.C.L.Q.*, pp. 1014-1016 (1963).

fully responsible for the performance of the agreement. It should be noted that Bank Regulation³⁴ No. 4 requires that a separate guarantee agreement should be concluded between the Bank and the metropolitan government which is responsible on the international plane for the dependency. Usually, the United Kingdom guaranteed such loans for her colonies. Our conclusion from this arrangement is that the metropolitan power, which is the sovereign,³⁵ remained the sole contracting party, at least in the perspective of the Bank, and the latter will continue to look forward to it for eventual amortisation of any loan debt. Therefore, in any event of the dependent territorial government defaulting or failing to fulfill its obligations, being the person the loan was directly advanced to, the metropole, in this case the United Kingdom, will be held responsible.³⁶ This work further observed that I.B.R.D's annual reports indicated that most African States are prone to a continued respect of the loan agreement which they entered into as colonial territories. Largely, the Bank's position about these loans is that they remain unaffected by the phenomenon of independence. However, in the isolated case of Kenya³⁷ it was considered more expedient to make extensive technical changes in the existing loan agreement.

In cases where dependencies were formally unions whilst under the metropolitan government as colonies and they split up with independence into distinct States, the Bank considered all successor States of the original borrower, *i.e.* the Union, jointly and severally liable for the debt obligations proceeding from the loan. This was what happened in cases like the British West Africa, British East Africa and Rwanda-Urundi.³⁸

(c) Loans obtained under the Colonial Development Welfare Act

These are loans made available to the colonies in virtue of the attainment of diverse developments in the territory of the dependencies. The United Kingdom government advanced these directly to them. An examination of the balance sheets of all newly independent African States in the year after the attainment of independency reveals that the African States continued to service debts incurred under this arrangement.

³⁴ The U.K. Government was, for example, authorised by the Colonial Loans Act of 1949 to guarantee such loans if it had satisfied itself that the loan would be used for the stated purpose and if either public revenues pledged to establish a fund for the interest and amortisation payments or the loans were secured by public property.

³⁵ See F. O k o y e: *International Law...*, p. 102.

³⁶ An instance of a metropolitan sovereign power honouring its commitment was recorded in the case of Congo (Leopoldville) which was unable to meet its obligations owing to its internal problems. Consequently, the Bank turned to Belgium which had initially guaranteed the loan, for payment of interim sums of capital and interest. Belgium did amortise.

³⁷ See the Supplemented Agreement of 2 April 1964, Loan No. 303, Clause C, which stipulated; "The Borrower has succeeded to the rights and obligations of the colony and Protectorate of Kenya under the Loan Agreement."

³⁸ Refer, for example, the statement of the First Secretary of State in House of Commons. The Contemporary practice of the U.K. in the field of Inter. Law (1962), Vol. II, p. 158-159. Also the Loan Assumption Agreement of Dec. 30, 1963 between the territory of Northern Rhodesia (Zambia) and Inter. Bank and Rhodesia Railways and the U.K. Loan No. 197 R.N.

(d) Administrative Loans

These include all local debentures and borrowings made by the territorial administrations. Some other debts which are properly classified as administrative debts should be discussed in this segment, even though they were not contracted as direct loans. They are otherwise known also as 'service pensions'.³⁹ At the inception, it should be mentioned in earnest that it is a clearly established fact that a successor State is under an obligation to respect debts that were incurred in the ordinary routine of governmental administration in the territory acquired by it. Under the traditional law of State succession, such debts approximate to the obligations of administrative contract and are subject to the same rules of succession as applied to the general public debt of the predecessor State.⁴⁰ This writer noted in the course of inquiries that none of the African States subrogated itself in the contracts of employment that were concluded by the metropolitan governments especially where such contracts involved non-nationals. This is justifiable and is supported by this writer. The argument stands out that it is politically and economically inexpedient for a State that has just been liberated from colonial clutches to retain foreign employees when its own nationales are scouting for jobs which were dominated by these imperialists earlier on.

Notwithstanding, it is salutary and satisfactory that most of these African States have regarded these contracts of employments, especially in relation to foreign employees, as creating private law rights which are comparable to acquired rights; thus bringing them within the realm of Conflict of Law or Private International Law. Practically therefore, African States paid compensation for early termination of career prospects. Arrangements were made to this effect in the numerous instruments granting independence to these African States for the payment of pensions and superannuation. For instance, a typical public officers agreement was entered into between the United Kingdom and Tanganyika (now Tanzania) to the effect that, *inter alia*;

(i) ... The conditions of service applicable to an officer who continues to be the substantive holder of a pensionable office in the public service of Tanganyika after 14 March 1962 shall be not less favourable than those which were applicable to him immediately before that date.

(ii) ... Entitlement to pensions, for persons who continued to be holders of pensionable post as well as the rights of pensions already receiving pensions, will continue to be governed by the laws in force on 14 March 1962 or by such other laws made thereafter that are not less favourable.⁴¹

4.2. The Francophone States

The fiscal separation of the French metropolitan government and its dependencies is exactly the same as found extant in British imperialism. On a broad basis, the policy regarding debt obligations is also similar to that of the United Kingdom. The normal

³⁹ F. O k o y e: *International Law...*, p. 115. He utilised this expression.

⁴⁰ See D.P. O'Connell, *The Law of State Succession*, 1956, p. 180; *State Succession in Municipal Law*, Vol. I (1967), p. 448.

⁴¹ Department of Technical Co-operation. Cmnd. 1813. This agreement was signed on 14 March 1962.

thing was an "automatic continuity of debt servicing".⁴² It was only in the case of Guinea that continuity was renounced.

It is under the French law that the roles which conflict of laws play in the analysis of the problem of succession to debt, is prominently articulated. The French legal system recognises a concept of integrity of the patrimony, which carries with it the notion that debt attach to credits, to the extent that if the assets are transferred, the liabilities associated with them are also transferred.⁴³ This is similar to the common law principle, succinctly expressed in the maxim *Qui sentit commodum, sentire debet et onus*⁴⁴ which traditional public international law has accorded a level of recognition. French jurists and scholars argue that when a debt is contracted on a territory that has been subjected to a change of sovereignty and such debt is attached to assets in that territory, it has become localised therein. To that effect, therefore, in as much as the debt relationship is unaffected by any change, no problem arises. However, if the successor State appropriates the assets, it will be unavoidable for the question to arise whether the debts continue to attach to those assets; and this question in an ultimate analysis is strictly one of conflict of laws.

This situation results because the resolution of the quagmire lies in the forum striving to look fore-most unto the law of the successor States as the *lex situs* of the assets. If by applying this set of rules it (the forum) comes into a conclusion that the integrity of the patrimony is intact and unaffected, it will then hold the successor state as the party which is still liable for the debts payment. Nonetheless, the existing laws in the *lex situs* may exonerate the successor State from liability still if there are rules providing for sovereign immunity in which case the courts of the successor State are precluded from entertaining any action against it, except with express waiver by the State's authority.

On the other hand, when the law of the successor State separates the actif from the passive, which means by implication that the integrity of the patrimony is affected, the forum automatically regards the debts as incapable of transfer even after an appropriation of the assets. In this situation, the forum continues to hold the displaced title – holder responsible for the debts, be it the predecessor State or any involved private individual, on the basis of an action in personam. Thus, in the celebrated French case of *Credit Industrial et Commercial v. Cara*⁴⁵ there arose a situation with the nationalization decrees of Algeria whereby certain French privately owned properties were transferred to State ownership. The creditors in France sued the dispossessed owners on their personal covenant or promise to repay. With this development, the separation of the actif and the passive in the Algerian decrees became a prime issue to be resolved. The French Cour de Cassation held on the 23 April 1969 that there should be the separation, even though this separation amounted to an expropriation without fair compensation. In the court's opinion, it was an Act of State to which no legal effect

⁴² D.P. O'Connell: op. cit.

⁴³ *Ibidem*.

⁴⁴ Transliterally means "He who enjoys the benefit bears the burden" and *vice versa*.

⁴⁵ Recueil Dalloz, Sirey, 1969, p. 341.

could be given in France. The creditors could therefore succeed on an action in personam, to compel the dispossessed owners to repay their outstanding debts.

Aside strict interpretation of the French law, some dependencies entered into specific agreements with the metropolitan government to 'take over' debts. For instance, in the Evian Agreements⁴⁶ signed between Algeria and France, it was agreed that:

L'Algérie assume les obligations et benefices des droits contractes en son nom ou en celui des établissements publics Algériens par les autorités Françaises competentes.⁴⁷

The Algerian debt's case was however compounded by the fact that Algeria had a somewhat complicated fiscal arrangement with the metropolitan France before its independence. This was because in *stricto sensu* it was not a French overseas territory on the eve of independence but was constitutionally a part of France. Consequently, the French test for determining which debts passed to Algeria was to ascertain whether they were charged on the Algerian budget or the metropolitan budget. In the case of *Chaurand v. Agent Judiciaire du Trésor Public*⁴⁸ the French court held that France was liable to compensate a French national whose property in Algeria had been requisitioned by the French authorities under the emergency decrees promulgated by French during the liberation struggles. In effect, this act was done in direct relation to the affaires of the metropole. Consequently, the hiatus created as a result of the problem of this emergency and its costs will be exclusively borne by France. Aside this, the successor State of Algeria might canvass that such debts are what the law regards as 'odious debts' and to that extent, Algeria may repudiate them.

In a similar vein, the agreements on economic, monetary and financial co-operations between France and the independent States which constituted the former French West Africa, provided expressly for French assistance in solving problems arising from the fiscal debts. For example, in the agreement between France and Dahomey (now Republic of Benin), Article 37 of the Agreement provides;

Le République Française et la République de Dahomey se consulteront sur la solution a apporter au problème posé par la prise on charge des dettes contractes par l'ex groupe de territoires de l'AOF envers la caisse centrale de co-operation économique par l'execution des programmes du Fides⁴⁹.

Another category of debts that is worthy of examination in relation to the French approach to matters of succession to debt is administrative debts or service pensions. Unlike the United Kingdom, France did not adopt any consistent method of transferring this type of debts to the African States. However, the metropole took up the

⁴⁶ *Journal Official of the French Republic*, 20 March 1962, p. 3026.

⁴⁷ *Ibidem*. Cited in F. O k o y e: *International Law...*, p. 111.

⁴⁸ *Ibidem*. See also *Gazette du Palais* I-238 (1964).

⁴⁹ Cited in F. O k o y e: *International Law...*, p. 114. See *Journal Official of the French Republic*, 6 February 1962, p. 1279.

problem in relation only to the pensions of those who had served in the French Military or in the Gendarmerie. This acceptance, even then, is restricted to successor African States with which it had concluded agreements resulting in Conventions concerning Co-operation in Defence Matters or Technical Military Assistance Agreements.

Notably, in the agreement between Mali, and France, the former accepted to honour pension rights of its own nationals as acquired in the French military and gendarmerie service.⁵⁰ Conversely however, it was France that accepted to pay the pension rights acquired by the nationals of Dahomey (Benin Republic), Niger, Upper Volta (Burkina Faso), Ivory Coast (Cote d'Ivoire), Chad, Gabon and Mauritania who had served in the French Army.⁵¹

It is worthy of note that it was only the Evian Agreement that attempted to protect the pensions of all civil servants. On default to pay as initially accepted in the agreement by Algeria, France eventually assumed the payment of pensions of those civil servants.

4.3. Other Cases

The Belgian cases are slightly different. In cases related to Belgium, a portion of the national debt was assigned to the successor State in a debt repartition agreement. For example, in the agreement between Belgium and Congo (Leopoldville) of 6 February 1965, a "Fonds belgo-congolais d'Amortissement et de Gestion" was created, wherein Belgium contributed a substantial sum into it. Under the arrangement, all Congo securities which were not guaranteed by Belgium are to be converted into fund certificates. By 20 March 1964, negotiations which started in 1962 on this settlement, had reached an advanced stage whereby a partial agreement emerged under which the Congo assumed responsibility for its internal debt, whilst Belgium agreed to continue to service external debts guaranteed by it.⁵²

With the splitting of the Federation of Rhodesia into Zambia and Zimbabwe, all existing public debts were shared by both states according to the magnitude of the benefits that accrued to each State. Also, when Gambia decided in 1981 to fuse into a Union with Senegal to establish the Republic of Senegambia, Senegal accepted, as the principal partner in the Senegambian Federation, to be responsible for Gambia's public debts, at least until a new confederal constitution dictates otherwise. In the case of Ubangi Shari which broke into the independent and sovereign States of Rwanda, Burundi and the Central African Republics, each State succeeded to the duties and rights allocated to it. All these confirm the ascertained state practice of most African States to continue the service of debts, unless peculiar circumstances otherwise dictate.

Such a distinctive case was recorded in the case of Tanzania, after the fusion of the former States of Tanganyika and Zanzibar. The agreement for fusion here was predi-

⁵⁰ Art. 2 of Annex 1 of the Accord de co-operation en Matiere de defense, *Journal Official of the French Republic*, 20 July 1960, p. 6631.

⁵¹ See, for example, Art. 6 of the Accord d'Assistance militaire technique between France and Dahomey. Cited *supra*.

⁵² See Z e m a n e k, "State Succession after Dedolonization", 116 *RCADI* (1965), *infra*.

cated on a particular form of government based on the UJAMMA social theory as expounded by Mwalimu Julius Nyerere. The adoption of this ideological theory occasioned some radical departures in the mode of payment of public debt reminiscent of the Russian Bolshevik revolution.⁵³

From the foregoing analysis, it is our humble opinion that any presumption in favour of State succession in the case of the African States, which we canvass for, must take into consideration the conflicting interests involved in the process of striking a just balance between respect for private rights acquired and the necessity for a regulated change in the politico-economic welfare of the States. To justify this stance satisfactorily, a jurisprudential examination of the principle of unjust enrichment must be done.

In his major work,⁵⁴ Friedmann, a proponent of the principle of unjust enrichment, categorically denied the assertion by some scholars that this principle means "an obligation to pay full, adequate and prompt compensation". He reiterated that this analysis was a confused one as they strive to equate 'unjust enrichment' with 'full damages'. In Friedmann's opinion, this erroneous equation stemmed from the use of the term "unjust enrichment" in the *Lena Goldfield's Arbitration Award*⁵⁵ where it was alternated for damages. We support the contention that 'damages' is a lot wider and considerably more extensive than 'unjust enrichment'. If the two are used as equivalent, it is our submission that the principle of unjust enrichment will no longer be useful in helping to bridge the gap, as it were, between the concepts of the economically developed and the developing nations. By implication, an alternative usage of the terms will achieve an unfair situation where any expropriation of foreign assets, regardless of the manner in which they were acquired or exploited, must be fully compensated for. This view is most unfavourable to the disadvantaged independent African States.

In Friedmann's view which this writer supports in an unaqualified manner, the principle of unjust enrichment is applicable in international law in full reference to the basic equities of the situation which arose during the long period of colonization. In our view, these equities doubtless include a recognition of the fact that the metropolitan government with their foreign interests have been the beneficiaries of an "unjust enrichment" which must be taken into cognisance. Friedmann once cited in support of a similar contention, an award by Max Huber in the *Spanish Zone of Morocco Claims, Great Britain v. Spain*⁵⁶ where the Arbitrator found that there was no basis for compensation because the value of the land, between the time of its seizure and that of restoration, had increased more than it normally would have, partly as a consequence of measures taken by the Spanish Government. This work aligns itself totally with the

⁵³ E.O. Essiemokhai: "The Organisation of African Unity and the International Legal Problems relating to State Succession in Africa", 2 *U.I.L.J.*, p. 32.

⁵⁴ Friedmann, *The Changing Structure of International Law*, 1964, pp. 207-210.

⁵⁵ 1929-30, Annual Digest, Case No. 1.

⁵⁶ 2 *R.I.A.A.* 615.

great jurist, Friedmann's view on the development of this doctrinal approach by legal science, when he said:

(it) ... would contribute greatly to a peaceful and fair adjustment of the difference between the capital exporting and the capital – importing countries in this age of decolonisation and socialisation of natural resources.⁵⁷

We observe, in conclusion, that the hitherto unclear status of the agreements entered into between the African States and the predecessor, metropolitan States, as to whether they were merely done *ex abundate cautela*⁵⁸ or otherwise, can now be declared as supplementing a rule of international law going by the potentials of the Draft Articles on Succession of States in Respect of Matters Other than Treaties. Article 22 of this instrument provides;

Newly independent states

When the Successor State is a newly independent state:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.
2. The provision of the agreement referred to in preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should fundamental economic equilibria of the newly independent State.⁵⁹

⁵⁷ Friedmann: *The Changing...*

⁵⁸ Transliterally meaning "From excess of caution or superfluity".

⁵⁹ UN Doc. A/32/183 of 30 August 1977; 4 *ILM* (1977), p. 1255.

International Responsibility arising from the Implementation of a Security Council Resolution: The 2nd Gulf War and the Rule of Proportionality

MICHAEL TERWIESCHE

1. Introduction

Soon after the invasion of Kuwait by Iraq on 2 August 1990 and fruitless attempts to peacefully achieve a withdrawal of Iraq, an international coalition was assembled in the Persian Gulf region in order to drive the occupying forces out of Kuwait. Twenty-eight States contributed ground, naval and air forces. On 24 February 1991 the coalition launched its ground assault code-named "Desert Sabre". Iraq's President Saddam Hussein announced on Baghdad radio on 26 February 1991 that Iraq was withdrawing from Kuwait in compliance with United Nations Security Council resolution 660 (1990).¹ The Council demanded in this resolution "that Iraq withdraw immediately and unconditionally all its forces to the position in which they were located on 1 August 1990." Following Iraq's acceptance of the United States' conditions for a temporary cease-fire, including, *inter alia*, compliance of Iraq with all relevant Security Council resolutions, the cease-fire came into effect on 28 February 1991.²

As transpires from various statements during the conflict, this operation was designed to carry out Security Council resolution 678 (1990).³ The Security Council thereby authorized "Member States co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement Security Council resolution 660

¹ D. Hiro: *Desert Shield to Desert Storm - The Second Gulf War*, 1992, p. 386.

² The acceptance by Iraq of all relevant Security Council resolution is declared in the letter from Iraq's Deputy Prime Minister and Minister for Foreign Affairs addressed to the President of the Security Council, UN Doc. S/22275. Note Security Council resolution 687 (1991), para. 33, whereby the Security Council declared that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions of this resolution (*e.g.* on boundary arrangements, UN observer units, inspection and destruction of weaponry, compensation fund etc.), a formal cease-fire is effective between Iraq and Kuwait in accordance with resolution 678 (1990). D. Hiro; *Desert Shield...*, pp. 392-393.

³ *E.g.* Prime Minister John Major, H.C. Hansard Vol. 183 Col. 979, 980 (17 January 1991); President François Mitterand, cited from H. Meyrowitz: "La Guerre du Golfe et le Droit des Conflits Armés", 96 *RGDIP* 563 (1992) note 23. Cf. O. Schächter "United Nations law in the Gulf Conflict", 85 *AJIL* 459 (1991); C. Warbrick: "The Invasion of Kuwait by Iraq", 40 *ICLQ* 966 (1991).

(1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”

2. Attribution of the Actions of International Forces

2.1. General Remarks

Attribution is the legal fiction which assimilates the actions or omissions of an organ to its legal entity and which renders the legal entity liable for damage.⁴ Resolution 678 (1990) does not provide for the attribution of the military operations to a subject of international law. On the one hand, the operations may be assessed as genuine UN actions because they were authorized by a principal organ of the UN, the Security Council. One could think of a kind of agency, since one of the purposes of the UN, viz. the maintenance of international peace and security (Article 1 [1] UN-Charter), is also envisaged in Security Council resolution 678 (1990) as an end of the operation.⁵ On the other hand, the actions might just as well be characterized as carried out by the individual States providing the contingents. The differentiation between the UN and the States involved is, however, crucial in the light of international responsibility for wrongful acts committed in the course of a military operation. A subject of international law can be held internationally responsible only if the acts or omissions at stake are attributable to it.⁶ Thus, Article 1 of the draft articles on State responsibility elaborated by the International Law Commission⁷ provides:

Every internationally wrongful act of a State entails the responsibility of that State.

According to draft Article 3 on State responsibility

[t]here is an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under international law.⁸

⁴ Cf. M.N. Shaw: *International Law*, 3rd ed. 1991, p. 459; M. B o t h e: *Streitkräfte internationaler Organisationen*, 1968, p. 33.

⁵ On the legitimate ends of the military actions against Iraq cf. Ch. G r e n w o o d: “Iraks Invasion in Kuwait Einige Rechtsfragen”, *NWelirRZ* 55 (1991); H. M e y r o w i t z, “La Guerre...”, pp. 562-564; E. R o s t o w: “Until What? Enforcement Action or Collective Self-Defense”, 85 *AJIL* 514 (1991), p. 514; M. W e l l e r: “The Kuwait Crisis: A. Survey of some Legal Issues”, 3 *AfrJICL* 25-29 (1990); B.H. W e s t o n: “Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy”, 85 *JIL* 526 (1991).

⁶ M. S o r n s e n: “Principes de Droit International Public - Cours Général”, 101 *RCADI* 223, 226 (1960); P. R e u t e r; *Principes de Droit International Public*, 103 *RCADI* 431 (1961); F. K a l s h o v e n: “State Responsibility for Warlike Acts of the Armed Forces”, 40 *ICLQ* 827 (1991). The opposite view is advanced by I. B r o w n l i c: *Principles of Public International Law*, 4th ed. 1990, p. 435: “Imputability would scent to be a superfluous notion, since the major issue in a given situation is whether there has been breach of duty...”.

⁷ On the authoritative character of the Draft Articles cf. R. H i g g i n s: *Problems and Process: International Law and How it is Used III*, 1994, p. 148.

⁸ *Yearbook of the International Law Commission (YBILC)* 1980, Vol. II (Part Two), p. 30.

2.2. Attribution via Article 48 UN-Charter

As a special provision, Article 48 could be seen as attributing conduct of armed forces to the respective Member States. Paragraph 1 reads:

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

It has been submitted that Article 48 is a delegation of authority to implement the decisions of the Security Council to Member States by the Council.⁹ Could one infer therefrom that, once authority has been conferred upon a State, it has to bear responsibility for all the acts carried out under this authority?

If one takes a look at the two functions of Article 48 paragraph 1, the answer must be in the negative.

At first, this provision is the specification of Article 25 with reference to the decisions taken under Chapter VII of the Charter.¹⁰ It implements the enforcement measures decided upon by the Security Council by giving the Council the right to impose a duty to act upon some or all Member States.¹¹

Secondly, the Council is given the permission to discriminate between the Members of the Organization as concerns the distribution of tasks among the Members. It could be necessary, in a given situation, to call upon only certain States to act, for example due to their geographic proximity or particular capacities.¹² Presumably, that is why the Security Council referred expressly to Article 48 (as well as to Article 25) in its resolution 670 (1990), which prescribed action in regard to air transport and freezing of assets by States in a position to take such action.¹³ Furthermore, the Security Council may call upon different Members to carry out different actions.¹⁴

Thus, Article 48 paragraph 1 elucidates the position of the Security Council vis-à-vis Member States in matters covered by Chapter VII of the Charter, but does not provide for the attribution of the non-forcible or forcible sanctions under Articles 41 and 42.

⁹ R. LaValle; "The Law of the United Nations and the Use of Force, under the relevant Security Council Resolutions of 1990 and 1991, to resolve the Persian Gulf Crisis", 23 *NethYBIL* 25 (1992); M. Weller, "TheKuwait...", p. 26.

¹⁰ Cf. "Legal Consequences for States of the Continued Presence of South Africa (South-West Africa) notwithstanding Security Council Resolution 276 (1970)", *ICJ Rep.* 1971, pp. 52-53, para. 113; J. Stone: *Legal Controls of International Conflicts*, 1959, p. 195.

¹¹ O. Schachter: "United Nations...", p. 463.

¹² P. Meisemann, in: J.-P. Cot, A. Pellet (ed.): *La Charte des Nations Unies*, 1985, p. 749; Ch. Greenwood: "Iraq's Invasion", p. 55; J. Stone: *Legal Controls...*, p. 197.

¹³ O. Schachter: "United Nations...", p. 463.

¹⁴ H. Kelsen: *The Lays of the United Nations*, 1951, p. 745; L. M. Goodrich, E. Hambro: *Commentaire de la Charte des Nations Unies*, 1946, p. 261.

2.3. Attribution Via the Concept of Organ

As a general principle, attribution is effected via the concept of “organ”.¹⁵ Draft Article 5 on State Responsibility reads that

“[f]or the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law...”.¹⁶

The same holds true as regards international organizations. They can be involved in responsibility towards third parties for injuries due to acts or omissions on the part of their agents.¹⁷ More specifically, Article 3 of the Convention respecting the laws and customs of war on land (The Hague, 18 October 1907)¹⁸ provides that a belligerent party shall be responsible for all acts committed by persons forming part of its armed forces. This would lead, however, to the question of the “belligerent party”: is it the UN, the State(s) holding the command over the operation or all States which contributed contingents? In other words: whose organ are the individuals committing the relevant acts?

It is submitted that, in order to qualify as an organ of a legal entity, the individual has to satisfy a formal as well as a material requirement.

a) *Formal Requirement: Link between Individual and Entity*

The individual’s position as an organ must be based upon a constituent decision emanating from the legal person or its founders.¹⁹ This requirement is justified in that a legal person cannot be compelled to recognize the intention or act of an individual unless there is a formal link between the entity and the individual. This link may be established either by the constitution of the entity as regards principal organs or by the constitution plus an act emanating from the principal organ which creates the subsidiary organ.

b) *Material Requirement: Effective Control*

To qualify as a principal organ, the individual has to exercise effective control over the affairs of the legal person. Consequently, in order to be a subsidiary organ, the individual has to be under the effective control of a principal organ.²⁰ This proposition rests upon two reasons:

¹⁵ Cf. Sørensen, “Principes...”, pp. 223, 226.

¹⁶ YBILC 1980, Vol. II (Part Two), p. 31.

¹⁷ Cf. “Effects of Awards of Compensation made by the United Nations Administrative Tribunal”, 1C.J. Rep. 1954, p. 53; F.V. García-Amador, in: YBILC 1956 Vol. II, p. 190 para. 87.

¹⁸ Hereinafter: IV. Hague Convention of 1907.

¹⁹ U. Fink: “Der Konflikt zwischen dem Irak und Kuwait und die internationale Friedensordnung”. 29 AVR 473 (1991).

²⁰ Cf. F. Seyersted: *United Nations Forces in the Law of Peace and War*, 1966, p. 176: “From the point of view of international law it is generally the factual control which matters ...”; R. Baxter: “Constitutional Forms and Some Legal Problems of International Military Command”, 29 BYIL 336-337 (1952).

The Principle of Effectiveness

This principle holds that in international law mere legal assertions are not recognized unless they correspond to the factual situation.²¹ Certain facts or situations must reach a degree of social reality before they can be integrated into the legal order.²² Because of the proximity to reality by taking into account certain factual situations the norms of international law are generally applied.²³ Hence, the principle of effectiveness prevents international law from being inapplicable. Attributing a certain behaviour to a legal person renders that person liable for the observance of the law dealing with this behaviour. However, an international person lacking effective control of the executive would not be able to guarantee the observance of its international obligations.²⁴ It does not make any sense to charge a person with a legal obligation without taking into account whether he is provided with the appropriate means to discharge this obligation. It follows that there must be a "genuine connection"²⁵ between user and means generally expressed by the effective control of the former over the latter.

The Principle of Responsibility

This principle serves two ends: The first one is to undo the wrong sustained. Yet, to order a person to make reparations for damages caused by actions over which he has no effective control and therefore could not prevent would be arbitrary.²⁶ The second end is to deter a person from committing an illegal act.²⁷ Deterrence makes sense only *vis-à-vis* someone who, by his effective control, can ensure the non-commitment of illegal acts.

It follows that armed forces are the organ of either an international organization or a State if

- (1) they are so constituted by a legal act stemming from either of them, and
- (2) if they are subordinated under the effective control of a primary organ.²⁸

²¹ A. Verdross, B. Simma: *Universelles Völkerrecht*, 3rd ed. 1984, § 69; K. Doehring: Effectiveness, in: R. Bernhardt (ed.): *Encyclopedia of Public International Law*, Instalment 7, 1984, p. 71. Cf. F. Seyersted: *United Nations...*, p. 121 (concerned with the status of the forces engaged in Korea): "The terminology used, whatever its intention may have been, cannot give the force a status which is not supported by the actual position."

²² Ch. de Visscher: *Theory and Reality in Public International Law*, 1968, p. 318.

²³ A. Verdross, B. Simma: *Universelles...* para. 68.

²⁴ This consideration is reflected in Article 80(2) of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Additional Protocol I): The issue of "orders and instructions to ensure observance of the Conventions and this Protocol" and the obligation to "supervise their execution" presupposes that a party to the conflict exercises effective control of its armed forces.

²⁵ Nottbohm Case (*Liechtenstein v. Guatemala*) Second Phase, *ICJ Rep.* 1955, p. 23; I. Brownlie: *Principles...*, p. 421: "substantial connection".

²⁶ Cf. "Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)", *ICJ Rep.* 1971, p. 42, para. 118: "Physical control of a territory... is the basis of State liability..."

²⁷ F. Kalshoven: *Constraints on the Waiving of War*, 2nd ed., 1991, p. 67.

²⁸ Cf. Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*, Merits), *ICJ Rep.* 1986, p. 65, para. 115: "For this conduct (*i.e.* the actions of the *contras*) to

As regards international organizations, the latter requirement is normally met when armed forces are under the genuine command and operational control of a commander appointed by the organization and exclusively subject to his orders.²⁹

c) *The Principle of Good Faith*

This result may be invalidated by the principle of good faith, as the basic premise upon which all international intercourse is based and in which law can be firmly rooted.³⁰ In particular, would it not run contrary to good faith to employ, on the one hand, a person in order to discharge one's duties (e.g. international contingents for the "suppression of acts of aggression" [Article 1(1) UN-Charter]), but to reject, on the other hand, attribution of the acts on the ground that there is a lack of control? A legal person benefiting from but declining responsibility for one and the same act could infringe the maxim *allegans contraria non est audiendus*. In the similar case of *The Mechanic*, where admissions relating to the existence of rules of international law were at stake, it was held that "Ecuador ... having fully recognized and claimed the principle on which the case now before us turns, whenever from such recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation."³¹ In this regard, an analogy may be drawn to the International Law Commission's Draft Article 8 on State Responsibility. It provides:

The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such persons or group of persons was in fact acting on behalf of that State;³²

This provision deals with the situation of "*de facto* officials" - in other words, persons who in principle are not State officials at all, but who in special circumstances were called upon to perform State functions in fact.³³ The conduct which has been taken into consideration for attribution to the State as acts generating international responsibility is, first, private persons used as auxiliaries in the police or armed forces, sent as "volunteers" to neighbouring countries, or, secondly, that of persons employed to carry out assignments in foreign territory (e.g. the *Eichmann* abduction), which may or may not be acknowledged.³⁴

give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

²⁹ F. Seyersted: *United Nations...*, pp. 97, 175-176; M. Bother: *Streitkräfte...*, pp. 40, 64, 68.

³⁰ Cf. M. Lachs; "Some Thoughts on the Role of Good Faith in International Law", in: *Declaration on Principles - Liber Atricorum Discipulorumque Prof. Dr. B.V.A. Röling*, 1977, p. 53.

³¹ Ecuadorian - US Claims Commission (17 August 1865): *Atlantic and Hope Insurance Companies v. Ecuador* (The Mechanic) Case, in: J.B. Moore: "History and Digest of the International Arbitration to which the United States Has Been a Party", 1898, Vol. III, p. 3226.

³² YB/LC 1980, Vol. II (Part Two), p. 31.

³³ International Law Commission, State Responsibility - Draft Articles submitted by the Special Rapporteur, YBILC 1974, Vol. I, p. 32 para. 3.

³⁴ Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, in: YBILC 1971, Vol. 11, Part One, p. 264, para. 191.

Is this result equally valid for the case under consideration, just because the forces provided by the Member States did in fact perform functions entrusted to the UN, when they took “effective collective measures for the ... suppression of acts of aggression”³⁵ by driving the Iraqi army out of Kuwait, although they were not by virtue of any agreements under Article 43 of the UN-Charter formally assigned to the UN? This question has to be answered in the negative. The essential difference between the examples mentioned above and international forces implementing a Security Council decision is that States could have performed through their *own* organs the acts earned out by private persons, had they wished to do so. But the UN, due to lack of Article 43 agreements, is not in the same position. The UN cannot, therefore, be blamed for circumventing international responsibility by authorizing States to perform its functions.

Secondly, there appears to be no need to attribute acts of military forces to the UN. It is possible to evaluate them under international law in case that they are attributed to States, those being subjects of international law.

It follows that the test of “organ” is the correct one by which attribution of forces to an international person may be effected.

3. Status of the Allied Forces in the Kuwait Crisis

The forces employed to drive Iraq out of Kuwait were no organ of the UN.

There has been no constituent decision emanating from the UN. In all cases which have happened so far, either the General Assembly or the Security Council have established in a more or less explicit language a UN force, *e.g.* General Assembly resolution 1000 (ES I of 5 November 1956 (UNEF): “Establishes a United Nations Command Security Council resolution S/5575 of 4 March 1963 (UNIFICYP): “Recommends the creation ... of a United Nations peace-keeping force in Cyprus.” In contrast, resolution 678 (1990) authorized *Member States* to use all necessary means to uphold and implement resolution 660 (1990). Hence, the addressee of this authorization was not an organ of the UN, but the Member States.

As to the material element, the armed forces involved were under the practical operational control of US-General Schwarzkopf, who was subject to the political control of the President of the United States.³⁶ The action itself was taken after extensive consultation between the principal governments represented in the multinational force and following direct discussion between President Bush and Prime Minister Major.³⁷ It was President Bush who decided on behalf of the international coalition to stop the fighting.³⁸

As the forces were under the practical operational control of US-General Schwarzkopf and as this conferring of command could not have been effected but by

³⁵ Article 1(1) UN-Charter.

³⁶ C. Warbrick: “The Invasion...”, p. 966.

³⁷ Prime Minister John Major, H.C. Hansard, Vol. 183 Col. 979 (17 January 1991).

³⁸ D. Hiro: *Desert...*, pp. 391-392.

an agreement between the United States and the States providing the contingents, it is submitted that the national contingents involved must be regarded as organs of the United States, which consequently represent internationally all coalition forces. It follows that the United States are liable for the observance of rules of international law incumbent on it as regards the acts and omissions of every national contingent which carried out General Schwarzkopf orders.³⁹

This proposition is, however, qualified in that the individual States cannot dissociate altogether from responsibility for acts contrary to international law committed by their contingent. It is even less permissible to allow a government to evade its responsibility on the plea of superior orders than it is in the case of individuals.⁴⁰ Hence, these States must observe their own obligations under international law.⁴¹ This falls into line with what has been said earlier, *i.e.* that one of the reasons for the non-accountability of the UN for the acts of the coalition force is that the Organization - due to lack of control of the forces - cannot prevent any breaches of the law. The essential difference is that the States, unlike the UN, could have ordered their forces prior to the transfer not to execute orders violating international law.

4. International Responsibility Arising from the Attack on Withdrawing Iraqi Forces

On 25 February 1991 at 22.30 GMT, Baghdad Radio announced that the Revolutionary Command Council had ordered an Iraqi withdrawal from Kuwait.⁴² During the time of the withdrawal beginning 25 February 1991 around midnight GMT and the coming into effect of the cease-fire on 28 February 1991 at 05.00 GMT, the Iraqi troops were attacked by allied forces and suffered such heavy losses that it was described as "slaughtering",⁴³ as "one of the most terrible harassments of a retreating army from the air in the history of warfare".⁴⁴ On Highway 8 connecting Umm Qasar with Baghdad via Nasiriyeh, US military helicopters fired their anti-tank missiles at the Iraqi tanks and machine guns at the fleeing soldiers heading for the marches. Thousands of retreating Iraqis, who managed to reach the Basra beachhead on their way to the Iranian border, found themselves under aerial attack, others were tracked down by allied helicopters up to 100 miles inside Iraq and gunned down. After the end of the hostilities, General Schwarzkopf summed up his state of mind as follows: "War is the remedy that our enemy has chosen: therefore, let him have as much of it as they want," and adding: "You do that by inflicting the maximum casualties on the enemy".⁴⁵

³⁹ Cf. F. Seyersted: *United Nations...*, p. 124 (Korea): "The United States as having operational control must clearly also be the party responsible for the other actions (*i.e.* acts different from the conclusion of treaties and the armistice agreement) of the Force,"

⁴⁰ *Ibidem*, p. 125.

⁴¹ H. Meyrowitz: "La Guene...", p. 558; in general cf. F. Seyersted: *United Nations...* p. 204.

⁴² D. Hiro: *Desert...* p. 383-384.

⁴³ *Ibidem*, p. 387.

⁴⁴ C. Smith: *The Observer* (cited from D. Hiro: *Desert...*, p. 387).

⁴⁵ D. Hiro: *Desert...*, pp. 387-391.

This resembles the attitude of some writers who argue that the defending State has the right to pursue the retreating enemy forces, hammering at them up to the time of their total defeat, and even to destroy the aggressor's army.⁴⁶ According to a statement made by the U.S. Department of Defense on the conduct of the Persian Gulf war, "[t]he attack was entirely consistent with military doctrine and the law of war."⁴⁷ On the other hand, more than a hundred years ago it was submitted that impairing the enemy is not the purpose, but only the consequence of war, because war is a legal remedy and thus aims at a peaceful and legal order. Inflicting harm on others was held to be not the function of the legal order.⁴⁸

4.1. The Applicable Standard

In order to find out whether this method of warfare was compatible with international law, the applicable rules of the *ins in bello* need to be determined.

That all the laws of war are applicable to UN enforcement actions⁴⁹ has been denied by a Committee of the American Society of International Law, but such laws of war should be selected as may seem to fit their purposes (e.g. prisoners of war, belligerent occupation), and such others should be added as may be needed, and those being rejected which seem incompatible with their purposes.⁵⁰ This view requires further study.

As no special conventions have been concluded concerning the conduct of hostilities aimed at enforcing a Security Council resolution, resort must be taken to the general rules applicable to warfare. Neither is Iraq a party to the IV. Hague Convention of 1907 nor are Iraq and several coalition members, including the United States, Great Britain and France, parties to the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Additional Protocol I).⁵¹ However, the rules on land warfare expressed in the IV. Hague Convention of 1907 were held by the International Military Tribunal in 1946 as being by 1939 declaratory of the laws and customs of war.⁵² They

⁴⁶ T. Dinstein: *War, Aggression and Self-Defence*, 1988, p. 219; J. Zourek: "La notion de légitime défense en droit international", 56 *AIDIA* 9 (1975). Cf. E. Rostow: *Until...*, p. 514; "[International law has never favored 'costless aggressions'."]

⁴⁷ "U.S. Department of Defense Report to the Congress on the Conduct of the Persian Gulf War - Appendix on the Role of the Law of War" I April It, 1992, 31 *LAf* 643 (1992).

⁴⁸ J.G. Bluntschli: *Das moderne Kriegsrecht der civilisierten Staaten*, 2nd ed. 1874, p. 36.

⁴⁹ The term "enforcement action" denotes measures under Articles 41 and 42 UN-Charter, cf. Article 2(7) UN-Charter; H. Kelsen: "Collective Security and Collective Self-Defense under the Charter of the United Nations", 42 *AJIL* 786 (1949).

⁵⁰ "Should the Laws of War apply to United Nations Enforcement Action?", Report of Committee on Stud)' of Legal Problems of the United Nations, 46 *PASIL* 220 (1952).

⁵¹ "U.S. Department of Defense Report...", pp. 616-617.

Judgment of the International Military Tribunal (Nuremberg), H.M. Stationery Office (HMSO), Miscellaneous No. 12 (1946), p. 65. Note the opinion of Max Huber, observing that in 1907 the Convention merely codified, to a large extent, preexisting customary law (Quelques considérations sur une Revision Eventuelle des Conventions de la Haye relative à la Guerre, in: *Revue Internationale de la Croix-Rouge*, July 1955, p. 420).

have the character of customary international law and are binding upon all parties to the conflict at stake.⁵³ Article 1 of the IV. Hague Convention of 1907 reads:

The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.⁵⁴

Even if one adopts the position that an enforcement action is not a “war”⁵⁵, there is good reason to apply these rules at least by analogy. The need to prevent unnecessary suffering and destruction is as strong in the case of an enforcement action as in a traditional war. Having in mind that one of the principal goals of the UN is to promote and encourage respect for human rights and to save mankind from the scourge of war, the rules which intend to mitigate the severity of armed conflict should certainly apply in such a case. Furthermore, it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them?⁵⁶ This would certainly lead to the most barbarous warfare conceivable, a result the rules of warfare mean to prevent.

It follows that during the hostilities the laws of war are governed by the principle of equality of the belligerents, and this applies even when the UN has designated one of the parties as aggressor as well as when an enforcement action is earned out against the aggressor under the auspices of the UN.⁵⁷

4.2. Denial of Quarter

The proscription of quarter is regulated in Article 23(d) of the Regulations respecting the laws and customs of war on land annexed to the IV. Hague Convention of 1907. It reads:

In additions to the prohibitions provided by special Conventions, it is especially forbidden-
id) To declare that no quarter will be given;

⁵³ H. Meyrowitz: “La Guerre...”, p. 565; “U.S. Department of Defense Report...”, p. 616.

⁵⁴ Italics added.

⁵⁵ H. Lauterpacht: *International Law*, Vol. II (Disputes, War and Neutrality), 7th ed. 1952, p. 224; H. M o: “The Sanctions of International Law”, in: *The Grotius Society, Transactions for the Year 1949*, Vol. 35, p. 10.

⁵⁶ H. Lauterpacht: “The Limits of the Operation of the Law of War”, 30 *BYBIL* 212 (1953); R. Baxter: “Constitutional...”, p. 358.

⁵⁷ Resolutions of the Institut de Droit International, 47 *AIDI* Vol. 153 (1957) (Projet definitif de Résolutions II - IV); H. Meyrowitz: “La Guerre...”, pp. 553-554; O. Schächter: “Authorized Uses of Force by the United Nations and Regional Organizations”, in: L.F. Damrosch, D.J. Scheffer (eds.): *Law and Force in the New International Order*, 1991, p. 76. This is without prejudice to the possibility of setting the aggressor State on a disadvantageous footing after the hostilities have ceased, cf. H. Lauterpacht: “The Limits...”, pp. 233-237; F. Kalshoven: *Constraints...*, p. 72.

⁵⁸ H. Lauterpacht: *International...*, p. 339; L.R. Penna: “Customary International Law and Protocol I: An Analysis of some Provisions”, in: Ch. Swinarski (ed.): *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, 1984, p. 212.

Article 40 of Additional Protocol I provides:

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

These provisions reflect customary international law.⁵⁸ Before dealing with this issue, some remarks on the concept of *hors de combat* seem to be conducive. This concept is provided for in Article 23(c) of the Regulations annexed to the IV. Hague Convention of 1907⁵⁹ and in Article 41 of Additional Protocol I. Under customary international law, a person is *hors de combat* when he has ceased to fight or when he is no longer capable of resistance because he has been overpowered. The concept of *hors de combat* is based on the principle of necessity: once combatants are *hors de combat*, any further attacks are not necessary to weaken the military power of the adversary⁶¹. Enemy soldiers, who, however, try to escape with their arms can reassemble, be reequipped with weapons and resume hostilities. This is presumably the *ratio* of the proviso in Article 41(2) of Additional Protocol I, according to which a person is *hors de combat* only if he abstains from any hostile act and does not attempt to escape. It is submitted that this proviso also applies to the customary concept of *hors de combat*. The opposite result, *i.e.* that Article 41(2) of Additional Protocol I has diminished a duty under customary law to protect persons *hors de combat* even if they try to escape would be incompatible with the purpose of Additional Protocol I as laid down in its third preambular paragraph, *viz.* "to reaffirm and develop the provisions protecting the victims of armed conflict."

Hence, Iraqi units trying to escape into Iraq cannot be regarded as *hors de combat*.

This leads to the question whether the same consideration applies to the principle of quarter. Must the enemy's life have to be spared only if he has laid down his arms and surrendered and does not try to escape? The prohibition of denial of quarter is based on the principle of necessity, too.⁶¹ In addition, the difference between the two concepts is only marginal.⁶² Article 23(d) of the Regulations annexed to the IV. Hague Convention of 1907 refers, strictly speaking, to the intention, the threat or pressure with a view to provoking an immediate surrender, whereas the practice of refusing quarter was generally covered by Article 23(c) of the Regulations annexed to the IV.

⁵⁹ Article 23(c) of the Regulations: "... it is especially forbidden- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion."

⁶⁰ M. Bothe, K.-J. Partsch, W. Solf: *New Rules for the Victims of Armed Conflict — Commentary on the Two Protocols Additional to the Geneva Conventions of 1949*, 1982, p. 219-220.

⁶¹ *Ibidem*, p. 217.

⁶² The concepts of "quarter" and "hors de combat" are dealt with by several authors in a way that a combatant *hors de combat* must be accorded quarter, *e.g.* H. Lauterpacht: *International...*, p. 338. Cf. T. Bathy, J.H. Morgan; *War; Its Conduct and Legal Consequences*, 1915, p. 172: "[The combatant] is entitled to quarter' if he throws down his arms", which seems to reflect Article 41 (2b) of Additional Protocol I, *i.e.* a clear expression of the intention to surrender.

⁶³ Y. Sandoz, Ch. Swinarski, B. Zimmermann: "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", 1987, No. 1591, 1589; M. Bothe, K.-J. Partsch, W. Solf: *New Rules...* p. 216; H. Castren: *The Present Law of War and Neutrality*, 1954, p. 188.

Hague Convention of 1907, both of which are laid down in Article 40 of Additional Protocol I.⁶³

However, Article 40 of Additional Protocol I implies that the parties to the conflict forgo using their weapons in such a way that it would amount to a denial of quarter. In other words, the rule of proportionality also applies with regard to combatants, up to a point.⁶⁴ The principle of a reasonable proportion between the destruction caused by a hostile act and its military result is, if not expressly laid down in a conventional provision, yet admitted by international law when interpreting the laws of war. The principle of proportionality is inherent in the idea of justice; it is a regulative principle of any law.⁶⁵ Indeed, the principle of proportionality serves in cases where there has been no surrender by the adversary's forces as a regulative to decide when attacks have to be either ceased or reduced in their impact on the enemy.

This result is confirmed by taking into account the prescription that "the right of the belligerents to adopt means (and methods) of injuring the enemy is not unlimited," as envisaged in Article 22 of the Regulations annexed to the IV. Hague Convention of 1907 and Article 35 of Additional Protocol I. This provision is seen as the "trunk" of the rules of warfare and may serve as a guidance when interpreting the special provisions governing the conduct of hostilities.⁶⁶

At 08.20 GMT on 26 February 1991, Saddam Hussein announced on Baghdad Radio that Iraq was withdrawing from Kuwait in compliance with Security Council resolution 660 (1990). At 11.50 GMT on the same day Kuwaiti resistance sources said that Iraqi forces had evacuated Kuwait City and suburbs.⁶⁷ The withdrawal from Kuwait was completed on 27 February 1991 at dawn local time.⁶⁸ Yet, the attack against the retreating forces did not stop until the coming into effect of the truce at 05.00 GMT on 28 February 1991.⁶⁹ A military advantage, therefore, could not have been gained any longer by the attacks; the more as it was apparent that the troops did not reassemble on Iraqi territory in order to try a new invasion into Kuwait. Only Iraq's acceptance of Security Council resolutions 662 (1990) and 674 (1990), *i.e.* rescission of the annexation and reparations, was still at issue. It is submitted that the comparative lack of importance of the remaining two resolutions did not justify the killing of 25,000 Iraqi soldiers, tracks filled with blood,⁷⁰ the Jahra-Basra road at Mitla ridge at

⁶⁴ Y. Sandoz, Ch. Swinarski, B. Zimmermann: "Commentary..No. 1589.

⁶⁵ J. Delbruck: "Proportionality", in: R. Bernhardt (ed.): *Encyclopedia of Public International Law*, Instalment 7, 1984, p. 396; M. Huber: *Revue...*, p. 423.

⁶⁶ S. Wei: "The Application of Rules Protecting Combatants Against the Effects of the Employment of Certain Means and Methods of Warfare", in: F. Kalshoven, Y. Sandoz (eds.): *Implementation of International Humanitarian Law*, 1989, p. 378; B. Graefrath: "Die Bedeutung des Ergänzungsprotokolls für den Schutz der Zivilbevölkerung", in: Ch. Swinarski (ed.): *Etudes...* no. 172-174.

⁶⁷ D. Hiro: *Desert...*, p. 386.

⁶⁸ Letter dated 27 February 1991 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/22274. Local time is three hours ahead of GMT throughout the year.

⁶⁹ D. Hiro: *Desert...*, p. 387.

⁷⁰ T. Clifton (*Newsweek*). in BBC-2 television's "Late Show" of 8 June 1991, cited from D. Hiro: *Desert...*, p. 388.

the morning of 28 February 1991 turned into a gigantic scrap-yard, with some 2,000 military and civilian vehicles destroyed, dead bodies and severed limbs scattered all over, some corpses petrified in their vehicles, and others incinerated, with their faces reduced to grinning teeth, what was described by pilots of Iranian patrol aircrafts as a “rat shot”,⁷¹ even taking into account that it is foremost the soldier who is exposed to the dangers of warfare.

This amount of destruction and casualties inflicted upon Iraq was out of proportion to the remaining two legitimate aims.⁷² It constitutes a violation of the principle of proportionality which underlies the prohibition of conducting hostilities on the basis that there shall be no survivors embodied in the customary rule to give quarter as codified in Article 40 of Additional Protocol I. Applying the test on international responsibility elaborated above, the United States as well as the States providing the contingents which were engaged in this kind of illegal warfare are internationally responsible to Iraq to make good any damage arising therefrom.⁷³

⁷¹ D. H i r o: *Desert...*, pp. 389-390.

⁷² Cf. H. M e y r o w i t z: “La Guerre...”, p. 582, who observes that these actions infringe the principle of necessity

⁷³ As to the amount of the indemnity due to be paid cf. *Chorzów Factory (Merits)*, PCU Series A, No. 13, p- 47,

OSCE Procedures for Peaceful Settlement of International Disputes

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It was still before the adoption of the Helsinki Final Act of the Conference for Security and Cooperation in Europe (to be exact during the second phase of the CSCE negotiations) that Switzerland put forward a draft of the convention on the European system of peaceful dispute settlement.¹ The draft contained the very principles of the peaceful settlement of disputes and rules regulating the procedure of inquiries, mediation, conciliation and compulsory arbitration.² The draft was not accepted by the participants of the CSCE. The 1975 Final Act of Helsinki incorporated the principle of peaceful settlement of disputes (principle V of the "Decalogue") and provided for the continuation of works aimed at finding a generally accepted system of dispute settlement, the draft convention proposed by Switzerland being taken into consideration.³

The well known disagreement between the former socialist European states on the one hand and the states of the Western Europe on the other as to the dispute settlement, especially as regards compulsory procedures thereof, made it impossible to reach an agreement on this subject during the two meetings of experts – in 1978 in Montreux and in 1984 in Athens.⁴

A new impetus was given in this respect by the Final Document of the Vienna Meeting of 19 January 1989. It provided for the preparation of the generally accepted system of dispute settlement with a compulsory third party involvement.⁵ If we take this very ambitious objective as a point of reference, we will conclude that the Expert

¹ See doc.CSCE/II/B/1 of September 18, 1973.

² More on the subject: M. I w a n e j k o: "System załatwiania sporów w Europie", 1977, No. 7–8, p. 54 ff.; M. P a s z k o w s k i: "Pokoje załatwianie sporów a system bezpieczeństwa i współpracy w Europie", *Sprawy Międzynarodowe* 1974, No. 4, p. 11 ff.; M. C h o j n a c k a: "KBWE a system pokojowego załatwiania sporów w Europie", *Sprawy Międzynarodowe* 1982, No. 4, p. 91 ff.; J. S u t o r: "Pokoje załatwianie sporów międzynarodowych w procesie KBWE", *Sprawy Międzynarodowe* 1990, No. 7–8, p. 85 ff.; V.-Y. G h e b a l i: "La CSCE et la transformation des relations internationales en Europe", in: D. B a r d o n n e t (ed.): *The Peaceful Settlement of International Disputes in Europe: Future Prospects*, Workshop 1990 (1991), p. 555 ff.

³ See A.D. R o t f e l d (ed.): "From Helsinki to Madrid – CSCE Documents 1973–1983", (1983), p. 124.

⁴ More on this subject: M. C h o j n a c k a: op. cit., p. 99 ff.; J. S u t o r: op. cit., p. 87 ff.; J. M r a z e k: "Third-Party Element in the Peaceful Settlement of International Disputes in the Framework of the CSCE Process", in: D. B a r d o n n e t (ed.): op. cit., p. 611 ff.

⁵ A. B l o e d (ed.): *From Helsinki to Vienna: Basic Documents of the Helsinki Process*, 1990, p. 181 ff., specially p. 185.

Meeting held in Valletta since 15 January 1991 till 8 February 1991 proved to be only partly successful. What was actually agreed in Valletta was a complicated multi-phase political mechanism of dispute settlement resembling the procedure of good offices or mediation. In addition there were little chances of the practical application of the very system. Such a result of the Valletta meeting makes it not surprising that the participating states soon looked for the establishment of new methods of dispute settlement within the framework of the OSCE. It was already during the Review Conference held in Helsinki in 1992 that three drafts were presented: a draft convention on conciliation and arbitration prepared by France and Germany, a British draft on conciliation, and an American draft on the so called "directed conciliation". The Helsinki Document of 10 July 1992 gave a mandate to the next Expert Meeting to deal with the peaceful settlement of disputes. This meeting was to be held in Geneva since 12 October until 23 October 1992.⁶ According to this mandate, the meeting was to elaborate a wide and coherent body of principles governing dispute settlement. The Geneva meeting had to deal with the compulsory element in conciliation, directed conciliation and the establishment of the Court of Conciliation and Arbitration.⁷ The obligation of peaceful settlement of disputes was recognized by the Helsinki Document as the cornerstone of the process of the Conference for Security and Cooperation in Europe⁸ (now Organization for Security and Cooperation in Europe).

The 1992 Geneva meeting of experts brought about the adoption of the Draft Decision of the Council of Ministers of the OSCE. It was accompanied by four annexes. They were namely:

- Annex 1 – Amendment of chapter V of the Valletta provisions on the OSCE Procedure for Peaceful Settlement of Disputes,
- Annex 2 – Convention on Conciliation and Arbitration within the OSCE,
- Annex 3 – Provisions on OSCE Conciliation Commission,
- Annex 4 – Provisions on Directed Conciliation.

All the above-mentioned documents were accepted by the OSCE Council of Ministers in Stockholm on 15 December 1992. On the same day the Convention on Conciliation and Arbitration was opened for signature. Already in Stockholm it was signed by foreign ministers of 29 states. Until now seventeen states have deposited their instruments of ratification or accession to the Convention. They are: Germany, Cyprus, Croatia, Denmark, Finland, France, Italy, Liechtenstein, Monaco, Poland, San Marino, Slovenia, Sweden, Switzerland, Tajikistan, Ukraine and Uzbekistan. The Convention entered into force on 5 December 1994 – after the deposit of 12 instruments of ratification or accession. This Convention will be the subject of detailed examination.

⁶ CSCE, 1992 Helsinki Document: in: *Wyzwania czasu przemian*, 1992, pp. 42–43.

⁷ *Ibidem*, p. 43.

⁸ *Ibidem*.

1. Convention on Conciliation and Arbitration within the OSCE

The Convention on Conciliation and Arbitration within the OSCE of 15 December 1992⁹ concerns - as it is already indicated by its title - two classic methods of dispute settlement namely conciliation and arbitration. It establishes the Court of Conciliation and Arbitration within the OSCE. The members thereof will be conciliators and arbitrators nominated by the States-Parties to the Convention. Each State-Party may nominate two conciliators, one arbitrator and one alternate (Articles 2 and 3 of the Convention). From among other general provisions we should mention Article 5 of the Convention which regulates the independence of the members of the Court and of its Registrar, as well as Article 6 regulating privileges and immunities of conciliators, arbitrators, the Registrar, agents and counsels. Subsequent provision of the Convention deals with the establishment of the Bureau of the Court composed of the President, Vice-Presidents and three other Members. An important question of the voting procedure is regulated in Article 8 which reads as follows:

- “1. The decisions of the Court shall be taken by a majority of the members participating in the vote. Those abstaining shall not be considered participating in the vote.
2. The decisions of the Bureau shall be taken by a majority of its members.
3. The decisions of Conciliation Commissions and Arbitral Tribunals shall be taken by a majority of their members, who may not abstain from voting.
4. In the event of a tied vote, the vote of the presiding officer shall prevail.”

According to Article 11, the Court is to adopt itself its own rules of procedure. The seat of the Court is in Geneva.

Article 19 deals with the important question of safeguarding the existing means of dispute settlement. It provides that in some cases other methods of dispute resolution than the ones regulated in the Convention will be given preference.

Two provisions of the Convention are of crucial importance for the determination of the character of conciliation regulated therein. They are namely Article 18(1) and Article 20.

Article 18(2) reads:

“Any State-Party to the present Convention may submit to a Conciliation Commission any dispute with another State-Party which has not been settled within a reasonable period of time through negotiation.”

⁹ Convention on Conciliation and Arbitration within the OSCE, 32 *ILM* 557 ff. (1993). On the subject of the Convention: R. B a d i n t e r: “L’Europe du droit”, Annex: Convention on Conciliation and Arbitration within the OSCE, 4 *EJIL* 15 (1993) (Annex – p. 24); R. S z a f a r z: “Konwencja o koncyliacji i arbitrażu w ramach KBWE” 48 *Państwo i Prawo*, No. 5, p. 58 ff. (1993); R. S z a f a r z: “CSCE Procedures for Peaceful Settlement of Disputes”, in: O. B r i n g, S. M a h m o u d i (eds.): *Current International Law Issues. Nordic Perspectives. Essays in Honour of Jerzy Sztucki*, 1994, p. 188 ff.; G.J. T a n j a: “Peaceful Settlement of Disputes within the Framework of the CSCE; a Legal Novelty in a Political-Diplomatic Environment”, in: A. B l o e d (ed.): *The Challenges of Change. The Helsinki Summit of the CSCE and its Aftermath*, 1994, p. 67 ff.

Article 20 of the Convention provides that each State-Party to the Convention may request the Registrar to establish a Conciliation Commission for any dispute between it and one or more other States-Parties to the Convention. Each party to a given dispute may consist of one or more states. The Parties may also demand the establishment of the Conciliation Commission on the basis of agreement concluded by them. The latter procedure makes it possible for states participating in the Organization for Security and Cooperation in Europe which are not parties to the Convention to take part in dispute settlement procedures under this Convention.

In the light of the preceding provisions it is clear that the procedure of conciliation between the Parties to this Convention is compulsory in the full sense of the term. It means that no additional declaration is necessary for any party wishing to initiate a conciliation procedure in a given dispute that it has with another State-Party. It means also that the latter party is obliged to take part in the procedure initiated unilaterally by the former one. The refusal to take part in the conciliation procedure would amount to a violation of the Convention and would entail the international responsibility of the respective state.

No substantive limitations of the competence of the Conciliation Commission are provided for in the Convention. In this context we must, however, remind that during the Geneva Expert Meeting the British delegation insisted that the Convention should make a few exceptions as regards the competence *rationae materiae* of the Conciliation Commission. The British delegates requested that the exceptions provided for in the Valletta Document should be intercepted by the text of the Convention and demanded the insertion of an additional provision according to which the resort to conciliation would be excluded in cases in which the defendant finds that the dispute concerns its national sovereignty, national defence, sovereignty over land territory or competing claims to jurisdiction over other territories. It was the echo of disputes concerning Cyprus, Gibraltar, the continental shelf of the Aegean Sea, and the French nuclear tests. What should be stressed, the competence to decide whether a given dispute referred to one of the above-mentioned items would belong to the interested party itself and not to the Conciliation Commission. It would lack "compétence de la compétence" in this field. Such a regulation would be in no case satisfactory. The more should it be welcomed that the most states participating in the OSCE were against the British proposals. The generally held opinion was that the adoption of special OSCE Convention on dispute settlement would only make sense had it been a real step forward as compared with the Valletta Document. What is to be cared of now is that the provision of Article 19(4) of the Convention – which gives Member-States the possibility of making reservations to the Convention¹⁰ is not interpreted in such a way as to deprive the Convention of its purpose.

¹⁰ Article 19(4) of the Convention reads: "A State may, at the time of signing, ratifying or acceding to this Convention, make a reservation in order to ensure the compatibility of the mechanism of dispute settlement that this Convention establishes with other means of dispute settlement resulting from international undertakings applicable to that State."

According to Article 21 – regulating the constitution of the Conciliation Commission – each party to the dispute shall appoint from the list of conciliators established in accordance with Article 3 one conciliator to sit on the Commission. The Bureau shall appoint three further conciliators, their number, however, may be increased or decreased by the Bureau, but it must be always uneven.

According to Article 24 “the Conciliation Commission shall assist the parties to the dispute in finding a settlement in accordance with international law and their OSCE commitments”. As the conciliation is one of extra-judicial forms of dispute settlement it is possible to take into consideration not only international law but also political OSCE commitments.

According to Article 25 dealing with “The Result of Conciliation”, the Commission shall prepare “a final report” containing the proposals of the Commission for the peaceful settlement of the dispute. If the proposals of the Commission are not accepted by the parties to the dispute, “the report shall be forwarded to the OSCE Council of Ministers through the Senior Council” (Art. 25[5]). As can be seen, the lack of approval of the proposed solution by the very parties to a given dispute will make the supreme organ of the Organization engaged in the dispute resolution. The OSCE Council of Ministers has, however, only political instruments at its disposal.

The second procedure regulated in the Convention is arbitration. A general principle regarding arbitration is to be found in Article 26 of the Convention which reads:

“1. A request for arbitration may be made at any time by agreement between two or more States-Parties to this Convention or between one or more other OSCE participating States.”

In the light of this provision it is clear that arbitration is optional, *i.e.* the initiation of arbitration procedure is dependent upon the agreement of the both parties to the dispute. The Convention makes it possible for states however to recognize the competence of the Arbitral Tribunal as compulsory. Paragraph 2 of Article 26 provides:

“The States-Parties to this Convention may at any time by a notice addressed to the Depositary declare that they recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of an Arbitral Tribunal, subject to reciprocity. Such a declaration may be made for an unlimited period or for a specified time. It may cover all disputes or exclude disputes concerning a State’s territorial integrity, national defence, title to sovereignty over land territory or competing claims with regard to jurisdiction over other areas”.

This provision requires a few remarks.

According to the above-cited provision, each State-Party may make a declaration accepting the compulsory jurisdiction of the Arbitral Tribunal on the condition of reciprocity. Such a declaration may cover all disputes or be of a limited character. These limitations are also called “reservations” and are identical with the ones to be found in the Valletta Document. The arbitral procedure will be compulsory in mutual relations of states which have made such declarations. It means that the procedure will be initiated on unilateral request made by any such party to a given dispute. In contrast to the optional arbitration which is accessible not only to the Parties to the Convention

but also other members of the OSCE, the compulsory arbitration may be resorted to only by the parties to the 1992 Convention.

According to the generally accepted principles of international law, it will be up for the Arbitral Tribunal itself to decide whether it has jurisdiction over a given dispute or whether its jurisdiction is excluded due to any of reservations included in the declaration. It means that the Arbitral Tribunal will have "compétence de la compétence".¹¹

Though the authors of the draft Convention (*i.e.* the French and German delegations) maintained during the Geneva Meeting that the list of possible reservations is exclusive, such a conclusion is in no case legitimate if we analyse the above-cited paragraph of Article 26. There is no stipulation confirming that no reservations other than the ones named in the Convention may be made by the parties in their declarations. What is missing is a short word "only". The practical conclusion is that we may expect that the parties to the Convention will insert into their declarations more reservations than the above-mentioned ones.¹² Suffice here to recall that such a practice was to be seen in the context of Article 36(2) and (3) of the ICJ Statute.

The possibility of withdrawing (denouncing) or modifying declarations made for unlimited time is doubtful and may give rise to disputes in the future (as it was the case with declarations addressed to the ICJ).¹³

According to Article 26(3), a request for compulsory arbitration against a state may be made only "after a period of thirty days after the report of the Conciliation Commission, which has dealt with the dispute, has been transmitted to the OSCE Council in accordance with Article 25, paragraph 5". This concerns however only situations in which the conciliation procedure has been resorted to.

The essential elements of the constitution of the Arbitral Tribunals are the following. First of all – Arbitral Tribunals are constituted for individual disputes subordinate to arbitration under this Convention. "The arbitrators appointed by the parties to the dispute in accordance with Article 4 are *ex officio* members of the Tribunal (...)" (Article 28 para. 2). The Bureau shall appoint, from among the arbitrators, a number of members to sit on the Tribunal so that the members appointed by the Bureau total at least one more than the *ex officio* members (Art. 26[3]). Also state-party to a given dispute being no party to the Convention may appoint its arbitrator (Art. 26[5]). "The Tribunal shall appoint its Chairman from among the members appointed by the Bureau" (Art. 26[6]). Article 29 regulates the arbitration procedure.

The function of the Arbitral Tribunal was regulated in Article 30. It reads as follows: "The function of the Arbitral Tribunal shall be to decide, in accordance with international law, such disputes as are submitted to it. The Arbitral Tribunals, as opposed to Conciliation Commissions, will decide only on the basis of international law. For the power of the Tribunals to decide cases *ex aequo et bono* an additional agreement of the parties is necessary" (Article 30).

¹¹ R. Szafarz: *The Compulsory Jurisdiction of the International Court of Justice*, 1993, p. 14 ff.

¹² *Ibidem*, p. 47 ff.

¹³ *Ibidem*, p. 73, 76 ff.

According to Article 31 paragraph 2, the award of the Tribunal shall have binding force only between the parties to the dispute and in respect of the case to which it relates, unless any other state intervenes into the case. In such a situation the ruling of the Tribunal will be also binding for the intervening state.

The awards will be final and no appeal from them is possible. However the parties to the dispute or one of them may request the Tribunal to interpret its award (Art. 31[3]). When a fact that was unknown to the Tribunal and the parties at the time when the award was made is later discovered, revision of the previous award is possible (Art. 31 para. 4).

All arbitral awards are to be communicated to the OSCE Council through the Senior Council. They will be also published by the Registrar (Art. 32).

