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The Disintegration of the USSR from the Point of View of International Law

LECH ANTONOWICZ

The reconstruction of the Union of Soviet Socialist Republics undertaken in 1985 finished with its disintegration in December 1991. As efforts to transform the Soviet Union into a union of sovereign states have not succeeded, the leaders of three Slavonic republics: Belarus, Russia and Ukraine, concluded in Minsk on December 8, 1991, an agreement on the creation of the Commonwealth of Independent States, considered as a new subject, not as a continuation of the USSR. According to the agreement, access to the Commonwealth has been left free to all republics of the former USSR, as well as for the other states accepting its aims and principles. The preamble states that the USSR has ceased to exist as a subject of international law and a geopolitical reality.[1]

On December 21, 1991, in Alma Ata, representatives of eleven former Soviet republics signed a Protocol to the Agreement on the creation of the Commonwealth of Independent States (CIS). It has been agreed that it enters into force at the time of ratification by respective parties.[2] Parties to the Agreement have been accordingly: Armenia, Azerbaijan, Belarus, Kazakhstan, Kirgiz, Moldavia, Russia, Tadjikistan, Turkestan, Ukraine and Uzbekistan. Lithuania, Latvia and Estonia have stayed outside the Commonwealth (they have been universally recognized as independent states), as well as Georgia.

Finally, on December 30, 1991, on the 69th anniversary of the proclamation of the USSR, the member states of the CIS undertook an attempt to regulate problems resulting from the new formulation of their mutual relations.[3]

All these facts require an international legal analysis of the following questions. What is the international legal status of states existing in the territory of the former USSR? How should the relationship between these states and the

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[1] *Commonwealth of Independent States Documents adopted by the Heads of State and Government*, 8 December 1991 - 30 April 1992, Foreign Broadcast Information Service, Special Memorandum, 8 May 1992, pp. 1-5.

[2] A.a., pp. 6-7.

[3] A.a., pp. 10-21.

USSR be defined? What is the international legal character of the Commonwealth of Independent States?

1. The disintegration of a state can occur in two ways. Firstly, a secession of one or more parts of state territory takes place, and a state preserves its international legal continuity and identity within its changed boundaries. Secondly, a dismemberment of a state can be observed, where a predecessor state ceases to exist as a subject of international law, and is replaced by two or more new states. The Vienna Convention of August 23, 1978, on the succession of states with respect to treaties[4] considers the two forms of disintegration of a state, but does not provide any criteria of differentiation between them.

Theoretically, a differentiation is clear, but it may be complicated in particular cases of state succession. Such complications can be observed with respect to the disintegration of the USSR.

At first sight it may be supposed that the disintegration of the USSR constitutes an example of the dismemberment of a state which ceased to exist as an international legal subject. Such an opinion was expressed by Russian lawyer V. Pustogarov in his study published shortly before the events of December 1991.5 Pustogarov stated that neither the decrease of territory, nor the deep reconstruction of the internal state system, nor the changing of the official name will result in the changing of the international legal status of the USSR, whereas the eventual division into component units will constitute the end of her existence as an international legal subject. Consequently, rights and duties of the USSR as a member of the UN and a party to international agreements will be divided among republics as successor states, none of which could claim exclusive succession to the USSR. The heads of the member states of the CIS have decided that all these states are successors to the rights and obligations of the former USSR.[6]

The detailed analysis of elements to be taken into account while considering this problem leads to the conclusion that Russia is identical with the USSR, and not simply a successor state. Important elements can be quoted in fovour of such a thesis.

First of all, there is a general presumption towards the continuity of statehood in international law. In contemporary practice, the collapse of a state as a subject of international law is exceptional[7]. From the point of view of the

[4] UN Doc.A/Conf. 80/35; 17 *ILM* 1488, 1978.

[5] V. Pustogarov: „ErozyaSoiuza. Mezhdunarodno-pravovyeposledstvya", *Mezdunarodnaya Zhizn*, No. 11, pp. 74-82, 1991; by the same author: „Sovetske respubliki w mirovom soobstchestve", ibidem, No. 4, pp. 5-16, 1991.

[6] *Commonwealth of Independent States Documents*, op. dt., p. 142.

[7] Comp. L. Antonowicz: *Państwo i terytoria. Studium międzynarodowoprawne* [States and Territories. An International Legal Study], Warszawa 1988, pp. 134-138.

interests of the international community it is generally more favourable to deal with the continuity of states than with the state succession, as the scope of succession with respect to international legal rights and obligations is disputable both in theory and practice.

Russia has always played a dominant role within the Soviet federal state. Notwithstanding the constitutional equality of all republics, the Russian Socialist Federal Soviet Republic has been mentioned first of all republics in all subsequent Soviet constitutions. This derives from the historical factors in the sense that before the October Revolution, Russia acted as state in international relations as a uniform international legal subject, and it played a decisive role in the creation of the USSR according to the agreement of December 30, 1922, concluded by four Soviet republics of that time: Russian Federation, Transcaucasian Federation, Ukraine and Belarus.[8] Demographic, economic and military factors were decisive for the crucial importance of Russia. The area of the Russian Republic constituted 3/4 of the area of the USSR, and her population more than 50 % of the total population of the Union.

In international relations Russia was treated as the fundamental part of the USSR, and sometimes even identified with her. From this point of view it was impossible that Russia could participate in any international legal instrument together with the Union, though such a possibility existed with respect to other federal republics, namely Ukraine and Belarus. Their equal constitutional status could not assure them equal treatment under international law.

The special position of Russia among all Soviet republics found its expression also in the process of the disintegration of the USSR in 1991. Although the Russian Socialist Federal Soviet Republic declared her state sovereignty on June 14, 1990,[9] contrary to other republics she did not declare independence nor a decision to leave the Union. Russia had a constitutional right to secede, as other republics, but her declaration of secession would be pointless after Kazakhstan declared her independence on December 16, 1991. At that time a conflict between state agencies of the disintegrating USSR and governmental agencies of the Russian Federation took place, but it was clearly of internal, and not of international, character. As to the principle, it was finished by the demission of the President of the USSR on December 25, 1991.

It is generally agreed that changes of territory and population, even more important than those in the relations between the USSR and Russia, do not influence the international legal personality of a state concerned. So the declaration by the presidents of Belarus, Russia and Ukraine on the dismemberment of the USSR as subject of international law does not seem correct. However, they were right from the point of view of geopolitical reality. The latter notion is not clear, but it can be supposed that it relates to a political and ideological formation functioning in a territory concerned.

[8] *Istoria sovetskoy konstitutsii (v dokumentakh) 1917-1956*, Moskva 1957, pp. 394-398: see also W. Sucheck i: *Geneza federalizmu radzieckiego* [Genesis of the Soviet Federalism], Warszawa 1961.

[9] Cf. Rosja, PAP (Polish Press Agency), *Błyskawica*, June 1990, pp. 112-114.

It can be asked whether the stance of the international community with regard to the disintegration of the USSR accepts the thesis according to which Russia continues the international legal personality of the Union. It seems that numerous facts confirm it. Member states of the CIS on December 21, 1991, declared their support for the Russian continuity of the Soviet membership of the UN including the membership of the Security Council, as well as the membership of other international organizations.[10] In practice Russia did not meet any difficulties in replacing the USSR in international organizations. The retaking of the place in the Security Council by Russia can be justifiable exclusively on the grounds of her identity with the USSR. The UN practice does not accept the succession with respect to membership of the UN. In all cases of the dismemberment of UN member states (India-Pakistan, Pakistan-Bangladesh, Malaysia-Singapore) one state was treated as identical with the former state while another one had to apply for membership as a new state. The only exception, the dismemberment of the United Arab Republic into Egypt and Syria, was not typical as both states had been members of the UN before their uniting. The succession with respect to membership in the UN would imply the recognition of membership rights and obligations of all successor states.

The problem of Russia's representation in bilateral international relations has been resolved according to the same pattern. After the disintegration of the USSR, foreign embassies in Moscow became embassies to the Russian Federation, and Soviet embassies abroad were transformed into embassies of Russia. Claims by the other republics to share of the former Soviet state property abroad are not taken into account, and do not shake this opinion. The identification of Russia with the USSR could be recognized notwithstanding the fact that the latter state has been mentioned several times under the name it borne till the end of 1991. The change of the name of the state does not influence its international legal personality. The new name of the state does not require the revision of the UN Charter, though it can be changed when the opportunity of other substantial changes occurs. Formally, the name *Russian Federation or Russia* is used. The problem will be resolved in a new Russian constitution.

It can be mentioned that Russia in fact has never been and is not a federal state. It does not consist of compotent territorial units which would be equal and possess the same legal status. It should rather be called a *differentiated state* composed of the centralised dominant part, and several autonomous territorial units.

The identification of Russia with the USSR means that she is subject to the same rights and obligations under international law as the Soviet Union, with some exceptions. According to the Vienna Convention on the succession of

[10] *Commonwealth of Independent States Documents*, **op. cit., p. 8.**

states with respect to the treaties of August 23, 1978, provides that the state identical to a predecessor state is bound by all international agreements except those concerning exclusively seceding parts of territory. So one can admit that Russia is bound by the Danube convention of August 18, 1948, but it should not be a member of the Commission for the Danube. The membership is limited to the riparian states which Russia for the time being is not.

2. From the point of view of the constitutional law of the USSR (under all the successive constitutions), all Soviet union republics possessed the same status. This principle also governed the constitutional regulation of their international position since the revision of the constitution of February 1, 1944.[11] In theory, the international legal status of the republics was the same. The maximum number of union republics was 16, and since the transformation of the Karelo-Finnish Republic from the union republic into the autonomous republic within the Russian Federation in 1956, — 15. This figure remained unchanged till the period of system transformations of the USSR in the late 1980's.

The Soviet union republics composing the USSR were not sovereign states erga omnes. Their relations with foreign states only were governed by international law, but this law was not applicable in the relations between the republics and between the republics and the Union. The relations within the USSR remained the domain of the constitution of the USSR. Therefore the Soviet Union should be treated as a constitutionally legal, and not internationally legal, union of states.

According to the constitutions of the USSR, the Soviet union republics were called sovereign states. However, notwithstanding important competences in international relations, they were not sovereign in the light of international law. Their status corresponded with the notion of component states. In practice, only two republics, Belarus and Ukraine, actively participated in international relations. They were original members of the United Nations and of certain specialized organizations of the UN system. Under these circumstances they could become parties to multilateral treaties concluded under the auspices of the UN.

Because of these reasons, certain authors were ready to recognize the international legal personality only of the two republics mentioned above.[12] While considering the actual status of post-Soviet states, Ukraine and Belarus should also be treated separately, even if their manner in the transformation of the USSR was similar to other republics. At first they declared their sovereignty

[11] *Istoria*, a.a., p. 824; cf. also L. Antonowicz, „Położenie ZSRR w prawie międzynarodowym" [The status of the USSR under international law], 15 *Studia Prawnicze* (1967), pp. 7-27.

[12] E. Dolan: „The member-republics of the USSR as subjects of the law of nations", *iCLQ* 1955, No. 4, pp. 632-636; A. Verdroß, Die Völkerrechtssubjektivität der Gliedstaaten der Sowjetunion, 1 *ÖZÖR* 218 (1946—48).

(Belarus on July 27, 1990; Ukraine on July 16, 1990), and subsequently proclamed independence (on August 25, 1991, and August 24, 1991, respectively; Ukraine decided also to organize a plebiscite on this question on December 1, 1991).

There is no doubt that Ukraine and Belarus have become independent states. One should consider what is the international legal relation to the former USSR on one hand, and to the former Soviet republics, Belarussian and Ukrainian, on the other hand.

The first question should be answered according to the law of state succession, the effects of which are regulated by the Vienna conventions: of August 23, 1978, with respect to treaties, and of April 7, 1983, with respect to state property, archives, and state debts.[13]

The international legal relationship between Belarus and Ukraine as sovereign states, and Belarussian and Ukrainian Soviet Republics, should be defined in a different way. It could be considered from the point of view of state succession, that a proclamation of sovereignty is of qualitative importance under international law. The sovereignty is an attribute of statehood as criterion of differentiation between states and other geopolitical units.

International legal practice in this field which is, in fact, very poor refers in such a context to the notions of identity and continuity. Similar to the Philippines and India, which became members of the UN as dependent units and preserved this status after declaring independence, both Belarus and Ukraine are identical with the former Soviet republics as far as their international legal rights and obligations are concerned.

3. Except for Belarus and Ukraine, the other Soviet republics did not make use of their constitutional competences in the field of international relations. Consequently, their international legal status as component states of the USSR was never realized. They can be treated as identical from the point of view of international law, but this issue is deprived of any practical importance. International agreements concluded by the USSR and any other Soviet republic except Ukraine and Belarus would have such importance. We are thinking here of the following republics: three Transcaucasian — Armenia, Azerbaijan and Georgia, and five Central Asiatic — Kazakhstan, Kirgistan, Tadjikistan, Turkmen and Uzbek. The three Baltic republics and Moldavia should be dealt with separately because of the particular circumstances of their inclusion into the USSR in 1940.

Among these eight, the Central Asiatic republics did not become independent states after the October Revolution, and the Transcaucasian ones were independent for a very short period. After the establishing of the USSR in

[13] UN Doc. A/Conf. 117/14; 22 *ILM* 306 IT, 1983.

1922, they all became its compotent parts. The amendment to the Soviet constitution in 1944 granting union republics the competence to act in international relations had for them – contrary to Belarus and Ukraine – no practical effect. First in the period directly preceding the disintegration of the USSR, Azerbaijan and Asiatic republics started to deal with neighboring Islamic states.

Since the transformation from the component states of the USSR into independent states, the former Soviet republics should be treated as successor states with respect to the Soviet Union. It is difficult to establish the date of succession. The respective states declared their independence – like Ukraine and Belarus – between August and December 1991. Two processes: the emancipation of former Soviet republics and disintegration of the USSR followed simultaneously. The declarations of independence were not realized immediately. The agreement of Alma Ata of December 21, 1991, the demission of the president of the USSR, and the self-dissolution of the Supreme Soviet of the USSR constituted a turning point in the process. Participants to the conference of eleven states on December 30, 1991, were independent states.

Nearly all former Soviet republics have been internationally recognized. Georgia was the only exception, and the delay has been caused by the civil war. The explanation of this issue is that, according to international practice, recognition signifies not only a simple statement confirming the existence of an international legal subject, but also the intention to enter into direct relations with it. There is no doubt that Georgia became independent by the disintegration of the USSR, though it was not immediately recognized. She should be treated as a state as she could not possess any other international legal status. An unrecognized state is also a state.

The secession of the Soviet republics can be appreciated from the points of view of international and Soviet constitutional law.

Self-determination constitutes one of the fundamental principles of contemporary international law. The principle has been included into the UN Charter on the initiative of the Soviet Union.[14] It is disputable whether the right to self-determination includes also a right to secede; so J. Tyranowski states that the right to self-determination provides the right of colonial peoples to independence, but not the right to secede for any compotent part of a territory of any state.[15] It seems, however, that no provision of the Charter indicates that the right of self-determination should be limited to terzitories of certain kind, according to degree of development or political status. In any case one should differentiate between the implementation of self-determination by independent states on the one hand, and colonial territories on the other hand.

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[14] Cf. S.B. Krylov: *Materiały k istorii Organisalsii Ohedivnyonnikh Nacyi*, Moskva-Leningrad 1949, vol. I, p. 9.

[15] J. Tyranowski: *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym* [Territorial Integrity, Inviolability of Boundaries, and Self-Determination in International Law], Warszawa 1990, pp. 196, 227, 238, 241, 285, 292-297.

The Soviet Union was the only state whose successive constitutions provided for the right of component republics to secede. The formulas were clear and unequivocal, but deprived of any regulation on their implementation. The latter were passed shortly before the disintegration of the USSR, and were never applied in practice.

It can be asked whether the secession of the republics was consistent with Soviet constitutional law. The answer should be affirmative taking into account the provisions dealing with the right to secede, as these provisions did not contain any limitation. However, their interpretation is difficult because of the lack of executory regulations.

From the point of view of international law, the conformity of secession with Soviet constitutional law is not important. The action by internal disintegration powers constitutes the only criterion of legality of secession. If this condition is fulfilled, and a secession takes place effectively, it results in the creation of a state as a subject of international law. So the disintegration of the USSR was carried into effect as the train of acts of secession.

4. The three Baltic states: Lithuania, Latvia and Estonia, should be treated separately as before their annexation by the USSR they were sovereign states under international law. Their annexation by the Soviet Union in summer, 1940, was contrary to international law.

The starting point for this annexation was the German-Soviet treaty of August 23, 1939, known as the Ribbentrop-Molotov pact, and in particular the secret protocol according to which Lithuania should have belonged to the German sphere of influence, and Latvia and Estonia to the Soviet one. While implementing this illegal treaty the parties modified the division of territories to include Lithuania in the Soviet sphere. Subsequently the USSR forced the Baltic states to conclude treaties constituting the bases of stationing of the Red Army in their territories.

The USSR took advantage of the military presence to press upon the Baltic states to hold parliamentary elections, consequently to proclaim the Soviet republics, and to demand admission to the Soviet Union. Formally the requests were accepted on August 3 (Lithuania), August 5 (Latvia) and August 6 (Estonia), 1940.

Notwithstanding the appearances, there is no doubt that the annexation of the Baltic states by the USSR was contrary to international law. These states did not lose their international personality, even if they were not able to realize its attributes. It should be asked, however, how long such a difference between theory and practice can exist.

There are no rules of international law establishing the time limit for restoring a statehood illegally abolished by another state. It seems however that such a status cannot exist *ad infinitum*. The annexation of the Baltic states

to the USSR being illegal, the passage of time exceeding twice their existence as independent states combined with the inertion of the international community legalized the original illegality. Such a solution is not rare in international relations.

These considerations are important for the appreciation of the contemporary legal status of Lithuania, Latvia and Estonia. According to the point of view adopted, they can be treated either as the new subjects of international law created in the course of secession or as the states identical with the states existing in the period between the two World Wars, and subject to foreign administration since 1940. In the latter case the Baltic states could not be treated as successor states with respect to the USSR.

Available documents show that the governments of Lithuania, Latvia and Estonia – notwithstanding different attitudes during the process of regaining independence – treat their states as identical with the former Baltic states. For example, they did not agree to proceed in accordance with Soviet law even if it would lead to the same effect (independence).

5. Moldavia has got particular status in comparison with the other post-Soviet states. She was annexed to the USSR in 1940, like Lithuania, Latvia and Estonia, on the base of the Ribbentrop-Molotov pact. At that time Moldavia (which was not independent, but constituted a part of Romania) provided that: a part of it was passed to the Ukrainian Republic, and a part of the Ukrainian Republic was created. In effect, Moldavia should be regarded as a new, successor state with respect to the USSR. It could be united with Romania if her population and government openly express such a will.

6. The Commonwealth of Independent States created in December 1991 is not yet fully formed. It is clear that it is not a state from the point of view of international law. In their declaration on the establishing of the CIS of December 21, 1991, the state participants expressed the view that the CIS is neither a state nor a supranational structure.[16]

The creation of the CIS was preceded by the concept of a confederal state to replace the USSR. The concept had its historical roots, but was in a way inconsistent. A confederation is an association of states, but not a state. If the proposed Union of the Sovereign States had been a state, its component units would not have been sovereign states, even possessing wider international competences than the former Soviet republics under the constitution of the USSR.

It seems that the Commonwealth of Independent States is to be regarded as an association of states, meaning an international organization. Its original

[16] *Commonwealth of Independent States Documents*, **op. cit., pp. 5-6.**

members are 11 states: Belarus, Russia, Ukraine, Armenia, Azerbaijan, Moldavia, Kazakhstan, Kirgistan, Tadjikistan, Turkmenistan and Uzbek. Outside of the CIS remain the former Soviet republics of Lithuania, Latvia and Estonia, as well as Georgia. No other state joined the CIS. Georgia is the party to certain treaties concluded in the framework of the CIS.[17]

The relations between the members of the CIS which are sovereign states are governed by international law. On March 13, 1992, the states of the CIS concluded the treaty on plenipotentiary missions, the status of which corresponds with the general international legal practice.[18]

At present one observes a transitional period of emancipation of states which formerly constituted parts of one state. In this context a notion of a *national of the CIS* can be used, although it is not legally correct. The acts establishing the CIS do not provide a common nationality.

Delimitation of territories of the post-Soviet states follows in accordance with the boundaries of the republics. However, some of them are disputable. Distinction should be drawn between possible modifications of existing boundaries and creation of new states on the course of secession of parts of the territories of the former republics. Such a possibility exists as those republics -at present independent states – have not been ethnically homogenous. Some of them are not homogenous also from the point of view of their territorial structure, as they consist i.a. of autonomous units. In particular, secessions of such autonomous units from Russia cannot be excluded. Two autonomous republics, Tchechen and Tatarstan declared sovereignty, though these statements were of purely declaratory importance.

Agreements between member states constitute the legal foundation of the CIS. According to their content and form, they are typical international treaties governed by international law. Particular agreements were concluded by a different circle of participants which seems to be typical for the CIS. Main organs of the Commonwealth are the Council of the Heads of States and the Council of the Heads of Governments. The official seat of the organs is Minsk, the capital of Belarus, but different agencies operate also in capitals of other member states.

It is too early to state whether the Commonwealth of Independent States is a subject of international law. No agreement between the CIS and any state or other international organization has been known. Probably agreements of this kind will be concluded in the future and then firm conclusions can be drawn. The agreement of March 13, 1992, on the principles of custom policy provides that the Custom Union established by it constitutes within the scope of its functions an independent subject of international law.[19]

[17] Ibidem, pp. 29-30, 79, 93, 114.
[18] Ibidem, p. 93.
[19] Ibidem, pp. 82-83 and 85.

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New Convention on the Protection of the Marine Environment of the Baltic Sea Area

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1. Introduction

The „Ostpolitik" of Willy Brandt enabled the adoption of a set of regional Baltic agreements. During the first Baltic wave of our time the Convention on the Protection of the Marine Environment of the Baltic Sea Area (1974) was signed by Denmark, Finland, the GDR, the FRG, Poland, Sweden and the USSR. Ten years after its entry into force, the Baltic States were not so far from the previous stage of isolation. It could be observed in state behaviour, organization, management and law.

The behaviour of states has been influenced by the idea of security which is traditionally associated with its military aspects. The Baltic States calculated everything from a national standpoint. They simply ignored international obligations to reduce such emissions which caused environmental harm outside of their own territories.

The Helsinki Commission (HELCOM) had to promote inter-state equity and guarantee greater rationality. During the first years of existence it was rather a community of experts contributing to national policies. The power of HELCOM did not allow its chairman to undertake any operational activities. The legal natura of the acts of HELCOM (all decisions and recommendations) as well as the optic out system in relation to the adoption and amendment of annexes could not make its position stronger.

The orthodox Soviet interpretation of sovereignty was behind an old approach to environmental management and law that the Helsinki Convention created the rules of co-existence rather than rules of co-operation and a „code of behaviour" rather than the rules of law, concentrating on pollution from ships instead of land-based pollution. Its value was simply „less than zero".

After the collapse of the Soviet empire and its vision of a „Common Future", there was an opportunity to „think globally and act locally". That is why the EEC Environmental Programme „Towards Sustainability" was launched within the framework of the new Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992) which was signed by 12 states and the EEC.[1]

[1] The Czech and Slovak Federal Republic does not exist any longer. 13 States may become Member States of this Convention now.

The Contracting States have agreed to extend, strengthen and modernize the legal regime for the protection of the marine environment of the Baltic Sea Area. Does the new Convention represent something more than the level of political consent currently able to change a glum perspective for the common future of our area?

2. A scientific perspective

Long-range transport and inputs via rivers and precipitation are the largest sources of pollution of the Baltic Sea. These sources originate from industry, agriculture, domestic sewage, traffic and energy production. It is often very difficult to trace them. For instance, some of the nitrogen entering the Baltic via Polish rivers may have its origin in atmospheric emissions from a country outside the Baltic drainage basins.

The demand for a higher standard of living in the Eastern Baltic countries will result in dramatic efforts to increase the yield from agriculture. One can expect that the mistakes made in the western countries will be repeated since gradual pollution is not as spectacular as the catastrophes of tankers.

The reconstruction of industry in Poland, Lithuania, Latvia, Estonia and Ukraine involves huge long-term investments that must be made profitable in terms of economics and the environment. It is a dangerous illusion to believe that the technological standards will have more than marginal effects on the Baltic environment. These standards which are badly designed as too low or too high are simply ignored in the practice. The trend towards sustainability is particularly relevant to new initiatives, connected with environmental planning aiming at long-term effects and changes.

The scenario of the development in Central and Eastern Europe gives a glum perspective for the future of the Baltic Sea. The goal – reverse loading and eutrophication to the levels of 40 years ago – may not be met in the next 50 years.[2] A common international strategy with clearly defined priorities and responsibilities is urgently needed.

3. Region and regionalism

A region has a geographical connotation. The Baltic Sea Area is therefore defined as the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bound by the parallel of the Skaw in the Skagerrak at 57 degrees 44.8' North. At the request of the Baltic States the old Convention does not include internal waters of the Contracting Parties.

In the future the internal waters (waters on the landward side of the base lines from which the breadth of the territorial sea is measured according to the

[2] F. Wulff: *Priorities for the Restoration of the Baltic Sea – a Scientific Perspective*, Rapport presented during the international seminar held in Tvarminne in 1991.

designation of the States) will be included according to a new concept of region as adopted by the Helsinki Convention 1992. The new Convention also refers to the catchment area of the Baltic Sea in the context of cooperation amongst the States. It means that the new agreement refers to regionalism as a mechanism designed to implement various types of cooperative activities among states.[3]

The best evidence of regionalism is the Baltic Sea Joint Comprehensive Programme. The work of the Task Force has started in all countries within the catchment area of the Baltic Sea with an aim to provide a concrete plan to restore the Baltic Sea to a sound ecological balance. it contains a list of priority actions needed to reverse the eutrophication of the sea, to identify the problem areas, „hot spots", and to suggest procedures to reduce pollution.[4]

4. The comprehensive approach

It was an ambition of the old Convention to represent the comprehensive approach to the protection of marine environment from pollution.[5] However, a misleading focal point could be observed in the text and in the practice.[6] In fact, the 1974 Convention provided only a general framework for national rules on the protection of the environment (the so-called „umbrella" approach) except the protection of the marine environment against vessel-based pollution (almost the piecemeal approach). It used to be a copy of MARPOL 73/78.

The development of other global or regional rules of international environmental law (e.g., the London Convention 1972, LRTAP 1979, Montreal Guidelines 1985)[7] and the preparatory work on „The Earth Charter" (later adopted during the Rio Conference 1992)[8] had an impact on the new Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area. The new agreement made an effort to relocate its focal point by formulation of principles and obligations concerning either all sources of pollution of pollution from land-based sources, prevention of pollution from ships, pleasure crafts, prohibition of incineration, prevention of dumping, exploration and exploitation of the seabed and its subsoil. Also the annexes concern almost all sources of pollution: harmful substances, criteria for the use of best environmental practice and best available technology, criteria and measures concerning the prevention of pollution from land-based sources.

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[3] Cf. M. Fitzmaurice: *International Legal Problems of the Environmental Protection of the Baltic Sea*, Dordrecht-Boston-London 1992, at 7.

[4] See, for example, Z. Brodecki and M. Sillén: *Pollution of the Baltic Sea Area and Its International Dimensionsy* The Conference of Baltic Rectors, Visby 1991, at 7-8.

[5] M. Fitzmaurice: supra note 3, at 19.

[6] Cf. Z. Brodecki: *Ecological Damages in International Law*, Warsaw 1990, at 161-163.

[7] *The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1979 Convention on Long-Range Transboundary Air Pollution* (Geneva); *The 1985 Guidelines for the Protection of the Seas from Land-Based Sources*. Ibidem, at 87-91, 99-102.

[8] *Declaration on Development and Environment*.

5. Fundamental principles and obligations

A attention must be given to the fundamental principles and obligations. A new set of general ideas is reflected in Article 3 which provides that:

„1. The Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance.

2. The Contracting Parties shall apply the precautionary principle, i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects.

3. In order to prevent and eliminate pollution of the Baltic Sea Area the Contracting Parties shall promote the use of Best Environmental Practice and Best Available Technology. If the reduction of inputs, resulting from the use of Best Environmental Practice and Best Available Technology, as described in Annex II, does not lead to environmentally acceptable results, additional measures shall be applied.