The Draft of the Convention provided one more procedure – leading to the adoption of advisory opinions (Article 30 of the Draft). They were to be made by the Court composed of the President and four members nominated by the Bureau of the Court from among arbitrators included in the list or possibly from other persons (at most two such persons could be nominated). Advisory opinions were to be made on the basis of international law. It was only the OSCE Council of Ministers and the Senior Council that could request advisory opinions on legal matters.

A strong resistance on the part of a substantial number of the participating states to the concept of advisory opinions resulted in the decision not to include the above-mentioned provisions into the text of the Convention as actually adopted. During the Geneva OSCE Expert Meeting it was emphasized that not all participants of the OSCE would become parties to the Convention. Consequently, the procedure according to which the organs of the organization were to refer for opinions to organs composed of a narrower circle of states was not thought to be suitable. Above this, it was pointed to be unreasonable to provide for advisory competence of any organs without knowing their composition.

Article 34 provides that the Convention may not be subject to any reservations that it does not expressly authorize. The only such authorization is to be found in Article 19 para. 4 of the Convention.¹⁴ It is doubtful whether a given state may reserve itself the right to insert into its declaration concerning the arbitration procedure such reservations as the ones included into its declarations addressed to the International Court of Justice. There is however no doubt that the states may reserve themselves the precedence of other means of dispute settlement (*e.g.* in case of concurring jurisdictions of a few tribunals).

According to Article 36, the Convention may be denounced at any time. Such a denunciation shall be effective one year after the date of receipt of the notification by the Depositary. It is clear that the denunciation of the Convention does not affect the conciliation or arbitration procedure that has been initiated before it.

It is probable that not all European states will accept the Convention. During the Geneva Expert Meeting however only one state expressed its will not to sign the

¹⁴ Cited in footnote 10.

Convention, namely the United States of America. This state clearly does not want to be too deeply engaged in the European matters.

It is worthwhile to add here that the states which expressed their specially critical attitude towards the very idea of the OSCE Convention on Peaceful Settlement of Disputes were the United States of America, Turkey, the Netherlands¹⁵ and – till a certain moment – the United Kingdom. These states invoked that the tradition of the OSCE process was to adopt political and not legal documents and that this homogeneity should be preserved. The opponents however entered into an agreement with the proponents of the Convention and did not block the consensus at the time of the adoption of its text. Consequently, on 15 December 1992 – during the Stockholm meeting of the OSCE Council of Ministers the Convention was signed by the ministers of foreign affairs of 29 states. For the other states participating in the OSCE it was open for signature until 31 March 1993. Up to this date the Convention was signed by 34 states. They are as follows: Albania, Germany, Armenia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Cyprus, Croatia, Denmark, Finland, France, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Moldova, Monaco, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovak Republic, Slovenia, Sweden, Switzerland and Ukraine. As was already said at the very beginning, the Convention entered into force on 5 December 1994 – after the deposit of the twelfth instrument of ratification. So far three states, namely Denmark, Finland and Sweden, have also made declarations accepting the compulsory jurisdiction of the Arbitral Tribunals.

2. OSCE Political Procedures of Dispute Settlement

The following documents of a political character dealing with dispute settlement have been elaborated in the framework of the OSCE:

a) The Report of the Group of OSCE Experts on the peaceful settlement of disputes (Valletta, 8 February 1991) approved during the Berlin Meeting of the Council of OSCE Ministers on 19–20 of June 1991,¹⁶

b) The Amendment of Section V of the Valletta Document establishing the OSCE procedure for peaceful settlement of disputes, Geneva, 23 October 1992 (OSCE Expert Meeting) and Stockholm, 15 December 1992 (the Council of Ministers),¹⁷

c) The Provisions on the OSCE Conciliation Commission, Geneva, 23 October 1992 (the Expert Meeting) and Stockholm, 15 December 1992 (the Council of Ministers),¹⁸

d) The Provisions for Directed Conciliation, Geneva, 23 October 1992 (the OSCE Expert Meeting) and Stockholm, 15 December 1992 (the Council of Ministers).¹⁹

¹⁵ The Netherlands seemed to perceive the Court of Conciliation and Arbitration as a competitor of the Permanent Court of Arbitration, with the seat in the Hague.

¹⁶ CSCE Report on Peaceful Settlement of Disputes, 30 *ILM* 384 ff. (1991).

¹⁷ CSCE: Decision on Peaceful Settlement of Disputes Including the Convention on Conciliation and Arbitration within the CSCE, Annex 1, 32 *ILM* 556 (1993).

¹⁸ See 17, Annex 3, p. 568.

¹⁹ *Ibidem*, Annex 4, p. 570.

Ad a) and b). The OSCE Valletta Document as modified by the OSCE Document of Geneva-Stockholm establishes so called OSCE Dispute Settlement Mechanism.²⁰ It is of a political character and unifies characteristics of good offices, mediation and even conciliation.

Each OSCE participating state being a party to a dispute which cannot be eliminated by means of direct consultations or negotiations may request the establishment of the OSCE Mechanism for the settlement of this dispute. To this end the other party to the dispute should be notified. A OSCE Dispute Settlement Mechanism consists of one or more members selected by common agreement of the parties to the dispute from the register of qualified candidates maintained by the nominating institution. According to the decision of the Berlin OSCE Council Meeting, a Conflict Prevention Centre is a nominating institution. Its seat is in Vienna. Each OSCE Member-State nominates up to four persons to the register. If the parties to the dispute cannot reach agreement on the composition of a Mechanism within two months from the initial request of a Party for the establishment of a Mechanism, the Senior Officer of the nominating authority (*i.e.* the Conflict Prevention Centre) will in consultation with the parties to the dispute, select seven names from the register. Each party to the dispute has the right to reject up to three of the nominees. After one month from the date of informing the parties of the nominations, the nominating institution will notify the parties of the composition of the Mechanism. The Mechanism may offer general or specific comment or advice in order to assist the parties in identifying suitable procedures for the settlement of their dispute. If, in spite of this, the parties are unable to settle the dispute or agree upon the procedure for its settlement, any party to the dispute may so notify the Mechanism and the other party to the dispute. In such a case any party to the dispute may within the period of three months from any notification request the Mechanism to provide general or specific comment or advice on the substance of the dispute to assist the parties in finding settlement in accordance with international law and their OSCE commitments. The parties are to consider in good faith and in a spirit of cooperation any such comment or advice of the Mechanism.

In the light of the provisions presented above "a comment or advice" of the Mechanism is a mere recommendation and not a binding decision. According however to the other provisions of the Valletta Document, the parties may in advance recognize the binding force of the future comment or advice of the Mechanism. It seems that in such a situation comments or advices of the latter will be binding either politically, or legally – according to the respective statements of the parties.

The measures, limited as they are, may not however be applied, nor the Mechanism may be established or continued if the other party to the dispute considers that the dispute raises issues concerning its territorial integrity or national defence, title to sovereignty over land territory or competing claims with regard to the jurisdiction

²⁰ See on this subject: L. C a f l i s c h: "Réglement pacifique des différends en Europe: La Procédure de la Valette et les perspectives d'avenir", in: Ch. D o m i n i c e, R. P a t r y, C. R e y m o n d (eds.): *Etudes de droit international en l'Honneur de Pierre Lalive*, 1993, p. 437 ff.; K. O e l l e r s - F r a h m: "Die obligatorische Komponente in der Streitbeilegung im Rahmen des KSZE", 51 *ZaöRV* 71 ff. (1991).

over other areas (this is a reflection of the disputes concerning Cyprus, Gibraltar, the Aegean Sea and the French nuclear tests).

Ad c). "Provisions on the OSCE Conciliation Commission" – a political document adopted on the initiative of the United Kingdom is aimed at supplementing the Valletta Document and provides for the establishment of a Conciliation Commission. According to this document, conciliation is, as a rule, optional and requires the consent of the both parties to a given dispute. Each Member-State of the OSCE may, however, make in advance a declaration accepting on condition of reciprocity the compulsory jurisdiction of the Conciliation Commission. In the mutual relations of the states which have submitted such declarations, the conciliation procedure may be initiated unilaterally by any party to the dispute. Conciliators will be appointed from the register provided for in the Valletta Document. Member-States of the OSCE may declare at any time that they will accept as binding any terms of settlement proposed by the Conciliation Commission. In such a case, the terms of settlement would be binding either politically, or legally – the decisive factor being the wording of the respective declarations of the parties.

The Director of the Vienna Conflict Prevention Centre will act as a Secretary of the OSCE Conciliation Commission. The purpose of this procedure of dispute settlement is specially evident if we discuss the fourth procedure – mentioned in point d).

Ad d). The Provisions for Directed Conciliation are another political document of the OSCE, adopted on the initiative of the United States of America. It provides that the OSCE Council of Ministers or the Senior Council may direct any two OSCE Participating States being the parties to a given dispute to seek conciliation. In cases involving disputes between two parties to the OSCE Convention on Conciliation and Arbitration the OSCE Council of Ministers or the Senior Council may direct that the parties use the provisions for conciliation established under this Convention. The parties to the dispute shall not take part in the decisions of the OSCE Council of Ministers or the Senior Council directing them to conciliation. It means that the principle "consensus minus two" will be applied in such cases. These decisions will be of political nature only. They will be politically binding for the parties to a given dispute but will not form legal obligations.

Also several exceptions are provided for in this document. The procedure of directed conciliation will not be resorted to in the following cases:

- a) if the dispute is being addressed under some other procedure for the peaceful settlement of disputes,
- b) if the dispute is covered by any process outside the OSCE which the parties to the dispute have accepted (even if only negotiations are provided for in the respective instrument),
- c) in situations in which the procedure provided for in the Valletta Document is excluded (disputes connected with territorial integrity and so on).

The procedure of directed conciliation may be useful in many situations in which no party to a given dispute or only one of them is ready to submit it to the other procedure of dispute settlement.

General Conclusions

The OSCE procedures – both political and legal ones – are to be seen in a wider perspective. To this end a few general conclusions should be made:

1. The establishment of special procedures for peaceful settlement of international disputes within the OSCE, including a legal method, was possible owing to the recent changes in Central and Eastern Europe. It is a result of the new approach of this region's states to law, including international law (at present law is perceived more as a value than as an instrument).

2. In the present situation in Europe the Valletta procedure for settlement of disputes seems to be an echo of the past. Almost immediately after its adoption it needed to be modified. One may still be sceptical as to its practical application.

3. It seems that the legal solutions contemplated in the Convention on Conciliation and Arbitration within the OSCE of 1992 constitute a maximum of what is possible at present. The OSCE Participating States, as a whole, are unwilling to agree to any further-reaching procedures.

4. Conciliation, which is envisaged in the Convention on Conciliation and Arbitration within the OSCE of 1992, has the following advantages: a) it is fully compulsory, b) there are no exceptions with respect to the subject-matter, c) the basis of the "proposals" of dispute settlement may also be political commitments of the OSCE, which are often more far-reaching than international law.

5. The functioning of the system of compulsory jurisdiction of arbitral tribunals, referred to in the Convention on Conciliation and Arbitration within the OSCE, is faced with the same problems as arose in the case of the ICJ (for example, the issue of withdrawal or modification of declarations made for unlimited period of time and the issue of a catalogue of reservations admissible in declarations).

6. The Convention on Conciliation and Arbitration within the OSCE, viewed as a legal document, is a certain turning point in the practice of the OSCE. It appears that the OSCE will be faced with the need to adopt treaties concerning other fields, if the OSCE is to function in the future as a forum of effective settlement of European problems.

7. It is possible that European states will place more trust as compared with other tribunals in the Court of Conciliation and Arbitration within the OSCE, established pursuant to the above-mentioned Convention. There is a great possibility that the European legal culture will be reflected in the activity of this Court.

8. As compared with the political procedures of the OSCE, the Convention on Conciliation and Arbitration within OSCE has, among others, the advantage of the clear status it will have in the legal order of states which accept it. This could be of significance for the effectiveness of future awards. As is known, the constitutions of states do not mention the internal effectiveness of political provisions.

9. The OSCE Document of Valletta provides that parties to a dispute may in advance recognize as binding the character of the future "commentary and advice" of the OSCE Mechanism for Peaceful Settlement of Disputes. It seems that in this situa-

tion the "commentary and advice" may be binding either exclusively politically or also legally, depending on the contents of the relevant declarations.

10. According to the Provisions for the OSCE Conciliation Commission, states participating in the OSCE may at any time submit a declaration on the acceptance as binding of the recommendations of the Conciliation Commission. In this situation it seems that the recommendations of the Conciliation Commission would be binding either in a political sense, or also in the legal sense depending on the concrete wording of the respective declarations.

11. The decisions of the OSCE Council of Ministers or of the Senior Council (adopted in accordance with the "Provisions for Directed Conciliation") on the directing of the parties to a dispute to conciliation are of a political character and not of a legal one. As such, they are binding on states parties to a dispute in a political but not legal sense.

12. The directed conciliation procedure has the undeniable merit of overcoming in principle the disadvantages in the field of peaceful settlement of disputes of the consensus rule applied within the OSCE.

13. While assessing positively the political procedures of the OSCE in the field of settlement of international disputes, it should be ascertained that the procedure determined in Valletta, even with the introduced changes, is the most complicated and at the same time the least effective method of dispute settlement. Of highest merit is the procedure of directed conciliation. The submission of disputes to conciliation (even if not legally binding) signifies a certain progress in the development of settlement of international disputes. One could only wonder when the UN Security Council will be authorized to direct disputes constituting a threat to international peace and security to the ICJ or arbitration.

14. This rather optimistic opinion on the OSCE procedures for peaceful settlement of international disputes is at present moderated by the possible impact of post-Soviet Asian States' participation in the OSCE process. It seems that the admission of these states to the OSCE was a mistake taking into account their different civilization and legal culture.

Dispute Settlement under Association Agreements with Central and Eastern European States

JOANNA GOMUŁA

1. General Remarks

The trade relations of the European Communities (the EC)¹ with Central and Eastern European states have been regulated by multilateral treaties since the end of the 1980s. Initially, the regulations took the form of agreements on trade and economic cooperation referred to as "first generation agreements", which set out general principles of cooperation between the states concerned.² Following the sweeping political and economic reforms in Central and Eastern Europe at the turn of the decades, the international regulation of these relations was set to take a more sophisticated legal form. One may even venture to say that the agreements on association with the European Communities signed on 16 December 1991 by Poland, Hungary and Czechoslovakia³ constituted a breakthrough in this respect. The agreements with Poland and Hungary entered into force on 1 February 1994. Pending their entry into force and in accordance with what is now an established practice, their main provisions relating to trade (including tariff regulations) were applied through interim agreements,⁴ which in the case of Poland and Hungary came into force on 1 March 1992.

The association agreements with Central and Eastern European states are commonly referred to as the Europe Agreements.⁵ Apart from the above-mentioned four agreements, since 1991 the EC has concluded similar treaties with Romania and Bul-

¹ Unless otherwise specified and depending on the context, references in this article to the EC will mean the European Community, the Communities jointly or the European Union.

² For an overview of the relations between Central and Eastern Europe and the EC, including "first generation" and "second generation" agreements, see *e.g.*, M. Maresceau, E. Montaguti: "The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal", 32 *CMLR* 1327 (1995) and D. Kennedy, D. Webb: "The Limits of Integration: Eastern Europe and the European Communities", 30 *CMLR* 1095 (1993).

³ For texts of the agreements with Hungary and Poland see *OJ* 1993 L 347/2 and L 348/2, respectively. Following the establishment of the Czech and Slovak Republic, new agreements were negotiated with those states, which entered into force on 1 February 1995; for texts see *OJ* 1994 L 360/2 and L 359/2, respectively.

⁴ See M. Maresceau, E. Montaguti: *op. cit.*, pp. 1329-1330. The authors note that "[s]ince the competence of the EC in the field of trade is exclusive, the conclusion of these agreements could take place easily and very quickly". *Ibidem*, p. 1329.

⁵ As the term is used in the official title of each agreement.

garia⁶ (both of which entered into force on 1 February 1995), and with the Baltic States (Lithuania, Latvia and Estonia) and Slovenia.⁷ It should be noted that previously the EC had become party to a number of other association and free trade agreements, just to mention those with Greece, Turkey, Malta, the Republic of Cyprus and Portugal.⁸ Most recently, the EC has signed such agreements with Tunisia, Israel, Morocco and Syria.

The basis for an association agreement is found in Article 238 of the Treaty establishing the European Community (as amended by subsequent treaties, the "EC Treaty") which provides that "[t]he Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures". Usually, an association agreement takes the form of a "mixed agreement", to which both the EC and the Member States are parties.⁹ Accordingly, the entry into force of such agreement requires its ratification by all Member States and acceptance by the European Communities.

Association agreements are generally characterized by a lack of proportion of the commitments of the EC, on the one hand, and of the associated state, on the other hand. When referring to two association conventions signed in 1969 by the EC with a number of African states and Madagascar, the European Court of Justice, taking note of the imbalance of obligations assumed by the EC towards these states, characterized it as "inherent in the special nature" of the conventions.¹⁰ This "special nature" is characteristic to all association agreements.

More importantly, association agreements are very comprehensive instruments, with broad objectives, traditionally focusing on the promotion and the strengthening of trade and economic relations between the parties. In this respect, the Europe Agreements have introduced a new quality. For example, among the broadly formulated objectives of the Poland Agreement, its Article 1.2 lists the following: to provide an appropriate framework for the political dialogue between the parties; to promote the expansion of trade and the harmonious economic relations between the parties so as to

⁶ OJ 1994 L 357/2 and 358/3, respectively.

⁷ Signed respectively on 12 and 15 June 1995. The agreement with Slovenia entered into force in June 1996, upon which Slovenia, as the last of these countries, applied for full membership. *Financial Times* June 11, 1996, p. 2.

⁸ For an overview of other agreements see e.g., F.S. B e n y o n: "Les «Accords européens» avec la Hongrie, la Pologne et la Tchécoslovaquie", *Revue du Marché Unique Européen* 1992, No. 2, pp. 30–35.

⁹ A mixed agreement has been defined as "any treaty to which an international organization, some or all of its Member States or one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence" (original in italics). H.G. S c h e r m e r s: *A Typology of Mixed Agreements*, in: *Mixed Agreements*, ed. G. O'K e e f f e e, H.G. S c h e r m e r s, (1983), pp. 25–26.

¹⁰ Case 87/75 *Bresciani v. Amministrazione Italiana* [1976] ECR 129, 141. In his opinion, Advocate-General Trabucchi acknowledged that the conventions "have features of their own" and "are not based strictly on the principle of reciprocity. [...] The conventions are mainly concerned with privileges granted by the Community and its Member States to the associated countries in order to help their development." *Ibidem*, p. 149. The Court recently referred to the "quite appreciable imbalance in the level of obligations" under the conventions that replaced those considered in the *Bresciani* case. See Case C-4569/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia* [1996] ECR I-4536, para. 32.

foster the dynamic development and prosperity in Poland; to provide a basis for the EC's financial and technical assistance to Poland; to provide an appropriate framework for Poland's gradual integration into the EC; and to promote co-operation in cultural matters.

The Europe Agreements are thus association agreements of a special kind, covering a broad range of topics in addition to the traditional trade-related issues.¹¹ In particular, a novel element are provisions on political dialogue, approximation of legislation and cultural co-operation.¹² It should also be noted that unlike most of their earlier counterparts, the Europe Agreements do not establish a customs union with the EC, but a free trade area.¹³

Given the complexity of association agreements, it is evident that their proper implementation and administration requires the establishment of a comprehensive institutional structure. One would expect this structure to include a well developed system of dispute settlement, to deal with controversies touching upon often very sensitive state interests. This paper will examine the dispute settlement mechanisms available under the Europe Agreements, taking as an example the Association Agreement with Poland (the "Poland Agreement"), against the background of their general institutional framework and the dispute settlement system of some of the association agreements concluded in former years. Provisions outside the general dispute settlement system will also be looked at. Finally, a few remarks will be devoted to the role of the European Court of Justice in implementing association agreements, in the context of the direct effect of their provisions.

2. The Institutional Structure of an Association Agreement

The analysis of the association agreement with Greece (the "Greece Agreement")¹⁴ has lead one author to conclude that an association is founded on two general principles: bilateralism, whereby the parties to an agreement are regarded as two distinct entities (for the purposes of which the EC and the Member States act as one entity), and autonomy (independence) of the institutions set up under an association.¹⁵ These

¹¹ For a discussion of the general terms of the first Europe Agreements and their background see e.g., F.S. B e n y o n: op. cit., 25–50; D. H o r o v i t z: "The Eastern Europe – Some Practical Considerations", 25 *JWT* 55 (1991), 55–80; C.-P. L u c r o n: "Contenu et portée des accords entre la Communauté et la Hongrie, la Pologne et la Tchécoslovaquie", *Revue du Marché Commun et de l'Union européenne* 1993, No. 369, 507–515; S. P e e r s: "An Ever Closer Waiting Room?: The Case for Eastern European Accession to the European Economic Area", 32 *CMLR* 187 (1995); L.E. R a m s e y: "The Implications of the Europe Agreements for an Expanded European Union", 44 *ILCQ* 161 (1995).

¹² On the special provisions of the Poland Agreement see S. S o ł t y s i ń s k i: "Agreement on Association of Poland with European Communities (Legal and Economic Issues)", 19 *P o l y B i l* 179 (1991–92); E. P i o n t e k: "Europe Agreement EEC–Poland (Legal Concept of a Scheme)", 19 *P o l y B i l* 133 (1991–92); J. M e n k e s: „Układ o ustanowieniu stowarzyszenia Polski ze Wspólnotami Europejskimi (cele i aspekty systemowe)", 48 *Państwo i Prawo*, No. 9, 14 (1993).

¹³ See M. M a r e s c e a u: op. cit., 511; S. S o ł t y s i ń s k i: op. cit., p. 180.

¹⁴ *OJ* 1963, p. 293; *OJ* 1974 (2nd) I(1), 3; English text in: *Encyclopedia of European Community Law*, Vol. BII.

¹⁵ J. R a u x: *Les relations extérieures de la Communauté Economique Européenne*, 1966, p. 416, et seq.

principles would well apply to other associations, including the system set up by the Europe Agreements, and may have influenced the development of a “model” institutional structure, upon which associations are based to this day.

The central role in this institutional structure is played by a Council of Association. Initially, pursuant to the Greece Agreement and the association agreement with Turkey (the “Turkey Agreement”),¹⁶ the Council was composed of, on the one hand, members of the governments of the Member States and members of the Council and the Commission of the EC, and, on the other hand, members of the government of the associated state. In later agreements, the Member States disappeared from the composition of the Council. The latter model has been followed by the Europe Agreements: the Association Council established under the Poland Agreement consists of, on the one hand, members of the EC Council and Commission, and, on the other hand, of members of the Government of Poland (Article 103). The absence of the Member States should be assessed positively. In particular, the associated state should be confident that for the purposes of the agreement its major partner is the EC, and not individual Member States (though those states remain parties to the agreement).

The powers of successive Association Councils have been evolving, in what seems to be a shift towards political resolution rather than authoritative decision-making. Under the Greece and Turkey Agreements, the responsibilities of the Council were formulated more in terms of the administration of the association, and not merely supervision of the implementation of the agreement. The Council, acting unanimously, was empowered to take decisions in cases specified by the Agreement, and could also make recommendations. The scope of the Council’s potential powers was significantly broadened, in comparison to later agreements, by provisions which, in their wording, corresponded to Article 235 of the EC Treaty. For example, pursuant to Article 70 of the Greece Agreement, the Council could take “appropriate decisions” in circumstances when joint action by the Contracting Parties was necessary to attain one of the objectives of the Agreement and the Agreement had not provided the necessary powers.¹⁷

There is no counterpart of Article 70 in later association agreements. In fact, the powers of Association Councils established in later years were considerably weaker than of those provided for by the Greece and Turkey Agreements. For example, in the association agreements concluded with Malta and Cyprus decisions were limited to procedural matters and were adopted by “common agreement”. This change of terminology, indifferent as far as legal effect is concerned, seemed to accentuate the political, rather than institutional, nature of the Council.

The institutional structure of the Europe Agreements is based on the “classic”¹⁸ model introduced by the first association agreements, in its “weaker” version. The

¹⁶ OJ 1964, p. 3687; OJ 1973 C113/1; English text in: *Encyclopedia...*; OJ 1964, p. 3687; OJ 1973 C113/1; English text in: *Encyclopedia...*

¹⁷ According to Ananiades, were it not for the bilateral nature of an association, this provision would have provided a strong argument for treating an association as an international organization. L.C. A n a n i a d e s: *L'association aux Communautés Européennes*, 1967, p. 177.

¹⁸ As the term is used by C.-P. L u c r o n: op. cit., p. 299.

major task of the Association Council established under the Poland Agreement is the supervision of the implementation of the Agreement (Article 102). In addition, the Council has been granted the general power to examine any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest. For the purpose of attaining the objectives of the Agreement, the Council has the power to take decisions in the cases provided for therein. Authorization for decision-making may be found in Articles 28, 33, 39, 49, 50, 55, 58, 63, 75, 103, 104 and 107, as well as in Annex XIII Para. 2, Protocol 2 Articles 8.3 and 8.4, Protocol 3 Articles 1.2, 1.3 and 4.3. The Council may also pass recommendations. Both decisions and recommendations are drawn up "by agreement" between the parties. Thus, slightly different terminology has been used to describe the process leading to the adoption of an act of the Council. As noted above, it seems that from a legal point of view all these terms have the same effect.

Even in the absence of explicit authorization to adopt recommendations (as envisaged by Articles 14 and 42), it may be assumed that the Council has the capacity to act through recommendations in all areas within its scope of activities. For example, the Council's duty to "examine" a matter (as provided by Articles 41, 42, 44, 46, 56, 61 and 67) should entail its right to recommend a favoured course of action. In some cases there may even be room for implying the Council's power to take decisions. For example, pursuant to Article 65, the Council should "ensure" that certain principles relating to undertakings are upheld. This duty, worded so authoritatively, should include the Council's power to take a decision, without which the Council may not be able to discharge itself appropriately of the assigned function. However, although the manner of decision-making "by agreement" may be an argument for the Council's broad powers to take decisions, such interpretation could eventually raise the problem of compliance with its decisions, and could be subject to challenge, in particular, in the legal system of the EC.

In some respects, the institutional structure of the Europe Agreements goes beyond the "classic" model. Pursuant to the Poland Agreement, the Council is assisted by an Association Committee, composed of representatives of the members of the Council of the EC and of members of the Commission of the EC, on the one hand, and of representatives of the Government of Poland, on the other hand. The Committee is an auxiliary body whose duties include the preparation of meetings of the Council. It should be noted that the Council may delegate, by decision, any of its powers to the Committee. The Council is also explicitly authorized to set up any other special committee or body to assist it in carrying out of its duties.

Another novelty is the establishment of an Association Parliamentary Committee, consisting of members of the European Parliament, on the one hand, and members of the Polish Parliament, on the other. In addition, there exists a separate framework for political dialogue, including consultations between the President of the European Council and the President of the Commission of the EC, on the one side, and the President of Poland, on the other, as well as dialogue, at ministerial level within the Association Council, and, at parliamentary level, within the framework of the Par-

liamentary Association Committee. The parties are free to set up other procedures and mechanisms for political dialogue.¹⁹

The enrichment of the institutional structure of the Europe Agreements by the above elements is not tantamount to making the structure "stronger" in comparison with other association agreements. For, this structural expansion has not been followed by the evolution of powers of the respective association authorities, in particular of the Association Council. The expectation that "[a]s the respective material scopes of the new Agreements become larger and their principles develop to become more demanding and legally complex, so would be the role and powers that the joint organ would require in order to adequately control their implementation",²⁰ has not been met.

This is especially striking when one compares the above structure to the sophisticated system created pursuant to the Agreement on the European Economic Area (the "EEA Agreement"). The EEA Agreement was signed on 2 May 1992, that is, at approximately the same time as the first Europe Agreements. It includes the EEA Council, responsible for determining general guidelines for the work of the EEA Joint Committee, the latter entrusted with the day-to-day implementation of the Agreement, as well as the EEA Parliamentary Committee and the EEA Consultative Committee. The structure is supported by special institutions established by the EFTA states, which include the EFTA Surveillance Authority (responsible for ensuring the fulfillment by EFTA States of their obligations under the EEA Agreement), the EFTA Court, a special tribunal modelled after the European Court of Justice (see below, Section 3.2.3), and the Standing Committee of EFTA States.²¹ The existence of appropriate decision-making and enforcement mechanisms, based on a "two-pillar" model,²² ensures a dynamic implementation of the EEA Agreement.

The comparison with the EEA structure brings out another weakness of the Europe Agreements: their "detached" nature. Unlike the EEA structure, which allows the application of common rules and the sharing of common obligations, including obligations in relations between the associated countries,²³ there is no formal mechanism linking individual Europe Agreements. Peers is right in noting that "[g]iven the likely expansion in trade among the nations of Eastern Europe, multilateralism is essential. In the absence of multilateralism, there would have to be multiple negotiations to extend the effect of EU legislation [...] A multilateral approach would also allow the EA States to present

¹⁹ See S. Peers: *op. cit.*, p. 203 note 70; M. Maresceau, E. Montaguti: *op. cit.*, pp. 1334–1335.

²⁰ D. Horowitz: *op. cit.*, p. 78. Lycourgos expresses his disappointment with the institutional structure of association agreements in general, characteristic of "simples rapports de coopération interétatiques", by pointing out that the parties are "très mal armées pour réussir ... mettre en place, puis éventuellement ... gérer une union douanière et ses politiques complémentaires". C. Lycourgos: *L'association avec union douanière: un mode de relations entre la C.E.E. et des Etats tiers*, 1991, p. 127.

²¹ For a commentary on the agreement see T. Blanchet, R. Piipponen, M. Westman-Clement: *The Agreement on the European Economic Area (EEA). A Guide to the Free Movement of Goods and Competition Rules*, 1994.

²² Pursuant to which the EC Commission monitors the implementation of the EEA rules by the Member States of the EC, while the EFTA Surveillance Authority carries out corresponding tasks with respect to the EFTA States. S. Norberg: "The Agreement on an European Economic Area", 29 *CMLR* 1171 (1992), p. 1189.

²³ S. Peers: *op. cit.*, p. 204.

concerns as a group".²⁴ One is tempted to propose, for the future and provided that the Eastern European states overcome their desire for individual treatment, the establishment of a mechanism (for example, a joint consultative organ) through which the interests of the states-parties to the Europe Agreements would be voiced *vis-à-vis* the EC.

3. Dispute Settlement under Europe Agreements

3.1. General Remarks

A well defined and efficient system of dispute settlement is important especially for the associated state, which in the course of implementation of the agreement may be confronted not only with the interests of the EC, but also with the particular interests of the Member States. In particular, "[p]rocedures for the settlement of disputes and provisions on responsibility have to assure third countries that the Community does not hide behind its Member States nor Member States behind the Community".²⁵ The optimum solution would be to create or make available "a balanced and appropriate dispute settlement organ of a judicial character".²⁶ The European Court of Justice, with its background and experience, would seem an attractive candidate for this role. However, an associated state will not resort readily to the Court for a number of reasons,²⁷ one of which is the concern that the Court will lean towards the interests of the EC and the Member States. The possibility of referral of disputes to the Court existed under the Greece and Turkey Agreements, but was abandoned in later association agreements.²⁸

The following paragraphs will focus on four selected aspects of dispute settlement under the Europe Agreements: subject of a dispute, the parties thereto, the procedure, and standards of review. The discussion will be followed by an overview of special provisions which may affect the resolution of potential or existing disputes.

3.2. Basic Provisions on Dispute Settlement

3.2.1. Subject of a Dispute

The subject of a dispute was formulated in the most detailed manner in the Greece and Turkey Agreements. Pursuant to the Agreements, a dispute had to relate to the application or interpretation of the Agreement and concern the Community, a Mem-

²⁴ *Ibidem*, pp. 204–205.

²⁵ C.-D. Ehlerman: "Mixed Agreements. A List of Problems", in: *Mixed Agreements*: op. cit., p. 14.

²⁶ D. Horowitz: op. cit., p. 80.

²⁷ For a discussion of the reasons why referring disputes to the European Court of Justice would not be a favored solution see C. Lycourgos: op. cit., pp. 104–105. The author also notes that the associated state will in general be cautious not to take any action considered unfriendly by the EC, including submission of disputes for settlement. *Ibidem*, p. 107.

²⁸ In the case of the Greece Agreement it was also proposed that disputes be submitted to a special chamber of the Court with the participation of an additional Greek judge. The proposal was rejected by Greece. See M. Torrelli: *L'association avec la Grèce* in: *L'association à la Communauté Economique Européenne. Aspects juridiques*, 1970, p. 68.

ber State, or an associated state. It is not clear whether the fact that the dispute had to “concern” one of the parties of the Agreement was intended as a limitation or whether the wording was simply a drafting matter. This clause was not repeated in later agreements. However, a “limitation” of another kind appeared in the association Agreement with Cyprus, the relevant provisions of which refer only to disputes relating to the interpretation, but not the application, of the Agreement. This has led some authors to assert that the dispute settlement mechanism in question does not cover decisions of the Association Council.²⁹ It is difficult to share this opinion. A decision of the Association Council, without doubt constituting an application of the Agreement, also requires an interpretation of its provisions.

The Europe Agreements provide for the least controversial subject of a dispute. Pursuant to Article 105 of the Poland Agreement, the dispute settlement procedure therein shall apply to any dispute relating to the application or interpretation of the Agreement.

3.2.2. *Parties to a Dispute*

In the case of an association agreement which is also a mixed agreement, the identification of the parties to a dispute is not always easy. The associated state is certainly one party. But which is, or are, the other party or parties? Is it the EC and each of the Member States jointly, or only the EC? And do provisions on dispute settlement contemplate situations where one or more Member States are opposed to the EC?

The association agreements themselves provide only some answers. For example, pursuant to the Greece Agreement, for the purpose of the procedure anticipated by its Article 67.3 (concerning the appointment of arbitrators), the EC and the Member States were to “be considered to be” a single party to a dispute. However, the Agreement did not make clear whether this rule applied to the dispute as such or whether it was limited to the selection of arbitrators. Based on his analysis of the Greece and Turkey Agreements, Lycourgos concludes that in any such dispute the EC and the Member States should act as a single party. The author rightly points out the lack of logic of the Council being seized with disputes where the EC would be opposed to a Member State.³⁰

Unfortunately, the Europe Agreements do not dispel all doubts. Article 105 of the Poland Agreement relating to dispute settlement is particularly confusing as far as terminology is concerned. As will be discussed below, this Article envisages two methods of dispute settlement: by the Association Council and through arbitration. Para. 1 (referral of a dispute to the Association Council) explicitly mentions “each of the *two* Parties” (emphasis added), while para. 3 (the carrying out of the decision of the Council) makes a reference to “each Party”. Para. 4 (concerning the settlement of disputes through arbitration) adopts the wording of the Greece Agreement and stipu-

²⁹ For the reason that, presumably, decisions of the Council constitute an “application”, but not an “interpretation” of the Agreement. C. Lycourgos: *op. cit.*, pp. 96–97.

³⁰ C. Lycourgos: *op. cit.*, p. 95. On this issue see also J. Raux: *op. cit.*, 419–420 and M. Torrelli: *op. cit.*, pp. 69, 72–73. One must note that it is not only the “lack of logic”, but could also be a matter of EC law. Article 219 of the EC Treaty precludes Member States from submitting disputes concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein. See also Opinion 1/91, [1991] ECR I-6079, reprinted in 31 *ILM* 440, 444–466 (1992).

lates that “for the application of this procedure the Community and the Member States shall be deemed to be one party to the dispute”. It is not clear, in particular because the above wording of para. 1 (“two parties”) is not repeated in para. 4, whether “this procedure” means the whole arbitration procedure or just the manner of appointment of arbitrators. The words “deemed to” could imply that, in fact, also the Member States are parties to a dispute in arbitration proceedings. However, there is no reasonable justification for treating such disputes differently from those considered at the level of the Association Council. The only concern with accepting a bi-party situation, to apply in both of the above procedures, is the undesired result that the Member States will not be under a direct obligation to implement a decision settling a dispute. On this issue, para. 4 states that the implementation of the decision of the arbitrators is the obligation of “each party to the dispute”.

To sum up: it is clear that there are only two parties to disputes before the Association Council (which, incidentally, are the only parties to the Agreement directly represented in the Council). Although provisions relating to arbitration proceedings leave room for doubt, logic and consistency point to a similar conclusion also in this case. However, there should be no question that all parties to the Agreement, including the Member States, should be obliged to carry out the decisions of the Association Council or of the arbitrators.

3.2.3. Procedure

The mechanism of dispute settlement envisaged by the Europe Agreements is based on provisions of earlier association agreements. However, although the principles are similar, the detailed rules of the procedure have undergone a considerable evolution since the Greece and Turkey Agreements. In general, there are two main actors of the dispute settlement scheme: one is the Association Council and the second is a judicial/ arbitration authority (with certain variations in the early agreements). However, no matter which organ ultimately decides a dispute, a major role in directing the course of action is played by the Association Council.

Under the Greece and Turkey Agreements disputes had to be “channelled” through the Council, but there was no obligation on the Council to attempt to resolve a dispute. The Council could either settle the dispute by decision³¹ or submit it (also by way of decision) to a judicial organ. With respect to the latter course of action, the Council had a choice of referring the matter either to the European Court of Justice³² or to “any existing court or tribunal”.³³

³¹ This being an instance of “political” resolution. C. L y c o u r g o s: op. cit., pp. 101–102.

³² The resolution of the dispute by the Court would be based on Article 181 of the EC Treaty and its decision would only have the effect of an arbitral award, binding on the parties. See discussion by L. C. A n a n i a d e s: op. cit., p. 176, who speculates whether by the fact of recourse to the Court the matter would become an internal matter of the Community. The author’s answer to this proposition is negative. See also *ibidem*, pp. 102 *et seq.*

³³ This clause was apparently included to provide a basis for the referral of a dispute to the International Court of Justice. J. R a u x: op. cit., p. 428. However, because the EC is not a state, it cannot be a party to proceedings before this Court. See C.-D. E h l e r m a n: op. cit., p. 14. This clause was not used in later agreements.

The Greece Agreement envisaged a second stage of dispute settlement in case of a deadlock within the Association Council or if the designated court or tribunal had not settled the dispute. It was initiated by the notification by one of the parties to the other of the appointment of an arbitrator. Within two months of such notification, the other party was required to appoint a second arbitrator. The appointment of the third arbitrator, who was to act as chairman, differed depending on the period since the entry into force of the Agreement: during the first five years from its entry into force the third arbitrator was to be the President of the European Court of Justice; following this period, the third arbitrator was appointed by mutual agreement (or in another manner decided upon by the Council), or, failing such agreement within two months, by the President of the International Court of Justice. Arbitration rulings were given by a simple majority. Under the Turkey Agreement, in case of failure to settle the dispute in the first stage (within the Council or by the European Court of Justice, or another court or tribunal), the Council could determine "the detailed rules for arbitration or for any other judicial procedure".

It should be noted that some agreements (for example, the agreements concluded with Malta and Cyprus) did not contain any detailed provisions on dispute settlement. There existed, however, the possibility of consultations, at the request of either party.

The procedure envisaged by the Europe Agreements is also a two-stage procedure, but the "intermediary" possibility of referral to a court or tribunal has been eliminated. Pursuant to Article 105 of the Poland Agreement, each of the parties may refer to the Association Council any dispute relating to the application or interpretation of the Agreement. The Council may settle the dispute by means of a decision.³⁴ Each party shall be bound to take the measures involved in carrying out such decision. The adoption of a decision by the Council means that the dispute has been settled and it does not "pass on" to arbitration.

Should it not be possible to settle the dispute in the above manner, the second stage is initiated by the notification of one party to the other on the appointment of an arbitrator. The second stage is not mandatory; each party *may*, but need not, appoint an arbitrator. However, once the first arbitrator is appointed, the other party must, within two months, appoint a second arbitrator. The third arbitrator is appointed by the Association Council. The arbitrators' decisions shall be taken by majority vote. Each party to the dispute must take the steps required to implement the arbitrators' decisions.

The above procedure is not free of weaknesses. Two features are striking: first, there are no deadlines for the taking of a decision by the Association Council (in the first stage) or for the appointment of the third arbitrator (in the second stage). The result is that with respect to a dispute considered by the Council, a party resisting arbitration may be tempted to argue that there is still a possibility of settlement of the dispute by that organ, and on these grounds oppose arbitration. Second, no alternative manner of appointment of the third arbitrator is envisaged and therefore one of the parties could successfully block the appointment of the third arbitrator (decision-making "by agreement"!). In consequence, each party to a dispute is equipped with a *de*

³⁴ In this case the Council acts in the capacity of a tribunal. *Komentarz do Układu Europejskiego*, 1994, p. 309.

facto veto power. Therefore, it would have been more efficient if – taking the Greece Agreement as a model – an independent party had been designated to appoint the third arbitrator, at least failing agreement by the parties to a dispute.

An additional weakness, already mentioned in Section 3.2.2 above, is the ambiguity of the wording of the above provisions. For example, it is not clear what is the difference between “taking measures involved in carrying out” the Council’s decision and “taking the steps required to implement the decision of the arbitrators”. One may wonder, in particular, *which* decision of the arbitrators is at stake, since the previous sentence, referring to majority voting by the arbitrators, speaks about *decisions* (plural).³⁵ Moreover, while para. 2 of Article 105 explicitly states that a dispute becomes “settled” by a decision of the Council, it lacks a similar clause in relation to the decision of the arbitrators.

Notwithstanding the above particular drawbacks, arbitration in general as a fall-back procedure for dispute settlement seems to be a wise choice. According to one author, arbitration “est la seule procédure réellement utilisable pour le règlement juridictionnel des différends”.³⁶ A specific advantage of the discussed mechanism is that action by one of the parties triggers an obligation on the part of the other party, and of the Council, as is the case with the appointment of the second and third arbitrators.³⁷ The members of the Council should bear in mind that in its dispute-settling capacity, the Council has not only the right and privilege, but above all, the *duty* to act. Therefore, the “agreement” necessary for the appointment of the third arbitrator is more than a matter of simply good faith on their part.

In comparison to the above, the EEA system is based on two “tracks” of dispute settlement. The first one relates to disputes between the EC and an EFTA State and includes, apart from settlement by a Joint Committee and through arbitration, the possibility of requesting a ruling from the European Court of Justice in case of a dispute concerning the interpretation of the provisions of the EEA Agreement which are identical in substance to corresponding EC rules. Interpretation of such provisions may not be subject of arbitration. The second “track” is an internal mechanism of the EFTA states, which in many respects corresponds to that of the EC, and which is supported by two organs: the EFTA Surveillance Authority and the EFTA Court. The EFTA Court is competent to settle disputes between the EFTA States and may render advisory opinions on the interpretation of the EEA Agreement, upon request of national courts or tribunals of the EFTA States. This system has not without reason been described as “hybrid and ingenious”.³⁸ It is regrettable that because of the accession of four EFTA States to the European Union, its practical implications will be limited, as

³⁵ The reason for the plural form in the first sentence may be that there could be other decisions preceding the final resolution of a dispute (for example, a decision on interim measures). It is surprising, however, that the second sentence is not explicit about the obligation of the parties to implement *all* decisions of the arbitrators.

³⁶ C. Lycourgos: op. cit., p. 105.

³⁷ See *ibidem*, p. 106.

³⁸ “Hybrid because for the settlement of a dispute regarding case law, the procedure is above all political; it can be judicial but only additionally, in case of agreement between the parties. The system is also ingenious because it avoids on the one hand that a judicial body should compete with the European Court of Justice for the

in most probability will be its effect on future legal solutions adopted in agreements concluded by the EC with third states.

When considering the initial EEA system in Opinion 1/91 the Court made several comments on the admissibility of setting up a system of courts by an international agreement concluded by the EC, such system to include a special court with jurisdiction to settle disputes between the parties. The Court noted that the decisions of such special court would be binding on EC institutions and the European Court of Justice itself "in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order". The Court stated that "[a]n international agreement providing for such a system of courts is in principle compatible with Community law".³⁹ It also noted that Article 238 of the EC Treaty may be the legal basis for such system.⁴⁰

In practice, the dispute settlement provisions of association agreements are not frequently used and potential disputes are resolved using political, rather than formal, means. In particular the associated state will be reluctant to initiate formal proceedings so as not to irritate its stronger partner, especially in view of its aspirations for full membership in the future. As a result, some matters may appear on the agenda of association bodies for many years. For example, in the first half of 1996 the following matters, most of which could qualify for the formal dispute settlement path, were discussed in the Association Committee set up by the Poland Agreement: the system of mandatory certificates for industrial products in Poland, limitation on exports of skins and hides, and scrap-metal from Poland, the requirement to have catalyzers in used cars imported into Poland, Polish protective measures in the import of petrochemical products, antidumping actions against Polish producers, trade in agricultural products, the Polish import tax. The following matters were raised by the EC at a meeting of the Association Council which was held in July 1996: protection of the Polish petro-chemical sector, preferential treatment of the Korean car manufacturer Daewoo, certain limitations on imports of vehicles, the Polish import tax, and customs duties on imports of certain agricultural products.⁴¹ Arbitration was almost employed in the dispute relating to quotas introduced by Poland on exports of raw skins and hides. However, the dispute was settled by Decision No. 3/96 of the Association Council.⁴²

interpretation of EEA (and therefore also EC law), and on the other hand that the EFTA countries should accept «foreign judges» without a consent given in each case." C. R e y m o n d: "Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area", 30 *CMLR* 475 (1993).

³⁹ Opinion 1/91, op. cit., paras. 39, 40.

⁴⁰ The Court was, however, careful to emphasize that this provision cannot provide a basis independent from other provisions of the EC Treaty: "Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community". *Ibidem*, paras. 70-71.

⁴¹ E. S y n o w i e c: "Obrady instytucji Stowarzyszenia w pierwszym półroczu 1996", *Biuletyn Informacyjny Wspólnoty Europejskiej* 1996, No. 6, pp. 25-27.

⁴² Decision No. 3/96 of the Association Council of 16 July 1996 settling the dispute between the European Communities and the Republic of Poland concerning skins and hides. *OJ* 1996 L 208/31.

3.2.4. Standards of Review

A problem worth exploring in more detail is whether there exist any special standards of review of disputes arising from association agreements. In particular, one may wonder whether EC rules and standards should be applied in the case of disputes concerning provisions of association agreements which are analogous to those contained in the EC Treaty.

The European Court of Justice has had the opportunity to touch upon the above problem. The Court's standpoint seems to be that because association (and free trade) agreements "pursue different objectives" from EC agreements, their respective interpretations should not be based on "simple analogy".⁴³ Even if two similarly worded provisions have "the same object", both provisions "must however be considered and interpreted in their own context", such interpretation being according to each provision's "term and in the light of the objective which it pursues in the system of free trade established by the Agreement".⁴⁴

In effect, and as was confirmed by the Court in the *Polydor* case, the case law relating to a particular provision of the EC Treaty may not be simply "transposed" to its counterpart in an association agreement.⁴⁵ Some authors take a different view with respect to the Europe Agreements. For example, Peers believes that the *Polydor* rule do not apply to intellectual property law, which, according to the author, the associated states are required to adopt *in toto* from EC law.⁴⁶ The author bases his conclusion on the wording of Article 66.1 of the Poland Agreement which obliges Poland to provide "a level of protection similar to that existing in the Community, including comparable means of enforcing such rights" with respect to intellectual, industrial and commercial property rights. It is difficult to share the author's opinion. Not only is the terminology of this provision unequivocal ("level of protection *similar* to that existing in the Community", "*comparable* means of enforcing such rights"),⁴⁷ but the author's

⁴³ Case 104/81 *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, 3666. The Court has stated that an association agreement "does not have the same purpose of the EEC Treaty, inasmuch as the latter [...] seeks to create a single market reproducing as closely as possible the conditions of a domestic market". Case 270/80 *Polydor v. Harlequin Record Shops*, [1982] ECR 329, 349.

⁴⁴ *Kupferberg*, op. cit., p. 3666. Most authors fully supported the Court's decision not to give the same interpretation to similarly worded provisions of the EC Treaty and of international agreements, e.g., J.H.J. B o u r g e o i s: "Effects of International Agreements in European Community Law: Are the Dice Cast?", 82 *Michigan Law Review*, 1273 (1984). See also Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] ECR 1331, in which the Court noted that the counterpart of Article 95 of the EC Treaty in the Association Agreement with Greece "fulfills, within the framework of the Association between the Community and Greece, the same function as that of Article 95"; *ibid.*, p. 1350. A critical voice on the *Pabst* case comes from G. B e r r: "Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg", 20 *CMLR* 58-59 (1983).

⁴⁵ *Polydor*, op. cit., p. 348.

⁴⁶ S. P e e r s: op. cit., p. 208.

⁴⁷ According to a commentary on the Poland Agreement, published by the Polish Office on European Integration, the provision is "subjective and imprecise", and obviously does not entail the simple transposition of EC rules. *Komentarz...*, op. cit., p. 182. Moreover, it should be noted that pursuant to Joint Declaration No. 13 to the Poland Agreement, the term "intellectual, industrial and commercial property" is to be given a "similar meaning" (not *identical*) as in Article 36 of the EC Treaty.

approach confuses the issue of the extent of obligations of the parties to the agreement with the choice of rules for the interpretation of such agreement – which seems to be the core of the *Polydor* case.

More recently, in Opinion 1/91, the Court has again emphasized that “[t]he fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives”.⁴⁸ This Opinion is particularly relevant because the Court dealt therein with the consequences of Article 6 of the (then) draft EEA Agreement, which stipulated that the provisions of the Agreement, “in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts in application of these two Treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement”. The Court rejected the initial mechanism of judicial supervision which anticipated the creation of an independent tribunal, to be integrated functionally with the European Court of Justice. The mechanism was rejected on the grounds, among others, that it did not, through Article 6 or other relevant provisions, adequately ensure “the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA”.⁴⁹

The Court’s conclusions in Opinion 1/91 have caused some confusion, in the context of association agreements. For example, Lycourgos has advanced the view that certain matters cannot fall under the dispute resolution procedure of association agreements, because a procedure initiated by an associated state could lead to a decision contrary to a rule of EC law and not be enforceable within the EC.⁵⁰ However, the EC is bound by an association agreement, as a matter of international law, and by any decisions settling disputes between the parties. But the author’s concern seems too far-reaching because association agreements do not set forth the objective of homogeneity of the application of their provisions, as is the case with the EEA Agreement. Association agreements have their distinct aims and will generate their own system of

⁴⁸ Opinion 1/91, op. cit., para. 14.

⁴⁹ *Ibidem*, op. cit., para. 29. For a discussion of Opinion 1/91 and its consequences see e.g., G. O’Keefe: “The Agreement on the European Economic Area”, 1, 12–17 *Legal Issues of European Integration* 1 (1992); M.F. Dominick: “The European Economic Area: Its Compatibility with the Community Legal Order”, 16 *Hastings International and Comparative Law Review* 476 (1993). The Court endorsed the final EEA structure in Opinion 1/92, [1992] ECR I–282.

⁵⁰ This would include disputes relating to competition, common customs tariff and agricultural policy. The dispute resolution procedures “ne peuvent être utilisées que pour régler des différends relatifs à l’interprétation et l’application de dispositions concernant la libération des échanges, l’adoption de mesures de sauvegarde et l’aide financière accordée par la Communauté à son partenaire, les accords d’association présentant dans ces domaines une originalité suffisante par rapport au droit communautaire”. C. Lycourgos: op. cit., pp. 99–100; see also *ibidem*, p. 124.

rules and principles, which may be overlapping, but are not necessarily identical, to those of the EC, or the EEA.⁵¹

As one author has rightly remarked, “[t]he question of uniform interpretation is [...] ultimately linked to the question of how to arrange for dispute settlement between the parties”.⁵² So long as the dispute settlement mechanism provided under the Europe Agreements is not linked directly to the EC judicial system (as is the EFTA mechanism), the standards of review cannot be expected to be identical to those existing in the latter, and must take into account the specificity of each agreement. Which does not mean, however, that common rules and standards will not develop within the “family” of Europe Agreements.

3.3. Other Provisions Affecting Dispute Settlement

3.3.1. Consultations and Notification

In addition to general dispute settlement provisions which, as indicated above, will usually not be readily resorted to by the parties, association agreements open the way for alternative methods of prevention and resolution of disputes. In particular, many provisions of association agreements impose the duty of consultations prior to, or simultaneously with, the introduction of restrictive measures. For example, the Poland Agreement requires the associated state to consult the Association Council prior to the introduction of exceptional measures to protect infant industries (Article 28), measures affecting the establishment of Community companies and nationals (Article 50), or measures to counter anti-competitive practices (Article 63.6). In the case of safeguard measures, periodic consultations should take place with a view to establishing a timetable for their abolition (Article 33.2). Because these situations are likely to arouse controversies between the parties, mandatory consultations may have a mitigating effect on the position of the parties. It should be noted that consultations need not be limited to cases explicitly provided for in an association agreement. In all cases, a primary role will be played by the Association Council.

Consultations which affect potential disputes should be distinguished from consultations as a means of exchanging information and harmonizing the respective policies of the parties in various fields. An example of the latter would be regular consultations on the strategy and practical modalities of the parties’ agricultural policies (Article 20.6), as well as consultations concerning agreements establishing customs unions or free trade areas and other major issues related to trade policy.

Maresceau and Montaguti emphasize that “it is important to develop fully the role of consultations on trade matters, in order to facilitate loyal implementation of the agreements”, because consultations are an effective instrument in dispute settlement

⁵¹ See Opinion 1/91, *op.cit.*, para. 29. O’Keeffe distinguishes two situations: that of juxtaposition of identical rules to the EC rules from which they are drawn and that of the establishment of a court by a specialized agreement which “borrows” rules from EC rules; the first situation would require a sole court to interpret the rules, whereas in the second situation the existence of two courts would not create problems of divergent interpretations. G. O’Keeffe: *op. cit.*, p. 17.

⁵² S. Norberg: *op. cit.*, p. 1187.

with “the precise objective of ensuring that a *mutually acceptable* solution is reached”.⁵³ Moreover, from the perspective of associated states “consultations can constitute one of the means through which the real situation in those countries can be known and appraised and their transition eased, in furtherance of the agreements’ objectives”.⁵⁴

Like consultations, the obligation to notify certain actions may have a mitigating effect on potential disputes. For example, Article 33.3.b of the Poland Agreement requires a party to inform the Association Council of the initiation of a dumping investigation. A party may adopt appropriate measures only if the dumping has not ceased or no other satisfactory solution has been reached within 30 days of the referral of the matter to the Association Council.

3.3.2. *Failure to Fulfil an Obligation*

Worth noting is Article 115.2 of the Poland Agreement, which constitutes a general framework for action in case of the failure of one party to fulfil an obligation under the Agreement. In such situation, the other party is entitled to take “appropriate measures”. Prior to doing so, however, the complaining party must supply the Council with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the parties. Priority should be given to measures which least disturb the functioning of the Agreement. Measures must be notified immediately to the Association Council and, if the other party so requests, shall be subject to consultations within the Council.

Article 115 is not an alternative to the dispute settlement mechanism provided for in Article 105 or to action permitted by other provisions of the Poland Agreement. It “encompasses” the detailed procedures envisaged by the Agreement, imposing additional requirements on the parties. This Article again emphasizes the central position of the Association Council and its responsibility for ensuring the proper implementation of the Agreement.

3.3.3. *Implementation of Competition Rules*

Competition law and policy is a highly sensitive area for the EC and it is therefore not surprising that strong emphasis is placed on provisions designed to counteract practices which prevent, restrict or distort competition. Although association agreements do not provide for special dispute settlement in this field, there has been a harbinger of such mechanism. Pursuant to Article 63.3 of the Poland Agreement, the Association Council should adopt the necessary rules for implementation of the Agreement’s provisions relating to competition. By Decision No. 1/96 of 16 July 1996 the Association Council adopted the “Implementing Rules for the Application of the Competition Provisions Applicable to Undertakings”.⁵⁵ The Implementing Rules deter-

⁵³ M. Maresceau, E. Montaguti: op. cit., pp. 1358–1359 (emphasis in original).

⁵⁴ *Ibidem*, p. 1359.

⁵⁵ OJ 1996 L 208/24. G. Maresceau discusses – what seems to be, despite the quoted earlier date of adoption (25 March 1995) – this agreement (referred to by the author as the “Implementation Agreement”) in G. Maresceau: “The Full Potential of the Europe Agreements: Trade and Competition Issues. The Case of Poland”, 19 *World Competition* 35 (1995).

mine the manner of coordination of action of the respective authorities charged with enforcement of competition rules: the EC Commission (DG-IV: department on competition matters), on the side of the EC, and the Polish Antimonopoly Office (new name: Office for Protection of Competition and Consumers), on the Polish side. The Implementing Rules make a distinction between cases affecting both the EC and the Polish market and falling under the competence of both competition authorities, and cases subject to the exclusive competence of one competition authority, but affecting important interests of the other party. In the first category of cases, the competition authorities are obliged to notify each other and conduct consultations with a view to finding a mutually acceptable solution, and, if no such solution is found, to present the case to the Association Council. In the second category of cases, a party has a duty to notify the other party of the initiation of an investigation or proceeding and to provide information about the case, upon request, to the extent possible and at a stage of proceedings far enough in advance of the adoption of a decision or settlement, to enable the requesting authority's views to be taken into account. Failing a solution, the case may be brought to the Association Council.

On the level of the Association Council, a uniform procedure applies to both categories of cases. First, within three months of the request of a party, an exchange of views should take place, following which (or upon expiration of the three months), the Association Council may make appropriate recommendations for the settlement of the case.

The above could be qualified as a special system of control or prevention, if not settlement, of disputes. Because of its narrow scope and rather precisely defined mode of action, the Implementing Rules may prove to be an effective means of eliminating disputes between the EC and Poland in the area of competition law.

4. Role of the European Court of Justice

The analysis would not be complete without a few remarks on the role of the European Court of Justice in the enhancement of the objectives of association agreements, in the context of dispute settlement. As has been mentioned above, under the Greece and Turkey Agreements there existed a possibility of referral of a dispute to the Court, which was not upheld by the Europe Agreements. Therefore, the Court's role in directly regulating the relations between the parties, on the level of the association agreement as such, is much limited. Instead, the Court has contributed to recognizing the direct effect (or direct applicability)⁵⁶ of the provisions of association agreements. On several occasions the Court has made an attempt to define the conditions under which interested parties may invoke particular provisions of an international agreement (including association agreements) to assert a right under such agreement.

⁵⁶ These terms are not used consistently, even by the Court. See e.g., J.A. Winter: "Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law", 9 *CMLR* 425 (1972). The author proposes that "the term «direct applicability» should be reserved for the method of incorporation of (secondary) Community Law into the municipal legal order (Art. 189). The problem as to when a Community provision is susceptible of receiving judicial enforcement is best described as the question of «direct effect»". *Ibidem*, pp. 425–426.

4.1. Jurisdiction of European Court of Justice

The Court has had little problems with asserting jurisdiction over cases involving the application of international agreements. In *Kupferberg* the Court concluded that because agreements signed pursuant to Article 228 of the EC Treaty are binding on EC institutions and the Member States, "it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements".⁵⁷ Moreover, since the provisions of such agreements form an integral part of the Community legal system,⁵⁸ "their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member State" and, therefore, "it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community".⁵⁹ The Court has also asserted jurisdiction to rule on the interpretation of provisions in mixed agreements containing a commitment which only the Member States could enter into, in the sphere of their own powers.⁶⁰ As one author has noted, the interpretation of the provisions of an international agreement by the Court is not tantamount to the creation of a legal effect *vis-à-vis* third states; however, "if it is correct that there exists an obligation under Community law for a Member State to honor its obligations undertaken in a mixed agreement, it is quite natural for the Court to determine the scope of these obligations towards the other contracting party".⁶¹

A further step was the acknowledgement of jurisdiction to interpret certain decisions of the Association Council: "Since the Court has jurisdiction to give preliminary rulings on the [Turkey] Agreement, in so far as it is an act adopted by one of the institutions of the Community [...], it also has jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation". The Court confirmed that such decisions form part of the Community legal system.⁶²

4.2. Direct Effect

This is a broad and complex topic of its own and therefore only a most basic overview has been given below. The general framework for direct effect of provisions of international agreements can be traced to the "landmark" case, *International Fruit Company*,⁶³ to which the Court has often referred in its later cases dealing with such

⁵⁷ *Kupferberg*, op. cit., p. 3662. On the jurisdiction of the Court in these matters see e.g., G. B e b r: op. cit., pp. 41–43.

⁵⁸ See also Case 181/73 *Haegman v. Belgium* [1974] 449.

⁵⁹ *Kupferberg*, op. cit., pp. 3662–3.

⁶⁰ See Case 12/86 *Meryem Demirel v. Stadt Schwabisch Gmund* [1987] ECR 3719, 3751.

⁶¹ G. N o l t e, "Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmund*, Judgment of 30 September 1987", 25 *CMLR* 408 (1988) (emphasis in original).

⁶² Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3497, 3501.

⁶³ Joined Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219. When analyzing this case from the point of view of association agreements, Bebr points out that one

agreements. For example, in the *Bresciani* case, the Court relied on *International Fruit Company* to remind that when considering the direct effect of a provision, "regard must be simultaneously paid to the spirit, the general scheme and the wording" of an agreement and the provision in question.⁶⁴

In *Kupferberg*, the Court set forth the conditions for the direct effect of a provision of an association agreement: the provision must be unconditional and sufficiently precise, it must be considered in the context of the agreement of which it forms part, and it should be analyzed in the light of both the object and the purpose of the agreement and of its context.⁶⁵ The "classic" rule followed in *Demirel*: "A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".⁶⁶

The Court has attributed direct effect not only to provisions of association agreements and additional protocols to such agreements,⁶⁷ but also to decisions of Association Councils. The prerequisite is the satisfaction of the *Demirel* criteria.⁶⁸

The Court has continually had to confront arguments denying direct effect to provisions of association agreements. And so, the Court rejected the argument that the special nature of an association convention constituted a barrier to the recognition of the direct effect of its provisions.⁶⁹ Nor did the Court find an obstacle to such effect in the imbalance in the obligations assumed by the EC towards an associated state,⁷⁰ which is a characteristic feature of association agreements.

A more interesting issue from the perspective of dispute settlement mechanisms was raised in *Kupferberg*: it was argued that provisions of association agreements cannot carry direct effect because such agreements have a separate institutional framework to settle disputes between the contracting parties. The Court noted that in conformity with the principles of public international law the parties to an agreement are free to agree on the effect of its provisions in the internal legal order of the respective party. In the absence of such provisions, the issue "falls for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty".⁷¹ In the Court's opinion, "[t]he mere

of the grounds for the Court's denial to recognize direct effect of GATT was the lack of jurisdiction therein for settling disputes among the parties. G. B e r r: op. cit., p. 68.

⁶⁴ *Bresciani*: op. cit., p. 140. See also recently *Chiquita Italia*, op. cit., para. 25.

⁶⁵ *Kupferberg*, op. cit., 3665.

⁶⁶ *Demirel*, op. cit., p. 3752.

⁶⁷ Case C-432/92 *Regina v. Minister of Agriculture, Fisheries and Food* [1995] 1 CMLRep. 569, para. 27. The Court stated that certain provisions of a protocol to the Association Agreement with Cyprus "do not constitute mere administrative arrangements but provisions necessary for the proper operation of the trade arrangements provided for in the Association Agreement". *Ibidem*, para. 43.

⁶⁸ *Sevince*, op. cit., p. 3502. Prior to *Sevince* it was often suggested that decisions of association councils do not carry direct effect. See H.G. S c h e r m e r s: op. cit., pp. 183-189, C. L y c o u r g o s: op. cit., pp. 114-120.

⁶⁹ *Bresciani*, op. cit., p. 141.

⁷⁰ *Chiquita Italia*, op. cit., para. 34-35.

⁷¹ *Kupferberg*, op. cit., p. 3663. See also *Chiquita Italia*, op. cit., para. 36.

fact that the contracting parties have established a special institutional framework for consultations and negotiations *inter se* in relation to the agreement is not in itself sufficient to exclude all judicial application of that agreement".⁷²

A major argument against direct effect is the lack of reciprocity. The EC has no power to ensure that the courts of an associated state will recognize the direct effect of provisions, with respect to which such effect has been confirmed by the European Court of Justice. The result is a "unilateral" direct effect, which in the opinion of some, places the EC at a disadvantage.⁷³ The Court, although aware of this problem, does not seem to share this concern. In *Kupferberg*, having asserted that "[a]lthough each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system" (unless otherwise specified by the agreement), the Court stated that the lack of recognition of direct effect by one of the parties is "not in itself such as to constitute a lack of reciprocity in the implementation of the agreement".⁷⁴ Schermers acknowledges the problems related to the "lack of reciprocity",⁷⁵ but praises the Court's choice to grant direct effect to treaties "whenever possible and irrespective of the position" of the other parties of such treaties: "[i]t is in the interest of the world those treaties should be as effective as possible".⁷⁶

A number of provisions in the Europe Agreements should "qualify" for direct effect, including provisions on the reduction or elimination of customs duties, quantitative restrictions and indirect taxes, non-discrimination of workers legally employed in the EC, and Council decisions relating to the movement of workers.⁷⁷ It has also been argued that Article 63 of the Poland Agreement and the Implementing Rules thereto should have direct effect.⁷⁸ While this may hold true under the EC legal system, when relating to the Polish legal system note should be taken of Item 11 of the Joint Declaration to the Poland Agreement. It provides that the "[p]arties may request the Association Council at a later stage, and after the adoption of the implementing

⁷² *Kupferberg*, op. cit., p. 3664. The Court did not specify the limits of this "judicial application". It noted, however, that "the fact that a court of one of the parties applies to a specific case before a provision of an agreement invoking an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the joint committee does not adversely affect the powers that the agreement confers on that committee". *Ibidem*.

⁷³ See Opinion of Mrs. Advocate General Rozes delivered on 5 May 1982, *Kupferberg*, op. cit., p. 3674.

⁷⁴ *Kupferberg*, op. cit., p. 3663. In the opinion of some authors the Court "left open the possibility that it would deny direct effect to an international agreement if the other party to the agreement would not reciprocate". N. Neuhall: "Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law", in: *The European Union and World Trade Law. After the GATT Uruguay Round*, ed. N. Emiliou, G. O'Keefe (1996), p. 319. However, the Court seems to have said the opposite: it distinguished between the reciprocal *bona fide* implementation of an agreement and the question of direct effect of its provisions.

⁷⁵ The author sees two major problems: one, that in granting direct effect the EC will be forced to execute its obligations carefully and, two, that in the absence of a supranational judiciary each party will interpret its own obligations, where such interpretations could be fundamentally divergent. H.G. Schermers: "Case Law", 28 *CMLR* 186 (1991).

⁷⁶ *Ibidem*, p. 187.

⁷⁷ M. Mareseau: op. cit., pp. 513-515.