4. The Contracting Parties shall apply the polluter-pays principle.

5. The Contracting Parties shall ensure that measurements and calculations of emissions from point sources to water and air and of inputs from diffuse sources to water and air are carried out in a scientifically appropriate manner in order to assess the state of the marine environment of the Baltic Sea Area and ascertain the implementation of this Convention.

6. The Contracting Parties shall use their best endeavours to ensure that the implementation of this Convention does not cause transboundary pollution in areas outside the Baltic Sea Area. Furthermore, the relevant measures shall not lead either to unacceptable environmental strains on air quality and the atmosphere or on waters, soil and ground water, to unacceptably harmful or increasing waste disposal, or to increased risks to human health."

The duty to take all appropriate legislative, administrative or other relevant measures to prevent or eliminate pollution is a traditional obligation adopted by the old Convention. The new form does not change it. Attention should also be given to the fact that Denmark and Germany are obliged to implement the Community obligations[9] whereas Finland, Norway and Sweden use the Nordic concept of environmental law when designing their own legislation.[10] The other Baltic States, however, have not integrated their own environmental laws.[11] It is a pity that the new Convention has not obliged all Baltic States to

[9] The Treaty of Rome provides for particular procedures aimed at ensuring full implementation by Member States of community obligations, while the European Court of Justice has developed its own legal principles aimed at achieving greater integration of Community law into a national legal system. See e.g., L. Krämer: „The implementation of environmental laws by the European Economic Communities", *International Conference on Environmental Enforcement, Proceedings*, Volume I, Budapest 1992, at 183-229.

[10] *The 1974 Convention on the Protection of the Environment was* concluded by Denmark, Finland, Norway and Sweden.

[11] Cf. M. Filzmaurice: supra note 3, at 114-118.

integrate their environmental law by adoption of the Community obligations or the Nordic concept of environmental law,[12] hence moving forward the process of integration through environmental law.

Inclusion in the new Convention of the precautionary principle is quite understandable, since it was initiated by the OECD already in 1987 and echoed in certain binding instruments of the EEC.[13] It has been also declared by Scandinavian countries.[14] Central and Eastern Europe must adopt the same rule that preventive measures have to be taken here even when no evidence exists of a causal link between the emissions and the effects.

As the required technical know-how exists mainly in western countries, much of their technology could be transferred to the new markets offered by Central and Eastern Europe. This transfer of technology will be critical for the success of the Baltic Sea Joint Comprehensive Programme. It is very important that the new Convention has obliged to use Best Environmental Practice (BEP) and the Best Available Technology (BAT) and described in Annex II the measures which shall be applied.

The Polluter Pays Principle (PPP) was developed as a method of allocating the costs of pollution control. In its original version, as introduced by the OECD, it meant that the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the state of origin pays for its own abatement costs, while an affected State (the Victim Pays Principle – VPP, as reversal of the PPP) pays for the occurring residual damage. As a compromise between the PPP and the VPP, the Equally Shared Responsibility Principle (ESRP) and the Mutual Compensation Principle (MCP) have recently been suggested.[15] Here the new Convention on the Protection of the Marine Environment of the Baltic Sea Area is rather conservative, in that is has only declared the existance of the PPP in a general way.

For the good of the Baltic States, the new Convention recognizes the responsibility of states to ensure that activities within their jurisdiction and control do not cause transboundary pollution in areas outside the Baltic Sea Area. Such an approach is in harmony with the Community obligations and environmental law of Contracting Parties.[16]

6. The issues in context

In relation to harmful substances (the „blacklist" and „greenlist") attention must be given to Article 5 of the new Convention, which states that:

[12] Supra note 10.
[13] L. Krämer: supra note 9, at 192-196.
[14] Supra note 10.
[15] Z. Brodecki: supra note 6, at 22-29 and 35-37.
[16] The principle of the prohibition of the injurious use of a territory is a well- established rule of customary international law.

„The Contracting Parties undertake to prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful substances from all sources, according to the provisions of this Convention and, to this end, to implement the procedures and measures of Annex I."

Annex I obliges the Contracting Parties to prohibit, totally or partially, the use of specified substances[17] in the Baltic Sea Area and its catchment area. Other substances are banned for certain application. Moreover, the States shall endeavour to minimize and, whenever possible, to ban the use of pesticides in this area.

Discharges of other harmful substances not on the list are also formulated in more precise form. New Article 6 on principles and obligations from land-based sources provides that:

„1. The Contracting Parties undertake to prevent and eliminate pollution of the Baltic Sea Area from land-based sources by using, inter alia, Best Environmental Practice for all sources and Best Available Technology for point sources. The relevant measures to this end shall be taken by each Contracting Party in the catchment area of the Baltic Sea without prejudice to its sovereignty.

2. The Contracting Parties shall implement the procedures and measures set out in Annex III. To this end they shall, inter alia, as appropriate co-operate in the development and adoption of specific programmes, guidelines, standards or regulations concerning emissions and inputs to water and air, environmental quality, and products containing harmful substances and materials and the use thereof.

3. Harmful substances from point sources shall not, except in negligible quantities, be introduced directly or indirectly into the marine environment of the Baltic Sea Area, without a prior special permit, which may be periodically reviewed, issued by the appropriate national authority in accordance with the principles contained in Annex III, Regulation 3. The Contracting Parties shall ensure that authorized emissions to water and air are monitored and controlled.

4. If the input from a watercourse, flowing through the territories of two or more Contracting Parties or forming a boundary between them, is liable to cause pollution of the marine environment of the Baltic Sea Area, the Contracting Parties concerned shall jointly and, if possible, in co-operation with a third state interested or concerned, take appropriate measures in order to prevent and eliminate such pollution."

Under Annex III regulation 3 the Contracting Parties shall be obliged to apply the specified principles and procedures when issuing the permits for industrial plants.[18]

In this context, the new Convention has introduced the environmental impact assessment as a national instrument which is subject to the decision of a competent national authority. It used to be undertaken for proposed activities

[17] Substances banned for all final uses, except for drugs: DDT [1,1,1-trioch!oro-2,2-bis(chlorophenyl)-ethane] and its derivatives DDE and DDD. PCB's (polychlorinated biphenyls) and PCT's (polychlorinated terphenyls) are banned for all uses, except in existing closed system equipment until the end of service life or for research, development and analytical purposes.

[18] The permits referred to in Article 6, paragraph 3 of this Convention.

that were likely to have a significant adverse impact on the environment. It is reflected in Article 7 in the following form.:

„1. Whenever an environmental impact assessment of a proposed activity that is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area is required by international law or supra-national regulations applicable to the Contracting Party of origin, that Contracting Party shall notify the Commission and any Contracting Party which may be affected by a transboundary impact on the Baltic Sea Area.

2. The Contracting Party of origin shall enter into consultations with any Contracting Party which is likely to be affected by such transboundary impact, whenever consultations are required by international law or supra-national regulations applicable to the Contracting Party of origin.

3. Where two or more Contracting Parties share transboundary waters within the catchment area of the Baltic Sea, these Parties shall cooperate to ensure that potential impacts on the marine environment of the Baltic Sea Area are fully investigated within the (...)".

In relation to prevention of pollution from ships and dumping, the provisions of the old Convention and some documents adopted by HELCOM (e.g., the Guidelines for Co-operation in Investigating Violations or Suspected Violations of Discharge and Related Regulations for Ships and Dumping) have been almost repeated by the new Convention and its Annexes. The basic provisions of the new Convention are governed by:

Article 8

1. In order to protect the Baltic Sea Area from pollution from ships, the Contracting Parties shall take measures as set out in Annex IV.

2. The Contracting Parties shall develop and apply uniform requirements for the provision of reception facilities for ship-generated wastes, taking into account, inter alia, the special needs of passenger ships operating in the Baltic Sea Area.

Article 11

1. The Contracting Parties shall, subject to exemptions set forth in paragraphs 2 and 4 of this Article, prohibit dumping in the Baltic Sea Area.

2. Dumping of dredged material shall be subject to a prior special permit issued by the appropriate national authority in accordance with the provisions of Annex V.

3. Each Contracting Party undertakes to ensure compliance with the provisions of this Article by ships and aircraft:

a) registered in its territory or flying its flag;

b) loading, within its territory or territorial sea, matter which is to be dumped; or

c) believed to be engaged in dumping within its internal waters and territorial sea.

4. The provisions of this Article shall not apply when the safety of human life or of a ship or aircraft at sea is threatened by the complete destruction or total loss of the ship or aircraft, or in any case which constitutes a danger to human life, if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur. Such dumping shall be so conducted as to minimize the likelihood of damage to human or marine life.

5. Dumping made under the provisions of paragraph 4 of this Article shall be reported and dealt with in accordance with Annex VII and shall be reported forthwith to the Commission in accordance with the provisions of Regulation 4 of Annex V.

6. In case of dumping suspected to be in contravention of the provisions of this Article the Contracting Parties shall co-operate in investigating the matter in accordance with Regulation 2 of Annex IV.

The prevention of pollution from offshore activities was almost not regulated by the old Convention at all.[19] At that time the problem of exploitation of the Baltic Sea Area was not yet advanced. It has become a real problem, hence the new Convention regulates exploration and exploitation of the seabed and its subsoil more precisely. Article 12 states:

„1. Each Contracting Party shall take all measures in order to prevent pollution of the marine environment of the Baltic Sea Area resulting from exploration or exploitation of its part of the seabed and the subsoil thereof or from any associated activities thereon as well as to ensure that adequate preparedness is maintained for immediate response actions against pollution incidents caused by such activities.

2. In order to prevent and eliminate pollution from such activities the contracting Parties undertake to implement the procedures and measures set out in Annex VI, as far as they are applicable."

Annex VI on the prevention of pollution from offshore activities governs not only a sphere of co-operation but also discharges and reporting procedure.[20]

7. A „Code of behaviour"

Modern law on transboundary harm has emphasized a question of notification and consultation on pollution incidents.[21] It provides that states shall have relevant information on activities that may produce a significant, adverse harmful effect and shall consult with potentially affected states at an early stage and in good faith. Notification and consultations on pollution incidents are also governed by the new Convention in Article 13, in the light of which:

1. Whenever a pollution incident in the territory of a Contracting Party is likely to cause pollution to the marine environment of the Baltic Sea Area outside its territory and adjacent maritime area in which it exercises sovereign rights and jurisdiction according to international law, this Contracting Party shall notify without delay such Contracting Parties whose interests are affected or likely to be affected.

2. Whenever deemed necessary by the Contracting Parties referred to in paragraph 1, consultations should take place with a view to preventing, reducing and controlling such pollution.

[49] Article 10 just repeated that each Contracting Party shall take all appropriate measures in order to prevent pollution of the marine environment resulting from exploration and exploitation of the seabed and its subsoil.

[20] For the purposes of this Annex, offshore activity means any exploration and exploitation of oil and gas by a fixed or floating offshore installation or structure including all associated activities thereon.

[21] Negotiations will generally be most effective if there remains a real possibility of litigation. It is most often used within the context of legal enforcement proceedings.

3. Paragraphs 1 and 2 shall also apply in cases where a Contracting Party has sustained such pollution from the territory of a third state."

The provisions of the old Convention concerning combatting marine pollution were and still are quite progressive, although the work of the Combatting Committee has been centred on oil pollution and the establishment of operational procedures and guidelines as well as the agreed policy for response capability and methods mainly applied in such situations.[22] Measures to prevent and combat marine pollution are to be bound in Annex on co-operation in combatting pollution which gives a fairly detailed description of the enforcement system. This tradition is continued by the new Convention in Article 14 on co-operation in combatting marine pollution, which states that:

„The Contracting Parties shall individually and jointly take, as set out in Annex VII, all appropriate measures to maintain adequate ability and to respond to pollution incidents in order to eliminate or minimize the consequences of these incidents to the marine environment of the Baltic Sea Area."

Human beings are at the centre of concern for sustainable development. This idea is behind a famous Report on our Common Future[23] and almost all new instruments of international environmental law which oblige the states to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem.[24] A concept of sustainable development can be also found in Article 15 on the new Convention on the Protection of the Marine Environment of the Baltic Sea Area. This principle deals here with a „nature conservation and biodiversity":

„The Contracting Parties shall individually and jointly take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes. Such measures shall also be taken in order to ensure the sustainable use of natural resources within the Baltic Sea Area. To this end, the Contracting Parties shall aim at adopting subsequent instruments containing appropriate guidelines and criteria."

The old Convention has obliged the Contracting States to report on the state of the open Baltic Sea on the basis of monitoring and research programmes. However, it has been the national responsibility and, consequently, outside the direct control of HELCOM.[25] For various reasons the national reporting on the state of coastal water has been fragmentary. Comprehensive data are

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[22] Cf. M. Fitzmaurice: supra note 3, at 125.

[23] *The Brudland Commission in Our Common Future.*

[24] See, for example, Lammers and Munro's: *Report on Environmental Protection and Sustainable Development, Legal Principles and Recommendations* (1986).

[25] Cf. M. Fitzmaurice: supra note 3, at. 97-102.

still incomplete for the eastern proper. In order to improve a system of reporting and exchange of information, the new Convention provides in Article 16 that:

„1. The Contracting Parties shall report to the Commission at regular intervals on:
a) the legal, regulatory, or other measures taken for the implementation of the provisions of this Convention, of its Annexes and of recommendations adopted thereunder;
b) the effectiveness of the measures taken to implement the provisions referred to in sub-paragraph a) of this paragraph; and
c) problems encountered in the implementation of the provisions referred to in sub-paragraph a) of this paragraph.
2. On the request of a Contracting Party or of the Commission, the Contracting Parties shall provide information on discharge permits, emission data or data on environmental quality, as far as available."

Taking into consideration a trend to facilitiate and encourage public awareness and participation by making information widely available,[26] the new Convention governs new rules on information to the public. They are quite modern, although they shall not affect the right or obligation to protect information related to intellectual property, including industrial and commercial secrecy or national security as the confidentiality of personal data. The basic rule is governed by Article 18:

„1. The Contracting Parties shall ensure that information is made available to the public on the condition of the Baltic Sea and the waters in its catchment area, measures taken or planned to be taken to prevent and eliminate pollution and the effectiveness of those measures. For this purpose, the Contracting Parties shall ensure that the following information is made available to the public:
a) permits issued and the conditions required to be met;
b) results of water and effluent sampling carried out for the purposes of monitoring and assessment, as well as results of checking compliance with water-quality objectives or permit conditions; and
c) water-quality objectives.
2. Each Contracting Party shall ensure that this information shall be available to the public at all reasonable times and shall provide members of the public with reasonable facilities for obtaining, on payment of reasonable charges, copies of entries in its registers."

The weakest point of both the old and new Conventions, however, is the lack of sanctions against acts that contravene its provisions. International law without sanctions soon becomes nothing but a „code of behaviour". Thus, most Baltic States try and will continue to avoid any environmental policy which is non-profitable in the short-run . It is a kind of grotesque that the new Convention repeated in Article 25 that:

[26] The role of citizens in environmental enforcement is great that they are omnipresent, motivated, and uniquely interested in environmental quality. See, e.g., E. Roberts and J. Dobbins: „The role of the citizen in environmental enforcement", *International Conference on Environmental Enforcement*, Volume I, Budapest 1992, at. 531-559.

„The Contracting Parties undertake jointly to develop and accept rules concerning responsibility for damage resulting from acts or omissions in contravention of this Convention, including, inter alia, limits of responsibility, criteria and procedures for the determination of liability and available remedies."

There is a great variety of disputes regarding settlement techniques in international law.[27] The New Convention on the Protection of the Marine Environment of the Baltic Sea Area follows the Charter of the United Nations in this respect with preference for negotiation. It provides, in Article 26, that:

„1. In case of a dispute between Contracting Parties as to the interpretation or application of this Convention, they should seek a solution by negotiation. If the Parties concerned cannot teach agreement they should seek the good offices of or jointly request mediation by a third Contracting Party, a qualified international organization or a qualified person.

2. If the Parties concerned have not been able to resolve their dispute through negotiation or have been unable to agree on measures as described above, such disputes shall be, upon common agreement, submitted to an ad hoc arbitration tribunal, to a permanent arbitration tribunal, or to the International Court of Justice."

8. Environmental regional management

For a long time environmental provisions were substance, rather than action oriented. In order to give the Action Plan institutional and financing backing, the UN General Assembly adopted a famous resolution 2997(XXVII) setting up the United Nations Environmental Programme (UNEP).[28] The Action Plan adopted by UNEP has created a foundation for environmental management. Also the EC Environmental Action Programmes made a great contribution to international protection of the environment.[29]

The Baltic Sea Joint Comprehensive Programme has been concentrating its attention on reducing existing pollution levels over a given time.[30] It should create a new strategy for environmental regional management, too. It may be cost-efficient to invest most funds in the Central and Eastern European countries where little has been done in the past. In the absence of realistic funding plans, both during construction and during operations, proposed investments will remain pipe-dreams.

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[27] According to Article 2(3) of the Charter of the United Nations: „All Members shall settle their international disputes by peaceful means in such a manner thet international peace and security, and justice, are not endangered".

[28] UNEP took its work in January 1973.

[29] See, e.g., R. Macrory: „Membership in the European Economic Community: What it means for environmental requirements and enforcement", *International Conference on Environmental Enforcement*, Volume I, Budapest 1992, at 171-181.

[30] The working documents produced so far by the HELCOM Task Force were discussed and revealed alarming facts that only one of the Baltic countries has presented a plan to reduce the total national loads of pollutants by 50 %.

A decentralization of ownership and control is necessary to make industrial and municipal enterprises responsive to environmental needs. Without any interference in administrative and legislative reforms, investments will be of limited value. Not only money but also managerial reforms are of utmost importance.

The most natural financing source will obviously be domestic funding in the countries themselves. But in the short term the central and eastern European countries will need help from the multilateral development banks, such as EBRD, EIB, NIB and the World Bank which are expected to play a central role to mobilize the financial resources and assist in the implementation of the Joint Comprehensive Programme. The EBRD and the World Bank offer the preferential credits.[31] Let's hope that also EIB and NIB will do the same. In this respect a new philosophy is needed in the light of which „nobody can make a profit offering credits for the protection of the environment", that was already adopted during the middle-ages when man started to fight against fire.

9. Organizational capabilities

When organizing international co-operation the first question to be answered is „What are the organizational capabilities of international organizations?". It has been observed that decision making in international organizations is an often complicated and time consuming process. These organizations cope with a number of different functions and for each function they must provide a forum for open criticism while, at the same time, respecting national integrity. Such a complex task in conjunction with the limited institutional capabilities of international organizations influences the execution of environmental policies. International organizations, including HELCOM, do not promote inter-state equity.

The duties of the Commission are formulated in Article 20 in the following way:

„1. The duties of the Commission shall be:

a) to keep the implementation of this Convention under continuous observation;

b) to make recommendations on measures relating to the purposes of this Convention;

c) to keep under review the contents of this Convention including its Annexes and to recommend to the Contracting Parties such amendments to this Convention including its Annexes as may be required including changes in the lists of substances and materials as well as the adoption of new Annexes;

d) to define pollution control criteria, objectives for the reduction of pollution, and objectives concerning measures, particularly those described in Annex III;

[31] The EBRD (European Bank for Reconstruction and Development) has indicated the environmental sector to be one of its priorities, whereas the EIB (European Investment Bank) and the NIB (Nordic Investment Bank) are equally involved in other sectors.

e) to promote in close co-operation with appropriate governmental bodies, taking into consideration sub-paragraph f) of this Article, additional measures to protect the marine environment of the Baltic Sea Area and for this purpose:

i) to receive, process, summarize and disseminate relevant scientific, technological and statistical information from available sources; and

ii) to promote scientific and technological research; and

f) to seek, when appropriate, the services of competent regional and other international organizations to collaborate in scientific and technological research as well as other relevant activities pertinent to the objectives of this Convention.

2. The Commission may assume such other functions as it deems appropriate to further the purposes of this Convention."

10. Conclusions

. A regional approach is attractive to traditional researchers who believe that it offers the possibility of creating more precise and restrictive norms and more useful institutions by narrowing the consensus-forming community to those states which have a close geographical relationship.[32]

It seems to an be idealistic position that at least the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area does not prove such observation. Even the new Convention would probably not play an important role in harmonizing national laws as it does not offer any supranational norm formulation in the environmental field as can be seen in the work of the European Communities.

The facts show that universal treaties concerning environmental affairs are more effective in the protection of the marine environment of the Baltic Sea Area because they offer more restrictive norms including administrative sanctions and civil liability for environmental damage.

Perhaps a new system of environmental management will be more effective than environmental law. It is, however, too early for any positive conclusion. Behind the rules of environmental management there are economic incentives which are based upon law. Thus we shall not underestimate a process of integration through law.

[32] Cf. M. Fitzmaurice: supra note 3, at 6.

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International Legal Aspects of Polish-Lithuanian Relations

WŁADYSŁAW CZAPLIŃSKI

Poland and Lithuania constituted for centuries one state, sharing their fate in good and bad times. The Polish government, however, was not willing to recognize Lithuanian independence in 1991, contrary to many other states. Notwithstanding global political issues, there existed numerous unresolved legal questions which caused such a stance, first of all the situation of a Polish minority in Lithuania. Tensions in mutual relations led to surprising results: Lithuania is the only neighboring state which Poland has not concluded a new treaty of friendship after the political revolution of 1989 with. The latest elections in Lithuania in 1993 brought some changes into the relationship between Poland and Lithuania, however, it is too early to speak about a turning point. Historical resentments still influence the current situation. This study reviews the most important problems of Polish-Lithuanian relations: territorial disputes (relating mostly to the past), status of the national minority in the respective states and the problem of Polish claims against Lithuania.

1. Territorial dispute

It is a paradox of history that the Oder-Neiße boundary between Poland and Germany which was one of the most important elements of the global East-West conflict has been confirmed by a treaty.[1] All other boundaries have been put to question in a more or less serious way. A number of politicians and authors claim the regions of Sejny, Suwałki, or even Białystok and Łomża areas (North-East Poland), as allegedly belonging respectively to Belarus and Lithuania. The letter Lithuania also claims that the boundary question is not final as no border treaty has been concluded between Poland and Lithuania. Certain Polish officials and writers maintain that the region of Vilna (in Polish „Wilno"; in Lithuanian „Vilnius") from the international legal point of view

[1] Cf. *31 ILM* 1292 (1992), and the study by R. Jasica: *Polish-German Treaties of 1990 and 1991* in the present volume.

still belongs to the Polish state. Though the common Polish-Lithuanian declaration of January 13, 1992 seems to resolve all disputes on this topic in favour of Lithuania, we would like to consider this problem once again.

1.1. The territorial status of Viina in the interwar period

On November 15, 1917 the Declaration of Rights of the Peoples of Russia was proclamed. In al. 2 it guaranteed the peoples composing the Russian Empire a right to self-determination including a right to secede and to create their own states. In the treaty of Brest-Litovsk of March 3, 1918 Soviet Russia ceded i.a. territories of Latvia and Lithuania to Germany in exchange for a cessation of hostilities and for peace. Finally on August 29, 1918 the Council of People's Commissioners (i.e., the Soviet government) passed a decree on an annulment of all treaties that partitioned Poland concluded by tsarist Russia with Prussia and Austria. In that way Soviet Russia renounced unilaterally any claims to territories annexed to the Russian Empire on the basis of partition treaties, and in particular to Viina and Grodno. The unilateral character of this act does not influence their binding force.[2] Subsequent renunciation of the treaty of Brest-Litovsk (in November 1918) was not effective and could not restore the Russian sovereignty in the Viina area for two reasons. Firstly, in the period after the First World War it was generally admitted, both in state practice and international legal writing, that treaties cannot be denounced unilaterally.[3] Secondly, the treaty of Brest-Litovsk created rights for third parties (including — on the basis of state succession — Poland and Lithuania) and without their agreement even all parties of the treaty of Brest-Litovsk would not be able to cancel these rights.

During the autumn and winter of 1918/19 the area of Viina passed several times from one sovereign to another: Lithuania,[4] Polish Self-defence Movement (January 1919), newly established under the occupation by the Red Army the Lithuanian-Byelorussian Socialist Republic (January/mid-April 1919), and Poland (April 1920). The Soviet counter-attack began on July 4, 1920 and the Red Army advanced extremely quickly: Minsk surrended on July 11, Viina on July 14, Brest and Białystok on August 1, 1920. On July 12, 1920, with a treaty concluded in Moscow, Soviet Russia recognized the independence of Lithuania.[5]

[2] Cf. *East Greenland Case, PCIJ Publ. Series* A/B, No. 53, in particular, at 71.

[3] Cf. S. Nahlik: *Kodeks prawa traktatów* (The Code of the Law of Treaties), Warszawa 1976, at 329; S. Bastid: *Les traités dans la vie internationale*, Paris 1986, at. 199; A.D. McNair: *The Law of Treaties*, Oxford 1961, p. 493; F.L. Oppenheim, H. Lanterpacht: *International Law. A. Treatise*, London 1955, vol. I, at 945 (the authors do not mention any other possibility of a renunciation of a treaty except a case of grave violation, and even then a termination of an agreement is not automatic); as to the state practice in the 18—20th centuries see J.H.W. Verzjil: *International Law in Historical Perspective*, Leiden 1973, vol. VI, at 336 ff.

[4] The creation of the state of Lithuania with a capital in Viina was proclamed in December 1918, while stille under German occupation.

[5] Negotiations started in May 1920.

The treaty delimitated a boundary between Russia and Lithuania, ceding in favour of the latter an area of 27,000 sq km with 1 million inhabitants, mostly of Polish nationality. Lithuania retained Vilna, Grodno, Augustów and Suwałki.

An appraisal of the Russian-Lithuanian treaty of 1920 is clear. At the time of its conclusion Vilna belonged to Poland, and this state possessed a territorial title in accordance with the principle of effectiveness.[6] None of the contracting states had a competence to dispose of the Polish territory. Soviet Russia concluded this treaty as identical with the Russian Empire (according to its Article I, Russia recognized without reservations independence and sovereignty of the state of Lithuania with all legal consequences stemming from the recognition, and renounced voluntarily and forever all sovereign rights regarding the people and territory of Lithuania). Such a position is surprising, as later practice and legal writing of Soviet Russia maintained that the USSR was a new state established as a result of the communist revolution, and therefore it is not responsible for any obligations of the Russian Empire. As to Lithuania, her claims to Vilna were not supported by any effective title recognized by international law. Secondly, according to the principle *pacta tertiis nec nocent, nec prosunt*, the parties to the 1920 treaty could not impose any obligations upon Poland against her will.[7] It is difficult, however, to claim the invalidity of the Russian-Lithuanian treaty, as neither authors nor any codification consider the rejection of a treaty by a third party as grounds for invalidity; the grounds for invalidity presented in this codification are of limitative character.[8]

Threatened directly by this act of Soviet aggression, Poland decided to conclude with the All red Powers an agreement of Spa on July 20, 1920. According to the agreement Poland, in return for Western help, accepted generally the Curzon line as the Eastern boundary of Poland and renounced claims to Vilna leaving a competence to finalizing the boundary to the Supreme Council of Entente.[9] The agreement delimited, to a large extent, freedom of action of Polish diplomacy.

A counter-offensive in August 1920 liberated Poland from Soviet forces and led to Polish-Lithuanian encounters. At the request of Poland which

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[6] It would be interesting to consider to what extent traditional notions of international law can be applied in extraordinary situations like global perturbations after a war, dismemberment of great empires, etc... .

[7] One could discuss, however, whether an agreement of Spa presented below could not be seen as confirming Polish acceptance to the terms of the 1920 Moscow agreement.

[8] W. Wielhorski: *Polska a Litwa. Stosunki wzajemne w biegu dziejów* [Poland and Lithuania. Mutual Relations in the Course of History], London 1947, at 332, referring to *The Times* mentions an alleged secret agreement between Soviet Russia and Lithuania, allowing the Red Army to use Lithuanian territory for military operations against Poland. As a matter of fact, Lithuania did not kept her neutrality during the Polish-Soviet war, accepting e.g., the transport of Soviet prisoners of war from Eastern Prussia to Russia. The existence of the secret agreement has been confirmed by P. Łossowski: *Stosunki polsko–litewskie w latach 1918–1920* [Polish-Lithuanian Relations 1918–1920], Warszawa 1966, at 33 ff.

[9] Cf. H. Batowski: *Między dwiema wojnami 1919–1939. Zarys historii dyplomatycznej* [Between Two Wars 1919–1939, An Outline of Diplomatic History], Kraków 1988, at 60.

claimed Soviet-Lithuanian aggression, the League of Nations intervened. The resolution of the Council of September 20, 192010 requested the parties to withdraw their armies to the demarcation line and provided the sending of a control commission of the League. Under these circumstances Polish authorities proposed negotiations on a cease-fire. A respective instrument called the Agreement of Suwałki was concluded on October 7, 1920. Its contents was dominated by the conflicting interests of the parties with regarding Vilna, though formally the name of this town did not appear.

According to Lithuania, the Agreement of Suwałki constituted a basis of the boundary between the two parties.[11] It was registered by the Secretary of the League in January 1922.12 On the other hand, Poland made efforts to diminish its importance. Polish authors agree that the agreement was exclusively of military character and delimited a demarcation line.[13]

Art. 1 of the agreement established a demarcation line between Polish and Lithuanian armies along the line Niemen River-Orany-Eishyshky-Bastuny. The same provision stated further that the demarcation line did not settle, finally, any territorial problems. Following provisions regulated the rules of cease-fire in the other areas, the use of the railway station at Orany, and the exchange of prisoners of war. Finally, according to art. V, the agreement should have entered into force on October 10, 1920, high noon and remained valid until the final solution of territorial disputes between Poland and Lithuania.

In order to correctly appreciate the agreement of Suwałki, one must define a cease-fire agreement. At that time belligerent agreements were established both in codifications[14] and customary laws. One should differentiate general agreements between belligerents (armistices) and local ones, dealing with certain areas or a part of armed forces (cease-fire). A cease-fire agreement can be concluded by low-level military commanders within their competence; even if it provides for an acceptance by governments, it does not automatically become

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[10] LN, OJ Doc. 23, at 64–65.

[11] Cf. S.A. Gorlov: „SSSR i terriloriaîne problemy Litvy", *Voennoistorichesky Zhurnal* 1990, No. 7, at 21. Another author, A.P. Gureckas: „Lithuania's boundaries and territorial claims between Lithuania and neighboring states", *12 NYLSchJICL* 112 (1991), maintains that the legal frontier between Poland and Lithuania was traced by Sigismundus Augustus, king of Poland and grand duke of Lithuania, in 1569 and remained as it existed in 1795 (the date of partition of Poland); while the actual boundary was established as a line of demarcation along the Curzon line by the agreement of Suwałki.

[12] *LNTS 8, 174.*

[13] S. Kutrzeba (ed. S. Grodziski): *Polska odrodzona* [Poland Restituted], Kraków 1988, at 146; J. Makowski: *Kwestia litewska. Studium prawne* [Lithuanian Question, Legal Study], Warszawa 1929, at 19–20; W. Wielhorski: op. cit., at 348–349; P. Lossowski: *Polska-Litwa. Ostatnie sto lat* [Poland-Lithuania. Recent Hundred Years], Warszawa 1991, at 28; H. Batowski: op. cit., at 63; J. Ochmański: *Historia Litwy* [History of Lithuania], Wrocław 1982, at 301.

[14] Cf. the Brussels declaration of August 27, 1874 on laws of war and the Hague Regulations of October 18, 1907 on the land warfare.

an inter-governmental agreement.[15] If it is concluded for an unlimited period, military actions can be undertaken first after its denunciation (Art. 36 of the Hague Regulations). Serious violations of a cease-fire agreement constitute grounds for denunciation or even for further military activities (Art. 40). even private persons infringing terms of a cease-fire agreement should be punished (Art. 41).

Certain authors maintain that if a peace treaty does not follow an armistice agreement, a demarcation line established gains the status of a state boundary.[16] This view, however, is not universally accepted.[17] It must be emphasized that the above mentioned considerations refer to international law under the UN Charter while the ban on war was established first under the Briand-Kellogg Pact of 1928. Although the Covenant of the League of Nations guaranteed the territorial integrity of the Member States (Art. X), it did not prohibit all forms of the use of force in international relations (formally a state of war did not exist between Poland and Lithuania in 1920). The ban on annexation of territory by force was accepted first with the Stimson Doctrine after 1932.[18] It is therefore difficult to accept the status of a demarcation line as equal to a state boundary in the 1920's.

The present author cannot accept the position of Lithuanian writers as to the political character of the Agreement of Suwałki. The parties expressly agreed that it did not resolve the title to territory. It should remain in force until the final settlement of territorial questions indicate the will of the parties to conclude a political treaty in future. The Agreement of Suwałki did not contain any other political clauses but regulated in detail the conditions of the cease-fire. It was therefore of the purely military and temporary character.

The cease-fire was violated by Polish forces under the command of General L. Żeligowki on October 9, 1920 (this means that the violation took place

[15] However, after the First World War conflicting parties concluded armistice agreements which included not only military, but also political clauses. Cf. in particular R.R. Baxter: „Armistices and other forms of suspension of hostilities", 149 RCADI 374 (1976).

[16] So e.g., Y. Dinstein: *War, Aggression and Self-Defence*, Cambridge 1988, at 45: „When a line of demarcation between States is sanctioned in such a way that it can be revised by mutual consent (ant not by foce), it becomes a political or territorial border". In a similar way recently a Soviet author R.A. Müllerson: *The Principle of Non-Threat and Non-Use of Force in the Modern World*, 26 *Coexistence* 30 (1989): „The violation of international demarcation and armistice lines established by international agreements is also an encroachment on the principle of the non-use of force".

[17] See V.A. Sokolov: *Mirnyj dogovor – osnavaia forma vosstanovlenia poslevoiennikh otnoshenii mezhdu gosudarstvami*, Saratov 1965, at 33. The author is not consequently stating that if any doubts as to the interpretation of a cease-fire agreement occur, it should be treated as constituting a basis of relations between interested states, a demarcation line acquiring therefore the status of a boundary. A differentiation between state boundaries and demarcation lines can be found also in the Declaration of Principles of International Law (UN GA Resolution 2625(XXV) of October 24, 1970), although this act proclaims an inviolability of demarcation lines.

[18] So authoritatively R.Y. Jennings: *The Acquisition of Territory in International Law*, Manchester 1963, at 52 ff.

before the entry of the agreement into force).[19] According to the rules of international law Poland was fully responsible for this action. However, it did not automatically, cause the extinction of the agreement, but only gave reason for the Lithuanian party to denounce it. Lithuania kept the agreement in force as the only title to the Vilna area.

On November 29, 1920 the agreement of Suwałki was replaced by a new cease-fire agreement concluded in Kaunas. This agreement established a new demarcation line between the military forces of Lithuania and the troops of General Żeligowski. It was subsequently accepted by the Military Control Commission of the League of Nations (on November 30, 1920). The same organ established also the demarcation line between Polish and Lithuanian forces. The agreement of Kaunas was registered by Poland by the Secretariate of the League of Nations.[20] From the international legal point of viwe, agreement of Suwałki was derogated by the agreement of kaunas. The demarcation line constituted the frontier between Lithuania and the Vilna area. After the incorporation of Vilna into Poland it constituted the frontier between Poland and Lithuania, according to the rules of state succession.

The League of Nations proposed mediation and plebiscite in the Vilna area, but the proposal was rejected by Lithuania.[21] Polish authorities organized local parliamentary elections on January 8, 1922.22 The newly established parliament applied for incorporation by Poland, and this application was accepted by the Polish Sejm (Parliament) on March 24, 1922. The will or the population was accepted by the Conference of Ambassadors by the decision of March 15, 1923; the decision was based upon Article 87 of the Treaty of Versailles, recognized earlier by Lithuania (note of November 18, 1922).

The decision was never recognized by Lithuania and — surprisingly — by the Soviet Union supporting Lithuania.[23] There were literally no relations between Poland and Lithuania before March 1938; numerous border incidents and

[19] The thesis expressed by W. Wiehorski: op. cit., at 349, that the action by General Żeligowski was legal because it passed in the area not included into the territorial scope of the agreement, is disputable. The parties to the agreement were willing to expand the scope of its application, and Poland was supposed to implement the agreement in good faith. It must be also taken into account that Poland renounced her rights to Vilna by the Agreement of Spa quoted above.

[20] J. Makowski: *op. cit.*, at 21.

[21] The reason is clear as the population of Vilna consisted mainly of Poles (54 %) — there were only 7,5 % of Lithuanians.

[22] A.P. Gureckas: op. cit., at T20, quotes the report by A.P. Chardiguy, the president of the League of Nations Military Control Commission slating that the elections were not objective and representative.

[23] As to the Soviet position see A.P. Gureckas: op. cit., at 121—122. The decision of the Council was also criticized by some authors — cf. A. de Lapradelle, L. Le Fur, A. Mandelstam: *Consultations concernant la force obligatoire de la decision de la Conference des Ambassadeurs du 15 mars 1923*, Paris 1928, especially at 39 and 80. However, this study was ordered and paid for the Lithuanian government.

repressions against national minorities representing respective nations took place. It is interesting that the state of affairs was accepted by the international community.[24]

Summing up, the territorial sovereignty of Poland in the Vilna area cannot be questioned. Before 1922 the title was based upon the effective rule, and subsequently upon the self-determination of the local population. Its decision was confirmed by the competent international body of the Council of Ambassadors. The it was exclusively a military cease-fire agreement, not resolving any territorial problems in a final way.

1.2. The status of Vilna area after 1939

It is not necessary to recall here events leading to the Second World War. We would like, however, to refer briefly to their legal effects. It is usually maintained that the Soviet-German treaty of non-aggression (know as the Hitler-Stalin or Ribbentrop-Molotov pact) was null and void as contrary to international morality, former agreements and peremptory norms of international law; they could not therefore cause the extinction of Lithuania as a state.[25] In our opinion, the situation is not clear. The Ribbentrop-Molotov pact was not invalid under international law in force in 1939. The violation of earlier agreements did not result in the invalidity of a treaty (Germany did not violate the Covenant of the League of Nations as it was not a member of League at that time); and the concept of peremptory norms was introduced into international law first after the entry into force of the Vienna Convention on the Law of Treaties, its scope is neither very wide nor clear (in our opinion, it does not constitute customary law yet). The pact could not create any legal title for Germany or USSR to dispose of the Polish territory. This fact cannot be changed by the Soviet note of September 17, 1939 on the alleged collapse of the Polish State, nor by the fact that the USSR recognized the Vilna area as belonging legally to Lithuania in the inter-war period.[26]

The secret protocol to the Hitler-Stalin pact of August 23, 1939 treated Lithuania as belonging to the German sphere of influence, but an additional secret protocol to the German-Soviet treaty of friendship of September 29, 1939 transferred Lithuania to the Soviet sphere. Both parties recognized a *special interest* of Lithuania in the Vilna area.

On October 3, 1939 the Soviet Union proposed Lithuania the conclusion of a package of agreements regulating their mutual relations: a treaty on mutual

[24] Cf. the advisory opinion by the PCIJ on the Landwarów-Kaisiadoris railway of October 15, 1931 (*PCIJ Puhi*, Series A/B, No. 42).

[25] Such a view was expressed i.a., by Polish Foreign Minister, Professor K. Skubiszewski, in his speech at the Parliament on January 14, 1992 – see *Gazeta Wyborcza" of 15 January 1992, at 5*.

[26] *See the treaty of non-aggression between the USSR and Lithuania of September 28, 1926 which confirmed the treaty of July 12, 1920*.

assistance providing the establishment of Soviet military bases in Lithuania, a treaty on the cession of Vilna to Lithuania, and the treaty on the cession of the South-West part of Lithuania in favour of Germany. The treaty on mutual assistance was concluded on October 10, 1939. According to this treaty, 25,000 soldiers of the Red Army occupied the most important strategic points of Lithuania. Implementing the treaty, 18 days later Lithuanian troops entered Vilna. The conclusion of the Treaty was welcomed by the population of Lithuania, celebrating the *recovery* of Vilna.[27] On October 27, 1939 the Lithuanian Parliament passed a law introducing Lithuanian administration in Vilna and surrounding, annexing the territory.

The treaty between the USSR and Lithuania of October 10, 1939 was concluded under a direct threat of force. Under general international law the threat of force is recognized as a premise for invalidity of a treaty, at least since the establishing of the ban on war in international relations.[28] This rule was valid customary law at the time of the conclusion of the Soviet-Lithuanian treaty of 1939. On the one hand it means that the stationing of Soviet troops in Lithuania was deprived of a legal basis. On the other hand, Lithuania had no valid title to extend her sovereignty in the town and area of Vilna (Lithuania and the USSR claimed that the transfer of Vilna was based upon the peace treaty of 1920 and *historical right of Lithuania to her capital,* acknowledged by Soviet foreign minister V. Molotov in his speech of October 31, 1939 before the Supreme Soviet).[29] The action by Lithuania violated rules of neutrality in the Polish-Soviet conflict, and competence of Lithuanian authorities were only those of an occupying power (even if the state of war did not exist between Poland and Lithuania).

The Soviet Union continued actions aimed towards annexation of the Baltic States. In May 1940 it accused Lithuania of provocations against Soviet garrisons, conclusion of a military pact with Latvia and Estonia against the USSR and violation of the mutual assistance treaty. Any steps to resolve the conflict through negotiations did not succeed. On June 14, 1940 the USSR presented an ultimatum claiming the establishment of a new government friendly to the USSR and accepting the enlargement of the number of Soviet forces in Lithuania. Even during negotiations Soviet Foreign Minister V. Molotov emphasized that the formula of the ultimatum would in every case

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[27] *On the ground of the treaty, Lithuania gained the area of 6,650 sq. km with 457,000 inhabitants, only 100,000 of them being of Lithuanian ethnic origin.*

[28] *Por.* F. L. Oppenheim *(editors R.Y. Jennings, A. Watts): International Law. A. Treatise,* London 1992, vol. I (Part Two), at 1290. The authors refer to the Briand-Kellogg Fact of 1928 as a turning point in the approach to the problem. Cf. also S. Bastid: *Les traités dans la vie internationale,* Paris 1985, at 93, giving an example of the treaty of peace between France and Siam of 1937, subsequently declared invalid; 1. Sinclair: *The Vienna Convention on the Law of Treaties,* Manchester 1973, at 96–97 (quoting a number of authors from the time before a codification of law of treaties, like P. Fauchille, A.D. McNair, Ch. de Visscher).

[29] In the same speech Molotov stated that thanks to powerful attacks by the German and Red Armies Poland, *damned bastard of the Treaty of Versailles,* ceased to exist.

allow Soviet troops to enter Lithuania.[30] Even during the negotiations Soviet soldiers occupied the most important strategic points of Lithuania. On June 15, 1940 the Lithuanian government accepted the Soviet claims. The Soviet army entered Lithuania. A similar policy was conducted by the Soviets towards the remaining Baltic States, thus violating several multi – and bilateral treaties. The Polish government in exile in London protested against the occupation of Lithuania by the USSR.

The situation of the Polish territories under the Soviet occupation changed radically after the German invasion of the USSR. The Polish government in exile started negotiations with the USSR expecting the invalidation of the Hitler-Stalin pact, cession of Vilna in favour of Lithuania and Soviet nationality decrees granting Soviet nationality to Polish nationals living in the territories under the Soviet occupation. The relations between Poland and the USSR should be based upon the Peace Treaty of Riga of 1921. The official position of the USSR was that the Polish State should be restored but the boundary between her and the Soviet Union should take into account *the will of the population expressed in the referendums organised under the Soviet occupation.*[31] Acting under the pressure of the British government, Polish prime minister General Sikorski decided to conclude an agreement with the Soviet government on July 30, 1941.32 According to its Article 1, the USSR did not treat the agreements with Germany of August and September 1939 as valid, and Article 2 restored normal diplomatic relations between Poland and the USSR.

Notwithstanding numerous proposals by the Polish government, the USSR was not willing to resolve disputable problems of the Polish Eastern territories and their population. Any attempts caused immediate retorsions by the Soviets. In December 1941 the Soviet government presented an idea of territorial compensation for Poland in the West at a charge of Germany. After hesitations, the idea was finally rejected by the Polish government in March 1943, however, at that time a consensus between the Great Powers as to the boundaries of Poland was achieved.

After the passage of the so-called Curzon line[33] by Soviet troops the Polish Committee for National Liberation (communist government) was created. Its first declaration stated that boundaries of Poland should be traced according to ethnic principles. The Committee concluded a secret agreement with the USSR on July 27, 1944.34 Polish Eastern territories were ceded to the USSR

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[30] Cf. archival sources quoted by V. Vadapalas, V. Zhalys: „Secret protocols to the Soviet-German Treaties of 1939 and the problem of prescription in international law", *39 Proceedings of the Estonian Academy of Sciences. Social Sciences* 128(1990).

[31] W. Kulski: „The lost opportunity for Russian-Polish friendship", *Foreign Affairs* July 1947, at 674–675. Cf. also *Pravda* of August 3, 1941.

[32] *Documents on Polish-Soviet Relations 1939–19451* London 1961, vol. I, at 141.

[33] The line proposed by Lord Curzon on behalf of the Allied Powers as the Eastern boundary of Poland in 1920, was rejected by Poland. The boundary was finally delimited several hundred km east of the Curzon line, according to the Peace Treaty of Riga of 1921 mentioned above.

[34] First published by A. Uschakov (in:) *Internationales Recht und Diplomatie 1970*, vol. II, at 71. In Polish: *Polska Ludowa – Związek Radziecki 1944–1974. Zbiór dokwnentów i materiałów*, Warszawa 1974, at 12–13.

which obliged herself to support Polish territorial claims in the West. The agreement was invalid from the point of view of international law, as the Committee was not legal as created under the Soviet occupation, and there was the Polish government in exile universally recognized (the Committee for National Liberation was even not formally recognized by the USSR).[35]

1.3. The present status of the Vilna area

During the Crimea conference of the Three Powers in February 1945 it was agreed that the eastern boundary of Poland should be delimited along the Curzon line in cooperation with a future Government of National Unity consisting of communists and political forces in exile. The Government was created on June 28, 1945 and subsequently recognized by the Great Powers. The Government was neither interested nor capable of renegotiating the secret agreement of July 27, 1944. A new boundary treaty between Poland and the USSR was concluded on August 16, 1945.36 It established the Eastern boundary in similar terms as the agreement of Yalta. For the first time since 1921 the legal government of Poland concluded a boundary treaty with the eastern neighbor. It entered into force on February 6, 1946 and since that time it produced constitutive effects.[37]

The annexation of Lithuania, Latvia and Estonia was not recognized by Western states according to the so-called Stimson doctrine. In the changed situation of the USSR the Baltic republics proclaimed independence in 1990-1991. The declaration of Lithuania was passed on March 11, 1990. It stated that the independence violated by force in 1940 was restored; foreign (i.e., Soviet) law deprived of any force in the Lithuanian territory. It proclaimed also the inviolability of Lithuanian boundaries, recognition by Lithuania of all principles of international law according to the CSCE Helsinki Act of 1975 and guarantees of all rights to individuals, citizens and ethnic groups.[38]

The reaction of Western states was reticent. The independence of the Baltic states was fully recognized first after the attempt of a coup d'état in August

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[35] Similarly also K. Marek: *Identity and Continuity of States in Public International Law*, Geneva 1968, at 465; opposite view cf. L. Gelberg: *Powstanie Polski Ludowej. Problemy prawa międzynarodowego* [Creation of the People's Republic of Poland. International Legal Problems], Warszawa 1970, at 58.

[36] *10 UNTS*, 193.

[37] In an interview for a Polish newspaper published in Vilna, *Kurier Wileński* (of May 5, 1993), the Polish Ambassador to Lithuania J. Widacki emphasized this issue remarking also that up to that time Vilna belonged legally to Poland. This opinion caused hysterical reaction by Lithuanian authorities including an official statement by the Ministry of Foreign AJTairs (*Kurier Wileński* of May 8, 1993) accusing the Ambassador of Poland of one-sidedness in evaluation of the history. As indicated above, Lithuania still underlines that the action by General Żeligowski was illegal and requires its condemnation by Poland as a necessary prerequisite for the conclusion of a treaty with Poland.

[38] Comp. *24 RBDI* 261 (1991).

1991. The position of the Baltic states (generally accepted by the international community) was in fact that of postliminium.[39] An international legal content of the notion is not very clear, it does not mean an automatic restitution of all former international rights and obligations. The solution is to be found for individual cases. In the case of Lithuania the boundary problem is the most important.

Lithuanian authorities were afraid of Polish territorial claims, notwithstanding numerous Polish declarations of the inviolability of boundaries. These fears were justified if one took into account the position of Lithuania towards the treaties concluded with the USSR in 1939-40. The claim on invalidity of these treaties would deprive Lithuania of her title to the Vilna area.[40] Lithuanian government therefore claimed the necessity to conclude a boundary treaty with Poland.

According to customary international law, confirmed by Article 11 of the Vienna Convention of August 23, 1978 on the succession of states with respect of treaties,[41] a succesor state is bound by boundary agreements of a predecessor state. It means in practice that the Polish-Soviet boundary treaty of 1945 remains in force in Polish-Lithuanian relations. An eventual Polish-Lithuanian treaty would be exclusively of declaratory importance, like the treaty of 1990 in the relations between Poland and Germany.[42]

2. The problem of a Polish minority in Lithuania and Lithuanian minority in Poland

Although the problems of minorities are very sensitive for both states, their scale is totally different. The Lithuanian minority in Poland consists of some 10,000 people inhabiting a borderland to Lithuania in north-eastern Poland,[43] constituting thus a typical pattern of boundary areas all over the world (a number of persons of Lithuanian origin also live in other towns and areas of Poland). The Polish minority in Lithuania, however, amounts to 7 % of the

[39] See on this question Ph. Kunig: *Postliminium*, (in:) R. Bernhardt (ed.), *EPIL, Instalment* IV, 1984, at 140–141, and authors quoted by him.

[40] In the opinion of eminent Belgian international lawyer, J. Salmon, the claim to invalidation of the Soviet acts of 1939–44 should lead to the restoration of independent Lithuania within its pre-war boundaries. It would mean the necessity to consider the status of Klaipeda (Memel) annexed by Lithuania in 1923 under circumstances similar to those of the action by General Żeligowski in Vilna in 1920. J. Salmon indicates also that the status of Vilna should be reviewed as it was incorporated by Lithuania on the basis of the agreement with the USSR, with full knowledge that the territory was earlier annexed by force by the USSR. Lithuania was fully aware of these problems, it emphasized therefore the role of the principle of inviolability of boundaries in her declaration of independence. Cf. J. Salmon, Pays Baltes, *24 RBDI* 267 (1991).

[41] *17 ILM* 1488 (1978).

[42] See the study by R. Jasica in this *Yearbook*, and by the present author : „The new Polish-German treaties and the changing political structure of Europe", *86 AJIL* 163 (1992).

[43] The population of the community of Punsk is of 80% Lithuanian, of Sejny – 33 %, of Shyplishky – 10 %.

entire population, inhabiting in a dense concentration Vilna and the area around the capital. Such a situation must lead to tensions, as the Polish population still preserves the Polish spirit, language and customs, and Lithuanian politicians are conscious that the circumstances of incorporation of Vilna were far from legal.

The practice shows that authors analyzing the legal situation of minorities tend to idealize the policy of their own state towards minorities while condemning the policy of other states. In order to avoid such a situation we shall base our remarks on the minority problem on the report prepared by the Danish Helsinki Committee of January 1993 entitled *The Polish and Lithuanian Minorities in Lithuania and Poland Respectively*.[44]

In the two regions near Vilna (Vilna and Soletchniki) approx 80% of the population is of Polish origin. In 1991, local councils consisting mostly of Poles were elected. The councils were dismissed on September 9, 1991 on the pretext that they supported the communist coup d'état in Moscow. The regions were governed by Lithuanian commissars not speaking Polish; all Poles employed in the local administration were dismissed and replaced by Lithuanian officials. Elections took place on November 25, 1992, and they were declared invalid due to low participation (under 50%). New elections were organized on February 14, 1993 and they were won mostly by Polish candidates. During the vote many violations of electoral bills by Lithuanian electoral offices were claimed. The State Electoral Office invalidated elections in several regions, making the activity of local councils impossible.[45]

According to the decisions of Lithuanian authorities, a new administrative structure of the country will be established, and the area of the City of Vilna should be enlarged fivefold. The major part of the land inhabited by Polish peasent population would be incorporated into the *Greater Vilna Area*. Lithuanian law allows pre-1940 land-owners to reclaim their land, however, these laws do not apply in the Vilna area. Poles will lose the possibility to regain their property. As the land in the area can be sold to private individuals, Poles fear that the result of the decisions will be the removal of the Polish population from their traditional settlements and the dispersal all over the city, resulting in them being minority in all districts and being unable to obtain their local councils. According to the Danish report, *the enormous enlargement of the city area is hardly justified by expectations of the future urban development. The deprivation of the Polish peasant's right of revindications of ancestral land seems to be totally unjustified considering the fact that the same land may be purchased*

[44] Multiplied manuscript possessed by the author.

[45] According to the declaration by Polish members of Lithuanian Parliament, published in a Polish newspaper edited in Vilna, elections in all regions were valid and Polish candidates won 28 places of 47 in the local council. The activities by Lithuanian electoral offices were called „serious violations of laws" and respective statements were passed to the public prosecutor's department. See *Nasza Gazeta* of March 9, 1993.

by private citizens. In this connection it is important to note that the Poles are said to have been removed from the privatisation commissions.

Local Polish newspapers have been closed in connection with the dismissal of the two local councils. The transmission of a Polish TV programme has been limited. However, the opening of a private Polish broadcast station marks certain progress. It is important to note that Lithuanian newspapers in Poland are sponsored by Poland.

The Polish population complains of job discrimination. Poles are often first to be dismissed in a new political and economic situation. There are no Polish high officials (to say nothing of ministers), within the local administration Poles were replaced by Lithuanians (to be frank, the same complaints are brought by the Lithuanian minority in Poland).

Discrimination of Poles is felt also because Poles are not allowed to celebrate holy services in the cathedral of Vilna, they are not allowed to use Polish personal names or to spell place names in Polish (the same conflicts take place in Poland, also with respect of the policy of the Roman catholic Church).

Finally, the number of Polish schools in Lithuania is diminishing and the level of education is much lower than in Lithuanian schools. Recent decisions by Lithuanian authorities provide that all teachers appointed by the Lithuanian state should speak Lithuanian. The implementation of these decisions can cause Polish schools in the Vilna area to be deprived of the necessary number of people (it is worth to mention that ca. 50% of the Polish population of the Vilna area do not speak Lithuanian). The Lithuanian University of Vilna does not have any department of Polish language and literature studies. Enormous troubles are met in attempting to organize a Polish university of Vilna – in fact, this university should be supported by Polish professors, and Lithuanian authorities are afraid of an increasing Polish influence upon young generations.

Lithuanian authorities claim officially that the standard granted to the Polish minority in the Vilna area is much higher than the one of the Lithuanian minority in Poland. It is difficult to accept such a view in the light of the Danish report quoted. It is important to note that the situation of Poles in the Vilna area is much better than in the other regions of Lithuania (which is often forgotten). Furthermore, it is difficult to appreciate the situation in Lithuania from the point of view of international legal standards. Article 27 of the 1966 Covenant on Civic and Political Rights dealing with the protection of minorities is formulated in very general terms, and the CSCE minority documents of Copenhagen (1990) and Geneva (1991) are drafted more *de lege ferenda* than illustrate the actual development of international law. They constitute an important stage of customary lawmaking process concerning minorities in Europe. The Polish-German Treaty on Good Neighbourliness and Friendly Cooperation of June 17, 1991 is another step in this process, being a pattern for future bilateral agreements in the field of minorities as providing a wide scope of minority rights protected by a state of residence, but also emphasizing the obligation of the minority to loyalty towards their state.

3. The problem of Polish claims against Lithuania

The problem of the responsibility of Lithuania for acts committed against Poland and Polish nationals in 1939–1940 could become the subject of future negotiations between the interested governments. However, the evaluation of positions of the parties raise difficulties. First, Lithuania claims satisfaction and apologies because of the illegal seizure of Vilna by the troops of General Żeligowski in 1920. Furthermore, Lithuania has treated the occupation of Vilna in October 1939 as legal and not as delict, so there lacks the most important premise of international responsibility, namely the illegality of the acts committed by Lithuania. In connection with the discussion in the Lithuanian Parliament on the problem of elimination of effects of illegal confiscations of property by communist authorities in 1940, the first prime minister of Lithuania after the restoration of independence, Mrs. Prunskiene, declared that there existed no possibility to grant property rights to persons living outside the territory of Lithuania. It can also be argued that the acts of confiscation book place in the territory of Lithuania, but they were acts of another state (the USSR) and Lithuania is not responsible for them. However, taking into account the thesis on the postliminium regarding the continuation of the Lithuanian statehood, Lithuania bears full responsibility for the prosecution of the Polish population in the end of 1939 and in the spring of 1940, for confiscations of Polish state property, as well as property of Polish organizations and private persons. This responsibility could be realized in two forms: as responsibility for illegal acts, i.e., violations of property rights towards aliens (if one accepts the Lithuanian thesis on the alleged legality of the annexation of Vilna in 1939), or as responsibility for illegal acts of occupying power (if one accepts the opinion mentioned above that the transfer of sovereignty took place first in 1946).