⁷⁸ G. Mareseau: op. cit., p. 53.

rules referred to in Article 63.3, to examine to what extent and under which conditions certain competition rules may be directly applicable, taking into account the progress made in the integration process between the Community and Poland". This provision seems to be aimed at direct applicability within the Polish legal system, and not within the EC (in view of the Court's case law). It seems to indicate that at the date of conclusion of the Poland Agreement the parties believed that these particular provisions had no direct effect.

The European Court's active approach to issues relating to association agreements should be assessed positively. The Court has also been wise in emphasizing that direct effect of provisions of an association agreement is a matter of the internal legal system of each party. It could be expected that the more developed the concept becomes in EC law, the more readily it will be applied in the legal systems of associated states.⁷⁹ Of course, this in turn could lead to more disputes and result in the need to create uniformization mechanisms.⁸⁰ On the other hand, if such mechanisms were agreed on, the burden of potential disputes would shift, at least to some degree, from the level of the EC-associated state (particularly the Association Council) to the level of national courts.

5. Final Remarks

The special nature of an association agreement makes its institutional structure a crucial element for the proper implementation of such agreement. This structure should be supported by an objective and efficient system of prevention and settlement of disputes. The parties should have available a number of options, which go beyond mere political resolution. Otherwise, there will be room for political and economic pressure which, in view of the usually inferior negotiating position of the associated state, is contrary to the concept of balanced relations between the parties.⁸¹ A strong dispute settlement system does not only mean easy access to judicial remedies, but a diversified choice of action. Unfortunately, the mechanisms offered by the Europe Agreements are in many respects unsatisfactory. Modelled after solutions introduced decades ago, they do not fully live up to the dynamics of contemporary international

⁷⁹ According to W. Czapliński, "there is not any obstacle to applying the Europe Agreement directly within the Polish legal system and to interpreting its provisions in accordance with the earlier practice of the European Court of Justice". W. Czapliński: "International Law and Polish Municipal Law. A Case Study", *Annuaire de la Haye de droit international* 1995, p. 42. Although the first part of the above sentence merits full support (there is no *legal* obstacle), the author in his usual optimism assumes that there would be no greater logistic problems – apart from imposing "additional duties upon Polish judges" – for the country's judicial system to incorporate EC rules. The example of the EEA shows what an enormous project this could prove to be. As noted by Peers: "[t]he complex task of harmonizing with thousands of pages of legislation is unlikely to succeed without effective judicial machinery". S. Peers: *op. cit.*, p. 213.

⁸⁰ "The difficulty and the risk of fully asymmetric interpretations, with their implications for the balance of advantages between contracting parties, require increased efforts to establish appropriate dispute settlement mechanisms, a greater willingness to use such mechanisms and the readiness to abide by their results". J.H.J. Bourgeois: *op. cit.*, p. 1273.

⁸¹ See C. Lycourgos: *L'association de Chypre a la CEE*, 1989, p. 21.

relations. The EEA system is worth careful study from this point of view, and perhaps certain of its elements could be incorporated in existing or future association agreements. In particular, a mechanism linking the Europe Agreements (if not all, then some of them) may prove advantageous to the countries in question.

In view of the above, and given the general reluctance of the parties to initiate official dispute settlement proceedings, it is proposed that other means available under the Europe Agreements be taken full advantage of. At least two such directions can be distinguished: first, consultations and mandatory notification may in many instances prevent actual disputes, and, second, special procedures should be developed within the existing framework of the Europe Agreements. The latter would apply to specific fields covered by those Agreements, as is the case with the Implementing Rules relating to competition law.⁸²

Finally, the application of direct effect should be mentioned, as a potentially useful means of eliminating disputes on the level of the association.

⁸² Another area which merits the creation of a separate consultation/dispute prevention mechanism is antidumping. D. H o r o v i t z: *op. cit.*, p. 77.

Removing International Trade Barriers After the Uruguay Round: Domestic Action in the Law of the European Union and the United States

TIM DE MEYER, CHARLES COWAN

Introduction

In ratifying the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, the GATT contracting parties made a decisive step in the direction of a rule based multilateral trading system and away from a trade system bilaterally managed. Although the phrasing of many World Trade Organization (hereafter “WTO”) Agreements has been kept sufficiently open-ended to allow for “collective management”, it is in particular the reinforced generic dispute settlement procedure that reveals a clear commitment on behalf of the WTO Members to trade by the same WTO rules.^{1 2} Henceforth, every World Trade Organization (hereafter “WTO”) contracting party feeling adversely affected by trade practices involving WTO Members that it considers to be in violation of any rules or procedures covered by the Dispute Settlement Understanding is under an obligation to seek satisfactory redress within the WTO system?

¹ The Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter “Dispute Settlement Understanding”) has created the opportunity to file appeal against dispute settlement panel reports. Panel or appellate reports shall be adopted by the Dispute Settlement Body, composed of representatives of all the Members (see the Agreement establishing the World Trade Organization, Art. IV, para. 3 *iuncto* para. 2) unless this Body decides *by consensus* *noi* (emphasis added) to adopt it within sixty (for panel reports not appealed against) or thirty days (for appellate reports) following issuance of the report to the WTO Members. See para. 16.4 and 17.14 of the Dispute Settlement Understanding. Note, however, (that the procedure involving a panel or the Standing Appellate Body is not the only valid means of solving a trade dispute within the GATT framework.

² A Member must equally do so if it considers that benefits accruing to it are nullified or impaired regardless of whether or not any have actually been violated. Article XXIII. para. 1 (b) has not been superseded but was elaborated by the Dispute Settlement Understanding. Para. 3.1 affirms the validity of GATT 1947. Although the Dispute Settlement Understanding does not explicitly say so, it is clear from its General Provisions (see para. 3.3 and 3.4 in particular) that the foremost objective of the procedures is the satisfactory settlement of disputes and not ensuring the supremacy of the rule of law. At any rate para. 23.2 (a) clearly stipulates that (1) Members shall not make a determination to the effect that a violation of obligations under the covered agreements has occurred or that benefits have been nullified or impaired, except through recourse to WTO dispute settlement procedures and that (2) they shall make any such determination consistent with WTO panel or appellate reports adopted or arbitration awards rendered.

In the past, Members have been chided for resorting to “managed trade” on a bilateral basis in disregard of multilateral commitments. Probably the most highly publicized of these renegade attempts is the adoption of Section 301 of the United States Trade Act of 1974, reinforced later by Section Super and Special 301 procedures.³ Basically this legislation gives legal status to private complaints and authorizes the U.S. Executive Branch to retaliate against trade practices by foreign countries that the U.S. autonomously considers to be inconsistent with international agreements, unjustifiable, unreasonable and/or discriminatory. Partly in response to Section 301, the Council of Ministers of the European Community (hereafter the “Council”) adopted a regulation commonly dubbed with a slightly Huxleyian touch the “New Commercial Policy Instrument” (hereafter the “New Instrument”).

The objective of this report is to explore the extent to which the strengthened multilateral trade rules have been able to force themselves upon domestic instruments unilaterally legitimating trade retaliation by some of the major global trading partners. These instruments obviously do not exclusively target WTO trading partners⁴, but insofar as they do, the issue to be considered is the effect WTO commitments in opposition to unilateral retaliation has upon such legislation.

1. European Union

1.1. New Commercial Policy Instrument

On 17 September 1984 the Council passed Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices.⁵ The Regulation strengthened at least four aspects of the European Community’s (hereafter “Community”)⁶ external trade policy. First, it expanded the Community’s arsenal of trade defense measures by providing a tool for responding to unfair⁷ trade practices of third countries while making this tool available to Commu-

³ Section Super 301 is directed against selected practices by selected countries. Special Section 301 further limits the focus to concentrate on the protection of intellectual property rights in selected countries.

⁴ Important global trading partners, such as the Federal Republic of Russia and the People’s Republic of China are still dealt with outside the WTO framework.

⁵ *Official Journal of the European Communities (OJ)* (1984) L 252/1 as amended by Regulation 522/94 07(1994) L 66/10.

⁶ The term “Community” will be used hereafter since the construction of the common commercial policy is a power exclusively attributed to the European Community. The incumbent Regulation is based on Art. 113 EC Treaty, which implies, for instance, that it does not apply to coal, steel or other products covered by the ECSC Treaty (I. van Bael and J.F. Bellis: *Anti-Dumping and Other Trade Protection Laws of the EEC*, 1990, p 1603; see however, C. D. Ehlermann: “The Scope of Article 113 of the EEC Treaty”, in: *Melanges P.H. Teitgen*, 1984, p. 145).

⁷ Unfair has a subjective connotation insofar as the notion does not necessarily refer to any other than a unilaterally established standard. In fact, as will be seen further, the Community has gradually developed a commitment only to tackle those trading practices which are challengeable under GATT/WTO rules, at least *vis-à-vis* WTO partners. According to Article XXIII GATT challengeable are trading practices causing nullification or impairment of benefits, resulting from (1) a *violation* of GATT obligations (which could then be called an *illicit* practice). (2) a *non-violation* disturbing the balance of benefits between contracting parties (called an *objectionable* practice) or (3) a *situational* measure not covered by the previous two categories and

nity exporters competing in foreign markets. Unilateral response against foreign exporters trying to penetrate the Community market(s) with dumped, subsidized or inordinately high quantities of imports was allowed under GATT from the outset.⁸ In step with the codification process within the GATT the Community had availed itself of a respectable body of law in this regard.⁹ The Regulation, therefore, explicitly did not apply to such imports and would only apply to imports of agricultural products insofar as the regulations organizing a common market for each of these products did not provide adequate protection against so called illicit commercial practices.

This desire to confront the trade policies of third countries with yet another instrument of commercial defense can be explained by a combination of internal and external factors. The crisis-ridden early 1980-s saw European governments struggling to stimulate domestic industry. Not only did some of these governments feel that their efforts should be paralleled by extra protection against foreign trade practices¹⁰, the European Parliament itself declared GATT's trade liberalization drive outdated. On top of that the common market idea was again gaining momentum and France in particular wanted to balance the removal of intra-Community trade barriers by tightening external trade policy.

Meanwhile, the GATT dispute settlement procedure, which required prior authorization to retaliate, lacked appropriate enforcement capability as long as the Community's major trading partners would not condone retaliation. Meanwhile the Community's global competitive was challenged. For example Section 301's private complaint procedure and broad definition of "unfairness" were equally used against the Community's import restrictions. At the same time Japan was accumulating trade surpluses with exports to the Community steadily exceeding imports by more than 50%.¹¹ Japanese exports increasingly targeted advanced technology markets.¹²

Secondly, the Regulation enabled the Community industry to complain directly on Community level against "illicit" commercial practices upon proof of injury or threat of injury. Section 301 established a controversial precedent by establishing

not foreseeable at the time of drafting of GATT. See *European Commission, Competition Policy in the New Trade Order: Strengthening international Trade Co-operation and Rules*, Annex 4 (Enforcement and dispute settlement in the GATT and the WTO), Brussels. 1995. p. 61.

⁸ Sec GATT Article VI on anti-dumping and countervailing duties and Article XIX' on safeguard duties

⁹ At the time of the adoption of Regulation 2641 /84: Regulation 2176/84 on Protection against Dumped or Subsidized Imports from Countries not members of the EEC and with respect to surveillance and safeguard measures. Regulation 288/82 on common rules for imports.

¹⁰ It is interesting to note that the New Commercial Policy Instrument was primarily conceived as a defensive instrument, protecting domestic industry against imports, rather than as an offensive one, legally underpinning the promotion of Community exports (see M.C.E.J. Bronckers: *Selective Safeguard Measures in Multilateral Trade Relations - Issues of Protectionism in GATT - European Community and United States law*, 1985, p. 210). As will be seen further, in practice, all except one of the cases dealt with so far concerned Unfair treatment of Community exporters on foreign markets. See with regard to the European Parliament's protectionist stance, the typical confrontation between interventionists and free marketeers in the drafting stage of the Instrument and the political genesis in general: M.C.E.J. Bronckers: op. cit., pp. 211-219 and J. Steenbergen: op. cit., p. 422.

¹¹ See for instance, figures for the period 1981-1993 from the Japan Institute for Social and Economic Affairs, *Japan 1995 An International Comparison*, Keizai Koho Centre, Tokyo, 1995, p. 34.

¹² See G. Daniels: "EC-Japan: Past, Present and Future", in: *The European Community and the*

a private complaint procedure. Academic circles (and some Community Member States) questioned the wisdom of establishing a private complaint procedure to spur governmental action in international trade relations. This criticism is precisely based upon the premise that international relations are best served by the mutually beneficial development of international trade, irrespective of the fairness of private claims. Private litigation aimed at enforcing commitments for private purposes while disregarding potential consequences on a larger scale and over a longer term limits a government's discretion and is therefore poised to disturb the climate of international trade. This is the same philosophy that so far has prevented the Court of Justice from endowing GATT with self-executing force within the Community legal order.

The New Instrument limits the power of individual complainants by setting high thresholds (complainants must prove an entire Community industry is affected by the illicit practices), by enabling the Commission to reject a complaint for lack of Community interest and by narrowing the scope of remedy to practices incompatible with international law (for instance GATT) or with generally accepted rules.

It soon turned out that the threshold would be too high, if it were to be strictly applied. This was borne out by the *AKZO* case. Although *AKZO* was the sole entity injured by discriminatory treatment in the United States and was in no position to speak on behalf of the Community chemical industry, its complaint was considered admissible on the grounds that it was the only Community producer of a specific product classified separately for customs purposes. In another instance, the *FEDIOL* case offered an opportunity to put the Community's discretion to the test. In this case, the Commission argued that its decision to reject a complaint for lack of GATT infringements could not be reviewed by the Court of Justice *inter alia* because the decisions on the initiation of an examination and on the assessment of Community interest are governed by purely political (and not reviewable) considerations. In response, *FEDIOL* argued that the concept of "Community interest" does not give the Commission any margin of discretion, because any country outside the Community that violates the obligations imposed on it by international law, thereby harming Community production, has to justify its conduct. Moreover, argued *FEDIOL*, the protection afforded by the Regulation would be impaired if action by the Community institutions were conditional on their "political goodwill". The Court took note of the question, but felt no need to rule on it because the Commission's decision contained no assessment of the Community's interest and confined itself to endorsing the Commission's finding that the allegedly illicit commercial practice was not contrary to GATT provisions.

Finally, the Regulation enhanced decision-making by providing for the delegation of powers from the Council to the Commission. Article 113 EC Treaty assigns decision-making power on external trade matters to the Council of Ministers. Decisions require only a qualified majority, but the then political practice only to go by consensus obviously gave rise to protracted negotiations. External trade and foreign policy more often than not being intertwined, the Council has in the past been reluctant to yield power to the Commission. The New Instrument, therefore, provided a procedure, dubbed the "guillotine", for overruling the Commission: decisions taken after

consultations with the Member States would stand unless the Council reversed it at short notice upon referral by a Member State at even shorter notice.

In substance, the Commission proposed that it be entrusted with the power (a) to respond to unfair commercial practices and (b) to ensure full exercise of the Community's rights pertaining to the Fields covered by the commercial policy. In practice, the distinction was not entirely clear, but the resemblance this dichotomy bears to Section 301 (a) (1) (A) and (B) of the U.S. Trade Act suggests that the instrument was designed from the outset to protect the Community's rights and interests (benefits), both covered under GATT. This proposal proved to be more than the Member States could tolerate and the Council regulation reserved the powers under (b) for the Council. Broadly speaking, the Commission retained the discretion to investigate complaints alleging illicit commercial practices (violation complaints); to terminate the proceedings if the results of the examination procedure did not call for further action; and to initiate, conduct and terminate international dispute settlement proceedings. The Council maintained its authority (1) to apply the "guillotine" to any of the above Commission decisions (aside from the decision to initiate an examination procedure) upon submission of such a matter by a Member State; (2) to act where the full exercise of the Community's rights had to be ensured; and (3) to decide on retaliatory measures after conclusion of international dispute settlement proceedings.

Before the WTO Agreement was even formally signed, an amending Regulation was adopted. It tied the whole mechanism more firmly within the multilateral framework, while striking a conciliatory note by stipulating that the procedures should be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures. Moreover, it simplified the decision-making machinery by abolishing any procedural distinction between "track (a)" and "track (b)" complaints.

Remarkably, Article 10 (2) and (3) provided that only those measures¹³ which are compatible with existing international obligations and procedures could be taken after discharge of international dispute settlement procedures and taking into account the results of the procedure. By the time the Uruguay Round agreements were to enter into force, the New Instrument had only scarcely been used¹⁴ and predominantly in relation to Community exports, several of such cases involving intellectual property rights.¹⁵

¹³ Article 10 (3) specified suspension or withdrawal of trade concessions, introduction or raising of customs duties or charges and introduction of quantitative restrictions.

¹⁴ There have been less than 10 cases in 10 years. Much of the European Union's commercial defense actions have been concentrated in the anti-dumping area. The latest WTO trade policy review states: "Only a few investigations had been carried out under the NCP1 since its inception in 1984; two cases remain active, now under the TBR. The European Union remains one of the most frequent users of anti-dumping remedies in the GATT system, maintaining 156 measures at the end of 1994. This contrasts with two countervailing actions and three safeguard measures under Article XIX, including restrictions by Germany on coal imports since 1958" (WTO Trade Policy Review Mechanism - The European Union [25 July 1995], *World Trade and Arbitration Materials*, September 1995, p. 10). See also H.F. B e s e l e r "Emphasis on Anti-Dumping Measures", in: *Trade Laws of the European Community and the United States in a Comparative Perspective*, 1992, p. 75.

¹⁵ In addition to the aforementioned AKZO case and FEDIOL case, in chronological order: (1) *International Federation of Phonogram Industries (IFPI) v. Indonesia (Unauthorized sound recordings)*, OJ (1987)

1.2. Trade Barrier Regulation

The implementation of the Uruguay Round results offered a good opportunity for revision of the New Instrument in the light of past experiences. The Council adopted Regulation 3286/94¹⁶ just in time to coincide with the entry into force of the WTO Agreements.¹⁷ If the title of the Regulation is to be taken as any indication, the defense of the Community's commercial interests are more firmly embedded than ever in the multilateral framework. On the occasion of the latest WTO trade policy review the European Union's representative declared that "the New Trade Barrier Regulation had updated procedures established under its predecessor regulation, but not the essential requirements. As before, action [can] be taken only if authorized under WTO provisions."¹⁸

I propose to summarize the salient modifications with respect to the New Instrument in five points. First, the somewhat enigmatic dichotomy in rationale between responding to illicit commercial practices and fully exercising the Community's rights has now been conclusively replaced by the practice of confronting obstacles to trade (hence the Regulation's nickname "Trade Barrier Regulation") affecting the Community market (*imports*) or the position of Community exporters on foreign markets (*exports*). Retaliatory action is always subject to existing international dispute settlement procedures. Secondly, the evaluation of the illicitness of a third country's trade practice in the light of the volatile notion of "international law and generally accepted rules" has given way to the much more objective focus on obstacles to trade incompatible with international trade rules, defined as the WTO Agreements or any trade agreement to which the Community is a party. Thirdly, the range of trade activities to be protected has been explicitly expanded to include services and intellectual property rights. Fourthly, access to the complaint procedure has been considerably facilitated for exporters in that any Community enterprise can now lodge a complaint, without necessarily having to prove actual injury. Fifthly, procedures have been streamlined, but apart from some enhanced language regarding the involvement of the Advisory Committee (read the Member States) and explicitly authorizing the Council to con-

C 136/3 (complaint), *OJ* (1987) L 355/22 (decision of suspension), *OJ* (1988) L 123/51; (2) *Smith Kline & French Laboratories v. Jordan (TAGAMET patent protection)*, *OJ* (1989) L 30/67 (rejection of complaint); (3) *EC Shipowners Association v. Japan (Harbour Management Fund fees)*, 07(1991) C 40/18 and 07 (1991) C 287/5 (initiation and extension of examination), 07 (1992) L 74/47 (decision of suspension), 07 (1993) L 166/45 (termination of examination); (4) *IFPI v. Thailand (Unauthorized sound recordings)*, *OJ* (1991) C 189/26 (initiation of examination), 07 (1996) C 11/7; (5) *International Rayon and Synthetic Fibres Committee (IRSF) v. Turkey ("Fund Levy" charge on polyester fibre)*, *OJ* (1993) C 235/4 (initiation of examination).

¹⁶ Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, 07 (1994) L 349/71. The Regulation is commonly called the "Trade Barrier Regulation".

¹⁷ Proceedings initiated after 1 January 1995 (correction made by Council Regulation 356/95, 07(1995) L 41/3) are governed by the new regime. Ongoing proceedings (currently only the Turkish "Fund Levy") are equally subject to the new regime.

¹⁸ WTO Trade Policy Review Mechanism - The European Union (25 July 1995), *World Trade and Arbitration Materials*, September 1995, p. 19.

elude dispute settling international agreements in accordance with Article 113 EC Treaty, nothing substantial has been added.

1.3. Scope

The private complaint procedure has been maintained and its scope expanded. A key precondition for invoking the procedure is that Community importers and exporters face *obstacles to trade*, defined as any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action.¹⁹ In its original, proposal the Commission intended "not to create an easier way of applying the instrument, but a different one, better suited to a market opening strategy in favour of our exporters".²⁰ Accordingly, it proposed to maintain the existing "tracks" and to add a third one enabling Community exporters to challenge illicit and objectionable trade practices in third country markets.²¹ This three track structure would have further obscured²² an already "unpopular" instrument. It may be for that reason that the structure was completely overhauled to give way to a two-pronged structure for responding to obstacles of trade having an effect on the Community market on the one hand and on a third country's market on the other hand.

With regard to obstacles of trade that affect the level of imports into the Community, only a Community industry demonstrating material injury²³ is in a position to complain, provided both that the injury cannot be removed through the exercise of other existing common commercial policy rules²⁴ and that the international trade rules concerned have established a right of action. Such right of action exists when the rules concerned prohibit a practice outright or create the right to seek elimination of its effects.²⁵ It logically flows from the foregoing that the procedure is now open for private complaints against practices which are either illicit or objectionable under the

¹⁹ Article 2 (1).

²⁰ *Explanatory Memorandum*, COM (94) 233, p. 2.

²¹ The Commission emphasized that it did not attempt to facilitate access for complainants as it required proof of material impact of the adverse trade effects on the economy of the Community and a kind of guarantee that international Community action would not only benefit the complaining enterprise (see *Explanatory Memorandum*, op. cit.).

²² See *Explanatory Memorandum*, op. cit., p. 4.

²³ A threat of injury is sufficient if it is clearly foreseeable that a particular situation is likely to develop into actual injury. See Article 10 (2).

²⁴ Must notably anti-dumping measures (Council Regulation 3283/94 on protection against dumped imports from countries not members of the European Community, *OJ* [1994] L 349/1), countervailing measures (Council Regulation 3284/94 on protection against subsidized imports from countries not members of the European Community, *OJ* [1994] L 349/22) and formal safeguard measures (Council Regulation 3285/94 on the common rules for imports and repealing Regulation 518/94, *OJ* [1994] L 349/53). What is less obvious for instance is the scope for exploiting the divergencies in injury required to trigger Community action: the Trade Barriers Regulation requires *material injury or threat of material injury* (Article 2 [3]), the Anti-dumping and Anti-subsidy Regulation *material injury, threat of material injury or threat of material retardation of the establishment of a Community industry* (Article 3 [1] and [5] for the equally slightly divergent criteria), the Imports Regulation *serious injury*, meaning a *significant* overall impairment in the position of the Community producers (Article 5 [21 and [3]).

²⁵ Article 2 (1).

international trade rules within the scope of the Trade Barrier Regulation as long as injury (or threat of injury) can be proven.²⁶

Any *Community enterprise* encountering adverse trade effects on an *export* market outside the Community caused by such obstacles may lodge a complaint, if it can produce evidence that these effects have a material impact on the economy of the Community, a Community region or a Community economic sector. A threat of adverse trade effects is sufficient if it is clearly foreseeable that a particular situation is likely to develop into actual adverse trade effects.²⁷ Adverse trade effects arise when trade flows which could potentially benefit Community enterprises are prevented, impeded or diverted as a result of any obstacle to trade, or from situations in which obstacles to trade have materially affected the supply or inputs to Community enterprises.²⁸ Adverse trade effects may stem from illicit or objectionable trade practices²⁹ and need not necessarily result in actual injury. The notion is borrowed from GATT rules and is likely to be developed in step with WTO dispute settlement jurisprudence. It contemplates action not only to remove actual injury, but to prevent it and even to prevent the loss of potential benefits.³⁰

²⁶ By leaving the first "track" unaltered, the original Commission proposal, by leaving the first "track" unaltered, only provided for *violation* complaints that alleged material injury on the Community market. By shifting the target to obstacles to trade, it seems as though *non-violation* complaints demonstrating material injury have become admissible.

²⁷ Threat of injury: Article 10 (2). Threat of adverse effects: Article 10 (4).

²⁸ Article 10 (4). A practical example concerns the in Japan hotly debated renewal of the Semiconductor Agreement of 1991 between the United States and Japan. At the time the Agreement stipulated that Japan should maintain a gradual and steady increase of market share for foreign semiconductors above the 20% level. The United States is now seeking to extend the agreement. To the extent that Community semiconductors would be diverted under the pressure to apply this guaranteed market access primarily to United States producers, Community producers might file a complaint under the Trade Barrier Regulation. The Japanese government is well aware of this. When the similar Automotive Agreement was concluded last year, Japan went to great length to emphasize that the benefits would be extended on a multilateral basis and was extremely cautious not to line up behind the United States' "estimates" of foreign parts purchases by Japanese companies, one third of which was "forecasted" to be from the United States (see *Japan-United States: Automotive Agreement and Supporting Documents*, 23 August 1995, 34 *ILM* 1482, 1995).

²⁹ It is also perceived as such by WTO: "The new Trade Barrier Regulation [...] specifies internal procedures for actions against objectionable or illicit trade practices abroad, including certain areas of services and intellectual property". WTO Trade Policy Review Mechanism - The European Union (25 July 1995), *World Trade and Arbitration Materials*, September 1995, p. 10.

³⁰ Article 5 of the WTO Agreement on Subsidies and Countervailing measures (hereafter "Agreement on SCM") distinguishes three types of adverse trade effects: those that cause injury to the domestic industry of another WTO Member, those that nullify or impair trade benefits accruing to other Members and those that cause serious prejudice. It can obviously not be taken for granted that this definition will as such be applied to other WTO Agreements, but this should not prevent an attempt to discern some logic in the distinction made. Injury then appears to be an adverse effect affecting an entire industry, predominantly caused by competing imported products and susceptible to objective examination and calculation (see Article 15 of the Agreement on SCM). Serious prejudice is an adverse effect which only exists in well-defined cases of subsidization (for instance subsidies consistently covering operating losses sustained by an enterprise with the result that competing exports of another Member are displaced or impeded -see Article 6 of the Agreement on SCM). Nullification or impairment of benefits then could be any kind of effect that frustrates the expectations of another Member as to the benefits to be derived from tariff commitments under the GATT/WTO irrespective of other commitments. This definition would confirm Jackson's perception of "nullification" as a "negotiating concept" (see *infra*).

Finally, a Member State may also avail itself of the procedures of the Trade Barrier Regulation and ask the Commission to investigate import and export obstacles. Member States need only to provide evidence of injury and adverse trade effects "where (...) appropriate".³¹

The question of whether the Commission can initiate an examination procedure *ex officio*³² appears to be merely academic since the Commission has the competence under Article 113 EC Treaty to make any proposal to the Council it deems fit (and this implies the power to prepare such proposal) and it is hard to see how the Trade Barrier Regulation, being silent on this point, could erode this Treaty provision establishing an institutional balance.

1.4. Examples

The experiences relating to the New Instrument are helpful in assessing the Trade Barrier Regulation. On the *import* side the New Instrument primarily envisaged a situation in which countries that are suppliers of raw materials or energy would begin to limit these exports.³³ Thus, the New Instrument's complaint procedure could be triggered against countries causing injury by consistently subsidizing their exports to the Community in contravention of, for instance GATT Article XVI, provided at least the aim of the complaint was to alter the third country's subsidy practices.³⁴ The WTO Agreement on SCM should not influence this conclusion. Its dispute settlement procedure³⁵ can be triggered if either (a) a related subsidy causes injury, (b) nullification or impairment of benefits occurs, or (c) serious prejudice is imposed upon an-

³¹ Article 6 (2). It is not specified when this appropriate. Member States can take advantage of other procedures to raise the same issue at the Community level. Article 15 of the Trade Barrier Regulation is explicit in pointing out that within the Article 113 framework, Member States can raise issues relating to trade obstacles beyond the limits of the Regulation and the Commission retains its right of proposal guaranteed by Article 113.

³² See H. B e e k m a n n: op. cit., p. 69.

³³ See I. v a n B a e l and J.F. B e l l i s: op. cit., p. 337. The EC is a major importer of the commodities concerned and export restrictions are in principle prohibited under Article XI of GATT. As was shown in the *FEDIOL* case there are many ways to hamper exports to the Community and some have been as considered prohibited by the WTO Agreements (for instance voluntary export restraints under the WTO Agreement on Safeguards), while others have not been considered as prohibited (for instance the system of differential charges on exports of soya products in *FEDIOL*). Under the Trade Barrier Regulation, the latter practices can only be challenged if they can be considered objectionable (and have caused or threaten to cause injury). It is submitted that it is not because a practice causes injury and is not prohibited by GATT/WTO Agreements that it automatically becomes objectionable. In order to have a case of "nullification or impairment of benefits" that is not caused by a breach of GATT obligations, it would be necessary that the "reasonable expectations" of, in this case, the European Community are frustrated. Such expectations are usually created with regard to the effects of a tariff concession. See J. J a c k s o n and W. D a v e y: *Legal Problems of International Economic Relations — Cases, Materials and Text*, Second edition, 1986, p. 334.

³⁴ See for instance C. C a s t i l l o d e l a T o r r e: op. cit., p. 692 and M.I.B. A r n o l d and M.C.E.J. B r o n e k e r s: op. cit., p. 34. See for an article specifically devoted to the subject: M.C.E.J. B r o n e k e r s: "Private Remedies against Foreign Subsidization: A European View", in: *Subsidies and International Trade — a European Lawyers' Perspective*, J. B o u r g e o i s (ed.), 1991, p. 187.

³⁵ The procedure is outlined in Article 7 and complemented by the generic rules laid down in Articles XXII and XXIII of GATT (see Article 30).

other Member³⁶ The Trade Barrier Regulation, however, restricts the admissibility of a private complaint these cases involving injury. It seems, strictly speaking, that for a private complaint to be admissible it makes no difference whether the subsidy is actionable or not under the Subsidy Agreement³⁷, as long as injury can be proven. Such a complaint is, however, unlikely to be acted upon *vis-à-vis* WTO Members, because the Trade Barrier Regulation depicts itself as the domestic complement of the WTO dispute settlement.

Restrictive business practices (such as export pricing arrangements or export quota arrangements), if “attributable” to governmental authorities, were equally considered challengeable under the New Instrument³⁸ The Trade Barrier Regulation has refined the notion of attribution as including only those practices adopted or maintained by the State authorities. Anticompetitive practices are assumably maintained for instance when a government does not enforce its competition legislation against export cartels.

On the *export* side, illicit tariff barriers are the most obvious example of a challengeable trade practice.³⁹ Community exporters can file a complaint when discriminated against in public procurement or adversely affected by price regulations or technical standards.⁴⁰ Community exporters suffering from competition with subsidized competitors have equally been offered the prospect of seeking redress under the New Instrument, at least when the complaint concerned a prohibited subsidy.⁴¹ Complaints with regard to “actionable” subsidies remain admissible, without the requirement of proof of actual injury.

Business practices by private parties that restrict export markets, such as concerted refusals to supply or deal with foreign purchasers,⁴² may prove to pose more

³⁶ Sec Article 5.

³⁷ Sec Part III and Part IV of the Subsidies Agreement.

³⁸ Sec C. Castillo de la Torre: op. cit., p. 693; M.C.E.J. Bronckers: op. cit., p. 238 and in somewhat more detail M.C.E.J. Bronckers: “The Potentials and Limitations of the Community’s New Trade Policy Instrument”, in: *Trade, laws of European Community and United States in a Comparative Perspective* (hereafter “*Trade Laws*”), 1992, p. 155. The applicability of Regulation 2641/84 to restrictive business practices in an import situation would possibly have overlapped with EC competition legislation, which applies when the restrictive conduct affects the Community market (see Court of Justice, Case 89/85 and joint cases, *Ahlströmi Osakeyhtiö v. Commission (Wood Pulp)*, [1988] ECR 5193). It is therefore important to once again clearly distinguish the proper aim of the Regulation, which is in this ease to convince the third country to bring its competition policy in line with international rules, if any (see further).

³⁹ For example the *Fund Levy* (Turkey) case. Turkey had raised customs duties on polyester fibres originating in the Community and introduced a *Fund Lew* charge on top of that, while its association agreement with the EEC actually provided a standstill clause and a phase-out timetable. Moreover, the duties were alleged to infringe GATT.

⁴⁰ J. Steenbergen: op. cit., p. 425. Concurrent WTO standards include the Plurilateral Trade Agreement on Government Procurement (note that Plurilateral Trade Agreements are only binding upon those WTO Members that have accepted their obligations - see Article II. para. 3 of the Agreement establishing the WTO) and the Agreement on Technical Barriers to Trade. Article 2.2 of the latter provides, for instance, that technical regulations shall not be more trade-restrictive than necessary to fulfil any of the listed legitimate objectives. Such principles of proportionality open the way for disputes.

⁴¹ J. Steenbergen: op. cit., p. 425 and M.C.E.J. Bronckers: op. cit., p. 238.

⁴² The examples arc taken from para. D (3) and (4) of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by the United Nations Conference on Restrictive Business Practices on 16 December 1980, U.N. Doc, TD/RBP/Conf/10/Rev.1.

problem.⁴³ Under the candid heading "Competition policy as a tool to open up trade with third countries"⁴⁴ the Commission has since quite a while declared itself prepared to defend the case of Community exporters encountering restrictive business practices abroad. One OECD Recommendation on restrictive business practices recommends that governments enforce competition legislation in the event enterprises from other OECD Member States are harmed by anticompetitive practices covered by the former's domestic legislation.⁴⁵ Reportedly, only the availability of concrete and detailed information stopped the Commission from initiating "procedures (...) under which the Commission can tackle private-sector obstacles to trade with third countries".⁴⁶

The New Instrument could encompass such diverse practices because of its flexible scope under the notion of "illicitness": any international trade practice was susceptible for investigation provided it was claimed to be incompatible with international law or generally accepted rules, possibly including non-binding legal instruments.⁴⁷ Although maybe not entirely in line with the Community's explicit desire to avoid Section 301-style spill-over actions, it would have been plausible for the Commission to initiate an examination procedure, for instance, if third countries did not comply with some international labour Conventions⁴⁸, the OECD Recommendation on Restrictive Business Practices or the corresponding U.N. Set of Rules⁴⁹, to mention only three. In such case, the Commission would not have needed to formally establish their trade related character. Under the Trade Barrier Regulation, it would seem that at least the latter two instruments do not qualify anymore as the basis for a complaint. The Regulation anticipates the exercise of the Community's rights under international trade rules, including, in addition to the WTO Agreements, "any agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries".⁵⁰ Although not unequivocal, this phrasing seems to burden the Commission with the task of discerning the legally binding character of an international agreement. Terminology such as "rights", "agreement" and "party" appear to exclude soft law as a source for contention.

⁴³ The problems with regard to the applicability of the Trade Barrier Regulation are of such a nature that they also arise when anticompetitive practices affect Community imports.

⁴⁴ *XXIInd Report on Competition Policy 1992*, ECSC-EEC-EAEC, Brussels, Luxembourg 1993, 61.

⁴⁵ Article I. B (4) of the Revised Recommendation of the Council Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, 21 May 1986, 25 *ILM* 1629 (1986). The provision has been called a "positive comity provision". It may be noted that enforcement is recommended "on a voluntary basis and considering [the Member countries'] legitimate interests" (Article 1, B (4) (c) *in fine*).

⁴⁶ *I.C.*, 62. Thus it would have been conceivable, for instance, to question Japan's faltering enforcement of its Antimonopoly Law. Japan is an OECD Member and the traditionally strong vertical integration of its company structure has much been criticized as a major impediment for market access by foreign companies; see H. F i r s t, "Antitrust Enforcement in Japan", 64 *Antitrust Law Journal*, 137 (1995).

⁴⁷ "Non-binding" in the sense that either the international instrument itself was not binding or the third country accused of an illicit practice was not a party to the instrument.

⁴⁸ See footnote 70.

⁴⁹ *Ibidem*

⁵⁰ Article 1 *in* Article 2 (2).

This does not mean the end of private complaints against anticompetitive practices affecting Community export markets. Several WTO Agreements have divergent *ad hoc* provisions regarding such practices⁵¹, and *de lege ferenda*, the Community (or at least the Commission) is eager to sponsor a more comprehensive arrangement, such as a plurilateral agreement.⁵² "Positive comity" provisions⁵³ have been included in "hard" bilateral agreements⁵⁴ between the Community and some of its trading partners and association agreements with prospective Member States contain detailed provisions on competition law.⁵⁵ In the absence of "hard" international agreements, it may prove difficult to challenge a third country's maintenance of restrictive practices.⁵⁶

Generally speaking then, a complaint lodged under an agreement to which the Community is a party and a third country is not would remain actionable. In the *Unauthorized Sound Recordings* (Indonesia) dispute, an export-related case that was eventually settled by agreement, the complaint was acted upon in spite of the fact that

⁵¹ The Commission mentions the services code and the multilateral steel arrangement: *supra*, 62. Articles VIII and IX of the WTO General Agreement on Services (GATS) and Article 40 of the WTO TRIPS Agreement regarding control of anti-competitive practices in contractual licenses are some of the most prominent provisions. For more instances in WTO Agreements, see E.U. Petersmann: op. cit., p. 55.

⁵² See *European Commission, Competition policy in the new trading order...* The underlying drive is always to pry open foreign markets.

⁵³ When considering the extra-territorial application of national competition laws, either a "negative comity" approach or a "positive comity" can be adopted. "Negative comity" calls for self-restraint when applying domestic competition laws when another country's important interests are involved. "Positive comity" calls for co-operation and affirmative action by competition authorities in such case. See *European Commission, Competition in the New Trade Order...* 19.

⁵⁴ See for instance, Article V of the EEC-USA Competition Laws Cooperation Agreement, 23 September 1991, 4 CMLR 823. Note, however, that para. 4 provides that a Party's discretion to enforce remains unaffected.

⁵⁵ See for instance, Part IV of the Agreement on the European Economic Area, 2 May 1992, O J 1994 L 1/3

which extends the EC competition rules to cover the European Economic Area. The mechanisms for enforcing these rules are so well entrenched that it would be odd to file a complaint under the Trade Barrier Regulation.

⁵⁶ In practical terms, private parties may be barred from filing a complaint against, for instance, *keiretsu* vertical integration maintained by the Japanese government, since at first sight there are no WTO standards prompting a particular domestic policy with regard to such practice. Complainants should, however, stand a fair chance when complaining about the same practices by the United States or Poland (the "Europe Agreements" with Central and Eastern European countries also contain competition related provisions). Stretching the philosophy followed in the *AKZO* case, discriminatory enforcement of competition legislation would then again be challengeable for infringing GATT's "national treatment" principle. This raises the question of whether the Community has external competence in competition matters or, in other words, whether the common commercial policy in Article 113 encompasses co-operation in regulating business practices affecting trade. The answer is probably positive, at least as long as the Council concludes related agreements (see Court of Justice, Case 327/91, *Erance v. Commission*, judgment of 9 August 1994). At any rate, the Court of Justice has recognized the Community's power under the EC Treaty competition rules to conclude international agreements in this field (see Opinion 1/92 on the draft agreement between the Community and EFTA relating to the creation of the European Economic Area, [1992] ECR I-2845, para. 40). Whatever the agreement under which the Community tackles a particular practice, it seems mandatory that whenever sanctions are taken *vis-à-vis* a WTO partner that are the subject of WTO commitments, WTO procedures will have to be followed and the law of WTO will have to be applied. This can be illustrated with an example. Poland is a "Europe Agreement" partner and WTO Member at the same time. Non-compliance with "Europe Agreement" provisions on competition may, subject to the procedures under the Agreement, be sanctioned by withdrawing specific concessions granted by the Community in that Agreement. Sanctions which imply a departure from WTO commitments (such as duty bindings resulting from the Uruguay Round), however, would need to be authorized by the WTO Dispute Settlement Body.

Indonesia was not a party to the Paris Convention for the Protection of Industrial Property. This was so because the Convention was considered a “generally accepted rule” under Article 2 (2) of the New Instrument.⁵⁷ With this precedent in mind, the possibility cannot be excluded that private parties will continue to be able to base their complaint on agreements to which only the Community is a party.⁵⁸

Whether the Trade Barrier Regulation will admit complaints related to the infringement of intellectual property rights is not a trivial question. It seems useful to consider this in the light of yet another question: what is meant by the requirement that the Community must be a party to an agreement involved in a dispute. Does the Community formally (and exclusively) have to be a party to the agreement, or can the subsidiarity principle⁵⁹ be reversed and will the Community be in a position to police agreements to which only the Member States are a party, provided that it can demonstrate that by reason of the scale the objectives of the action are better achieved by the Community? Article 2 (8) of the Regulation defines the services covered by the Trade Barrier Regulation as those services “in respect of which international agreements can be concluded by the Community on the basis of Article 113 of the Treaty”. Clearly the definition reveals the intention of the Council to simply abide by the Court’s of Justice view on the scope of Article 113 expressed in Opinion 1/94,⁶⁰ but does it mean that services (or intellectual property rights) in respect of which mixed agreements can be concluded are not covered by the Trade Barrier Regulation? Technically, it is hard to refute this *a contrario* interpretation, precisely because the Trade Barrier Regulation itself has been adopted on the basis of Article 113 only. In line with this *a contrario* interpretation complaints related to trade matters for which the Community does not enjoy exclusive competence should not be admissible.

Such an interpretation would make the admissibility of a complaint dependent upon the current scope of Article 113. This may well imply a missed opportunity, if not a step back. In Opinion 1/94 The Commission referred to some of its uncontested decisions in the *AKZO*, *IFPI* (Indonesia) and *IF PI* (Thailand) cases to establish the Community’s exclusive competence in the field of TRIPS.⁶¹ Indeed, *Unauthorized Sound Recordings* (Indonesia) provides a precedent. The Community was and is not

⁵⁷ A “generally accepted rule” has been interpreted as rule which is sufficiently widely accepted (for instance by the Community’s major trading partners) to be valid in trade matters (see M. B r o n e k e r s: *Trade Laws*... p. 152).

⁵⁸ In the same sense, see H. B e c k m a n n: *op. cit.* pp. 64-65.

⁵⁹ Article 3b EC Treaty. The subsidiarity principle applies to the realization of objectives situated on the margins of the Community’s power and it also applies to the Commission exercising its decisional authority under the Trade Barrier Regulation (see H. B e c k m a n n: “Subsidiarity and the European Community”, *Häslings International and Comparative Law Review*, Vol. 17:97, p. 104).

⁶⁰ Opinion 1/94 concerning the competence of the European Community to conclude international agreements concerning services and the protection of intellectual property - Article 228(6) of the EC Treaty, 15 November 1994, 34 *ILM* 689 (1995). In short, the Court opined that the Community has exclusive competence to conclude the WTO Agreements on trade in goods on the basis of Article 113, but transboundary services involving the physical movement of persons, such as transport services and trade-related intellectual property rights (TRIPS), do not come within the ambit of Art 113.

⁶¹ See para. 62.

a party to the Paris Convention⁶², nor did it succeed the Member States in their rights and obligations. All the same, the Member States did not contend the Commission's decision to accept the case, nor did they object when the Commission reached a settlement agreement with the Indonesian government.⁶³ The Court brushed the argument aside, contending that the retaliatory measures provided for in the instrument came within the scope of Article 113, while arguing that the primary objective of the WTO TRIPS Agreement is harmonization of intellectual property protection, which does not come within Article 113's ambit.⁶⁴ One should be careful not to read too much in a brief consideration made in another context, but the Court confirms an impression established earlier by the Council that the Community internally can investigate practices that substantially fall outside the ambit of Article 113, as long as the final legal action (agreement or retaliatory measures) falls within the ambit of Article 113.⁶⁵

The main problem is, however, that the conclusion of an international agreement stipulating protection of intellectual property rights for Community exporters in a third country is concerned with harmonization of intellectual property protection and would, thus, not normally fall within Article 113. Moreover, the incidence of such agreements is likely to be much higher than that of retaliation.⁶⁶ If cumbersome mixed agreements⁶⁷ are to be kept out of the proceedings, it should be sufficient for the Commission to apply Article 3b of the EC Treaty in full and demonstrate prior to taking action in defense of a Convention to which only Member States are parties, that the objectives of the proposed action cannot be sufficiently achieved by the Member States. There are good policy arguments for this interpretation. For one thing, Member States remain firmly in control of the proceedings through the Advisory Committee. If necessary, they can wield the "guillotine" (except against a Commission decision to initiate an examination procedure) and retaliatory measures can eventually only be taken by the Council. The Commission itself can always prove a lack of Community interest at a later stage. Meanwhile it is provided with the information it needs.

⁶² International Convention for the Protection of Industrial Property, signed at Paris on 20 March 1883. Complainants can sidestep the admissibility question regarding the Paris Convention and other Conventions in the same field since Article 2 of the WTO TRIPS Agreement (agreement on trade-related aspects of intellectual property rights, including trade in counterfeit goods) requires compliance with the substantial Articles of this Convention. Because the WTO TRIPS Agreement is itself a mixed agreement, this does not, however, solve the question of internal competence further on in the proceedings. Finally, even with regard to the WTO TRIPS Agreement, it might be argued that on the face of it, the Community is a party to the agreement, but that this fact does not grant it the power to take action on these intellectual property aspects for which it cannot conclude an international agreement, because it does not enjoy exclusive competence.

⁶³ As M.C.E.J. Bronckers (*Trade Laws...*, p. 143) points out this could have become a very thorny issue if the Member States had pressed it. Article 11 (3) now anticipates controversy by providing that the conclusion of such agreements must follow the Article 113 procedure.

⁶⁴ See para. 63.

⁶⁵ See explicitly para. 109.

⁶⁶ See M. Bronckers: "The Potential and Limitations of the Community's New Trade Policy Instrument", p. 137; M. Arnold and M. Bronckers: *op. cit.*, p. 36.

⁶⁷ An agreement signed and implemented jointly by the Community and the Member States:

From a political perspective the wisdom of trade liberalization and the monopolization of its process by business interests⁶⁸ without some elementary guarantees as to the redistribution of its benefits is frequently questioned.⁶⁹ Such considerations have at any rate not given rise to the unilateral establishment of minimum labour standards as a criterion to regulate international trade. The closest match to international trade rules in this area triggering the application of the Trade Barrier Regulation are international labour Conventions.⁷⁰ The trade dimension of at least some of these Conventions is arguable so that the infringement of some of them could be construed as an obstacle to trade.⁷¹ It is a fact, however, that the Community is not a party to any of these Conventions.⁷² It would require full acceptance of the reversed subsidiarity theory and the Commission's willingness to prove that Community action is more appropri-

⁶⁸ The juridification by establishing a complaint procedure with access limited to Community industry or Community enterprises is one aspect, although in the Community it is much more than under Section 301 counterbalanced by a large appreciation margin. Illustrative is for instance the rejection of an amendment proposed by the European Parliament which would have forced the Commission to take account of the opinion of interest groups such as consumers and workers' organizations (see *OJ* [1995] C 18/76).

⁶⁹ Press reports put the "social clause" "high on the U.S. agenda" for the December 1996 WTO Ministerial Conference in Singapore, while the European Union is reported to reassure in particular Asian countries that the issue will not be dealt with unilaterally ("Tough talk - the WTO gears up for a contentious conclave", *For Eastern Economic Review*, 11 January 1996, 76).

⁷⁰ It may be remembered here that the first substantial chapter of the Havana Charter (Chapter 11) dealt with fair labour standards (see for a comparison between ITO and WTO: R. VERNON: "The World Trade Organization: A New Stage in International Trade and Development", *Harvard International Law Journal*, 329 [1995]). Particularly in the early years of the ILO the prevention of international competition in working conditions constituted a major justification for international labour standards, as it also emerges from the Preamble to the ILO's Constitution. Time has seen other justifications occupying front stage but it is recognized that international labour standards promoting equivalence rather than uniformity of legislation and costs still have an important role to play in the liberalization of world trade (see N. V A L T I C O S: *International Labour Law*, 1979, p. 22).

⁷¹ Although enforcement of these Conventions has admittedly not proven to be particularly dissuasive, they are definitely legally binding treaties (see N. V A L T I C O S: *Droit international du travail. Traité de droit du travail* [G.H. Canierlynck dir.], [1983], 549). The question is then whether the implementation of an international labour Convention can be considered an international trade practice. The Community itself has created a precedent in this regard by foreboding to link the benefits to be obtained under the Generalized System of Preferences (GSP) to the implementation of certain specified international labour Conventions. The linkage to Conventions No. 87, 98 and 138 by offering incentive preferences as proposed by the Commission was postponed by the Council to 1998 at the earliest, but practising forced labour in non-compliance with Conventions No. 29 or 105 was qualified as a disloyal trade practice (see COM [94] 337 of 7 September 1994 and Article 9 of Council Regulation applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, 3281/94 *OJ* [1994] L 348/1). See for an impending application of Article 9: notice of initiation of an investigation of forced labour practices being carried out in Myanmar, *OJ* (1996) C 15/3. It should in particular be noted that the GSP Regulation has exclusively been based on Article 113 EC Treaty. The trade dimension of international labour law is even more pertinent with regard to working conditions in Asian so called export-processing zones, some of which have been found to be incompatible with aforementioned Conventions for many years (see most recently for instance observations by the supervisory ILO Committee of Experts on the application of Convention No. 87 by Bangladesh or Convention No. 98 by Pakistan: ILC, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III [Part 4 A], K2nd Session, 1995, p. 151 and 247).

⁷² This would change were the Community to become a member of the International Labour Organization (ILO), because the Community has an external competence on some matters dealt with in these Conventions (see J. S A C K: "The European Community's Membership of International Organizations". *CMLR* 1229 [1995]).

ate than Member State action in order for a Community industry complaint⁷³ alleging infringement of these Conventions to have a chance of admissibility.

Further, in order to establish an infringement of any of these Conventions ILO Member States have the right to file a complaint with the ILO under the condition that both Member States have ratified the Convention concerned.⁷⁴ The Community is not a Member of the ILO and has no access to the International Court of Justice for appeal.⁷⁵ Finally, even if one reaches the bold conclusion that the Community can make a unilateral assessment of a third country's obligations under international labour law the Trade Barrier Regulation requires that the retaliatory commercial policy measures eventually taken must be compatible with existing obligations. In the case of measures affecting WTO Member States this means after following the appropriate dispute settlement procedure⁷⁶ and upon authorization of the Dispute Settlement Body, which is rarely given. Other states though remain more exposed to unilateral measures.

Finally, would Member States then separately not be entitled to retaliate against infringements? This question would be governed by customary international law on counter-measures, but it would definitely not be possible to retaliate with the commercial policy measures mentioned in the Trade Barrier Regulation nor with any measure covered by Article 113.⁷⁷ These are the exclusive competence of the Community.

1.5. A Brief Evaluation

The European Community's WTO trading partners perceive the Trade Barrier Regulation as an instrument justifying unilateral measures. They have aired concern that such measures might be taken in the absence of WTO authorization. Suspicion has been raised that the threat of investigation might be used as a tool of coercion and, finally, the need for the instrument has been questioned if it does not perform these functions.⁷⁸

It should be clear from the foregoing that the Trade Barrier Regulation raises many technical questions which will need to be clarified in practice, but on the politically

⁷³ Workers and employers organizations obviously have no access to the complaint procedure.

⁷⁴ Article 26 of the ILO Constitution, An ILO Commission of Inquiry will examine the complaint and report to the Governing Body. A Member State not accepting the recommendations of the Commission of Inquiry may refer the complaint to the International Court of Justice (Article 29). In case of non-compliance with the report or the ICJ's judgement, the Governing Body may recommend action to the International Labour Conference. The procedure raises a few awkward questions. Can Member States unilaterally determine infringements of international labour Conventions (Article 26 establishes a right, but apparently no formal obligation to file such a complaint)? Can a Member State do so when confronted with another Member State which has not ratified a particular Convention? The procedure has altogether infrequently been used (some 40 cases since the ILO's inception since 1919) and no case has ever reached the ICJ.

⁷⁵ Only states have (Article 34 of the Statute of the International Court of Justice).

⁷⁶ It would seem then that the infringement of an international labour Convention needs to be construed as a non-violation nullification or impairment since the WTO Agreement for the time being contains no rules on labour standards.

⁷⁷ In theory they could arguably cross-retaliate by withdrawing intellectual property protection.

⁷⁸ See WTO Trade Policy Review, *supra*, 18-19 and Industrial Structure Council - Japan, "1995 Report on WTO consistency of trade policies by Major Trading Partners", *World Trade and Arbitration Materials*, July 1995, p. 177.

sensitive issues the Regulation could hardly be clearer. Private parties nor Member States can legally force the Community authorities to unilaterally take retaliatory measures against WTO Members under the Trade Barrier Regulation. These authorities can investigate trade obstacles up to a certain point, but this is as such not prohibited under international law. Whatever the outcome of such an investigation, no retaliatory measures can be taken against WTO Members prior to completion of the appropriate dispute settlement procedure and without WTO authorization.

The actual usefulness of this kind of instrument has been examined in-depth elsewhere.⁷⁹ Be it sufficient here to point out that the Regulation was necessary to establish a transparent private complaint procedure and to rearrange the workload between the Commission and the Council. The first was needed to provide and maintain an adequate flow of information, the second to make its digestion by the Community possible. There is no denying that the Trade Barrier Regulation has made it easier for Community exporters to enlist the Commission's assistance in conquering new markets abroad. Notwithstanding this, it is important to bear in mind that the Community has expressed strong support for multilateralism.

Overall, the Regulation's main purpose is to provide an interface between Community procedures and WTO procedures on the one hand and between private and public concerns on the other hand. Given the restraints imposed by the WTO Agreements, any threat of coercion ultimately depends upon the susceptibility to coercion of the counterpart. The reserve with which the Commission may initiate investigations should not alter this conclusion.

The threat which the Regulation implies for countries outside the WTO framework would exist regardless of the Regulation's existence since the Community has the exclusive competence to take any commercial policy measure on the basis of Article 113. This threat can also be perceived as an incentive for outside parties to adhere to the WTO principles. In this respect, at least, the Regulation would serve an objective of the Community's common commercial policy as stated in Article 110 EC Treaty: the harmonious development of world trade.

2. The United States

Perhaps no single piece of trade-related domestic legislation has stirred as much controversy as Section 301 of the U.S. Trade Act of 1974.⁸⁰ It is perhaps ironic that the United States, initial proponent and co-founder of the original GATT system, has come under fire from its trading partners for resorting to unilateral measures that are, according to many, in violation of the spirit, if not the letter of the GATT agreement. In defense of the various unilateral measures threatened or undertaken pursuant to

⁷⁹ Sec M. Bronckers: "The Potentials and Limitations of the Community's New Trade Policy Instrument". in: *Trade Laws of European Community and United States in a Comparative Perspective*, 1992, 160; M. Arnold and M. Bronckers: *op. cit.*, p. 35.

⁸⁰ Trade Act of 1974, paras. 301-06 (codified at 19 U.S.C.A. paras. 2411-16), as amended. Pub.L. No. 96-39, tit. IX, 93 Stat. 295 (1979); Pub.L. No. 98-573, paras. 304, 306. 98 Stat. 3002 (1984).

Section 301, advocates of U.S. trade policy argue that the measures are necessary in order to compensate for the inherent weaknesses of the GATT system. According to this view, Section 301 sanctions actually serve the cause of free trade and, in a broad sense, ensure the implementation of the GATT system's most basic principles.⁸¹ In a sense, argue proponents, Section 301 acts much like a free-roaming watchdog - serving to protect through intimidation.

Despite consistent and vociferous criticism from abroad, The United States has persevered in its use of unilateral actions in defense of trade largely because the GATT system has been unable to address the fears of many U.S. policymakers. Members of the United States Congress, in arguing for the utility of unilateral action, have criticized the narrow scope of the conduct dealt with under GATT's substantive rules. Until recently, for example, GATT rules did not address trade in services - a very serious deficiency for the "service-intensive" American marketplace⁸² Finally, and perhaps most importantly, advocates of Section 301 have pointed to the GATT's ineffective and burdensome dispute resolution process as justification for resorting to unilateral measures⁸³

Complaints such as those noted above were of primary concern to the GATT Contracting Parties at the onset of the recently concluded Uruguay Round of trade talks. Meeting in Punta del Este, Uruguay, in 1986, the parties established an ambitious agenda for reform of the GATT system⁸⁴ Overall, the aim of the Uruguay talks was to codify and standardize the rules and practices that had evolved through both formal and informal processes within the GATT system over the previous forty years. Although not expressly intended to allay the fears of U.S. policymakers that had led to passage and implementation of Section 301, the Uruguay Round may have alleviated the need for resort to 301 sanctions under certain circumstances.

Through historical analysis and consideration of the results of the Uruguay Round, the following section will consider whether, and to what extent, Section 301 will comport with the new GATT system, embodied in the newly-created World Trade Organization.

2.1. Section 301 An Overview

Prior to the passage of the Trade Act of 1974 and its accompanying Section 301, the United States President enjoyed little discretion with regard to the enforcement of American trade interests abroad?⁸⁵ More specifically, the President was generally un-

⁸¹ See, e.g., W.J. Davey: "Comment Section 301 and its Effect on the Multilateral Trading System," in: *Trade Laws of the European Community and the United States in a Comparative Perspective*, 167 (1992).

⁸² H. Yoo: "Fairness, Reciprocity and Retaliation after WTO Section 301 of the U.S. Trade Act", in: *Trilateral Perspectives on International Legal Issues Relevance of Domestic Law and Policy*, 401, 406 (Report of the Trilateral Symposium, Tokyo, Japan, July 25-28, 1994).

⁸³ E. Grabits and A. von Bogdandy (eds): *U.S. Trade Barriers. A Legal Analysis*, 386 (1991).

⁸⁴ J. Jackson: "Reflections on Problems of International Economic Relations," in: *Trilateral Perspectives on International Legal Issues Relevance of Domestic Law and Policy*, pp. 307, 314 (Report of the Trilateral Symposium, Tokyo, Japan, July 25-28, 1994).

⁸⁵ J. Jackson, W. Davey: op. cit., p. 803.

able to respond to the pleas of individual citizens or domestic entities for relief from harmful foreign trade practices. Thus, individuals, who could not bring an action for relief within the GATT system, were similarly unable to rely upon their own government for support in pursuing their claims against foreign businesses.

Into this most fundamental of the international trade system's notorious "loop-holes," Congress introduced the 1974 Trade Act, and provided the President of the United States with the powerful weapon of Section 301 sanctions. Specifically, Section 301, as originally drafted, creates procedures under which U.S. citizens might petition the Executive Branch to take retaliatory action against a foreign government whose actions are causing harm to U.S. commercial interests.⁸⁶ Subsequent amendments and additions to the basic Section 301 have expanded the President's authority in responding to harmful foreign actions involving government procurement, trade in services and protection of intellectual property.⁸⁷

In order to ensure the effectiveness of Section 301, its drafters created a relatively simple procedure for seeking redress under the Section. In order to initiate a Section 301 action, an aggrieved party must first submit a complaint to the office of the United States Trade Representative (USTR). The USTR must within 45 days decide upon whether or not to begin an investigation of the matter. If the USTR deems that an investigation is merited, public hearings may be held upon request of the complainant.

At the outset of an investigation, the USTR must consult with the foreign parties named in a 301 complaint. The consultations must be held in the appropriate international forum⁸⁸ If consultations fail to achieve a satisfactory settlement of the matter, the USTR is directed to initiate appropriate dispute resolution processes. In practical terms, this means that in cases involving goods, the USTR is required to resort to GATT dispute resolution, as the GATT is likely to be the appropriate forum⁸⁹ Ultimately, the USTR is directed to make a recommendation to the President regarding the advisability of retaliatory action, whereupon the President exercises his discretion in determining whether or not to proceed with retaliatory action.⁹⁰

In practice, the above procedure has been employed in two general types of actions. The first type of action commonly initiated under Section 301 involves the enforcement of rights pursuant to existing international agreements. As noted above, the USTR is obligated to proceed with dispute resolution under international agreements relevant to a given dispute. This form of action is somewhat less controversial precisely because it often involves the use of existing dispute resolution procedures. Difficulty arises, however, when Section 301 action is taken prior to initiation or completion of international dispute resolution. Critics of this form of unilateral action point out that the time limits provided for in the section do not allow for the delays commonly associated with GATT panel dispute resolution.⁹¹ As a practical matter,

⁸⁶ *Ibidem.*

⁸⁷ *Ibidem.*

⁸⁸ J. Jackson, W. D a v e y : op. cit., p. 804.

⁸⁹ *Ibidem.*

⁹⁰ *Ibidem.*

⁹¹ H. Y o o : op. cit., p. 406.

then, retaliatory action has occasionally been taken before the GATT Contracting Parties have assessed the validity of a given complaint.

A second, and certainly more controversial, type of complaint commonly filed under Section 301 involves allegations of “unreasonable,” “unjustifiable” or “discriminatory” foreign trade practices.⁹² Quite often, such complaints call for retaliatory action in the face of harmful, but not technically “illegal” behavior. Consequently, behavior that either comports with or does not strictly violate the GATT may nevertheless give rise to Section 301 sanctions if they are deemed unjustifiable, unreasonable or discriminatory by the USTR. Pursuant to the 1979 amendments to Section 301, for example, the USTR may take action against “unjustifiable” foreign acts that are deemed to be “inconsistent” with international agreements.⁹³ The drafters of this particular amendment failed, perhaps intentionally, to make clear the definition of “unjustifiable”. It is reasonable to assume, for example, that foreign trade practices that violate the “spirit” if not the letter of international agreements might give rise to Section 301 sanctions.⁹⁴ That the determination as to whether or not an act is “justifiable” will necessarily be made according to American notions of fairness and free trade has, not surprisingly, given rise to widespread criticism of “economic ethnocentrism” on the part of the USTR.

In addition to acts deemed “unjustifiable”, the USTR may also take action against acts considered to be “discriminatory”.⁹⁵ It is unclear whether or not the Act’s use of the term “discriminatory” is meant to parallel language contained in numerous international agreements. If so, this particular provision would simply embody well accepted principle, such as most favored nation (MFN) treatment, non-discrimination and national treatment.⁹⁶ When read in conjunction with the original Act, however, the term “discriminatory” becomes less clear. Given that the USTR possessed the authority to act in defense of American trade interests arising from international agreements, the inclusion of an additional provision relating to existing international obligations would seem unnecessary. Assuming that the drafters of Section 301 and its amendments intended this particular provision to expand upon the notion of discrimination found in international agreements, the result is yet another powerful “extra-legal” tool for retaliation.

Perhaps most troublesome among the three bases for a Section 301 complaint cited above is that of “reasonableness”. In a clear departure from the language of the GATT, the Trade Act permits the USTR to take action against foreign trade practices deemed “unreasonable”. According to the Senate Finance Committee, “unreasonable” acts include “restrictions which are not necessarily inconsistent with trade agreements, but which nullify or impair benefits accruing to the United States under trade agree-

⁹² B. Fisher, R. Steinhardt: “Section 301 of the U.S. Trade Act of 1974 Protection for U.S. Exporters of Goods, Services and Capital,” 14 *Law & Poly. Int’l Bus.* 569, 575 (1982).

⁹³ *Ibidem*, p. 596.

⁹⁴ *Ibidem*, p. 597.

⁹⁵ *Ibidem*.

⁹⁶ *Ibidem*.

merits or which otherwise restrict or burden U.S. commerce". By granting the President broad authority to respond to unreasonable foreign acts, Section 301 would presumably serve to close several critical loopholes in the GATT agreement.

Chief among the GATT's deficiencies in this regard are its treatment of so-called "non-violation" cases and the limited scope of the pre-Uruguay GATT agreement. At the time of the enactment of the original Trade Act of 1974, many commentators in the United States viewed this particular provision without a great deal of concern. Although acknowledging the potential for abuse presented by the "unreasonableness" standard, most American observers of the time believed that the President's authority under this provision would be exercised with restraint and in keeping with GATT obligations.⁹⁷ Clearly, given the highly subjective nature of the term "unreasonable", it is all but inevitable that the U.S. would exercise its authority in this regard according to its own notions of fairness. Critics of the reasonableness standard, however, argue that the provision has in fact been used to impose a uniquely "American" version of reasonableness upon the world trading community.⁹⁸ Indeed, the reasonableness standard appears to have been utilized on a largely sector-by-sector basis, seemingly in order to alleviate trade pressures as they impact certain classes of American goods.⁹⁹ Consequently, it is difficult to argue - as the Congress, President and USTR have done in the past - that this provision of the Trade Act is intended solely to remedy loopholes in the GATT, especially insofar as the provision seems generally to be relied upon in a reactive, protectionistic manner.

In addition to the problem of non-violating foreign trade action, Section 301 might similarly be used to address behavior that is not addressed in the GATT agreement. Although, as will be seen, the Uruguay Round has resulted in a substantial expansion of the GATT's substantive scope, the pre-Uruguay agreement failed to address a number of areas of growing importance in international commerce, particularly trade, in services and protection of intellectual property rights. In the absence of relevant GATT regulations, then, the "unreasonableness" standard, it is argued, permits the United States to act in defense of important commercial interests. Especially given the protracted nature of substantive GATT negotiations (the Uruguay Round, for example, lasted for over eight years), advocates of the "unreasonableness" standard argue that it is an essential tool for addressing immediate threats from unfair competition. Within this limited context, the "unreasonableness" provision of Section 301 is largely unsailable. Clearly, in agreeing to forfeit a certain degree of sovereignty to an international trading scheme, nations must be willing to accept the limitations upon their autonomy that necessarily accompany such a forfeiture. To the extent that an international trading regime fails either to anticipate future problems or to address existing deficiencies in a timely manner, it is reasonable to expect that nations will respond Unilaterally to threats from abroad.

⁹⁷ See e.g., R. H u d e c: "Retaliation against 'Unreasonable' Foreign Trade Practices The New Section 301 and GATT Nullification and Impairment," 59 *Minn..L.Rev.* 461 (1975)

⁹⁸ See e.g., H. Y o o: op. cit., p. 405.