Up to now, no claims on behalf of Polish nationals who suffered damages because of the acts of Lithuania have been presented by the Polish government. The problem of prescription of claims should be therefore considered. There is no unanimity among authors as to the extinctive prescription in international law. Some authors maintain that the prescription is a general rule of law in the meaning of Article 38 of the Statute of the ICJ, while the others present a view that international law does not contain any express rule on this.[46] One can speak of a certain unanimity of opinions that the lapse of defined time bars claims, especially if the principle of equity so requires. Such a position has been confirmed recently by the ICJ in the judgment in the *Phosphate Lands in Nauru*

[46] Cf. F. Oppenheim: *International Law. A Treatise*, (eds. R.Y. Jennings, A. Watts), vol. I (Parts 2–4), London 1992, at 705–706. However, international arbitral practice brings examples accepting the principle of prescription, quoted by I. Brownlie: *Principles of Public International Law*, Oxford 1986, at 505–506.

(Preliminary Objections) case.[47] The time limit is not defined: the jurisprudence indicated the period of 20 years, but the 1972 Convention on International Liability for Damage caused by Space Objects[48] limits the time of presenting claims to 1 year from the occurance of damage. Some authors say that because of an informal character of international law no rigid terms for extinctive prescription can be precise. We agree with the view that the only premise of prescription is estoppel, i.e., when taking into account all circumstances of the case one can state that a state has renounced all claims towards another one. It must be emphasized that the extinctive prescription rule cannot be applied regarding violations of fundamental norms of international law — the acts of illegal seizure and annexation of territory of another state certainly belong to such norms.

Finally, we would like to refer to a rule established by the *Cayuga Indians Arbitration* (1926).[49] According to the award, the lapse of time cannot bar claims if during the time passed one of the parties involved in a dispute was deprived of a *jus standi*. The rule has been confirmed recently in French-German relations. France presented her claims immediately after World War II.[50] In accordance with the London Convention on German External Debt of February 27, 1953,[51] a vindication of claims suspended until a final peace settlement. During ther negotiation on the unification of Germany France presented her claims to Germany again; the unified FRG started negotiations.[52] As Lithuania did not exist as a sovereign state in the period of 1940–1991, Poland could not present her claims. However, official statements by the Polish government seem to renounce any claims against Lithuania because of violations of international law in 1939–40.

In order to present a complicated situation of property rights in Lithuania, we would like to refer to recent developments. In 1992, the American Embassy bought a house which belonged to the Polish scouting organization before 1939 and was subsequently confiscated by Lithuanian authorities contrary to international law. Though the US state agencies are fully conscious of acting in bad faith, they are not willing to recognize the right of Polish minority organizations to the building. The situation shows a certain double standard adopted by American authorities with respect to protection of property rights (which are not fully recognized if rights of American nationals are not involved).

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[47] *ICJ Rep.* 1992, at 253–254: *The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of the claimant State may render an application inadmissible. it note, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.*

[48] *66 AJIL* 702 (1972).

[49] *6 RIAA* 173.

[50] Cf. *The Reparations Agreement of Paris of January 14,* 1946, *40 AJIL Suppl.* 117 (1946).

[51] *333 UNTS* 3.

[52] *95 RGDIP* 441–2 (1991).

4. Problems of nationality and citizenship

The problem of potential damage claims by Poland is strictly connected with the regulation of nationality and citizenship in Polish law (according to customary international law, Poland can claim damages exclusively on behalf of her nationals, taking into account the principle of nationality of claims).

The Polish Nationality Act of January 20, 1920 regulated the acquisition and loss of nationality.[53] The Act did not contain any rule concerning nationality by an acquisition of territory. According to international law of the early 20th century the population of a territory transferred automatically acquired the nationality of a successor state. Such a solution was generally accepted in international practice including the Polish one after 1920. Polish nationality legislation after the annexation by Poland of the part of Czechoslovak Silesia and Javorina Area in 1938 was based on this principle. In a similar way the problem of Polish nationality in the area of Vilna was regulated. The ordonance of the Council of Ministers (Government) of August 7, 1922 stated that all inhabitants of the area of Vilna pertinent to this territory on the day of its incorporation by Poland automatically acquired Polish nationality. Polish law of April 6, 1922 on the incorporation of Vilna extended binding force of the 1920 Polish Nationality Act to the newly incorporated area.

After the occupation of the Polish eastern territories by the USSR in September 1939 the Soviet authorities conferred the Soviet nationality upon inhabitants of occupied territories. The decrees of November 29, 1939 did not cover the inhabitants of Vilna ceded to Lithuania. On her side, Lithuanian Parliament passed on November 30, 1939 an act on the acquisition of Lithuanian nationality by the Polish population of Vilna. Conditions of the acquisition of nationality were restrictive, so that the majority of the Polish population was treated as aliens and deprived of any rights, as well as of the diplomatic protection by the Polish government in exile (the reason of such a solution is clear: the occupation of Vilna was illegal and was not recognized by the international community). Not discussing here the problem of manifest illegality of both Soviet and Lithuanian nationality legislation, we must state that from the point of view of Polish law the population in the territories occupied by the USSR and Lithuania did not lose Polish nationality.

After the annexation of the Baltic States by the USSR in 1940 the situation of the population of Polish origin in these territories did not change. The thesis by the USSR at that time was that the Polish State ceased to exist because of the subjugation by the USSR and Nazi Germany, so that Polish nationals in the Vilna area were treated as stateless (the remaining ones acquired Soviet nationality on the basis of the decrees mentioned above). The situation altered first after the conclusion of the Sikorski-Maysky Treaty on July 30, 1941. However, future developments made agreement in this field impossible.

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[53] *Dz. U. RP* [Official Journal] 1920, No. 7, Item 44, with later amendments.

Newly established Polish governments concluded after World War II a series of agreements on the exchange and transfer of population with the Soviet republics of Byelorus, Ukraine (both on September 9, 1944) and Lithuania (on September 22, 1944). According to these agreements, persons of Polish origin were subject to transfer to Poland. The agreements did not deal with the problem of nationality – curiously, the USSR treated persons to be resettled as Polish nationals, notwithstanding the former granting of the Soviet nationality. Another treaty was concluded between Poland and the USSR on July 6, 1945. According to it, population of Polish origin possessing on September 17, 1939 (i.e., the day of the Soviet invasion against Poland) Polish nationality was entitled to repatriation to Poland, the condition thereto was, however, renunciation of the Soviet nationality granted by the decrees of 1939. The conclusion of the treaty means that Poland recognized the automatic change of nationality at the moment of the annexation of the Polish eastern territories by the USSR, even if formally the cession of these territories was effected according to the treaty of August 16, 1945. The solution was confirmed by the subsequent judicial practice of Polish courts (which was sharply criticized by the legal writing) and by the Polish Nationality Act of January 8, 1951.[54] According to its wording, persons possessing Polish nationality on August 31, 1939 who were living abroad and acquired foreign nationality in connection with territorial changes consequently lost Polish nationality. This practice was confirmed by a treaty on March 25, 1957 on the repatriation of persons of Polish origin from the USSR. The personal scope of validity of this treaty was limited to persons possessing Polish nationality before September 17, 1939 who subsequently became Soviet nationals. The renunciation of the Soviet nationality and acquisition of the Polish one were indispensable conditions for repatriation.

According to these remarks, the circle of persons entitled to Poland's protection against respect of damages suffered in connection with illegal acts of Lithuania is limited. It does not include members of the Polish minority in Lithuania as these persons lost Polish nationality according to the Polish Nationality Act of 1951. Claims can be brought on behalf of persons repatriated after the World War II. The Polish government is, however, not reluctant to intervene with the Lithuanian authorities.

5. Postscript

Poiish-Lithuanian relations are burdened by history. Nationalism on both sides makes the problem of reconciliation more difficult. We are far from finding Lithuanian authorities exclusively guilty of an aggravation of mutual relations. We must, however, objectively state that the fears against Polish domination that manifest themselves in the policy towards the Polish minority

[54] *Dz. U.* [Officiai Journal] 1951, No. 4, Item 35.

in Lithuania and multiplied by the consciousness of the illegality of annexation of Vilna are the main factors influencing these relations. As we have just indicated, the Hitler-Stalin pact created in fact the only title to Vilna, and Lithuania paid a terrific price for obtaining it. Lithuania's recovery after Soviet domination and joining the democratic community of European states (accepted as member of the Council of Europe on May 14, 1993) will certainly bring changes in her attitude towards the nearest neighbour. The developments in the field of minority protection will be a touchstone of democracy.

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The Position of the Court of Justice of the European Communities in its Institutional System

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1. General remarks

The Court of Justice is one of the four institutions of the European Communities (Art. 4 EEC–Treaty). According to Article 164 EEC–Treaty it „shall ensure that in the interpretation and application of this Treaty the law is observed".[1] The other institutions, this is the European Parliament, Council and Commission have to act politically in order to further the objectifs of the community. The Court watches that this is done in the respects of the rules of law, this means of the Treaties as well as of the general principles of law which the Court finds itself in the context of the Treaties and in the common ground of the legal orders of the member States.

The Court is, therefore, not an international Court in the traditional sense as the Courts at the Hague or Strasbourg. It has a function in a constitutional system disposing of an own legal order with rights and duties of the member States as well as the citizens.

On the other hand, however, the Court is not like a national court even if its function is comparable to it under some aspects. The Community is not a state and also not a federal state but a special system in which the Member States have a dominant role. The composition of the Court – 13 judges nominated by the 12 Member States and 6 Avocates–General also coming from different Member States – reflects its special character even if these members of the Court do not represent the Member States and their interests.[2]

The Court and its members are nominated by the Member States, but they are independent and decide only according to the rules of law. Since the legal textes of the Community are incomplete and insufficent, the Court must find

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[1] See for the Court in general R. Lecourt: *L'Europe des Juges*, Bruxelles 1976; H. Kutscher: *Über den Gerichtshof der Europäischen Gemeinschaften*, Europarecht (EuR) 1981, p. 392; N. Brown/F. Jacobs: *The Court of Justice of the European Communities*, 3rd ed., London 1989; U. Klinke: *Der Gerichtshof der Europäischen Gemeinschaften*, Baden–Baden 1989.

[2] U. Everling: „Der Gerichtshof als Entscheidungsinstanz", (in:) J. Schwarze (Hrsg.), *Der Gerichtshof als Verfassungsgericht und Entscheidungsinstanz*, Baden–Baden 1983, p. 137, also: „The court of justice as a decisionmaking authority", 82 *MichLRev* 1984, p. 1294.

itself these rules on the base of the legal orders of the member States. They contribute to the forming of the Community law by mediation of the members of the Court representing their different legal orders and traditions and introducing them in the discussions inside the Court during the decision-making process.

The Court's activity concerns two different kinds of procedures.[3] First, it decides direct actions, that is to say actions which begin directly in the Court of Justice. The most important action in this respect is the action for annulment under Article 173 EEC-Treaty with which the applicant asserts the illegality of an act of one of the institutions of the Community.[4] Further direct actions are the action for a failure to act (Art. 175 EEC-Treaty), the infringement actions, which means the actions against Member States for failure to fulfil the obligations of the Treaty (Art. 169, 170 EEC-Treaty)[5] and the actions for damages (Art. 178 EEC-Treaty).[6]

The second kind of procedure is the preliminary ruling by a request from a national court according to Art. 177 EEC-Treaty.[7] If such a court considers a decision on the interpretation of the Treaty or on the validity and interpretation of an act of one of the Community institutions to be necessary in order to decide a case pending before it, the court is entitled to ask the Court of Justice to give a ruling thereon. National courts, against whose decisions there is no judicial remedy in the concrete case pending before them, are obliged to bring the matter before the Court of Justice. The Court gives ruling only on an abstract point of Community law; the application of this law to the case in question is incumbent on the national court.

It is correct to describe the Court's function as being a constitutional court as well as an instance of judicial protection.[8] With respect to its first function

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[3] See the explanations in the Commentaries to the EEC-Treaty of H. v.d. Groeben/J. Thiesing/C. D. Ehlermann (Hrsg.), 4. Ed., Baden-Baden 1991, and E. Grabitz (Hrsg.), München 1987 ff. Furthermore G. Bebr: *Development of Judicial Control of the European Communities*, The Hague 1981; K. Lasok: *The European Court of Justice – Practice and Procedure*, London 1984; H. Schermers/D. Walbroel: *Judicial Protection in the European Communities*, 5th Ed., Deventer 1992.

[4] H.W. Daig: *Nichtigkeits- und Untätigkeitsklagen im Recht der Europäischen Gemeinschaften*, Baden-Baden 1985.

[5] B. Ortlepp: *Das Vertragsverletzungsverfahren ah Instrument der Sicherung der Legalität in der Europäischen Gemeinschaft*, Baden-Baden 1987; H. Audretsch: *Supervision in European Community Law*, 2nd Ed., Amsterdam 1986.

[6] H. Sehermers/T. Heukels/P. Mead (Eds.), *Non-contractual Liability of the European Communities*, Dordrecht 1988; N. Green/A. Barav: „Damages in the national courts for breach of community law", *Yearbook EurL.* 1986, (1987) Oxford, p. 55; M. Herdegen: *Die Haftung der Europäischen Wirtschaftsgemeinschaft für fehlerhafte Rechtsetzungsakte*, Berlin 1983.

[7] R.M. Chevallier/D. Maidani: *Guide pratique Article 177 CEE*, Luxembourg 1981; M. Dauses: *Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag*, Luxembourg 1986; U. Everling: *Das Vorabentscheidungsverfahren vor dem Gerichtshof der europäischen Gemeinschaften*, Baden-Baden 1987; H. Schermers/C. Timmermans (eds.), *Article 177: Experiences and problems*, The Hague 1987.

[8] See J. Schwarze (Hrsg.): supra note 2.

the Court decides the relations and disputes either between the institutions inter se or between the institutions and the Member States. As far as its second function is concerned, the Court guarantees the protection of rights against any illegal interference of the Community institutions. In this respect any citizen or undertaking as well as the Member States might be concerned and thus be entitled to bring an action before the Court. The two functions of the Court overlap and especially the system of judicial protection entails significant constitutional consequences.

2. The European Court of Justice as a constitutional court

Firstly, the Court acts as a constitutional court in litigations between the institutions under the procedure for annulment according to Article 173 EEC–Treaty. Many times the litigation concerns a material dispute about the content or subject of an act issued by the defendant. This is for example the case when the Commission brings an action against the Council stating that the Council has chosen a wrong legal base which contains stricter procedural requirements, asks especially unanimous vote instead of majority vote.[9] But often also material questions, like the adoption of the budget, are at stake.[10]

Many times, behind the action for annulment, there is a hidden dispute about the competence of the institutions. This became obvious in the actions of the European Parliament which the Court in the beginning rejected as inadmissible. Subsequently, the Court declared such actions to be admissible, arguing that according to the rule of law the Parliament must by able to defend its prerogatives against violations by activities of other institutions.[11]

Secondly, the Court decides litigations between the Community institutions and the Member States. Also in these disputes to some extent real actions for annulment are concerned. This is for example the case when a Member State which has been outvoted in the decision-making-process brings an action against the act before the Court or when a Member State challenges the granting of payments out of one of the structural funds.[12] These actions also often deal with the competence and the obligations of the participating institutions and the Member States.

But this is first of all the subject matter of the numerous actions brought before the Court of Justice by the Commission for the failure of a Member State to fulfil the obligations of the Treaty.[13] Many times these litigations

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[9] See for instance Cases 45/86, 51/87 and C–300/89, *Commission v. Council, ECR* 1987, 1493, *ECR* 1988, 5459 and *ECR* 1991, 1 2869.

[10] Case 34/86, *Council v. Rarllament, ECR* 1986, 2155.

[11] See at first Case 302/87, *Parliament v. Council, ECR* 1988, 5615, and afterwards Case C 70/88, *ECR* 1990, I 2041.

[12] See for instance Cases 68/86 and 131/86, *Great Britain v. Council, ECR* 1988, 855, 905; Cases C–303/88, C–305/89 and C–261/89, *Italy v. Commission, ECR* 1991, 1 1470, 1635, 4437; Case 342/89, *Germany v. Commission, ECR* 1991, 1 5031.

[13] See B. Or11e pp; supra note 5.

concern the competence of the Community and the member States and their mutual rights and duties. But mostly they concern the compatibility of national law with the Community legal order. Often the infringement of the obligations deriving from the Treaty is manifest, i.e. if directives are not transposed into national law within the time limit prescribed by the directive, but in other cases the interpretations of the Treaty or the acts of the institutions presents difficult questions.[14]

The procedure of the preliminary ruling fulfils a similar function. If one of the parties in a litigation before a national court asserts that the national law which is to apply in the case in question is incompatible with Community law, the court has to interpret it. A preliminary ruling of the Court of Justice becomes a regular necessity. The Court directly only rules on Community law, but at the same time it indirectly decides on the application of national law. Due to the supremacy of Community law the national court is no longer entitled to apply the national law if it is incompatible with the Community law as interpreted by the Court.[15]

All this proves that in the constitutional system of the Community with its separation of powers, the Court's role is to act as an arbitrator and to fulfil a peace-making function.

3. The Court as a system of judicial protection

The EEC-Treaty disposes of a comprehensive system of judicial protection. This system concerns in the first place the relation between the institutions. They are entitled to bring the action for annulment under Art. 173 (1) EEC-Treaty at any time. For the European Parliament such a right has not been provided for in this article. But after a first, negative decision, the Court has subsequently developed the right of the Parliament to go to the Court in so far as it asserts to be infringed in its own prerogatives, as already mentioned above.[16]

Judicial protection by the Court is also guaranteed with regard to the Member States. As it has been already shown, they can protect themselves against an interference of Community law by using the action for annulment under Article 173 EEC-Treaty or the action for a failure to act under Article 175 EEC-Treaty.

But above all, the judicial protection belongs to citizens and undertakings which are violated in their rights by an act of one of the Community institutions. If a decision is addressed to a natural or a legal person, this person is entitled to bring an action for annulment before the Court under Article 173 (2)

[14] Examples Case C-377/90, *Commission v. Belge, ECR* 1992, 1 1233 on the one hand and Case 178/84, *Commission v. Germany, ECR* 1987, 1227 on the other.

[15] U. Everling: supra note 7, p. 18.

[16] Supra note 11.

EEC—Treaty. This is especially the case when decisions on the application of the rules of competition (Articles 85, 86 EEC—Treaty) are at stake.

According to Article 173 (2) EEC—Treaty a natural or legal person can bring an action against decisions, „which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". This clause concerns firstly the actions of concurrents against decisions favouring, in their opinions, unlegally other undertakings. The Court has developed a relatively comprehensive jurisprudence in this respects.[17] But there is still no consensus if a more farreaching possibility to bring an action before the Court should be introduced.[18]

Even more disputed is the second problem dealt with in Article 173 (2) EEC—Treaty. It is questionned whether or not particulars are entitled to go to the Court against regulations issued by the institutions of the Community.[19] According to Article 189 EEC—Treaty regulations are legal acts which have general application. In this respect they are comparable to national laws although they are not adopted by a Parliament. In most of the member States a natural or legal person cannot challenge a national law before the courts. This follows from the principle of separation of powers, but also from practical, reasons, since the violation of rights of citizens normally occurs not by the law itself but by its execution by administrative authorities. Under German Law this possibility is only extraordinarily granted before the Bundesverfassungsgericht (Federal Constitutional Court) in so far as infringements of fundamental rights are at stake and if all national remedies are exhausted.

For the same reason the Court has developed relatively narrow criteria for a direct action. A direct and individual concern of a citizen or an undertaking is only accepted by the Court, if they can prove that they are affected by the regulation by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and that they are by virtue of these factors individually distinguished from all other persons.[20] This might be the case if the category of persons addressed by the regulation consists of a small and identifiable number of persons, but also in the case of applicants and other participants in procedures.

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[17] See Case 169/84, *Cofaz v. Commission, ECR* 1986, 391; Case C—313/90, *CIRFS v. Commission, Judgement of March 23, 1993, not yet published.*

[18] *See T. von Danwitz: Die Garantie effektiven Rechtsschutzes im Recht der Europäischen Gemeinschaften, NJW* 1993, p. 1108; G. Nicolaysen: *Ein neuer Weg der Konkurrentenklage, EuR* 1986, p. 261; C. Harding: „The Review of EEC regulations and decisions", *CMLR* 1982, p. 311.

[19] T. von Danwitz and C. Harding (note 18); J. Schwarze: *Rechtsschutz Privater gegenüber normativen Rechtsakten im Recht der EG*, Festschrift für Schlochauer, Berlin 1981, p. 927; H. Rasmussen: „Why is article 173 interpreted against private plaintiffs?", *ELRev* 1980, p. 112; U. Everling: „Justiz im Europa von morgen", *DtRichtZ* 1993, p. 5, 9.

[20] Case 138/79, *Roquette v. Commission, ECR* 1980, 3333; Case 264/82, *Timex v. Commission, ECR* 1985, 849; Case C—358/89, *Extramet v. Commission, ECR* 1991, I 2051.

The other citizens and undertaking which do not fulfil the criteria mentioned above enjoy judicial protection, too, as most of the regulations are executed by national authorities.[21] So it is for the national custom authorities to apply the common customs tariff. A decision of the national customs authorities is subject to judicial review and by bringing an action before the national courts the applicants can also object to the interpretation or validity of Community law. At the latest the court against from which there is no appeal is then obliged to make a reference for a preliminary ruling of the Court of Justice.[22]

A special importance with regard to the judicial protection must be dedicated to fundamental rights and rights similar to them. These rights have been developed by the Court of Justice in the interest of the Community citizens and they are constantly deepened and improved.[23] The protection of the property, the right to a hearing, the protection of legitimate expectations and the freedom of information may serve as examples. The jurisprudence on the protection of fundamental rights shows good promises in respect of the establishment of a system of values and is a prerequisite for a proper Community identity.

But a further aspect should be emphasized. The Court has jurisdiction to order the Community to compensate damages suffered by citizens whose rights have been violated by an act of the Community institutions. With regard to normative acts, however, the Community does not incur liability unless a sufficiently serious breach of a superior rule of law of the protection of the individual has occurred.[24] Recently, the Court has accepted the obligations deriving from the Treaty, in particular to transpose directives into national law within the prescribed periods.[25] With its jurisprudence, the Court of Justice has strengthened the judicial protection of the Community citizen.

4. The role of the Court of Justice in relation to the Community Legislator

In proceedings before the Court of Justice, the litigation very often concerns the question whether an act which has been adopted in the prescribed procedure by one of the political institutions, this is the Parliament, the Council or the Commission, is compatible with Community law. The Court, by controlling and correcting the responsible institutions, gets into such strained relations

[21] J. Schwarze: *Europäisches Verwaltungsrecht*, Baden–Baden 1988, p. 33.

[22] Supra note 15.

[23] H.W. Rengelling: *Grundrechtsschutz in der Europäischen Gemeinschaft*, München 1993; A. Clapham: „A Human Rights Policy for the European Community", *Yearbook for Eur. Law* 1990, Oxford 1991, p. 309.

[24] Case 20/88, *Roquette v. Commission, ECR* 1989, 1553; Case C–152/88, *Sofrimport v. Commission, ECR* 1990, I 2477; Case C–104/89 and 37/90, *Mulder v. Conseil et Commission, ECR* 1992, 3126. See E. Grabitz: *Zur Haftung der Europäischen Gemeinschaften für normatives Unrecht*, Festschrift für Kutscher, Baden–Baden 1981, p. 215.

[23] Cases 6/90 and 9/90, *Francovich v. Haly, ECR* 1991, 1 5357.

with the Community legislator as they are already known between the constitutional courts of the Member States and the national legislators. As this controlling function of the Court is justified by its role to assure the supremacy of the rule of law it cannot be regarded – and this is the same for the Community as for national states – neither as a violation of the doctrine of separation of powers nor of the principle of democracy.

But it is not necessarily evident what constitutes the law – in the Community even less than in the Member States. The Treaties are full of gaps, imperfect and rudimentary. To guarantee the proper functioning of the Community they constantly need to be interpreted, completed and devoloped. The law is adopted by the Community institutions in difficult procedures in which disputes most of the time are more concealed than solved. It is therefore the Court's charge to precise these acts, to complete them and very often to make them function.[26]

It is for this reason that judge made law is a necessary element in the Community and that is even more necessary that in the Member States. The problematic nature of judicial law–making in a modern constitutional state is well known – its legitimation, formation and limits are discussed. In the Community the discussion about all these questions is even more urgent. In contrast to the member States the Community does not dispose of a common legal tradition, a common legal consciousness and a complete legal system which is based on a common economic and social foundation. Pursuing the objectives of the Community in their interpretation given by the Court and comparing the different legal orders of the member States in an evaluating approach, the Court has to develop common Community principles.[27]

But limits are necessary and in a system which is governed by the separation of powers the Court is not allowed to take the place of the political organs. On the other hand it would also be wrong to set too sharp limits to the Court's activity. In its interpretation of the Treaty, the Court must be entitled to act as a constitutional court and to contribute to the realization of the ideas, spirit and the integrative goals of the Community as they are expressed in the Treaty.

After all, the crucial point is that the Court of Justice is aware of its limits and exercises judicial self–restraint in so far as there is a political discretion of the legislating institutions. In this respect one can observe that the Court of Justice indeed has largely abstained from a political evaluation.

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[26] J. Schwarze: *Die Befugnis zur Abstraktion im europäischen Gemeinschaftsrecht*, Baden–Baden 1976; U. Everling: *Richterrechl in der Europäischen Gemeinschaft*, Vortr ge aus dem Europa–Institut 1988, Nr. 151, Saarbrückken, ferner 50 *RabelsZ* 1986, p. 163; T. Stein: Richterrecht wie anderswo auch? Der Gerichtshof der Europäischen Gemeinschaften als "Integrationsmotor", Festschrift der Jur. Fakultät, Heidelberg 1986, p. 619; H. Rasmussen: On *Law and Policy in the Court of Justice*, Dordrecht 1986; D. Berlin: "Interactions between the Lawmaker and the Judiciary within the EC", *Legal Issues of Eur. Lawy* 1992/2, p. 17.

[27] See to this problem and to the following U. Everling (note 26), 50 *RabelsZ* 1986, p. 163, with references.

5. The role of the Court of Justice in relation to the Member States

The judicial law-making mentioned above, is especially problematic with regard to the relation of the Community to the member States. Judge made law either by an extensive interpretation or by a completion of the Treaty might lead to an extension of the Community competence and thus have a similar effect as an additional transfer of sovereign rights of the Member States to the Community.

But as a rule, the possibility in the Member States to transfer sovereignty requires the application of a special procedure which is provided for in the constitution.[28] In the Federal Republic of Germany according to Article 24, in the future according to Article 23 of the Fundamental Law, a law is necessary. Thus the judicial law-making does not only create strained relations of the Court of Justice and the Community legislator, but also between the Court and the Member States and their Parliaments. This tension does not lead inevitably to the prohibition and inadmissibility of any judge made law. As the Bundesverfassungsgericht has stated, in the occidental tradition this is the function of any judicial power – although within certain limits.[29]

Where these limits should be set, cannot be determined in the abstract – even not with regard to the Member States. This question has been for example discussed on the occasion of the judgement concerning the obligation of the Member States to pay damages, which has been mentioned earlier[30]. At any rate one has to assume that a competence which does no longer belong, as the Bundesverfassungsgericht had put it, to the "programme of integration" of the Treaties,[31] as ratified and approved by the Parliaments of the Member States, cannot be created by judge made law.

But even with this approach, the discussion is only transferred to a level where several opinions are possible. The difficulty consists in the fact that the Court itself decides on the interpretation of the competences of the Community. If a Member State, especially its Constitutional Court, is of the opinion that the Court has adjusted ultra vires a competence to the Community and rejects to apply this judgement, it is acting in the view of the Community and the other Member States in breach of the Community law as defined by the Court. In this situation, a political conflict is unevitable which may give cause to a crisis of the integration.

It is selfunderstanding that a Member State may not provoke such a crisis on account of single judgements which may be or may not be regarded as an overstepping of the borderline of the competences of the Community. Even on

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[28] See the comprehensive survey of the law of all Member Slates by N. Lorenz: *Die Übertragung von Hoheitsrechten auf die Europäischen Gemeinschaften,* Frankfurt 1990.

[29] BVerfGE 75, 223, 240.

[30] Supra note 25.

[31] BVerfGE 58, 1, 35; 68, 1, 98.

the base of the jurisprudence of the German Constitutional Court an ultra vires activity may only be assumed in the event of a apparent, grave and permanent interference with substantial rights of the Member States which are not transferred to the Community.[32] After all, also in this respect it is important that the Court is aware of its own limits and the limits of the Community and exercises judicial self-restraint where it is necessary.

An appreciation of the jurisprudence reveals that the Court has exercised more judicial self-restraint in its relation to the Community legislator than in its relation to the Member States.[33] This can be explained by the fact that in the Court's view its role as a Community institution requires the promotion and the strengthening of Community objectives. During the years in which the Community was built up, the Court of Justice gained merits as being the motor of integration. It was in the eighties when the Court was beginning to show care to find the right way in the brinkmanship between law and politics. In this context, the provisions of the Maastricht Treaty and especially the principle of susidiarity are of a special importance.

6. The function of the Court of Justice in the European Union

The Maastricht Treaty on the European Union is ambivalent and a mirror of the different conceptions of the Member States. On the one hand, especially with the expansion of the Economic and Monetary Union, with extensions of competence, improvements with regard to the institutional system and changes within the legislative procedure, the Treaty strengthens the Community and its supranational and unifying elements. On the other hand it emphasizes the federational elements of the Community. Instead of changing the Community into a Union, the Treaty puts the Union as a cooperation between the Member States on the existing Community.[34]

The institutionalization of the European Council, the body composed of the heads of States and Governments, as the leading organ changes the view of the "telos" which is the basis of the Court's teleological interpretation. The emphasis put on the identity of the member States (Treaty on the European Union Art. F), the reservations concerning the cooperating policies on Foreign and Security Policy as well as on Justice and Home Affairs and the formulation of new policies (Art. 128 *et seq.* Treaty on the European Union), which partially aim at a restriction of existing Community competences developed by the Court,

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[32] See E. Klein/M. Beckmann: „Neuere Entwicklungen des Rechts der Europäischen Gemeinschaften", 1990 *Die Öffentliche Verwaltung (DÖV)*, 179, 180; U. Everling: „Brauchen wir *Solange ///?*", *Zu den Forderungen nach Revision der Rechtsprechung des Bundesverfassungsgerichts, EuR* 1990, 195, 224.

[33] U. Everling: supra note 26, 50 *RabelsZ* 1986, pp. 163, 229.

[34] D. Curtin: „The constitutional structure of the Union: A Europe of bits and pieces", 30 *CMLR* 1993, 17; U. Everling: „Reflections on the structure of the European Union", 29 *CMLR* 1992, 1053.

all go in the same direction. This will be of special significance for the Court's future practice..

The principle of subsidiarity has to be seen in the same context.[35] The Member States in their role as the contracting parties and bearers of the Community with this principle confirm their view of a Community and of a Union which is organized, even if it is not and may not be a Federal State, according to the principle of federalism instead of following the idea of centralisation. The consequence which the Court of Justice has to draw from this understanding is that with regard to the actual state of integration its task no longer consists mainly in the protection and strengthening of the Community and its institutions but in the appropriate distribution of competence between the different levels of the decision-making process.

At the moment there is an intense discussion about the justiciability of the principle of subsidiarity. With regard to the wide margin of discretion granted to the Community instititions such a judicial control is doubtful. Only a manifest disregard of this principle might be subject to judicial review. Apart from that the respect of this principle must be primarily realized in an inter-institutional debate between the Community institutions.[36]

The very significance of the subsidiarity principle for the Court of Justice lies in the function described above, namely to be a signal for the objectives of the future Union and the Community. Up to now the Court of Justice understood its role in the first place as being the motor of integration and in strengthening the Community. The Treaty on the European Union and the principle of subsidiarity indicate that with the expansion of the Community's activity to all political fields it becomes necessary to achieve an appropriate distribution of tasks and competences between the Community and the Member States.

7. The Function of the Court of Justice with regard to Treaties with third States

Concerning treaties with third states, the position of the Court of Justice is of a particular importance. With the conclusion of the Treaty on the European Economic Area and the trade or association agreements with the East-European and Baltic states which are already or will be concluded in the future, this importance will even increase.

From the very beginning the Court's view of such treaties is that with the conclusion they become an integral part of Community law and thus can be interpreted by the Court of Justice. It already exists a comprehensive jurisprudence for instance concerning the questions of an effect of the GATT within

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[35] Vgl. Stewing: *Subsidiarität und Föderalismus in der Europäischen Union*, Köln 1992; Heintzen: „Subsidiaritätsprinzip und Europäische Gemeinschaft", *Juristenzeitung* 1991, 317, A.G. Toth: „The principle of subsidiarity in the Maastricht-Treaty", 29 *CMLR* 1992, 1079.

[36] See G. Konow: „Zum Subsidiaritätsprinzip des Vertrages von Maastricht", *DÖV* 1993, 405.

the Community legal order, concerning the application of provisions deriving from association agreements, concerning the rights of Turkish workers based on the association agreement between the EEC and Turkey and concerning public contracts within the scope of the Lomé agreement with African and Caribean States.[37]

The judgements of the Court, however, only have an effect within the Community. It is not guaranteed that the courts of the contracting partners decide in the same way. In the case that the latter deviate from the Court's view, an international litigation is provoked which then has to be settled in the political bodies established by the agreement or by diplomatic channels. The Court, however, has no jurisdiction with regard to such conflicts.

In its opinion 1/91 concerning the Agreement on the European Economic Area the Court has declared a provision to be incompatible with the Treaty according to which judges from third states were entitled to participate in the interpretation of the agreement.[38] In the Court's view this system was a threat to the independence of the Court of Justice and impaired its position in the institutional system of the Community. This has to be taken in account in future negotiations.

8. Conclusions

This survey has shown the central position of the Court of Justice in the system of the Community. The Court has managed to transform the imperfect rules of the Treaties into a structured legal order which deserves this name. Furthermore, it has developed and realized general principles of law.

These principles are the base of a constitutional system ensuring the functioning of the institutional procedures and regulating the correlations between and the prerogatives respectives of the Community's institutions and the Member States. They are also the common ground for the application of foundamental rights and for the legal protection of citizens and undertakings in the framework of Community Law. It is, therefore, above all due to the Court's activity that the Community can be called a Community based on the rule of law. The Community is not able to apply force in order to realize its objectives. Its only means is the application of the rule of law and the Court of Justice has made a decisive contribution in this respect.

But with the increasing number of proceedings it gets extremely difficult for the Court to fulfil this task. Therefore it is inevitable that the organisation of the European jurisdiction is improved and expanded. A first step in this

[37] See as examples *ECJ Case* 266/81, *SIOT* v. *Haly*, *ECR* 1983, 782; Case 104/81, *HZA Mainz* v. *Kupferberg*, *ECR* 1982, 3641; Case 12/86; *Demirel* v. *Schwäbisch–Gmünd*, *ECR* 1987, 3719.

[38] Opinion 1/91, *ECR* 1991, 1 6079.

direction is the establishment, on the base of Art. 168a EEC-Treaty, of the Court of First Instance, against whose judgements an appeal on points of law to the Court of Justice is admissible.[39] The competence of this Court of First Instance has to be enlarged step by step so that it will become competent for all actions concerning the usual activities of the Community and its consequences for Member States, undertakings and citizens.[40]

In the future, the Court of Justice should decide cases of general, especially constitutional importance and remedies against judgements of the Court of First Instance admitted because of their general interest. Only if the Court of Justice will be decharged in this way it will be guaranteed on the long run that it is able to fulfil its principal task which is to ensure that in the interpretation and application of the Treaty the law is respected and enforced.

[39] Council Decision 88/591 of 24 October 1988 establishing the Court of First Instance, *OJ* 1988 L 319, p. 1; corrected version in *OJ* 1989, C 215, p. 1. See H. Jung: *Das Gericht erster Instanz*, Baden-Baden 1991; K. Lenaerts: „Das Gericht erster Instanz der Europäischen Gemeinschaften", *EuR* 1990, 228; H. Schermers: „The European Court of First Instance", 25 *CMLR* 1988, 541.

[40] See H. Jung: „Das Gericht erster Instanz der Europäischen Gemeinschaften – Praktische Erfahrungen und zukünftige Entwicklung", *EuR* 1992, 246; T. Koopmans: „The future of the Court of Justice of the European Communities", *Yearbook of Eur. Law* 1991, Oxford 1992, p. 15; J.-P. Jacque/J. Weiler: „Sur la voie de PUnion européenne, une nouvelle architecture judiciaire", (1990) *Rev.trim.dr.eur.*, 441; U. Everling: supra note 19, p. 14.

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Equitable Principles of the Delimitation of Continental Shelf

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1. Equitable principles as basis of settlement of international disputes

In 1967 dispute between Federal Republic of Germany versus Danemark and netherlands concerning continental shelf of Nothern Sea the judgment should be awarded on the basis of principles and rules of general international law, but neither the principle of a median line nor principle of equidistance were treated as principles characterizing general rules, although they were provided by the convention of Geneva on continental shelf of 1958. It meant that the equitable principles which were the principles of median line and equidistance line were not treated as norms of general international law. They were treated as external to international law of majority of States and especially for the States not bound by the. In the dispute between Libya and Tunisia concerning continental shelf in 1978 both States which are were not bound by Geneva Convention on Continental Shelf pointed out as basis for the judgment: 1/ equitable principles, 2/ circumstances characteristic for the region, 3/ contemporary trends characteristic for the Third Conference of the Law of the Sea. It can be pointed out that the States in the dispute agreed that the judgment should be ordered, inter alia, on the basis of the equitable principles which reflect opinio iuris. It evidenced the process of internationalisation of the equitable principles by international law.[1]

A different situation has characterized a dispute between Libya and Malta concerning delimitation of the continental shelf. In compromise agreement, the question posed was of what principles and juridical rules of international law are regulating the delimitation of the continental shelf of both States. However, in the memorial of Libya it was pointed out that the delimitation should be achieved „on the basis of the agreement being in accord with equitable principles and taking into consideration all circumstances aimed at achieving of the

[1] In compromise concluded by Republic of Tunisia and Arab Libyan Jamahiriya from 10 June 1977 it was agreed that Court should consider „des principles équitables et de circonstances pertinentes propres à la région, ainsi que des tendances récentes admises à la troisième Conférence sur le droit de la mer". *ICJ*. Pleadings, Oral Arguments, Documents. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), vol. I, p. 9.

equitable result".[2] In the counter-memorial of Malta there was demand for a court ruling on the principles and rules of international law applying to the delimitation of the area of continental shelf belonging to Malta and Libya, in which case the delimitation should be achieved on the basis of international law aiming at the achievement of the equitable result.[3] The consequence of that is that in the memorial of Libya the equitable principles were treated as becoming the principles of international law with the moment of the conclusion of the international agreement on the delimitation but in the counter-memorial of Malta the aforementioned principles were treated as belonging to international law and as such enabling the achievement of the „equitable result". It is necessary to mention that the statement of Malta in the greatest form is consistent with the principles of the convention on the law of the sea of 1982. The article 83 § 1 stated: „The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".[4]

It must be stressed out that between 1969 and 1985 the situation changed completely. The equitable principles, which only two were contained in the Geneva convention on continental shelf of 1958, futher are not external to international law and were internalised by international law, developing corpus iuris gentium.

The described point of view however is not unique. The doctrine stressed that the equitable principles *ab initio* are the part of international law. It is pointed out that in such meaning they were included into international law just in the beginnings of this concept. In the proclamation of President Truman of 28 September 1945 it was stated: ,,In cases where the continental shelf extends to the shoresd of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with the equitable principles".[5] Consequently, Tunisia in her memorial in the dispute with Libya maintained that the equitable principles have nothing in common with the settlement *ex aequo et bono*, because:

„Ils ont toujours été et continuent d'être une partie intégrante du droit même. C'est d'ailleurs là un trait caractéristique de toute idée d'équité. L'équité est née du besoin de modifier les effets d'une application rigide des règles juridiques là oú cette application n'aboutit pas par elle-même a faire justice. Ainsi, la fonction de l'équité consiste à compléte les règles de droit, plutôt qu'à les vider de leur sens".[6]

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[2] *ICJ. Reports of Judgments*, Advisory Opinions and Orders. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, p. 18.

[3] Ibidem, p. 19.

[4] *The Law of the Sea. United Nations Convention on the Law of the Sea*, New York 1983, pp. 29–30.

[5] *Proclamation n° 2667. Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf* 28 September 1945, Department of State Bulletin, 30 September 1945, p. 485.

[6] *ICJ. Pleadings, Oral Arguments, Documents. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, vol. I, p. 166.

As an approval for these statements there was a quotation of the Judge Manley Hudson's opinion from 1937 formulated in case Prises d'eau à la Meuse:

„What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals (...). A sharp division between law and equity (...). Should find no place in international jurisprudence".[7]

In fact one can distinguish as a basic modalities of equity: equity praeter legem and equity secundum legem, which means that equity is an external system in respect to law which modifies the achievement of justice, when application of the legal rules itself does not lead to the achievement of justice. In such a way equity in the British system enables achievement of a compensation, when it would not be possible to obtain such a compensation on the basis of juridical rules.[8] However, the equitable principles by the application by international courts and its incorporation to the international conventions delimiting maritime areas change into legal norms.[9] In such sense Manley Hudson having in mind river law, which existed much earlier than the appearance of continental shelf, maintained that there is no border between equity and international law. It meant that the equitable principles were receipted to international law and become its legal norms.

2. Content of the equitable principles of delimitation of continental shelf

In the decision of the International Court of Justice on the continental shelf between Tunisia and Libya of 1982 there were proclaimed two equitable principles, which were applied: 1/ principle of the perpendicularity of the shelf to the coast and 2/ principle of the prolongation of the general direction of the land boundary. The Court stated:

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[7] *PCIJ* Publ. Series A/B, n° 70, p. 76.

[8] *ICJ* in the *North Sea Continental Shelf* Case stated: „it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles". *ICJ. Reports* 1969, p. 47, § 85.

[9] I.A. Shearer: „The concept of equity in relation to land–locked states", (in:) *The International Law Association. Report of the Fifty–Ninth Conference*, Belgrade 1980, pp. 312–322; S. Rosenne: „Equitable principles of the compulsory jurisdiction of international tribunals", (in:) *Festschrift für Rudolf Bindschedler* , Bern 1980, pp. 407–425; S. Bilge: „Le nouveau rôle des principles équitables en droit international", (in:) *Festschrift fur Rudolf Bindschedler*; R. Bermejo: „Place et rôle de l'équité dans le droit international nouveau", 36 *ÖZöRVR* 1986; W. Friedmann: *The Contribution of English Equity to the Idea of An International Equity Tribunal*, London 1935; M.B. Feldman: „*The Tunisia–Libya Continental Shelf Case*, Geographic justice or judicial compromise?", 76 *AJIL* No. 2, 1983.

„the factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are, in the view of the Court, relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution".[10]

In the Tunisia memorial dealing with the case the equitable principles were treated in another way but it was an agreement that there are two principles. First principle was characterized as the principle of the integrity of natural prolongation without affecting the natural prolongation of the neighbour and the second principle that gains or disadvantages contained in the physical characteristic of the geographical situation of the State should not be the matter of compensation in order to achieve equity.[11] The second principle was motivated by the award of the arbitral tribunal of 1977, in which it was stated:

„De même que l'équité ńa pas pour fonction de reire totalement la géographie lors de la délimitation du plateau continental, elle ńa pas non plus pour fonction de dréer une situation de complete équité lorsque la nature et la géographie ont crée une inéquité".[12]

From the principle of the perpendicularity of the shelf to the coast it can be drawn as its consequence the principle of the proportionality of the shelfs to the coast. however the principle of the proportionality can be treated as independent principle giving effect to the idea of iustitia distributiva. Its manifestation is the principle of equidistance. However, one must remember that the principle of equidistance can not in every case lead to justice. That is why exaggerating critic in the counter-miemorial of Libya in dispute between Tunisia and Libya it was stated, that it is neither the principle, nor norm, but a method of delimitation. It was argued that if the aforementioned principle was applied to Ras Ajdir, Tunisia would obtain 42 000 km^2, which gives 70% of the whole area, and in the same Libya would obtain only 20 000 km^2, which constitutes only 30% of the whole area.[13] At the same time it was indicated that Tunisia, which demanded the application of the equidistance method would obtain 2/3 of the area of continental shelf in the region of Gulf of Gabes and lost interest in the construction of the common exploitation of the area, which was discussed between Libya and Tunisia in period of 1972–1975.[14]

If one takes into consideration the principle of the natural prolongation of the coast by continental shelf, which was treated as the effect of nature, which can not be repaired one must point out that the concept can be disputed.

[10] *ICJ*. Rep. 1982, p. 85.
[11] *ICJ*. *Pleadings, Oral Arguments, Documents. Case Concerning the Continental Shelf (Tunisia)Libyan Arab Jamahiriya)*, vol. I, p. 168.
[12] Ibidem.
[13] Ibidem, vol. I, p. 507.
[14] Ibidem, p. 508.

Professor Jennings in his statement before the International Court of Justice in the dispute between Tunisia and Libya stated:

Yet, if one asks a scientist what is the «natural prolongation», because this is not a scientific term of art. And indeed how could scientific inquiry alone establish the «natural» prolongation under the sea of a State, which itself is not a natural, but a political phenomenon, with land boundaries, the termini of which are inescepably the termini of the «natural prolongation», as it is understood in the law, but which are established and fixed not by nature at all, but by law and by politics".[15]

However, it is not just to challenge the natural prolongation as equitable principle. One can agree that the principle is not a component of the law of natura, but it is not possible to question its character as equitable principle. However, it is not possible to draw a consequence that the nature cannot be repaired, because it will be the evidence of the geographical determinism. Exactly progressivity demonstrates itself in view that the nature can be repaired, it means in the concrete geographical situations, and this belief demonstrates itself in the view that the disproportionality must be taken into consideration in the process of the delimitation of continental shelf when it is dictated by geographical, geological, economic, hydrographical and demographic factors. Professor Virally was right when he stated that the statement of the International Court of Justice of 1969 that land dominates over sea can be understood not in the sense of its predominance but in such metaphisical sense that the people inhabiting dominate over neighbouring sea and sovereign rights to continental shelf are derived from sovereignty over continental territory of island.[16]

The most complete catalogue of equitable principles was presented by the International Court of Justice in its judgement concerning the continental shelf of Libya/Malta. There were mentioned: 1/ principle that there is no question of repairing of geography or compensation of inequalities of nature, 2/ principle of not affecting by one side of the natural prolongation of the other side, which is the negative formulation of the positive norm that coastal State executes its sovereign rights over continental shelf adjacent to coast in full range permitted by international law in proper circumstances, 3/ principle that though all States are equal under law and must by equally treated „equity does not necessarily mean equality" or that it cannot be made equal what was done by nature unequal, and 4/ principle that one cannot speak about *iustitia* distributivez.[17]

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[15] *ICJ. Pleadings, Oral Arguments, Documents. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, vol. IV, p. 417.

[16] Ibidem, p. 489.

[17] *ICJ*. Rep. 1985, pp. 39–40.

3. Dependency of equitable principles from geographical conditions

Equality is an application of justice to particular situation[18]. That is why Charles de Visscher was right when he stated that equity from the judicial perspective is more or less individualised justice and in addition it is „justice adjusted to space".[19] As a consequence application of the equitable principles in every situation makes it necessary to take into consideration all geographical, geological, historic or economic circumstances.[20] In the *North Sea Continental Shelf Case* it was commanded to take into the consideration for the application of equitable principles to concrete situation such factors as: 1/ general configuration of the coasts of parties and its special characteristic, 2/ physical and geological structure of natural resources of the disputed zone of continental shelf, 3/ conditions which were created by delimitation of the continental shelf according to equitable principles between largeness of shelf and coast.[21]

It is regarded that the method of equidistance can be applied only in such circumstances when geographical situations are not complicated, especially when coasts are situated in opposition and look similarily.[22] This view was backed by the International Court of Justice in the case of continental shelf Libya/Malta:

„The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast–whatever the geological characteristic of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts of the claimant States of any areas of sea–bed claimed by way of continental shelf, and the geological or geomorfological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less that 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the «rift zone» cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary".[23]

As it is maintained in opposite situation there was not achieved justice, because as stated the International Court of Justice in the North Sea Continental Shelf Cases:

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[18] *ICJ. Rep.* 1982, p. 60.

[19] Ch. de Visscher: *De l'équité dans le règlement arbitral judiciaire des litiges de droit international public*, Paris 1972, p. 3.

[20] *ICJ. Pleadings...*, (Tunisia/Libyan Arab Jamahiriya), vol. 1, p. 173.

[21] *ICJ. Rep.* 1969, § 101 D.

[22] *ICJ. Pleadings...*, (Tunisia/Libyan Arab Jamahiriya), vol. I, p. 173.

[23] *ICJ. Rep.* 1969, p. 49.

„The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been see in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible – being of itself creative of inequity".[24]

The necessity of the modification of the equidistance principle was perceived in the arbitral proceedings in the French–British case from 1977. Award there stated that the aforementione principle should be corrected by taking into consideration special situations because „principle of equidistance always is conditioned by the circumstance until other boundary line is not justified by special conditions".[25] In this case however the delimitation of the continental shelf of France and Great Britain in the English Channel was not based on special circumstances but the judgment was based on the application of the median principle.

Malta maintained that in the case of an application of the equitable principles to delimitation of continental shelf it is necessary to take into consideration economic and security factors, and especially lack of sources of energy on the Island of Malta, the fact that she is an economically developing State and the scope of her fisheries activity. The Court, however, came to the conclusion, that it does not take into consideration the difference in economic position of the States being in dispute in such manner as to increase disproportionally continental shelf of the less developed State in order to compensate its inferiority in economic area. As it was stated:

„Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question. While the concept of the exclusive economic zone has, from the outset, included certain special provisions for the benefit of developing States, those provisions have not related to the extent of such areas nor to their delimitation between neighbouring States, but merely to the exploitation of their resources".[26]

Further it was maintained that International Court of Justice could take into consideration the resources of the continental shelf as a factor determining delimitation, but parties to the dispute did not present information to the

[24] *ICJ. Rep.* 1985, p. 26.

[25] Dissenting opinion of Judge Oda: *ICJ Rep.* 1985, p. 145.

[26] *ICJ. Rep.* 1985, p. 41. However it is necessary to stress that in case of delimitation of Gulf of Maine between Canada and the United States there was applied homogeneous delimitation line for continental shelf and fisheries jurisdiction. Canada obtained 1/6 of Georges Bank and only 1/2 of areas she claimed. **P.** Underwood: „Beyond a line. Georges Bank Management. New directions in ocean law", *Policy and Management* 1984, vol. 4, no 2, pp. 1–2.

subject. It is astonishing that the International Court of Justice was ready to take into consideration security circumstances, because they were the basis of the Truman proclamation, but these circumstances were not argued by the parties by pointing out the military devices on a continental shelf which reflect the security of the parties.

The situation which developed was paradoxical one because the International Court of Justice was ready to take into consideration military factors for the delimitation of *par excellence* economic institut on at the same time rejecting the possibility of taking into consideration economic factors, which were mentioned in memorial and counter∧nemorial and in other documents presented to the Court.

In the decision of the International Court of Justice concerning continental shelf Malta/Libya a position of Malta as an island and its influence on delimitation of continental shelf, taken into consideration shelf were taken especially whether a disproportionality of shelf could be based on an insular position of Malta. However the Court did not took into consideration also this premise pointing out that quite different a situation of continental shelf would be if an island belonged to State than when we have to do with an island being a State. The Court however did not pointed out how its reasoning in such a case would be.

The International Court of Justice did not apply automatically of the principle of median line in the case of delimitation of the shelf of Malta toward Libya because Malta „appear as a relatively small feature in a semi-enclosed sea" as well as that there is „the great disparity in the length of the relevant coasts of the two Parties".[27] In such a way there was achieved a level of proportionality between the scope of continental shelf belonging to the coastal State and the coast. Finally shelf was delimited not according to the principle of median line but on the base of a line more favourable to Libya.

4. The development of international law of delimitation of continental shelf by the application of equitable principles

Professor Jennings argued before the International Court of Justice in the case of the Tunisia/Malta continental shelf that equitable principles do not make equity in broad meaning, but equitable delimitation taking into account as far as it is possible the actual physical situation of the continental shelf.[28] Such a reasoning points out that the equitable principles are not abstract norms but norms existing for a specific situation, they are an application of justice to concrete cases. However, if one takes into account that the equitable principles may and are catalogued and in every future case international tribunals quote formerly ascertained and applied one must come to conclusion that they become

[27] *ICJ. Rep.* 1985, p. 52.
[24] *ICJ. Pleadings...*, (Tunisia/Libyan Arab Jamahiriya), vol. IV, pp. 415–416.

customary norms strenghtening the concept of delimitation of continental shelf.[29] In such a way international tribunals while applying equitable principles do not refer to the idea of the settlement of disputes *ex aequo et bono* but to the formulation of the sources of international law as it was done in Article 38 al. 1 of the Statue of the International Court of Justice.[30]

Naturally the question rises whether equitable principles with the moment of repeatedly application by international tribunals and their transformation into customary norms cease to belong to aquity, it means whether by their application they cease to be equitable principles. Taking into consideration that equity can be treated not only as external to international law but as well as a part international law, the situation rises that principles applied by international tribunals, although becoming customary norms, do not cease to be at equitable principles the same time. Equity as a factor of international justice is not only external to international law but in the same time exists as collection of values and norms of international law. A separation of international morality from international law is. Complete misunderstanding in periods of shaping of the new institutions of international law in a drive to achieve justice equity changes norms of international law, developes them and makes them nearer to a modern concept of justice. It is astonishing that international lawyers as judges or arbiters or as advisers finally States or to as writers always quoting equitable principles in conditions of the egoism of States and their organizations, in conditions of rivalty of States aim at ensuring international justice. It can not be doubted that this article ensures that a concept of international justice was achieved by the application of equity with respect to the delimitation of a continental shelf. However the institution of continental shelf is not exception because also in other institutes of the law of the sea and international economic relations the constant process of the guaranteeing of internal justice of the international law by application of equitable principles can be observed. As a consequence it may be observed that new international law devolops by application of equitable principles which replaces ancient axiology of international law and ancient concept of its internal justice.[31]

[29] The possibility that equitable principles can be customary norms was evidenced by G. Schwarzenberger: „Equity in international law", 26 *BWA* ff 353–354, 1972.

[30] R. H. Pohl: „Correspondence", 77 *AJIL* 873, 1983.

[31] J. Gilas: *Sprawiedliwość międzynarodowa gospodarcza* [International Economic Justice], Toruń 1991.

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Polish – German Treaties of 1990 and 1991 on the Confirmation of their Mutual Border and on good Neighborliness and Friendly Co-operation

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Three times after the Second World War Poland and Germany have signed treaties on their common border and on the principles of their coexistence.

The first time the communist governments of Poland and of the Democratic Republic of Germany (GDR) in Zgorzelec (Görlitz) signed on 6 July 1950, the treaty concerning the demarcation of the established and existing Polish-German state frontier.[1] In the exercise of this treaty the two parties have signed in Frankfurt an der Oder the Act on the demarcation of the State frontier between Poland and Germany.[2] The Agreement signed by Poland and the GDR in Berlin on 22 May 1989 on the delimitation of maritime areas in the Bay of Pomerania[3] may be regarded as the continuation of the Treaty of 1950.

The second time the communist government of Poland and the government of the Federal Republic of Germany (FRG) signed in Warsaw on 7 December 1970, the treaty concerning the basis for normalizing their mutual relations.[4]

And finally the third time, the non-communist government of Poland and the government of the FRG, representing the reunified Germany, signed in Warsaw, on 14 November 1990, a treaty to confirm the border existing between them,[5] and in Bonn, on 17 June 1991, the Treaty on Good Neighborliness and Friendly Co-operation.[6] The last one has been accompanied by the exchange of letters of the Ministers for Foreign Affairs of the two parties, Mr. Krzysztof Skubiszewski and Mr. Hans-Dietrich Genscher.[7] At the same place and on the same day the two parties have signed the Agreements on the Polish-German co-operation of Youth,[8] on the creation of the Polish-German Council on the

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[1] 319 *UNTS* 593.
[2] 319 *UNTS* 111.
[3] *Dz. U.* 1989 No. 43, Items 233, 234.
[4] 830 *UNTS* 327.
[5] 31 *ILM* 1292 (1992).
[6] *Dz. U.* 1992 No. 14, Items 56, 57.
[7] *Zeszyty Niemcoznawcze PISM* 1991 No. VI(3), p. 40, 1991.
[8] **Supra, p. 42.**

protection of the environment[9] and on the creation of the Polish-German intergovernmental Commission for regional co-operation.[10]

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The problem of the Polish-German border has been, since the end of the Second World War, the greatest obstacle on the way to the normalization of the Polish-German relations. Although much has been published about it, it seems to be necessary to review here the most important facts.