⁹⁹ *Ibidem*

As the above discussion serves to illustrate, much of the controversy underlying the use of Section 301 may be reduced to a difference in perceptions. To the advocate of Section 301, it is a necessary, well-crafted means of ensuring reciprocity and of safeguarding the spirit of the GATT. Indeed, as one advocate points out:

“So long as the U.S. invokes it only to encourage other countries to follow open-market, free trade policies that are followed by the U.S., Section 301 is unobjectionable. In the absence of an agreement, the U.S. should not have to open its markets to those that will not reciprocate. Indeed, to the extent that the U.S. goal is to promote a more open trading system, the use of Section 301 in these situations seems appropriate, and it is arguable that its use has in fact promoted more open markets. It would be nice if there were multilateral agreements on all aspects of trade, but since there are not, U.S. use of Section 301 to promote reciprocal open markets can be viewed as desirable.”¹⁰⁰

As the above excerpt indicates, advocates of the policies underlying Section 301 view the provision as much more than simply a reflection of U.S. notions of free trade and reciprocity. Indeed, advocates of Section 301 often point to its beneficial effect upon the world trading system in general.

Critics of Section 301, on the other hand, argue that the American definition of “reciprocity” is largely situational and that Section 301 represents an important threat to the economic self-determination of America’s trading partners.¹⁰¹ Perhaps the most commonly asserted criticism of Section 301 is not that it is actually used in an anticompetitive way, but that it has the potential to be so used. The mere threat of Section 301 sanction procedures, according to this view, may act to inhibit activities that are both perfectly legal and justifiable under the GATT agreement. Indeed, even advocates of Section 301 acknowledge its coercive tendencies, as indicated in the following excerpt:

“In practice, a petition filed under section 301 by a private party carries an effective threat of potential retaliation, combined with the threat of adverse publicity and a general souring of trade relations. These potential ramifications alone may bring the offending government to the bargaining table. Indeed, a stately using the *threat* of filing a section 301 complaint as leverage to achieve a desired end may lead to better results than actually filing a complaint and pursuing the case through administrative channels (...) More than any other U.S. trade law, section 301 works through feints and threats, rather than through formal legal processes.”¹⁰²

Critics of Section 301 argue further that the threat posed by the filing of a complaint is derived not from a sense of culpability on the part of those being accused of anticompetitive behavior, but from the overall lack of clarity and predictability inherent in the Trade Act procedures. This, perhaps, is the essence of complaints levied against unilateral action in general that such actions are necessarily based upon biased, and highly ethnocentric notions of reciprocity, fairness and free trade. As one commentator notes:

¹⁰⁰ W. D a v e y: op. cit., p. 167.

¹⁰¹ H. Y o o: op. cit., p. 405.

¹⁰² B. F i s h e r, R. S t e i n h a r d t: op. cit., p. 575.

"It is evident that Section 301 (d)(3)(D) directs the USTR to consider reciprocal opportunities in the U.S. for foreign nationals and firms for the purpose of determining whether any act, policy, or practice is unreasonable. Moreover, Section 301 goes further than reciprocity in the sense that the U.S. orders access to its markets according to reciprocal access to the markets of other countries, and pursues the U.S. domestic economic aims in the shaping of foreign markets and in inducing other countries to adopt the U.S. regulatory scheme."¹⁰³

The disparity between the above perspectives is particularly acute in discussions involving the GATT system. Advocates of Section 301 argue that it is necessary in order to preserve the highest ideals of the GATT, or, at the very least, to remedy the weaknesses inherent in the GATT system. Others, such as the Japanese Ministry of International Trade and Industry (MITI), counter that resort to unilateral means such as Section 301 "endangers the international economic order to the extent that it demonstrates a country's willingness to violate the GATT and, in turn, damages other countries' confidence in the GATT provisions."¹⁰⁴

How is it possible that measures viewed by policymakers in the United States as necessary, in part, to ensure the principles of GATT can be viewed by critics within and outside of the U.S. as perhaps the greatest threat to the GATT system? Although not explicitly addressed in the Uruguay Round of talks, this disparity was clearly a motivating factor behind many of the revisions made in the course of the eight-year negotiations. Whether, and to what extent, the Uruguay Round effectively addressed the concerns voiced above remains to be seen. In the following section, this report will consider a few of the Uruguay Round's more impressive results and their potential impact upon the future of Section 301 actions.

After Uruguay The Future of Section 301

As noted above, the two chief complaints levied against the GATT system by advocates of Section 301 are 1) that the GATT's substantive scope is overly narrow, and 2) that the GATT's existing dispute resolution mechanisms are ineffective.¹⁰⁵ In order to address these and a variety of additional concerns, the Contracting Parties have substantially revised the GATT system as it existed prior to the Uruguay Round. In addition, as will be seen, the Uruguay Round served as an opportunity for the majority of Contracting Parties to reaffirm the system's opposition to unilateralism.

Given the scope of this report, Uruguay Round revisions of the GATT dispute resolution process are of particular importance. As a preliminary matter, Article 23 of the Uruguay Round's Understanding of Rules and Procedures Governing the Settle-

¹⁰³ H. Yoo: op. cit., p. 405.

¹⁰⁴ MITI Industrial Structure Council, 1993 *Report on Unfair Trade Policies by Major Trading Partners Trade Policies and GATT Obligations* (JETRO, 1993).

¹⁰⁵ See e.g., N. Saiki, "WTO Rules and Procedures for the Settlement of Disputes - Their Formation. A Practitioner's View," in: *Trilateral Perspectives on International Legal Issues Relevance of Domestic Law and Policy*, 555 (Report of the Trilateral Symposium. Tokyo, Japan. July 25-28, 1994).

ment of Disputes (“Understanding”)¹⁰⁶ makes clear the intention of the Contracting Parties to refer all controversies arising under the GATT to the dispute resolution processes established under the WTO. This provision reads as follows “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements..., they shall have recourse to, and abide by, the rules and procedures of this Understanding.” The provision elaborates upon this theme by prohibiting the unilateral determination of GATT-applicability to disputes and requires prior authorization before retaliatory action may be taken against a recalcitrant party to a GATT dispute.¹⁰⁷ Although these provisions merely reaffirm preexisting obligations under the GATT, their inclusion in the Uruguay Round understanding may fairly be interpreted as the basis for challenging future unilateral action such as that taken under Section 301.

Although a thorough analysis of each of the changes implemented by the Contracting Parties is beyond the scope of this report, a few provisions are particularly relevant to the issue of unilateralism and will therefore be considered below. In order to expedite the GATT dispute resolution process, for example, the Understanding creates a standing Dispute Settlement Body (DSB) and vests in this body the authority to oversee disputes involving GATT rights and obligations.¹⁰⁸ An important element of DSB authority resides in the fact that consensus is no longer a requirement for adoption of panel reports.¹⁰⁹ In fact, all reports are deemed automatically accepted unless a “negative consensus” may be reached to block acceptance of a panel report.¹¹⁰ This is of particular importance with regard to the complaints underlying passage of and resort to Section 301 sanction procedures. As noted earlier, advocates of unilateral action have often pointed to the cumbersome and unpredictable nature of GATT dispute resolution as justification for undertaking unilateral action. Much of the time required for effective GATT dispute resolution under the prior system was a direct result of the GATT system’s reliance upon consensus.¹¹¹ Although it is clearly premature to assess the effectiveness of the move from consensus, it may well be that the Uruguay Round has addressed and perhaps alleviated important justification for unilateral action.

Yet another important innovation of the Uruguay Round is the creation of an internal Appellate Body within the GATT itself. It is unclear whether or not this additional step in the dispute resolution process will represent a positive change. It is important to note, for example, that decisions of the Appellate Body are to be made by consensus. It may well be, then, that the appellate procedure will act in a manner similar to that of the GATT panels. If so, then the beneficial effects realized through the creation of the DSB might be compromised. For this reason, in addition to others,

¹⁰⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes in the Uruguay Round Final Act (15 April 1994), pp. 353-377.

¹⁰⁷ See N. S a i k i: op. cit., p. 564.

¹⁰⁸ Understanding, *supra*, note 122, at Article 2.1.

¹⁰⁹ N. S a i k i: op. cit., p. 556.

¹¹⁰ *Ibidem*.

¹¹¹ *Ibidem*, p. 557.

the appellate procedure has been introduced as something of an “experiment.”¹¹² Accordingly, the Contracting Parties will monitor the appellate procedure and will, after four years, determine whether or not it should continue to exist.¹¹³ Almost certainly, an important consideration in determining the usefulness of the appellate procedure will be its effect upon unilateralism. If, for example, appeals increase substantially the duration of GATT disputes, it is likely that advocates of Section 301 sanctions would refuse to rely solely upon the GATT dispute resolution process.

In addressing one of the most serious deficiencies of the former GATT system - *i.e.*, the treatment of “non-violation” cases, the Contracting Parties faced serious obstacles. Precisely because the vast majority of “non-violation” cases involve activities that are either not covered or have not been anticipated by the GATT, the drafters of the Uruguay Round Final Act were faced with the difficult challenge of drafting rules sufficient to appease advocates of unilateralism while at the same time preserving flexibility within the international trading system. Rather than require parties arguably guilty of “nullification or impairment” to conform their behavior to the GATT, the Uruguay Round Act provides that non-violation cases should be treated as “negotiating concepts.”¹¹⁴ Basically, this means that non-violation cases are to be used as the basis of negotiations toward the payment of compensation and not as a means for ensuring party conformity with either the letter or spirit of GATT. In this regard, it is unclear to what extent the arguments of Section 301 advocates will be addressed. To the extent that Section 301 actions are intended to modify behavior - a claim often made by advocates and detractors alike - it is unlikely that the new provisions regarding “non-violation” cases will signal a change in 301 policy.

Beyond the topic of dispute resolution, the Uruguay Act includes a few key provisions that may affect the future of Section 301 sanctioning procedure. As noted earlier, a common complaint levied against the GATT is that its substantive scope is too narrow. This has been particularly true with regard to issues such as trade in services and protection of intellectual property rights. Although the former GATT agreements failed to address such issues, the Uruguay Round served as a launching point for discussions toward conclusion of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIP).¹¹⁵ Although not yet realized, these two agreements may well serve to address important gaps in the scope of the GATT system - gaps which have formed the basis of at least two additions to Section 301 to date. Yet another aspect of the Uruguay Round that may have an impact upon Section 301 activity is the creation by the GATT parties of the Trade Policy Review Mechanism (“TPRM”).¹¹⁶ In principle, the TPRM is designed to allow for broad review of a nation’s trade policy, including aspects of policy

¹¹² Sec Article IXI of the Agreement Establishing the Multilateral Trade Organization.

¹¹³ Decision on the Application and Review of the Understanding of Rules and Procedures Governing the Settlement of Disputes in the Uruguay Round Final Act (15 April 1994), p. 419.

¹¹⁴ See *e.g.*, J. J a c k s o n: op. cit., p. 317.

¹¹⁵ See *i.e.*, N. S a i k i: op. cit., p. 54S.

¹¹⁶ J. J a c k s o n: op. cit., p. 318.

that may not fall under the GATT. Ideally, this review process would address many of the concerns underlying resort to Section 301 sanctions. The TPRM has been in effect for eight years, however, and has as yet proven largely ineffective.¹¹⁷ As can be seen from the brief analysis above, several significant steps have been taken as a result of the Uruguay Round of trade negotiations. In closing, the following section will consider the extent to which the Uruguay Round will impact Section 301 of the U.S. Trade Act. Uruguay and 301 What Will the Future Hold? The United States' representatives to the Uruguay Round of discussions often voiced scepticism concerning the efforts by the Contracting Parties to eliminate the possibility of unilateral action by and against members of the GATT system.¹¹⁸ Notwithstanding this hesitancy on the part of the United States, it is clear that the Uruguay Round sought to address a number of the justifications underlying legislation such as Section 301 of the United States Trade Act. But the question remains - does entry into force of the Uruguay Round's Final Act signal an end to Section 301? Although it is perhaps too early to be certain, the answer to this question is likely "no." Given that much of the current controversy surrounding Section 301 involves serious differences in perception, it is unlikely that the Uruguay Round will have much affect upon Section 301 practice. This is due largely to the fact that advocates of the unilateral action taken under Section 301 to date believe that the Section is in keeping with the letter and spirit of the GATT agreement. As noted earlier, basic 301 procedure requires the USTR to resort to appropriate dispute resolution processes in cases involving violation of international agreements. To the extent that the new GATT has broadened in scope, it is likely that a greater number of Section 301 procedures will be referred to WTO dispute resolution. The provisions of the Uruguay Round Act requiring resort to GATT dispute resolution are, thus, largely symbolic - they serve only to reinforce a principle under which the United States already felt bound to act. Certainly the amendments with regard to timing of GATT dispute resolution, particularly with regard to the abolishment of the GATT panel consensus requirement, will limit the USTR's ability to justify preemptive retaliation. Once again, however, this is not necessarily a departure from the principles underlying Section 301. Indeed, advocates of Section 301 may well view the amendments with regard to timing as the inevitable result of past unilateral sanctions. In this sense, the Trade Act of 1974 may be viewed as an important impetus behind the reforms of the Uruguay Round. To the extent that this perception is shared among advocates of Section 301, it will likely serve to bolster further support for unilateral action. In an ironic sense, the very changes intended to thwart future unilateral action may serve as ex-post justification for past unilateralism. Aside from a few minor revisions with regard to timing of sanctions or transition measures, then, it is unlikely that the Uruguay Round will force many changes in the current Section 301, at least for the near future. Unless and until the WTO proves that it can ensure the goals to be realized through unilateral action, the justifications underlying past instances of 301

¹¹⁷ *Ibidem*.

¹¹⁸ N. S a i k i: op, cit., p. 556,

sanctions will likely continue. Although the Uruguay Round has certainly made important strides towards the alleviation of trade frictions formerly outside of the GATT system, the fact remains that the true force behind Section 301 is perception - and it is very difficult, if not impossible, to negotiate a change in perception.

The Current Problems Connected with the Agreements on Legal Assistance in Civil and Criminal Matters Concluded by Poland with Other States (Succession to Treaties by New States and New Treaties Concluded)

JAN CISZEWSKI

1. Introduction

The aim of the present article is a presentation of a current survey of treaties on legal assistance concluded by Poland with other states. Special attention will be however paid to the developments in this field which have taken place since 1989.

The events of crucial importance that took place relatively recently: the unification of Germany, the collapse of the Soviet Union, the former Yugoslavia and the split of Czechoslovakia prompt us to determine what are the normative foundations of our relations with newly-created states.

From the practical point of view it is very important to establish which agreements concluded with the German Democratic Republic, the Soviet Union, Czechoslovakia and Yugoslavia are still binding and what is their territorial scope of application.

Before dealing with this very subject matter of the article, the problem of promulgation (publication) of international agreements ratified by Poland must be mentioned.

According to Art. 1(1)(3) of the 1950 Statute on the Official Journal of the Polish Republic¹ agreements concluded by Poland with other states and official governmental communiques on: 1) the binding force of these treaties, 2) their ratification and participation of other states are to be promulgated in the Official Journal of the Polish Republic (*Dziennik Ustaw – Dz.U.*).

In practice, however, several international agreements concerning legal assistance have not been published at all, while others have been published with a considerable delay. The latter is just the case of the following treaties:

– the Convention on the Civil Aspects of Child Abduction Abroad (done in the Hague, on 25 October 1980)² which entered into force for Poland on 25 September 1992, but was promulgated on 25 September 1995,

¹ The Statute of 30 December 1950 on the Publication of the Official Journal and the Polish Monitor – in the Official Journal (hereafter *Dz. U.*) No. 58, Item 524 (amended see: *Dz. U.* 1991, No. 94, Item 420.

² *Dz. U.* 1995, No. 108, Item 528, 529.

– the International Convention on Access to Justice – done in the Hague on 25 October 1980³ which entered into force for Poland on 1 November 1992 and was published on 25 February 1995,

– the European Convention on Information of Foreign Law – done in London on 7 June 1968,⁴ which entered into force for Poland on 15 December 1992 and was published on 30 May 1994,

– the European Convention on Extradition done in Paris on 13 December 1957⁵ which entered into force for Poland on 13 September 1993 and was published on 21 June 1994,

– the Convention on Competent Organs and Law Applicable for the Protection of Minors – done in the Hague on 5 October 1961⁶ which entered into force for Poland on 25 July 1993 and was published on 15 September 1995.

As regards bilateral conventions on legal assistance promulgated with delay, the following may be mentioned:

– two agreements with Egypt done in Cairo on 17 May 1992,⁷ which entered into force on 21 February 1993 and were published on 17 March 1994,

– the Agreement with Lithuania on Legal Assistance and Legal Relationships in Civil, Family, Employees and Criminal Matters done in Warsaw on 26 January 1993⁸ which entered into force on 18 October 1993 and was published on 18 March 1994,

– the Agreement with the Federal Republic of Germany on Further Fostering of Legal Assistance signed in Warsaw on 14 December 1992,⁹ which entered into force on 1 December 1993 and was promulgated on 10 March 1994.

This phenomenon is not a new one. If we examine the agreements concluded in the years 1990–1993, we will find that only two of them were promulgated before the day of their entry into force.¹⁰

Multilateral treaties are often published after two years¹¹ from the time of their entry into force.¹² What should give rise to anxiety – also conventions on human rights are promulgated with a considerable delay. *E.g.* the Convention on the Rights of a Child¹³ and the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁴ were promulgated 6 months after their entry into force and

³ *Dz. U.* 1995, No. 18, Item 86, 87.

⁴ *Dz. U.* 1994, No. 64, Item 272–275.

⁵ *Dz. U.* 1994, No. 70, Item 307–310.

⁶ *Dz. U.* 1995, No. 106, Item 519 and 520.

⁷ *Dz. U.* 1994, No. 34, Item 126–129.

⁸ *Dz. U.* 1994, No. 35, Item 130 and 131.

⁹ *Dz. U.* 1994, No. 30, Item 110 and 111.

¹⁰ See: *Dz. U.* 1991, No. 14, Item 58 and 59 (the Agreement with Austria on Mutual Enforcement of Court Judgments in Criminal Matters) and *Dz. U.* 1992, No. 17, Item 69 and 70 (the Transitional Agreement on Trade and Trade-Related Matters with the European Economic Community and the European Coal and Steel Community).

¹¹ See *e.g.* *Dz. U.* 1989, No. 17, Item 93 and 94; *Dz. U.* 1992, No. 98, Item 488 and 489; *Dz. U.* 1992, No. 98, Item 490 and 491; *Dz. U.* 1993, No. 116, Item 514 and 515.

¹² Convention No. 151 of the International Labour Organization was promulgated after 10 years (*Dz. U.* 1994, No. 22, Item 78 and 79).

¹³ *Dz. U.* 1991, No. 120, Item 526 and 527.

¹⁴ *Dz. U.* 1993, No. 61, Item 284 and 285.

the Facultative Protocol to the Covenant on Civil and Political Rights – 2 years after its entry into force.¹⁵

Also bilateral treaties are promulgated with delay of even one year and six months.¹⁶ The Agreement with Turkey on Legal Assistance in Civil and Commercial Matters was promulgated 9 months after its entry into force.¹⁷

The lack of publication in the Official Journal makes a given treaty inapplicable, as it is impossible for anybody (both citizens and public organs) to take cognizance of its provisions.¹⁸

It is however not the only consequence of the lack of due and timely publication of treaties, as according to both the doctrine and the jurisprudence only treaties promulgated in the Official Journal take avail of primacy over municipal law in matters reserved for regulation in the form of acts of Parliament. The publication is a condition *sine qua non* of the binding force of treaties in Poland.¹⁹

According to Prof. Skubiszewski,²⁰ if we assume that norms of treaties regulate certain matters in the legal order of a given state only after the publication of the respective treaty in the Official Journal, we would deny the applicability of binding treaties as such (*i.e.* the ones, that have entered into force). Such a conclusion would infringe the principle *pacta sunt servanda*.

One should agree with Professor Skubiszewski, specially as according to Art. 27 of the Vienna Convention on the Law of Treaties²¹ no state may invoke its own law to justify the lack of application of any treaty.

Governmental communiques concerning the binding force of treaties for Poland and presenting the lists of the states parties to such treaties are to be published in the Official Journal.²²

Also in this respect the practice does not follow strictly the law.

¹⁵ Dz. U. 1994, No. 23, Item 80 and 81.

¹⁶ See *e.g.*: Dz. U. 1992, No. 28, Item 122 and 123; Dz. U. 1992, No. 98, Item 492 and 493; Dz. U. 1993, No. 120, Item 534 and 535; Dz. U. 1993, No. 124, Item, 561 and 562; Dz. U. 1993, No. 124, Item 567 and 568; Dz. U. 1993, No. 125, Item 571 and 572; Dz. U. 1994, No. 3, Item 12 and 13.

¹⁷ Dz. U. 1992, No. 3, Item 13 and 14.

¹⁸ See: J. J o d ł o w s k i: „Umowy międzynarodowe w świetle judykatury Sądu Najwyższego” [Treaties in the Jurisprudence of the Supreme Court], *Palestra* 1985/2, p. 14 ff.

¹⁹ Also the Constitutional Court has expressed its view on the significance of the publication of normative acts according to law. In the opinion of this Court, such a publication is the only official promulgation giving rise to the presumption of authenticity of the text. Such a publication is a condition of the entry into force of a given act. In consequence, it may be applied only after such a publication (the ruling of 13 February 1991 – W 3/90, published in *Orzecznictwo Trybunału Konstytucyjnego* [Jurisprudence of the Constitutional Court] 1991, Item 27).

According to the Ombudsman, who initiated the proceedings in this case, Official Journals are printed and delivered with considerable delay as compared with the date of respectively the adoption and the publication of the act concerned.

²⁰ K. S k u b i s z e w s k i: “A Gloss to the Resolution of the Supreme Court of 5 October 1974 – III ZP 71/73”, 32 *PiP* No. 8–9, p. 263 (1977).

²¹ The Vienna Convention on the Law of Treaties done in Vienna on 23 May 1969 (Dz. U. 1990, No. 74, Item 439).

²² See also para.18(3) of the Resolution of the Council of State and the Council of Ministers of 28 December 1968 on the Conclusion and Denunciation of International Agreements.

Though it may seem to be a joke, the recent governmental communique with a list of the states parties to treaties dates back from... 1984.²³

Since 1985 no such communiques were issued with respect to multilateral treaties to which Poland is a party.

Since 1988, however, a peculiar clause has begun to emerge in the governmental communiques on the ratification of multilateral treaties. According to it: "information on states who become subsequently parties to the treaty may be obtained with the Treaty Department of the Ministry of Foreign Affairs."

Such a practice is contrary to the law and to the principle that law must be certain and known to citizens. The Polish citizens cannot, however, know the other states parties to a given treaty and consequently the subjective and territorial scope thereof.

Several states have recently acceded to multilateral treaties like for example the Hague conventions and the Convention on Vindication of Alimony Abroad. The knowledge of the names of these new states parties to these treaties is to be got from any sources short the most proper one *i.e.* the Official Journal of the Polish Republic.

Also the fact of denunciation of several treaties by other states was not reflected in the Official Journals. It was just the case with the denunciation by Germany of the 1905 Convention on Incapacitation.

No official communiques were issued in connection with the termination of agreements with the German Democratic Republic or the denunciation by Bulgaria of the Convention on Double Nationality.

Though the succession of the new states to the agreements on legal assistance concluded with Poland is the main subject of the present article, it seems useful to supplement it with the list of agreements on legal assistance concluded by Poland with other states within the last two years.

2. The Development of Legal Assistance in Relations with the Federal Republic of Germany and the Legal Foundations Thereof after the Unification of Germany

The problem of legal assistance in relations between Poland and Germany has always been complicated. The legal assistance has encountered obstacles from time to time. They affected adversely the interests of nationals of the both states, what gave rise to anxiety, taking into consideration the importance and intensity of relations between Poland and the Federal Republic of Germany (FRG).

This makes us devote more space to legal assistance on the line Poland-the FRG, special attention being paid to the unification of Germany and succession by the FRG to the treaties concluded by the German Democratic Republic.

Here we must remind that the relations between Poland and the GDR in this respect were regulated by the Agreement on Legal Assistance in Civil, Family and Criminal Matters signed in Warsaw on 1 February 1957, as amended by the Protocol done in Warsaw on 18 April 1976.²⁴ The transfer of prisoners was regulated in a convention

²³ *Dz. U.* 1984, No. 31, Item 170 and 171.

²⁴ *Dz. U.* 1958, No. 27, Item 114; an amendment in *Dz. U.* 1976, No. 14, Item 80.

signed in Berlin in December 1981 concerning the implementation of the Berlin Convention on Transfer of Prisoners to Serve Sentence in the State of Their Nationality (signed in Berlin on 19 May 1978).²⁵ We should also invoke the consular convention signed in Berlin on 25 February 1972²⁶ and the Convention on the Regulation of Double Nationality (Berlin, 12 November 1975).²⁷

The other part of this article deals with the development of legal assistance after its resumption and the influence of the unification of Germany upon the legal assistance in the Polish-German relations.

2.1. The Development of Legal Assistance after its Resumption

Since June 1984 till mid 1989 the legal assistance in relations between Poland and the Federal Republic of Germany was suspended. No assistance was given on the basis of either the 1954 Hague Convention on the Civil Procedure or the 1956 New York Convention on Vindication of Alimony Abroad.

On 12 April 1989 a Protocol on Resumption of the Legal Assistance was signed. In May 1989 the details of the legal assistance in civil matters to be given on the bases of the aforementioned conventions were agreed upon. Poland and the Federal Republic of Germany agreed that the principle of reciprocity will govern their legal assistance in criminal matters. Subsequently they agreed on legal assistance in financial and administrative matters. In September 1990 Poland and the FRG agreed on actual reciprocity as regards recognition of judgments in alimony cases.

On 14 December 1992 the Warsaw Treaty on Further Facilitation of Legal Assistance on the Basis of the 1954 Hague Convention on the Civil Procedure was signed.

On 9 March 1993 a Common Protocol on Legal Assistance in Criminal Matters was signed in Bonn. It was agreed that requests concerning 1) the delivery of process documents to the parties to proceedings, 2) the taking of evidence in the other state and 3) the impartion of information from registers of sentenced persons would be transmitted directly between respective courts and prosecutors, without the intermediary of diplomatic missions. The Protocol confirmed the actual reciprocity in the field of extradition and transfer of criminal proceedings.

2.2. The Unification of Germany and the Binding Force of the Agreements Concluded by the GDR

On 31 August 1990 the Berlin Treaty on the German Unity was concluded by the Federal Republic of Germany and the German Democratic Republic.²⁸

Art. 12 thereof focused on international agreements concluded by the German Democratic Republic with other states. According to Art. 12(1) of the Treaty, the other contracting parties to these treaties were to be consulted on their application.

²⁵ *Dz. U.* 1982, No. 21, Item 150.

²⁶ *Dz. U.* 1972, No. 15, Item 360.

²⁷ *Dz. U.* 1976, No. 15, Item 91.

²⁸ *BGBI.* 1990, II, p. 88.

During these consultations such factors as: the respect for the confidence of the partners of the GDR, the respect for the obligations of the Federal Republic of Germany, for the democratic freedoms, the rule of law, and the competences of the European Communities were to be taken into consideration.

Art. 12(2) of the Unification Treaty provided that the united Germany will present its position with respect to its succession to the agreements of the GDR after consultations with parties to these agreements and – if necessary – the European Communities.

During negotiations with Poland the Federal Republic of Germany emphasized that since 3 October 1990 the agreements concluded by it itself would be binding also in the territory of the former GDR. It meant that the bases of legal assistance in relations between Germany and Poland would be the 1954 Hague Convention and the 1956 New York Convention.

The FRG denied to apply to the treaties concluded by the German Democratic Republic the provisions of the draft Vienna Convention on the State Succession to Treaties.

Despite the fact that the German unification did not result *ipso iure* in the termination of treaties concluded by the GDR, the 1957 Agreement between Poland and the GDR on the Legal Assistance was, according to the FRG, to be applied after 3 October 1990 only during the transitional period and exclusively on the territory of the former GDR. What is more, only articles 1–20 and 59–61 and 63 of this Agreement were to be applied. They concerned legal assistance, exception from the duty to pay so called plaintiff deposit, release from costs of proceedings and enforcement of judgments concerning the costs of proceedings. These were the matters covered by the 1954 Hague Convention, with the exception of provisions on protection of witnesses and experts (Art. 7), release of documents from legalization (Art. 12) and impartion of legal information.

Other provisions of the 1957 Agreement were not to be applied. They covered conflict of law norms and norms on jurisdiction (Art. 21–50), provisions on recognition and enforcement of judgments (Art. 51–58), extradition and transfer of criminal proceedings (Art. 64 ff.).

It meant that the courts of the FRG will apply German law to determine the applicable law, the proper organs to decide civil cases and the possibility of recognizing and enforcing judgments of the Polish courts.

The Polish courts, having taken this into consideration and desiring to provide Poland with equal treatment *vis-à-vis* Germany, decided that they will apply the Polish law in the same matters in which the German courts will apply the German regulations. As regards recognition and enforcement of judgments, this applied to both the GDR and FRG courts.

As there was no longer the possibility to request German courts to turn Polish judgments to enforcement (by the way of the so called „enforcement clause” – Art. 55(2) of the Agreement) the courts began to apply the procedure of alimony vindication from the 1956 New York Convention.

Just to illustrate the complexity of the problem encountered by courts at the time, we should remind that on 1 July 1990 – *i.e.* still before the unification – a monetary

union between the GDR and the FRG came into force. It meant the withdrawal of the currency of the GDR.

One of the problems that emerged then was connected with the execution of alimony to be paid by the Polish residents but expressed by the German courts in the GDR marks. As the respective judgments were to be recognized and applied by the Polish courts, it was necessary to change marks into zlotys (the Polish currency). Before 1989 the calculation was usually effected by the executory organ (bailiff) on the basis of official exchange rates published by the Polish Central Bank. This was no longer possible after the German monetary union. To resolve the problem, a reference was made to the value of the GDR mark from the last day of its existence (30 June 1990).

The negotiations between Poland and Germany on the binding force of treaties concluded by Poland with the GDR were finished on 9 April 1992. The parties agreed on the termination of these agreements.

The Polish citizens were not however informed about this in the Official Journal. This author was lucky to read about this arrangement in the German Official Journal.²⁹

The communique of the German Government from 21 June 1993 on the termination of agreements concluded by the German Democratic Republic with Poland was published there.

In this communique the Government of Germany declares that on the basis of its verbal note to the Polish Government from 7 May 1993, of Art. 12 of the Unification Treaty and after consultations held in Warsaw on 6–9 April 1992 the agreements concluded by Poland and the GDR and listed in the appendix were terminated (lost their binding force) on the day of the German unification *i.e.* on 3 October 1990.

The appendix to this communique lists 114 agreements, among them the 1957 Agreement on Legal Assistance and the Protocol thereto, the 1972 Consular Convention together with the Protocol, the 1975 Agreement on the Nationality and the Agreement on the Implementation of the Berlin Convention.

The last part of the communique indicates that also other agreements, though not listed, may have lost the binding force as well on the day of the German Unification.

2.3. The Polish-German Treaty on Further Facilitation of Legal Assistance on the Basis of the 1954 Hague Convention

From among new agreements concluded by Poland with the Federal Republic of Germany we should mention here the Treaty on the Good Neighbourhood and the Agreement on the Implementation of the 1954 Hague Convention.

The first agreement was signed in Bonn on 17 June 1991.³⁰ According to its Article 33(1) the both parties agreed to develop, intensify and simplify their legal and consular relations, including legal assistance in civil, criminal, employees and admin-

²⁹ *BGBL* 1993 II 1180 (the annex at 1181–1187) and also in *BGBL* 1994 II 249–250; *BGBL* 1995 II 322.

³⁰ *Dz. U.* 1992, No. 14, Item 56.

istrative matters, while taking into consideration their legal systems and multilateral agreements, specially those prepared by the Council of Europe.

The legal assistance in civil matters is regulated in the Agreement on Further Facilitation of the Legal Assistance on the Basis of the 1954 Hague Convention on Civil Procedure. The Agreement was signed in Warsaw on 14 December 1992. It entered into force on 1 December 1993.³¹

It provides for direct communication of the courts of the contracting states (*i.e.* with no need of resort to diplomatic representatives). The courts are only to use special forms of requests addressed to their counterparts.

The agreement regulates also:

- the relation between different forms of delivery of court documents.
- the right of consuls to take testimony from the nationals of the sending State Party,
- the release of moral persons from the so called plaintiff deposit (a deposit to be paid by the foreign plaintiffs),
- the simplification of the formal conditions to be fulfilled by requests concerning the enforcement of judgments imposing obligations to return the costs of proceedings,
- the simplification of the procedure of requesting the other Party's consent for the execution of judgments dealing with the return of the costs of proceedings and the procedure of requesting the release from the obligation to pay the costs of proceedings.

The principle of reciprocity is to a high extent the basis of legal assistance in this respect. It is also the fundamental principle in criminal matters and in matters connected with criminal proceedings.

The principle of reciprocity (Art. 1146 of the Code on Civil Procedure) is utilized for the recognition of judgments with respect to divorce; assertion and denial of paternity or maternity; parental powers; adoption and tutelage.

Also the condition of reciprocity mentioned in Art. 1150(3) of the Polish Code of Civil Procedure has been established in the Polish-German relations, what makes possible the mutual enforcement of maintenance judgments.

3. The Bases of Legal Assistance in Relations with the States of the Former Soviet Union

The Warsaw Agreement on Legal Assistance and Legal Relationships in Civil, Family and Criminal Matters from 28 December 1957³² was the main basis of relations between Poland and the Soviet Union in this respect. The agreement was amended by the Moscow Protocol from 23 January 1980.³³ We must remind here of the Consular Convention from 27 May 1971³⁴ (signed in Warsaw) and two conventions con-

³¹ *Dz. U.* 1994, No. 30, Item 110 and 111.

³² *Dz. U.* 1958, No. 32, Item 147.

³³ *Dz. U.* 1980, No. 28, Item 121.

³⁴ *Dz. U.* 1972, No. 15, Item 106.

cerning nationality: the Warsaw Convention on the Double Nationality from 21 January 1958³⁵ and on the Convention on the Prevention of Cases of the Double Nationality signed in Warsaw on 31 March 1965.³⁶

3.1. The Succession to Treaties and the Creation of the Community of Independent States

At the beginning we should analyse the acts of international law following the collapse of the Soviet Union. This author has fortunately got access to some of these documents.

The most important of them is certainly the treaty on the Creation of the Community of Independent States. It was signed in Minsk on 8 December 1991 by the Russian Federation, Ukraine and Belarus. On 21 December 1991 Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tadjikistan, Turkmenistan and Uzbekistan joined the Community. Georgia remained outside and Azerbaijan left the Community in 1992, but already in 1993 both these countries found themselves back in the Community.

In consequence, the Baltic states are at present the only states on the territory of the former Soviet Union that are not members of the Community of Independent States.

Art. 12 of the Treaty on the Community of Independent States provides that States Parties shall respect international agreements concluded by the Soviet Union. Such a provision may make us believe that all members of the Community succeeded to the treaties concluded by the former Soviet Union. Such a conclusion is not fully acceptable, as is demonstrated by the other documents issued in the context of the activities of the Community. On 20 March 1992 in Kiev the Council of Heads of States Parties to the Community issued a decision according to which States Parties are successors of the Soviet Union with respect to the rights and the obligations of the Soviet Union. Turkmenistan, however, has not signed this declaration.

Another document of the Community demonstrated a departure from the previously adopted principle of the full succession of the Soviet obligations by the new states. It was the Moscow Memorandum on the Mutual Interpretation of Treaties of Common Interest concluded by the Former Soviet Union. The Memorandum was signed on 6 July 1992. Art. 1 of the Memorandum provides that almost all agreements concluded by the Soviet Union express the common interest of the members of the Community of Independent States. However, it is individual Member States that decide whether a given treaty is in its interest or not. According to para. 40 of the Memorandum, the matters connected with individual treaties will be decided during negotiations with interested states. Neither Kyrgyzstan nor Uzbekistan signed the Memorandum.

As can be inferred from these remarks, it is difficult to establish that the new states are successors to the 1957 Treaty on Legal Assistance.

One should refer in consequence to internal regulations and bilateral agreements with individual states of the Community of Independent States.

³⁵ *Dz. U.* 1958, No. 32, Item 143.

³⁶ *Dz. U.* 1966, No. 4, Item 19.

3.2. The Russian Federation

The position of the Russian Federation *vis-à-vis* treaties concluded by the Soviet Union was presented in the note of the President of Russia to the Secretary-General of the United Nations from 24 December 1991. According to this note the Russian Republic is a continuator of the Soviet Union and implements rights and obligations thereof.

This statement was confirmed in the Protocol signed in December 1992 in Warsaw. According to this document the 1957 treaty belongs to a category of treaties that should be amended or replaced by new agreements. The Protocol has not determined, however, which bilateral treaties concluded by Poland with the Soviet Union remain in force. The Protocol on this subject is being prepared now. It is to be supplemented by annexes with the names of different categories of treaties. Renegotiation is to be provided for *i.a.* the 1957 Treaty and the both above-mentioned conventions on double nationality. It lets us, however, summarize that so far all three treaties are binding and govern relations between Poland and the Russian Federation in the respective fields.

One should mention of course the Polish-Russian Treaty on Friendly Cooperation and Good Neighbourhood done in Moscow on 22 May 1992³⁷ which entered into force on 8 May 1993. According to Art. 18(1) of this agreement, the Contracting Parties shall foster in the form of subsequent treaties the cooperation in legal matters, among them in the field of legal assistance in civil, family and criminal matters.

On 28 October 1995 the Consular Convention between Poland and the Russian Federation done in Moscow on 22 May 1992³⁸ entered into force. Article 33(1)(3) thereof provides that consular officers will have the right to register (give) marriages according to the law of the sending state if both partners are nationals of that state. Art. 37 of the Convention regulates the right of the consular officers to deliver documents and examine witnesses being nationals of the sending state. On the date of the entry into force of the new Consular Convention the former one – from 1971 – was terminated. Now a new agreement on legal assistance is negotiated.

3.3. Ukraine

The question of succession by Ukraine to treaties concluded by the former Soviet Union is regulated by the Statute of 12 September 1991 on the Legal Succession of Ukraine.³⁹ Art. 7 of this Statute reads that Ukraine is a successor of the rights and the obligations of the Soviet Union, unless they are contrary to the Constitution or to the interests of the State.

Several declarations and the practice confirm that Ukraine has recognized its succession to the 1957 Treaty on Legal Assistance. It does not mean that there were no difficulties, the latter are however inevitable in situations, in which the state concluding a treaty is not identical with the one implementing it. What must be noted here are

³⁷ Dz. U. 1993, No. 61, Item 291.

³⁸ Dz. U. 1995, No. 140, Item 687 and 688.

³⁹ *Vedomosti Verkhovnoi Rady* No. 46 of 12 November 1991.

the instances of difficulties with the implementation of Art. 4 of the 1957 Treaty *i.e.* the treatment of the requests of the Polish authorities with respect to transfer of the criminal proceedings.

Ukraine is also a successor to the two conventions on double nationality.

The 1957 Treaty was replaced by the Kiev Agreement on Legal Assistance and Legal Relationships in Civil and Criminal Matters done on 24 May 1993,⁴⁰ which entered into force on 14 August 1994.

On 18 May 1992 a Treaty on Good Neighbourhood, Friendly Relations and Cooperation between Poland and Ukraine entered into force.⁴¹ Art. 16(1) of the treaty provides that both states will develop, intensify and improve legal and consular relations, including legal assistance in civil, criminal and administrative matters. On 20 January 1994 a Consular Convention between the two states done in Warsaw on 8 September 1991⁴² entered into force. The convention provides *inter alia* the right of consular officers to register marriages (Art. 27 (1)(4)).

3.4. The Republic of Belarus

The Presidency of the Supreme Council of the Republic of Belarus issued on 3 June 1992 the Provision on the Procedure of Succession. It was based on Art. 12 of the Treaty Establishing the Community of Independent States.

According to the Provision, decisions on succession are made by the Supreme Council with respect to treaties concluded by the Supreme Council of the Soviet Union, the Belarus Government is competent to make analogous decisions with respect to treaties concluded by the government of the Soviet Union. According to the cited provision, the Government of Belarus was to determine the procedure of ascertaining state succession to governmental and ministerial agreements. Such a resolution of the Government (Resolution no 479) was issued on 4 August 1992. It provides for the competence of the Council of Ministers acting on the initiative of the Minister of Foreign Affairs in cases of succession to treaties concluded by the Government of the Soviet Union and the competence of respective ministers acting in cooperation with the Minister of Foreign Affairs with respect to treaties concluded by the Soviet ministers.

As can be seen, only the procedure of confirming the state succession is determined in the Resolution. The practice shows that this procedure has been used only with respect to a few multilateral treaties. It was done in respect to bilateral treaties, among them the 1957 Agreement on Legal Assistance.

The Belarus Republic found itself, however, a successor to this treaty.

This situation was kept till 1 August 1995, *i.e.* till the entry into force of the Agreement between Poland and Belarus on Legal Assistance and Legal Relationships in Civil, Family, Employees and Criminal Matters done in Minsk on 26 October 1994.⁴³

⁴⁰ Dz. U. 1994, No. 96, Item 465 and 466.

⁴¹ Dz. U. 1993 No. 125, Item 573.

⁴² Dz. U. 1994, No. 60, Item 248 and 249.

⁴³ Dz. U. 1994, No. 50, Item 197 and 198.

Belarus finds itself a successor to the both afore-mentioned conventions on double nationality.

On 30 March 1993 a Treaty on Good Neighbourhood and Friendly Cooperation between Poland and the Belarus Republic done in Warsaw on 23 June 1992⁴⁴ entered into force. It provides that the parties will improve consular relations and give legal assistance in civil, family, criminal and administrative matters.

On 29 January 1994 a new consular convention (signed on 2 March 1992) entered into force.⁴⁵ It also provides for the right of consular officers to register marriages (Art. 28(1)(3)), to deliver documents and to examine witnesses on the initiative of the organs of the receiving state (Art. 32).

On the day of the entry into force of the latter convention, the 1971 Consular Convention was terminated.

3.5. The Republic of Moldova

As we were informed, the Parliament of Moldova issued a Declaration on succession to treaties concluded by the former Soviet Union on condition that they were not contrary to the internal law of Moldova. This declaration would perhaps apply to the 1957 Convention. Such a conclusion would be supported by the Moldovian practice of taking into consideration the Polish requests for legal assistance.⁴⁶

On 15 November 1994 the Consular Convention with Moldova was signed, but has not entered into force yet.

3.6. The Republic of Armenia

The author does not possess sufficient knowledge on the Armenian domestic legislation on succession to the treaties of the former Soviet Union. The practice shows that the requests for legal assistance are followed, but there is neither recognition nor enforcement of judgments of the Polish courts. A consular convention with Armenia is negotiated at present.

3.7. The Republic of Azerbaijan

Azerbaijan does not recognize itself as successor to the 1957 Agreement on Legal Assistance. The requests of Polish courts concerning legal assistance are denied on the basis of the alleged lack of treaty on legal assistance. Attempts have been made to recognize actual reciprocity in this respect, but no results have been achieved so far.

3.8. The Republic of Georgia

The position of Georgia as regards succession to the Soviet Union treaties is ambiguous.

⁴⁴ *Dz. U.* 1993, No. 118, Item 527.

⁴⁵ *Dz. U.* 1995, No. 128, Item 619 and 620.

⁴⁶ Moldova is also a party to the Convention on the Civil Procedure signed in the Hague on 1 March 1954.

The Polish requests for legal assistance are neither rejected nor respected. On 20 April 1993 a Treaty on Friendship and Cooperation between Poland and Georgia was signed. This treaty has been already ratified by Poland. The treaty provides that separate agreements on legal assistance will be concluded in the future (Art. 17(1)).

The negotiations on a consular convention have not been finished so far.

3.9. The Republic of Kazakhstan

Kazakhstan recognizes itself as a successor to the agreements concluded by the former Soviet Union. In practice the Polish requests based on the 1957 Agreement are respected and the Kazakhstan authorities expressly recognize this treaty as a valid basis of their rights and obligations. The negotiations on consular relations are continued at present.

3.10. The Republic of Uzbekistan

Uzbekistan respects the provisions of the 1957 Agreement and follows the requests of the Polish courts and prosecutors based on it. On 11 January 1995 a Treaty on Friendship and Cooperation and the Polish-Uzbek Consular Convention were signed, but not entered into force so far.

3.11. Kyrgyzstan, Tadjikistan and Turkmenistan

The present author has not been able to learn anything about the succession of those states to the 1957 Agreement.

On 5 June 1993 a consular convention with Kyrgyzstan was signed but not entered into force so far.

3.12. Lithuania, Latvia and Estonia

These states merit special and separate mention as they do not belong to the Community of Independent States. As a rule these states did not recognize themselves as successors to the treaties concluded by the former Soviet Union. Some differences in the positions of individual Baltic states in this respect can however be detected.

3.13. Lithuania

Lithuania denied its succession to the 1957 agreement, but accepted that its provisions would be respected during the transitional period *i.e.* till the conclusion of a new agreement on legal assistance. Such a position was accepted by Poland and the cooperation with Lithuania in this respect was smooth. On 26 January 1993 the Polish-Lithuanian Agreement on Legal Assistance and Legal Relationships in Civil, Family, Employees and Criminal Matters was signed in Warsaw. It entered into force on 18 October 1993.

It does not however mean that the „transitional period” came to an end already on this date, as the treaty was promulgated only on 18 March 1994.⁴⁷

⁴⁷ Dz. U. 1994, No. 35, Item 130 and 131.

The same delay of publication occurred to the Consular Convention which was signed on 13 January 1992 and entered into force on 15 December 1993.⁴⁸ The convention gave several rights to consular officers – among them the right to register marriages.

On 26 April 1994 the Polish-Lithuanian Treaty on Friendly Relations and Good Neighbourhood was signed in Vilnius. It entered into force on 26 November 1994.⁴⁹ According to Art. 24(1) of the Treaty, separate agreements are to regulate the field of legal assistance in civil, family, criminal and administrative matters.

3.14. The Republic of Latvia

The position of Latvia in this respect was very similar to the one presented by Lithuania. Despite the lack of succession to the treaties of the Soviet Union as such, Latvia agreed on their provisional application. It was just the case of the 1957 Agreement. The respective understanding on the provisional application of this treaty was effected in a form of exchange of letters of the Ministers of Justice of the two states. Since then the cooperation was quite good, despite minor disputes as to certain provisions of the 1957 Agreement concerning for example the duty of translating extradition requests (see Art. 4 and Art. 66 of the Agreement).

It should be noted that the organs of Latvia referred several times to diplomatic way for transmission of requests for legal assistance.

We should also remind here that before the Second World War both Poland and Latvia were the parties to the 1905 Hague Convention on the Civil Procedure.⁵⁰ On 12 September 1993 the 1954 Hague Convention on the Civil Procedure entered into force as between Poland and Latvia.

On 23 February 1994 the Polish-Latvian Riga Convention on Legal Assistance and Legal Relationships in Civil, Family, Employees and Criminal Matters was signed. It entered into force on 5 September 1995.⁵¹ On 17 December 1992 the Polish-Latvian Treaty on Friendship and Cooperation entered into force. It was signed on 1 July 1992 in Riga.⁵² According to Art. 17(1) thereof, separate treaties are to be concluded to create conditions for legal assistance in civil, family, criminal and administrative matters.

On 20 October 1993 the Polish-Latvian Consular Convention entered into force. It was signed in Warsaw on 17 December 1992. It gives consular officers several rights connected with marriages, delivery of documents and examining witnesses.

3.15. The Estonian Republic

In 1992 and in the first part of 1993 there were grounds to claim that the position of Estonia in the field of legal assistance in relations with Poland was analogous to the ones of Latvia and Lithuania.

⁴⁸ *Dz. U.* 1994, No. 30, Item 108 and 109.

⁴⁹ *Dz. U.* 1995, No. 15, Item 71 and 72.

⁵⁰ The accession of Latvia – *Dz. U.* RP 1930, No. 42, Item 368.

⁵¹ *Dz. U.* 1995, No. 110, Item 534 and 535.

⁵² *Dz. U.* 1993, No. 114, Item 502.

In the second part of 1993 Estonia notified Poland that because of the lack of treaty regulation of legal assistance in their mutual relations diplomatic way should be resorted to for the delivery of requests of courts and prosecutors for such an assistance.⁵³ It was equal to a notification about the lack of binding force of the 1957 Agreement in the Polish-Estonian relations. The bases of legal assistance are now to be found in the domestic regulations of the two states. From a theoretical point of view there is possibility that if Estonia resumes its participation in the 1905 Hague Convention, the latter will be the basis of legal assistance in civil matters.

On 19 June 1938 a Polish-Estonian Agreement on Extradition and Legal Assistance in Criminal Matters was signed in Tallin. It had not, however, entered into force, perhaps because of the outbreak of the war that preceded the end of the ratification procedure.⁵⁴

Now, a Polish-Estonian Agreement on Legal Assistance is negotiated.

We should note in this context that the Tallin Treaty on Friendly Cooperation and Baltic Neighbourhood signed on 2 July 1992 entered into force on 6 May 1993.⁵⁵ It provides that separate treaties are to be concluded to govern the matters of legal assistance.

A consular convention between Poland and Estonia was signed on 2 July 1992 and ratified but has not entered into force yet. Its provisions resemble the ones of the Polish-Latvian Convention.

4. The Bases of Legal Assistance in Relations with the States that Emerged from the Former Yugoslavia

Two treaties were the bases of Yugoslavian-Polish relations in the field of legal assistance till the split of Yugoslavia. They were namely: the Warsaw Agreement on Legal Assistance in Civil and Criminal Matters signed on 6 February 1960⁵⁶ and the Warsaw Consular Convention from 2 December 1982.⁵⁷

The following is the state of affairs with respect to their succession by new states:

4.1. The Federation of Yugoslavia (Serbia and Montenegro)

On 27 April 1992 the Parliament of Yugoslavia issued the Declaration on the Creation of the New State. According to Art. 1 of this Declaration, Yugoslavia possesses the international personality as identical with the Socialist Federal Republic of Yugoslavia, and is to respect strictly all international obligations of the latter. In practice both the 1960 Agreement and the Consular Convention are respected as the bases of mutual relations.

⁵³ *Dz. U.* 1993, No. 112, Item 494.

⁵⁴ The accession of Estonia – *Dz. U.* 1930, No. 2, Item 11.

⁵⁵ *Dz. U.* 1993, No. 121, Item 536.

⁵⁶ *Dz. U.* 1963, No. 27, Item 162.

⁵⁷ *Dz. U.* 1984, No. 11, Item 48.

4.2. The Republic of Croatia

On 25 June 1991 the Parliament of Croatia issued a Declaration on Sovereignty and Independence. This Declaration was later confirmed in the Parliamentary Resolution of 8 October 1991.

The Republic of Croatia was recognized by the European Communities themselves and their 12 Member States on 15 January 1992. Poland recognized Croatia on 21 January 1992.

On 26 July 1991 the Statute on the Preparation and Conclusion of International Agreements was adopted.⁵⁸ According to Art. 33 thereof international agreements concluded by the Socialist Federal Republic of Yugoslavia bind for Croatia as a successor, unless they are contrary to the Constitution or to the Croat legal order.

On 13 April 1995 the Agreement between Poland and the Republic of Croatia on the Croatian Succession to Bilateral Treaties was concluded in Zagreb. According to this agreement, the both above-mentioned treaties remain in force. Only Art. 73–91 of the 1960 Agreement lost their force as they concerned extradition and the matters covered by them were regulated by Art. 28(1) of the European Convention on Extradition which is binding for both Poland and Croatia.

On 21 February 1995 a new consular convention was signed but not entered into force so far.

4.3. The Republic of Slovenia

The Parliament of Slovenia issued a Declaration on Independence on 25 June 1991. It was confirmed on 8 October 1991.

The members of the European Communities recognized Slovenia on 15 January 1992 and Poland recognized it on 21 January 1992.

On 9 March 1992 the Republic of Slovenia suggested that the 1960 Agreement was kept in force. This proposal was accepted by Poland.

On 1 March 1995 Poland and Slovenia concluded an Agreement on the Binding Effect of Bilateral Agreements concluded by Poland and Yugoslavia in the years 1922–1991. According to this act, both the above-mentioned agreements are to remain in force, with the exception of articles on extradition for the same reasons as those indicated in the case of Croatia. The evaluation of the functioning of this agreement is not possible yet.

4.4. The Republic of Bosnia and Herzegovina

This republic was recognized by the Member States of the European Communities on 6 April 1992. Poland followed them soon. No legal assistance has been given or sought since February 1992 due to war activities. Also several attempts to use diplomatic channels for the delivery of Polish requests for assistance remained with no success.

⁵⁸ *Narodne Novine* No. 53/1991.

4.5. The Republic of Macedonia

Macedonia was recognized by the members of the European Communities in December 1993.

As we have learnt, the Parliament of Macedonia has enacted a Statute on the Implementation of the Constitution. According to it, Macedonia is a successor of the "old" Yugoslavia with respect to treaties concluded by it. This view is supported in practice, as Macedonia respects Polish requests for legal assistance based on the 1960 Agreement.

5. The Bases of Legal Assistance in Relations with the Czech Republic and the Slovak Republic

Before the split of Czechoslovakia the matters of cooperation in the field of law in its relations with Poland were regulated in three treaties: the Agreement on Legal Assistance and Legal Relationships in Civil, Family, Employees and Criminal Matters signed in Warsaw on 21 December 1987⁵⁹; the Consular Convention signed in Warsaw on 9 June 1972⁶⁰ and the Convention on the Regulation of Cases of Double Nationality signed in Warsaw on 17 May 1965.⁶¹

Our considerations will be limited to the succession to these three agreements by the Czech Republic and the Slovak Republic.

On December 15, 1992 the Parliament of the Czech and Slovak Federal Republic issued the „Resolution”. According to Art. 1(1) thereof, both new states were to be successors of the international obligations of Czechoslovakia.

5.1. The Czech Republic

The Czech Republic has taken over all legal obligations of Czechoslovakia, including obligations resulting from international agreements. Such a provision was repeated in the Proclamation of the Czech Republic to Parliaments and Nations of the World, as well as in the Statute of the Czech National Council (no 4/1992), which provides in para. 4 that all rights and obligations of Czechoslovakia become rights and obligations of the Czech Republic to the extent determined by the Parliament and the agreements with the Slovak Republic. Para. 5(2) of this Statute provides that the Czech Republic succeed to the international rights and obligations of Czechoslovakia connected with its territory.

In 1993 the works on the Polish-Czech Protocol on Succession to Bilateral Treaties and the Survey of the System of Treaties in Force between the Parties were initiated. The Protocol is to provide that agreements listed in the annex thereto would be terminated. Neither of the three above-mentioned agreements is to be included into

⁵⁹ Dz. U. 1989, No. 39, Item 210.

⁶⁰ Dz. U. 1973, No. 19, Item 108.

⁶¹ Dz. U. 1966, No. 19, Item 120.

this annex. In consequence, the provisions of these treaties are still binding upon the parties.

5.2. The Slovak Republic

The above-mentioned Resolution of the Parliament lets us recognize Slovakia as well as a successor to the treaties concluded by Czechoslovakia.

Also the Polish-Slovak Protocol on the Binding Effect of Treaties Concluded by Poland and Czechoslovakia in the years 1918–1992 signed in Bratislava on 8 July 1993 confirmed this solution. The appendix to the Protocol lists agreements that were not succeeded to by Slovakia and that were to expire on the date of the entry into force of the Protocol. Neither of the afore-mentioned treaties is listed there, so they remain binding for the parties, specially in the light of an express provision according to which agreements not listed are to be binding.

We should remind here, that on 4 May 1992, that is before the split of Czechoslovakia, the Treaty on Good Neighbourhood, Solidarity and Friendly Cooperation between Poland and the Czech and the Slovak Republic (done in Cracow on 6 October 1991)⁶² entered into force. Art. 20(1) thereof provides that the parties will conclude separate treaties on legal assistance.

6. New Treaties on Legal Assistance Concluded with Other States

As this article is to provide knowledge on the present state of law concerning legal assistance, it seems to be advisable to present new agreements concerning legal assistance accepted by Poland and promulgated after 1989. Also unpublished agreements and unilateral declarations will be mentioned here.

6.1. The Republic of Austria

On 19 April 1990 the Agreement on Mutual Enforcement of Judgments in Criminal Matters was signed in Vienna.⁶³

Except this agreement the following agreements on legal matters are in force between Poland and Austria:

- the Vienna Agreement on Mutual Relations in Civil Matters and on the Documents signed on 11 December 1963, amended by the Additional Protocol signed in Vienna on 25 January 1973,⁶⁴
- the Agreement on Legal Assistance in Criminal Matters signed in Vienna on 27 February 1978,⁶⁵
- the Consular Convention signed in Vienna on 2 October 1974.⁶⁶

⁶² *Dz. U.* 1992, No. 59, Item 296.

⁶³ *Dz. U.* 1991, No. 14, Item 58.

⁶⁴ *Dz. U.* 1974, No. 6, Item 33 and 34.

⁶⁵ *Dz. U.* 1980, No. 14, Item 44.

⁶⁶ *Dz. U.* 1975, No. 24, Item 131.

Due to Art. 28(1) of the European Convention on Extradition signed in Paris on 13 December 1957 the Polish-Austrian Agreement on Extradition signed in Vienna on 27 February 1978⁶⁷ expired.

6.2. The Kingdom of Belgium

On 17 December 1986 the Polish-Belgian Agreement on Legal Information was signed in Brussels. On the same day the following treaties were signed:

- the Convention on Legal Assistance in Criminal Matters,
- the Convention on Recognition of Judgments in Divorce Cases,
- the Convention on Recognition and Enforcement of Alimony Judgments,
- the Convention on the Facilitation of the Application of the 1954 Hague Convention on the Civil Procedure.

These agreements were ratified by Poland on 16 December 1987 but have not been ratified by Belgium yet.

6.3. The Republic of Bulgaria

The mutual relations between Poland and Bulgaria in the field of legal relations were regulated by the Convention on Double Nationality signed in Warsaw on 7 February 1972.⁶⁸

The author has been informed that Bulgaria denounced unilaterally this convention and that it is no longer binding. It is difficult to establish the date of the termination of the treaty since the Polish Official Journal does not inform us about any developments in this field.

The suggested date of 13 June 1991 gives rise to serious doubts as to conformity of this denunciation with Art. 17(2) of the Convention which provides that it has been concluded for the period of 5 years starting on the day of its entry into force. The convention was to be renewed for next five-year periods, unless any of states parties denounced it 6 months before the end of any such period. This provision should be interpreted so that the denunciation of the treaty may take place during 6 months preceding the end of any 5-year period, the first of which was to begin at the date of the entry into force of the convention. We should also agree that the result of such denunciation may take place after 6 months, on the next day following the end of the next 5-year period.

As the convention entered into force on 25 September 1972, it could not lose its binding force before 25 September 1992 if the denunciation were to take place after 25 September 1987.

One should also focus on the entry into force of the Treaty on Friendly Relations and Cooperation which was signed in Warsaw on 25 February 1993.⁶⁹ Art. 15 thereof provides that legal assistance will be regulated in separate agreements.

⁶⁷ *Dz. U.* 1980, No. 14, Item 46.

⁶⁸ *Dz. U.* 1972, No. 41, Item 262.

⁶⁹ *Dz. U.* 1993, No. 118, Item 529.

One of them is the Agreement on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters signed in Warsaw on 4 December 1961 and changed by the Protocol signed in Sofia on 27 June 1980.⁷⁰ Articles 65-81 of this agreement were deleted as a consequence of Art. 28(1) of the European Convention on Extradition.

On 10 November 1972 the Polish-Bulgarian Consular Convention was signed in Sofia.⁷¹ A new convention was already signed in Warsaw on 11 April 1994 but has not entered into force so far.

6.4. The Arab Republic of Egypt

On 17 May 1992 two agreements with Egypt were signed by Poland in Cairo:

- the Agreement on Legal Assistance in Criminal Matters, on the Transfer of Prisoners and Extradition,
- the Agreement on Legal Assistance in Civil and Commercial Matters.

These agreements entered into force on 20 and 21 February 1993, respectively but were promulgated in the Official Journal on 17 March 1994.⁷²

6.5. Canada

On 12 September 1994 the Polish-Canadian Agreement on Legal Assistance in Criminal Matters was signed in Ottawa, but has not entered into force yet.

6.6. Romania

On 25 January 1993 the Polish-Romanian Agreement on Friendly Relations and Cooperation was signed in Bucarest. It entered into force on 13 January 1994.⁷³

Art. 21(1) thereof provides that the parties will develop, intensify and improve to the interests of their citizens their legal and consular relations. The Agreement on Legal Assistance and Legal Relationships in Civil, Family and Criminal Matters, signed in Bucarest on 25 January 1962, as amended by the Protocol signed in Warsaw on 14 September 1972⁷⁴, is still in force. A new agreement in this field is negotiated at present.

A new consular convention was signed on 25 January 1993. It entered into force on 13 January 1994⁷⁵ and replaced the former convention of 24 March 1973.⁷⁶

Another convention in force between Poland and Romania that is worth mentioning is the Hague Convention on the Protection of Children and on the Cooperation in Adoption Abroad, signed on 29 May 1993.

⁷⁰ *Dz. U.* 1963, No. 17, Item 88; amendment in *Dz. U.* 1981, No. 10, Item 43.

⁷¹ *Dz. U.* 1973, No. 24, Item 138.

⁷² *Dz. U.* 1994, No. 34, Item 126–129.

⁷³ *Dz. U.* 1994, No. 29, Item 106 and 107.

⁷⁴ *Dz. U.* 1962, No. 63, Item 301; *Dz. U.* 1973, No. 41, Item 243.

⁷⁵ *Dz. U.* 1994, No. 29, Item 104 and 105.

⁷⁶ *Dz. U.* 1974, No. 15, Item 87.

6.7. The Kingdom of Sweden

The Polish-Swedish Agreement on Legal Assistance in Criminal Matters was signed in Warsaw on 10 February 1989.⁷⁷

6.8. Turkey

On 12 April 1988 the Agreement on Legal Assistance in Civil and Commercial Matters⁷⁸ was signed in Warsaw. On 9 January 1989 the Ankara Convention on Legal Assistance in Criminal Matters, on Extradition and Transfer of Prisoners was signed⁷⁹ Art. 12–28 of the latter agreement were replaced by Art. 28 of the European Convention on Extradition.

6.9. The Republic of Vietnam

The Agreement on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters was signed in Warsaw on 22 March 1993. It entered into force on 18 January 1995.⁸⁰

6.10. Hungary

The Treaty on the Friendly Cooperation and the Good Neighbourhood signed in Cracov on 6 October 1991 entered into force on 15 June 1992.⁸¹ According to Art. 16(1) thereof the cooperation in the field of legal relations, justice and police is to be regulated in separate agreements.

One of them is the Agreement on Legal Assistance in Civil, Family and Criminal Matters signed in Budapest on 6 March 1959, amended by the Warsaw Protocol from 18 September 1980.⁸² Art. 28(1) of the European Convention on Extradition deleted articles 70–83 of the 1959 Agreement.

The Polish-Hungarian Consular Convention was signed in Warsaw on 5 June 1973.⁸³

On 5 July 1961 the Polish-Hungarian Convention on the Regulation of Nationality of Persons with Double Nationality was signed.⁸⁴ It was terminated on 12 February 1994 according to and on the day of the entry into force of the Budapest Protocol on the termination of the afore-mentioned convention.⁸⁵

⁷⁷ *Dz. U.* 1990, No. 63, Item 368.

⁷⁸ *Dz. U.* 1992, No. 3, Item 13.

⁷⁹ *Dz. U.* 1991, No. 52, Item 224.

⁸⁰ *Dz. U.* 1995, No. 55, Item 289.

⁸¹ *Dz. U.* 1992, No. 59, Item 298.

⁸² *Dz. U.* 1960, No. 8, Item 54; *Dz. U.* 1982, No. 5, Item 32.

⁸³ *Dz. U.* 1974, No. 5, Item 28.

⁸⁴ *Dz. U.* 1962, No. 5, Item 18.

⁸⁵ *Dz. U.* 1994, No. 45, Item 176 and 177.

6.11. Italy

On 28 April 1989 the following agreements were signed:

- the Agreement on Legal Assistance and on Recognition and Enforcement of Judgments in Civil Matters,⁸⁶
- the Agreement on Legal Assistance in Criminal Matters,⁸⁷
- the Agreement on Extradition.⁸⁸

As regards the latter, we must remember that on 13 September 1993 the European Convention on Extradition (done in Paris on 13 December 1957 together with the 1975 Strasbourg Protocol and the 1978 Strasbourg Protocol) entered into force for Poland.

Italy was also a party to this convention and to the 1978 Protocol thereto. In consequence it was the latter and not the bilateral convention that was applied since 13 September 1993. Before this day there was no treaty regulation of extradition in the Polish-Italian relations.

The bilateral convention entered into force on 1 May 1994⁸⁹ that is after the entry into force of the European Convention. Art. 28 of the latter provided that the convention derogated the provisions of prior bilateral agreements on extradition between states parties. In this context we must consider the relation between both treaties. We should first of all interpret Art. 28 of the European Convention.

The literal interpretation would be in favour of restricting the scope of this derogation only to prior agreements – *i.e.* the ones in force on the date of the entry into force of the European Convention. Such a conclusion is supported by the Explanatory Report to the European Convention on Extradition⁹⁰ which reads as follows: “after a long discussion the Committee decided that the multilateral convention should have priority over prior agreements.”

Such an interpretation would be in favour of the conclusion that the Polish-Italian Agreement on Extradition is binding for the parties.

The relation between these two treaties remains yet to be determined. The bilateral agreement is obviously later and does not determine its relation *vis-à-vis* other treaties. On the other hand, the European Convention provides that parties thereto may conclude agreements in the field of its application only to facilitate the application or to supplement the provisions of the European Convention itself (Art. 28(2)). It is equal to prohibition of agreements that would regulate matters covered by the European Convention independently from the latter.

The commentary informs us that the principle of Art. 28(2) applies only to future agreements. It is a logical consequence of the fact that Art. 28(1) relates only to earlier agreements.

The Polish-Italian agreement must be regarded as the one regulating matters covered by the European Convention independently from the latter. Although some provi-

⁸⁶ Dz. U. 1992, No. 23, Item 97.

⁸⁷ Dz. U. 1992, No. 23, Item 99.

⁸⁸ Dz. U. 1994, No. 85, Item 389 and 390.

⁸⁹ Dz. U. 1994, No. 70, Item 308–310.

⁹⁰ Explanatory Report on the European Convention on Extradition, Strasbourg 1985.

sions of the two instruments are even identical, the bilateral convention concerns several matters regulated in the multilateral treaty in detail. What is more, such matters are often the very bases of extradition. It is just the case of the very notion of the extraditable crimes and the positive and negative premises of extradition (Art. 2 and 3).