At the Yalta Conference in February 1945 the leaders of the US, UK and USSR decided that „Poland must receive substantial accessions of territory in the North and West", as compensation for her Eastern territories they had decided to incorporate into the USSR.[11]

After the unconditional surrender of Germany the four victorious powers — France, the UK, US and USSR — issued on 5 June 1945, two declarations, one stating that „Germany within her frontiers as they were on the 31 December, 1937, will, for the purpose of occupation, be divided into four zones",[12] the other that they „will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory".[13]

The announced determination took place on 2 August 1945 at the Potsdam Conference of the heads of government of the UK, US and USSR. Chapter DC of the Decisions of the Conference reads as follows:

„The three Heads of Government agree that, pending the final determination of Poland's western frontier, the former German territories east of a line running from the Baltic Sea immediately west of Świnoujście, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the administration of the USSR in accordance with the understanding reached at this Conference including the area of the former city of Gdańsk shall be under the administration of the Polish State and for such purpose shall not be considered as part of the Soviet Zone of occupation in Germany".[14]

In Chapter XIII the three Heads of Government have agreed „that the transfer to Germany of German populations of elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken".

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[9] Supra, p. 49.
[10] Supra, p. 52.
[11] Cmd. 6598.
[12] *Official Gazette of the Control Council for Germany,* Suppl. I, at 11.
[13] Supra, at 7.
[14] Supra, at 17.

Poland and Germany have expressed opposite opinions as to the character of the decisions of the Potsdam Conference.

According to the German legal position, the unconditional capitulation of German armed forces and the collapse of the German state apparatus have not caused the disappearance of the German Reich. It continues to exist in its boundaries as they were on 31 December 1937, and the FRG has become its successor, although territorially limited. Not having been party to the Potsdam decisions, the FRG cannot be bound by them. The transfer of sovereignty over any part of German territory and the determination of its boundaries may be done only in a peace treaty with the reunified German state.

This legal position has found its expression in the Basic Law of FRG of 23 May 1945,[15] namely in its preamble stating that the Basic Law has been adopted only by one part of the German nation; in its Article 23 determining that it shall be applied only within the territory of the FRG and in other parts of Germany it shall come into force after their accession; in its Article 146 stating that it shall loose its binding force after a Constitution adopted in a free decision of the German nation will come into force; and finally in its Article 116(1), recognizing as Germans those persons of German nationality who, as refugees or expellees, have found refuge within the territory of the German Reich in its borders as of 31 December 1937, as well as in many laws passed by the German Bundestag, some of which will be discussed later.

The Polish side represents the view that the decisions of the Potsdam Conference are final. After the unconditional capitulation of German armed forces and the collapse of the German state apparatus the participants in the Potsdam Conference acted as the supreme power of Germany. In this manner they could decide in the name of Germany in all cases, including her territory and boundaries, which they clearly stated in their Declaration of 5 June 1945 mentioned above. The conclusion of a peace treaty between Poland and Germany was not necessary, because the decisions of the Potsdam Conference solved all problems between Poland and Germany which are normally decided in peace treaties. The final character of the Potsdam decisions is shown by the language (e.g. „the former German territories") as well as by the decision on the transfer of Germans from Poland to Germany and, finally, by the practice the powers represented in Potsdam which manifested itself, for example, in elaborating the plans for the transfer of Germans from Austria, Czechoslovakia, Hungary and Poland to the four occupation zones of Germany adopted on 25 October 1945 by the Control Council for Germany,[16] and in the Polish-British agreement of 14 February 1946 on the transfer of Germans from Poland to the British Occupation Zone,[17] and then in the execution of these plans and of this agreement.

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[15] *Grundgesetz für die Bundesrepublik Deutschland* vom 23. Mai 1949 (BGBl. S. 1), with later amendments.

[16] *Documents on Germany under Occupation 1945-1954*. Selected and Edited by B. Ruhm von Oppen, London 1955, p. 89-90.

[17] Supra, p. 107-108.

The first two Polish-German border treaties – of 1950 with the GDR and of 1970 with the FRG – confirm that the Polish-German border runs along the Oder-Neisse-line established by the Potsdam decisions. The third – of 1990 with reunified Germany – refers to the first two and, therefore, also to the border line established in Potsdam. In all the three treaties their parties have recognized the Polish-German border as inviolable and renounced any territorial claims against one another.

To answer the question whether the Polish-German border treaty of 1990 means the FRG's abandoning its legal position on the status of Germany and, consequently, the final solution of the Polish-German border problem, it is indispensable to refer to other documents, and namely to the agreement signed in Berlin, on 31 August 1990, by the FRG and the GDR on the restoration of German Unity[18] and to the Treaty on the Final Settlement with Respect to Germany concluded in Moscow on 12 September 1990 by France, UK, US, USSR and the two German States („Two-plus-Four Treaty").[19]

In the reunification Treaty the two German States agleed to change the provisions of the Basic Law of the FRG dealing with the situation of divided Germany which have lost their actuality with the moment of the reunification of the two German States. So the Preamble states now that the whole German nation (and not only a part) has adopted the Basic Law and that in this way it has accomplished the work of German unity and freedom. Consequently, Article 23 of the Basic Law has been abolished, which means that there are no other parts of Germany remaining outside the borders of the reunified Germany. Article 146 of the Basic Law has been changed by adding the statement that it is binding to the whole German nation, however, the statement that the Basic Law shall be replaced in the future by a Constitution adopted by a free decision of the German nation has been retained, which may be regarded as the recognition that the transitional period in the German political life for which the Basic Law was adopted in 1949 has not ended.

Consequently, the transitional Article 116(1) dealing with the status of persons of German nationality and Article 119 dealing with the problems of refugees and expellees have neither been abolished nor changed.

In the Treaty on the Final Settlement with Respect to Germany concluded twelve days later, its signatories decided that a united Germany would comprise the territories of the FRG, the GDR and of Berlin, that the external borders of the two German States shall constitute the external borders of Germany and that they shall become final on the day of the entry into force of the Treaty. Poland and Germany have been obliged to confirm the border between them in a treaty binding under international law. The Treaty has also stated that Germany has no territorial claims against other states and that she will not put

[18] 30 *ILM* 457 (1991).
[19] 29 *ILM* 1187 (1990).

forward any such claims in the future. The governments of the FRG and GDR have been obliged to ensure that the constitution of the united Germany would not contain provisions incompatible with the principles adopted by the Treaty; the Preamble and Articles 23 and 146 of the Basic Law of the FRG have been expressly mentioned with this in mind. And finally, the four Big Powers responsible for Germany have declared that the final character of the borders of the united Germany will be confirmed after the fulfilment by the governments of the FRG and the GDR of obligations and declarations adopted by them in the Treaty.

United Germany has fulfilled some of her obligations: she has concluded an internationally binding border treaty with Poland and she has changed the relevant provisions of the Basic Law. However, in the future she is still obliged to formulate her constitution in such a way that it would be compatible with the provisions of the Treaty on the Final Settlement with Respect to Germany.

Having this reservation in mind it should be stated that the problem of the Polish-German border has this time been solved finally and once and for all. However, such a statement has to be called into question in view of the fact that in the legislation of the FRG there have been twenty laws and three by-laws from the years 1950-1969 still in force in which the Polish Western and Northern territories, with the exception of the territory of the former Free City of Gdańsk have been described as „the German Eastern territories at present under foreign administration" (die zur Zeit unter fremder Verwaltung stehenden deutschen Ostgebiete),[20] or „German territories not under German administ-

[20] a) Gesetz über den Lastenausgleich vom 14. August 1952 (BGBl. I S. 446) in der Fassung vom 1. Oktober 1969 (BGBl. I S. 1909) zuletzt geändert durch das Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. I S. 2094) – § 11(1), (2) 3, § 12(1), (8), § 14(1).

b) Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge vom 19. Mai 1953 (BGBl. I S. 201) in der Fassung vom 3. September 1971 (BGBl. 1 S. 1565) zuletzt geändert durch das Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. 1 S. 2094) – § 1(1), (2) 3, § 10(2) 2.

c) Gesetz über die Entschädigung ehemaliger deutscher Kriegsgefangener vom 30. Januar 1954 (BGBl. I S. 5) in der Fassung vom 4. Februar 1987 (BGBL. I S. 506) zuletzt geändert durch das Gesetz zur Aufhebung des Heimkehrergesetzes und zur Änderung anderer Vorschriften vom 20. Dezember 1991 (BGBL. I S. 2317) – § 1(1) *2;* aufgehoben durch das Gesetz zur Bereinigung von Kriegs folgengesetzen vom 21. Dezember 1992 (BGBl. I S. 2094).

d) Achte Verordnung zur Durchführung des Feststellungsgesetzes vom 18. Dezember 1956 (BGBl. 1 S. 928) in der Fassung vom 31. Juli 1970 (BGBl. 1 S. 1190) zuletzt geändert durch die Verordnung zur Änderung lastenausgleichsrechtlichen Vorschriften vom 14. April 1973 (BGBl. IS. 311) – § 1(1), § 10(3).

e) Elfte Verordnung über die Ausgleichsleistungen nach dem Lastenausgleichsgesetz vom 18. Dezember 1956 (BGBl. I S. 932) in der Fassung vom 17. November 1962 (BGBl. I S. 676) zuletzt geändert durch Fünfte Verordnung zur Änderung der Elften Verordnung über die Ausgleichsleistungen nach dem Lastenausgleichsgesetz vom 13. März 1986 (BGBl. 1 S. 335) – § 5(3), § 8(5).

f) Gesetz zur allgemeinen Regulung durch den Krieg und den Zusammenbruch des Deutschen Reiches entstandenen Schäden vom 5. November 1957 (BGBl. I S. 1747) zuletzt geändert durch das Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. I S. 2094) – § 6(1) 3, § 33(2) 2a, § 70(2), § 71(1), § 72(3) 3a.

ration" (die nicht unter deutscher Verwaltung stehenden deutschen Gebiete)[21] or „German territories to the East of the Oder-Neisse-line" (die deutschen Gebiete östlich der Oder-Neisse-linie),[22] or „the German territories under Polish or Soviet administration" (die deutschen unter polnischer oder sowjetischer Verwaltung stehenden Gebiete),[23] or „the territory of the German Reich in its boundaries as of 31 December 1937 to the East of the Oder-Neisse line" (das Gebiet des Deutschen Reiches nach dem Gebietsstand vom 31. Dezember 1937 östlich der Oder-Neisse-linie),[24] or in some other similar ways.[25]

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g) Verordnung über die Zuständigkeit der Verwaltungsbehörden der Kriegsopferversorgung für Berechtigte außerhalb des Geltungsbereichs des Grundgesetzes vom 9. Juni 1964 (BGBl. I S. 349) geändert durch die Verordnung zur Änderung der Verordnung über die Zuständigkeit der Verwaltungsbehörden der Kriegsopferversorgung für Berechtigte außerhalb des Geltungsbereichs des Grundgesetzes vom 22. Dezember 1966 (BGBl. 1 S. 772) – § 1(1) o; außer Kraft durch die Verordnung über die Zuständigkeit der Verwaltungsbehörden der Kriegsopferversorgung für Berechtigte im Ausland vom 28. Mai 1991 (BGBl. I S. 1204).

h) Gesetz zur Regelung der Verbindlichkeiten nationalsozialistischer Einrichtungen und der Rechtsverhältnisse an deren Vermögen vom 17. März 1965 (BGBl. I S. 79) zuletzt geändert durch das Gesetz zur Aufhebung des Heimkehrergesetzes und zur Änderung anderer Vorschriften vom 20. Dezember 1991 (BGBl. 1 S. 2317) – § 9(1) 4a.

i) Gesetz über die Beweissicherung und Feststellung von Vermögensschäden in der sowjetischen Besatzungszone Deutschlands und im Sowjetsektor von Berlin vom 22. Mai 1965 (BGBl. I S. 425) zuletzt geändert durch das Gesetz zur Neuregelung des verwaltungsrechtlichen Verfahrens vom 17. Dezember 1990 (BGBl. I S. 2809) – § 7(2).

j) Gesetz zur Abgeltung von Réparations-, Restitutions-, Zerstörungs- und Rückerstattungsschäden vom 12. Februar 1969 (BGBl. I S. 105) zuletzt geändert durch das Gesetz zur Aufhebung des Heimkehrergesetzes und zur Änderung anderer Vorschriften vom 20. Dezember 1991 (BGBl. I S. 2317) – § 2(1) 1, § 8(3), § 12(1), (6), § 13(2), § 15(1) 9, § 19(1), § 27(1), § 32(1) 2, § 38(2) 2, § 54(1) 1, § 60(1) 2, (2).

[21] Gesetz über die Versorgung der Opfer des Krieges vom 20 Dezember 1950 (BGBl. S. 791) in der Fassung vom 22. Januar 1982 (BGBl. I S. 21) zuletzt geändert durch das Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. 1 S. 2094) – § 1(2) c.

[22] Gesetz über einen Währungsausgleich für Sparguthaben Vertriebener vom 27. März 1952 (BGBl. I S. 213) in der Fassung vom 1. Dezember 1965 (BGBl. I S. 2060) zuletzt geändert durch das Gesetz zur Anpassung gesetzlich festgelegter Zuständigkeiten an die Neuabgrenzung der Geschäftsbereiche von Bundesministem vom 18. März 1975 (BGBl. I S. 705) – § KD, (5).

[23] a) Gesetz über einen Währungsausgleich für Sparguthaben Vertriebener vom 27. März 1952 (BGBl. S. 213) in der Fassung vom 1. Dezember 1965 (BGBl. 1 S. 2060) zuletzt geändert durch das Gesetz zur Anpassung gesetzlich festgelegter Zuständigkeiten an die Neuabgrenzung der Geschäftsbereiche von Bundesministem vom 18. März 1975 (BGBl. I S. 705) – § 2(2).

b) Gesetz zur Milderung von Härten der Währungsreform vom 14. Juli 1953 (BGBl. I S. 495) in der Fassung vom 1. April 1959 (BGBl. I S. 169) zuletzt geändert durch den Einigungsvertrag vom 31. August 1990 (BGBl. II S. 885 (965)) – § 4(3).

[24] a) Gesetz über die Anerkennung von Nottrauungen vom 2. Dezember 1950 (BGBl. S. 778) – § HD b.

b) Gesetz über die Versorgung der Opfer des Krieges vom 20. Dezember 1950 (BGBl. S. 791) in der Fassung vom 22. Januar 1982 (BGBl. I S. 21) zuletzt geändert durch das Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. I S. 2094) – § 7(1) 2.

c) Gesetz zur Ergänzung von Zuständigkeiten auf dem Gebiet des Bürgerlichen Rechts, des Handelsrechts und des Strafrechts vom 7. August 1952 (BGBl. I S. 407) – § 1, 1.

[25] a) ReichsVersicherungsordnung vom 19. Juli 1911 (RGBl. S. 509) inder Fassung vom 15. Dezember 1924 (RBG1.1 S. 779) zuletzt geändert durch Zweites Gesetz zur Änderung des Fünften Buches Sozialgesetzbuch vom 20. Dezember 1991 (BGBl. I S. 2325) – § 1251(1) 3.

In all the laws and other instruments mentioned above the territories thus mentioned have been expressely qualified as forming part of the domestic territory („Inland"), though the meaning of the term „Poland" used in them has been limited to the remaining part of the territory of the Polish State, sometimes also without the territory of the former Free City of Gdańsk.[26]

As far as Article 116(1) of the Basic Law of the FRG is concerned, its aim has been to settle the situation of persons of German origin, citizens of foreign countries, who during or after the Second World War had to leave their domiciles abroad, often established more than one hundred years ago, and have been admitted in Germany in her boundaries as of 31 December 1937. The fact of the admittance in Germany so defined has been recognized in Article 116(1) as the demonstration of „Germanhood" justifying the granting of the status of „a German", practically identical with that of a German citizen. The seriousness of the problem undoubtedly required a constitutional solution, but it is entirely wrong to recognize the fact of seeking admittance also in territories which ceased to be German in 1945 as the demonstration of one's Germanhood.

The Polish-German Treaty of 1990 on the confirmation of the Polish-German border does not oblige the FRG to change those of the provisions of its laws which are in flagrant violation of its letter and spirit, as well as of the letter and spirit of the Two-plus-Four Treaty. Neither does it oblige the FRG to remove from its Basic Law Article 116(1) and not to include into the future German Constitution the similar provisions.

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b) Angestelltenversicherungsgeselz vom 20. Dezember 1911 (RGBl. S. 989) in der Fassung vom 28. Mai 1924 (RGBl. I S. 563) zuletzt geändert durch das Gesetz zur Herstellung der Rechtseinheit in der gesetzlichen Renten- und Unfallversicherung vom 25. Juli 1991 (BGBl. I S. 1606) – § 28(1) 3.

c) Reichsknappschaftsgesetz vom 23. Juni 1923 (RBG1. I S. 431) in der Fassung vom 1. Juli 1926 (RGBl. 1 S. 369) zuletzt geändert durch das Gesetz zur Herstellung der Rechtseinheit in der gesetzlichen Renten- und Unfallversicherung vom 25. Juli 1991 (BGBl. I S. 1606) – § 51(1) 3.

d) Erstes Gesetz zur Überleitung von Lasten und Deckungsmitteln auf den Bund vom 28. November 1950 (BGBl. S. 773) in der Fassung vom 28. April 1955 (BGBl. I S. 193) zuletzt geändert durch das Gesetz zur Aufhebung des Heimkehrergesetzes und Zur Änderung anderer Vorschriften vom 20. Dezember 1991 (BGBl. 1 S. 2317) – § 15(1).

e) Gesetz zur Regulung der Wiedergutmachung nationalsozialistischen Unrechts für Angehörige des öffentlichen Dienstes vom 11. Mai 1951 (BGBl. I S. 291) in der Fassung vom 15. Dezember 1965 (BGBl. I S. 2073) zuletzt geändert durch das Gesetz über die Unternehmen Verfassung der Deutschen Bundespost vom 8. Juni 1989 (BGBl. 1 S. 1026) – § 3(1) 2c.

0 Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung vom 18. September 1953 (BGBl. I S. 1387) in der Fassung vom 29. Juni 1956 (BGBl. 1 S. 559) zuletzt geändert durch das Gesetz zur Aufhebung des Heimkehrergesetzes und zur Änderung anderer Vorschriften vom 20. Dezember 1991 (BGBl. I S. 2317) – § 4(1) c.

g) Fremdrentengeselz vom 7. August 1953 (BGBl. 1 S. 848) in der Fassung vom 25. Februar 1960 (BGBl. I S. 93) zuletzt geändert durch das Gesetz zur Änderung des Renten-Überleitungsgesetzes vom 18. Dezember 1991 (BGBl. 1 S. 2207) – § 3.

h) Gesetz zur Regulung von Fragen der Staatsangehörigkeit vom 22. Februar 1955 (BGBl. I S. 65) zuletzt geändert durch das Ausführungsgesetz zum Übereinkommen vom 30. August 1961 zur Verminderung der Staatenlosigkeit und zum Abkommen vom 13. September 1973 zur Verringerung der Fälle von Staatenlosigkeit vom 29. Juni 1977 (BGBl. I S. 1101) § 19(2).

[26] See below, p. 13.

The obligation of the FRG to conform its law to its renouncement of the former Eastern German territories derived already from the Polish-German Treaty of 1970. Little, however, has been done to this end. One of the cases to be mentioned has been the change introduced into the Law on the Provision for the Victims of War of 20 December 1950,[27] where the formula „the German territories at present under foreign administration" has been replaced in Law passed in 197628 by the formula „the territory of the German Reich in its boundaries as of 31 December 1937 to the East of the Oder-Neisse line". However, the territory in question has been qualified as part of the German domestic territory, and in the vindication of the draft the Government of the FRG has stated that the change proposed had aimed at the „adaptation to the contemporary linguistic practice",[29] and not to the obligation arising from the 1970 Treaty with Poland. In the cases of a By-law of 198030 and a Law of 198831 the term „Poland" has been used to determine the whole of her territory.

After the signing of the 1990 Treaty on the confirmation of the Polish-German border, the first change in the right direction was done in May 1991, when one of the implementation ordonances of 1956,[32] using the formula „the German Eastern territories at present under foreign administration" and qualifying these territories as part of the German domestic territory, has been abolished and replaced by a new By-law dealing with the same subject,[33] describing them as „that part of Poland which, according to the state as of 31 December 1937, had belonged to the State territory of the German Reich" (der Teil Polens, der nach dem Stande vom 31. Dezember 1937 zum Staatsgebiet des Deutschen Reiches gehört hat).

Unfortunately, the legislator of the FRG has not followed this direction: the same formula — „the German Eastern territories at present under foreign administration" — contained in a Law of 195334 has been changed by a Law passed in December 199235 by replacing the words „zur Zeit" (at present) by the word „ehemals" (in the past). The meaning of the new German formula may be translated into English as „the territories which in the past had been the German eastern territories under foreign administration". This formula admits that the territories in question had been German Eastern territories under foreign administration, does not specify the moment they have lost this

[27] Supra, footnote 24/b.

[M] Achtes Gesetz über die Anpassung der Leistungen des Bundesversorgungsgesetzes vom 14. Juni 1976 (BGBl. 1 S. 1481).

[29] Drucksache 7/4653. Gesetzentwurf der Bundesregierung. Begründung zu Nummer 1 (§ 7).

[30] Verordnung über die Gleichstellung von Anerkennungen und Zulassungen von Saatgut vom 19. Dezember 1980 (BGBl. I S. 2319).

[31] Steuerreformgesetz 1990 vom 25. Juli 1988 (BGBl. I S. 1093).

[32] Supra, footnote 20/d.

[33] Verordnung über die Zuständigkeit der Verwaltungsbehörden der ICriegsopferversorgung für Berechtigte im Ausland vom 28. Mai 1991 (BGBl. I S. 1204).

[34] Supra, footnote 20/b.

[35] Gesetz zur Bereinigung von Kriegsfolgengesetzen vom 21. Dezember 1992 (BGBl. I S. 2094).

character and, finally, does not explain what character they acquired after having lost the previous one. For these reasons it can by no means be accepted.

Poland should request the FRG to adapt immediately, by using the pattern of 1991 presented above, all the laws in question to the provisions of the Polish-German Treaty on the confirmation of their mutual border and of the Two-plus-Four Treaty. It should also request the FRG to change Article 116(1) without waiting for the drafting of the new German constitution. Otherwise, good neighborliness and friendly co-operation between Poland and Germany may be seriously endangered.

There is one more problem requiring particular attention in connection with the Polish-German Treaty of 1990 which has been introduced into it, although it has no direct connection with the border problems and should be and, as a matter of fact has been, solved in the Treaty on Good Neighborliness and Friendly Co-operation, namely that of „expellees".

In paragraph 5 of the Preamble of the Treaty the parties have expressed their awareness of immense suffering brought by the Second World War, „including the loss by many Poles and Germans of their native land due to expulsion (Vertreibung) or deportation (Aussiedlung)".

The substantives „expulsion" and „deportation", as well as „expellee" (Vertriebener) and „deportee" (Aussiedler) form part of the German juridical language and denote a specific legal institution established by the Law on Expellees and Refugees of 19 May 1953.[36]

According to the original version of that Law, „an expellee is a person of German citizenship or of German nationality who had been domiciled in the German Eastern territories at present under foreign administration or in the territories outside the borders of the German Reich as of 31 December 1937 and who lost his domicile in connection with the events of the Second World War because of expulsion (Vertreibung), especially by way of banishment (Ausweisung) or escape". According to further provisions of that Law, expellees are also those German citizens and persons of German nationality who had left their domiciles outside Germany in connection with agreements signed during the Second World War by the German Reich with countries of their domicile or in connection with acts of German authorities in areas occupied by German armed forces, persons who had been forced to leave the German Reich after 30 January 1933 in connection with persecutions perpetrated by the Nazi regime for political, racial, religious or ideological reasons and, finally German citizens and persons of German nationality who, „after the end of general actions of expulsions had left before 1 July 1990 or leave after that date the German Eastern territories at present under foreign administration, Danzig, Estonia, Latvia, Lithuania, the Soviet Union, Czechoslovakia, Hungary, Romania, Bulgaria, Yugoslavia, Albania or China (deportees)".

[36] Supra, p. 9 footnote 20/b.

The Law has created a special category of „expellees from the native land" (Heimatvertriebener) comprising those expellees who had been domiciled in the territory from which they were expelled on 31 December 1937 or at any moment before that date.

The status of expellees has been granted also to spouses of expellees not possessing German nationality or not being of German ethnic origin, as well as to the descendants of expellees.

The Law on Expellees has been changed several times in the last few years. Under the Law on the Procedure of Admittance of Deportees of 28 June 199037, the applications for admittance in the FRG have to be presented only by, and the promise of admittance may be given only to, persons living outside the territory of the FRG and not, as it often happened in the past, after they had arrived in the FRG. At the same time, the Plenipotentiary of the Federal Government of the FRG for the Affairs of Deportees, Mr. Horst Waffenschmidt, in a letter distributed by the Embassy of the FRG in Poland, has appealed to Germans living in Poland not to leave their native land.[38]

Besides the change in the description of the former German Eastern territories, most of the changes introduced by the Law of 1992 already mentioned above[39], have been influenced by the fact that the Polish-German Treaty of 1991 has recognized the existence of the German minority in Poland and has granted it extensive rights defined in international instruments. The time limit has been established for obtaining the status of an expellee: the status of an expellee and privileges connected with it shall be granted only to those Germans who leave their native land outside the territory of the FRG with the aim to settle in the FRG before 1 January 1993. With that day the number of expellees has stopped growing.

A new institution of „late deportees" (Spätaussiedler) has been created embracing Germans who, after 31 December 1992 leave the Republics of the former Soviet Union, Estonia, Latvia or Lithuania to seek admittance in the FRG. The privileges granted them are much lesser than those which had been granted the expellees.

The tragedy of millions of Poles and Germans who had lost their native land in the result of the Second World War cannot be denied. Even if one admits that Poland bears a certain part of responsibility for the transfer to Germany under the decisions of the Potsdam Conference of several millions of Germans, one can by no means agree to blame her for the tragedy of Germans who had been victims of the Nazi regime or for the fate of more than one million Germans who left Poland voluntarily between 1955 and 1992.

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[37] Gesetz zur Regelung des Aufnahmeverfahrens für Aussiedler vom 28. Juni 1990 (BGBl. I S. 1247).

[38] In the result, the number of Germans leaving Poland has fallen from 250340 in 1989 to 113253 in 1990 and to 40129 in 1991 *(Statistisches Jahrbuck fur die Bundesrepublik Deutschland,* 1992 s. 91).

[39] Supra, p. 11 footnote 35.

The loss by millions of Poles and Germans of their native land is but one of the tragic chapters of the Polish-German past. It certainly is „a warning and a challenge", as stated in the Preamble of the Treaty of 1990, it seems, however, that this chapter cannot be closed with the use of the terminology taken from the Law on Expellees and Refugees.

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Whereas the aim of the Polish-German Treaty of 1970 has been to create bases for the normalization of Polish-German relations, the Polish-German Treaty of 1991 opens a new era: that of good neighborliness and friendly co-operation.

The 1991 Treaty is ample: it contains a Preamble and 38 Articles dealing with almost all spheres of life: political, economic, financial, scientific, cultural, social and legal. Many of the provisions of the Treaty contain general declarations demonstrating the attachment of the parties for the principles contained in the Charter of the United Nations and in the documents of the Conference of Security and Co-operation in Europe. Others express their intentions as to the future development of their relations, like the undertaking of common efforts for the enforcement of the European security; the supporting by the FRG of the efforts of Poland aimed at her access to the European Community; the supporting by the FRG of the economic development of Poland; the enlarging of co-operation in the sphere of finances, including the problem of the solution of the Polish debt; the co-operation on regional and municipal, levels; the co-operation in the sphere of social security; scientific, cultural and technological co-operation; the protection of environment, health, law, transport, tourism and human relations. The Chiefs of the two governments, the Ministers for Foreign Affairs and the heads of other ministries shall meet regularly to control the realization of the provisions of the Treaty.

The Treaty creates a good basis for a real neighbourly and friendly co-operation between Poland and Germany. The future will show whether and to what extent the aims of the parties will materialize. On the one hand, the Treaty contains provisions evoking doubts, and on the other hand does not solve some important problems.

First of all it is the problem defined in Article 2 of the Treaty as that of „Minorities and equivalent groups". Under Article 20, point 1 of the Treaty, „persons in the Republic of Poland possessing Polish citizenship who are of German origin or confess to belong to the German language, culture or tradition" constitute the German minority in Poland, whereas „persons in the Federal Republic of Germany possessing German citizenship who are of Polish origin or confess to belong to the Polish language, culture or tradition", (fulfilling the same conditions), do not acquire the status of the Polish minority in Germany. Article 20 point 1 qualifies them, but only indirectly, as a „group"

which, in the light of Article 2, should be understood as a „group equivalent to a minority", an „equivalent group".

There are two reasons for this striking asymmetry, neither of them mentioned in the Treaty. The first one is of a historical character and it comes from the fact that the existence of the German minority in Poland is due mainly to the territorial changes done after the Second World War. Therefore, members of the German minority have lived in Poland for hundreds of years, whereas the presence of the Polish „equivalent group" in Germany results mainly from migrations after the Second World War and only in a small part from economic migration from Poland between 1926 and 1930.

The second reason is of a practical character: there are in Germany several national groups who had come to Germany after the Second World War from the former Yugoslavia, Turkey, Italy and other countries originally as seasonal workers (Gastarbeiter) and who then settled there for good. To grant the status of minority to Poles could provoke these groups to ask the same status for themselves.

From the Polish point of view one could accept this asymmetry as to the legal qualification of both groups, because their right and obligations established in Article 20, point 1, 3 and 4 and in Article 22, as well as their possibilities enumerated in Article 21, are identical. However, this acceptance should be conditioned by the clarification of some problems which, unfortunately, has not been done.

The first one results from the provisions of Article 20, point 2 under which the parties realize rights and duties in accordance with international standards applicable to minorities contained especially in the Universal Declaration of Human Rights and Fundamental Freedoms of 1950, in the Convention on the Elimination of all Forms of Racial Discrimination of 1966, in the International Covenant on Civil and Political Rights of 1966, in the Final Act of the Conference on Security and Co-operation in Europe of 1975, in the Copenhagen Document on the Human Dimension of the CSEE of 1990, as well as in the Paris Charter of Europe of 1990. The parties have not stated, however, whose rights and duties they have had in mind. Therefore, because all the documents mentioned in Article 20, point 2 speak only of minorities and not of any groups, whether equivalent to minorities or not, the conclusion may be drawn that only Poland is bound by these documents in the treatment of the German minority in Poland, whereas Germany, in the treatment of the Polish group in Germany, is bound only by the Polish-German treaty of 1991.

The second problem is that of the citizenship of persons belonging to the German minority in Poland and to the Polish group in Germany.

Article 20 point 1 rightly enumerates the possession of the citizenship of the state of the domicile as one of the conditions under which a person may be included into one of these groups, and Article 22 point 2 obliges the members of these groups to the loyalty in relation to the state of which they are citizens.

Not possessing the citizenship of the state of domicile would mean that the person in question would not be regarded as a member of the German minority in Poland or of the Polish group in Germany, but only as alien, and therefore not falling under articles 20 and 21 of the Treaty: in the letters exchanged by the Ministers for Foreign Affaires of the parties the government of the FRG has promised unilaterally to create for persons of Polish origin living in Germany and not covered by Article 20 point 1 the possibilities to benefit from the rights and possibilities mentioned respectively in Articles 20 and 21.

It is well known, however, that a certain, rather small, number of members of the Polish group in the FRG (Polish spouses of Germans who emigrated to the FRG) has retained their Polish citizenskip and that almost all members of the German minority in Poland, estimated at about 400,000, have retained, under the German law, their German citizenship they possessed before 8 May 1945, despite having obtained after that date Polish citizenship, or have acquired it through birth from their German parents, acquiring at the same time Polish citizenship. All these persons possess two passports – the Polish and the German one, and in this way appear in Poland as Polish citizens and in Germany as German citizens. This may cause situations in which it may be difficult for particular persons to observe loyalty in relation to the state in which they are domiciled as members of the minority or of the equivalent group, and of which they are citizens.

There is also a danger, this time however only in relation to the members of the German minority in Poland practically all possessing, as it has been stated above, the German nationality and connected with the laws and by-laws of the FRG discussed above, describing the Polish Western and Northern territories in which the overwhelming majority of them live, as „the German Eastern territories at present under foreign administration". Some of these laws, and especially the Law on Expellees and Refugees of 1953, are addressed to all members of the German minority in Poland and their texts are very well known to them. In this way some of them may have acquired a „double identity": of a Polish citizen of German nationality living in Poland and that of a German citizen of German nationality living in Germany, and namely in that part which is only „at present" – only „temporarily" – under foreign, Polish, administration. The future will show to what extent the last changes of the Law on Expellees and Refugees will change this attitude of the members of the German minority in Poland.

Some members of the German nationality in Poland have already chosen this second identity and already manifest it at many occasions, antagonizing the Polish environment and inflicting serious harm upon that part of the German minority which desires to be loyal to the state they happen to live.

The parties to the Treaty seem to be aware of the problems presented above. It has been manifested in the letters exchanged by the Ministers for Foreign Affairs in which the Polish Government has stated that „it does not

see at present any possibility to agree to topographic names also in the German language to be admitted in the areas traditionally inhabited by the German minority" and the two Parties have declared that „the Treaty does not deal with the problem of citizenship".

The first statement, although formulated in a very categorical manner, does not exclude the possibility that the Polish Government may change its view in the future. The second statement does not give any indication whatsoever as to whether the parties, and first of all the FRG, intend to solve the problem of citizenship. At the same time the parties have deemed it necessary to deal with a problem which will metarialize only in the very far future: the Polish government has proclaimed to create conditions for German citizens to settle in Poland „in view of the perspective of the Polish membership in the European Community"; it has to be noted that the letter does not contain a reciprocal statement by the Government of the FRG.

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The Polish-German Treaties of 1990 and 1991 on the Confirmation of their Mutual Border and on Good Neighborliness and Friendly Co-operation contain many valuable provisions which may create a solid basis for the future development of Polish-German relations and, at the same time, for the creating of a new united Europe. However, they contain many ambiguities and do not give final solutions to many serious problems, which may gravely hinder the realization of the moble aims set forth by the parties, or even make their realization impossible.

The most serious imperfection of the Treaties of 1990 and 1991 is the absence of the obligation on the part of the FRG to change that part of its legislation which is contrary to the letter and spirit of these Treaties and of the One-plus-Four Treaty. The Polish-German reconciliation may be achieved exclusively through direct contacts between individual human beings on both sides of the common border, and not between officials of whatever level they may be. If on the Western side of the border the rules of law regarded by the antagonists of the reconciliation as the legal basis of their activities will not be eliminated, it will be impossible, on the Eastern side of the border, to stop the distrust of the neighbour and the xenophobia resulting therefrom.

One should, therefore, express the hope that the imperfections of the 1990 and 1991 Treaties will be eliminated as soon as possible.

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La révocation du testament à la lumière de la loi sur le droit international privé et de la Convention de La Haye sur les conflits de lois en matière de forme des dispositions testamentaires

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L'un des éléments essentiels caractéristiques pour le testament, celui décide de son caractère distinctif par rapport aux autres actes juridiques *mortis causa*, réside en sa révocabilité. La révocabilité du testament signifie que le testateur par une déclaration de volonté peut décider que le testament valable, fait à une époque antérieure, n'entraînera pas de conséquences juridiques au moment de son décès.

En tant qu'acte juridique *mortis causa*, le testament ne doit avoir d'effets juridiques que du moment du décès de la personne qui a disposé. Le moment de la confection du testament et celui de l'apparition des effets juridiques sont séparés par une période plus ou moins longue, au cours de laquelle la volonté du testateur peut subir des changements. Tout en prenant en considération cette possibilité, le droit civil de tous les Etats envisage le testament comme acte juridique révocable. On aspire de la sorte à ce que la volonté du testateur exprimée dans le testament soit réellement sa „dernière volonté". Par conséquent, les actes juridiques à cause de mort irrévocables (par exemple les pactes successoraux) ne sont pas appelés „déclarations de dernière volonté".

La testateur n'est pas lié par les dispositions de son testament et peut le révoquer à tout moment et pour des raisons quelconques qu'il n'est pas obligé de révéler. Les personnes qui devront bénéficier du testament d'une manière quelconque n'acquièrent de ce fait aucun droit tant que le testateur est en vie. Malgré la ressemblance du terme, la révocabilité du testament n'est pas la même chose que la révocabilité de certains actes juridiques *inter vivos*. Par exemple, dans le cas de la donation la révocabilité résulte exclusivement du caractère unilatéral de ce contrat. Cette différence consiste entre autres dans le fait que la déclaration de révocation du testament est révocable, tandis que la révocation de la donation étant une manifestation du droit à caractère constitutif dont jouit le donateur, ne peut être portée en retrait sans l'accord du donataire.

La révocation du testament peut être liée à une nouvelle disposition testamentaire, mais elle peut aussi se produire sans celle-ci. Le décès du testateur qui a révoqué toutes ses dispositions successives sans faire un testament nouveau

aura pour conséquence une succession *ab intestato*. Ainsi, de même que le testament, la révocation de celui-ci exerce-t-elle aussi une influence sur la manière de régler le problème des biens du testateur après son décès, mais à l'encontre de ce premier, elle ne contient pas de dispositions positives.

Vu sa fonction particulière et son rapport avec le testament, la révocation n'est pas un acte juridique indépendant. On procède cependant à l'appréciation de la validité de la révocation indépendamment le l'appréciation de la validité du testament révoqué. Souvent, à la lumière des lois civiles, les conditions de validité de la révocation ne sont pas aussi sévères que les conditions de validité du testament. Nous pouvons par exemple rencontrer une réglementation conformément à laquelle le testateur qui, après avoir disposé, a perdu la capacité de tester (par exemple dans le cas d'interdiction) garde pour autant la capacitéde révoquer le testament antérieur.[1] La tendance à rendre plus souples les conditions de validité de la révocation est particulièrement sensible lorsqu'il s'agit de sa forme. En dehors de la forme prévue pour la confection du testament, les lois de différents Etats envisagent nombre d'autres manières de déclarer sa volonté de révocation du testament. On peut les systématiser de la façon suivante:

1) La confection d'un testament nouveau sans indication de son rapport avec le testament antérieur. Cela entraîne toujours la révocation des dispositions de l'ancien testament contradictoires aux nouvelles; sur ce point, l'attitude de tous les Etats est la même. Quant aux autres dispositions, leur problème est résolu de manières différentes: selon certaines lois, on présume que le testament nouveau constitue un complément du précédent,[2] selon d'autres - on présume que l'intention du testateur était de révoquer le testament antérieur en entier.[3]

A l'heure actuelle, les dispositions en cette matière portent le caractère de régies d'interpretation, qui cessent en cas de constatation de la volonté contraire du testateur.

2) La confection d'un nouveau testament pourvu de déclaration de révocation du précédent ou des précédents. Dans la situation où une loi donnée rend les conditions de validité de révocation moins sévères que celles de validité du testament, le problème se pose de savoir si la révocation contenue dans un testament invalide est valable. Vu que dans les deux cas précités (ad 1 et ad 2) la révocation du testament se produit en vertu d'une déclaration de volonté du testateur, et non pas *ex lege* - le problème devrait être résolu de la même manière dans les deux situations.

3) La déclaration de révocation, faite dans la forme prévue pour la confection du testament. Il est évident que cette forme n'est pas obligatoirement identique à celle dans laquelle a été fait le testament révoqué.

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[1] P. ex. § 2253 BGB.
[2] P. ex. art. 1036 C.c., français § 2258 BGB.
[3] P. ex. § 713 ABGB, art. 511 C.c.

4) La déclaration faite dans une forme particulière déterminée par la loi, mais autre que celle du testament.[4]

5) La déclaration faite distinctement dans une forme quelconque.[5]

6) La déclaration faite sous forme de conjecture, par certains actes concluants, dont le document contenant le testament antérieur est le sujet: destruction du document, privation de traits de validité ou bien modifications du document telles qu'il en résulte la volonté de révocation. Il faut souligner que ces actions doivent être entreprises dans l'intention de révoquer le testament.

La révocation du testament peut être considérée, suivant le contexte, d'une part comme un acte juridique dans la composition duquel entre une déclaration de volonté ayant un contenu convenable, et d'autre part comme l'effet de cet acte juridique sous forme de caducité du testament valable en cas de mort. Certaines législations associent un tel effet á d'autres événements qui se produisent après la confection du testament, et parfois même après l'ouverture de la succession. Il peut s'agir de différents événements: actes juridiques (p. ex. la conclusion du mariage, l'aliénation de la chose léguée), jugements judiciaires constitutives (p. ex. de divorce) ou événements *sensu stricto* (p. ex. la naissance d'un enfant). Le trait commun des situations susmentionnées consiste en ce que l'annulation du testament s'accomplit *ex lege*, sans égard à la volonté du testateur. Celles-ci sont souvent appelées révocation du testament, bien qu'elles n'aient rien de commun avec la révocabilité du testament dans le sens qui nous préoccupe ici. La terminologie admise par le langage du droit civil et de la doitrine n'est pas assez précise et provoque beaucoup de malentendus, en particulier quant au problème des conflits de lois.[6]

Conformément à la loi polonaise, le statut successoral c'est *lex patriae* du testateur du moment de sa mort (art. 34 de la loi sur le droit international privé du 12 novembre 1965,[7] plus loin: p.p.m.) Cette loi est compétente pour l'ensemble des problèmes de succession, à l'exclusion du problème de validité du testament et d'autres actes juridiques à cause de mort. Dans ce dernier domaine, c'est *lex patriae* du testateur du moment où ces actes sont accomplis qui est exclusivement (et non pas alternativement) compétente (art. 35 phrase I p.p.m.).[8] La norme qui commande l'application de cette loi est en vigueur

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[4] P. ex. art. 1035 C.c. français, art. 1763 C.c. grec.

[5] Ce mode de révoquer est familier aux législations des Etats Scandinaves, cf. A. Malmström: *Die Form des Testaments nach schwedischem Recht, Zeitschrift für Rechtsvergleichung* 1965 p. 207; F. Marcus: *Das neue dänische Erbgesetz, Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1965 p. 396–397; Z. Sundström: *Die finnische Gesetzgebung auf dem Gebiete des Privatrechts 1945–1965*, Rabels Z 1967 p. 287.

[6] E. Frankenstein: *Internationales Privatrecht (Grenzrecht)*, Bd IV, Berlin 1935, p. 507; H. Lewald: *Questions de droit international des successions, Recueil des cours* 1925 IV, p. 122–123; E. Rabel: „The Conflict of laws", *A Comparative Study*, vol. IV, Ann Arbor 1958, p. 344–348.

[7] Traduction français: 55 *RCDIP* 323–327 (1966); *Droit polonais contemporain* 1967, No. 7–8.

[8] A. Mączyński: „Kolizyjna problematyka czynności prawnych na wypadek śmierci, zagadnienia wybrane" [Les actes juridiques à cause de mort en droit international privé, problèmes choisis], *Krakowskie Studia Prawnicze* vol. XII: 1979 p. 63–81.

indépendamment du fait de savoir si le testateur avait jamais possédé la nationalité polonaise. Sans égard à la position qu'on adoptera face à la question - controversée dans la doctrine - si le testament révoqué est privé d'efficacité juridique dès le moment de la déclaration de révocation, ou bien seulement au moment où il doit entraîner des effets juridiques (c'est-à-dire au moment du décès du testateur), le fait que la révocation du testament appartient à la catégorie d'actes à laquelle on applique l'art. 35 p.p.m. n'éveille aucun doute. Par conséquent c'est *lex patriae* du testateur du moment de la déclaration de révocation qui décide de la validité de la révocation. Cependant il résulte du caractère juridique particulier de la révocation du testament - â l'encontre du testament - qu'il n'y a pas de fondements pour apprécier séparément sa validité et son efficacité. Ainsi toute revocation remplissant dans les conditions de validité a pour effet de priver le testament révoqué de sa faculté d'entraîner des conséquences juridiques au moment du décès du testateur. Cependant la question de l'admissibilité de la révocation exige une appréciation à part. C'est *lex patriae* du testateur du moment de la confection du testament révoqué qui y est compétente. La question de savoir si l'acte juridique accompli possède le caractère d'un acte révocable, doit être résolue dès l'instant de son accomplissement et ne peut dépendre de changements futurs de la nationalité du testateur.

Parmi les conditions de validité la révocation, *lex patriae* du testateur du moment de la révocation étant compétente quant à ces conditions, il faut compter sans doute la capacité, les vices de la volonté et la forme. Pour la validité de la révocation *quoad formam,* il suffit d'observer la forme prévue par la loi de l'Etat dans lequel l'acte a été accompli (art. 35 phrase II p.p.m.).

Quant à la forme de la révocation, de même que celle du testament, l'art. 35 p.p.m. a perdu son importance pratique depuis l'entrée en vigueur, en Pologne, de la Convention sur les conflits de lois en matière de forme des dispositions testamentaires, conclue à La Haye le 5 octobre 1961.[9]

Cette Convention exprime deux règles concernant le problème de loi compétente pour la forme de la révocation du testament. La première entend que les règles sur les conflits de lois exprimées dans l'art. premier de la Convention s'appliquent aussi aux dispositions testamentaires révoquant une disposition testamentaire antérieure (art. 2 al. I). Il faut préciser cette formule: certainement la Convention concerne aussi la forme de dispositions révoquant non seulement une, mais *quelques-unes* de dispositions testamentaires antérieures. De plus, dans l'art. 2 il s'agit d'une application „convenable" de l'art. premier , ce qui

[9] Cependant, les dispositions des conventions bilatérales conclues par la Pologne avec d'autes Etats aussi bien avant qu'aprés l'entrée en vigueur de la Convention de La Haye restent en vigueur. Vu le caractère différent du contenu de ces dispositions par rapport à celles de la Convention de La Haye, celte solution est particuliérment peu satisfaisante par rapport aux Etats qui sont aussi signataires de la Convention de La Haye (par ex. la Yougoslavie). L'art. 64 de la convention entre la Pologne et l'Autriche sur les relations mutuelles dans les domaine du droit civil et sur les documents, signé le 11 décembre 1963, est un exemple de la bonne résolution du conflit de conventions.

signifie que dans le cas des points de rattachement personnels, ce sont le moment de la mort du testateur et celui de la révocation, et non celui de la confection du testament révoqué, qui décideront de la compétence de la loi (le texte de la Convention désigne les deux actes du verbe „disposer"). Conformément à la seconde règle, la révocation est également valable quant à la forme, si elle répond à l'une des lois aux termes de laquelle, conformément à l'article premier, la disposition testamentaire révoquée était valable (art. 2 al. II).

A la lumière de ce que la doctrine a précisé jusqu'ici au sujet de l'art. 2 de la Convention, il n'est pas certain si les règles de conflits de lois exprimées dans cette disposition portent sur t o u t e s les formes de la révocation du testament. Les opinions à ce sujet ne se rejoignent que sur deux points: premièrement, la Convention ne s'applique pas aux cas aù un testament valable perd son efficacité juridique sans égard à la volonté du testateur;[10] deuxièmement, la Convention s'étend aussi sur les déclarations de volonté de révoquer qui ont été faites simultanément avec une nouvelle disposition testamentaire et ont été confectionnées dans la meme forme. La reconnaissance de la validité d'une telle disposition testamentaire s'étend aussi sur la déclaration de révocation qu'elle contient, déclaration qui règle le rapport entre les deux testaments successifs. Dans le cas où le testament postérieur ne contient pas de déclaration *explicite* du testateur à ce sujet, il faut distinguer deux questions: l'appréciation de la régularité du testament en ce qui concerne sa forme, et l'établissement de la volonté du testateur pour ce qui est de la révocation. En cas de difficultés à établir son contenu, entreront en jeu les régies interprétatives du droit civil compétent pour l'interpretation du testament postérieur.

Des doutes naissent lorsqu'on cherche à établir l'étendue de l'art. 2 de la Convention en dehors de ces deux points. Ces doutes ont déjà apparu lors des travaux sur le projet de la Convention. La formule de l'art. 2 a subi une évolution caractéristique. Cela vaudrait la peine d'examiner son déroulement, parce qu'il peut jeter un peu de lumière sur l'interpretation de cette disposition. On a surtout discuté de l'étendue de la première des régies qu'elle exprime, tandis que les modifications apportées à la seconde n'avaient qu'un caractère rédactionnel.

Selon la formule des avant-projets de la Convention, respectivement celui de juin 1958 et de mai 1959, par la disposition testamentaire on entend aussi la révocation de la disposition antérieure. Cela voulait dire que la révocation était valable en ce qui concerne la forme, si celle-ci correspondait à une des lois compétentes, selon l'art. premier pour l'appréciation de la forme des dispositions

[10] La doctrine manque d'attitude uniforme pour ce que est de savoir si c'est *tex causae* d'un événement ou le statut successoral qui décide de la caducité du testament étant un effet *ex lege* de cet événement. Sur le plan de la loi polonaise, on peut défendre l'opinion selon laquelle l'effet dont il est question se produit seulement lorsqu'il est prévu par le statut successoral (art. 34 p.p.m.) dans la même mesure que par la loi compétente pour la validité du testament donné (art. 35 phrase 1 p.p.m.)

testamentaires. Quant à la déclaration de révocation, contenue dans le testament, le projet de prescription avait plutôt seulement une signification de constatation, ce qui était du au fait que la Convention concerne toutes les décisions contenues dans le testament (cf. art. 10 de l'avant-projet de 1959, correspondant à l'art. 12 de la Convention). Elle élargissait cependant l'étendue des règles de la Convention sur les cas de révocation sans qu'un testament nouveau soit rédigé. Dans les deux phrases du projet de disposition on mentionnait le même terme de „révocation". Le Rapport de la Commission spéciale joint au projet insistait sur le fait que la Convention ne concerne pas la révocation en tant qu'effet d'événements différents (comme je l'ai déjà mentionné - en effet ces cas ne sont pas une révocation en tant qu'acte juridique), cependant les questions de destruction du testament ou d'actions semblables du testateur, de me me que celle de retrait d'un testament déposé en garde officielle (par ex. chez un notaire) n'ont pas été tranchées.[11] Deux Etats, à savoir la Suisse et la Grande Bretagne, ont présenté des remarques concernant ce texte. A l'avis de la Suisse, il aurait été désirable que la Convention s'étende aussi sur le retrait et la destruction du testament accomplis dans l'intention de le révoquer, de même que l'alienation de la chose leguée faite par le testateur.[12] Quant à la proposition britannique, elle tendait à limiter l'étendue de la Convention uniquement aux déclarations de révocation faites sous forme de document („documentary revocations") car il n'est pas motivé de soumettre la révocation du testament par sa destruction à l'appréciation des lois énumerees dans l'art. premier du projet.[13] Sans nous demander ici si cette proposition était bien fondée, il faut observer qu'elle n'était pas un moyen propre à atteindre le but visé. En l'acceptant, on aurait exclu de l'étendue de la Convention la révocation résultant du contenu d'un testament fait dans une forme orale.

Lors des débats de la Conférence,[14] il s'est dessiné une nette divergence d'opinions pour ce qui était d'étendre ou de ne pas étendre la Convention sur les deux cas susmentionnés, c'est-â-dire la destruction du testament et le retrait du testament déposé en garde officielle. Initialement on avait décidé que l'étendue de l'art. 2 devait être limitée à la déclaration de révocation, faite sous forme d'acte ayant le caractère d'un testament. Le Comité de rédaction a proposé deux formules au choix: le texte A parlait de l'application de l'art. premier à la „déclaration de volonté visant la révocation...", le texte B -des „dispositions testamentaires écrites, révoquant...". Les deux textes ont suscité des objections. Le délégué britannique a proposé de compléter le texte A par te terme „écrite". Le texte B, á son tour, faisait craindre qu'on n'exclue, de la sorte, de l'étendue de la Convention la déclaration de révocation faite sous forme de testament,

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[11] *Conférence de La Haye de Droit International Privé, Actes et documents de la neuvième Session*, t. III: Forme de testament 1961, p. 25.

[12] ***Actes...***, p. 39–40.

[13] ***Actes...***, p. 36.

[14] ***Actes...***, p. 74,78, 118–121.

mais qui ne soit pas liée avec quelque nouvelle décision positive. A la suite de la motion du rapporteur du projet, H. Batiffol dans le texte B on a supprimé la mention sur le caractère écrit et c'est dans cette forme que le texte a été admis, d'abord à une très petite majorité de voix,[15] et plus tard par une majorité considérable.[16] Les adversaires de cette motion objectaient que de cette manière on reculait jusqu'à la position exprimée dans les avant-projets. La Rapport explicatif du projet définitif de Convention, élaborée par H. Batiffol, explique l'emploi du terme de „disposition testamentaire révoquant" par le fait qu'a l'avis de la plupart des participants à la discussion, il s'étend aussi sur une déclaration de volonté faite sous forme de testament, laquelle se limite à révoquer le testament antérieur, et n'exclue pas la forme orale de la disposition testamentaire. Cependant l'emploi de ce terme ne préjuge pas si la destruction ou le retrait du testament sont une question de forme ou de fond.[17]

En dehors des doutes énumérés par H. Batiffol, la position de la Convention n'est pas claire non plus en ce qui concerne l'appréciation de la déclaration de volonté de révocation faite dans une forme particulière autre que celle de testament et la revocation du testament sous forme de déclaration expresse sans observer la forme légale. Ces deux situations n'ont pas été traitées au cours de l'élaboration du texte définitif du projet de la Convention. Parmi les auteures qui commentent la Convention, A.E. von Overbeck a consacré la plus grande attention au problème de révocation. Les autres auteurs se limitent à constater que la Convention, sans trancher ces questions, laisse au tribunal la liberté d'interpretation.[18] En plus de cela, il faut remarquer que la loi anglaise de 1963 (Wills Act) anglais limite la disposition de l'art. 2 de la Convention à seuls les testaments, en excluant de cette manière les autres formes de révocation.

A.E. von Overbeck consacre beaucoup de place aux trois problèmes suivants: le retrait du testament de chez le notaire, sa destruction et sa révocation par une déclaration de volonté faite sous une forme quelconque.[19] Selon lui, le retrait du testament constitue „une véritable forme légale. du me me ordre que les autres formes de testaments, mais dont l'emploi est restreint à la révocation". Par conséquent, elle tombe sous la compétence de l'art. 2 de la Covention - à la lumière de celle-ci le testament retiré doit être traité comme révoqué. Tandis que, selon les opinions de A.E. von Overbeck, on ne devrait pas inclure la

[15] *Actes...*, p. 120.
[16] *Actes...*, p. 150.
[17] H. Batiffol: „Rapport explicatif' (in:) *Actes...*, p. 166. Cf. G.A.L. Droz: „Les nouvelles règles de conflit françaises en matière de forme des testaments". *Revue critique de droit international privé* 1968 p. 9.
[18] G.A.L. Droz: *Rx.d.i.p.* 1968 p. 9–10.
[19] A.E. von Overbeck: „Vers une convention internationale sur la loi applicable à la forme des testaments", *Schweizerisches Jahrbuch für Internationales Recht* 1958 p. 238–240; A.E. von Overbeck: *La neuvième session de la Conference de La Haye de droit international privé*, Nederlands Tijdschrift voor International Recht 1961 p. 44–46; A.E. von Overbeck: *L'unification des règles de conflits de lois en matière de forme de testaments*, Fribourg (Suisse) 1961 p. 101–108.

destruction du testament dans l'étendue de la forme de la révocation. En voulant y procéder, le testateur n'est obligé de suivre les indications d'aucune loi. Ainsi peut-on y parler tout au plus de l'aspect extérieur que tout acte juridique possède, mais non pas de la forme dans le sens technique. La destruction du testament est un acte du testateur, à la suite duquel apparai t le problème de l'interpretation de la volonté du testateur qui n'a été exprimée d'aucune manière, mais non pas un problème de validité du point de vue de la forme. C'est pourquoi elle est soumise au statut successoral. Quant â la troisiène question - selon A.E. von Overbeck - la déclaration de la révocation pour laquelle la loi n'établit pas l'obligation d'observer une forme légale définie, n'entre certainement pas dans l'étendue de l'art. 2 al.l de la Convention. Afin d'éviter les difficultés, A.E. von Overbeck propose une interpretation orginale de l'art. 2 al. 2 en attirant l'attention sur le fait que cette prescription ne traite pas d'une „disposition testamentaire révoquant", mais tout simplement de la „révocation". Par conséquent la question si cette manière de révoquer un testament est admissible[20] doit être soumise à la loi en vertu de laquelle le testament révoqué est valable pour ce qui est de la forme.