The respective provisions of the two treaties are also partly different. Only some provisions of the Polish-Italian Agreement may be believed to implement or supplement the European Convention. It is the case of the following provisions: Art. 3(1)(e) (*ad hoc* courts), Art. 3(1)(h) (minors), Art. 8(1)(e) (the period of imprisonment to be suffered after extradition), Art. 11(2) (temporary extradition), Art. 14 (information on the result of the proceedings), Art. 16(2) (release of documents from legalization).

There are however several provisions that may be claimed to infringe Art. 28(2) of the European Convention. It is just the case of the notion of extraditable crime (Art. 2(1) of the European Convention provides for the extradition for crimes for which the maximum sanction is at least one-year imprisonment, while Art. 2(1) of the bilateral agreement makes extradition possible only when the respective sanction is above 1-year imprisonment. Another example is connected with the determination of the punishment which is to be suffered as a result of extradition – Art. 2(1) of the European Convention provides that extradition is possible when the punishment to be suffered in result of the extradition is at least 4 months, Art. 2(2) of the bilateral agreement provides that a respective term is to be 6 months. The same may be said about the moment of determination of nationality of the person concerned. According to the European Convention the moment when the decision is made is decisive, according to the bilateral agreement – the moment of the receipt of the request of extradition is given priority.

The reasons of this state of affairs are very simple – at the time of negotiations (before 1989) neither of the parties reckoned with the Polish accession to the European Convention.

Had the agreement entered into force before 13 September 1993, there would be no necessity of examining Art. 28(2) of the European Convention. The delay was due to the Italian party. Poland ratified the agreement on 27 February 1990, Italy only on 27 August 1993. As the exchange of documents of ratification took place on 28 March 1994 there was no possibility of the entry into force of the bilateral convention before September 1993.

There is no space to discuss the expediency of the very exchange of the ratification documents in the light of the conflict of the bilateral agreement with the European Convention.

We must consider the consequences of the lack of conformity between Art. 28(2) of the Convention and the bilateral agreement. It must be emphasized that Art. 28(2) – as opposed to Art. 28(1) does not prescribe the consequences of the lack of conformity of acts concerned. No such sanction can be found in Art. 41(1) of the Vienna Convention on the Law of Treaties which provides that parties to multilateral treaties may modify them in their relations when *i.a.* such a possibility is provided for by the multilateral treaty itself. It was also not possible to claim the conflict of the Polish-Italian Agreement with the peremptory norm of international law (Art. 53).

The conclusion is that despite the conflict between the two agreements the validity of the bilateral one is not affected. The binding force of the bilateral agreement between Poland and Italy must be recognized. The priority should, however, be attributed to the European Convention.

Is the latter opinion fully justified? It seems that in each individual case a thorough comparison of the bilateral and multilateral act should be effected. These provisions which may be held to implement or supplement the European Convention should be applied.

In other cases the priority of the European Convention should be accorded.

Such a solution may be proposed on the assumption that the two agreements are strictly connected but may be distinguished however.

The solution according to which the bilateral agreement is binding but not applicable seems to be too far-reaching.

The question of priority is in no case a merely theoretical one. The practical significance may be very considerable, as the two agreements differ from each other in important aspects.

The best example thereof is connected with extradition of persons guilty of acts for which the capital penalty is provided for in states requesting the extradition. As Italy has declared, that it would not extradite such a person, the extradition on the basis of the European Convention would not be possible. The bilateral agreement leaves however such a possibility on the condition of the party requesting extradition guaranteeing that death penalty will not be sentenced or not executed in cases in which it has been already sentenced.

Significant Aspects of Legal Solutions*

MACIEJ LIS

1. Introduction

The subject matter of the Conference assumes, on the one hand, a retrospective survey of the effected changes and, on the other hand, it brings forward the necessity of indicating the directions in the process of adapting the Polish legal system to the European standards.

As you might guess, the very subject would provide sufficient material for a number of conferences. Its extensive range is illustrated by the White Papers containing records of the undertaken efforts and prospects for joining the European Community, prepared jointly by the Community and Poland.

In a short speech it is only possible to point out the main groups of problems. They refer to the conditions for system transformations, the scope of tools for the execution of adaptation processes in Poland, and the priorities in the process of changes in the legal system standards. Those problems are mutually related and interwoven and thus their separation provides the topic for discussion. The above-mentioned practical reasons release the present writer from the obligation to quote, refer to literature sources and from other requirements connected with scientific publications. This report is not a typical scientific publication but merely an introduction to a discussion.

2. Basic Principles of the Conditions for System Changes

1. The change of the function of law in the new democratic social and political system.

First of all, the law should become a stabilizing factor which would make the society trust the accepted legal standards. The equality in law should be respected as the equality of opportunities in a democratic institutional surrounding guaranteed by the state.

2. The establishment of a comprehensive and modern catalogue of basic constitutional norms and principles regulating the functioning of the society, social groups and individuals in a democratic state.

* Conference Report The Central and Eastern European Countries' Efforts and Prospects for Joining the European Union exemplified by Poland presented at Frankfurt an der Oder/Ślubice 13-14 September 1996.

The above issues are connected with the strengthening of the protection of the constitution by the final authority of the Constitutional Tribunal's rulings and the expansion of a circle of those entitled to file a constitutional complaint (e.g. individual citizens).

3. The introduction of a clear system of sources of law with respect for the rule that the accepted external obligations resulting from the participation in a supranational organization have priority of application before the state law.

This is connected with the approval by Poland of the necessity to relinquish a part of its sovereignty. Without this approval, the participation in the European integration is not possible.

4. The establishment of an 'automatism' to be applied in the legislative process in reference to the conformity of internal legal regulations with the European Union's standards. In other words, internal mechanisms for the evaluation of this conformity have to be developed at the stage of the creation of internal regulations.

As it seems, these basic principles have been taken into consideration by Poland since the end of 1989, *i.e.* from the moment the new social and political reality started to be shaped. They were strengthened when Poland entered the Europe Agreement on 16 December 1991, especially by the content of the Third Chapter of the Agreement, Articles 68–70. Poland has accepted specific obligations of the international law regarding the assimilation of both the existing and future national legislation into the European Law. It refers primarily to the standards regulating the functioning and legal status of business entities as well as the regulations connected with the wide range of business activities.

3. General Conditions for the Transformation of Law

It should be emphasized that some of the above-mentioned basic principles relating to transformation processes, are applied in a specific reality which stimulates both the extent and pace of those transformations. The most essential conditions include:

1. The constant lack of fundamental law and, as it seems, too much freedom in the interpretation of the existing constitutional standards. Due to the extra-legal reasons (mainly political), an act which was to be a priority in the legislative effort, has become, to a large extent, a card in a political argument.

2. There still exist visible symptoms and habits from the past epoch of centralistic methods of the country's management, both in the functioning of institutions and in social expectations. At the same time, local self-governments lack an actual autonomy and there are no set priorities in the reform of the state administration and in the development of regional policy.

3. There is a perceptible lack of qualified cadres and an insufficient organizational system. These are necessary to provide a faster pace in the process of the adaptation of the country's legislation to the European law standards.

4. The so called "social setting" of the transformation processes is also significant. Having unstable legal solutions in particularly vulnerable branches of economy, such as taxation law, labour law, trade law, banking law and social law, the decrease

in social approval of the transformations is inevitable. The longer the process of transformations (with the additional instability of the already accepted legal solutions), the less social approval it will receive.

Only a few significant conditions for the present stage of the changes in the Polish legal system have been mentioned. It should be realized that the external conditions, such as the European Union's ability to reform and expand in the nearest future, are equally important. In this matter, however, the influence of the countries intending to join the European Union is highly limited. The present intergovernmental conference of the member states, and particularly the Committee and Parliament's proposals resulting from their attitude to the conference's objectives, are univocal. First of all, the Union has to provide the effective mechanisms for its functioning with the expanded membership, and then a further membership expansion will take place.

4. Scope of the Effected Changes

1. During the period of the execution of social and political transformations, which started in 1989, practically every branch of the law was affected by more or less intensive changes. In comparison to the initial state and considering the fact that the new law has been frequently implemented by people accustomed to different practice of law application, it seems that a very important remodelling of the key branches of the law has been accomplished.

However, we should consider the fact that this is a social process connected with the general legal awareness of the society.

2. The conditions and foundations necessary for the system changes in important branches for the European Union's functioning have been created. The most significant of them include customs law, foreign exchange law, banking law, trade law, property protection (including copyright), anti-monopolistic law, trade protection and others.

3. The organizational bases, constituting a guarantee of adaptation processes, have been also developed. First of all, at the governmental level, the European Integration and Foreign Assistance Office has been created. Within the Centre's current reform, it is going to be transformed into the European Integration Committee – the organ coordinating the activities of the government's departments in adaptation processes and controlling the course of these activities. Special organizational units for the correlation of the internal law with the Union's regulations have been also set up.

4. Foreign assistance has been widely used in adaptation processes. Within various programmes financed by the Community (PHARE, TEMPUS, STUDER, etc.) or thanks to the cooperation with various associations and institutions (*e.g.* Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit, the J. Mone's Foundation, the Konrad Adenauer's Foundation, etc.), resources for the cadre education and the legal system's logistics have been obtained.

5. The clearly noticeable intensification of the Legislative Council's work regarding the evaluation and planning of the system changes, seems to be significant. The

Council's role in the creation of a new economic law and its function in the Committee for the Civil Law Reform seems to be particularly important.

5. Prospects for the Legal System Changes

1. As regards this area, it should first be noticed that the change of the legal system in Poland – a country which after several decades wants to be an equal partner in Europe – is an objective need. A democratic and stable country needs appropriate legal regulations which will provide the society with a guarantee of its proper development. Changes in this area should be made regardless of whether and when Poland will become a member of Europe's integrated economic and political system.

This objectiveness is additionally associated with the fact that our rightful place in the European family is declared to us within the Union. Having accepted the specific obligations in the Europe Agreement, we have been additionally stimulated to effect these changes. They will be observed and evaluated by the Union and the Community's member states. For Poland, it is an important evaluation of not only its intentions but also of practice.

2. However, it should be realized that in an accelerated process we are attempting to achieve what the others have been learning and implementing for over 40 years. It is up to us, to a large extent, how much we will manage to shorten the transformation period. It seems advisable to emphasize this fact because it looks as if the society has not been informed well enough that pursuing one's aim takes sacrifice. It regards both the "macrosphere" (e.g. handing over some elements of authority to be jointly regulated) and the direct-influence sphere (e.g. restrictions in the protection of weaker branches of economy, like automobile industry, steel industry, etc.). The above-mentioned, socially sensitive issues have to be handled fast and become socially acceptable in a period of time shorter than that which the Community's present member states had in the past.

3. It seems that not enough emphasis has been put on the social processes connected with necessary changes. It is worth trying to find a method to "accelerate" the execution of the system changes in connection with the Union standards, in a way which will be fully approved by the society. In other words, in spite of incomparably worse conditions, we should try to avoid tiring the society with the Union's problems, which is currently taking place in the member countries.

4. At the present stage, the following seem to be the most significant branches of the internal law in Poland, which need to be changed urgently referring at the same time to the experience of the Community's member states:

a) Constitutional Law

- the acceptance of the principle of primacy of the Community's law over the municipal law,
- the acceptance of the principle of a direct influence of some external standards on the national legal procedures,

– the adjustment of the “treaty-making power” question in accordance with the European standards;

b) Administrative Law

– the creation of local autonomy and sources of its financing,
– a territorial reform enabling regional policy by the decentralization of the authority power and creation of a possibility (within the obligatory internal law) to exercise authority also in beyond-the-border relations at the local level;

c) Civil Law

– the standardization of trade law,
– the principle of a national treatment clause for foreigners from the Community countries (equality in trade),
– changes in the regulations relating to trade security (mortgage, registered pledge, disclosure of business activities, etc.),
– the uniformity of labour law;

d) Finance and Banking Law

– the consolidation of the Central Bank’s autonomy,
– the consolidation of the banking system and its gradual opening to foreign capital, proportionally to increasing possibilities in the national financial and capital system,
– the creation of a stable taxation policy offering stronger preference to investors;

e) Social Benefits and Insurance Law

– a radical change of the model from the centralized quasi social insurance tax into commercial or corporate social insurance funds,
– the stimulation of unemployment elimination policy through preference for the self-employed and those creating new jobs,
– the objectification of the conditions for using social welfare and transferring the responsibility for the social welfare provision from the state to territorial self-governments, charity organizations, churches, etc.

The mentioned scope of legal transformations gives a preliminary picture of an enormous amount of work which awaits us in the nearest future. The necessary changes in the procedures of justice and administration systems, which presently hardly follow the transformations and new tasks, have been omitted here.

Concluding this short presentation, I would like to share one more reflection with you. As I have already mentioned, the process of transformations of the legal system in Poland is objectively indispensable. Regardless of whether we will join the Union in five or ten years, a democratic law-abiding state which tends toward a modern state with a wealthy society is, in any case, subject to the standards accepted in Europe. We are presently facing this sort of opportunity and we should not miss it. It is unques-

tionable that a mobilizing factor for us is the European Union which, while helping in the process of transformation, also evaluates its effects. A visible political persistence in aiming at the Union's membership should be accompanied by a fully conscious, thoroughly planned and society-oriented practice of the state organs. It is high time we followed the truth contained in a Chinese proverb saying that one should promptly take up a challenge rather than avoid facing hardships.

Das Recht auf Kulturgüter in den westlichen und nördlichen Gebieten Polens

JAN PRUSZYŃSKI

*„Wer kann in dieser Welt schon was sein eigen nennen:
Was heute dir gehört, füllt morgen fremde Tennen,
Erst ist es meins, dann deins, und dann gehört es allen,
Indes wir wie das Baumblatt welk nach unten fallen”*

(Jan Kochanowski – Dryas Zamchana – 1578)¹

1. Einleitung

Wem gehören Kulturgüter – historische und Kunstgegenstände, die in vergangenen Zeiten von einer Nation hergestellt wurden, nach politischen Veränderungen eine andere Zugehörigkeit haben und nun einem anderen im Rechtssinne gehören? Diese Frage muß ganz allgemein gestellt werden, nicht nur der geraubten Kunstschatze wegen.

Das Problem wird noch schwieriger, wenn Gegenstände ohne klaren Eigentumsstatus einen Teil des kulturellen Erbes eines Volkes darstellen, zu dessen Identität beigetragen haben, also zu diesem *de facto* kulturell gehören. Allerdings würde die Anwendung dieses Gedankens ohne gegenständliche, zeitliche und territoriale Einschränkung und ohne Beachtung des Rechtes eines Staates zur Regelung durch nationales Vermögensrecht komplizierte Rechtsstreitigkeiten auslösen, man denke etwa an Beweisführung und Anspruchskonkurrenzen.

Auf dem Weg der Normalisierung der polnisch-deutschen Beziehungen scheint das Problem der deutschen öffentlichrechtlichen und zivilrechtlichen Ansprüche auf Kulturgüter unlösbar – auf Kulturgüter, die auf den von Polen auf Grund internationaler Vereinbarungen wiedergewonnenen Gebieten zurückgelassen wurden. Diese Gebiete – Schlesien, Westpommern, Ermland und Masuren – fielen nach dem Willen der vertragsschließenden Seiten Polen zu, und zwar sowohl auf Grund historischer Umstände als auch teilweise als Entschädigung für die an die Sowjetunion verlorenen Ostgebiete der II. Republik im heutigen Litauen, in Weißrußland und in der Ukraine – Gebiete, die von der Sowjetunion im Jahre 1939 *manu militari* besetzt wurden. Ohne dieser politischen Entscheidung der Großmächte hier nachgehen zu können, muß

¹ Übersetzt von Karl Dedecius.

festgestellt werden, daß infolge der Ergebnisse der Potsdamer Konferenz² vom 2. August 1945 der polnische Staat der Souverän auf jenen Gebieten wurde, die früher dem Dritten Reich angehörten, mit allen Folgen im Bereich der Eigentumsrechte³.

Der Eigentumserwerb ist also primär und unentgeltlich erfolgt und ist damit frei von Belastungen und unmittelbaren Entschädigungspflichten. Ein Teil aber des auf diese Weise erworbenen Vermögens hat den Charakter von Kulturgut, das heißt, es handelt sich um Kunst- und altertümliche Gegenstände, Archiv- und Bibliotheksbestände mit historischem, künstlerischem und wissenschaftlichem Wert⁴.

Einer Erläuterung und Begründung ihrer Rechtmäßigkeit bedürfen vor allem jene Regelungen über das Eigentum an Kulturgütern, deren juristische sowie politische Ursachen und Voraussetzungen in der Politik Deutschlands gegenüber den in den Jahren 1939 bis 1945 besetzten polnischen Gebieten liegen – mit allen Konsequenzen im Kulturbereich.

2. Art und Charakter des Eigentums

Zu den Bestandteilen des in das Eigentum des polnischen Staates in den West- und Nordgebieten übergegangenen Eigentums gehört im Ganzen das physisch bestehende Hab und Gut

- a) des Deutschen Reiches und der ehemaligen Freien Stadt Danzig;
- b) der Bürger des Deutschen Reiches und der ehemaligen Freien Stadt Danzig mit Ausnahme von Personen polnischer Volkszugehörigkeit und solcher, die von Deutschen verfolgt wurden;
- c) deutscher und Danziger juristischer Personen mit Ausnahme von juristischen Personen des öffentlichen Rechts;
- d) der Gesellschaften, die von deutschen oder Danziger Bürgern bzw. durch die deutsche oder Danziger Verwaltung kontrolliert wurden;
- e) von Personen, die zum Gegner übergelaufen sind⁵.

Dieses Hab und Gut trug den Charakter eines verlassenen, wenn sein Besitz infolge des am 1. September 1939 begonnenen Kriegs den Eigentümern, deren Rechtsnachfolgern oder Vertretern bzw. dritten Personen verloren ging und später nicht wiedergewonnen wurde⁶. Aus diesem Hab und Gut wurde aufgegebenes Gut⁷ ausgesondert,

² *Zbiór Dokumentów* (Sammlung von Dokumenten) 1946, Nr. 1/4, Warszawa 1946, und Nr. 12/15 (Dok. 43, S. 426).

³ Ein Teil der deutschen Doktrin vertrat den Standpunkt, daß diese Gebiete sich infolge des Vertrags nur „unter polnischer Verwaltung“ befanden.

⁴ Nach in den dreißiger und vierziger Jahren verbreiteten Ansichten von Kunsthistorikern hatten einen solchen Wert nicht die architektonischen Bauten, die nach 1855 entstanden, und auch nicht solche Kunstgegenstände, die als Nachahmungen gelten und nach diesem Datum hergestellt wurden.

⁵ Erlaß vom 8.3.1946 über verlassenes und ehemals deutsches Vermögen – Art. 2 Abs. 1 a–e. *Dz. U.* (poln. GBl) Nr. 13, Pos. 87.

⁶ Im Sinne des Erlasses vom 2.3.1945 über verlassenes und aufgegebenes Vermögen – Art. 1 § 1 (*Dz. U.* Nr. 9, Pos. 45) und des Gesetzes vom 6.5.1945 über verlassenes und aufgegebenes Vermögen – Art. 1 § 1 (*Dz. U.* Nr. 17, Pos. 97), und des Erlasses vom 8.3.1946 – Art. 1.1 (siehe Fn.5).

⁷ Art. 2 § 1 des Erlasses vom 2.3.1945 und Gesetz vom 6.5.1945 (vgl. Anm. 6).

d.h. solches, das zum Zeitpunkt des Inkrafttretens der den Charakter dieses Guts regelnden Vorschriften von den Organen der staatlichen oder kommunalen Verwaltung noch nicht erfaßt worden war.

Außerdem sahen getrennte Vorschriften⁸ eine Beschlagnahme des Vermögens von Personen vor, die durch rechtskräftiges Urteil eines Strafgerichts⁹ wegen Kriegsverbrechen verurteilt wurden. Der Erlaß vom 8. März 1946¹⁰ bestimmt die Bestandteile des Vermögens, das auf Grund des bestehenden Rechts in das Eigentum entsprechender polnischer juristischer Personen übergang, mit Ausnahme des von der ehemaligen Besatzungsmacht vereinnahmten oder beschlagnahmten bzw. vor dem 1. September 1939 unter Drohung¹¹ veräußerten Hab und Guts.

Entsprechende Anwendung fanden die Vorschriften der Erlasse über die Durchführung der Landreform vom 6. September 1944¹², über die Verwaltung der wiedergewonnenen Gebiete vom 13. November 1945¹³ sowie über die Landstruktur und das Siedlungswesen im Bereich der wiedergewonnenen Gebiete und der ehemaligen Freien Stadt Danzig vom 6. September 1946, die, indem sie im Grundsatz die Probleme der Übernahme des Liegenschaftseigentums regeln, einen direkten Einfluß auf die beweglichen Bestandteile des diesem angehörigen Hab und Guts hatten. Eine grundsätzliche Bedeutung hatte dabei die Feststellung des Eigentumscharakters der Güter, die sich zum Zeitpunkt des Inkrafttretens der genannten Vorschriften auf dem zuständigen Verwaltungsgebiet befanden. Eine präzise Trennung des verlassenen und aufgegebenen Guts, sowohl eines solchen, dessen bisherige Eigentümer festgestellt werden konnten als auch des Guts mit unbestimmtem Eigentumsstatus, und die Feststellung, daß dieses Vermögen nicht das Hab und Gut von „juristischen Personen des öffentlichen Rechts“ ist, sind in der Mehrzahl der Fälle in bezug auf Mobilien, vor allem aber des beweglichen Guts mit historischem Charakter, unmöglich gewesen.

Zum historischen Bestand an Kulturgütern, die auf den Gebieten von Schlesien, Westpommern, des Ermlands und Masuren zurückgelassen wurden, gehören

⁸ PKWN-Erlaß (in der UdSSR erfaßtes „Polnisches Komitee der Nationalen Befreiung“) vom 31.8.1944 über das Strafmaß für faschistische und Hitler-Verbrecher (*Dz. U. Nr. 4*, Pos. 16 mit Änderungen – *Dz. U. Nr. 7*, Pos. 29). Vgl. J. S a w i c k i, B. W a l a w s k i: *Zbiór przepisów specjalnych przeciwko zbrodniarzom hitlerowskim i zdrajcom narodu. Komentarz* (Sammlung der Sonderrechte gegen Hitlerverbrecher und Verräter. Kommentiert), Warszawa 1945, S. 14 u. 17.

⁹ Die Beschlagnahme umfaßte auch das Vermögen von Personen, die durch den Nürnberger Gerichtshof verurteilt wurden. Sie betrifft also auch die Flugzeugsammlung von H. Goering, gegenwärtig aufbewahrt im Museum in Czyżyny bei Krakau.

¹⁰ Er hob die früheren in Anm. 6 erwähnten Vorschriften auf.

¹¹ Z. B. auf Grund der deutschen *Verordnung vom 15.9.1939 über die Beschlagnahme des Vermögens des früheren polnischen Staates innerhalb des GG* (VBl.GG, S. 37), die die Übernahme des „gesamten Vermögens des ehemaligen polnischen Staates in das Eigentum des Reichs“ bestimmt, der dazugehörenden *Einführungsverordnung vom 16.3.1940* (VBl.GG, S. 209), die die Herausgabe von Kunstgegenständen unter Strafandrohung fordert, wenn sie die in der *I. Ausführungsverordnung vom 15.1.1940* (VBl.GG, Teil II, S. 61) vorgesehenen Qualifikation entsprechen, und auch auf Grund der *Prisengerichtsordnung und Prisenerordnung* (RGebl., S. 1589, 1593), die das „neutrale oder feindliche Eigentum nach Staatsangehörigkeit des Eigentümers“ bestimmt.

¹² Einheitsl. Text *Dz. U.* 1945, Nr. 3, Pos. 13.

¹³ *Dz. U.* Nr. 51, Pos. 295 – in Kraft getreten am 27.11.1945.

- a) unbewegliche Objekte von anerkanntem historischen Wert;
- b) die Ausrüstung und Einzelheiten des Verputzes dieser Objekte;
- c) Gegenstände, die in dem genannten Gebiet zeitweise aufbewahrt wurden oder sich dort befanden.

Aus diesem Bestand wurden Objekte ausgesondert, die während der Kriegshandlungen oder nach deren Beendigung fortgeschafft wurden. Sie können aufgeteilt werden in

- a) Gegenstände, die von deutschen Behörden deponiert worden waren;
- b) Gegenstände, die von den Deutschen während des Rückzugs fortgeschafft wurden;
- c) Gegenstände, die auf Grund des „Beuterechts“ von der Sowjetarmee übernommen wurden;
- d) Gegenstände, die von der sowjetischen Militärverwaltung auf Grund der Beschlüsse über die Realisierung des Rechts auf Entschädigung fortgebracht wurden.

Kunstgeschichtlich erfüllte ein bedeutender Teil der Objekte, die heute dem Denkmalschutz unterliegen würden, damals nicht die dafür geforderten Kriterien. Dies waren vor allem nach 1855 entstandene Architektur sowie Einzelheiten von Ausrüstung und Verputz. Der Schutz wurde damit Objekten versagt, die neoromanische, neogotische und sog. eklektische Merkmale aufwiesen, Objekten im Jugendstil sowie neueren Erzeugnissen, vor allem Gebrauchsgegenständen wie etwa Möbeln und Handwerks-erzeugnissen, auch des Kunsthandwerks.

Neben Objekten, die sich in situ befanden, also historisch zu den Liegenschaften gehörten oder einen Teil von Sammlungen bildeten, fanden sich in den westlichen und nördlichen Gebieten Polens Gegenstände, die von den deutschen Behörden aus dem Reichsgebiet dorthin gebracht worden waren, um sie in Schlössern und Klöstern sowie in besonderen Verstecken und Bunkern – von der deutschen Verwaltung zunächst bewacht – vor den Folgen von Bombenangriffen zu schützen, die aber bei der Flucht aus dem Gebiet aufgegeben wurden. Außerdem wurden besonders nach Schlesien in neu errichtete Museen Objekte gebracht, die einen Beweis für die sogenannte urdeutsche Anwesenheit erbringen sollten. Andererseits wurden häufig sehr wertvolle Objekte an andere Stellen verbracht, z.B. für das geplante Museum in Linz, gedacht als ein Denkmal des siegreichen Dritten Reiches, oder in Sammlungen von NS-Parteifunktionären.

Während des Rückzugs der deutschen Armee wurde ein Teil der historischen Objekte, die in Vorkriegs-Bestandsverzeichnissen erfaßt waren, in den Westen gebracht, andererseits fanden sich in den Lagerstätten von Schlesien und Pommern unter Denkmalschutz stehende Objekte von höchstem Wert, die vorher von der NS-Besatzungsmacht in den besetzten Gebieten Polens, vor allem in Warschau nach dem Niedergang des Warschauer Aufstands im Jahre 1944, geraubt worden waren. Art und Ausmaß des Schutzes am Ort der Aufbewahrung oder beim Transport waren sowohl durch politische Bedingungen als auch durch die Leistungsfähigkeit der Verwaltungsorgane begrenzt.

3. Politische Rahmenbedingungen und Verwaltungsregelungen

Die Grenzveränderungen im Ergebnis der Potsdamer Konferenz wurden nicht sofort wirksam. Die Gebiete, die in Abhandlungen in den Jahren 1944 bis 1945 als „gefordert“ bezeichnet wurden, sind von der sowjetischen Verwaltung als Territorium des Gegners behandelt worden. Da in Potsdam festgelegt wurde, daß die Sowjetunion ihre Entschädigungsforderungen durch „Ausfuhr entsprechender Gegenstände aus der sowjetischen Besatzungszone und aus dem sich im Ausland befindenden deutschen Vermögen“ befriedigen wird – wurde als solches das in Schlesien und Pommern vorgefundene Hab und Gut angesehen. Die sowjetische Militärverwaltung und einzelne Angehörige der Streitkräfte haben als Kriegsbeute bzw. als Vermögen, das ihnen als Entschädigung für Kriegsschäden zusteht, jeden nach eigenem Gutdünken geeigneten Gegenstand angesehen, unabhängig vom historischen oder Gebrauchswert. Außerdem war deren Handlungsweise – vor dem Hintergrund der Grausamkeiten des Krieges und der deutschen Besatzung teilweise gerechtfertigt – von Rachegedanken getragen und führte auch zur Zerstörung historischer Objekte.

Angesichts der durch die Sowjetmacht politisch begrenzten Souveränität hatten der polnische Staat und die polnische Verwaltung der wiedergewonnenen Gebiete keinerlei Möglichkeiten einzugreifen. Überdies war man nicht gewillt, die sowjetischen Handlungen zu kontrollieren, wenn Gegenstand des Raubes Hab und Gut war, das Polen auf Grund internationaler Vereinbarungen zustand, ja sogar, wenn es sich evident um polnische Güter handelte, die von den Deutschen in Zentralpolen geraubt worden waren.

Auch ist zu berücksichtigen, daß die Potsdamer Beschlüsse insofern eine kuriose Situation hervorriefen, als Polen anstelle des Rechts auf unabhängige Entschädigungen solche Ansprüche aus dem gemeinsamen Reparationskontingent befriedigen sollte, über das die Sowjetunion verfügte. Diese bestimmte darüber nach Art und Höhe, und die durch Erlaß des in Moskau tätigen „Polnischen Komitees der Nationalen Befreiung“ zuständigen Behörden erklärten sich ohne Widerspruch einverstanden.

Die Übernahme des Territoriums, das damals als „wiedergewonnene Gebiete“ bezeichnet wurde, war mit einer Bevölkerungsmigration von bisher unbekanntem Ausmaß verbunden. Vor der herannahenden Front flohen ca. 4 Millionen Menschen aus den besetzten polnischen Gebieten und aus den Polen zuerkannten ehemaligen Gebieten des Dritten Reiches oder wurden von den deutschen Behörden evakuiert. Eine organisierte Deportation der Deutschen begann am 1. Oktober 1945, aber nur bis zur Grenze der sowjetischen Besatzungszone, wo die Transporte den sowjetischen Behörden übergeben wurden. Aus Dokumenten geht hervor, daß bis Mitte 1946 in organisierten Transporten ca. 250.000 Menschen Schlesien und 100.000 Pommern verlassen haben. Obwohl die sowjetische Militärverwaltung in Deutschland die Genehmigung für die Ausfuhr z.B. von Büchersammlungen erteilte, schränkten doch Anweisungen bei der Repatriierung ein auf „Gepäck, das die physischen Kräfte eines Rücksiedlers nicht überschreitet“ (in der Praxis ca. 50 kg pro Person) und begrenzten so die Ausfuhr von anderen Gegenständen als nur der persönlichen. Fälle der Mitnahme von

historischen Objekten, mit Ausnahme von persönlichem Schmuck, den man formell mit sich nehmen konnte, sind unbekannt.

Gleichzeitig wurden in diese Gebiete unter extrem schwierigen Bedingungen polnische Bürger aus den ehemaligen Ostgebieten der Republik Polen umgesiedelt wie auch Personen, die vorher in die UdSSR deportiert worden wurden, und ehemalige Angehörige der Armee. Vom 2. Februar 1945 an wurde die zeitweilige Verwaltung der West- und Nordgebiete aufgebaut: das Büro für die Westgebiete, das Amt des Generalbevollmächtigten für die sogenannten „wiedergewonnenen Gebiete“, eingerichtet am 11. April 1945 durch den Minister für öffentliche Verwaltung, und das Ministerium für wiedergewonnene Gebiete, das durch Erlaß vom 13. November 1945 gegründet wurde und dessen Zuständigkeit auch „die Verwaltung des ehemals deutschen Vermögens“ umfaßte. Diese Organe arbeiteten mit dem auf Grund des Erlasses vom 2. März 1945 über verlassenes und aufgegebenes Vermögen gegründeten Hauptamts der Provisorischen Staatsverwaltung beim Minister für den Staatshaushalt und mit dem Haupt-Liquidationsamt sowie dessen Bezirks-Außenstellen zusammen, die durch Erlaß vom 8. März 1946 über verlassenes und aufgegebenes Vermögen ins Leben gerufen wurden.

Das Rundschreiben Nr.4553 des Leiters der Abteilung für die Verfügung über nichtlandwirtschaftliches Vermögen im Siedlungsdepartement des Ministeriums für öffentliche Verwaltung¹⁴ enthielt Empfehlungen für die Regelung der Eigentumsbeziehungen der Siedler. Die Anweisung für die Verwaltungsbehörden über die Repatriierung der deutschen Bevölkerung aus den Grenzen des polnischen Staates¹⁵ gebot den Wojewodschafts- und Kreisbehörden, besonders darauf zu achten, daß die Aussiedlung der Deutschen nach Möglichkeit mit der Ansiedlung polnischer Siedler in den ehemaligen deutschen Objekten harmonisiert wird, um das zurückgelassene Gut vor Zerstörung und Plünderung zu schützen. Gleichzeitig wurde empfohlen, daß *„wertvolles Gut wie Sammlungen von Kunst- und ähnlichen Gegenständen in Amtsräumlichkeiten nach vorhergehender protokollarischer Aufnahme und Beschreibung sichergestellt wird“*. Da das Vermögen der ehemaligen deutschen Kommunalverwaltung auf Grund des Art.2 Abs.4 des Erlasses vom 8. März 1946 in das Eigentum „entsprechender polnischer juristischer Personen“ überging, unterlag es nicht den Vorschriften des ausschließlich den Übergang in das Vermögen des Staatsaushalts regelnden Erlasses vom 6. Dezember 1946 über die Übernahme des nicht landwirtschaftlichen Vermögens in den wiedergewonnenen Gebieten und der ehemaligen Freien Stadt Danzig durch den Staat. Da Verfahrensakten der nicht landwirtschaftlichen Siedlungskommission und der Klassifizierungs- und Schätzungskommission, die durch Ausführungsverordnung zu diesem Erlaß¹⁶ ins Leben gerufen wurden, nicht vorhanden sind, kann man den Charakter des übergebenen Guts nicht feststellen, insbesondere auch nicht die historischen Bestandteile. Angelegenheiten,

¹⁴ AAN – Archiv, Gruppe Minist.f.öffentl.Verw. (Min.Adm.Publ.), Mappe 1171.

¹⁵ AAN – Archiv, Gruppe wie Anm.25, Mappe 758, S. 17.

¹⁶ Vom 7.5.1947, Dz. U. Nr. 39, Pos. 195.

die deren Schutz betreffen, fielen in die Zuständigkeit des Ministeriums für Kultur und Kunst.

4. Die Tätigkeit der Denkmalschutzverwaltung

Im organisatorischen Rahmen der Hauptdirektion der Museen und des Denkmalschutzes des Ministeriums für Kultur und Kunst¹⁷ wurde 1945 die Abteilung III – das Büro für Rückforderungen und Entschädigungen – geschaffen. Dieses Büro befaßte sich mit Problemen der Rückforderung von geraubtem Kulturgut und leitete die Tätigkeit von Beauftragten für Angelegenheiten der Rückforderung. Es arbeitete mit dem Büro für Kriegsentschädigungen beim Präsidium des Ministerrats und mit den zuständigen Ministerien zusammen¹⁸. Begründete¹⁹ Ansprüche betrafen nicht nur die Rückgabe polnischer historischer Kunstschatze, die aus Museen, öffentlichen und privaten Sammlungen sowie aus Kirchen in Polen geraubt worden waren, sondern auch die sächliche Wiedergutmachung für den Fall, daß ein Kulturgut verlorengegangen oder zerstört war, d.h. durch Zuerkennung von Ersatzobjekten.

Dies sollte weder eine Vergeltungsmaßnahme sein noch ein Akt der natürlichen Kontribution (*restitution in kind*) vielmehr der Ausgleich für Verluste, die durch bewußtes und gewolltes Handeln Deutschlands zu Lasten der polnischen Nationalkultur entstanden waren. Die ersten Rückforderungsaktionen in Schlesien und Pommern²⁰ brachten nicht nur wertvollste polnische Bestände zurück, sie sicherten auch die zurückgelassenen vormals deutschen Sammlungen. Wie aus einem Schreiben des Direktors des Nationalmuseums an den Minister für die wiedergewonnenen Gebiete vom 3. Juni 1946 hervorgeht²¹, wurden aus „*Museumslagern Schlesiens 13 Waggons mit Objekten nach Warschau gebracht*“, und aus Niederschlesien wurden schon im Jahre 1945 in das Nationalmuseum 28 Lastkraftwagen und 118 PKW mit historischem Kulturgut gebracht²². Das war gerechtfertigt sowohl vor dem Hintergrund der Vernichtung von 90% der Bestände des Nationalmuseums als auch angesichts der von der damaligen Leitung des Kulturministeriums vertretenen Konzeption der Zentralisierung

¹⁷ Beschluß des Ministerrats vom 13.2.1945 und Verordnung des Min.f.Kultur und Kunst vom 25.7.1946, *Dz.Urząd. MKiS* (Amtsblatt des Min.f.Kultur u.Kunst) Nr. 3; vgl. J. P r u s z y ń s k i: *Ochrona zabytków w Polsce* (Denkmalschutz in Polen). Warszawa 1989, S. 130–131 und 137–147.

¹⁸ Vgl. K. S r o c z y ń s k a: *Rewindykacja dzieł sztuki* (Herausgabe von Kunstobjekten), in: *Materiały do zagadnień muzealnictwa i konserwatorstwa polskiego w latach 1944–1963* (Zu Problemen der Museologie und Denkmalpflege in Polen 1944–1963). Warszawa 1968.

¹⁹ Vgl. W. B o r o w y: *Tezy ogólne rewindykacji i odszkodowania w dziedzinie kultury i sztuki* (Allgemeine These zur Herausgabe und Entschädigung im Bereich von Kultur und Kunst) und W. Suchodolski: *Zagadnienie prymatu strat kulturalnych w ogólnym programie odszkodowań* (Der Vorrang der Kulturentscheidigungen im allgemeinen Entschädigungsprogramm). Beide Arbeiten Warszawa 1945. MKiS, BRiO Schreibmaschinentext, AAN – Archiv MKiS 387, Mappe 74).

²⁰ Vgl. J. P r u s z y ń s k i: op. cit., S. 139, 149–154.

²¹ AAN – Archiv Gruppe Min.Ziem Odz. Nr. 79, S. 21.

²² Vgl. Gruppe MKiS in ANN – Archiv Nr. 387 und St. L o r e n t z: *Walka o dobra kultury* (Der Kampf um Kulturgüter), Warszawa 1970. Zum Vergleich: Allein die Gruppe Rosenberg hatte 137 Waggons (4174 Kisten) mit Kulturgütern ins Reich verschickt. Vgl. den Bericht von R.Scholz in den Akten des Nürnberger Gerichtshofs. Bericht vom 1.10.1946; auch Mezyński A.: *Kommando Paulsen*, Warszawa 1995.

und Spezialisierung von Beständen. Die in Bozkow (ehem. Eckersdorf), Henryków (Heinrichau), Karpacz (Krummhübel), Lagów (Lagow), Namysłów (Namslau), Oliwa (Oliva), Sopot (Zoppot) und Zelazno (Eisersdorf) sowie später noch in Kozłówka in Zentralpolen gebildeten Museumslager wurden zu provisorischen Sammlungen, häufig aber auch zu Orten der zufälligen Verteilung des historischen Guts²³. Oft waren ideologische Gründe dafür ausschlaggebend, ob die Objekte für „Staatsgebäude mit besonderer Bedeutung“²⁴, für den Verkauf oder sogar die physische Zerstörung vorgesehen wurden. Im Vergleich dazu erging es den schlesischen Bestände weder besser noch schlechter als den Objekten des sogenannten „ehemaligen Hofguts“²⁵, über das in einer Verordnung des Ministers für Landwirtschaft und Bodenreform vom 1. März 1945²⁶ verfügt wurde, daß „Gegenstände mit wissenschaftlichem, künstlerischem und musealem Wert“ ohne gesetzliche Vollmacht konfisziert werden konnten.

5. Aspekte der Verantwortlichkeit für fremde Kulturgüter

Die politischen Vorgaben, aus Polen einen ethnischen Staat zu schaffen und deutsche Spuren zu verwischen, verursacht durch besonders grausames Verhalten der Deutschen gegenüber dem polnischen Volk während des Zweiten Weltkrieges und der Besatzungszeit, ließen es nicht zu, daß Gegenstände mit deutlichen deutschen Merkmalen²⁷ geschützt wurden, obwohl diesen an sich dieser Schutz zugestanden hätte.

Man darf aber nicht vergessen, daß *„drei Generationen von Polen als Folge der deutschen Vernichtungen ein kümmerliches kulturelles Leben mit übergroßen Anstrengungen führen werden“*, wie damals Professor Wacław Borowý schrieb²⁸. Seine Argumente sind zutreffend: *„Mit der Entfaltung des Krieges haben sich die Deutschen das Ziel nicht nur der Vernichtung des polnischen Staats, sondern vor allem der zahlenmäßigen Dezimierung des polnischen Volks gestellt (...). Das letztgenannte Ziel war vor allem mit dem Kampf gegen die polnische Kultur verbunden; dieser Kampf wurde während der ganzen Besatzungszeit von den deutschen Behörden außergewöhnlich planmäßig und konsequent geführt. Um die inneren Kräfte Polens zu schwächen, griff die deutsche Verwaltung vor allem polnische kulturelle Werte an“*²⁹.

Hier geht es sowohl um in ihrem Wesen rechtswidrige Rechtsakte für die besetzten polnischen Gebiete als auch um offenkundigen Raub. Dieser Raub in Verbindung mit

²³ Vgl. J. Pruszyński: op. cit. S. 154–156.

²⁴ Vgl. Rundschreiben des MKiS vom 7.6.1949 über die Sicherstellung des ehemaligen deutschen Hofguts. Dz.Urz.MKiS Nr. 4, Pos. 60.

²⁵ Die polnischen Landbesitzer waren nach der aus der UdSSR übernommenen Ideologie als „Klassenfeinde“ enteignet worden.

²⁶ Dz. U. Nr. 10, Pos. 51.

²⁷ Der Begriff „deutsche Merkmale“ wurde auf alle Kulturgegenstände mit deutschen Kennzeichen ausgedehnt, darunter schlesische Epitaphie aus dem 16. bis 18. Jahrhundert, Grabstelen, Archiv- und Bibliotheksbestände, die lange vor der Machtergreifung der Nationalsozialisten entstanden waren.

²⁸ W. Borowý, bekannter Philologe und Bücherfreunde, Sachverständiger für Rückgabeansprüche. Tezy ogólne do rewindykacji i odszkodowań w dziedzinie kultury i sztuki (Zur Rückgabe und Entschädigung im Kultur- und Kunstbereich. Einleitung). Warszawa 1945 (zitiert nach AAN – Archiv, Gruppe 387/74, S. 6).

²⁹ Ausarbeitung über Kriegsverluste. AAN – Archiv, Gruppe BRiO Akten 387, Mappe 17.

einem hohen Maß an böartigem Willen, in totalem Widerspruch zu Sitte und Moral³⁰ wie auch zu den Grundsätzen der internationalen Gesetzgebung, wurde zu Recht von Prof. Nahlik als „*internationales Verbrechen*“ bezeichnet³¹. Die Gründlichkeit der „Sonderaktion“³² gegen die polnische Kultur hatte insgesamt einen Geist der Vergeltung hervorgerufen, ohne jede Unterscheidung. Alles wurde „deutschfaschistisch“ genannt und sollte spurlos verschwinden. Sosehr für die aus den ärmsten und am wenigstens gebildeten Schichten³³ stammenden Umsiedler aus den ehemaligen östlichen Gebieten Polens die historischen Kunstwerke nur fremd waren und bloße Gleichgültigkeit hervorriefen, so war dies für die Mehrheit des Volkes nicht der Fall, das auf welche Art auch immer unter der Besatzungsmacht allzu schwer gelitten hatte. Hinzu kam „*die Nichtrespektierung der wesentlichen Grundsätze des internationalen Rechts gegenüber Polen, ...die Anwendung drakonischer Rechtsvorschriften, die absolute Willkür der deutschen Verwaltung*“³⁴, was für Polen unverhältnismäßig hohe Kriegsschäden und Verluste bedeutete³⁵.

Grundlage für die Höhe von Kriegsentschädigungen, die Polen nur unvollständig erhielt, waren nur die Vermögensverluste, ohne Berücksichtigung der Schäden, die infolge der Verringerung des Nationaleinkommens und der Arbeitsleistung entstanden, vor allem aber ohne Berücksichtigung der kulturellen Verluste.

Der Verzicht Polens auf Entschädigungen, im Jahre 1953 erklärt infolge der Errichtung der Deutschen Demokratischen Republik aus der sowjetischen Besatzungszone im Jahre 1949, führte dazu, daß man das Sammeln von Informationen einstellte, die für Rückforderungen von Bedeutung gewesen wären, ferner daß man das Büro für Rückforderungen und Entschädigungen auflöste und – noch bedeutsamer – das Archiv dieses Büros vernichtete. Nur ein kleiner Teil dieses Archivs blieb bis heute bestehen³⁶.

³⁰ Als Beispiel: Unter den von den Soldaten der Wehrmacht mitgeführten persönlichen Dokumenten war eine Regel im Verhaltenskodex, wonach Kulturgegenstände von besonderer historischer Bedeutung sowie Gebäude, die religiösen Zielen, der Kunst, Wissenschaft und Wohltätigkeit dienen, mit besonderer Achtung zu behandeln sind. Dies stand im Gegensatz sowohl zu den rechtlichen Regelungen als auch zur Praxis der Besatzungsbehörden.

³¹ Mit diesem Terminus hatte St. Nahlik das deutsche Vorgehen gegen die polnische Kultur bezeichnet: op. cit. S. 47–55.

³² Dieser Begriff war erstmals für die heimtückische Verhaftung von Universitätsprofessoren in Krakau im Jahre 1939 verwendet worden.

³³ Es sei daran erinnert, daß der gebildete und reichere Teil des Volkes in diesen Gebieten sowohl von sowjetischen als auch von Hitler-Behörden ausgelöscht wurde.

³⁴ Vgl. *Gesetz vom 2.9.1939 über die Vereinigung der Freien Stadt Danzig mit dem Deutschen Reich* (RGBl.S.1547); *Erlaß vom 8.10.1939 über die Gliederung und Verwaltung der Ostgebiete* (RGBl.D.2042); *Erlaß über die Verwaltung der besetzten polnischen Gebiete* (RGBl.D.2077). Vgl. auch St. K a n i a: „Stosunek faszyzmu hitlerowskiego do kultury polskiej“ (Das NS-Verhältnis zur polnischen Kultur) und R. F u c h s: „Działalność das Ahnenerbe w zakresie grabieży dzieł polskiej kultury narodowej“ (Das Wirken des Ahnenerbe im Raub der polnischen Kulturgüter), beide in: Cz. P i l i c h o w s k i: *Zbrodnie i sprawcy* (Verbrechen und Täter). Warszawa 1980: op. cit. Auch J. P r u s z y ń s k i: op. cit., S. 110–114 und 119–124.

³⁵ Vgl. *Zestawienie strat i szkód wojennych Polski w latach 1939–1945. Mat. Biura Odszkodowań Wojennych przy Prezydium Rady Ministrów* (Kriegsschäden und Verluste Polens 1939–1945. Mat. des Büros für Kriegsentschädigungen beim Präsidium des Ministerrates), AAN – Archiv, Gruppe BOW, Mappe 10 und Gruppe MKiS 387/46.

³⁶ AAN – Archiv Gruppe des Büros für Rückforderungen und Entschädigungen. Vernichtet wurde die ab 1945 geführte Kartei mit Informationen über Bestände, die von den Deutsche Behörden und der Roten Armee beiseitegeschafft wurden. AAN – Archiv Gruppe MKiS 387, Mappe 34 – 296 Karten.

Ähnlich ungenau ist die Dokumentation der Museumseingänge in den ersten Nachkriegsjahren, so daß man vermuten kann, daß ein Vertuschen des Ursprungs mancher Gegenstände, die in die Museen aus dem Hofgut oder den ehemaligen deutschen Beständen kamen, kein Zufall, sondern durch politische Umstände begründet war. Dies führte sehr häufig dazu, daß die Suche nach Gegenständen unmöglich wurde, die kraft des Gesetzes in den ersten Nachkriegsjahren angeeignet wurden.

6. Standpunkte des polnischen Volksanwalts und des Obersten Gerichtshofes

Die Beurteilung des Erlasses vom 8. März 1946 und der ihm vorausgehenden Vorschriften führt zu dem Ergebnis, daß der polnische Staat bei der Ausübung der Staatsgewalt über Gebiete, die auf Grund internationaler Abkommen schon damals zu ihm gehörten, nicht nur das Recht, sondern auch die Pflicht hatte, in bezug auf die eigenen Bürger die Rechtsverhältnisse des verlassenen und ehemals deutschen Hab und Guts wie auch anderer Bestandteile des öffentlichen Vermögens zu regeln.

Diesen Standpunkt nahm auch der polnische Volksanwalt für Bürgerrechte ein. In einem Gutachten kam er zu dem Ergebnis, daß *„die vom Gesetzgeber angenommenen gesetzlichen Lösungen eine Folge und Konsequenz des von Hitlerdeutschland ausgerufenen Kriegs sind, in dessen Folge der polnische Staat und dessen Bürger riesige Opfer und materielle Verluste hinnehmen mußten. Die Übernahme des ehemaligen deutschen Hab und Guts stellte nur eine teilweise Kompensation für die erlittenen Verluste dar“*³⁷.

In Bezug auf das verlassene Vermögen gewährleistete der Erlaß vom 8. März 1946 jenen Personen einen Besitzschutz, die diesen Besitz infolge des 1939 begonnenen Kriegs verloren hatten. Teil III des Erlasses – *„Wiedereinräumung des verlassenen ehemaligen Besitzes“* – sah dafür ein besonderes gerichtliches Verfahren bis zum 31. Dezember 1947 vor. Diese Frist wurde durch Erlaß vom 28. Oktober 1947 bis zum 31. Dezember 1948 verlängert³⁸. Zu einem späteren Zeitpunkt war eine privatrechtliche Klage auf Wiedereinräumung des Besitzes möglich, jedoch mit der Möglichkeit der Verjährung der Ansprüche. Art.34 Abs.1 des Erlasses vom 8. März 1946 bestimmte, daß *„der Staatshaushalt und die Gebietskörperschaften mit Selbstverwaltung nach Verjährung im Wege der Ersitzung das Eigentum am verlassenen beweglichen Vermögen... nach 5 Jahren erwerben, gerechnet vom Ende des Kalenderjahrs an, in dem es übernommen wurde“*. Einer ähnlichen Verjährung unterlagen Ansprüche auf Erstattung von Einkommen. Angeführt sei noch ein Beschluß, der in dieser Angelegenheit von der gemeinsamen Zivilkammer des Obersten Gerichts gefaßt wurde³⁹: *„Zum Erwerb von Eigentum an Liegenschaften durch den Staat*

³⁷ Standpunkt des Volksanwalts vom 10.3.1990 über das ehemalige deutsche Vermögen, RPO/55436/89/IV.

³⁸ Dz. U. Nr. 66, Pos. 402.

³⁹ Rechtsprechung des Obersten Gerichtshofes: I CO 9/56 (OSN Nr. 1/1957) und CO 16/60 (OSN Nr. 31/1961). Vgl. auch die Stellungnahme des Volksanwalts (zum verlassenen Vermögen) vom 6.3.1990. RPO 4976/88/IV.

aufgrund des Art. 34 des Erlasses vom 8.3.1946 über verlassenes und ehemals deutsches Vermögen ist erforderlich, daß a) die Liegenschaft ein verlassener Besitz im Sinne des Art.1 des Erlasses ist und b) mindestens eine 10jährige Frist – fünf Jahre bei beweglichen Gegenständen – gemäß den gesetzlichen Bestimmungen abgelaufen ist. Eine Voraussetzung für den Erwerb ist nicht der Besitz der Liegenschaft durch den Staat, andererseits erwirbt der Staat das Eigentum an der Liegenschaft aufgrund der angeführten Vorschrift nicht, wenn im Moment des Ablaufs der Frist die Liegenschaft sich im Besitz des Eigentümers befindet”.

In der Begründung seines Beschlusses führt das Oberste Gericht aus, daß der in Art.34 geregelte Eigentumserwerb in Wirklichkeit keine Ersitzung ist, und zwar wegen der zeitweiligen Verfügungsmacht über das Vermögen durch das Liquidationsamt, d.h. durch den Bevollmächtigten für Rückforderungen.

Dies ist aber nicht von Belang hinsichtlich historischer Gegenstände, denn im Gegensatz zu anderen Bestandteilen des verlassenen Hab und Guts verfolgte der Staat das Ziel der Nationalisierung von Gegenständen, die als Antiquitäten und Kunstgegenstände angesehen wurden; dies ergab sich aus zahlreichen rechtlichen Regelungen⁴⁰. Ungeachtet der Begründung dafür im einzelnen sei festgestellt, daß der Zeitablauf die Geltendmachung von Ansprüchen auf Bestandteile des verlassenen Besitzes⁴¹ unmöglich macht.

Das Ausmaß der Verluste infolge von Kriegshandlungen und unbegründeter bewußter Zerstörung von Kunstgütern⁴² darf nicht vergessen werden, wenn die Kriegsschäden der Opfer mit denen der Aggressoren verglichen werden. Daher⁴³ sind auch die Übernahme des ehemaligen deutschen Vermögens und aller sich daraus ergebenden materiellen Rechte in vollem Umfange begründet und die Forderungen nach Entschädigung oder einer physischen Rückgabe von Teilen daraus unbegründet.

7. Internationale Regelungen

Aus dem Grundsatz des Schutzes des europäischen Kulturerbes ergibt sich auch der Schutz von Bestandteilen *in situ*, die direkt mit der Zivilisationsgeschichte in einer bestimmte Region in Verbindung stehen. Das Problem der Zugehörigkeit von Kunstgegenständen und Denkmälern entstand nicht erst aus den territorialen Veränderungen

⁴⁰ Rundschreiben des Ministers für Kultur und Kunst vom 7.6.1949 über die Sicherstellung beweglicher historischer Güter aus dem Hof- und ehemaligen deutschen Besitz, *Dz.Urz.MKiS* Nr.4, Pos.60; Verordnung MKiS Nr.78 vom 9.12.1949 über die Verstaatlichung der Museen (nicht veröffentlicht); Erlaß vom 1.3.1946 über die Registrierung und das Ausfuhrverbot von Werken der bildenden Kunst und Gegenständen mit künstlerischem Wert, *Dz. U.* Nr. 14, Pos. 99).

⁴¹ Vgl. die Stellungnahme des Volksanwalts für Bürgerrechte (RPO) vom 6.3.1990 und Anm.46.

⁴² Als Beispiele seien angeführt: die Ausplünderung und Zerstörung des Königsschlusses in Warschau und die Brandstiftungen in den unterirdischen Lagerräumen der Krasinskis Bibliothek („Ordynacji Krasieńskich”), wo wertvollste polnische Inkunabeln verbrannten.

⁴³ Vgl. St. N a h l i k: *Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej* (Der Kunstraub. Die Entstehung internationaler Verbrechen). Wrocław 1958, S.47–55 und E. K o b i e r s k a-M o t a s: „Działalność pełnomocnika do spraw zabezpieczenia dzieł sztuki i zabytków kultury w Generalnej Guberni” (Die Tätigkeit des Sonderbeauftragten für Sicherstellung der Kunst- und Kulturgüter im Generalgouvernement) in: Cz. P i l i c h o w s k i: op. cit.

nach dem 2. Weltkrieg und ist keine Besonderheit der polnisch – deutschen Beziehungen. Schon vom 18. Jahrhundert an ist die Geschichte reich an Grenzänderungen, die für ethnische oder kulturelle Gebiete eines anderen Volkes Fremdherrschaft bedeuten. In solchen Situationen hatten sich die fremden Herrscher zuallererst die Kulturschätze angeeignet, und dies nicht nur ihrer materiellen Werte wegen. Auch führte die Entstehung von Museen und Sammlungen während des ganzen 19. Jahrhunderts zu einer Anhäufung von Kulturgütern in England, Frankreich und Deutschland, meistens in Widerspruch zum Recht der auf diese Weise ärmer gewordenen Völker und sicher zum Schaden für deren nationale Interessen. Es wäre nicht schwierig, den Beweis für das Recht dieser Völker auf manche Kunstwerke zu führen, die heute die größten Museen der Welt zieren.

Internationale Abkommen enthalten schon seit langem Probleme der Rückführung, Rückerstattung und materiellen Entschädigung bezüglich angeeigneter Kunstwerke⁴⁴. In Polen bemühte man sich in einer besonderen Situation um die Rückgabe von Bestandteilen des Kulturerbes. Dort waren Kunstschatze bereits in den annektierten Teilungsgebieten und im Ersten Weltkrieg geraubt worden, die größten Verluste aber traten während des Zweiten Weltkriegs und der Besatzungszeit 1939–1945 auf. Es waren politische Gründe, die dazu führten, daß die Entschädigungsforderungen Polens nach den beiden Weltkriegen nur zu einem geringen Teil erfüllt wurden⁴⁵.

8. Schlußbemerkung

In neueren Erklärungen und Presseberichten im Ausland kann man die Auffassung finden, daß die polnischen Behörden die Vernichtung oder den Raub von Bestandteilen des deutschen Kulturerbes vorsätzlich zuließen und sogar selbst an derartigem Tun beteiligt waren, obwohl sie das Erbe hätten schützen sollen. Nur bei völliger Außerachtlassung der Realitäten direkt nach dem Zweiten Weltkrieg, also von einem sehr theoretischen Standpunkt aus, kann die Behauptung aufrechterhalten werden, daß die Zerstörung einer Mehrzahl historischer Gebäude, in Abtragungsmaterial umgewandelt⁴⁶, die Zerstückelung von Sammlungen und anderen Beständen, die physische Zerstörung von Bibliotheken oder die Beseitigung von deutschen Aufschriften auf kirchlichen Denkmälern im wesentlichen sowohl die Behörden als auch die polnischen Bürger belasten – also nur dann, wenn wir die Ursachen der Gleichgültigkeit, des Unwillens, der Unkenntnis oder sogar des Hasses gegenüber dem deutschen „Element“ und dessen materiellen Erscheinungen übersehen.

⁴⁴ Vgl. St. N a h l i k, ebenda, und Charles de Visscher: „Necessite d'une reglementation internationale. La protection des patrimoines artistiques et historiques nationaux“, *Art et Archeologie* Nr. 1/1939; E.A. F e i l - c h e n f e l d: *The International Economic Law of Belligerent Occupation*. Washington 1942. Vgl. auch Entwurf einer Denkschrift des Büros für Kongreßarbeiten in Warschau von 1919 für den Internationalen Zurückforderungsrat, AAN – Archiv, Gruppe 387 Nr. 115.

⁴⁵ Vgl. J. P r u s z y Ń s k i: op. cit., S. 97–106 und 137–147.

⁴⁶ Verordnung Nr. 2 des Ministers für wiedergewonnene Gebiete von 1947 in Fragen der Bewirtschaftung von Abbruchmaterialien aus Städten und Siedlungen. L.dz. 9671/V/Org.47. AAN – Archiv, Akten MKiS 376/67.

Überdies muß darauf hingewiesen werden, daß angesichts der Situation des Denkmalschutzes in den allgemeinen politischen und wirtschaftlichen Verhältnissen der fünfziger Jahre den wenigen Mitarbeitern von Museen und Konservationswerkstätten eigentlich großer Respekt gebührt – und so sollten diese Menschen wie auch das polnische Volk insgesamt nicht mit der Verantwortung für das Geschehene belastet werden. Bemühungen um Schutz von ehemals deutschem Besitz konnte in jenen Jahren Anlaß zu strafrechtlichen Repressalien sein. Es wäre also ungerecht und hart, die damaligen Konservatoren mit der materiellen oder zumindest moralischen Verantwortung für fehlenden Schutz und mangelnde Aufsicht über die genannten Kunstgüter zu belasten.

Regelungen des internationalen Rechts über Rückgabe, Austausch oder Wiedergutmachung im kulturellen Bereich sind weiterhin ein offenes Problem, das nicht nur die polnisch-deutschen Beziehungen betrifft. *„Das gemeinsame europäische Kulturerbe könnte die Basis für neue kulturelle Arbeitsprojekte bilden. Sie könnten aus dem – trotz mancher Erfolge der bisherigen Zusammenarbeit – derzeit unerfreulichen Zustand des teilweisen Gegeneinanders oder der Stagnation in eine leuchtendere Zukunft führen“*, schreibt Professor Wilfried Fiedler⁴⁷. Die Lösung hängt aber vom guten Willen der beiden Verhandlungspartner ab. Entscheidend sollten dabei die Grundsätze des Kompromisses und einvernehmlichen Handelns sein wie auch das Prinzip des „Heimatswerts“, wonach bestimmte Kunstgegenstände und historische Güter Werke fremder Herkunft im Besitz einer der Seiten sind. Wesentlich ist auch, daß jede Seite in der Lage ist, diesen Werken den notwendigen Schutz und entsprechende Pflege zu gewähren. Ein derartiges bilaterales Abkommen setzt jedoch die Gleichberechtigung beider Seiten voraus, wovon bis vor kurzem nicht die Rede sein konnte, und das Prinzip der Gegenseitigkeit, das möglichst umfassend einen Ausgleich der Schäden erfordert, die der nationalen Kultur zugefügt wurden. Der größte Dichter der polnischen Renaissance, Jan Kochanowski, hatte völlig Recht, wenn er schrieb: *„Erst ist es meins, dann deins, und dann gehört es allen...“*.

9. Summary

Right to the cultural property of western and northern territories of Poland

With the process of normalisation of bilateral relations between Poland and Germany a serious problem arises concerning rights toward cultural property of western and northern territories of Poland. These territories had been brought back to Poland upon the Potsdam Treaty 1945, because of historical reasons, as well in a sense of compensation for former Polish eastern territories of present Belarus, Lithuania and Ukraine, whose status – in spite of their previous occupation by the Soviet Union – was being confirmed by Allied Powers in said Treaty.

Sovereign rights of Poland, denied by some representatives of the German law doctrine, made necessary the regulation concerning property left by Germans on re-

⁴⁷ W. Fiedler: *Kulturgüter als Kriegsbeute? Rechtliche Probleme der Rückführung deutscher Kulturgüter aus Rußland*, Heidelberg, 1995, S. 34.

gained territories. Author presents an object – cultural properties, legal premises of their acquisition and legal regulations upon taking them over, after the World War II was ended. It should not be forgotten that waging war the Nazi Germany intent not only annihilation of the Polish nation and statehood, but eradication of its any vestiges. Their hostile and inhuman policy caused that Poland suffered incomparably high cultural losses in ruined monuments, spoiled art collections and museums, devastated archives and libraries. Extremely difficult is to resolve – half a century after – all the questions concerning property of belongings, deposits and goods – once spoiled, then stored by the German administration in peril of bombardments of their territories and abandoned on the end of war. Even more to distinct those taken away by the Soviet “trophy commissions”. One must stress also then trends in policy of making Poland an ethnically Polish state, with no remnants of significant foreign descend.

All this does not change obvious fact: said cultural property – belonging previously to the German III Reich, its citizens and legal persons, and having historical, artistical and scientific significance as a part of the German heritage – was being rightfully taken in the possession of the Polish state upon both international and national law regulations. Due to inefficiency only of then provisional administration, and doctrine of protection of monuments, many valuable objects had been deteriorated. In a study the laws/decrees of 1945 and 1946 years upon taking over abandoned and ex-German property are being analysed, as well as jurisdiction of the Supreme Court. Important is binding opinion of the Polish Ombudsman in that matter, coming from 1990: *“The legal regulations were being strictly bound with the atrocity of the war waged by the Nazi Germany, and of German occupation, resulting huge material losses of the Polish citizens. It made the restitution in kind fully justified”*. When nowadays in a world press problems of property of cultural heritage are more and more frequently described, with no special attention towards the facts and reasons, this troublesome aftermath of the World War II should be reminded, and reminded to the German readers being convinced of no their cultural debts toward Poland, and of unjustified detention by Poland distinctive parts of their *“Prussian Library”* deposited once in Silesian monastery. It is why, a study, reflecting an official standpoint of the Polish authorities is exceptionally published in German. International return and exchange of cultural property, as well as settlement of losses surpass matters analysed in a study. More then proof of rights, a good will is needed in resolving problems almost half a century kept under secret, and an attempt to compensate substantial losses in a cultural property.

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Selected Jurisprudence of the Polish Supreme Court and Constitutional Court Involving Questions of Public and Private International Law

I. The Resolution of the 7 Judges of the Polish Supreme Court, Administrative, Labour and Social Insurance Chamber of 27 April 1995 (III AZP 4/95), published in the Jurisprudence of the Supreme Court, Official Collection, No. 19/1995.

Seven Judges of the Administrative, Labour and Social Insurance Chamber of the Supreme Court have passed the following resolution according to the application made by the First President of the Supreme Court:

In virtue of the Art. 3 al. 1 of the Law of 28 October 1950 on the profession of physician *Dziennik Ustaw* ([Official Journal], further quoted: *Dz. U.*) No. 50, Item 458 with the posterior changes) the Minister of Health and Social Protection in co-operation with the Supreme Council of Physicians can either authorize the foreigner to practise a profession of a medical doctor within the territory of the Polish Republic, and furthermore – to be employed in the public institution of health protection or refuse to deliver these permissions.

There is no restriction on the foreigner's right to practise his profession of physician in Poland which could be deducted from the contents of the above mentioned provision of law, in particular no obligation to be employed solely in the public institution of health protection.

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The necessity to give the interpretation to the above mentioned provisions arose when the divergence of opinions occurred between the Supreme Administrative Court on one part and the Minister of Health and Social Protection together with the Supreme Council of Physicians on the other. The divergent opinions concerned the tenor of Art. 3 al.1 of the Law on the Profession of Physician of 28 October 1950 (No. 50,

Item 458 with the posterior changes). This provision stipulates that the Minister of Health and Social Protection, after having consulted the Supreme Council of Physicians, can authorize a foreigner who has practised the profession of medical doctor abroad according to the laws in force in that country, to practise medicine in Poland and to be employed in the public institution of health protection in the framework of the conditions given in the authorization. Minister of Health and the Supreme Council of Physicians represent the standpoint that Art. 3 al. 1 of the above mentioned law creates the possibility for these organs to deliver the permission for the foreigner to practise medicine in Poland as an employee of the public institution of health protection only (see: Decision of the Minister of Health and Social Protection of 1 January 1994, No. KDU – I-804/93).

The different point of view is represented by the Supreme Administrative Court in the sentence of 23 September 1994, II SA 309/94. The Supreme Administrative Court has adopted the position that Art. 3 al. 1 of the Law on the profession of physician authorizes Minister of Health and Social Protection to deliver two kinds of permissions: authorizing a foreigner to practise medicine in Poland – or – a separate permission allowing a foreigner to be employed at one of the posts in the public institutions of health protection which implies the possession by a foreigner of special qualifications. The Supreme Administrative Court makes a difference between these two permissions because, in its opinion, the first permission constitutes nothing more but a confirmation by a competent state organ of the qualifications possessed by a foreigner while the second permission is depending on the current situation on the labour market in Poland as well as on the needs of the respective institutions.

In the opinion of the First President of the Polish Supreme Court, Art. 3 al.1 of the above mentioned Law on the profession of physician should be interpreted in the broad context of the other laws in force in Poland. From these provisions we can deduct that a foreigner can carry on his activity as a medical doctor in the Polish territory only after obtaining the adequate authorization. This authorization implies the possession of the necessary qualifications by the foreigner. However, the permission authorizing a foreigner to practise medicine in Poland does not give him the right to be employed in the public institution of health protection. In order to become the employee of such an institution a foreigner has to obtain the supplementary permission delivered by the Minister of Health in co-operation with the Supreme Council of Physicians. This second permission can be granted to the foreigner who has been allowed to practise in the Polish territory upon his application. In a case when the foreigner, after being duly informed about the existing practice, does not submit the application – the authorization issued by the proper organs will not cover the right to be employed in the public institutions of health protection.

In addition to the above, the President of the Polish Supreme Court has adopted the stand-point that in order to be employed by the particular institution of health protection in Poland a foreigner has to obtain, despite the above mentioned permissions of the Minister of Health delivered in co-operation with the Supreme Council of Physicians, also the consentment of the appropriate director of the Regional Labour Of-

fice at the Voivodship level having the competence in the region where the public institution of health protection wishing to employ a foreigner has its seat (Art. 50 al. 1 and Art. 5 of the Law of 14 December 1994 on the employment and prevention to unemployment, in connection with Art. 3 al. 1 of the above mentioned law on the profession of physician).

In the opinion of the President of the Polish Supreme Court practising medicine in Poland without being employed in the public institution of health protection is possible for a foreigner after obtaining the respective permission of the Minister of Health and after registering private establishment of health protection created by him.

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Reasoning

Existing situation has been created by the amendment which has been recently made to the Art. 3 al. 1 of the law on the profession of physician of 1950 (this amendment results from Art. 62 of the law of 17 May 1989 on the medical chambers – Journal of Laws No. 30, item 158 with the posterior changes). The previous Art. 3 al. 1 of the above mentioned law allowed a foreigner to practise medicine in Poland after obtaining the permission issued by the Minister of Health and within the frames given in this permission. The new tenor of this regulation stipulates that the Minister of Health in co-operation with the Supreme Council of Physicians can authorize a foreigner to practise as a medical doctor in Poland and to be employed by the public institution of health protection under conditions described in the permission when the following conditions are fulfilled: 1. he has practised abroad as a medical doctor and all the conditions required by the foreign law have been observed, or 2. he has either graduated in Poland from the medical academy or accomplished his education as a medical doctor in the foreign country but his home title is regarded as equivalent to the Polish diploma, and 3. he has not been incapacitated. The problem which arose after the amendment made to the Art. 3 al. 1 of the above mentioned law is whether the Minister of Health can authorize a foreigner to practise medicine in Poland exclusively if at the same time he authorizes him to be employed by the public institution of health protection.

The Supreme Court has discussed the conditions which have to be fulfilled by a foreigner in order to obtain the permission to practise medicine in Poland. If a foreigner has practised as a medical doctor abroad, his qualifications should be evaluated according to the law in force in the country where he has practised medicine. Especially the conditions relating to the entry to the profession of medical doctor as well as the conditions concerning practising medicine in that country should be examined.

The other group of the applicants can prove their qualifications by the way of presenting the diploma issued either by the Polish medical academy or by the medical academy of the other country which is regarded as the equivalent to the Polish diploma. In this respect it is pointed out that Poland has entered into the several conventions on the recognition of the diplomas. The most important of them are: the Conven-

tion on the reciprocal recognition of the diplomas issued by the secondary schools, professional secondary schools and the institutions of higher education as well as of the documents on the conferment of the degrees and scientific diplomas, signed in Prague on 7 June 1972 – ratified by Poland on 6 December 1973 (Dz. U. 1995 No. 5, Item 28) and the Convention on the recognition of the periods of studies, diplomas of higher education and scientific degrees in the countries of Europe, signed in Paris on 21 December 1979 – ratified by Poland on 17 September 1982 (Dz. U. 1983 No. 7, Item 38). The aim of these conventions is to oblige all the states-parties to the conventions to recognize as equivalent the education and the diploma or any other document confirming the education obtained in the other state-party to the convention. It should be stressed that the Supreme Court has adopted the position that the permission to practise medicine in Poland issued by the Minister of Health in co-operation with the Supreme Council of Physicians releases a foreigner from the obligation to have his qualifications confirmed by the way of the resolution, of the Regional Council of Physicians. In consequence the permission to practise medicine in Poland given to a foreigner replaces this resolution, and can be considered as the basis for the inscription of a foreigner to the local register of physicians.

The Supreme Court considers that granting a foreigner with the permission to practise as a physician in Poland means that: 1. a foreigner can carry on his activity in Poland, 2. he is entitled to practise in Poland when observing the same conditions as those provided for in the Code of the Professional Ethics of Physicians of 1993, and 3. he can be registered as the member of the regional council of physicians for the region where he wishes to practise.

With regard to the above mentioned question of the President of the Polish Supreme Court, the most important problem is to determine if the conditions relating to practising as a medical doctor applicable to a foreigner wishing to carry on his activity in Poland are the same as those applicable to the Polish medical doctors.

Polish medical doctors can develop their activities in three possible forms: providing services within the frames of employment in the public establishment of health protection, providing services within the framework of employment in the non-public establishment of health protection and finally – practising medicine without being an employee of any establishment of health protection – neither public nor private. The Supreme Court has considered what are the possible forms in which a foreigner can provide medical services in Poland. It results from the Art. 3 al. 1 of the law on the profession of physician that the permission delivered by the Minister of Health does not authorize a foreigner to be employed as the physician in any public institution of health care. Such an employment requires the special permission issued by the Minister of Health together with the Supreme Council of Physicians, and subsequently the permission of the respective director of the Labour Office at the voivodship level.

In the opinion of the Polish Supreme Court the requirement imposed on foreigners, after their qualifications have been recognized by the Minister of Health in co-operation with the Supreme Council of Physicians, before obtaining the relevant permission in order to practise medicine in Poland as the employees of the public

institutions of health service is not the matter of discrimination of foreign medical doctors in Poland. Public establishments of health protection in Poland are created by the organs of state administration and supported by these organs with the public funds. It should also be stressed that the employment of a medical doctor by the public institution of health protection requires from him special qualifications and professional experience. Hence, it is justified that the Minister of Health wants to supervise persons authorized to give medical help to the Polish citizens who are insured by the social insurance system or have the right to be supplied with medical help in virtue of the particular regulations.

These special restrictions do not apply to the employment of the foreign medical doctors in the other, that is non-public, establishment of health protection or practising medicine in Poland in the form of private activity. That is why the Seven Judges of the Administrative, Labour and Social Insurance Chamber of the Polish Supreme Court did not accept the interpretation given to the Art. 3 al. 1 of the law on the profession of physician by the Minister of Health together with the Supreme Council of Physicians. This interpretation implies that this provision excludes the possibility for the foreign medical doctors to practise medicine outside the public establishment of health protection.

It is true that every state has the right to regulate the activity of the foreigners in its territory among others in the form of the obligation to obtain the permission issued by the appropriate state organ but the provisions of the domestic rules in this respect should be compatible with the regulations contained in the bilateral and multilateral treaties concluded by this country. Especially, the regulations of the domestic law can not introduce the discriminatory treatment of the foreigners when such a discrimination is forbidden in virtue of the binding international treaties.

The Supreme Court has adopted the position that Art. 3 al. 1 of the law on the profession of the medical doctor can not be regarded as the only source of the regulations concerning the practising medicine in Poland in case when the foreigners are involved. The law on the medical chambers has abolished the restrictions on the legal forms of providing medical services contained in Art. 6 of this law (this article has been repealed since then). On the other hand, the law on the public establishments of health care has opened the possibility to create private establishments providing medical services in Poland to all natural persons, either Polish subjects or the foreigners. In the opinion of the Supreme Court there are no arguments which could give grounds to the standpoint based on the restrictive interpretation of Art. 3 al.1 of the law on physicians which forbids *ex lege* the foreigners to practise medicine in Poland in forms open to Polish citizens.

On the other hand, the Supreme Court has made the reference to the Association agreement concluded by Poland on one side and European Communities together with their members on the other on 16 December 1991 which had entered into force on 1 January 1994 (Dz. U. 1994 No. 11, Item 38). The analysis of this agreement has led the Supreme Court to the statement that even if one accepts that the foreigners can practise medicine in Poland in all the forms which are open to Polish citizens, it does

not mean that they must be treated on equal footing with Polish doctors. It means in fact that the Europe Agreement does not provide for the national treatment of the citizens of the one party residing in the territory of the other. In consequence, all the restrictions existing in the Polish law related to practising medicine in Poland by the medical doctors coming from the member states of the European Union can not give grounds to any judicial proceeding before Polish courts. This conclusion is due to the fact that the rule of the national treatment, being the fundamental principle of the Europe Agreement, does not apply to the free movement of workers.

Hence, the citizen of the European Union wishing to practise medicine in Poland outside the public establishment of health protection has to obtain the permission of the director of the Labour Office at the voivodship level authorizing him to be employed by the particular private establishment of health protection. When the medical doctor coming from the territory of the European Union intends to practise medicine outside any establishment of health protection either public or private in Poland, he has to obtain solely the general permission of the Minister of Health, and he must register his own medical cabinet fulfilling the conditions described in the Law on the establishments of health protection.

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Commentary:

The resolution of the seven Judges of the Polish Supreme Court discussed above is very important because it refers to the Europe Agreement with Poland and to one of the freedoms of the single European market. It is evident that if the main directive of the Polish foreign policy does not change in future, very soon Polish citizens will have to accept that the foreigners can be employed in Poland on the same legal conditions and without discrimination, except for the derogations provided for in the European law. This resolution opens the long row of the sentences of the Polish courts pertaining to the European law, and particularly to the rules governing the free movement of persons.

The resolution of the Polish Supreme Court has been based on two methods of legal thinking. Firstly, the Supreme Court has analysed the existing national legal acts and has made its own interpretation with respect to the situation of the foreign physicians wishing to practise medicine in Poland. General interpretation of the Court is sound. It can not be deducted from the actual tenor of the Art. 3 al.1 of the law on the profession of physician that there is only one possibility for the foreigners to provide medical services in Poland, namely to be employed by the public establishment of health protection. In all other European states the conditions for practising medicine in the public establishments are more severe than those applying to the foreigners desiring to practice on their own. It implies that the restrictions applicable to the employment of foreigners by the public establishments of health protection do not apply to those wishing to establish as practising doctors. Besides, if there was any restriction imposed on the foreign medical doctors forbidding them to practise as the self-em-

ployed persons, it should be provided expressly by law. Since the activity of the foreign medical doctor acting as a self-employed person has not been regulated in a special manner by the existing laws it should be understood, as it was clearly given in the resolution of the Supreme Court, that the only conditions which should be fulfilled are those applying to the Polish citizens. In consequence, apart from the authorization of the Minister of Health and of the Supreme Council of Physicians regarding practising medicine in Poland, the foreigner has to register his proper establishment of health care at the voivodship level. The other interpretation of the Art. 3 al.1 of the Law on the profession of the medical doctor would not be justified.

The remarks of the Supreme Court concerning the Europe Agreement with the European Communities are of great interest. The Supreme Court has expressed the opinion that even if there is any discrimination of the physicians coming to Poland from the European Union with respect to the situation at the labour market in Poland, it is compatible with the provisions of this international treaty because it does not provide for the free movement of workers. Hence, the physicians coming to Poland from the European Union wishing to be employed in the public establishment of health protection have to obtain the second, special permission of the Minister of Health after consulting the Supreme Council of Physicians, and furthermore – the permission of the director of the Labour Office at the voivodship level.

The situation of the foreign physicians coming from the European Union is quite different when they intend to practise as the self-employed persons which means to create their own establishment of health protection. The Europe Agreement with Poland has liberated in the consecutive stages the movement of persons wishing to implement the right of establishment. Since the medical services are not treated as the special services with respect to which Polish market will remain closed for longer period of time, the physicians coming from the European Union should be treated without discrimination from the date of entering into force of the Europe Agreement, that is from 1 February 1994. The only obstacle in the freedom of establishment is the problem of the recognition of the foreign diplomas. The special directive concerning the recognition of the diplomas of medical doctors which is in force between the states-members of a European Union is not binding in the framework of relations with the states which are only associated with the European Communities. For this reason the special authorization on the part of the Minister of Health together with the Supreme Council of Physicians is necessary in order to confirm the qualifications of the foreign medical doctors. It should also be stressed, as it was said by the Polish Supreme Court, that the obligation of the foreigner to register the establishment of health protection created by him at the voivodship level is the normal condition imposed on Polish citizens, and compatible with the Europe Agreement with Poland.

The resolution of the Seven Judges of the Administrative, Labour and Social Security Chamber of the Polish Supreme Court is of great value because it gives the first directive on the interpretation of the Europe Agreement with respect to the free movement of persons.

II. The sentence of the Constitutional Court of 23 October 1995 (Case K. 4/95) published in the Jurisprudence of the Constitutional Court Part II/1995

The Constitutional Court considered the application submitted by the Union of the Polish Cities, City Councils of: Skierniewice, Elbląg, Chelmek, as well as by the Regional Councils of the Voivodships of: Poznań and Opole with respect to the consistency of:

- 1) the law of 2 July 1994 on the lease of appartements and special supplements to the rent (Dz.U. No. 105, Item 509, amendment of 1995, No. 86, Item 433) and in particular Art. 4, Art. 39 al. 2, Art. 45 and Art. 68 with:
 - a) the Constitution, that is with: Art. 1, Art. 70 al. 1, Art. 71 al. 2, Art. 72 al. 2 and 3 as well as with Art. 73 al. 1 of the Constitutional Law of 17 October 1992 on the mutual relations between the legislative and executive powers of the Polish Republic as well as on the local self-government (Dz.U. No. 84, Item 426, amendment of 1995, No. 38, Item 184), and with Art. 1, Art. 5, Art. 7 and Art. 67 al. 2 of these provisions of the Constitution of 1952 which have remained in force in virtue of Art. 77 of the Constitutional Law mentioned above respectively;
 - b) the international treaty – European Charter of the Local Self-Government, concluded on 15 October 1985 and ratified by Poland on 26 April 1994 (Dz.U. 1994, No. 124, Item 607) that is with Art. 5, Art. 7 and Art. 9 al. 1 of this treaty respectively;
 - c) the following laws:
 - with respect to the Art. 4 and Art. 45 of the law on lease of appartements and special supplements to the rent – with the Art. 7 al. 2 of the law of 8 March 1990 on the local self-government (Dz.U. No. 16, Item 95 with the posterior changes), and with respect to the Art. 45 of the above mentioned law with the Art. 21 al. 1 point 4 of the law of 10 December 1993 on the financement of communes (Dz.U. No. 129, Item 600 with later amendments) and Art. 51 and Art. 54 al. 1 of the law of 8 March 1990;
 - with respect to Art. 68 of the law of 2 July 1994 – with Art. 57 of 5 January 1991 – Budgetary Law (Dz.U. 1993, No. 72, Item 344 with the changements) respectively;
- 2) the regulation of the Council of Ministers of 7 November 1994 on the subsidies for the communes with respect to the financement of the payment of the special subsidies (Dz.U. No. 119, Item 571 and No. 129, Item 643), in particular paragraphs 2 and 3 with:
 - a) the provisions of Art. 56 al. 3 and Art. 73 al. 1 and 2 of the Constitutional Law of 17 October 1992 as well as with the Art. 1 and Art. 7 of the Constitution of 1952 maintained in force by Art. 77 of the Constitutional Law,
 - b) an international treaty – European Charter of the Local Self-Government, in particular Art. 9 al.1 and 2 of this treaty,

- c) the provisions of the respective laws – Art. 45 al. 1 of the law of 8 March 1990 on the local self-government in connection with Art. 2 and Art. 7 of this law as well as with Art. 5 al. 1 of the law of 1 December 1993 on the financing of the communes, and with the law of 2 July 1994 on the lease of appartements and special supplements to the rent.

The Constitutional Court has decided:

1. Art. 4 of the Law of 2 July 1994 on lease of appartements and special supplements to the rent, interpreted in such way that it does not give subjective rights to the members of the community, is consistent with Art. 1, Art. 70 al. 1, Art. 71 al. 2 and Art. 73 al. 1 and 2 of the Constitutional Law of 17 October 1992, as well as with Art. 1, Art. 5 and Art. 6 of the Constitution of 1952 maintained in force by the Art. 77 of the above mentioned Constitutional Law.

2. Art. 39 al. 2, in its part covered by points 2, 3 – to the extent in which it excludes from the right to obtain special supplements the subjects of the rural tax and by point 4 of the law of 2 July 1994 is inconsistent with Art. 1 and Art. 67 al. 2 of the Constitution of 1952 maintained in force by Art. 77 of the Constitutional Law of 17 October 1992; in the remaining part Art. 39 al. 2 of the above mentioned law is consistent with above mentioned articles of the Constitution.

3. Art. 45 al. 1 of the law of 2 July 1994 is consistent with Art. 73 al. 2 and Art. 71 al. 1 and 2 of the Constitutional Law of 17 October 1992, this article is not contrary to Art. 1, Art. 5, Art. 7 and Art. 67 al. 2 of the provisions of the Constitution maintained in force by Art. 77 of the Constitutional Law.

4. Art. 45 al. 2 of the law of 2 July 1994 interpreted in the way obligating the Parliament to take into account when preparing the Budgetary Law that there should be prepared the amount of money which can guarantee in the form of special subventions the full payment by the organs of the local self-government of the special supplements to the rent, is not inconsistent with Art. 73 al. 2 of the Constitutional Law.

5. Art. 45 al. 3 of the law of 2 July 1994 in its part concerning the determination in the form of the regulation of the rules and procedure of establishing and transferring to the communes from the State Budget the subventions for the payment of the special supplements to the rent, is inconsistent with the Art. 1 of the Constitution of 1952 maintained in force in virtue of Art. 77 of the Constitutional Law of 17 October 1992 as well as with Art. 54 al. 1 and Art. 73 al. 2 of this Constitutional Law; in the remaining part Art. 45 al. 3 is not inconsistent with the Constitution.

6. Art. 68 of the law of 2 July 1994 is not inconsistent with Art. 1 of the Constitution of 1952 maintained in force by Art. 77 of the Constitutional Law of 17 October 1992.

Furthermore, because the application has been withdrawn and there are no grounds for the continuation of the proceedings on its own initiative:

7. The Constitutional Court discontinued the proceedings in its part concerning the inconsistency of the regulation of the Council of Ministers of 7 November 1994 on the subventions for the communes for the financement of the payment of the special supplements to the rent (Dz.U. No. 119, Item 571, and No. 129, Item 643; of 1995 No. 47, Item 245, and No. 100, Item 498) with the Constitution and the laws.

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According to the opinion of the applicants, Art. 4 of the law of 2 July 1994 on the lease of appartements and special supplements to the rent is inconsistent with the above mentioned provisions of the Constitution and of the European Charter of Local Self-Government because it provides for the public right which may give grounds to the citizens to rise claims against the commune to have their needs concerning the accomodation satisfied. It violates the essence of the concept of self-government which should satisfy the housing needs of the local community only subsidiarily, and not by imposing on it the tasks of the organisational character. It may lead to require from the communes the direct responsibility for satisfying the individual needs of the citizens concerning housing. From the provision of Art. 4 of the law it may result, in the opinion of the applicants, the violation of the position of the local self-government provided for in the Constitution, in particular by breaking the rule of the division of powers. The applicants have expressed the opinion that it results from Art. 1 and 5 of the Constitution of 1952 as well as from Art. 70 al. 1 of the Little Constitution that the local self-governement can not be held responsible for the practical realisation of the tasks of economical character. Furthermore the applicants state that the legislator has not described the financial resources which could serve for the realisation of the purpose described in Art. 4 of the above mentioned law. This fault of the law infringes Art. 73 al. 2 of the Little Constitution and the rule of adequacy of the revenues to the tasks which results from Art. 9 al. 2 of the European Charter of Self-Government. The applicants hold that the evaluation of the law from the point of view represented in the European Charter of the Local Self-Government is possible because through Art. 1 of the Constitution the standards of the state of law included among others into the international treaties ratified by Poland become the binding norms having priority over the laws. The applicants consider also the Art. 45 al. 2 of the discussed law to be inconsistent with the Art. 73 al. 2 of the Little Constitution since it does not indicate the financial resources for the realisation of the new tasks by the commune. In consequence, the commune has no legal means to require from the state the financement of these new tasks.

Also Art. 39 al. 2 of the law is regarded by the applicants as inconsistent with the Art. 73 al.2 of the Little Constitution because by excluding certain categories of the members of the commune from the right to the special supplement it breaks the constitutional rule of equality of citizens and of social justice. The applicants claim further that Articles 45 and 68 of the law are inconsistent with Art. 1 of the Constitution because the communes have not had time to prepare themselves for the new tasks imposed on them by law while the state has covered only part of the expenses connected with them, what is inconsistent with the rule of law.

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Reasoning:

The Constitutional Court has evaluated the claims of the applicants concerning Art. 4 of the law. Taking into consideration the contents of the Art. 4 of the law the Constitutional Court has not found any reason why this provision could give grounds to the members of the commune to have their housing needs satisfied by the commune. The law prescribes neither in which way the right of the member of the commune should be fulfilled nor when and through what procedure this right could be realised. In consequence it can not be deduced from Art. 4 that the members of the commune have the subjective right to have their housing needs satisfied. On the other hand, the task of the commune to satisfy the housing needs of the members of the commune is its general function performed on the basis of the special rules on the competences of the commune, and should be realised by the commune in the framework of its competences and to the extent when it is possible as to the financial resources being in its possession. The obligation of the commune to undertake all the possible actions in order to improve the situation of the members of the commune with effect, to their housing needs is the task of the state provided for in the Constitution which should be realised together by the state administration and local self-government. In effect, when imposing on the commune the obligation to satisfy the housing needs of the members of the commune the legislator has not broken the provisions of the Constitution but also has developed them according to the contents of those provisions of the Constitution which contain the general characteristic of the local self-government.

As to Art. 45 of the law, the Constitutional Court has considered firstly its al. 1 which qualifies the new task of the commune as its proper task. The Court has adopted the position that classifying the satisfying the needs of the members of the commune with regard to housing as the proper task of the commune is consistent with the law in force since it fulfills all the requirements of law: this task is of public character, implies satisfying the needs of the members of the commune, and can be realised within the framework of the one part of the administrative division of the state.

Further, the Constitutional Court has expressed its view on the problem of the guarantees for the commune as to the financial resources necessary to fulfil the new tasks. The Court has accepted as consistent with the law in force the system provided for in the law which allows for two sources of the financement of the new tasks: the possibility to increase its revenues by the way of increasing the rent for the appartements belonging to the commune and also the subventions from the state. The Constitutional Court has stressed that state subvention should be considered only as the supplementary source of financement. The duty of the state is only to foresee the necessary sums for the communes to allow them the payment of the special supplements to the rent. The above mentioned rules do not, in the opinion of the Court, infringe the rule of autonomy of the local self-government expressed in the Constitution.

Analysing the Art. 45 al. 3 of the law the Constitutional Court has expressed the opinion that it is only partially consistent with the Constitution. The authorization to

issue the executive act in the form of a regulation containing the rules of payment of the special supplements to the members of the commune is given according to the conditions provided in the Constitution. To the contrary, the other part of this provision concerning the authorization to issue the act containing the rules and procedure of establishing and transferring from the budget to the communes the special subventions for the payment of the special supplements to the rent, belongs to the sphere reserved for the regulation in the form of the law. Consequently, Art. 45 al. 3 of the law should have given clear directives how these specific problems should be solved. In fact the law on lease of appartements and special supplements to the rent does not contain guarantees that subventions for the communes will be properly calculated nor transferred.

The Constitutional Court has also evaluated the Art. 39 al. 2 of the law which excludes certain groups of citizens from the right to obtain the supplement, even when the general conditions necessary to obtain this right have been fulfilled. The Court has adopted the standpoint that in the three of the four exceptions there are no grounds for excluding these people from the right to the supplement (namely: tenants of the social appartements, tenants of the appartements who are at the same time the subjects of the rural tax and tenants who are conducting the commercial activity), and in consequence this provision of the law is inconsistent with the relevant provisions of the Constitution expressing the rules: of the equality (Art. 67 al. 2) and of social justice (Art. 1). The Court has stressed that in its jurisprudence it has always followed the pattern of the European Court of Human Rights which has represented the opinion that the rule of the equality of the rights is applied in a fair way when it presumes the equal treatment of people who are identical as to the certain feature which is important for this special regulation, while the treatment of the subjects different with respect to this special feature can be differentiated.

Considering the claim concerning the moment of entering into force of the law on lease of appartements and special supplements to the rent which in the opinion of the applicants was infringing the rule of law (since the law has entered into force during the budgetary year, *i.e.* on 12 November 1994), the Court has adopted the standpoint that this manner of introducing the law has not been contrary to the rule of law. The financial resources prepared in the budget for the subventions for the communes have been sufficient to cover all the expenses and moreover during the month of December the communes have had enough time to make plans for the next year in view of their experiences of this month.

Last the Constitutional Court has discussed the consistency of Art. 4 and 45 of the law on the lease of appartements and special supplements to the rent with Art. 9 of the European Charter of the Local Self-Government. This international treaty has been ratified by Poland on 14 July 1994 and published in the Dz.U. No. 124 of 1994 on 25 November 1994. The ratification has taken place without the special authorization of the Parliament expressed in the form of the ratification bill. According to the Constitutional Court, the law of 2 July 1994 – published in the Dz.U. No. 105 on 11 October 1994 and which entered into force on 12 November 1994 – is earlier than the interna-

tional treaty. In consequence, the Constitutional Court presumes that the Charter had to be consistent with the national legislation in Poland at the moment of the ratification because otherwise the ratification without prior consent of the Parliament would not be possible (Art. 33 of the Little Constitution).

The regulations of the law on lease of appartements and special supplements to the rent are – in the opinion of the Court – consistent with the Charter because in Art. 9 al.1 of this treaty the freedom of the communes to administer their financial resources is restricted by the additional condition that it should be performed within the frames of the national economic policy, which – in case of the discussed law – means that this activity of the communes must be compatible with the directives of the housing policy of the state. The law is consistent also with Art. 9 al. 7 of the Charter because the condition included in it, that “as far as it is possible the subventions awarded to the local communities should not serve to support the specific projects” has been observed. The Court recognizes that the evaluation of the conditions of every particular case belongs to the legislative organs and so the Polish Diet could have decided the creation of the subventions intended for the financement of the proper tasks of the local self-government.

The Court has adopted the standpoint that from Art. 9 al. 2 of the Charter (“The amount of the financial resources of the local authorities should be adapted to the scope of the rights attributed to it by the Constitution or the law”) it does not result that the state is obliged to assure the “adequate financial resources” only by the way of subventions. It was foreseen in the law on lease of appartements and special supplements to the rent that the separate different system of gaining money for this specific purpose.

The Constitutional Court has stressed that since the Charter has not been ratified after the authorisation of the Parliament in the form of the ratification bill, so this international treaty has the inferior position in comparison with the national laws. The Court has also said that the international treaties can not serve as an independent basis for the control executed by the Court because the Constitution has not provided for the priority of the ratified treaties before the national laws.

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Commentary:

The most important, from our point of view, are the remarks contained in the reasoning of the Court which concern the position of the international treaties in the Polish legal system. The Constitutional Court has expressed the view that the position of the international treaty which has been ratified by the President without prior consent by the Parliament in the form of a ratification bill, is weaker than the position of the treaty which has been introduced into the Polish legal system by the constitutional law. The standpoint of the Constitutional Court dividing the international treaties ratified by Poland into two categories of which only one is superior over the national laws is included into the draft of the new Polish Constitution. According to this project the

second category of the international treaties can only be regarded as superior over the legal acts of the lower rank than the laws.

However, the sentence of the Constitutional Court has been passed when the ratification of the international treaties in Poland is still regulated by Art. 33 of the Little Constitution. This article stipulates that the international treaty should be ratified after the authorisation of the Parliament expressed by the ratification bill, in case when the treaty makes necessary the introduction of changes to Polish domestic legislation. The Court expresses the opinion that the law on lease of appartements and special supplements has been earlier than the European Charter of the Local Self-Government, and this implies that the law is consistent with the treaty because otherwise the ratification of this law should have been preceded by the law of the Parliament. Taking the above into consideration it must be said that such reasoning of the Court is not justified.

First of all, under the regime of the Little Constitution (still in force) the Constitutional Court has expressed the opinion (see: Judgement of 7 January 1992; K.8/91 – Jurisprudence of the Constitutional Court, 1992, Item 5) that the ratified international treaty is binding for the Polish state and it should be applied by the courts *ex proprio vigore* with the exception of these norms of the treaties which are not self-executing. Secondly, the Constitutional Court has adopted the position (see: The Resolution of the Polish Constitutional Court of 30 November 1994, W.10/94 – Jurisprudence of the Constitutional Court Part II/1994) that the obligation to amend the domestic legislation is a normal consequence of its conclusion. If we admit, as it has been said by the applicants, that the law on the lease of appartements and special supplements to the rent has been inconsistent with the Charter, than the system of introducing this international treaty to the domestic legislation was unconstitutional. In any case it seems that the standpoint of the Constitutional Court considering the above mentioned law as consistent with the Charter because it has been ratified by President without prior approval of the Parliament in the form of the ratification bill is not very convincing.

EWA SKRZYDŁO-TEFELSKA

**Some Remarks on Resolution of the Constitutional Court
of 30 April 1996 (Case 18/95) on the Interpretation
of Art. 8 para. 2a of the Law of 23 February 1991 on the
Invalidation of Certain Judicial Decisions Passed
in Respect to Persons Subjected to Repressions because
of Their Activity in Favour of the Independence
of the Polish State (Dziennik Ustaw [Official Journal]
No. 34, Item 148, in the Meaning of the Law
of 20 February 1993, Dziennik Ustaw No. 36, Item 159)**

The proceeding in the case was initiated by the Ombudsman in connection with an inconsistency of judicial practice concerning an establishing of persons subjected to illegitimate repressions on the basis of the agreement of 26 July 1944 between the Polish Committee of National Liberation and the Government of the USSR. The agreements partially transferred a criminal jurisdiction in the territory of Poland to Soviet authorities.

The Criminal Chamber of the Supreme Court of Poland (composed of Seven Judges) passed a resolution, according to which reparations could be paid exclusively to persons subjected to repressions in the part of the Polish territory west of the so-called Curzon line.¹ The Ombudsman did not share such an interpretation and argued before the Constitutional Court that such a position discriminated persons acting in favour of the Polish independence east of the Curzon line, in the territory of Poland within the frontiers established by the peace treaty with Soviet Russia (the treaty of Riga of 18 March 1921). Although the interpretation proposed by the Chamber of the Supreme Court was supported in the proceeding before the Constitutional Court, the latter inclined to the opinion of the Ombudsman and stated that Art. 8 para. 2a of the Law of 23 February 1991 should be interpreted as covering the whole territory of Poland within its boundaries established by the treaty of Riga.

The importance of the decision of the Court transcended the Law of 23 February 1993. For the first time the supreme judicial agency of the Republic of Poland precised date and form of a transfer of sovereignty in respect of the former Polish Eastern

¹ The line proposed by Lord Curzon in 1919 as eastern boundary of Poland, accepted as such after the Second World War.

territories (*i.e.* the territories situated between the present eastern boundary of Poland and the boundary established by the treaty of Riga) in favour of the USSR. The resolution deals indirectly with two further problems: a competence of the Polish Committee of National Liberation to conclude binding international commitments, and a responsibility of the Russian Federation for injuries caused to Polish nationals both in the former Eastern territories of Poland and in the post-war Poland.

Let us remind here that the annexation of the Eastern territories took place formally on the basis of requests presented to the Supreme Soviet of the USSR by the local provincial assemblies of Western Belarus (with the seat at Białystok) and Western Ukraine (with the seat in Lvov). Both assemblies were elected under the Soviet occupation and therefore illegitimate. The decisions by the Supreme Soviet were taken on 1 and 2 November 1939 respectively. They were indirectly based upon the thesis on a collapse of the Polish State expressed by the Soviet Government in its note to the Polish Ambassador in Moscow of 17 September 1939 (the note preceded the Soviet aggression agreed in the Ribbentrop–Molotov [or: Hitler–Stalin] Pact, and should have justified it, although it was contrary to international law). In the occupied territories of Poland the Soviets committed mass violations of international law, including executions of Polish prisoners of war, murders of civil population, deportations, and confiscations of property. In particular, the local population was granted the Soviet nationality by decree of 29 November 1939.

The situation, which was contrary to international law (the Hague Regulation on Land Warfare of 1907 and customary law), changed to a certain extent with the German aggression against the USSR in June 1941. The Polish government-in-exile headed by General W. Sikorski suggested direct negotiation with Stalin, preconditions thereof being a comeback to a status quo established by the treaty of Riga, an invalidation of a cession of Wilna (realized by the Soviets without any legal title by agreement with Lithuania of 10 October 1939), a derogation of the nationality legislation, and restitution of the confiscated property. The Soviet government – notwithstanding a difficult military situation – rejected these conditions. Subjected to important pressure by the British government, General Sikorski decided to conclude an agreement known as Sikorski–Maysky agreement (30 July 1941). Art. 1 thereof stated that the Soviet government did not consider the Soviet-German arrangements of September 1939 as valid any more. Such a clause meant – according to the Polish government – a restitution of the Riga boundary; the Soviets rejected such an interpretation and considered the line established in the Ribbentrop–Molotov Pact as resulting from a will of local populations expressed in the plebiscites and elections of 1939. Any attempts to press by the Polish government caused immediate repressions against the Poles residing in the Soviet territory. In March 1943 the Polish government finally rejected all Soviet territorial claims, but at that time three Great Powers agreed as to the rule the future boundaries of Poland. Formally speaking, from the point of view of international law, neither Soviet nor German aggressors nor Western Powers had any legitimation to dispose of the Polish territory. All arrangements like the Ribbentrop–Molotov Pact, agreements of Teheran and Yalta, constituted *pacta in odium tertii* and could not be effective

without an acceptance by a legitimate Polish government (*i.e.* the government-in-exile in London).

Although we agree with the Constitutional Court (p. 11 of the reasoning) that all above-mentioned agreements were not treaties of cession, the Court seems erroneously (after the speech by the former Polish Foreign Minister K. Skubiszewski before the Polish Parliament) admitting that the Ribbentrop–Molotov Pact was invalid. K. Skubiszewski referred to a discrepancy between the Pact and an international morality, former agreements, and principles of international law. In the light of international law as in 1939, these discrepancies did not constitute premises of invalidity of a treaty. A moral element as legal obligation was introduced to international law by the Vienna convention on the law of treaties of 1969 (*jus cogens*), and it was certainly not universally accepted even at that time by the international community as a whole. The contradiction to earlier arrangements caused an illegality of the Pact but not its invalidity. The Pact was therefore exclusively non-opposable to third states including Poland.

It is also interesting that none of the parties to the Pact undertook any actions towards invalidating it. Resolution of the Congress of National Deputies of the USSR of 24 December 1989 declared exclusively that the Pact itself was concordant with international law and diplomatic practice, and the secret protocol on the delimitation of zones of influence did not mirror the will of the peoples of the USSR and it was therefore invalid. The Declaration emphasized also that the pact on non-aggression expired with the Nazi aggression against the USSR, *i.e.* on 22 June 1941. The resolution of the Congress was a parliamentary act, not effective in international relations. We do not know any act by the German authorities expressly or indirectly derogating the Ribbentrop–Molotov Pact.

On 4 January 1944 the Red Army crossed the boundary line established in Riga. The communiqué by the Soviet press agency TASS (referred to in the reasoning of the resolution of the Constitutional Court) mentioned once more the “new” boundary as established in result of the plebiscites of 1939. However, the reference to an alleged will of population of annexed territories could not change their status, as the right to self-determination as a legal norm developed first under the UN Charter, it is also dubious whether it could prevail over the territorial sovereignty and integrity of Poland.

The Polish Committee for National Liberation (provisional communist government) established on 21 July 1944 started its activity with a conclusion of two agreements with the USSR. The agreement of 26 July 1944 constituted the subject of the proceeding before the Constitutional Court. It concerned the competence of Soviet authorities in liberated territories of Poland. The other one, dated on next day and first published in Poland 1974 (in a collection of documents for scientific purposes, and not in an official journal) concerned the cession of the former Eastern territories in favour of the USSR; on the other hand, the USSR obligated to support enigmatic “Polish territorial claims in the West”. The Constitutional Court limited to the statement that the agreement in question violated a requirement of promulgation, and in particular the regulations of the two Polish constitutions (of March 1921 and April 1935) which made the validity of boundary treaties depending upon their ratification

by the Parliament. It is unclear which of these constitutions served as precise basis of invalidity of the agreement. In our opinion, the agreements of 1944 were invalid from the point of international law, as the Committee concluding them was illegal. In the same time the Polish government-in-exile still existed in London. It was recognized by numerous states including the USSR which even negotiated with it. The Committee was even not a government *de facto* as it did not dispose of effective power.

As mentioned above, the Eastern boundary of Poland was established by the Great Powers during the Yalta conference. The decision did not bind Poland as third state; the Powers made the delimitation of the boundary dependent of its recognition by the Provisional Government of National Unity. This Polish government composed of members of the government-in-exile and of the communist leaders was established on 28 June 1945, and within one week it was recognised by Western states. It did not try to renegotiate the agreement of 27 July 1944. The boundary treaty was concluded on 16 August 1945, registered by the UN Secretary-General, and published in the UNTS.² Its Art. 1 defined the boundary in reference to the Yalta agreement. The boundary treaty entered into force on 6 February 1946. The Constitutional Court rightly considered this date as the day of transfer of sovereignty in respect of the former Eastern territories. All events and legal acts passed before that day had to be regarded as effective in the whole territory of Poland including the former Eastern territories. This effect is present also as far as the acts of Soviet authorities based on the agreement concluded by the Committee on 26 July 1944, the effects of which were discussed by the Constitutional Court in the commented resolution. We leave aside a controversial issue of the competence of the Committee to conclude the agreement.

Let us add that the resolution of the Constitutional Court resolves also certain problems concerning an interpretation of Art. 1 para. 2(5) of the Law of 24 January 1991 on former combatants. This regulation could have suggested that the transfer of sovereignty (or similar effect) could take place on the day of the invasion of Poland by the Red Army. The resolution excluded also a possibility of a *de facto* loss of Polish nationality by the Polish population residing in the former Polish Eastern territories effective 17 September 1939, as until the formal cession by the boundary treaty of 16 August 1945 the Polish legislation remained valid in these territories.

Finally, one must discuss the nature of financial benefits paid by the Polish State on the basis of the Law of 23 February 1991. They are of *ex gratia* character, and they should compensate to a certain extent damages suffered by the Polish nationals in the territories annexed by the USSR in 1939. Reparations should be paid by the Russian government. Let us remind here that the dissolution of the USSR did not break the continuity of statehood. Russia was recognized by the international community as identical with the former Soviet Union, and it overtook all rights and obligations of the latter in conformity with international rules governing state succession. Russia bears therefore a total state responsibility for all delicts committed by the USSR against Poland and her nationals in the whole territory of Poland within the boundaries estab-

² Vol. 10, p. 193.

lished in the treaty of Riga, and after the entry into force of the treaty of 16 August 1945 – in the present territory of Poland. The responsibility cannot be excluded by reference to the consent given by the Polish authorities, as the Polish Committee of National Liberation was not competent to conclude the agreement of 26 July 1944.

WŁADYSŁAW CZAPLIŃSKI

The Practice of Poland as the “Other State Party” and as a Depository – as Regards Succession of Recently Established States in Respect of Treaties (a Case Study)*

I. Introduction

The main purpose of this paper is to illustrate the practice of Poland as regards succession of post-USSR, post-Yugoslav and post-Czechoslovak states, as well as of Germany, in respect of treaties. The second purpose is to present the relevant practice of Poland as a depository of the Warsaw Convention on the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929. The third purpose is to evaluate the above mentioned practice of Poland and the successor states in the light of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978. This Convention is expected to enter into force soon since 14 of the required 15 instruments of ratification (accession) succession have already been deposited. This applies to the following states: Bosnia and Herzegovina, Croatia, Dominica, Egypt, Estonia, Ethiopia, Iraq, Morocco, Seychelles, Slovakia, Slovenia, Tunisia, Ukraine and Yugoslavia (it is not clear however, whether it is the former or new Yugoslavia).²

Bosnia and Herzegovina, Croatia and Slovenia succeeded to the Vienna Convention on the basis of its previous ratification by former Yugoslavia, The Czech Republic and the Slovak Republic succeeded to this Convention on the basis of its previous signing by former Czechoslovakia. By the same token, the relevant provisions of the Vienna Convention, namely Art. 36 para. 1 (“Participation in treaties not in force at the date of succession of States in cases of separation of parts of a State”) and Art. 37 para. 1 (“Par-

* This case study has originally been prepared for the ILA Committee on State Succession. Generally, legal writing is not quoted in this case study.

¹ The author of this case study was a member of the Polish delegation to the Vienna Conference on Succession of States in respect of Treaties (1977, 1978). Her earlier publications on this subject include: “Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym” [Succession of States in respect of Treaties in Contemporary International Law], Wrocław-Warszawa 1992, pp. 412 (a monograph in Polish), “Vienna Convention on Succession of States in respect of Treaties: A General Analysis”, 10 *POLYBIL* and “Succession of States in respect of Treaties in Contemporary International Law”, 12 *POLYBIL* 119(1983).

² See UN Doc., Multilateral treaties Deposited with the Secretary-General. Status as at 31 December 1994 – ST/LEG/SER, E/13, p. 896, and information concerning Slovakia provided by the Permanent Mission of the Republic of Poland to the United Nations.

ticipation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval") have been applied respectively.

It is purposeful to emphasize that all present neighbours of Poland are recently established states.

II. Poland and Treaties of the Former USSR

1. General Remarks

The position of the Republic of Poland is that in the process of decomposition of the former USSR in essence two distinct phenomena took place. The first phenomenon was the end of the illegal occupation of the Baltic Republics: Estonia, Latvia and Lithuania. The second phenomenon was a combination of dissolution and agreed secession(s). As a result, the Russian Federation simply continues (on the basis of identity) the legal personality of the former USSR (the predecessor) but the Ukraine, Belarus, Moldova, Armenia, Azerbaijan, Georgia, Kazakhstan, Uzbekistan, Kyrgyzstan, Tadjikistan and Turkmenistan are successor states (seceding states). Therefore it seems that the best way to describe the whole process of disintegration of the USSR is to use the language of the Vienna Convention on Succession of States in respect of Treaties of 1978, namely: separation of parts of a State with a State continuing after such separation (of parts of its territory). Consequently, it is to be understood that the Russian Federation is a simple "continuator" of the predecessor state, *i.e.* the former USSR, while post-USSR successor states are "separated" states.

The general position of the Russian Federation, as well as the post-USSR successor states as regards treaties concluded by the former USSR is as follows:

The Treaty on the Establishment of the Commonwealth of Independent States (CIS) of 8 December 1991 (to which all post-USSR states, except for the Baltic Republics, are parties) provided in Art. 12 that all states parties guarantee the fulfilment of their international obligations arising from treaties and agreements concluded by the USSR.

On 20 March 1992 the Council of Heads of States participating in the CIS decided in Kiev that states constituting the CIS were successors in respect of the rights and obligations of the former USSR. It should be noted that Turkmenistan did not sign the above Decision.

The consecutive relevant instrument, namely the Moscow Memorandum on Mutual Understanding on Agreements of the Former USSR Expressing the Common Interest of 6 July 1992, departs to a certain extent from the idea of obligatory succession in respect of treaties. While in point 1 it is stated that practically all multilateral treaties concluded by the former USSR express the common interest, the participation (succession) of the post-USSR states in these treaties would be decided independently by each state. Point 4 of this Memorandum provides that all problems connected with succession of these states in respect of treaties (including bilateral treaties) concluded by the former USSR will be settled after consultations between interested states (the

concept of optional succession). It should be added that Kyrgyzstan and Uzbekistan did not sign the above mentioned Memorandum.

Generally, Poland considers all post-USSR states, except for the Russian Federation and the Baltic Republics, to be potential successors in respect of Polish-Soviet treaties. Therefore, Poland sent special Notes (of 15 October 1993 and 20 January 1994) to all these states proposing bilateral consultations on the problem of succession to those treaties. A list of relevant Polish-Soviet treaties was attached (the financial and military agreements were excluded). However, the response of post-USSR states to the Polish proposal has not been uniform (see below).

2. Russian Federation

On 24 December 1991 the President of the Russian Federation notified the Secretary-General of the United Nations that the Russian Federation simply continues to perform the international rights and obligations of the former USSR, according to the concept that the Russian Federation is a "continuator" of the USSR (continuation of treaties as a result of continuity and identity of states).

The above thesis was indirectly confirmed in the Polish-Russian Protocol which was signed in Warsaw in December 1992. For example, this Protocol lists the Polish-Soviet Agreements on Legal Assistance of 1957 among those treaties which should be modified or substituted by new agreements. At present, Polish-Russian consultations are under way with a view of concluding a protocol regulating the future applicability of Polish-Soviet treaties in relations between Poland and the Russian Federation. These consultations are based on the assumption of the continuity of the legal personality of the former USSR by the Russian Federation and on the resulting assumption of the continuation of the Russian Federation as a party to Soviet treaties.

The protocol in question will also enumerate treaties which will be terminated as of the date of entry into force of this Protocol (*ex nunc*).

3. Baltic Republics

Poland supports the idea put forward by Estonia, Latvia and Lithuania that the separation of these states from the former USSR means in fact an end of illegal occupation of those Republics. Therefore, the position of Poland (and these states) is that these states are identical to pre-war Estonia, Latvia and Lithuania.

Poland has initiated consultations with Estonia and Latvia with a view of deciding on the applicability/binding force of the pre-war Polish-Estonian and Polish-Latvian treaties. The commonly accepted assumption is the continuation of these pre-war treaties.

The consultations with Latvia are most advance. It is probable that several Polish-Latvian pre-war treaties will be terminated as of the date of entry into force of the now negotiated protocol.

In practice, there are some exceptions to the clear standpoint presented above. For example, Lithuania appears to be a successor state in respect of the Polish-Soviet

Agreement concerning Polish-Soviet Boundary of 16 August 1945. It is a view of Poland that Lithuania really is a successor state in respect of this Agreement.

Moreover, while Lithuania rejected its succession in respect of the Polish-Soviet Agreement on Legal Assistance of 1957, it presented a view that this agreement applies in its relations with Poland provisionally, *i.e.* until a new agreement on legal assistance is concluded. Also Latvia and Poland decided on the provisional application of the above mentioned agreement in their mutual relations. This was decided in 1992 on the basis of an exchange of letters between Ministers of Justice of both states.

The attitude of Estonia as regards the Polish-Soviet Agreement on Legal Assistance of 1957 was not decisive until the second half of 1993. At that time, Estonia informed Poland that no agreement on legal assistance applies in their mutual relations.

4. Ukraine

The problem of succession of Ukraine in respect of treaties of the former USSR was regulated in a special domestic Law of 12 September 1991.³ Art. 7 of this Law provides that Ukraine is a successor state in respect of rights and obligations arising out of international agreements concluded by the former USSR, unless they contradict the Constitution of Ukraine and state interests.

In practice, Ukraine considers itself to be a successor state in respect of many Polish-Soviet treaties, including the Agreement concerning dual nationality.

The Polish-Ukrainian consultations are under way with a view of concluding a special protocol confirming succession of Ukraine in respect of the Polish-Soviet treaties. These consultations are based on the presumption of succession of Ukraine in respect of those treaties. Several Polish-Soviet treaties may be terminated in Polish-Ukrainian relations as of the date of entry into force of the now negotiated protocol.

The financial and military agreements, as well as so-called localized agreements concerning areas beyond the Ukrainian territory are excluded from the above mentioned consultations.

Ukraine is a simple "continuator" in respect of those multilateral treaties to which the Ukrainian Soviet Socialist Republic had been a party.

5. Belarus

In connection with art. 12 of the Treaty on the Establishment of the Commonwealth of Independent States (CIS) of 1991 the Presidium of the Supreme Council of Belarus adopted a Resolution on the procedure as regarding the confirmation of succession in respect of treaties. In particular, this Resolution indicated state authorities which would be competent to decide on succession to different categories of treaties (interstate, intergovernmental and interdepartmental agreements).

³ See – *Vedomosti Verhovnoy Rady* No. 46 of 12 November 1991.

In practice, Belarus considers itself to be a successor state in respect of many Polish-Soviet treaties, including the above mentioned Agreement on legal assistance of 1957 and two conventions – of 1958 and 1965 – concerning dual nationality.

Polish-Belarusian consultations are under way with a view of concluding a special protocol confirming succession of Belarus in respect of the Polish-Soviet treaties. These consultations are based on the presumption of succession of Belarus in respect of these treaties. Several Polish-Soviet treaties may be terminated in Polish-Belarusian relations as of the date of entry into force of the now negotiated protocol.

The financial and military agreements as well as localized agreements concerning areas beyond the Belorussian territory are excluded from the above mentioned consultations/negotiations.

Belarus is a simple “continuator” in respect of those multilateral treaties to which the Belarussian Soviet Socialist Republic became a party.

6. Moldova

The Parliament of Moldova adopted a Declaration on succession to international agreements concluded by the former USSR, unless these agreements would contradict the domestic law of Moldova.

Moldova accepted the Polish proposal to start consultations on the problems connected with the succession of Moldova in respect of the Polish-Soviet treaties. However, so far these consultations have not begun.

7. Armenia

Armenia has accepted the Polish proposal to start consultations on the problems connected with the succession of Armenia in respect of the Polish-Soviet treaties. However, so far the consultations have not begun.

8. Azerbaijan

In reply to the Polish Notes Azerbaijan has stated that it does not consider itself to be a successor state in respect of the Polish-Soviet treaties. So far, Poland has not formally objected to this view. It has not yet been decided what position should be taken with respect to Azerbaijan. Probably Poland will not insist on succession.

9. Georgia

Georgia has not replied to the Polish Notes.

10. Kazakhstan

In practice, Kazakhstan seems to consider itself to be a successor state in respect of at least some Polish-Soviet treaties. For example, Kazakhstan applies the Polish-Soviet Agreement on Legal Assistance of 1957.

Kazakhstan has not replied to the Polish Notes.

11. Uzbekistan

Uzbekistan, in reply to the Polish Note, has stated that it does not consider itself to be a successor state in respect of the Polish-Soviet treaties. So far, Poland has not formally objected to this view. It has not yet been decided what position should be taken with respect to Uzbekistan. Probably Poland will not insist on succession.

In practice Uzbekistan applies the Polish-Soviet Agreement on Legal Assistance of 1957.

12. Tadjikistan

Tadjikistan is the only post-USSR Asiatic state which in response to the Polish Notes declared itself to be a successor state in respect of Polish-Soviet treaties. Poland accepts the attitude of Tadjikistan in this respect.

13. Kyrgyzstan and Turkmenistan

Kyrgyzstan and Turkmenistan have not replied to the Polish Notes.

14. Conclusions

The practice of Poland and the post-USSR states only partially conforms to the respective regulation provided in the Vienna Convention on Succession of States in respect of Treaties of 1978. Namely, as far as the Russian Federation (which is identical to the USSR as a predecessor state) is concerned, the practice of Poland (and the Russian Federation) seems to fall in line with the provisions of Art. 35 ("Position if a State continues after separation of part of its territory") of the Vienna Convention. In this case a simple continuation of the Polish-Soviet treaties takes place.

As far as other post-USSR states (except for the Baltic Republics) are concerned, the practice of Poland is at least partially in line with the provisions of Art. 34 ("Succession of States in cases of separation of parts of a State") of the Vienna Convention. The following elements of this practice should be emphasized:

a) Poland proposed to post-USSR successor states to conduct consultations with a view of agreeing on the future of particular treaties. In particular, the intention of Poland was also to determinate with treaties would not be succeeded to because of reasons stated in Art. 34 para. 2 of the Vienna Convention, as well as to determine which treaties would be terminated as of the date of entry into force of the respective protocols concluded between Poland and a particular post-USSR state.

b) The starting point for Poland in the above mentioned consultations was the presumption of succession of post-USSR states in respect of the Polish-Soviet treaties (which seemed to fall in line with Art. 34 para. 1 of the Vienna Convention).

c) However, Poland did not insist on succession in respect of treaties of those post-Soviet states which were unwilling to succeed to any Polish-Soviet treaties.

The general picture of the practice of all post-USSR states seems to be as follows: some of these states have recognized obligatory succession in respect of post-Soviet treaties (with agreed or other exceptions), some of them have probably accepted optional succession in respect of those treaties, while others states have rejected any succession in respect of those treaties. Consequently, this practice partly conforms to the provisions of Art. 34 of the Vienna Convention (principle of *ipso jure* continuity) and partly to the customary "clean slate" principle applied traditionally to cases of secession (to seceding states).

III. Poland and Treaties of Former Yugoslavia

1. General Remarks

It is a firm position of Poland that the decomposition of former Yugoslavia should be qualified as dismemberment and not as a series of secessions. Consequently, no predecessor state exists but all post-Yugoslav states, including new Yugoslavia (Serbia and Montenegro) are new states, *i.e.* successor states.

2. Yugoslavia (Serbia and Montenegro)

On 27 April 1992 the Parliament of new Yugoslavia adopted a Declaration providing, *inter alia*, that this state would respect all international obligations of former Yugoslavia (the Yugoslav Parliament also claimed the identity of new Yugoslavia with former Yugoslavia, and therefore declared a simple continuation of treaties concluded by former Yugoslavia).

It may be added that new Yugoslavia applies several treaties concluded by Poland with former Yugoslavia (for example, the Agreement on the Legal Assistance in Civil and Criminal Matters of 1960 and the Consular Convention of 1982).

Because of continuing war in the territory of former Yugoslavia and the embargo, Poland has not yet proposed to new Yugoslavia consultations on the future of particular treaties concluded by Poland with former Yugoslavia.

3. Croatia

According to art. 33 of the Croatian Law (Statute) of 26 July 1991 on the preparation and conclusion of treaties, Croatia considers itself to be a successor state in respect of treaties concluded by former Yugoslavia, unless these treaties contradict the Constitution or the legal order of Croatia.

On 13 April 1995 an Agreement between the Government of the Republic of Poland and the Government of the Republic of Croatia on Succession to Bilateral Treaties was signed (unpublished). The principal provisions of this Agreement read as follows:

"The Government of the Republic of Poland and the Government of the Republic of Croatia...

- confirming that the Republic of Croatia is a successor state of predecessor states in respect of treaties concluded with Poland in the period of 1922–1991,
- pursuant to Art. III of the Constitutional resolution of the Republic of Croatia on Sovereignty and Independence of 25 June 1991,
- being guided by general principles of international law concerning succession in particular by the Vienna Convention on the Law of Treaties of 1969 and the principles of the Vienna Convention on Succession of States in respect of Treaties of 1978,
- aiming at the strengthening of treaty relations between the two States,
- have decided to conclude the present agreement and have agreed as follows:

Article 1

The Contracting Parties confirm that the following treaties continue to be binding in relations between the Republic of Poland and the Republic of Croatia:"

[18 treaties concluded between Poland and former Yugoslavia in 1926–1987 are listed].

"Article 2

The Contracting Parties decide that the following treaties will be terminated on the date of entry into force of the present agreement and will not be applied since the date of its signing:"

[4 treaties concluded between Poland and former Yugoslavia are listed]

"Article 3

The present Agreement will enter into force upon the receipt of the last diplomatic note informing about the fulfilment of all conditions prescribed by domestic legislation for its entry into force."

(...)

This Agreement has not yet entered into force.

4. Slovenia

On 1 March 1995 Poland and Slovenia concluded an Accord – in the form of an exchange of notes – on succession of Slovenia to bilateral treaties concluded by Poland with former Yugoslavia ("Accord on the Binding Force, in Relations between the Republic of Poland and The Republic of Slovenia, of Bilateral Treaties concluded by Former Yugoslavia and Poland in 1922–1991;" unpublished). The operative part of this Accord reads as follows:

"The Republic of Slovenia is a legal successor in respect of treaties concluded by former Yugoslavia and Poland in the period 1922–June 1991.

The following treaties continue to be binding in relations between the Republic of Poland and the Republic of Slovenia:"

[17 treaties concluded in 1955–1985 are listed].

"In respect of treaties listed under numbers 2–17 the intention of their modification or substitution by new treaties was expressed.

On the date of entry into force of this accord the following treaties will be terminated:"

[7 treaties concluded in 1956–1983 are listed].

The above Accord has not as yet entered into force.

5. Bosnia and Herzegovina

For self-evident reasons the problem of succession of Bosnia and Herzegovina in respect of bilateral treaties concluded between Poland and former Yugoslavia has not been settled.

6. Macedonia

The Parliament of Macedonia has adopted a Law on the implementation of the Constitution. This Law provides, *inter alia*, that Macedonia is a successor state in respect of international agreements concluded by former Yugoslavia.

Macedonia has expressed its intention to consult with Poland the problems of its succession to bilateral Polish-Yugoslav treaties and has asked Poland to provide it with the copies of some of such treaties.

7. Conclusions

To the extent that the problem of succession of the post-Yugoslav states to Polish-Yugoslav treaties has been settled, it has occurred in conformity with the provisions of Art. 34 para. 1 of Vienna Convention on Succession of States in respect of Treaties of 1978 (see agreements quoted above concluded by Poland with Croatia and Slovenia).

IV. Poland and Treaties of the former Czechoslovakia (Czech and Slovak Federal Republic)

1. General Remarks

The firm position of Poland is that the decomposition of the Czech and Slovak Federal Republic is a dissolution of the federation and not a secession. Therefore, both the Czech Republic and the Slovak Republic are new states, *i.e.* successor states.

On 15 December 1992 the Parliament of the Czech and Slovak Federal Republic adopted a Resolution which provided in Art. 1 para 1 that both newly established states would be the general successors in respect of treaties concluded by Czechoslovakia/Czech and Slovak Federal Republic.

2. Czech Republic

The Czech Republic recognized its general succession in respect of treaties concluded by Czechoslovakia/Czech and Slovak Federal Republic in its Proclamation addressed to the parliaments and nations of the world and in the Law No. 4/1992 adopted by the Czech National Council on 31 December 1992.

In 1993 Polish-Czech consultations began with a view of concluding a protocol between the Government of the Republic of Poland and the Government of the Czech Republic on succession to the Polish-Czechoslovak treaties. In the draft Protocol there are listed: treaties which are simply succeeded to (which continue to be in force), treaties

which are succeeded to but will be renegotiated/modified, and treaties which are succeeded to but will be terminated as of the date of entry into force of the Protocol.

3. Slovakia

On 8 July 1993 a Protocol between the Government of the Republic of Poland and the Government of the Slovak Republic concerning the ending Force in Relations between the Republic of Poland and the Slovak Republic of the Bilateral International Agreements Concluded in 1918–1992 between Poland (the Republic of Poland, the Polish People's Republic) and Czechoslovakia (the Czechoslovak Republic, The Czechoslovak Federal Socialist Republic, The Czech and Slovak Federal Republic), was signed (unpublished). The operative part of this Protocol reads as follows:

1.

"The Contracting Parties confirm that on the date of entry into force of the present Protocol the agreements listed in an annex to this Protocol, which constitutes its integral part, will be terminated.

2.

The Contracting Parties confirm that all other international agreements concluded between Poland and Czechoslovakia in 1918–1992 which are not listed in the annex to the Protocol are binding for the Parties in accordance with the provisions contained therein. This does not concern agreements in respect of which the Parties have recognized that they have been implemented or have been otherwise terminated.

At a proper time, both Parties will publish lists of such agreements in accordance with their domestic legislation."

This Protocol entered into force on 6 June 1994.

4. Conclusions

The problem of succession of the Czech Republic and the Slovak republic in respect of the Polish-Czechoslovak treaties has been/will be settled in full conformity with the provisions of Art. 34 para. 1 of the Vienna Convention on Succession of States in respect of Treaties of 1978.

V. Poland and Treaties of the Former GDR

On 31 August 1990 the Treaty between the Federal Republic of Germany and The German Democratic Republic on the Establishment of the Unity of Germany was signed in Berlin.⁴ This Treaty was the legal basis of the voluntary incorporation of the GDR into the FRG. In the light of the preparatory work connected with the conclusion of the Vienna Convention on Succession of States in respect of Treaties of 1978, it is clear that a voluntary incorporation of a state is one of the possible forms of the uniting of states.

⁴ BGBl 1990, Part II, p. 88.

Art. 12 para. 1 of the above mentioned treaty provides that as a consequence of the establishment of the unity of Germany, the treaties of the GDR will be discussed with individual states which are parties to these treaties, *i.e.* with the treaty partners of the GDR. These discussions will take into account the protection (of confidence) of interests of states parties to the treaties, the treaty obligations of the FRG, the principle of democracy and the rule of law, as well as the competence of the European Communities. Art. 12 para. 2 provides that united Germany will present its position on succession in respect of GDR treaties after consultations with its treaty partners and in some cases – with the European Communities.

Generally, united Germany refused to apply the provisions of the Vienna Convention on Succession of States in respect of Treaties of 1978 (see Art. 31–33 of this Convention). By the same token the FRG refused to apply the principle of *ipso jure* continuity and to recognize the resulting obligatory succession in respect of GDR treaties. However, in the light of the above quoted Art. 12 of the Treaty on the Establishment of the Unity of Germany of 1990 it is clear that treaties concluded by the former GDR did not expire automatically on the date of the unification of Germany.

The first round of Polish-German consultations relating to the binding force of treaties concluded between Poland and the former GDR ended on 9 April 1992. In 1993 an official unilateral German statement of 21 June 1993 – concerning the expiration of some such treaties – was published.⁵ The Government of the FRG declared in this statement that on the basis of its Verbal Note of 7 May 1993 addressed to the Government of the Republic of Poland, as well as Art. 12 of the Treaty on the Unity of Germany of 31 August 1990 and following Polish-German consultations which took place in Warsaw on 6–9 April 1992, the treaties concluded by Poland and the former GDR – listed in an annex – were considered to be terminated as of 3 October 1990, *i.e.* the date of the unification of Germany.⁶ In the annex in question 114 treaties are listed. Moreover, according to the above mentioned statement it is not excluded that also some other agreements concluded by Poland and the former GDR expired as of the date of the unification of Germany.

The problem of the binding force, including possible succession, of the remaining 40 or so bilateral treaties concluded by Poland and the former GDR has still not been settled.

The respective principles of the Vienna Convention Succession of States in respect of Treaties of 1978 were not applied to treaties concluded between Poland and the former GDR. Moreover, it should be pointed out that, in fact, Germany treated the records of the Polish-German consultations as a basis for declaring the expiration of 114 treaties between Poland and the former GDR. This seems to be a rather doubtful legal basis for doing so.

⁵ BGBl 1993, Part II, No. 26, p. 1180 (the annex is published at pp. 1181–1187).

⁶ *Ibidem*.

VI. The Practice of Poland as a Depository – as Regards Succession of Recently Established States in Respect of Treaties

Poland is a depository, *inter alia*, of the Warsaw Convention on the Unification of Certain Rules relating to International Carriage by Air (and the Additional Protocol) of 12 October 1929 and of the Hague Protocol modifying this Convention – of 28 September 1955.

The Warsaw Convention entered into force on 13 February 1933, and the Hague Protocol – on 1 August 1963.

The practice of the recently established states in respect of this Convention/Protocol is as follows:

1) Belarus and Ukraine simply continue the participation, respectively, of the Belarussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic in the Warsaw Convention and the Hague Protocol (simple continuation).

2) The Minister of Foreign Affairs of Bosnia and Herzegovina has sent the Government of Poland the following Note:

“Dear Sirs,

I have the honour to notify you, in your capacity as depository, that the Republic of Bosnia and Herzegovina, as the successor State, in conformity with the provisions of the International Law and the Vienna Convention on Succession of States in Respect of Treaties, dated 23 August 1978, by virtue of succession to the Socialist Federal Republic of Yugoslavia in respect of the territory of the Republic of Bosnia and Herzegovina, considers itself bound by the following Convention and protocols:

1. Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929;

2. Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at The Hague on 28 September 1955;

3. Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975;

4. Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975;

5. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975.

Referring to the above, we kindly ask initiating the procedure of registration at the Government of the Republic of Poland and publication, namely notifying the parties of the Convention and protocols, as well as the organs of respective international organizations, on the succession of the Republic of Bosnia and Herzegovina.

Thank you for your kind co-operation.

Please accept, Sirs, the assurances of my highest consideration.

Done at Sarajevo, the 9th Day of February 1995
Dr Irfan Ljubijankić
Minister."

By virtue of this notification of succession the Warsaw Convention and related Protocols are legally effective in respect of Bosnia and Herzegovina as of the date of independence of this state (6 March 1992).

3) Croatia has succeeded to the Warsaw Convention and the Hague Protocol on 8 July 1993 – with effect as of 8 October 1991 (the date of independence of Croatia).

4) On 2 February 1994 Macedonia sent the Polish Minister of Foreign Affairs a notification of succession to the Warsaw Convention and the Hague Protocol (with effect as of 8 September 1991, *i.e.* the date of independence of Macedonia).

5) The Warsaw Embassy of the Russian Federation has sent the Polish Ministry of Foreign Affairs an instrument dated 11 February 1992, stating that "... by a Note of 13 January 1992 the Ministry of Foreign Affairs of Russia advised all heads of diplomatic missions in Moscow that the Russian Federation continues to realize its rights and to perform its obligations arising out of international agreements concluded by the USSR. This statement means that Russia has automatically become a party to all agreements of the former USSR, including the Warsaw Convention on the Unification of Certain Rules relating to International Carriage by Air of 12 October 1992..." (translation from Russian).

Thus, in case of the Russian Federation a simple continuation of the participation in the Warsaw Convention (and The Hague Protocol) takes place.

6) Latvia continues its pre-war participation in the Warsaw Convention.

7) The Czech Republic has notified its succession to both the Warsaw Convention and Hague Protocol. These treaties are legally effective in relations to the Czech Republic as of 1 January 1993, *i.e.* the date of independence of this state.

8) In 1995 the Slovak Republic sent the Government of Poland the following letter:

"The Ministry of Foreign Affairs of the Slovak Republic presents its compliments to the Government of the Republic of Poland and has the honour to notify the following:

In accordance with relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor state, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, *i.e.* the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declaration made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaties-parties.

The Slovak Republic wishes further to maintain its status as a contracting State of the Treaties to which Czechoslovakia was a Contracting State and which were not yet in force at the date of the dissolution of the Czech and Slovak Federal republic as well as the status of a signatory State of the treaties which were previously signed but not ratified by Czechoslovakia.

This applies to the treaties deposited with the Government of the Republic of Poland listed in the Annex to this letter.

in order to ensure continuous implementation of these treaties in relation between the Slovak Republic and other parties to these treaties, the Ministry request the Government of the Republic of Poland, in his capacity as depositary, to communicate this information as soon as possible to the parties to the below mentioned treaties.

The Ministry of Foreign Affairs of the Slovak Republic avails of this opportunity to renew to the Government of the Republic of Poland the assurance of its highest consideration.

Bratislava 16 February 1995."

In the Annex to the above quoted letter, *inter alia*, the Warsaw Convention and the Hague Protocol are listed. Therefore, the Slovak Republic is a party to these treaties as of 1 January 1993, *i.e.* the date of independence of this state.

9) Turkmenistan acceded to the Warsaw Convention on 21 December 1994.

10) The question of the participation of new Yugoslavia (Serbia and Montenegro) in the Warsaw Convention and the Hague Protocol is being clarified by the depositary.

11) GDR ceased to be a party to the Warsaw Convention and the Hague Protocol on 3 October 1990, *i.e.* on the date of the unification of Germany.

Generally, as the depositary Poland has always accepted the position of recently established states, including successor states, as regards their status in respect of the Warsaw Convention and the related Protocols.

VII. General Conclusions

1. The Polish practice illustrates that initiating and conducting consultations/negotiations between successor states and the "other states parties" as regards succession to bilateral treaties is no evidence as to the non-applicability of the *ipso jure* continuity principle (obligatory succession to treaties). Namely, such consultations/negotiations are always necessary even in order to check whether the conditions/circumstances provided for in Art. 34 para. 2(a) and (b) occur and consequently the respective rules should be applied. In most instances it is impossible to decide this question without consultations of the interested states (a given successor state and the treaty partner of his predecessor). Consequently, consultations/negotiations, as such, do not prove the applicability of a clean slate principle (optional succession to treaties) in any given case.

In this context it is useful to emphasize that, in fact, all agreements concluded/negotiated by Poland with the recently established successor states only confirm obligatory succession to bilateral treaties. It is also true whenever they provide for an expiration/termination of certain succeeded to treaties – with the *ex nunc* effect (*i.e.* as of the date of entry into force of the respective agreements).

2. The practice of Poland as regards succession of recently established states in respect of treaties, and in particular the interaction of Poland and the successor states, evidences that the respective provisions/principles embodied in the Vienna Convention on Succession of States in respect of Treaties of 1978 have been applied to same extent. Namely, they have fully applied to the dissolution of the Czech and Slovak

Federal Republic. They also seem to have applied in case of the dismemberment of former Yugoslavia. On the other hand, only in some cases of secession of post-USSR states the rules embodied in the Vienna Convention have been observed. In case of the unification of Germany the rules of the Vienna Convention were not applied at all.

Thus, the Vienna Convention on Succession of State in respect of Treaties of 1978 has influenced the recent practice of states to some extent. In my opinion this comes as no surprise since this Convention, though not yet in force, is nevertheless the most authoritative statement of the views and positions of the international community of states as a whole as to the proper law in the domain of succession of states in respect of treaties.

3. The recent cases of state succession (ex-USSR, ex-Yugoslavia) were characterised and qualified not only in line with the will of the interested states but also as a result of recognition of the international community of states as a whole. Therefore, not always a self-appraisal of a given state has been recognized internationally (*vide* new Yugoslavia).

RENATA SZAFARZ

A Conspectus of International Agreements Concluded by the Republic of Poland, 1995

Commentary¹:

1. Between Poland and Neighbouring States

In 1995, Poland concluded several bilateral agreements with its neighbours – Russia, Belarus, Lithuania, Ukraine, the Czech Republic, the Slovak Republic, and the Federal Republic of Germany. The majority of these agreements are in general concerned with transborder co-operation – although there are also some agreements focusing on particular subjects of transborder co-operation; for example, a Polish-German agreement concerning co-operation of the police and border authorities in the border zone. There is another agreement, between Poland and Belarus, describing the rules of co-operation in the field of examination of cross-border road and rail movements. Another field addressed by these agreements relates to the maintenance of border crossing points.²

The second kind of agreements deal with co-operation between customs authorities.³ It is also necessary to point to agreements signed with the Czech and Slovak republics establishing the State border with these States.

There were 2 important agreements, with the Lithuanian government, and with the Russian Federation on nuclear alerts and co-operation in the field of atomic security and radiological protection.

Two other important conventions were signed with the Russian Federation, laying down with the basic principles governing the discharge of debt outstanding from transactions between the Polish People's Republic and the former Soviet Union, and a consular convention.

The final conventions which fall to be mentioned in this part are both with Belarus in the field of the protection of cultural heritage, and co-operation in the field of culture, science and education.

¹ This commentary is necessarily brief, since prepared solely on the basis of the titles of the agreements. In many cases, the actual texts of the agreement have not been made available to the author.

² *E.g.* with the Slovak Republic (maintenance of the highway), with Federal Republic of Germany (construction and maintenance of bridges, road and rail crossings: Olszyna-Forst 20 March 1995, Gubinek-Guben 20 March 1995).

³ With Lithuania, with Russia, with Belarus, with Ukraine.

List of agreements:

Poland – Czech Republic

1. Agreement between the government of the Republic of Poland and the government of the Czech Republic on trans-border co-operation; Warsaw 8 September 1994, came into effect 5 January 1995.
2. Statute of Polish–Czech International Commission on trans-border co-operation; 1st June, 1995, confirmed 14 December 1995.
3. Agreement between the government of the Republic of Poland and the government of the Czech Republic about changes in the character of the border railway crossing at Cesky Tesin–Cieszyn to a personal crossing for nationals of all states of the world and a personal border crossing with small border movement; 28 February 1995, came into effect on the same day.
4. Agreement between the government of the Republic of Poland and the Czech Republic concerning the common State border; 17 January 1995.
5. Agreement between the government of the Republic of Poland and the Czech Republic on small (localised) border traffic; 17 January 1995.

Poland – The Slovak Republic

1. Agreement between the government of the Republic of Poland and the government of the Slovak Republic on co-operation in the field of quarantine and plant protection; 18 August 1994, came into effect 5 January 1995.
2. Agreement between the Republic of Poland and the Slovak Republic on legal relations and co-operation on the common State border; 6 July 1995.
3. Agreement between the Republic of Poland and the Slovak Republic on common State border; 6 July 1995.
4. Agreement between the government of the Republic of Poland and the government of the Slovak Republic on maintenance of border bridges and common parts of roads on the common State border; 29 November 1995.
5. Agreement between the government of the Republic of Poland and the government of the Slovak Republic on co-operation in the field of transport; Warsaw, 16 August 1994, confirmed by decree of the Council of Ministers 61/95, 5 June 1995 came into force 25 June 1995.

Poland – Lithuania

1. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on early notice of nuclear accidents, and co-operation in the field of nuclear security and radiological protection; Warsaw, 2 June 1995.
2. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on co-operation and mutual customs assistance; Vilnius, 30 January 1995; ratified by President of Poland on 30 May, 1995; came into force 9 July 1995.

3. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on trans-border co-operation; 16 September 1995, *Dziennik Ustaw* 1995 No. 113, Item 541.

4. Agreement on mutual employment of Polish and Lithuanian nationals; 26 September 1994; confirmed 10 August 1995.

Poland – Russian Federation

1. Draft agreement between the government of the Republic of Poland and the government of the Russian Federation regarding the basic rules for the regulation of mutual debts which arose under operations between the Polish Peoples Republic and the Soviet Union, signed and came into force, 20 January 1995.

2. Agreement between the Republic of Poland the Russian Federation on trade and economic co-operation, signed in Warsaw, 25 August 1993, came into force 13 February 1995. *Dz. U.* 1995, No. 50, Item 266, 1995.

3. Agreement between the government of the Republic of Poland and the government of the Russian Federation on early notice of nuclear accidents and exchange of information on nuclear sites and co-operation in the field of nuclear security and radiological protection, signed Warsaw 18 February 1995, came into force, 18 May 1995.

4. Agreement between the government of the Republic of Poland and the government of the Russian Federation regarding co-operation in customs matters signed Warsaw 18 February 1995, confirmed by decree of the Council of Ministers 81/95, 30 June 1995, came into effect 6 August 1995.

5. Agreement between the government of the Republic of Poland and the government of the Russian Federation on mutual fisheries policy, signed 5 July 1995, confirmed 18 July 1995.

6. Consular convention between the Republic of Poland and the Russian Federation, Moscow, 22 May 1992, came into force 28 October 1995, *Dz. U.* 1995, No. 140, Item 687.

Poland – Belarus

1. Agreement between the government of the Republic of Poland and the government of Belarus regarding co-operation in the field of cultural heritage protection. Warsaw 25 March 1995, confirmed 19 July 1995.

2. Agreement between the government of the Republic of Poland and the government of Belarus on civil air communication, 8 June 1993, confirmed 16 October 1995, came into force 28 November 1995.

3. Agreement between the government of the Republic of Poland and the government of Belarus on co-operation in the field of culture, science and education.

4. Agreement between the government of the Republic of Poland and the government of Belarus on co-operation in customs matters signed 27 November 1995.

5. Agreement between the government of the Republic of Poland and the government of Belarus on co-operation in the field of tourism, signed 27 November 1995.

6. Agreement between the government of the Republic of Poland and the government of Belarus on rules about co-operation during the control of persons, goods and transport crossing the border on road and rail crossings. Signed 21 January 1995, confirmed 25 October 1995.

Poland – Ukraine

1. Agreement on co-operation and mutual customs assistance. Signed 18 December 1995.

Poland – Federal Republic of Germany

1. Agreement on maritime traffic, Warsaw 20 March 1995, confirmed by decree of the Council of Ministers 72/95 22nd June 1995.

2. Between Poland and other States

Poland also signed a range of agreements with countries other than its neighbours, and on a range of topics, for example, trade, tourism, and double taxation. It is necessary to distinguish two agreements on friendship and co-operation signed between the Republic of Poland and the Republic of Turkey, and with the Republic of Uzbekistan which came into effect in 1995.

1. With Turkey, Warsaw, 3 November 1993, came into effect 15 June 1995. Dz. U. 1995, No. 118, Item 566.

2. With Uzbekistan, Warsaw, 11 January 1995, came into effect 20 November 1995.

The majority of remaining agreements are in general concerned with commercial co-operation, and agreements which relate to support and mutual protection of investments or double taxation. An extensive list of these is presented below.

Trade agreements:

1. Agreement between the government of the Republic of Poland and the government of the Republic of Lebanon on trade and economic co-operation with Lebanon, Beyrouth 17 May 1993, ratified 26 October 1993, came into effect 28 May 1995.

2. Agreement between the government of the Republic of Poland and the government of the Republic of Ecuador, 2 February 1990, came into force 12 September 1995.

3. Free-trade agreement between the government of the Republic of Poland and the government of the Republic of Slovenia, 17 July 1995.

4. Trade agreement between the government of the Republic of Poland and the government of the Islamic Republic of Pakistan, 12 July 1995, confirmed 27 September, 1995.

5. With the United States of America, 25 May 1995; draft agreement on subvention.

Support and mutual protection of investments:

1. With the Republic of Greece, 14 October 1992, came into effect 20 February 1995, Dz. U. 1995, No. 51, Item 275.

2. With the Republic of Croatia, Warsaw 21 February 1995, ratified 3 April 1995.
3. With the government of the Kingdom of Morocco, Rabat 24 October 1994, ratified 18 May 1995.
4. With the Republic of Uzbekistan, 11 January 1995, ratified 9 March 1995, came into force 29 April 1995, Dz. U. 1995, No. 116, Item 561.
5. With the Republic of Chile, 5 July 1995.
6. With the Arabic Republic of Egypt, 1 July 1995
7. With the government of Mongolia, 8 November 1995.
8. With the republic of Moldova, 16 November 1994, came into force 27 July 1995, Dz. U. 1996, No. 137, Item 679.

Conventions relating to double taxation and prevention of income tax avoidance:

1. With the government of the Socialist Republic of North Vietnam, 31 August 1994, came into force 20 January 1995. Income tax only, Dz. U. 1995, No. 49, Item 258.
2. With the government of Uzbekistan, Warsaw 11 January 1995, ratified 9 March 1995, came into force 29 April 1995, Dz. U. 1995, No. 116, Item 559.
3. With the government of Kazakhstan, Alma-Ata 21 September 1994, came into force 13 May 1995, Dz. U. 1995, No. 121, Item 586.
4. With the Republic of Hungary, 23 September 1992, came into force 10 September 1995.
5. With the government of the Republic of Romania, 23 June 1994, came into force 15 September 1995, Dz. U. 1995, No. 125, Item 679.
6. With the Republic of Moldova, 16 November 1994, came into force 17 October 1995.
7. With the government of the Republic of Ireland, 13 November 1995, came into force 22 December 1995 (income tax only).

Conventions relating to double taxation (property and income taxation)

1. With the Grand Duchy of Luxemburg, 14 June 1995.
2. With the government of the Kingdom of Morocco, Rabat 24 October 1994, ratified 10 May 1995.
3. With the Republic of Bulgaria, Warsaw 11 April 1994, came into force 10 May 1995.
4. With the Republic of Portugal, Lisbon 9 May 1995 (income tax only).
5. With the Republic of Zambia, Harare, 19 May 1995 (property income).

Transport:

1. With the government of the Republic of Croatia, Zagreb, 30 September 1994, confirmed by decree of the Council of Ministers 28/95 of 28 February 1995, came into force 1 April 1995; international road carriage of persons and goods.
2. With the government of the Socialist Republic of North Vietnam, 6 December 1995; co-operation in maritime transport.

3. With the government of the Republic of Moldova, 27 July 1995; agreement on civil air communication.

4. With the government of Belarus, 8 June 1993, confirmed 16 October 1995, came into force 28 November 1995; agreement on civil air communication.

5. With the government of the Republic of Estonia, 6 May 1993, confirmed 16 October 1995, came into force 27 October 1995; agreement on civil air communication.

6. With the government of the Republic of Uzbekistan, 11 January 1995, confirmed 16 October 1995, came into force 5 December 1995.

7. With the government of Indonesia, 13 December 1991, confirmed 16 October 1995; agreement on air transport, in particular regular air communication.

Miscellaneous:

1. With the government of Bulgaria, 28 September 1994, came into force 10 February 1995; veterinary co-operation.

2. With the government of the Republic of Croatia, 7 December 1995; veterinary co-operation.

3. With the government of Bulgaria, 28 September 1994, came into force 24 March 1995; co-operation in the fields of quarantine and plant protection.

4. With the United States of America; creation of an American-Polish Fulbright Commission.

Tourism:

1. With Albania, Tirana 28 October 1994, confirmed by decree of the Council of Ministers 75/95 23 June 1995, came into force 7 July 1995.

2. With Romania, 13 December 1994, came into force 31 August 1995.

Selected instances⁴ of Polish accession to multilateral agreements:

1. European convention on the Prevention of torture and inhuman treatment or punishment (Strasbourg, 26 November 1987), 11 July 1994, came into force 1 February 1995. Dz. U. 1995, No. 46, Item 238.

2. Protocols numbers 1 and 2 to 1. Ratificatory documents deposited, 24 March 1995.

3. Exchange of Convicted Persons (Strasbourg, 21 March 1983), 1 March 1995, Dz. U. 1995, No. 51, Item 279.

4. European Convention on Violence and Hooliganism during Sporting Events, especially during Football Matches (Strasbourg, 19 August 1985), ratified 9 March 1995, ratificatory document deposited 21 April 1995, came into force 1 June 1995, Dz. U. 1995, No. 129, Item 625.

5. Protocol number 9 to the European Convention on Human Rights and Fundamental Freedoms (Rome, 6 November 1990), 1 February 1995, Dz. U. 1995, No. 36, Item 177.

⁴ Poland acceded to 38 multilateral agreements, of which only the examples cited above are of wide interest.

6. Convention on the Protection of Children and Co-operation in the field of International Adoption (The Hague, 29 May 1993), ratificatory document deposited 16 January 1995.

7. Convention on Nuclear Security (Vienna, 20 September 1994), ratified 10 May 1995. Ratificatory document deposited 14 June 1995.

8. Agreement for the Establishment of the World Trade Organisation (Marrakesh, 15 April 1994), ratified 30 May 1995, came into force 1 July 1995., Dz. U. 1995, No. 98, Item 483.

9. Vienna Convention on the International Sale of Goods (Vienna, 11 April 1980), ratified 13 March 1995. Ratificatory document deposited 19 May 1995. Came into force 1 June 1996.

10. Convention on the prevention of testing, production, accumulation and use of chemical weapons, as well as destruction of stockpiles (Paris, 13 January 1993), ratified 27 July 1995.

Other:

Poland was also active in other spheres, for instance, in the recognition of other states,⁵ in the regional,⁶ European,⁷ and world⁸ co-operation.

KATARZYNA MYSZONA*

⁵ E.g. Brunei, 21 November 1995, Decree of the Council of Ministers 134/95.

⁶ Address by the then Minister of Foreign Affairs to the 4 session of the Council of Baltic States, Gdańsk, May 1995.

⁷ Prime Minister Józef Oleksy delivered an address during a meetings with the URE Council (Brussels, 5 April 1995) and the Council of Europe (Cannes, 27 June 1995), and the then Minister of Foreign Affairs addressed a special joint session of the Bundestag and Bundesrat, Bonn, April 1995.

⁸ The then President of the Republic of Poland, Lech Wałęsa, gave a speech in San Francisco on 25 June 1995 during the ceremonies commemorating the fiftieth anniversary of the foundation of the United Nations Organisation. The then Minister of Foreign Affairs, Władysław Bartoszewski, addressed the 50 session of the United Nations General Assembly, New York, 3 October 1995. Poland also tried to maintain close association with NATO, with addresses by the then President, Prime Minister, and Minister of Foreign Affairs during 1995.

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B O O K R E V I E W S

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E. MCWHINNEY, *Judge Manfred Lachs and Judicial Law-Making*, Kluwer Law International, The Hague 1995

The renowned publisher has initiated a new series of publications concerning a specific aspect of the International Court of Justice: portraits of honourable members of this authoritative highest judicial organ of the international community. One of the first books has been devoted to a person whose activity played enormously important role both in the functioning of the Court and the development of international law in Poland.

The book has been written according to a special schema. First part introduces a reader to life and career of the Judge, the second chapter presents different cases decided by the Court in the presence of the Judge, and shows the importance of the Judge for resolving it; finally, in the third part fragments of judgements elaborated by particular Judges and separate and dissenting opinions are reproduced.

We would like to point out the most important features of activity and achievements of Judge Lachs. First of all, he always remembered that the task of the Court did not consist upon a finding a sophisticated legal reasoning but upon a resolving a specific dispute. He tended therefore to finish a proceeding as soon as possible. He took into account a development of science and technology, and a necessity to adapt legal norms to changing situation (thanks to him, law did not remain fossilized). He was a pioneer of a new role of the Court in an international judicial proceeding – judges became less dogmatic and more flexible and active in bringing parties to a dispute to a mutually acceptable solution. As to substantive development of international law, Judge Lachs proposed an introduction of a notion of obligations *erga omnes* into international law (*Barcelona Traction* case) and rejected a concept of separation of powers within the UN, allowing a simultaneous dealing with a specific dispute by different organs, in particular the Security Council and the ICJ. Such an approach was in fact a direct consequence of the opinion mentioned above that every action should lead towards a resolving dispute endangering a stability of international community.

The development of the career of Judge Lachs shows that a perfect international lawyer should pass through different stages and forms of activity. In fact, those who join academic career with practical experience (*e.g.* as legal officers, civil servants, but also practising lawyers) and – possible – with diplomatic experience play the most important role in the development of international law.

Finally, E. McWhinney presents connections of Judge Lachs with Poland. Notwithstanding difficulties of different kind (the author shows rare among foreigners knowledge of some specificity of Polish relations), Lachs remained permanently in contact with Polish authorities and with Polish research centres (as professor of the Warsaw University and of the Institute of Law Studies, finally, as member of the Polish Academy of Sciences). It is also important to

stress that Judge Lachs always supported the education of young generations of Polish international lawyers. Notwithstanding his occupation he used to find time to meet Polish participants to the Hague Academy of International Law, and he granted several scholarships yearly to enable such a participation. In his last will he obligated the executors to find funds for continuing this practice. Let us add here that the last will provided also for establishing a Foundation aimed at supporting a research in public international law in Poland, *i.a.* through granting special prizes to authors of the most important publications.

We would like to emphasise some elements decisive for the quality of the reviewed volume: close personal relations between the author and the late Judge Lachs, a deep knowledge of all aspects of the activity of the ICJ allowing a keen evaluation of influence of particular members of the Court upon the decisions. All this makes the book a valuable source of information on the masterpiece output of the judicial activity of M. Lachs. The analysis has been followed by the bibliography of books, articles, and other publications by the eminent Judge.

Władysław Czapliński

A. WYROZUMSKA, *Ewolucja statusu prawnego Antarktyki a państwa trzecie*, Łódź 1995

The issues dealing with the status of Antarctic belong to vividly discussed problems of international relations and international law, because of specific legal regulation of these issues, and of international claims presented by different states to the territory and the resources of this Continent. A. Wyrozumska does not question a competence of a limited circle of states-parties to the Antarctic Treaty and following agreements to establish a particular territorial regime opposable to third states: she poses a problem to what extent changing circumstances can influence rights of third states to claim a revision of this regime. The analysis concentrates therefore to a large extent upon theoretical problems of the law of treaties.

Discussing territorial titles to territory in Antarctic, Wyrozumska concludes that the territorial regime created by the Treaty of 1959 is specific, as it excludes certain kinds of claims while allowing other ones. It is not possible to recognise Antarctic as a common heritage of mankind (we agree that this concept is unclear and far from constituting general customary norm) but the status is dominated by elements qualifying it as common territory (*res communis*).

The next chapter has been devoted to measures of protecting interests of third states by the parties to the Treaty. Wyrozumska briefly referred to concepts of *actio popularis* and processual intervention in international law (in particular an analysis of the former is insufficient; on the other hand, the intervention concerns a judicial proceeding and is of little importance in respect of the Antarctic regime). We notice with interest the first presentation of a possibility of revision of international agreements on the basis of Art. 14 of the UN Charter in Polish international legal literature.

The most interesting Chapter V concerns the effectiveness of the Treaty and its opposability to third parties. Wyrozumska has based the opposability on the very nature of the Treaty, rejecting its binding force as customary law and its acceptance by these third states. In our opinion, the authoress goes too far. The nature of a treaty itself cannot constitute a premise of its

opposability. The Antarctic Treaty imposes important obligations upon third states, and according to fundamental rules of international law the freedom to act under international law is limited by rights of third states. Finally, according to well established rule, treaties do not bind third parties. In fact, Wyrozumska has put this thesis in question by quoting statements made by third states rejecting a regulatory competence of the parties of the Treaty to establish an objective regime (at p. 156). The matter is extremely delicate and disputable.

Finally, the authoress has presented effects of third states' opinions upon a development of the status of Antarctic. She has shown that although in theory a possibility to act has been extremely limited, in reality third states have been able to force the parties to the Treaty to change their policy and to amend the regime. It is unclear, however, whether these amendments result from a development of political circumstances or are effect of an application of these limited measures at the disposal of the non-parties.

The book discusses a problem which is important from the point of view of the law of treaties. Such presentation are – unfortunately – extremely rare in the Polish literature lately, so the publication deserves an attention. It is methodologically interesting and very carefully written, the bibliography contains over 300 positions (unfortunately, Wyrozumska has referred to a few German publications only). We would like to emphasise the way of referring by the authoress to jurisprudence of international courts, showing not only a sentence of a judgement but also factual and legal background of specific cases. Even if certain mistakes can be found (she erroneously identifies territorial claims with title to territory), and some views are highly disputable (it is difficult to agree that the creation of customary rules of peremptory character is less complicated than the creation of “normal” customary law, as from the very nature of *jus cogens* as requiring a fulfilment of special conditions the contrary should be concluded), it is highly regrettable that the access to this valuable book is limited for persons speaking Polish.

Let us add that the book by A. Wyrozumska has been granted the Manfred Lachs Price as the most outstanding Polish monograph in international law in 1996.

Władysław Czapliński

United Nations: Law, Policies and Practice, Editor-in-Chief Rudiger Wolfrum, Managing Director – Christiane Philipp, Verlag C.H. Beck – Munchen, Martinus Nijhoff Publishers, Dordrecht–London–Boston, 1995

The voluminous book on the law and policies of the United Nations is the third – modified edition of the “Handbuch Vereinte Nationen” – previously published in a German version in 1977 and 1991. Though the editors did not refer themselves to the 50th anniversary of the United Nations – the very choice of the date of the publication is in no case a result of mere incident. Those, who would like to assess 50 years of the United Nations, will get a hardly replaceable instrument to this end. Two-volume publication comprises 162 chapters discussing in detail several aspects of the UN system.

It is impossible to discuss here all the chapters suffices here to divide them into four groups – namely 1) chapters dealing with the general aspects of the UN law and the UN organs,

2) chapters on the UN specialized agencies, 3) chapters presenting post-war international conflicts and 4) chapters devoted to certain branches of public international law. This classification is, however, in no case exhaustive.

Special attention of lawyers will certainly be attracted by chapters dealing with the core problems of the Organization itself, its basic organs, powers, principles, activities. A few chapters devoted to these problems will be discussed below.

To begin with, we should refer to a marvellous article "Purposes and Principles of the United Nations" written by Albrecht Randelzhofer. The author deals with articles 2 and 3 of the UN Charter. What specially interests lawyers is the very legal character of these provisions, namely whether they are to be recognized as norms of state conduct (legal obligations). Albert Randelzhofer presents the arguments of both proponents and opponents of the binding force of the UN purposes and principles (p. 996), the proponents invoking the inclusion thereof into the articles of the Charter instead of the preamble and the opponents pointing *i.a.* at the lack of any preamble in the draft Charter. The author himself hesitates, finally making a differentiation between principles with and without binding force and qualifying the purposes of the Organization as something more than mere programmatic formulas due to the close connection thereof with the norms of public international law.

Lawyers may not omit the chapter "Resolution, Declaration, Decision" written by Rainer Lagoni. The author presents a definition of "binding effect" and the prerequisites thereof (namely: the power of the respective organ to make a given decision, conformity of the decision-making process with the procedural requirements and the will of the respective organ to make its decision binding). The nature of decisions (in a broad meaning of the term) of the General Assembly and the Security Council is discussed in detail, the conclusion being that the Security Council only may bind states outside the scope of the Organization. The author refers to the arguments of some scholars as to the binding force of some UN General Assembly resolutions but he denies the very concept. According to his opinion "the habitual repetition and citation of previous resolutions within later resolutions of the General Assembly does not create customary law or general principles of law" (p. 1087). Such a restrictive view is to be attributed to the fundamental difference between the interpretation of the Charter by the General Assembly and the amendment thereof – to be effected only in accordance with Articles 108 and 109 of the Charter. As regards the resolutions of the Security Council, the author presents the opinion that the binding effect of its decisions *pro foro externo* provided for in Article 25 of the Charter is not limited to decisions made on the basis of Chapter VII and VIII of the Charter, but extends also to measures connected with investigation of disputes and the enforcement of the ICJ judgments.

The author advocates the presumption of legality of measures of the UN institutions in doubtful cases – as "only decisions that are clearly and obviously violating principles or rules of a fundamental character can be considered null and void" (p. 1088). This conclusion is itself doubtful, as any transgressing of powers by the organization may be usually qualified as a violation of the state sovereignty – which is itself a fundamental principle of international law.

The above considerations make us take a brief look at the chapters devoted to the most important organs of the United Nations. Thomas Bruha is an author of the most interesting chapter on the Security Council. He presents in detail its competences under Chapter VI and VII of the Charter. His interpretation of Article 25 of the Charter ("The Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter") is, however, just the opposite to the above-mentioned one of Rainer Lagoni as it advocates the limiting of the scope of this provision to decisions based on Chapter VII of the Charter only. According to Thomas Bruha, the way of interpretation is to be inferred from the very Charter and the lack

of any respective provisions should be understood as a requirement of strict interpretation rather than as an open door for the “effect utile” principle – that is to be found in the EC law. In this context the author referred to the Security Council resolutions 731 (calling Libya to surrender two its nationals) and 748 (imposing an embargo against Libya for its disobedience with Resolution 731). In the opinion of the author, what he calls “the lowering of the threshold of the Charter” may result in a breach of the prohibition of intervention.

The two above-summarized chapters should be read in conjunction and treated as two votes in the discussion about the role of law, practice (usage) and reasonable expectations in the United Nations. As the positive practice is said not to create customary law, the lack of actual application of certain Charter provisions may not affect the scope of competence of the UN organs as well. Consequently the reasonable expectations are to be based on the treaty itself and not on the practice of UN.

The chapter on the International Court of Justice – written by Meinhard Schroder – may be a little shocking for international lawyers, as it emphasizes the limited role of the ICJ in the UN system. The opening remarks refer to the weakening of the position of the ICJ as compared with the PCIJ and the obligation of the Court to co-operate with the other organs of the UN. The limited role of the ICJ is attributed to the requirement of the state consent for the jurisdiction of the Court. The author criticizes the rule according to which the UN may not be a party to disputes decided by the ICJ, this disadvantage being only partly compensated by the right of the UN organs to request the ICJ for advisory opinions.

The chapter on the General Assembly written by Christian Tomuschat is very interesting. The author demonstrates his critical attitude towards the case of “elbowing out” of South Africa from the UN GA and the attempted elbowing out of Israel. He advocates also the view about the lack of binding force of the UN GA resolutions. From among other questions at least two are considered by the author, but not unequivocally answered. The first of them is the problem whether the state in arrears loses its right to vote automatically or only subject to a resolution of the General Assembly. The second problem is the interpretation of the term “action” used in Article 11(2) of the Charter (whether it denotes “all actions necessary for the resolution of the conflict” or only “measures taken on the basis of Chapter VII of the Charter”). The author presents the view that Article 11(2) as opposed to Article 12 does not affect the power of the General Assembly to make resolutions.

The last chapter that will be invoked here is the one written by Rudiger Wolfrum and devoted to the peaceful settlement of disputes. The powers of the two main UN organs are compared with each other, the conclusion being that the powers of the UN GA in this respect are “in one sense broader and in one sense narrower”. These powers are only partly to be found in Chapter VI of the Charter, the most important bases thereof being Articles 10 and 11. The author discusses the role of Secretary General in the resolution of disputes, pointing at cases in which he acted without being asked to do so by the other organs of the UN. The rather critical evaluation of the functioning of the UN system in this field concludes the chapter.

The brief discussion of a few chapters will in no case provide readers with the full idea of the book. The very choice of chapters does not dare to be any kind of comparative evaluation – what really matters is the ability to show that the book presents different views and reflects the doctrinal disputes on several legal problems. This is a very important advantage of the book, as it does not attempt to point at “the only proper” interpretation of the Charter, showing instead, which different views may coexist in the discussions of practitioners and publicists of law.

Przemysław Saganek

KLAUS HÜFNER (ed.), *Agenda for Change: New Tasks for the United Nations*, Leske & Budrich, Opladen 1995

The book constitutes the outcome of two workshops organised by the International Institute for Peace in 1993 and 1994 in Vienna. The 50th anniversary of the United Nations was a good occasion to review the functioning of this most important global organisation and to propose improvements aimed at meeting the challenges of XXIst century.

Thus the first part of the volume is entitled "The United Nations System in a changing Environment: Retrospect and Prospect" and consists of five essays. Mihaly Simai presents accomplishments and limitations of the United Nations through the organisation's history. James R. Sewell indicates new challenges for the United Nations pointing out, *inter alia*, to the fact that "the end of the East-West confrontation marks the beginning of genuine opportunity to implement the comprehensive security framework set out by the United Nations Charter" (p. 43). Maciej Perczyński discusses the main trend in international transformation: from interdependence to global partnership. Jan Woroniecki analyses the problem of the UN Organisation's reform and in particular the reform of the Security Council (composition, procedure) (p. 73–77). Johan Kaufmann indicates new tasks of the UN System concentrating on Boutros Ghali's "Agenda for Peace" (p. 86–90).

The Second part of the volume is devoted to "The Security Council, Peace-Keeping and Peacemaking". It consists of seven essays. Alexander Yankov discusses the problem of enhancing the peacemaking and peace-keeping capacities of the United Nations. Pamos Tsakaloyannis and Dimitris Dopurantonis present the question of the reorganisation of the Security Council and conclude that "a failure to reform the Security Council and bring in tune with contemporary international realities will, sooner or later, lead to the unravelling of post-war structures, with incalculable consequences" (p. 116). Benjamin Rivlin analyses the currently vivid issue of "a division of labour" between the UN and regional bodies in peace-keeping. The author concludes that "Burden – sharing between the Security Council and regional organisations in maintaining international peace and security is not amenable to a quick-cure but requires patience and a long-term approach" (p. 149). Sverre Lodgaard indicates new missions for the United Nations in defence of international peace and security. *Inter alia*, the author discusses the following types of action: peace-keeping, preventive deployment, violence prevention (p. 156–158). Jan Oberg presents the painful Yugoslavia case and draws from it lessons for the United Nations members. The author lists 24 "management mistakes" in handling the Yugoslav crisis. Some of them are doubtful, for instance: "(7) diplomatic isolation and exclusion from international forums," "(8) Demonization", "(9) Sanctions", "(11) The Recognition of Bosnia & Herzegovina" (p. 180–184). Maurice Bertrand asks the question: "The United Nations as a Core Structure of International Peace and Security"? The author concludes that a completely new "World Organization" is needed (p. 207).

The third part of the book is entitled "The United Nations at the Cross-roads of Reform: Economic and Social Issues". It comprises four essays. Pierre de Senarclens writes on reform of the United Nations in terms of necessity and illusion. *Inter alia*, the author presents the socio-economic discussion of conflicts (p. 218–219) and emphasis the need for institutional reform (p. 219). Benjamin Bassin analyses the role of the United Nations in global economic and social policy-making. The author concludes that "[t]he UN needs to incorporate into its institutional design some expedient for meaningful communication with the bearers of (...) new policy-making structures: the international business community and the civil society" (p. 237). Also, in view of the author, the UN System should be reformed to function in accordance with the

subsidiarity principle (p. 237). Yvers Beigbeder presents a process of reforming the economic and social sectors of the United Nations. Referring to the resolution 48/162 the author concludes that "[e]ven if a more radical reform of the UN economic and social system was seriously considered and approved, there is doubt that the industrialized countries would allow the UN organizations to assume a significant role in global economic management: they want to maintain full control over their own development and funds, and not to be subjected to the Group of 77's demands" (p. 256). The last essay by Klaus Hübner is devoted to the reform of financing the UN.

The book also comprises a Report of the Independent Working Group on the Future of the United Nations entitled "The United Nations in Its Second Half-Century" (the Group was convened by the Ford Foundation at the request of Secretary-General, Boutros Boutros-Ghali in 1993).

The value of the book under consideration lays in the wealth of the ideas contained in it and some detailed proposals for the reform of the United Nations are well-founded. nevertheless, the common conviction as to the need of multidimensional reform of the United Nations is accompanied by serious doubts as to the chances of such a reform's introduction.

The reviewed collection of essays is an example of rational thinking about the United Nations. It is one of the most valuable books on the topic and evidences that at least international lawyers and political scientists cannot be blamed for the possible failure to improve the UN functioning in proper time.

Renata Szafarz

Les sanctions des Nations Unies dans le conflit de l'ex-Yugoslavie, Bruylant, Bruxelles 1995

Small by dimensions, the book containing three studies concerning different aspects of implementation of sanctions in the Yugoslav conflict deserves an attention. Three authors, officials of the UE and OSCE, were directly involved in the process, so they are able to give authoritative information.

E. Kalpyris presented general international legal issues dealing with the Yugoslav sanctions. In his (right) opinion, the fact that the sanctions were based upon Chapter VII without stating a precise legal basis is consistent with the previous practice of the UN; however, we cannot share his opinion that there is no doubt as to the legality of the measures directed against "new" Yugoslavia as a non-member state (the precedent of Southern Rhodesia does not provide sufficient support for the indisputable legality of such action); we do not agree as well that this is a political issue (to the contrary, the issue is strictly international legal). Important statement concerns a possibility of unilateral cancellation of sanctions by particular states or international organisations; there is no doubt that the competence of the Security Council in this respect is exclusive. Following parts of the presentation are devoted to specific kinds and forms of sanctions. Special interest should be given to a relatively unknown field: sanctions concerning the Danube transport.

R. Vork characterised activities of missions helping the neighbouring countries in the implementation of sanctions (one of the most important aspects of the conflict in the former Yugo-

slavia was certainly the immense effort of the international community to implement the sanctions). Furthermore, the authors presented the activities of the SAMCOMM and its role in the co-operation with the states directly concerned, and with the UN organs (including the sanctions committee acting on the basis of Resolution 724). On the other hand, Vork showed that there still existed certain possibilities to avoid sanctions and to bring certain categories of forbidden goods to Serbia. The paper by Vork contains interesting statistical data and documents annexed.

A.Napolitano discussed a system of sanctions introduced by Security Council Resolution 820, and their implementation and supervision by the OSCE, WEU and NATO. The text is highly technical and even difficult. The most important conclusion concerns the grounds which made the sanction system so effective: the author emphasises the importance of modern technology including satellite observation and computer techniques allowing full control and immediate reactions for all potential violations. The author finished his presentation by discussing Article 50 of the UN Charter and its role in the process of compensating damages suffered during the conflict by the neighbouring countries. Unfortunately, Napolitano limited to general information on the Vienna conference of 1994 on this topic, without any details on an implementation of its decisions. The presentation is followed by the texts of resolutions of the Security Council dealing with the Yugoslav war.

The papers show how effective actions of the international community can be if all measures destined to resolve the conflict are enforced (unfortunately, such a consequence is not always present). We would like to remark that the authors did their best to avoid political references to discussed questions (although such a political approach would sometimes be useful – e.g. in the presentation of the position of Greece towards the Yugoslav conflict); a presentation of practice of implementing agencies is sometimes relatively poor and – probably – not representative; finally, some aspects of the papers are too technical and not interesting for average international lawyers.

Władysław Czapliński

S.A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, Kluwer Law International, The Hague 1996

Bulgarian lawyer, former deputy foreign minister, devoted his monograph to one of the most important issues of contemporary international law: the use of force, and in particular an important aspect of it – the right to self-defense.

After a long and exhaustive presentation of historical issues dealing with the development of the right to self-defense in international law, the author concentrated upon the position of this right under the UN Charter. The most important points of discussion were as follows: firstly, the Charter introduced three new elements – a collective self-defense as parallel to an individual one, a limitation of the regulation of self-defense to an attack against a member of the UN, and a temporary character of the right (until the Security Council does not undertake measures necessary to maintain international peace and security); secondly, the interpretation

of the notion of an armed attack was left to the competence of the Security Council; thirdly, the notions of aggression, armed attack, and self-defense are not correlated. We agree with the author that the right of self-defense within the UN system covers also the non-members of the UN (in particular in the light of Art. 2.6 of the Charter). International practice confirmed also the opinion of the author that the notion of armed attack should be interpreted narrowly as covering exclusively the use of force contrary to the Charter (presumably: against the sovereignty and territorial integrity of States). Does it mean that the reaction of states concerned against other forms of the use of force (like *e.g.* an intervention without an authorisation by the UN Security Council) is not governed by the rules concerning self-defense? If the answer is affirmative, what are the rules applicable? The author does not give clear answer. He also does not formulate clear proposals as to the position of self-defense in cases when the Security Council, although informed of the particular act of use of force, does not undertake any action (*e.g.* because of the veto of one of the Great Powers).

The most important conclusion of a presentation of issues of individual self-determination is that a state referring the fact of occurrence of an armed attack against it to the Security Council should be presumed to act militarily in self-defense. However, such a conclusion can be limited exclusively to the members of the UN (as clearly stated by the ICJ in the *Nicaragua* judgement). How to reconcile such a view with the opinion mentioned above that the right to self-defense is granted also (as a natural right) to non-member states?

The analysis of an anticipatory self-defense seems to suggest that international practice excludes its legality. Alexandrov posed, however, an important question: how and when could a state defend itself against a nuclear attack, in particular if one accepts the position of the international community as reflected by the Security Council condemning the Israeli air raid against the Iraqi nuclear installation at Osiraq? The author declared that under extreme circumstances an anticipatory self-defense should be accepted as legal but he does not quote any authority in favour of such statement nor consider conditions which should be fulfilled in such a case.

The discussion of different forms of intervention in the context of self-defense was a little surprising. The author pointed out that the aim of his presentation was an analysis whether self-defense could be invoked in such cases (and not the legality intervention). In fact, it is difficult to make distinction between these issues. We agree with him that the approach of the international community is unclear, and that the redaction of respective rules of international law in general, and of the UN Charter in particular is insufficient. In fact, the notion of an intervention is often abused.

Finally, the last part of the book deals with the collective self-defense. Also in this context the author refers to abuses (in particular, to difficulties in drawing distinction between collective self-defense and an intervention on invitation of the government concerned). The criteria established in the *Nicaragua* judgement (declaration on the part of an attacked state and clear request for help) should be observed in any case.

The book by S. Alexandrov is one more doctrinal analysis of international legal practice concerning the use of force. It refers to different cases in which the right to self-defense has been invoked. We must indicate also a rich bibliography concerning the subject testifying enormous actuality of the topic and great interest of international legal writers.

Władysław Czapliński

B. LORINSER, *Bindende Resolutionen des Sicherheitsrates*, Nomos Verlagsgesellschaft, Baden-Baden 1996

Political changes in the world, and in particular the elimination of partition into two contradictory political and military blocks, resulted not only in an increased number of conflicts but also made possible a functioning of the UN collective security system. Some activities of the UN aimed at a securing international peace and security (like ones concerning the Lockerbie incident, the Kurds, and Somalia) posed a question of legality of decisions of the UN Security Council and of protection of rights of the member states against actions of the Organisation *ultra vires*. Ms. Lorinser has discussed the problem.

She starts with a general remark that the UN Charter has not introduced any possibility of controlling decisions of political organs of the UN (contrary to some other international instruments like *e.g.* the agreement on the IMF). Every UN organ has a right to interpret the Charter and to evaluate its position (such a thesis by the authoress reflects the general principle of international law in respect of international legal position of states). However, these organs are not entitled to modify the Charter. The Security Council must act within the limits of its competence. It is difficult to define these limits. Lorinser states simply that the limits are precised by a requirement to act in accordance with international law but such an argument is neither clear nor convincing. The limit of freedom of action can be deduced from the aims and principles of the Charter. It means that every action aimed at preserving international peace and security should be accepted (in fact, the further analysis of the state and ICJ practice shows that the international community is ready to accept far-reaching measures if they correspond with its feelings and conscience). Lorinser concludes that no precise limits of freedom of action can be drawn but one could confer such a task to a particular organ – we must remember, however, that *de lege lata* the Charter does not provide for such a possibility (the authoress has pointed out that a control of legality has been directly excluded during the *travaux préparatoires* in San Francisco). On the other hand, we can share a view that the ICJ – although formally excluding the control of legality of action of the Security Council – indirectly accepts it.

Lorinser suggests that the freedom of action of the Security Council should be limited and controlled; she refers in this respect to domestic legal systems and control executed by constitutional courts. However, one must distinguish between the UN system and domestic legal orders. A comparative analysis of constitutional provisions shows that the competence of the ICJ cannot be identified with the powers of constitutional tribunals. Finally, international legal system does not know a check-and-balance system. All organs of the UN are independent in fulfilling their tasks and duties. We agree that under the present letter of the Charter any limitation of freedom of action would restrict the possibility to act in order to preserve international peace and security.

We would like to refer briefly to the conclusions by B. Lorinser. We can agree that many arguments speak in favour of acceptance of some forms of control. However, it would be difficult to define limits of such control. The authoress rejects a distinction between violations of formal (procedural) and substantive norms. We would exclude a substantive control and limit its to formal requirements as a condition of legality. On the other hand, the Security Council has been able even to modify its own procedural rules (*e.g.* by treating abstentions as affirmative votes), so that not every infringement of procedural rules amounts to serious violation causing the invalidity of the act (an analogy could be drawn to regulations of the Vienna convention on the law of treaties of 1969 concerning an invalidity of international agreements). Finally, the whole sphere of international responsibility of international organisations should

be remembered (B. Lorinser has considered the problem of control of acts of the UN organs exclusively from the point of view of their legality and opposability).

Władysław Czapliński

H. NEUHOLD, B. SIMMA (eds.), *Neues europäisches Völkerrecht nach dem Ende des Ost-West Konflikts*, Nomos Verlagsgesellschaft Baden-Baden 1996

The book contains materials presented by leading German international lawyers during a seminar held in September 1994. They are devoted to these areas of international law which have developed or changed recently: self-determination, state succession, human rights and protection of minorities, neutrality, and regional organisations.

D. Thuerer has discussed the present developments of the right to self-determination. In his opinion, self-determination should be interpreted in the context of aims of the UN Charter and of human rights what means that it is subjected to a protection of international peace and security. The author draws a distinction between offensive and defensive self-determination (very popular among German lawyers), and treats them as an important factor of legitimacy of governments and political regimes. However, the developments in Russia show that the right to self-determination is still subjected to territorial integrity, and – on the other hand – although self-determination is not granted to minorities (it is replaced by an autonomy), under specific political circumstances new states emerging from seceding entities can be recognised. If this trend is recognised in future, we shall move from declarative to constitutive theory of recognition. We agree therefore with a commentator to this paper, K. Ginther, that in Europe self-determination is in practice limited to internal self-determination.

U. Fastenrath has discussed some developments in the law of state succession: membership in international organisations, state property, state debts, nationality. The task of the reporter has been difficult, as the recent cases of succession in Europe cannot be treated on the same footing as belonging to different types and models of succession. Of course, it is difficult not to accept an opinion that solutions adopted in particular cases have been based upon pragmatism, but on the other hand because of diversities of precedents their value as customary law-making factors is limited. In respect of some aspects of succession (e.g. state property), no solution has been elaborated up to now in the cases of ex-Yugoslavia and – to a lesser extent – the ex-USSR, so any conclusion would be premature. In respect of the other aspects, some clearly established norms have been followed (the continuity of boundary treaties). If any new cases of state succession occur, they will constitute a test of law in this domain.

Ch. Tomuschat has discussed a problem of a protection of human rights and minorities in today Europe. He has emphasised a great importance of the European Convention for the development of democracy; on the other hand, he has feared whether the Convention is correctly and fully implemented. Even if the author is right that all Central and Eastern European States lack democratic tradition (or rather that the tradition has been broken by the communist regime), we cannot agree that the accession of these states to the Council of Europe and to the Convention is connected with any risk. To the contrary, it should serve towards strengthening

democratic reforms by imposing a high standard of human rights protection to be obtained. First effects are clearly visible: many people have just found they way to Strasbourg organs, and many claims have been accepted by the Commission. In fact, the only risk of failure has been an accession of Russia (where political and social system is far from democracy). However, this important state could not be isolated any longer. It is clear that the implementation of the system of protection could not be reached within a short period after the democratic revolution. Tomuschat has continued with a discussion of a protection of minorities. He is right in his evaluation of failure and insufficiency of the world system, but the European system seems to be much more advanced (contrary to the opinion by the author who points out that in many elements including a definition of a minority the European regulation remains one step backwards). Neither the author nor the commentator (E. Riedel) have referred to one important element of the European system of protection – a principle of loyalty towards the state of residence. Finally, it should be pointed out that Central and Eastern European states have been ready to grant far more reaching protection to their minorities than Western states; a requirement of an implementation of minority protection as a premise of recognition of new states while avoiding a development of protection in Western Europe (*e.g.* in favour of migrant workers) shows also a double standard.

Finally, we fully agree with R. Wolfrum and W. Lang that regional organisations could and should play an important role in securing peace and security in Europe. Even if their activities should be subordinated to decisions of the Security Council, in any case they can react quickly and flexibly to all violations and potential violations of legal order in Europe. A stabilisatory function of the NATO has been recognised by nearly all new democracies in Europe streaming at an accession; on the other hand, Russia proposes an enlargement of competence of the OSCE which should replace the NATO as a collective security system in Europe, and some states suggest an increasing position of the WEU is an armed arm of the European Union independent of the USA. It seems therefore that the forthcoming years will bring important changes in the role and tasks of the regional organisations in Europe.

An introductory paper by B. Simma and H.P. Neuhold finishes with an interesting conclusion that in fact changes of European international law consist mostly upon a widening of territorial scope of validity of (former) "Western" international law, while substantive norms remain unchanged. We cannot fully accept such conclusions. Many institutions and concepts underlie important changes. Let us refer here to the new role of the NATO used outside the borders of its members, or the new aspects of self-determination amounting – according to some authors – to emerging on a regional level right to democracy. We can trace them while following rich ideas presented by the participants of the conference and authors of the papers.

Władysław Czapliński

J. DELBRÜCK (ed.), *Allocation of Law Enforcement Authority in the International System*, Duncker & Humbolt, Berlin 1995

The publication under review contains presentations of a seminar held at the University of Kiel in March 1994. It was the second seminar of this kind – the first one took place in 1992 and

concerned the future of international law enforcement.* The book contains four reports with comments, and is followed by minutes of a discussion.

P. Szasz has discussed centralized and decentralized models of international law enforcement, analysing activities of the UN Security Council and of the General Assembly acting under Chapters VII and VIII of the Charter. The most important conclusion seems to be that one should be extremely cautious in an evaluation of activities of political organs of international organisations, in particular in respect of a legal basis of these actions. In author's view, the reactions of the General Assembly on at least certain decisions of the Security Council show that even though these decisions exceeded formally a scope of competence of the S.C. as defined in the Charter (we agree with the author as to his evaluation of the conditions of establishing conditions of peace with Iraq, of the creation of the Criminal Court for former Yugoslavia, and of the way of implementation of humanitarian intervention by the UN forces), they were accepted and supported by the international community. Szasz is for a large interpretation of Art. 42 of the Charter.

The presentation by F. Morrison has dealt with the role of regional organisations in the enforcement of international law. The author has started with a proposal that action based on Chapter VII of the UN Charter is an enforcement action and requires legal basis while actions based on Chapter VI are not. The fundamental condition of legality is that the action must be decided in accordance with the statute of the organisation. The author seems to emphasise advantages of the UN (and a collective security system in general) comparing to actions taken by regional organisations: the latter can undertake their action exclusively in cases of armed attack against their members while the former can act if peace and security are endangered; it is unclear whether regional organisations can act outside territories of their member states (the engagement of NATO in Bosnia-Herzegovina proves that they can); finally, the decisions of the Security Council are mandatory while those by regional organizations in many cases are not. The suggested priority of the collective security system has been criticised by a commentator (K. Dicke) who has been of the opinion that regional organisations can act much faster and more effective than the UN; the UN Charter creates conditions for actions by regional organisations, and this opportunity should be used.

The discussion has concentrated mostly on the scope of competence of the Security Council. Some participants have interpreted this competence broadly and have included humanitarian interventions; they have also had no difficulties in accepting all controversial decisions of the Council. They have also argued that although the judicial control of political acts of the Council has been rejected by the Founding Fathers of the Charter, nevertheless in those cases where the issue has been discussed by the ICJ, the Judges have tended to accept the decisions of the Council. The opponents have stated that no provision of the Charter gives the Court a right to control the decisions of the Council but the Charter should be amended in this direction; it has been suggested that the basis of decisions have been disputable in all these cases in which the Council has had difficulties in indicating a precise basis of its action. We personally agree with the thesis that the presumption of legality of action by the Security Council precludes any form of judicial control (both by international and domestic courts); the states are obliged to implement the measures decided by the Council.

T. Stein and M. O'Connell have discussed the role of states as law enforcing subjects. Both authors agree that states remain most important factor of implementation of international law; in fact, their position has not changed under the collective security system of the UN as agreements provided in Art. 43 have not been concluded. According to Stein, the establishing of the

* See 19 *PolyBIL* (1991-1992), at 284.

collective security system results in mutual obligation: the states give up their right to act and freedom to evaluate their position under international law in favour of more effective international organ; this organ (Security Council) is therefore obliged to act if necessary. Our position is more traditional: if the Security Council does not act, states are free to undertake enforcement measures to guard international peace and security. The scope of such an action is problematic: any action to protect direct interests of states concerned is manifestly allowed but an action to implement erga omnes obligations might be controversial.

Finally, J. Delbrück, the editor of the whole volume, has presented his position as to the changes of international law enforcement process. He concludes that the whole law-making system has changed: the consensus among states plays less and less important role, similarly as state practice and *opinio iuris* (we are not convinced as to the correctness of this opinion – the ICJ still refers to both elements in order to ascertain the state of international law). Law enforcement still remains the domain of states which are free in applying countermeasures not amounting to the use of force. Regional organisations will play an important role in this context. Though conservative, such a view seems to reflect the present stage of evolution of international law. Finally, the author remarks that the Security Council tends to interpret Chapter VII of the Charter broadly. The reason is clear – the international communities expects this organ to react in more and more numerous cases and situations which are not literally covered by the Charter. The moral support and expectations of the states force the Council to act. As the prospects for revision of the Charter are unclear, such a situation will continue to exist.

Władysław Czapliński

ARIE BLOED (ed.), *The Challenges of Change. The Helsinki Summit of the CSCE and Its Aftermath*, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1994

Professor Arie Bloed's vivid interest in the CSCE (now OSCE) problems has resulted in a consecutive book devoted to this topic, namely, Professor Bloed published a valuable collection of essays pertaining to various aspects of the 1992 Helsinki Summit of the CSCE.

The first essay entitled "The Challenges of Change: an Introduction on Helsinki-II" by Erica B. Schlager is a brief survey on the Helsinki Follow-up Meeting. The following essays are devoted to political and security dimensions of the CSCE. These are as follows: "CSCE Peace-keeping Operations" by Gajus Scheltema, "The CSCE Forum on Security Co-operation: Creating an Arms Control Negotiation for Post-Arms Control Europe" by Heather F. Jurlburt, "Peaceful Settlement of Disputes within the Framework of the CSCE: a Legal Novelty in a Political – Diplomatic Environment" by Gerard J. Tanja, "The CSCE High Commissioner on National Minorities: Prehistory and Negotiations" by Rob Zaagman and Hannie Zaal, and "The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context" by Rob Zaagman. All these essays show a considerable progress that has been made at the 1992 Helsinki Summit towards further operationalisation of the CSCE in both preventive and management terms.

One essay is devoted to the second basket (economic, scientific and technical co-operation) of the CSCE process: "The Second Basket of the CSCE: History, Helsinki-II and Afterwards" by Rob Zaagman. Special attention has justifiably been paid by the Author to the establishment of the Economic Forum in the framework of the Committee of Senior Officials (now the Senior Council) of the CSCE. Finally, four essays have been devoted to human dimension issues: "Institutional Aspects of the CSCE Human Dimension after Helsinki-II" by Rob Zaagman, "The Human Dimension's Swansong in Helsinki-II" by Alexis Heraclides, "The Human Dimension after Helsinki-II" by Thomas M. Buchsbaum, and "A New Role for NGOs in the CSCE" by Rachel Brett. *Inter alia*, the authors focus their attention on the progress that has been achieved by the introduction of human dimension seminars on specific subjects (such as tolerance, immigration, minorities, media) and of biennial implementation meetings.

Generally, all essays indicate how the comprehensive security concept is understood within the CSCE and report on the details of further institutionalization of the CSCE process.

In essays under consideration a reader will find an accurate description, a competent analysis and pertinent appraisal. However, in view of the Yugoslav conflict and various conflicts in the post-Soviet area the reasoning and expectations of the authors seem to be marked with overtones which sound too optimistic today.

Renata Szafarz

A. D'AMATO, *International Law and Political Reality. Collected Papers*, vol. 1, Kluwer Law International, The Hague-Boston-London 1995

One of the leading academic international lawyers from the United States, Professor Anthony D'Amato has decided to publish a series of his articles, collected under a title *International Law and Political Reality*. This is a first part of multivolume publication containing works written by him during a period of about thirty years and grouped in four parts.

The first unit is devoted to the legal issues arising from the Vietnam war. As the author himself had been engaged in the opposition to the US involvement in the War, he raises different questions concerning constitutionality of the Vietnam War as it was not declared by Congress, violations of human rights including war crimes committed by the United States military forces and service-resister cases. Since the articles have been written during the Vietnam War, their aim was to consider the legal applicability of the concept of war crimes as defined at Nuremberg trials, in American domestic courts. Therefore the author presents evidence of war crimes committed in Vietnam, including the testimony given before the unofficial Bertrand Russell International War Crimes Tribunal from 1967-1968. Additionally, he presents possible defences to war crimes allegations such as the concept of reprisals and *tu quoque*, military necessity, obedience to superior orders, ignorance of the law and duress. As far as the problem of service resister refusing combat duty in Vietnam on the basis of his possible or probable implication in the commission of war crimes is concerned, the author wrongly assumes the possibility of a claim for adjudication *before* committing any war crime (pp. 53-55). The difficulty of raising the claim as a serviceman in Vietnam cannot be regarded as an obstacle.

The second part of the book considers the legitimate use of force in the form of enforcement action, range of sanctions in international law and deals with the facts from political reality such as terrorism in Libya, conflicts between Israel and Palestine, interventions in Nicaragua, Panama and Grenada, war crimes in Kuwait and Bosnia. In the last case the author proposed that the United Nations should have put a Yugoslav war crimes tribunal as an explicit "bargaining chip" in the peace negotiations for the sake of non prolonging a war of civilian atrocities and reaching an agreement between the antagonists (pp. 206–217). Another interesting proposal made by Professor D'Amato is the idea of establishing rules for terrorist activities, similar to the international humanitarian law applicable during the war (pp. 223–224).

Problems connected with nuclear technology are the subject of the third part of the book. D'Amato considers the question of legality of French nuclear test series of 1966 in the light of the prior American tests. He argues that the latter cannot be used as a precedent due to the need of environmental protection. Another aspect of nuclear phenomenon is whether pre-emptive strikes against nuclear installations can be regarded as a justification for the use of force (the problem is based on the Israeli strike upon an Iraqi nuclear reactor in 1981). Very controversial issues raises Chapter 16 on the State responsibility for exporting nuclear power technology, with the proposals – far reaching and probably unrealistic – for the international legal regulation in this field.

The last part of the book entitled *Minority rights* contains four chapters; only one of them is properly chosen for the subject, as it forms a historical essay on the Assyrian minority in Iraq and their claim for autonomy. The other article presents philosophical and cultural aspects of individual and group freedom. The last two chapters devoted to the problem of apartheid in South West Africa can hardly be described as concerning minority rights, since the native population of South West Africa, even though in a non-dominant position, formed a numerical majority. The writings are of historical value today and clearly depict the Author's theoretical and practical involvement in crucial international issues of contemporary world (he was an agent on behalf of Ethiopia and Liberia before the ICJ in the case against South Africa). The articles were an attempt to use the concept of apartheid policy through the scholarly process to change the public perception of international political reality.

The book of Professor D'Amato presents international law in the broader context of political and moral reality. Therefore international law cannot be regarded as a set of prescriptive rules but rather as an "institutionalised decisional procedure designed to safeguard the conditions of human flourishing" (p. 309). The role of legal researchers can be described as a lobbying for a safer world, and this is the main message of Professor D'Amato's work.

Dobrochna Bach

J. DELBRÜCK, *Die Konstitution des Friedens als Rechtsordnung*, Duncker & Humbolt Berlin 1996

The Publisher has decided to publish again selected articles written by J. Delbrück, professor of international law at the University of Kiel, during his research career. The articles are divided into three groups, according to their focus: human rights, European peace order, and international peace order.

From our point of view, the first category of papers is the least interesting, what does not mean deprived of importance. The eminent author discussed *e.g.* the problem of interrelations between human rights and peace (the paper touches philosophical, political and international legal issues), and between human rights and sovereignty (enumerating the most fundamental human rights constituting a minimum standard under contemporary customary international law – ban on tortures, right to live, ban on slavery, right to legal personality; according to the author, the difficulties in practical implementation of this standard are connected with the different interpretation of specific rights by states, and the effort should be directed towards the elaboration of a common denominator. The paper published first in 1980 still remains actual); two articles deal with an often neglected problem of human rights protection and procedures in the framework of UNESCO, and with the impact of human rights upon private law.

Different articles concerning the European peace order discuss at first the problem – often posed nowadays in Poland and other Central and Eastern European countries – whether any state can survive alone in the contemporary world of changing conditions, international situation, and public tasks. Delbrück emphasizes at least three elements suggesting the necessity of narrow co-operation with other states: an external security including, if necessary, the use of nuclear and classical weapons, an internal security including the protection of human rights as a point of interest of the international community, and an economic development. He expresses an opinion that even though certain elements of international system have limited the traditional state sovereignty (like the EC), all international organisations have been created because it has occurred impossible to maintain the sovereignty. Even the European and American systems of human rights protection cannot violate the sovereignty, as any claims made by individuals depend upon an earlier acceptance of the system by particular states. This remark should be noticed by all opponents to the protection of human rights by international institutions.

Important study (first published in 1974) concerns the origins of the CSCE and the position of different groups of states during the negotiations on the document what has become later the Helsinki Act. This paper is followed by a presentation dealing with different models of European security. Although written in the mid-1970-s, the paper still remains actual: it considers the possibility of expanding of the Council of Europe and an institutionalisation of the CSCE as possible scenarios of future developments. It is interesting that corresponding ideas have been presented by Russia in order to avoid the expansion of the NATO and to include Russia into the European security system. Finally, the study published in 1990 presents different issues connected with the European peace order and the German unification. Although the author accepts political, economic, military and cultural needs of Central and Eastern European states, he also realizes that the German unification has taken place faster than the construction of the general European security system, and therefore the “new” FRG has decided to remain within the NATO. In the meantime the states mentioned by the author also expressed their will of joining the NATO. In this meaning the idea expressed by the author of the NATO acting as a guarantee of international peace and security has been confirmed. From the Polish point of view, it is interesting to notice that the author has confirmed the right of Poland to the secure boundaries, and has declared that the Great Powers in no time have expressed an idea of returning the former German Eastern territories to Germany.

Among the papers dealing with the aspects of international peace order, we would like to emphasize in particular two studies. Considering the main elements of the system, Delbrück indicated the need to create a new international economic order (it seems that this idea, popular in the 1980-s, has failed) and the transformation of the right to self-determination into its identification with former premises of state sovereignty. Self-determination should create the basis of substantive (not only formal) equality of all states including in particular the former colo-

nies. In fact such an approach limits self-determination to newly independent states. Another paper deals with the rule of law in the UN. Interestingly, it has been published in 1977, long before the Haiti intervention and Lockerbie case, both putting an issue of the legality and legitimacy of the UN organs, in particular of the Security Council, limits of their powers and a possibility of an independent control. In the opinion of the author, in the light of political character of the UN, the rule of law should be observed in particular in the decision-making process.

We can repeat once more that many problems presented by the author are still present in the contemporary world. On the one hand, it testifies the competence of the author and his shrewdness in posing questions; on the other hand, it shows that the international community has been unable to resolve the problems fundamental for its existence and functioning.

Władysław Czapliński

HERWIG ROGGEMANN, *Fragen und Wege zur Rechtseinheit in Deutschland*, Berlin Verlag Arno Spitz GmbH, Berlin 1995

The unification of Germany within its post-Potsdam boundaries belongs undoubtedly to the most important events of the end of 20th century. It constitutes an object of wide research studies not only within Germany, but also – because of many different reasons – in other countries, including Poland. It focuses *i.a.* legal research including international and constitutional law. Among numerous publications, the book under review deserves particular attention.

The book concerns ways towards the German unification and problems accompanying this unification in the past and in present. It has been published by an eminent expert in the field of constitutional law in the framework of a series of publications edited under auspices of the East European Institute of the Free University of Berlin.

The author published numerous studies on the state and legal system of the GDR. He belonged to the best specialists in this field, including treaty relations between the two German states; he was interested as well in the important in the possible future perspective thesis on “changes through approximation” (*Wandel durch Annäherung*) of the both German states.

The author has not treated his recent book as another approach to a trend of “reconstruction of German history” (*Rekonstruktion der deutschen Geschichte*), according to which a national socialism (scil. Nazism – L.J.) and a state socialism have not constitute parts of the all-German history. He has pointed out important legal facts (*Rechtstaatsachen*) of the history of German democracy and the history of division in Germany after the First, and in particular Second World War.

In his opinion, one should not accept a thesis of those authors who accepted an international legal subjectivity of the GDR as the third – after the FRG and Austria – German state, and who were sometimes called “upholders” of this state (*Helfershelfer* – at p.17).

He does not reject an influence of a concept of German confederation upon the unification process, even if such a concept has not been applied in the rapid process of unification and accession of the GDR to the FRG. This process has in fact overruled also Four-Powers-reservations concerning Germany of 1944/45 and later, connected with the responsibility of the Great Powers for Germany as a whole, lasting till the unification of Germany on 3 October 1990 (p. 21).

We can only adhere to the opinion that the process of unification has led to an extent much larger than in the case of any other post-communist state to the replacement of the old legal system by the new law, in this case: by the law of the FRG, although the process has not been immediate. The author has remarked that even the occupying Powers could not eliminate the whole system of Nazi-law at once, even if it remained in force 12 years only (and not 40, as the case of the GDR law was – p. 24 and 27).

He has stressed that the proposed (mostly in the unification treaty of 31 August 1990) relatively short terms of implementation of unification obligations occurred illusory – let us mention here new Art. 143 of the Basic Law.

We share the view that a generally adopted notion of “re-unification of Germany” (staatliche Wiedervereinigung Deutschlands), in fact being alien to the Basic Law itself, would have been justified exclusively if the both German states unified into a new single state, based upon a new constitution, as provided in Art. 146 of the Basic Law. The notion of a “German unity” contained in the new preamble to the Basic Law should be understood – according to the author – exclusively as conferring a democratic legitimation to the state, and not as proclaiming territorial and demographic enlargement. The “new” FRG is therefore “partially identical” and not identical with the former one (p. 31).

Against the background of general problems presented here, the book concerns a general analysis of specific problems connected with the incorporation of the GDR into the FRG as a “democratic state ruled by law”. The author has discussed basic differences between the state system of the GDR based upon a dictatorship of the communist party (SED), and the democratic-liberal state system of the FRG. We must emphasise here a view by Roggemann that one cannot equalize the GDR version of state socialism with mass murders and genocide by the Nazis (p. 49). He points out such current problems like open issues of property and reprivatization (pp. 48, 127, 185 et al.), and specific political and legal trends in the new federal states (Laender); he also analyses a situation of judiciary, prosecutors and attorneys, subjected to a large extent to the supremacy and control by the SED and Ministry for Public Security (Stasi). In order to show the special problems of these persons, Roggemann refers to a liberal approach adopted in respect to civil servants of the Third Reich (p. 127 ff.). An interesting analysis deals with the responsibility for delicts connected with the protection of state borders of the former GDR.

According to a limited space available, one cannot present here all questions dealt with by the author; the book contains the evaluation of the GDR as “national-socialist pre-legal state” (staatssozialistischer undemokratischer Vor-Rechtsstaat). The book is accompanied by a large index.

Lech Janicki

B. ZIEMSKE, *Die deutsche Staatsangehörigkeit nach dem Grundgesetz*, Duncker & Humbolt Berlin 1995

The book under review deals with the German nationality and citizenship regulations, *i.e.* with questions of German municipal law (the rule of exclusive competence of states to regulate their nationality is firmly established in international law). The German regulation has, how-

ever, important international context. It is connected, on one hand, with the situation of (in particular non-EU) aliens residing in the FRG, and, on the other hand, with the important consequences of the Second World War, the transfer of the former Eastern territories to Poland and the USSR, the existence of the two German states in 1949–1991, and with the German unification.

From the point of view of our interest, two groups of problems dealt with by the author seem to be important. In the first part of his book he discusses the functions of German nationality in its international context. He presents different solutions adopted in connection with acquisitions and cessions of territory by the German state. We share the opinion by the author that the rule of automatical change of nationality in cases of state succession has been rejected under contemporary international law; however, we are not convinced as to the status of such a proposed international legal norm before 1945 (when the discussed territorial changes took place). The author is right as well when stating that Polish and Soviet nationality regulations in the territories acquired by those states could not directly cause the loss of German nationality of persons concerned. The situation changes if we consider that the decision of the Potsdam conference has resulted in an adjudication of the former German territories to Poland and the USSR; Germany has been bound by this decision, and in effect it should adjust its nationality law to its international obligations. Keeping in force of the present regulation is contrary to the principle of effectiveness of nationality (as it confers the German nationality to persons not connected with the German state).

We agree also with the author that the treaty on European Union, though introducing a notion of “European citizenship”, has not derogated nationalities of respective member states. It is clear that the EU does not constitute a state in the meaning of international law; its nationality is based upon the nationalities of its member states.

The comparative part of the book is based on the analysis of principles of the German nationality viewed from the perspective of the regulations of the other Western European states. The considerations of the author are generally not controversial, except some surprising conclusions (*e.g.* he concludes that Hungary by opening its boundary with Austria for GDR nationals accepted the primacy of the (all-) German nationality over the nationality of the GDR; such a conclusion is justified *ex post* but we do not think that it has been the most important ground of the decision). It is interesting to notice that Ziemske seems to accept a traditional tendency towards elimination double nationality, notwithstanding some modern trends in this respect.

The book by Ziemske is the first so extensive and exhaustive publication on German nationality published after the unification of Germany. It represents a high level and proves a maturity of the author’s research. It can be recommended as valuable source of information on the present and proposed nationality regulations. However, on some important points it is very traditional and shows theoretical and practical difficulties in dealing with the legal aspects of the German history.

Władysław Czapliński

O. DÖRR, *Die Inkorporation als Tatbestand der Staatensukzession*, Duncker & Humbolt, Berlin 1995

State succession has become object of interest of international legal authors in connection with territorial changes occurring in Central and Eastern Europe in 1989–1991.

The author has begun his study with defining a notion of incorporation comparing with other forms of state succession. Such a proposal is correct, as we agree with the author that the existence of substantive norms in the field of state succession is possible to ascertain exclusively in respect to particular forms of succession. It is surprising that an incorporation as the form of succession has been largely neglected up to the 1990s. The author continues then with the discussion of premises of legality of incorporation under international law; he draws distinction between a wilful incorporation (on the basis of the previous approval by an incorporated state) and an annexation by force, which is contrary to contemporary international law. This analysis is followed by an interesting presentation of state practice and opinions of writers. Conclusions are to some extent surprising – the author opposes *e.g.* to the generally accepted opinion that the Pact of Paris (Briand–Kellogg Pact) delegatized annexation as a form of acquisition of territory. He quotes a number of judicial decisions stating the contrary. On the other hand, some conclusions are erroneous – we do not think *e.g.* that Polish courts have unanimously accepted the thesis on the continuity of the Polish statehood after the 1st World War. We are not fully convinced that such a detailed study of the legality of annexation is really necessary for the narration of the book.

A merger of states is another form of state succession which must be distinguished from the incorporation. The author adopts concepts of state identity and continuity as a decisive criterion of distinction between the incorporation and merger (uniting of states) – in the case of incorporation one of the predecessors disappears and the other continues to exist within new boundaries, while in the case of the uniting of states both predecessor cease to exist, and a successor is a new state. We fully agree that the recognition by third states and the declaration by the state(s) concerned constitute the most important factors to be taken into account by evaluating the international legal position of uniting states. The author proposes also a test of continuity of treaties of the predecessor state.

The second part of the book under review is devoted to the presentation of different cases of incorporation in the past. The number of cases collected by Dörr is surprising, as authors usually refer to the two incorporations: of Texas into the USA in 1845 and of Corea into Japan in 1910: sometimes they invoke also the disputable precedent of the unification of Italy in 1860. However, the author is far of classifying of all cases considered as incorporations. We can regret that the analysis is often one-sided: *e.g.* a thesis that Gdansk (Danzig) has not formally belonged to Poland in 15–18th centuries but constituted a kind of a free republic is based exclusively on the German writings, and in our view is not right (even if Gdansk has got special privileges and enjoyed a special position, it has never denied its status as Polish town inhabited by largely German population).

According to some learned authors, state succession belongs to the most complicated and obscure fields of international law. We are afraid that notwithstanding a rich recent state practice this opinion will still remain actual, as this practice has not elaborated universal solutions and it is far of being unanimous. Any attempt to research the state of international law is mostly welcome.

Władysław Czapliński

J. AREGGER, J. POCZOBUT, M. WYRZYKOWSKI (eds.),
Rechtsfragen der Transformation in Polen, Baran & Suszczyński Publishers, Kraków 1995

The volume contains materials of a Polish-Swiss Colloquy held in Warsaw in May 1994. It presents some general papers dealing with general institutional aspects of transformation of Polish legal system (introducing of a rule of law principle, position of judges), and with different institutions of Polish economic law, also in their relations to international and Community law. On some important points Polish developments have been confronted with solutions adopted in Swiss law.

It is extremely difficult to present here all papers included in the book. We shall indicate only some of them which seem to be the most important. M. Wyrzykowski presents the rule of law principle and difficulties in its implementation in the practice of Central and Eastern European states. He emphasises the importance of peaceful conflict resolution procedures (both parliamentary and extraparlimentary), the role of human rights, independent courts of justice, and self-government; however, the most valuable element of the presentation is the stressing the role of an approximation of legislation to legal systems of Western states, not only in the field of private law but also public law and criminal law (in connection with new forms of criminality resulting from the change of economic structure of the State); of a limitation of powers of State agencies, and of restitution of property (and of privatisation of economy in general). T. Ereciński discusses a status of judges and a functioning of a new organ: National Council of Judiciary, a supreme body dealing with an appointment of judges. He concentrates upon an implementation of constitutional principle of an independence of judges and upon a necessity of constitutional regulation of the Council. Z. Czeszejko-Sochacki analyses Art. 6 of the Constitution providing for a freedom of economic activity and discusses a jurisprudence of the Constitutional Court interpreting the law of 1988 on economic activity. W. Popiołek considers the most important aspects of a status of aliens under Polish law concerning economic activities. He stresses that in fact these activities are subjected to the process of deregulation – less and less specific provisions concerning aliens can be found in Polish law after 1991. A national treatment principle has been introduced, as well as new regulations concerning activities of companies with mixed capital, transfer of profits, protection of investments and double taxation (including bilateral agreements in this field). It is worth to emphasise that this trend has been continued; among developments posterior to the publication we can indicate *e.g.* a liberalisation of acquisition of land estate by foreigners. E. Piontek devotes his presentation to rules of origin including regulations of the Europe Agreement; he presents his remarks in the context of a new EC regulations. The same subject has been dealt with by H. Kaestli in connection with a development of the rules of origin in relations between the EC and associated states including the European Economic Area. A. Wiśniewski presents a development of an international arbitration in corporate matters of joint ventures limited liabilities companies in Poland. According to him, a rapid growth of this form of dispute settlement can be observed owed to deficiency of the system of state courts, as well as to important advantages of the arbitration (flexibility, speed, impartiality, and international authority). The author states that generally all disputes of this kind is arbitrable. B. Kordasiewicz points out deficiencies of a consumer protection system in the transition period. In particular no regulation concerning elimination of abusive practices can be found in the civil code, and a regulation of publicity is far of being exhaustive. The author concludes finally that even a limited system of protection is not correctly implemented by courts, and it does not attract an interest of a legal doctrine. Let us

remark here again that a new regulation on consumer protection has been passed after the publication of the volume.

The presented publication seems to be of a great value for specialists (both theoreticians and practitioners) in the field of private law, in particular commercial law, interested in any kind of activity in Poland.

Władysław Czapliński

V. GOWLLAND-DEBBAS, *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague 1996

The book contains collected papers presented at a colloquium held in Geneva in May 1994; however, all studies still remain actual. Problems of refugee protection and asylum become more and more acute, and steps undertaken by particular states and groups of states deal with syndromes rather instead of causes.

The book has been divided into two parts. The first one deals with aspects of refugees seen from the UNHCR perspective. It concentrates upon issues of Yugoslavia and Africa (studies by G. Okoth-Obbo and W. van Hovell) – and it contains important substantive and factual material showing a whole variety of problems confronted with by missions of the UN in those areas. These presentations are followed by a paper by M. Iogna-Prat concerning nationality and statelessness issues in the newly independent states – it corresponds with presentations contained in the second part of the book.

The second part has been devoted to specific theoretical aspects of refugee law presented by specialists in respective fields of international law. The studies concern: state succession and refugees, state responsibility, the right to leave and to return, personal jurisdiction in respect to refugees, and conflicts between the UN political and humanitarian mandates with regard to refugees. We shall concentrate upon the former three issues.

V. Mikulka and A. Pellet, members of the ILC, have discussed issues of state succession in respect of treaties concerning refugees, and in respect of nationality. According to Mikulka, there is a strong tendency towards an acceptance of succession in respect of treaties of universal character which amounts to creation of a customary rule; in respect of nationality, he has stated that although municipal legislation remains the only relevant source of nationality law, it is limited by international law, in particular by the rule of effectiveness and protection of human rights. Finally, he has pointed out certain dangerous trends in the contemporary practice of successor states like granting nationality exclusively to persons of certain ethnic origin. Mikulka has not drawn conclusions from his statements. Pellet has concentrated first upon showing the relevance of nationality for refugees issue; he has agreed that states are not free in passing their nationality legislation, and they are bound by the principle of effectiveness – the same principle should be observed by third states. In our opinion, the nationality issues play only a secondary role in refugee law, as nationality (understood rather as citizenship) rarely constitutes a ground of persecution; however, it might be relevant if an origin of a person must be established (*e.g.* from the perspective of a safe country).

Ch. Tomuschat and B. Stern have discussed issues of state responsibility from the point of view of refugee law. The former author has drawn a distinction between three kinds of responsibility depending of the subjects towards whom responsibility is owed: individuals, state receiving refugees, and international community as a whole. As to the first question, there is no uniform international practice entitling individuals concerned to reparation for human rights violations; the same conclusion can be drawn as to the second form of responsibility (Tomuschat has referred in this context to the cases of Kurds and Bosnia and Herzegovina, where security zones have been established to protect individuals and to protect neighbouring states against the flows of refugees; it is known that these experiments have not been successful). As to the responsibility towards the international community, the author has referred to the concept of obligations *erga omnes* as possible basis of action; he has also indicated Rwanda as an (isolated) example of the UN action in this domain. We could add here that the UN action in Haiti has been based also upon the will to avoid further refugee flow towards third states. Tomuschat has based his analysis on the conditions of responsibility as formulated by the ILC. B. Stern has discussed similar problems. She has added the Protocol No. 4 to the European Human Rights Convention as a possible basis of responsibility; she has agreed with the analysis of imputability of violations to the state (acts by state agencies, lack of responsibility for natural disasters and acts of war), and she has added also a responsibility for acts of individuals and groups of individuals (armed bands). She has presented also certain objections as to the basis of responsibility towards a receiving state (refugees cannot violate territorial sovereignty of this state, as such a delict can be committed exclusively by a state). Generally, a conclusion can be drawn (and we have expressed a similar opinion in our paper published in AFDI 1994) that there are no unequivocal and generally accepted basis of responsibility for having caused a flow of refugees, in particular towards individuals and towards international community as a whole (as the concepts of peremptory norms, obligations *erga omnes* and international crimes are not clearly established). This conclusion does not exclude a liability of a state of origin towards a receiving state, in particular in respect of financial burdens.

Finally, we would like to refer here to presentations by G. Goodwin-Gill and K. Hailbronner. Both authors have emphasized the treaty and customary character of the right to leave one's own country, and the right to return. It seems, however, that the importance of both rights in context of refugee law is limited. The real problems are: the lack of obligation to grant asylum to a refugee (in fact, there is no right to entry any state as the immigration remains a sovereign domain of every state; under these circumstances, Western countries protect themselves against abuses of asylum demands through not allowing asylum seekers to their territories), and the (alleged) obligation to return to the country of origin when the grounds of escape cease to exist (in fact, the protection granted to (mass) refugees should be temporary; they are, however, mostly not willing to return to their home countries, and the concept of a refugee has often been abused by economic refugees).

The papers of the Geneva colloquium cover interesting issues rarely dealt with in connection to refugee matters, so we can recommend them to everyone interested in broad aspects of refugee relations in the contemporary world.

Władysław Czapliński

B. BAUMGARTL, A. FAVELL (eds.), *New Xenophobia in Europe*, Kluwer Law International, London–The Hague–Boston, 1995

European University Institute in Florence has undertaken a far-reaching research in the field of xenophobia in Europe. By referring to the “new” phenomenon of xenophobia, the aim was to study whether there are any distinctive features of racial attitudes in the continent after the collapse of communism. The presented volume forms the first part of the three-stage programme. Documentation and empirical observations are to be followed by the explanatory section and proposals for policies available for fighting xenophobia.

The book is divided into 27 sections covering the situation in different nation-states and a concluding chapter entitled *Europe*, summarising the search. The authors are social scientists, describing their own countries’ cases. The comparative analysis is done by Bernd Baumgartl and Adrian Favell, both researchers at the Department of Political and Social Science at the EUI.

Each national section is produced following certain guidelines, including brief historical background of ethnic population and national identity formation, recent political and legal developments and a study of social attitudes. Even though presented in alphabetical order the set of 27 countries can be divided into five different groups. The first one contains former communist States, such as Bosnia-Herzegovina, Bulgaria, Czech Republic, Hungary, Poland, Rumunia, Slovakia, Slovenia, Yugoslavia (the non-inclusion of Baltic States and the republics in the Russian Federation or Central Asia is understandable due to space limitations but, as admitted, completely arbitrary). The second group of the former colonial powers – France, Great Britain and the Netherlands – tend to evolution towards multicultural or pluralist regimes and face similar tensions. Thirdly, Germany, Belgium and Denmark represent migrant-worker States, while Portugal, Italy, Spain and Greece are examples of the former emigration countries. The last group is described as “innocent” or formerly oppressed nations (Ireland, Luxembourg, Switzerland, Scandinavian countries).

Xenophobia is directed to groups different from the society such as immigrants, migrants in transit, national minorities, foreigners in residence and refugees. The community of Gypsies, estimated up to 5 million people, forms a specific case, similar to the situation of Jews in pre-war Europe.

The common feature of contemporary European States is the negative attitude towards foreigners, as expressed in the rise of extreme right-wing populist and xenophobic parties and in the development of restrictive national laws (following the rules of Schengen agreements). The reasons for such phenomena are complex – the authors point out that tolerance is related to the security and stability of the population, including positive economic conditions. The collapse of communism has created a vacuum and the appeal to ethnic feelings remained the quickest way of re-establishing order. There is also a profound crisis of collective identity and the major threat of “others” is perceived on the cultural ground. Therefore, as anti-foreigner movements have shifted their arguments from biological concepts to cultural fundamentalism, racism has diminished with xenophobia taking its place.

Xenophobic attitudes towards foreigners do not necessarily depend on the number of “others” in the country. In Germany, the process of *xenophobia without strangers* is observed, as negative feelings are much stronger in the Eastern part where nearly no foreigners live. In the Western part major xenophobic events did not occur in large multicultural cities but in the provincial, rather homogenous towns.

Even though there is much differentiation between States, xenophobic attitudes are present in each of them. This may be regarded as *signum temporis* for it is the result of the uncertain future of the European continent. The authors link xenophobia with such processes as the debate about collective national identity and historical destiny, supranational citizenship and cultural diversity. The role of law is regarded crucial as a means to combat violent excesses of xenophobia. Still, previously non-existent, exclusion and intolerance has become accepted in the societies. The example of the former Yugoslavia shows that "weakness in the face of xenophobia can very quickly develop into a general violent situation" (p. 54) with the instrumental policy of ethnic cleansing.

It is hard to present the essence of the States' reports; they may be recommended to anyone willing to understand the reasons of the contemporary European national policies towards the issue of foreigners.

Dobrochna Bach

H. LAMBERT, *Seeking Asylum*, Martinus Nijhoff Publishers, Dordrecht etc. 1995

A still increasing number of refugees in Europe poses a problem of a need of a modification of their legal status. Changes have been introduced on two levels: international law and domestic law. The former ones consist upon a new framework of co-operation within the European Union (Schengen and Dublin agreements, intergovernmental co-operation within the Third Pillar of the EU), and a network of bilateral arrangements, mostly readmission agreements between Central and Eastern European states (it should be recalled, however, that the agreements of this kind have been concluded also between Western states like Switzerland or Spain). The latter can be found in numerous amendments or even totally new refugee and asylum legislations in many European states.

H. Lambert has analysed the legislation of selected states: Belgium, France, Germany, Sweden, Switzerland, and the UK. She has concentrated upon a few issues of greatest importance: admission procedures, right and procedure of appeal, evidence, non-refoulement principle and its implementation, de facto refugees, and rights of recognised refugees. Domestic regulations are discussed against their international legal background – the 1951 Geneva convention on refugees, and other international instruments binding respective states.

The study is extremely detailed; the authoress has contacted both governmental officials and the UNHCR representatives in order to obtain a full and correct view of legal regulations and practice of state agencies involved (the experience shows that an access to the documents often is difficult). The book constitutes an important and valuable source of information (it seems only to underestimate some general conclusions in a comparative aspect).

Władysław Czapliński

N. EMILIOU, D. O'KEEFFE (eds.), *The European Union and World Trade Law after the GATT Uruguay Round*, John Wiley & Sons 1996

The conclusion of the Uruguay Round and the establishment of the World Trade Organization, which formally commenced its activities on 1 January 1995, constituted the beginning of a new chapter in international economic relations. From this moment, these relations became subject to the comprehensive and complex GATT/WTO regulations. The significance of these issues and the relative scarcity of publications concerning GATT make every work devoted to world trade law welcome. If such work is prepared from the perspective of the still unfathomable phenomenon of the European Union, it is even more than welcome: the editors of *The European Union and World Trade Law* have presented us with almost a delicacy.

The book is divided into six parts, of which the first two are devoted to general issues relating to the EC: the international personality of the EC and the general legal framework of the EC's external trade policy. In the first part, E. Denza discusses the problem of the EC as a member of international organizations. This is particularly relevant in the context of GATT, in the case of which the EC, although never formally a party to the agreement, exercised the rights and obligations conferred thereby (except for budgetary matters) and participated in sessions of the contracting parties. To add to the confusion, the EC was formally a party to international agreements concluded under GATT auspices. The WTO Agreement has clarified the above by allowing the European Communities, along with the Member States, to become original members of the WTO. The articles in the second part concern: the role of EU institutions in external trade policy (Baroness Elles), the allocation of competence between the EC and its Member States in the sphere of external relations (N. Emiliou), the legal base and external relations of the EC (D. Chalmers), and human rights and democracy clauses in EC trade agreements (M. Cremona). One would expect a more profound analysis in this part of the Court's Opinion 1/94, which concerned the competence of the EC and the Member States to conclude the GATT Uruguay Round Agreements; however, this problem is discussed in more detail in A. Arnulf's article in the fifth part of the book.

The third part, of which the title promises an evaluation of the Uruguay Round, contains only two contributions: comments on the Uruguay Round from the EC standpoint (J. Bourgeois) and from the United Kingdom standpoint (S. Hyett). A true evaluation is found in part four entitled "The Uruguay Round: Effect on the EC Legal Order", which constitutes the core of the book. Various aspects of the Uruguay Round Agreements are discussed here, in the context of EC law, starting with J. Usher's interesting paper on the consequences of the Customs Union and L. Gormley's detailed (though lacking comparisons to the Uruguay Round Agreements) account of the EC Customs Code. These articles are followed by W. Kennett's comments on the General Agreement on Trade in Services, C. Barnard's discussion of the external dimension of the EC's social policy and J. Scott's analysis relating to the Common Agricultural Policy. Next are discussed the significant topics of balancing trade freedom with the requirements of sustainable development (M. Hession, R. Macrory) and of EC anti-dumping practice in light of the GATT (M. Clough and F. Randolph). Worth particular notice is the excellent analysis by E.-U. Petersmann of the GATT dispute settlement system as an instrument of the foreign trade policy of the EC, in which the author presents the evolution of the EC's approach towards the dispute settlement mechanisms available under the GATT. Between 1958 and 1980 the EC initiated dispute settlement proceedings in only two cases, while being the target of 11 complaints (with 10 complaints against individual Member States in the period of 1958–1973); between 1980 and 1992 the EC

raised 25 complaints, with 30 complaints being directed against it in this period. The author is critical of the position of the European Court which, having taken account of the GATT dispute settlement procedures, has concluded that GATT rules are not unconditional and refused to assess the compliance with GATT of EC regulations. Part four is completed by H. Yamane's article on the EC/Japan commercial consensus relating to the import of motor vehicles in the light of "grey area" measures and M. Footer's interesting contribution on the legal framework for public procurement and EC external relations.

Part five is specifically devoted to the EC's external trade policy before the Court of Justice. The problems discussed include the direct effect of GATT (N. Neuwahl), judicial review of commercial policy measures after the Uruguay Round (F. Jacobs) and the above-mentioned Opinion 1/94 (A. Arnulf). These problems seem to coincide with the issues discussed in the first two parts of the book and from this point of view there was perhaps no need to distinguish them in a separate section. The sixth and last part of the book consists only of one contribution: F. Snyder discusses the legal aspects of trade between the EC and China.

Although the book is not free of some editing flaws (for example, J. Bourgeois' article has not been updated and not only ignores Opinion 1/94, but also refers to twelve Member States – an explanatory endnote would have solved the problem, like in the case of S. Hyett's paper; the title of Chapter 18 has an obvious error, p. 313), its advantages outweigh the minor drawbacks. The book presents a number of significant problems relating to world trade law in a transparent and diversified way. Some "traditional" subjects of scholarly analysis are revisited, such as the allocation of competence between the EC and Member States or the problem of direct effect. New elements in international trade law are discussed, just to mention international regulations of trade in services or human rights and democracy clauses in trade agreements. The contributions can be further divided into those of general interest to almost everyone (such as dispute resolution in GATT/WTO) and those which will appeal to specialists in a particular field, including customs law, agricultural law, public procurement or anti-dumping. This book should be of interest to practitioners and scholars alike.

Joanna Gomula

CLIVE STANBROOK, PHILIP BENTLEY *Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community*, Third Edition, Kluwer Law International, London–The Hague–Boston 1996

The fact that this is the third, revised and updated, edition of a 1980 publication should speak for itself. It indicates not only the usefulness of this book, but also proves that dumping and subsidies remain a very important problem of international trade law.

Chapter 1 provides the introductory framework for the book, explaining in general terms the concepts of dumping and subsidies. Dumping occurs when an exporter sells an exported product at a price lower than that of the same or similar product on the domestic market. Subsidies are financial advantages provided by governments to producers which result in the reduc-

tion of the costs of production and, in consequence, of export prices. To offset the injurious effects of dumping or subsidies, antidumping and countervailing measures can be applied, respectively. Although dumping and subsidies are two distinct institutions (a striking difference being that the first relates to the practices of private producers while the latter involves governments), they have a number of elements in common, including a common regulation in Article VI of the original GATT. Thus, it is not unjustified to give parallel treatment to both concepts.

The evolution of EC regulations in both fields is presented in Chapter 2. In general, EC law followed the developments on the international plane and the adoption of subsequent GATT codes. The first EC regulation relating to anti-dumping and subsidization was enacted in 1968 (Regulation No 495/68) as a result of the GATT Kennedy Round. It was replaced after the GATT Tokyo Round by Regulation No 3017/79, which in turn was superseded by Regulations No 2176/84 and No 2423/88. After the Uruguay Round, anti-dumping and countervailing duty provisions were placed in two separate acts: Regulation No 384/96 and Regulation No 3283/94, respectively. The authors note that "[a]lthough there are still many common features in anti-dumping and countervailing duty proceedings, it was considered necessary to divide the legislation into two regulations because of the large number of specialized rules in this area" (p. 16).

Chapters 3 and 4 discuss in more detail the basic elements of dumping and subsidies, respectively. Of the two, a fuller presentation is made on issues related to dumping, such as the calculation of normal value and export price, comparison of export price with normal value, and calculation of dumping margins and dumping duties. A separate section is devoted to the circumvention of anti-dumping duties, an issue on which agreement was not reached during the Uruguay Round and whose universal regulation has been postponed. Under EC law, circumvention provisions apply not only to assemblage in the Community, but also to assemblage in third countries. In contrast to Chapter 3, Chapter 4 contains only a general overview of the problem of subsidies, focusing on export subsidies and non-countervailable subsidies and the manner of their calculation.

The remaining chapters of the book apply equally to dumping and subsidies. Chapter 5 deals with injury, which is a prerequisite to the application of anti-dumping or countervailing measures. In conformity with GATT principles, three categories of broadly understood "injury" may be distinguished: material injury to the Community industry (which produces the same or like product to the product under investigation), threat of material injury, and material retardation of the establishment of a Community industry. The authors devote much attention to the definitions of "like product" and "Community industry", as well as to the problems of evidencing the injury and demonstrating causation. The next chapter, Chapter 6, concerns a concept specific to the EC, that of Community interest. Under EC law, anti-dumping or countervailing measures should not be imposed if this would be contrary to Community interest. Unfortunately, one is left with the impression that Community authorities will apply this rule "only in the most exceptional of cases" (p. 143).

The last three chapters deal with procedural matters. Chapter 7 leads the reader through different stages of the procedure: complaint, initiation of proceedings, investigation, and conclusion of the investigation or the proceeding. A special role is played by the Advisory Committee, an organ composed of representatives of the Member States and a representative of the Commission, which the Commission is required to consult in the course of the proceedings. The imposition of definitive measures does not close the door to other special procedures, of which refunds of duties and review procedures (including so-called newcomer reviews for new market participants) are discussed in Chapter 8. No special judicial remedies are available under EC law in anti-dumping or countervailing matters. The two basic remedies: action for review and annulment, and references for preliminary rulings, are presented in Chapter 9.

The usefulness of the book is increased by 11 appendices with currently binding legal acts (EC and GATT) and data on dumping and subsidy cases as of 31 March 1996. Anti-dumping proceedings are listed according to three criteria (investigations initiated, measures in force and measures which have been terminated), and presented alphabetically by product and country. A list of anti-dumping cases before the Court of Justice and the Court of First Instance is also attached.

It should also be mentioned that in the course of the presentation the authors also review respective regulations and practice concerning the ECSC.

The book is addressed to practitioners rather than academics, and takes the form of a practical manual. Legal points (such as the nature of regulations imposing anti-dumping and countervailing duties) are therefore not discussed in depth. EC case-law in this field is also treated rather superficially. However, anyone interested in recent developments in international trade law should greet with satisfaction the thorough comparative references to the relevant Uruguay Round agreements and enjoy the transparent and lucid presentation of a very complicated topic.

Joanna Gomula

KARL M. MEESSEN (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, Kluwer Law International, London–The Hague–Boston, 1996.

Those, who are interested in jurisdictional matters, will certainly welcome a new book edited by a famous specialist of the problems of extraterritorial jurisdiction – Professor Karl M. Meessen. The book is a transcript of a 1993 Dresden symposium organized in connection with the works of the ILA Committee on Extraterritorial Jurisdiction. The book is divided into 11 chapters, each of them comprising a detailed introduction and subsequent discussion on a given subject. It is impossible to name all 23 participants, suffice here to say that both European and American lawyers were present.

The book does not purport to exhaust the subject nor to cast any “good” definition of “extraterritoriality”. The very structure of the book with opening and closing chapters devoted to highly specialized matters (as banking, taxes, insurance, environment and others subjects often presented only in the context of the practice of a single state), the chapter dealing with the general concept of the extraterritoriality being just in the middle, shows that what is really looked for is a wide spectrum of problems rather than a classical manual on jurisdiction. The latter would be hardly possible as the problems of competition law and of the export regulation laws (two branches, which together with criminal law were in the very centre of interest of international law in this context) were deliberately excluded from the discussions of the symposium. In this note we will deal first of all with the general aspects of extraterritoriality to say later a few words on more specific questions.

While dealing with the latter (specially in the chapters on banking or environment), readers will certainly ask themselves several times, whether a given act of state is actually an example of extraterritorial jurisdiction. The authors of several contributions address this question as

well. In this context one should cite Karl Meessen who remarked that "some of the most fiercely contested conflicts of jurisdiction (...) were cases where there was a perfect bases for territorial jurisdiction" (p. 226). It is, however the area of possible and actual conflicts that merits special attention of lawyers. That is why the problems discussed in several chapters may be held to exceed the traditional concept of extraterritorial jurisdiction. It is, however, no vice of the book, as it would be unreasonable to require the contributors of the symposium to adhere strictly to doctrinal classifications differentiating extraterritorial jurisdiction from other forms thereof.

In this context the attention of international lawyers should be attracted to a very interesting chapter dealing with "Jurisdictional Rules in Customary International Law" (p. 64 ff.). Strangely enough it is the only chapter of the book in which two longer presentations are put together side by side. It is in no case a mere incident, as the views of Harold G. Maier and Andrea Bianchi differ on many important items (specially with respect to the position of international law *vis-à-vis* conflicts of jurisdictions). This can explain how difficult a search of a common understanding in jurisdictional matters may be. To illustrate the problems with defining the very term "extraterritoriality" suffices here to say that in the opinion of H.G. Maier the "effects" doctrine (as enshrined in the *Lotus* judgment of the Permanent Court of International Justice is nothing but an application of objective territoriality principle of jurisdiction. If the model example of extraterritoriality will be equalized with territoriality (what does not change the fact that the other contributor – Adelheid Puttler – differentiates "jurisdiction based on territoriality" and "jurisdiction based on effects"), no one should be astonished by the wide scope of problems discussed in the book.

It should not be understood as a critical remark - specialists of international law are confronted on the one hand with doctrinal notions and classifications that had been formed long ago (like five bases of jurisdiction: territorial – subjective and objective, personal, universal and protective one; notions of extraterritoriality and territoriality) and on the other hand with the realities of life. The task of binding the two ends is not always easy. This task is, however, undertaken by the participants of the symposium and this very fact should be welcomed. Specially Andrea Bianchi makes a very interesting attempt to consider the question of jurisdiction and extraterritoriality as a matter of degree (p. 77). He also criticizes the classical international doctrine on jurisdiction – stemming from the *Lotus* case. Similar observations are made by Francesco Francioni in his excellent paper on extraterritorial application of environmental law. The proposal made by A. Bianchi is just to base the doctrine of jurisdiction on the careful examination of state practice rather on the generalization of the PCIJ judgment.

The reference to state practice makes us consider for a moment the legal character of boundaries of state jurisdiction. H. Maier presents the opinion that in absence of express prohibitory rule, international law does not exclude the resort of states to extraterritorial jurisdiction when their interests have been affected by acts taking place outside their territory. The limits of making use of such bases of jurisdiction are to be found in comity. The opposite view of A. Bianchi defends the role of international law in jurisdictional matters. The same author mentions the relationship between the jurisdiction and sovereignty. This question is widely discussed also in the Polish doctrine of international law in the context of the future accession of Poland to the European structures. Another question that certainly will be interesting for both specialists of public international law and of civil procedure is put by Campbell McLachlan in the paper entitled "Extraterritorial Orders Affecting Bank Deposits" (p. 39 ff.). The author wonders whether civil jurisdiction is really a subset of the international law of jurisdiction (p. 50). The doubts of the author are to be attributed to the fact that civil process has different objectives than a typical exercise of state authority.

This question is not an isolated one – the same may emerge in different areas, as is perfectly illustrated by the contribution of F. Francioni. The author shows that extraterritoriality of envi-

ronmental law may benefit other states (specially the receivers of environmentally harmful substances).

The conclusion is that in the field of jurisdiction any generalization with no sufficient background in the state practice is to be avoided.

As regards specific issues, the attention of lawyers should be attracted to the first chapter of the book with the paper by Andreas F. Lowenfeld presenting the US Supreme Court decision in the *Insurance Antitrust (Hartford Fire Insurance Co v. California)*. The practice of the US courts towards the extraterritorial application of the US law has always been a most interesting for international law specialists (though not welcomed by all). The reasoning of the Court in the recent case seems to depart from the moderate version of extraterritoriality – adopted in *Timberlane* case and *Mannington Mills* case. The author criticizes specially the equalization of the concept of “conflict between domestic and foreign law” (as exoneration for the lack of compliance with the latter) with much narrower concept of “foreign compulsion”.

Persons interested in international economic law should not omit marvellous chapters on extraterritorial taxation with the paper by Rutzel Silvestre J. Martha, and on banking and securities with the paper by Ulrich Bosch.

Przemysław Saganek

D. MARTIN, *La libre circulation des personnes dans l'Union Européenne*, Bruylant Bruxelles 1995

The commentary to the provisions of the Community treaties and secondary instruments, written by a servant of the European Commission in Brussels, deals with one of the essential elements of the system of Community law – freedom of movement of persons. It is not – in fact – strictly limited to the main topic, as the author often refers to other Community freedoms, to which similar or analogous regulations apply. The author emphasises clearly the differences between respective freedoms, in particular different regulations concerning the restrictions in access to these freedoms (Art. 48(3) and 55 of the Treaty of Rome). A particular place in the considerations by Martin occupies an analysis of a concept of discrimination under Community law. The presentation is, however, strictly connected with the freedom of movement of persons (it can be clearly seen *e.g.* from the manner of discussing the institution of European citizenship within the meaning of Art. 8a of the Treaty of Rome where the other rights and duties of European citizens are not mentioned; it will be interesting to hear whether the ECJ confirms the proposal of direct effect of this provision in aspects expanding the freedom of movement).

After having presented the provisions of the Treaty of Rome indirectly and/or directly connected with the free movement of persons within the EC, Martin moves towards secondary acts of Community law. In respect of many acts the commentaries are short and limited to purely grammatical interpretation of the text (in some cases referring to reasoning of drafts presented by the Commission). It means that there is no jurisprudence of the Court in respective fields. It is regrettable, however, that the author has not presented social rights of migrant workers, limiting his presentation to purely administrative (formal) aspects of the freedom of movement of persons, services and of the right of establishment.

A separate part of the publication has been devoted to aspects of freedom of movement within international agreements concluded by the EC. The case of an European Economic Area Agreement is relatively clear – as the parties intended to create a unique space accessible for all their nationals, the comment simply repeats the author's remarks to Art. 48ff. of the Treaty of Rome. The same technique has been used in respect of provisions of Art. 31 and 36 of the EEA Agreement concerning freedom of services and of establishment, respectively. On the other hand, association agreements contain more disputable regulations. Some of them provide for conditional freedom of movement of persons to be introduced by the organs of association (Martin presents a rich – in the meantime – jurisprudence of the ECJ dealing with decisions of the Association Council EC-Turkey); the others including an agreement with Poland exclude the free movement of persons, being limited to granting social rights to persons legally employed by enterprises of respective parties.

Martin refers also to certain provisions of Community law dealing with the status of refugee and with migratory policy of the European Community. He limited his analysis, however, to a presentation of extremely selected secondary acts, leaving aside Art. 100c of the Treaty of Rome and all controversies concerning agreements of Schengen and Dublin. It can be supposed that this complicated problems have been excluded partially because of their unclear status from the point of view of the EC law (Schengen) or because the specific provisions have not entered into force yet (Dublin). It seems to us that these acts, as well as a draft convention on the crossing of external frontiers of the Union, could have been at least mentioned while presenting Articles K-K.9 of the Treaty of Maastricht. In fact, this presentation counts 3 pages out of 535, although the title of the book reads "Free Movement in the European Union".

From the point of view of an extracommunity reader, the book by Martin has several important advantages. Firstly, it refers to a rich jurisprudence of the ECJ interpreting the free movement of persons (one should remind here that the Court of Justice is the only organ competent to do it); a doctrinal analysis is relatively limited – to cases in which the author decisively rejects the reasoning of the ECJ. Secondly, in many respects – while discussing specific aspects of the Community freedoms – the author refers to the basic issues and concepts of the Community legal system to illustrate adopted solutions. From the Polish point of view we must stress here that it is impossible to understand the philosophy of European law and to apply it correctly without the knowledge of these fundamentals (this truth is often forgotten by specialists in different fields of domestic law turning to EC law without having studied the methodology of the system).

Władysław Czapliński

P.CH. MÜLLER-GRAFF, *Europäische Zusammenarbeit in den Bereichen Justiz und Inneres*, Nomos Verlagsgesellschaft, Baden-Baden 1996

The forms and scope of co-operation of Member States of the European Union within the Third Pillar are still controversial and relatively unknown to the wide public. On the other hand, Community citizens and nationals of third states are more and more interested in the

developments in this field as they touch their individual interests in a direct way: the right to entry and to stay within the EU, the right to claim asylum, the data bases – all these elements should be subjected to democratic control, and the existing system is far from securing it.

The volume has been divided into two parts. The first part contains two general papers devoted to the present state of the co-operation in the framework of the Third Pillar and to the perspectives of reform of the Pillar at the Intergovernmental Conference 1996–1997; the second one regroups presentations dealing with specific fields of co-operation.

Opening paper by Müller-Graff starts with a statement that the Treaty of Maastricht does not give a clear answer to a question on the aim of the Third Pillar. The author has emphasized that the co-operation concentrates upon several distinct politics which have neither been clearly defined nor separated and from each other. The solution adopted is complicated because a part of co-operation has been situated within the Community Pillar (a common visa policy), and the notion of justice and home affairs as an object of co-operation has never been precised. The author discusses the issues from the point of view of the system of Community law, and concludes that the Third Pillar does not constitute its part. The aim of co-operation should be approximation and cohesion of national policies; an analogy can be drawn therefore with the first stage of development of Community law. Special institutional developments (a domination of the Council and a limited role of the Commission) testify also a special character of the Third Pillar. The author seems to be surprised by the general outcome of the Third Pillar; however, it has been clear from the very beginning that – knowing a cautious attitude of the member states towards closer co-operation in so sensitive areas – the Pillar would be based upon an intergovernmental co-operation. On the other hand, we fully share a criticism of the author on the exclusion of any form of parliamentary and – in particular – judicial supervision. The domain of justice and home affairs is of direct concern for human rights, and democratic control is absolutely needed.

The second paper in this part, by W. de Lobkowicz, official of the Community, is devoted to proposals of future solutions but refers also to the present regulations. Interestingly the author evaluates them more favorably than his predecessor. He stresses that the regulation is a result of a compromise between the parties to the Treaty (what is right if one reminds that home affairs belong to the most important prerogatives of state sovereignty, crucial for a security of states); the elaborated system offers – in his opinion – many possibilities of co-operation including even Community instruments, however, intergovernmental forms are still preferred by the states, and the agreed methods have not been used. The most important reasons thereof are: uncertainty as to the state of law, unclear division of powers, and unanimity in a decision-making process. We think that the opinion of Lobkowicz is too optimistic. The opinion of the Commission on the functioning of the Third Pillar has been extremely critical, so are commentators, but neither substantive nor procedural amendments to the present regulations will be easy to introduce.

The subsequent papers have been devoted to different policies in the framework of the Third Pillar. They concentrate mostly upon the future prospects and possible developments. Numerous suggestions have been made: a necessity of unification of visa policies and in effect an introduction of a common visa policy (because of its lack the importance of a present regulation of Art.100c is extremely limited), possibly in the Community framework; a unification of substantive asylum law, a necessity of unification of criminal law and procedures (the present regulation consists more on the making an inter-state co-operation more effective instead of a real harmonization), an approximation of legislation and an intensification of co-operation in the field of justice (a draft of convention on mutual recognition of judgments in family matters has been elaborated), new steps in a development of co-operation in customs matters (in fact, an

elaboration of a compromise in this specific field should be easy, as customs union belongs since the very beginning to the Community Pillar).

It seems that all subjects concerned realize a necessity of important changes in the organization and functioning of the Third Pillar. However, it is still unclear whether the states will be willing to expand and deepen their co-operation. From our perspective, the co-operation in the field of justice and home affairs between the European Union and candidates to accession should be intensified as soon as possible, as potential dangers for all partners are still growing. This clear necessity, however, is still neglected.

Władysław Czapliński

A. ACHERMANN (et al., eds.), *Schengen und die Folgen*,
Staempfli – C.H. Beck – MANZ, Bern–München–Wien 1995

Four papers included in the publication have been presented during a seminar at Solothurn in 1994. The seminar has been devoted to the recent development in co-operation in the field of justice and home affairs in the framework of the European Union. The reporters have addressed extremely important and sensitive issues, involving vivid discussions among Member States of the Union and their nationals because of potential restrictions upon human rights and possible growing police supervision in the Union states.

A. Epiney has discussed general issues of the Schengen agreements. The most important part of the paper deals with the relationship between the agreements and Community law. On the one hand Epiney emphasises that the Schengen regulations fills a gap in the Community legal system as it is aimed at the implementation of the freedom of movement of persons within the EC (interestingly, it is still unclear whether the internal market should cover also non-Community nationals; although the Commission has presented a view that they are included into the free movement principle as far as a border crossing is concerned, and in practice no control takes place, formally the parties to the agreements are empowered to introduce the control in respect of the non-Community nationals) and they do not infringe neither Art. 7a nor Art. 5 of the EC Treaty, on the other hand she correctly states that the agreements of Schengen (and Dublin) in fact have been drafted as a future EU regulation, so as their conformity with EC decision making procedures are doubtful. Finally, a part of Member states are parties to the agreements only, although their number seems to increase (and to include also other states – the same principles have been introduced lately in relation to Scandinavian states in order to enable the free movement of persons within the EEA).

Epiney has presented also different aspects of rights of third states nationals, conditions of border control, and premises of entry of extra-Community nationals into the “Schengenland”. She rightly remarks that the regulation imposes upon its parties a duty to consider the exclusion of aliens unwanted in one of the Member States into the whole territory of the Union, but – on the other hand – this regulation cannot impose upon the other states a duty to take into consideration legitimate interests of particular states to allow the entry of specific groups of persons. However, the Schengen regulation provides for a possibility to exclude nationals of particular states from the personal scope of validity (of course, Switzerland is meant here, as in result of

the referendum rejecting the EEA accession Swiss nationals are formally treated on the same footing as nationals of African and Asian states, subjected to particularly sharp controls because of a high risk of immigration). Finally, the authoress criticises the technique of regulation used in the agreements: the status of non-Union aliens has been regulated without necessary guarantees of their rights.

A. Achermann has discussed issues of asylum policy in the EU. In his opinion, the Schengen and Dublin system is a response to failed attempts to harmonise and unify refugee and asylum legislations of the EU states. He has presented the activities of the Union on the basis of Art.K.4 of the Treaty of Maastricht. We agree with critical remarks by the author concerning gaps and false solutions adopted in the agreements. At least partially they are contrary to obligations deriving from the Geneva Convention as to a limited possibility to choose an asylum country and automatic imposition of a competence of the first-entry states; they do not take into account a problem of *de facto* refugees (however, we must emphasise that this group of persons is not protected by the 1951 Geneva convention, And the protection is granted on humanitarian grounds); also a concept of safe third countries limits potential rights of asylum seekers. Anyway, the Schengen system has influenced municipal legislation of the Union Member States, and many other European states tend to base their refugee and asylum law on the same principles. It is also true in respect of Central and Eastern European regulations including a Polish draft aliens act.

Finally, R. Wehner has discussed problems of police co-operation within the Schengen system. They are less known but create also serious problems (*e.g.* in the field of a data protection). The authoress concludes that the level of co-operation will be precised on national level, and notwithstanding possible resistance domestic legislation must be brought in line with the elaborated Schengen system. She also indicates possibilities and needs of co-operation with the police of the states non-parties to the Agreements.

In a conclusion presented at the seminar, R. Bieber has stressed that the Schengen system constitutes in fact a new form of integration which is not fully compatible with the existing model of economic and political integration; he has even expressed serious doubts as to its compatibility with the European treaties in force. Although we share this opinion, we must also emphasise that the regulations have become reality, and all potential future member states will be bound by them. In particular Poland, the Eastern border of which will become future external border of the European Union, must adapt its aliens and police regulations to the requirements of the European integration.

Władysław Czapliński

JAN H. JANS, *European Environmental Law*, Kluwer
Law International, The Hague–London–Boston 1996

The publication under review deals with the European Community's (EC) environmental legislation. Although, the title, itself suggests much broader range of topics, the author focuses mainly on deliberations about issues related to the development and implementation of the environmental protection law within the framework of the European Union (EU).

The publication is of great importance and it should serve well those who are involved in theory and practice of the environmental protection, and particularly those responsible for harmonization of Polish law with the Community law.

Chapter I is devoted to the development of the environmental competences of the EC. This issue is essential from the practical point of view, in evaluating the effectiveness of the Community environment policy.

In 1987, when the Single European Act came into force, these competences gained a firm legal basis. This, however, does not mean that the Single European Act and a later Maastricht Treaty provide for explicitly that provisions of Articles 130r–130t designed specifically to protect the environment has become the basis for establishing ecological policy. These regulations apply very often to issues concerning 'internal market' which fall within the scope of Article 100a. This duality of the legal basis is the reason why directives adopted on the ground of improper legal foundations are being voided.

Subsidiarity has become a leading principle which outlines the range of the Community's activities. The author stresses that the application of this principle entails far reaching consequences; *inter alia* the following should be mentioned: the use of 'minimum standards' whereby Member States are free to lay down stricter national standards, and the use of given legal instruments. Preference is given to directives, particularly framework directives and no-binding instruments.

Environmental protection is a very specific area of the Community's activity since it involves principles of a properly functioning internal market. Hence, a concerted approach is required based on the need for incorporating proecological means and actions into other policies of the European Communities. This peculiarity is also pronounced by the necessity for developing different attitudes towards harmonization of laws, namely towards total harmonization on the one hand and minimum harmonization on the other. A very clear presentation of the principles and scopes of both kinds of harmonization and related case law is a paramount contribution of the author.

It seems advisable to stress here the significance of Court of Justice decision that total harmonization of national legislation deprives a Member State of recourse to Article 36 of the Treaty (C 169/89).

The implementation of the EC environmental law poses a significant and difficult problem as soon as decision is taken by the Community to join the action for the environmental protection and it exists until final solution. The Chapter in which the author considers this problem requires special mention.

The presentation of the process how the law is implemented helps to formulate a number of practical guidelines for the Member States which are committed to incorporate the EC law into internal legal order.

A successive Chapter (V) of the book focuses on legal protection in European environmental law. Like in the case of the whole publication, the title of this Chapter implies its much broader scope, not limited only to European Communities. Its content, however, shows clearly that the author concentrates only on the Community law. Nevertheless, it is essential that presenting the issue the author refers to Court of Justice decisions and the 'direct effect' principle. The discussion on the significance of the Francovich case and its implications for the environment should also be underlined.

Environmental protection law is often analysed in the literature in view of the mechanisms of its legal instruments and substantive law. Although, the author pays much attention to substantive law analysing individual directives and regulations, formulating key requirements and referring to examples of Court of Justice decisions, the reader's attention is attracted, to greater

extent, by Chapter VI in which one of the freedoms of the internal market is discussed, namely free movement of goods and its links with protection of the environment. Among others, the author highlights the issue of taxes and charges occurring in the sphere of the environmental protection; the scope of application of Article 34 of the Treaty providing for that restrictions on exports are prohibited and Article 36 which provides for the exceptions to the principle of quantitative restrictions on import, export and transit. The analysis of case law is an important element of the author's deliberations.

Chapter VII devoted to competition policy and environmental protection is of equal importance, particularly an analysis of so called 'voluntary agreements' in the light of Articles 85 and 86 of the Treaty concerning the competition policy.

The book under the title "European Environmental Law" presents an extensive analysis of environmental law, highlighting the dynamics of its development. It is of great value to researchers and those involved in practical aspects of the issue, responsible for approximation of national legislation to the Community law. The fact that all deliberations presented in the book are supported by examples of Court of Justice jurisprudence ensures that its content will find a broad application in practice.

Hanna Machińska

SERGEI A. VOITOVICH, *International Economic Organizations in the International Legal Process*, Martinus Nijhoff Publishers, Dordrecht-Boston-London 1995

Sergei Voitovich has set himself the task of demonstrating "in what manner and forms international economic organizations (IEOs) participate in the two main stages of the international legal process: law-making and law-implementation" (p. xv). The scope of potential subjects covered by his analysis is very broad and includes all international organizations dealing "prevailingly" or "considerably" with international economic problems (p. xvii), with the explicit exception of ILO, ICAO and the WHO.

The book is divided into three parts, each dealing with different aspects of the law of international economic organizations. Part One contains a background of the analysis and deals with general problems of international economic law and international organizations. In Chapter 1 the author discusses the object of international economic law, drawing attention to the highly dynamic nature of international economic relations and to the transformation of this field of law from one based on prevailingly bilateral rules to a system of rules binding on regional, interregional and world-wide levels. The author rightly concludes that despite the complex nature of international economic law, it is a branch of public international law. He also notes that certain general rules relating to all IEOs, and even all intergovernmental organizations, are gradually crystallizing from the common practice of international organizations. Having presented the general problems relating to international economic law the author passes, in Chapter 2, to the concept and typology of international economic organizations. The author revisits traditional problems of the theory of international organizations (such as that of their international legal personality). The major distinguishing feature of an IEO seems to be its

purpose, which is "the coordination of economic co-operation in certain fields" (p. 16). In the section relating to the classification of IEOs the author resorts to as many as eight criteria (form of statutory act, legal status, volume of powers, accession to membership, character of membership, subject of activities, geographical sphere of activities, decision-making competence). Of features particular to IEOs the following could be mentioned: the functioning of a large number of IEOs on the basis of documents other than treaties or even without any single formal statutory act (GATT), the unique phenomenon of "supra-nationality" (EC), frequent restrictions on accession (associations of producers and exporters), and a majority of regional organizations with a small number of organizations aspiring to universalism. This Chapter contains an interesting overview of various legal solutions applied with respect to IEOs. Among the author's conclusions is the assertion of an evolving system of IEOs, with links among individual organizations and their groups (p. 30). Its "major structural units are: the U.N. family of economic institutions, the OECD, the GATT, the organizations of producers and exporters, international commodity organizations and some regional groups of IEOs" (p. 161).

Part Two is devoted to the role of IEOs in international law-making. According to the author, there are three basic forms in which IEOs participate in such law-making: by concluding treaties with other subjects, by engaging in the process of drawing up multilateral conventions and by adopting normative acts. In line with this classification, the author begins by discussing, in Chapter 3, the treaty-making competence of IEOs, in respect of which there do not seem to be any striking distinctions from that of other international organizations. IEOs are particularly predisposed towards the second form of international norm-making: multilateral convention-making, which is discussed in Chapter 4. The participation of IEOs in this process is indirect and they perform an "auxiliary law-making function" (p. 58), by contributing, above all, their institutional basis. The author focuses in particular on the participation by IEOs in the elaboration of three types of multilateral conventions: codification, unification and special multilateral conventions. It is not clear from the analysis whether the IEOs have contributed particularly to the elaboration of any specific types of multilateral conventions. One reason may perhaps be that, as the author admits, "the convention-making process has a sporadic, rather than systematic, character" (p. 67). Chapter 5 deals with the last form of international law-making by IEOs: normative acts. The author discusses here both procedural aspects and questions of substance, including matters "common" to all international organizations (such as the concept of "soft" law). Compared to other organizations, most IEOs are authorized to take binding decisions not only in procedural but also in substantive matters, such decisions constituting a source of international law. A special aspect of this problem is the supra-nationality (and supra-regionality) of certain IEOs. For example, the African Economic Community has the power to adopt decisions binding not only on its members, but also on certain regional economic communities.

Part Three is devoted to law-implementing functions of IEOs. This problem is important, especially in view of the high frequency of breaches of rules of international economic law. Covered by this part, in Chapters 6 to 9, are the following law-implementing functions: interpretation and subsequent rule-making, supervision and operative norm-execution, dispute resolution and sanctions. With respect to dispute settlement, it should be mentioned that within most IEOs emphasis is placed on negotiations and consultations, rather than rule-oriented methods. With respect to sanctions, it is worth noting that, according to the author, regional economic organizations and organizations of special competence have the right to impose sanctions on a non-member which has committed a serious international crime. However, in view of the specific nature of international economic law which relies on reciprocity and mutual consent, rather than coercion, sanctions play a limited role in law enforcement (p. 155).

The book is descriptive rather than analytical, at times of an uneven character, where problems discussed in a very detailed manner intertwine with important issues touched upon only superficially. Given the enormous volume of the relevant material, the author's efforts may have been more effective if only a limited number of IEOs had been selected for the analysis and their rules and practice analyzed in depth.

Another weakness of the book is that it does not take into account the World Trade Organization which was already in existence at the date of publication (1995). (The list of abbreviations does, however, include the abbreviation "WTO" which turns out to be the World Tourism Organization.) The author explains that the analysis relates to the factual state as of 1 June 1993. However, frequent references are made to the then non-existent CMEA.

The editing of the book is highly unsatisfactory, with numerous spelling mistakes and a variety of methods employed for the quotation of footnotes. Moreover, in the latter case some sources are repeated in full at random (using different methods). Editorial error is probably also to blame for the inclusion in the "List of Treaties" of documents which are not "treaties", such as decisions and recommendations of various IEOs. The questionable page turns out to be a repetition of a page in the "List of Selected Documents".

Fortunately, the above drawbacks are not of such nature to have a destructive effect on the major virtue of the book: its originality. The book is a noteworthy contribution to the theory of international economic law under circumstances where this field of law is becoming increasingly important.

Joanna Gomula

MICHAEL BOWMAN, CATHERINE REDGWELL, *International Law and the Conservation of Biological Diversity*, International Environmental Law and Policy Series, Kluwer Law International, London–The Hague–Boston 1996

The Convention on Biological Diversity, adopted during the United Nations Conference on Environment and Development in 1992, is the first international treaty dealing with all aspects of species and ecosystems conservation, sustainable use of components of biological diversity and access to genetic resources and biotechnology. Previous conventions are either sectoral – cover only limited aspects of the problem and concern with the protection of certain species, or are regional in their scope. The Biodiversity Convention, which came into force on 29 December 1993, does not propose to replace or affect existing conventions but to provide a coherent framework within which the action of these treaties could be propelled by establishing global priorities, criteria and guidelines.

The book under review is not only a commentary on the Biodiversity Convention. It offers a comprehensive presentation of significant issues related to the conservation of biological diversity in international law. The volume contains the collection of papers written by members of the Committee on Environmental Law of the British Branch of the International Law Association.

The main body of the book consists of fourteen chapters. The first chapter is devoted to an analysis of the nature, development and philosophical foundations of the biodiversity concept

in international law. As the author remarks biological diversity is “an umbrella term for degree of nature’s variety” and it embraces three elements: the diversity of ecosystems, the diversity of species and the genetic diversity within species. Biodiversity must be conserved on each of these three levels.

Chapter 2 provides an analysis of the provisions of the Biodiversity Convention. These provisions are based on the principle that states have the sovereign right to exploit their own biological resources and the responsibility to ensure that their activities do not cause damage to the environment of other states and of areas beyond the limits of national jurisdiction.

The next chapter examines the concept of sustainable use of biological diversity which means the use of its components in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

The succeeding three chapters deal with the existing measures for protection of terrestrial species and habitats, marine ecosystems and the Antarctic environment. As authors rightly indicate there are many practical weaknesses about previous agreements which limit their effectiveness: a relatively low number of ratifications, a list system, a lack of proper machinery for monitoring the implementation of conventions and of an adequate financial mechanism to assist parties in caring out their obligations.

The volume also contains chapters examining problems or *ex situ* conservation, the conservation and control of plant genetic resources and controversial issue of the role of intellectual property rights in biodiversity conservation.

In the next two chapters reader will find interesting considerations of the implementation of the Biodiversity Convention in the United States and in the European Union (which has ratified the Convention along with all of its member states).

The authors of two papers analyse the differences between developing and developed states and the role of indigenous people in the conservation and management of biodiversity. Financial aspects of the conservation form focus of the last chapter.

The book is enriched with appendix containing the text of the Convention on Biological Diversity, selected bibliography and useful index.

The foregoing description of the contents of the volume should insist the reviewer’s opinion that it is properly documented and remarkably erudite study of the problems of biodiversity conservation in international law.

One point on which critical remark is in order concerns synchronizing aspects. In my opinion the book suffers from a lack of clear division of the contents of respective papers, which in some cases leads to recurrences or omissions.

The book is well produced, presented in hard-cover and is of high quality. The reviewed volume has immense value for international lawyers, natural scientists and policy makers involved with or interested in the problems of the conservation of biodiversity and the sustainable use of its components.

Anna Przyborowska-Klimczak

RUDOLF DOLZER, MARGRETE STEVENS, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, The Hague 1995

This volume concerning the most characteristic issue in the field of contemporary international economic relations, viz. the legal side of direct foreign investments phenomenon, has been published under the aegis of the International Centre for Settlement of Investment Disputes. The book is needful since starting from the first treaty regarding the protection of investment concluded between Germany and Pakistan in 1959, there are being negotiated over 40 of such treaties annually after 1989. It has been realized that it is not the credits given to economically developing countries but exactly direct foreign investment that can best help in their development. Economically developing countries compete with each other in using incentives for gaining alien foreign investment but simultaneously the phenomenon of direct foreign investment of economically developing countries in industrially developed countries begins to take shape.

One may wonder who is the book addressed to. Generally there is no discussion in the book about the practice that has been developing on the basis of bilateral treaties. Questions of international law that have been provided by bilateral treaties on the protection of investment are not considered as indicating a norm of international law that could have been recognized by the doctrine as universal. The book has been written with the intention of drafting a multilateral treaty on the protection of investment that could substitute bilateral treaties. Hence there is discussed the issue of uniform clauses indicating what kind of bilateral treaties' stipulations are predominantly or exceptionally met. The book is rather a study of bilateral treaties instead of the norms of general international law. In this state of affairs it may be assumed that the authors doubt whether there have been created universal standards of foreign investments' protection sufficiently based on international law as they refuse to consider them through all sources of international law. Nevertheless, the reviewer must conclude that the codification of the issue of foreign investments' protection would have been premature, all the more so as due to states' incentives for locating investments within their territories, standards of national treatment and treatment in accordance with the most favoured nation in respective countries are variously understood. One has to remember that the activities of the International Law Commission on the convention regarding the most favoured nation clause generally resulted in a failure as it was only formal issues to be codified and not the standard as such since it has been undergoing continuous transformations and in principle it is difficult to define even in the area of more detailed international economic relations.

The book of Rudolf Dolzer and Margrete Stevens is composed of five chapters of the analytical part, 8 items of the documentary unit and bibliography that consists of not only the traditional list of subject literature but also the chronological register of bilateral investment treaties and the arrangement of these treaties according to particular states. The eight units of the documentary part represent the model bilateral treaties elaborated in practice of Austria, Denmark, Germany, Hong Kong, Holland, Switzerland, United Kingdom and United States. Taking cognizance of these pattern treaties one recognizes that they are imposed on economically weaker contracting party and using the example of the investments' protection treaty between Germany and Poland of 10 November 1989 one may indicate how many hardships await the economically weaker country requesting to withdraw from a model treaty. This was the situation of Poland when she refused to accept two different definitions of foreign investor according to German and Polish law and because of the extraterritoriality of German law in the

field of citizenship Poland supported a single definition provided under general international law.

Publication of register of bilateral investment treaties on the protection of investment is of great worth. The chronological list enables to observe the process of breaking down the practice of new international economic order and its gradual substitution by the practice of direct foreign investments. It also justifies the conclusion that the leadership and pioneer position in this field was held by Germany since she concluded 8 of 9 initial treaties and only afterwards she was joined by Switzerland. The register of bilateral investment treaties indicates, however, that a number of high investment risk states still do not participate in the process of direct foreign investment attraction (for example Angola) while the others do not take part in a higher degree of involvement (as for instance Russia is being represented only by 4 treaties). The list arranged according to states also leads to the statement that especially interested entities in foreign investments are those states whose model treaties are presented in the book. In consideration of the state where this review has been published in one may notice that Poland has concluded 30 investment treaties till August 1994 thus it is nearly the same amount as Hungary (29 treaties) and less than Romania (41 treaties but with some states twice).

The analytical part of the book has been organized according to the structure of bilateral treaties on foreign investments' protection. It has been presented therefore the issues of the range of application and particularly the conception of investment and foreign investor as well as the application of treaty in course of time. One has to emphasize that the issue of the definition of investor should be investigated not only on the basis of treaty regulations but also with reference to legislation of particular states as the question of natural persons' citizenship and enterprises' nationality is variously regulated. The autonomous examination of this problem based only on bilateral treaties on foreign investments' protection is thus far from scientific formulation as it is only the comparative research in the field of internal legislation of particular states that would enable to choose the most suitable solution for multilateral treaty. Chapter three deals with the formulation of consent to foreign investment and its treatment. An interesting issue is the problem of exceptions from national or most favoured treatment; one may point out the privileges and benefits being granted in close-border regimes and in international economical integration spheres as well as based on acts and treaties of taxation. Probably as a result of changes of international legal norms in the field of privileges vested in investors, one may find a treaty stipulation indicating that if the international legal norms changed, the new regulation would be valid for foreign investors of both contracting parties. For example, on the basis of model bilateral treaty of Holland art. 3 (5) declares: "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement". In this state of affairs the authors of the book while studying the standards of treatment should not limit themselves to the regulation of bilateral treaties on investments' protection but take into consideration the legal rules for investment encouragement used by states (the information available from UNCTAD) and simultaneously the treaties of taxation, especially regarding avoidance of double taxation.

Chapter four deals with the issue of expropriation and chapter five with dispute settlement. The former is lacking the study of interesting regulations aiming at determination of compensation currency or the problem of inclusion in compensation lost profits; it could have a character of international legal research. The latter is limited to the presentation of bilateral treaties clauses

regarding dispute settlement between states, the state of investment location and foreign investor. However, there is no mention on practice and whether it has developed on the basis of these regulations at all. An interesting point is the issue of foreign investments' insurance and subrogation of investor's rights by insurer.

Concluding, I must admit that the reviewed book is a valuable position in the field international economic law, confirming that this branch of law contains not only the norms of public law but also private ones (this statement is vindicated by the issue of subrogation, the accepted solutions on the problem of investor's definition and basing dispute settlements on the clauses of UNCITRAL).

Janusz Gilas

Recueil des Cours. Academie de droit international, The Hague, Vol. 243 (1993-VII), and 247 (1994-III)

Two volumes of the Hague Recueil contain the lectures given by Sh. Oda, J.H.A. Van Loon, A. Watts, D. Martiny, and J. Barboza, dealing with particular aspects of both public international law and conflicts of laws.

Japanese Sh. Oda, eminent specialist in the field of the law of the sea and former Vice-President of the ICJ, devoted his lectures to different aspects of the activities of the Court. Describing the contentious jurisdiction, Oda presented different bases of the Court's jurisdiction (compromissory clauses, unilateral declarations) and the chamber procedures. Subsequently he discussed provisional measures as applied by the Court, and different issues of intervention. After having considered advisory opinions given by the ICJ, Oda analysed technical aspects of the Court's activities (including the composition of the Court and practical procedural issues). Finally, the substantive issues dealt with by the Court, described by Oda, concentrated mostly upon the law of the sea, main domain of research activities of the Judge. The lecture is followed by the summary cases showing different groups of cases according to the kind of procedures applied, as well as by an exhaustive bibliography of the Court.

Van Loon, Dutch lawyer serving as the First Secretary of the Hague Conference on Private International Law, described different issues of international (inter-country) adoption. He divided his presentation into four parts. First one dealt with the evolution, practice, and abuses of adoption, the following concerning different legislative issues in a comparative perspective, international activities towards the codification of inter-country adoption, and – finally – with the description of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption. Enclosed to the text of the Hague lectures by Mr. Van Loon can be found comparative tables of legislation of different countries dealing with the international adoption, and texts of selected international instruments in this field.

A. Watts, British lawyer serving for many years as legal adviser to the Foreign Office, presented different issues connected with the international legal position of highest state organs: heads of states, heads of governments, and foreign ministers. The lectures concentrated upon the rights and immunities of these persons, but also on the legal significance of their activities. Rich personal experience of the author, vivid narration, and numerous practical examples illustrating the views of the Sir Watts made the lecture extremely interesting.

D. Martiny, at present professor at the Viadrina University at Frankfurt (Oder), an educational institution of great importance for Polish-German relations, presented in his lectures international private legal aspects of maintenance obligations. He discussed the substantive issues dealing mostly with the scope of the obligation, international legal instruments regulating the maintenance between subjects of different nationality or residence, main conflict of laws issues, and the principal procedural issues.

Finally, J. Barboza, Argentinian expert and long-time member of the ILC, considered the issues of liability for acts not prohibited by international law in the context of the protection of environment. Barboza, specialist in these issues, concentrated on the practical developments in international law in this field, and on this basis tried to find out the customary rules governing the state liability. He defined many important notions and institutions (hazardous activities, transboundary character of activities and their effects, jurisdictional issues), compared international legal solutions with private legal regimes from the point of view of possible analogies and differences. He terminated with the presentation of special questions dealing with the activities concerning damages to "global common" with particular attention to the "common heritage of mankind".

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