La solution de questions énumérés ci-dessus est d'une grande importance protique. Il s'agit tout simplement de savoir laquelle des lois peut déterminer les manières admissibles de déclaration de volonté de révocation. Dans le cas où on établirait que quelques-unes parmi le formes susmentionnées de révocation du testament sont exclues de l'étendue de l'art. 2 de la Convention, leur appréciation dépendrait de la loi désignée par les règles de conflits de lois découlant de p.p.m. L'essence du problème réside donc en la question de savoir quelles règles de conflits, celles de Convention au celles de la loi, constituent la base pour établir la loi applicable pour la forme de la révocation du testament. La tentative de résolution de ce problème doit être précédée par des considérations du caractère juridique de ces modes de révocation du testament dont l'appartenance à l'étendue de la Convention éveille des doutes.

a) Commençons par une situation qui n'a pas été traitée lors des débats de la Conférence et qui a été omise par A.E. von Overbeck. Il s'agit d'une révocation du testament accomplie dans une forme particulière, définie par la loi, mais différente de celles qui sont prévues par cette loi pour la confection du testament(ci-dessus ad 4). Nuis arguments s'opposent à son inclusion dans l'étendue de l'art. 2 de la Convention. Cela signifie qu'une révocation accomplie dans une telle forme est valable, si cette forme est prévue en tant que celle de révocation du testamet par n'importe quelle des lois énumérées dans l'art. 2 en rapport avec l'article premier de la Convention.

b) C'est dans différentes situations que nous avons affaire au retrait du testament déposé en garde officielle. Il peut être question du retrait d'un testament (par exemple holographe) qui a déjà été confectionné eonme valable

[20] Et aussi la révocation par la destruction et des actes semblables du testateur — A.E.von Overbeck: *NTIR* 1961 **p**. 46.

et qui a ensuite été déposé chez un notaire jusqu'au moment de l'ouverture de la succession afin d'être gardé en sécurité. Ce fait de déposer le document chez le notaire n'est pas une condition de validité du testament, aussi son retrait n'influe-t-il pas sur l'efficacité juridique du testament. On rencontre cependant des legislations en vertu desquelles le dépôt d'un document contenant la déclaration de la dernière volonté du testateur constitue la condition indispensable d'observer une forme déterminée de la confection du testament. A cet endroit, il faut rappeler la forme mystique, familière à plusieurs lois, qui consiste, en grandes lignes, en ce que le testateur remet au notaire (ou à une autre personne officielle) un écrit cacheté ou non cacheté qu'il a confectionné lui-même ou qu'il a fait confectionner à une autre personne, en déclarant oralement que celui-ci constitue son testament. D'autres formalités s'y joignent: la présence de témoins, la rédaction du protocole du dépôt etc. Un testament confectionné dans cette forme doit incessamment rester en dépôt chez le notaire qui participait a sa confection?. Cette stricte exigence a pour but de conserver le document déposé (dont le contenu peut être ignoré de tous en dehors du testateur, même du notaire) exactement dans la même forme qu'il avait au moment où le testateur le remettait au notaire, sans la moindre modification.[21] Un moyen de réalisation de ce but, c'est la disposition en vertu de laquelle un testament retiré de chez un notaire par le testateur est considéré comme révoqué. Ce motif n'entre plus enjeu si dés le début le testament correspond aux exigences d'une forme différente, par exemple holographe (document entièrement écrit à la main par le testateur, signé et daté). Alors, si le testament a été retiré sans l'intention de le révoquer, il n'y a pas de raison pour refuser au testament l'efficacité juridique *mortis causa*, mais on le traite comme testament holographe valable et non révoqué.[22] La formule susmentionnée de la disposition „on considère comme révoqué" (§ 2256 B.G.B. a été, sur ce point, le modèle de dispositions de nombreuses lois) a causé beaucoup de confusion. Car c'est à partir de celle-ci qu'on traite le retrait du testament comme fiction légale de la déclaration de la volonté de révoquer, faite par le testateur, donc comme révocation au sens strict.[23] Cela est transféré sur le plan du droit international

[21] Comme le document ne doit pas être écrit à la main par le testateur ou par une personne officielle – ainsi dans le cas contraire il pourrait être facilement contrefait ou falsifié.

[22] La loi grecque occupe une position différente qui eclue la possibilité de reconnaître un document retiré pour testament holographe valable (art. 1766 al. 1 C.c. – cela ne concerne pourtant pas un testament holographe déposé chez le notaire afin d'être gardé en sécurité, donc non dans l'intention de profiter de la forme mystique, art. 1767 C.c. en rapport avec l'art. 1722 C.c.) Cette prescriotion rigourese cède devant les exigences de la vie. Car en pratique on reconnaît la validité d'un tel testament, si seulement le testateur, après l'avoit retiré, a signelé dans le document que celui-ci constitue son testament et s'il a signé et daté celte remarque. Depuis lors le document est considéré comme un testament holographe nouvea – K.G. Stefanopulos: „Gültigkeit, Eröffnung und Vollstreckung der Testamente in Griechenland", *Österreichische Juristen-Zeitung* 1962 p. 377–378, aussi la jurisprudence présentée chez P. Markianos: *Rabels Z* 1960 p. 120–121.

[23] Ainsi la plupart des auteurs allemands, cf. p.ex. H. Brox, Erbrecht, Köln 1983 p. 83.

privé.[24] Une cause supplémentaire de la confusion, c'est le fait qu'en général le testateur est instruit du contenu des prescriptions concernant cette forme du testament et en reprenant le document, il agit dans l'intention de révoquer le testament. Il arrive cependant des cas différents. Et ici, il faut particulièrement insister sur le fait que retirer un testament confectionné dans la forme mystique de la garde officielle revient à provoquer les même effets que ceux d'une déclaration de la révocation sans égard à l'intention du testateur et même contre sa volonté nettement exprimée.

Il résulte de ce qui précède que le retrait du testament déposé en garde officielle n'a jamais le caractère d'un acte juridique.[25] Il peut être qualifié de ce qu'on appelle „activités juridiques" („Rechtshandlungen"), en tant que manifestation de volonté semblable à la déclaration de volonté. L'effet juridique qui y est lié (la testament est privé de la facutté d'exercer des effets juridiques au moment de l'ouverture de la succession) se produit *ex lege*, sans égard à la volonté du testateur. Par conséquent, à quel droit civil est soumis le retrait du testament? Le caractère juridique ne s'oppose pas de lui-même à la soumission de celle-ci aux règles de conflits de lois portant sur les actes juridiques *mortis causa*, car la doctrine admet qu'on applique aux activités juridiques , de manière analogue, les règles de conflits de lois concernant les actes juridiques.[26] Il semble cependant qu'il existe une solution plus simple et plus fondée que celle proposée par A.E. von Overbeck.

Elle consiste en appréciation des effets du retrait du testament par le droit civil auquel avait été soumise la forme observée lors de la confection du testament donné. La compétence du statut de la forme (de confection) du testament peut s'étendre exceptionnellement aussi sur l'appréciation des circonstances postérieures à la confection du testament: par exemple du terme pendant lequel reste en vigueur un testament fait dans une forme particulière, ou de la manière de reconstitution du contenu d'un testament oral.[27] C'est là précisément, à mon avis, que se produit l'une des situations de ce genre: la loi compétente pour la forme du testament exige que l'un des éléments de la situation de fait réalisée au moment de la confection du testament (dépôt en garde officielle du document) dure jusqu'au moment du décès du testateur. L'appréciation de la validité *quoad formom* de ce testament ne saurait dépendre d'un changement de la circonstance indiquant la compétence de la loi, lequel se

[24] T. Scheuermann: Statutenwechsel im internationalen Erbrecht Müchen 1969 p. 85.

[25] W. Merle: Zur Rückgabe eines öffentlichen Testaments aus der amtlichen Verwahrung, Archiv für die civilistische Praxis 1971 p. 486–509; U. von Lübtow: Erbrecht, Bd 1, Berlin 1971 p. 242–246.

[26] E. Zitelmann: Internationales Privatrecht, Bd II, Leizig 1912 p. 158; E. Frankenstein: Internationales Privatrecht (Grenzrecht), Bd I, Berlin 1926 p. 558; K. Firsching (in:) G. Beitzke, H. Coing, K. Firsching, F. Korkisch: Internationales Privatrecht, (Sonderausgabe aus Staudingers Kommentar zum BGB), Bd I, Berlin 1970 p. 196.

[27] A. Mączyński: *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym* [Succession testamentaire dans le droit international privé], Kraków 1976 p. 78–79.

produirait après la confection du testament. La forme du testament fait de cette manière est en permanence soumise à la compétence de la même loi, indépendamment de changements de la nationalité, du domicile ou de la résidence habituelle du testateur. Le retrait du testament de chez le notaire entraîne toujours les effets tels qui résultent de cette loi,[28] et non pas du droit personnel actuel du testateur. Une telle forme peut être entièrement ignorée par la loi à laquelle le testateur est lié actuellement et de ce fait-même elle n'associe aucun effet juridique au fait d'avoir retiré le testament. Toute autre solution (par exemple la compétence du droit personnel du testateur du moment du retrait du testament ou de son décès) romprait le lien étroit qui existe dans le cas de cette forme de testament entre les prescriptions déterminant les exigences formelles pour ce qui est de la confection même du testament, et les prescriptions , qui en sont une conséquence, sur la nécessité de laisser le document en garde officielle.

c) En considérant le caractère juridique de la destruction du testament, de même que d'autres actes semblables du testateur (ci-dessus ad 6), il faut distinguer deux situations: soit le testateur a détruit le testament dans l'intention de révoquer ses dispositions, soit sans cette intention, par exemple par hasard. Cette distinction est uniquement basée sur les établissements de fait quant à l'existence de l'intention de révoquer chez le testateur, mais elle a une importance essentielle pour l'appréciation juridique de ces situations. Dans la première, la destruction du document est un moyen de manifester par le testateur son intention de révoquer le testament. C'est donc une révocation du testament au sens propre du mot, c'est-à-dire un acte juridique dans la composition duquel entre la déclaration de la volonté de priver le testament de son efficacité juridique en cas de mort. Cette déclaration a été faite *per facta concludentia,* mais uniquement d'un genre défini: en général la loi exige que ces actes concernent le document dans lequel est écrit le contenu de la dernière volonté du testateur. Les dispositions du droit civil qui déterminent ces actes (par exemple l'art. 946 du Code civil polonais) constituent quelque chose d'intermédiaire entre la forme de l'acte juridique déterminé par la loi et la forme librement choisie par la personne qui procède à l'acte juridique. La

[28] L'argument que A. E. von O v e r b e c k avance pour appuyer sa position, c'est l'exemple de la loi grecque (art 1766, 1767 du Code civil, cf. ci-dessus note 21). Il semble qu'il ne s'oppose pas à l'opinion présentée dans le texte: si un testament pour la forme duquel la loi grecque est applicable, a été retiré de chez le notaire, les effets prévus par la loi grecque s'en suivent, y compris l'impossibilité de reconnaître ce testament pour testament holographe valable. Cependant si au moment de la confection une autre loi était aussi compétante pour la forme de ce testament (p. ex. française), le retrait du testament remplissant les conditions requises pour sa validité comme testament holographe, effectué sans l'intention de le révoquer, ne causera pas la caducité du testament (cf. art. 979 C.c. français). Il ne serait pourtant pas fondé de soumettre â la loi grecque les effets du retrait d'un testament confectionné dans une forme conforme à la loi française uniquement parce qu'au moment du retrait de chez le notaire le testateur est lié à la loi grecque par l'intermédiaire d'une circonstance correspondant à l'un des points de rattachement énumérés dans l'art. premier al.1 lettre b-d de la Convention.

liberté du choix quant à la manière de déclarer sa volonté y est plus grande que quant à la forme déterminée par la loi (ainsi par exemple la destruction du testament consiste à l'anéantir physiquement d'une manière quelconque, alors que la fait de le barrer, couper, jeter etc. est un changement qui montre l'intention de le révoquer), elle n'est pas illimitée, comme cela a lieu dans le cas de formes appelées libres. Car, en vertu des dispositions dont nous parlons le testateur ne peut exprimer sa volonté de révocation à travers tout comportement révélant cette volonté d'une manière suffisante.

La destruction du testament sans l'intention de le révoquer n'est certainement pas un acte juridique, et par conséquent le problème de l'appréciation de sa validité est sans raison. C'est le problème de la loi compétente pour l'appréciation des conséquences d'un tel événement qui peut, tout au plus, demeurer actuel. La plupart des legislations n'exigent pas que le document dans laequel ont été rassemblées les dispositions testamentaires, existe jusqu'au moment de l'ouverture de la succession à la suite de quoi sa destruction par une personne autre que le testateur, ou bien par le testateur, certes, mais sans l'intention de révoquer, n'influe pas négativement sur l'efficacité du testament. Une position différente est représentée par une partie de la doctrine française, ce qui s'explique par le fait que parmi les dispositions sur la révocation du testament du Code civil français manque de disposition sur la destruction du document[29]. Vu la ressemblance d'une telle situation au retrait du testament dont nous avons parlé ci-dessus, je me prononcerais en faveur d'une solution analogue, c'est-à-dire consistant à la soumettre à la compétence de la loi à laquelle est soumise la forme du testament donné.

d) Selon certaines lois, le testament peut être révoqué par une declaration expresse du testateur que le testament donné ne doit pas être traité comme expression de sa dernière volonté (ci-dessus ad 5). On y exige que cette déclaration soit faite d'une manière qui permette d'établir sans nul doute la volonté de révocation, donc non pas â travers un comportement quelconque. Dans ce genre de situation, nous avons affaire à un acte juridique.

Dans le cas où il a été établi que dans l'intention de révoquer le testament le testateur l'a détruit ou a fait une déclaration distincte de volonté d'un contenu convenable, le problème se pose si l'acte juridique accompli de la sorte (la révocation du testament) est valable sous l'aspect de la forme. Il résulte de l'argumentation ci-dessus que deux attitudes sont possibles pour ce qui est de savoir si ces deux formes de révocation du testament appartiennent â l'étendue de la Convention:

1) La Convention concerne seulement les révocations faîtes dans une forme particulière, déterminée par la loi (c'est-à-dire sous forme de testament, mais probablement aussi dans une autre forme particulière). La déclaration de la

[29] Telle opinion est représentée par J. P. W a y m e l: *Les formes du testament olographe et le maintien de cas formes jusqu'au décès du testateur*, Paris 1963 p. 195—237. La plus grande partie des représentants de la doctrine et la jurisprudence occupent une position différente.

volonté de révocation, faite d'une manière différente, en tant qu'exclue de l'étendue de la Convention, continue à être soumise aux règles sur les conflits de lois résultant de p.p.m.

2) La Convention concerne toutes les connues au droit civil formes de révocation du testament (au sens strict - c'est-à-dire par une déclaration de volonté du testateur). Ainsi la révocation est-elle valable lorsqu'elle a été faite dans une forme correspondant à l'un de ces droits, applicable en vertu de l'art. 2 de la Convention.

Dans ses grandes lignes, la première de ces attitudes se rapproche de celle que représente A.E. von Overbeck (la différence ne concerne que le retrait du testament et l'inclusion de la forme particulière autre que celle de testament - ci-dessus ad a et b). Le principe fondamental sur lequel se fondent les opinions d' A.E. von Overbeck, c'est la thèse selon laquelle la Convention concerne seulement les actes juridiques formels au sens strict, à savoir ayant la forme indique par la loi. Par conséquent le fait de désigner un droit civil comme compétent pour la forme de révocation du testament signifie que le testateur peut procéder á la déclaration de révocation en la forme prévue par ce droit pour la confection du testament. A.E. von Overbeck accepte tacitement cette thèse et ne donne d'aucuns arguments pour la motiver. Cependant celle-ci n'est pas du tout évidente. Son admission peut-être fondée sur le déroulement (décrit ci-dessus) de la discussion sur l'art. 2 de la Convention, ce dont témoigne nettement le Rapport explicatif élaboré par le rapporteur du projet: il constate que la question de compétence de la loi quant à la révocation du testament à travers sa destruction a été laissée non résolue.[30] La situation la plus aléatoire, à savoir la déclaration de révocation faite dans une forme libre, n'a pas du tout été traitée lors de la discussion. A.E. von Overbeck n'est pas d'ailleurs conséquent à l'égard du principe qu'il a admis. En l'appliquant avec conséquence, il aurait dû exclure aussi de étendue de la Convention le retrait du testament qui n'est pourtant nulle part prévu en tant que forme de confection du testament (ceci n'est pas un acte juridique, comme j'ai essayé de le montrer ci-dessus).[31]

A mon avis, c'est la seconde attitude qu'il faut reconnaître pour juste.[32] Nombre d'arguments sérieux témoignent en sa faveur, elle n'est contradictoire ni avec les buts de la Convention, ni avec son texte, ni enfin avec les matériaux liés à l'élaboration de la Convention. Avant tout, il semble hors de doute qu'il ne soit pas nécessaire de maintenir en viguer un testament dont le contenu a cessé de correspondre à la volonté du testateur. Cela résulte du principe

[30] H. Batiffol (in:) *Actes...*, p. 166.

[31] La position d'A. E. von Overbeck vient peut-être du fait que la doctrine français ne remarque pas le besoin de distinguer strictement les déclarations de volonté et les manifestations de volonté semblables aux déclarations de volonté, cf. M. Ferid: „Das französische Zivilrecht", Bd I, Frankfurt a.M.-Berlin 1971 p. 1248.

[32] Pour la première fois, j'ai présenté et argumenté cette opinion dans ma thèse de doctorat intitulée „Forma testamentu w polskim prawie prywatnym międzynarodowym" [La forme du testament dans le droit international prive polonais], Cracovie 1974 (manuscrit) p. 195–208.

fondamental du réglement de la succession dans des législations contemporaines, à savoir de la liberté de tester dont la liberté de révoquer le testament est une conséquence. En réalisant ce principe, les droits civils facilitent au testateur la déclaration de révocation, entre autres par le fait qu'elle peut être faite non seulement en chaque forme prévue pour la confection du testament, mais aussi dans une forme dont les exigences sont très atténuées (par exemple par la destruction du document). Sur le plan du droit international privé, cela devrait aboutir à soumettre la forme de révocation du testament aux mêmes règles de conflits de lois que celles qui concernent la confection du testament. Il devrait suffire pour la validité *quoad formant* de la révocation du testament d'observer la forme prévue dans chaque législation. De plus, il me semble pas souhaitable de faire dépendre l'application des règles de conflits de lois concernant la compétence de la loi dans un domaine quelconque du contenu des normes que règlent ce problème dans les droits civils lesquels entrent en jeu, alors que la première attitude aboutit précisément au même résultat.

Il faut encore consacrer quelques mots à l'art. 2 al. 2 de la Convention. Il soumet la forme de la révocation à la compétence de cette loi en vertu de laquelle, au termes de l'art. 1 de la Convention, le testament révoqué était valable quant à la forme. Pratiquement, cette prescription n'entre enjeu qu'au moment où il s'avère que la forme en laquelle a été faite la déclaration de révocation ne correspond à aucune loi compétente en vertu de l'art. 2 al. 1 en rapport avec l'art. premier (ni en vertu de l'art. 3). La possibilité supplémentaire qui y est prévue concerne uniquement la forme de la déclaration de révocation. Par conséquent, les disposition positives liées, grace à l'identité de la forme, à une révocation valable seulement en vertu de l'art. 2 al. 2, ne sont pas valables. Cela pose le problème susmentionné de l'appréciation de l'efficacité d'une révocation valable du point de vue de la forme, résultant d'un testament non valable, difficile à resudre surtout lorsque la révocation est implicitement contenue dans ce testament (cela découle de la contradiction entre le dispositions postérieures, non valables, avec les antérieures). D'ordinaire, dans de tels cas il faut admettre l'inefficacité de la révocation.

Le mode de régler la compétence de la loi admis par l'art. 2 al. 2 est dicté par l'aspiration à tenir compte de la tendance naturelle du testateur à se servir en révoquant le testament de la même forme en laquelle le testament révoqué a été confectionné, de même qu'à prendre en considération les prescriptions éventuelles du droit civil qui peuvent exiger l'observation de cette forme précisément. En vertu de l'art. 2 al. 2 la compétence de la loi dont les prescriptions ont été observées au moment de la confection du testament, est prolongée jusqu'au moment de sa révocation même si le testateur avait perdu tout contact avec cette loi (par exemple il a changé de nationalité, de domicile, de résidence habituelle ou quitté l'Etat dans lequel le testament avait été confectionné). En révoquant le testament, le testateur peut faire la déclaration en toute forme prévue par cette loi pour la révocation du testament, non seulement celle qui avait été observée lors de sa confection.

L'opinion exprimée par A.E. von Overbeck, selon laquelle l'étendue de l'art. 2 al. 2 est plus large que celle de l'art. 2 al. 1 ne semble pas être juste. A.E. von Overbeck pensait à éviter les diffecultés liées â l'exclusion de certaines formes (appelées libres) de révocation de l'étendue de l'art. 2 al. 1 de la Convention. Il le motivait par le fait que les prescriptions portant sur la forme de la confection et celle de la révocation du testament constituent un certain ensemble dans chaque droit civil. Ceci est vrai, mais l'argument a été mal choisi: c'est précisément dans le cas de la forme libre de révocation qu'est sensible l'indépendance des modes de régler la forme de la confection et de la révocation du testament.

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Remarks on the Place of International Human Rights in the Constitution of the Republic of Poland

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1. Working out the new constitution of the Republic

The necessity of replacing the old Constitution of July 22, 1952, a law born in the very apogee of the Stalinist era, with some thoroughly new written constitution – had been self-evident for many years for Polish opposition circles. The call for this replacement was intensified during the second half of the seventies as anticommunist organizations were founded and began to manifest their presence more and more solutely. The famous amendment of February 1976 which introduced to the text of the July Constitution a new article 6, containing the principle of friendship and co-operation with the Soviet Union and other socialist countries, provoked first of all many critical reflections on the constitution in force. Censorship, however, inhibited any criticism of this point in official publications, in so called „first circulation".Such criticism was allowed only in 1983. That very year Professor Andrzej Gwiżdż managed to smuggle his mostly tangled, due to censorship consternation. It sounded as follows: „Not entering the analysis of political reasons for such a completing of the Constitution, there is mean not to state that from a strictly juridical point of view it was not at all quite indispensable".[1]

Some years had gone by and it became evident that all of the Constitution „is not quite completely indispensable". In 1987 editor Stanisław Remuszko founded within the Moderation and Labour Club, in Warsaw, a Constitutional Group which began to work out a new written constitution, initially, under nearly conspiratorial conditions. A year later a group headed by Professor Sylwester Zawadzki started in the University of Warsaw studying theoretical problems underlying generally all constitutional solutions. Also the fact that this kind of problem was foreseen by the official governmental research programme, No. CPBP 11.12, indicates that the then political powers undertook to reconsider and to ponder upon some new constitution.

[1] A. Gwiżdż: „The role of the Diet in modelling international relations of the Polish People's Republic", in: *Legal and Organizational Basis of the Relations of the Polish People's Republic with Foreign States*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1983, p. 11.

Political transformations of 1989 brought forth two amendments to the Constitution. The first one, of April 7, 1989, brought us the two-chamber Parliament and the office of President of the Republic. The second one, dated December 29, 1989, was the expression of profound changes occured in a system of government through the elimination of ideological formulations and the introduction of the principle of a democratic state of law as well as, at the same time, the principle of freedom of economic activity. Altogether this gave qualitative change to the system of government.

At the same time, the general conviction grew more and more intense that, as soon as possible a new Constitution should be written, so that it could be voted on the occasion of the 200th anniversary of the May Third Constitution, At the beginning of December 1989, both chambers of Parliament separately founded their constitutional commissions. Their work was begun with the feelings of sureness and resolution that the aim could be achieved before May 3rd, 1991. Nevertheless, the pressure of other legislative activities as well as the more and more frequently expressed opinion that the so-called „Diet based on political contract" (which, issued as a fruit of compromise, concluded at the „Round Table") should not be creator of the new constitution all made it so that initial projects could not be realized before both chambers were elected anew and in a fully democratic way.

Yet this period brought a rather rich range of projects for a new constitution. The Senatorial Constitutional Commission voted its project on April 12, 1991, and the amended and final text of it on October 22, 1991. The project prepared by the Constitutional Commission of the Diet of the Republic of Poland was drawn up finally in August 1991. Another project, of the group headed by Professor S. Zawadzki (other members: Professors Z. Czeszejko-Sochacki, Z. Jarosz, W. Sobolewicz, L. Wiśniewski, B. Zawadzka, T. Moldawa), was published in October 1990. Professors A. Mycielski and W. Szyszkowski presented an author-project of the Senatorial Constitutional Commission in June 1990, and Professors J. Zakrzewska and J. Ciemniewski promulgated their own project in the daily newspaper *Rzeczpospolita* on December 14, 1990. The group of individual authors of projects was joined also by J. Lityński.

Projects prepared by political parties have been presente successively by the Democratic Party (1989), the Polish Peasants Party (in July 1990), the Agreement-Centre Party (in March 1991, assumptions only) and by the Confederation for Independent Poland (in July 1991).

In May 1992, the Olszewski government revealed the existence of a governmental project for a provisional constitution. The contents have never been published and the author is most probably Professor A. Stelmachowski.[2]

The President of the Constitutional Commission of the Diet of the Republic of Poland, Professor B. Geremek, has written in the preface to the Diet's

[2] *Gazeta Wyborcza*, May 16–17, 1992, p. 2.

project that the 10th term's Diet did not undertake its legislative functions on relation to constitutional matters because it wanted the Constitution to be voted on by new national representation selected already in free elections. All the above mentioned projects, i.e., Senatorial, of the Diet, projects elaborated by particular political parties, institutions of individuals, could be of much help in the work of preparing the constitution of the independent Republic.[3]

There is no doubt that the heritage transmitted in such a way to a new legislative power is to have much influence on the final shape of the constitution if only this new power is able to deal with the matter within its term of office. For this reason there is a major need to analyze the submitted projects as well as to spread knowledge about solutions applied in the projects. Furthermore, it must be done with public opinion in mind which up to the present day has only minimally been involved in the discussion on the constitution. And if the new constitution has to be ratified by the whole nation by means of a referendum — initiating such a discussion shall quickly become imperative.

2. International law in drafts of a new constitution of the Republic of Poland

2.1. Provisions regarding international law before and after the amendments of April 1990

When presenting the place occupied by international law and human rights in projects for the new constitution one must pay particular attention to two projects — the Senatorial and the one issued in the Diet — because both of them have been elaborated by respective Constitutional Commissions as competent bodies for advancing legislative initiatives. The Diet draft, however, has not got its explanatory statement. (Professor Zawadzki's group has joined such a statement to its own project). So it is necessary to follow up the ,,travaux préparatoires" for both drafts, because just out of that stage come, to some degree, motives of putting in such or another legal solution. All modern constitutions contain provisions related to external functions of a state. They concern, principally, the questions of establishing and then maintaining contacts with other states, of defense of its own territory and, more rarely, of principles of foreign policy and of the place of international law in the system of domestic law.

The provisions of the July Constitution of 1952, as far as international relations are concerned, were exceedingly concise. Article 30 in its part 1 mentioned functions of the Council of State and, among others, it quoted nomination of plenipotentiary representatives of the Polish People's Republic in other countries, agreement of credentials of other countries diplomatic representatives to be accredited in Poland as well as the ratification or rejection of international

[3] Constitutional Commission of the Diet of the Republic of Poland (10th term) — Constitution — A project, The Diet's Editions, Warsaw 1992, p. 10.

treaties. After the above mentioned amendments of April, these functions have been taken over by the President of the Republic with the reservation of ratification of international agreements which make the state financially burdened or which necessarily need previous legislative changes. In both last mentioned cases a ratification must be preceded by the acceptance of the Diet (article 32 letter G paragraph 2).

Until the amendments of April, the Diet itself had no special powers in the sphere of international relations. The lot of international agreements was depending, de facto, on the Council of Ministers when we consider that the Council of State was to ratify them automatically and without any possibility of verifying the standpoint of the government. Parliamentary control of executive powers actions in the domain of international relations had all the characteristic features of an apparent activity. The Diet commissions for foreign matters and international trade have been unceremoniously inactive, which is proved by the fact that there are almost no traces at all of an interpellation or of Parliament members questions put to respective Ministers (for example, members of Parliament of the VIth Diet's term lodged no interpellation nor question at all).

Nowadays too the Diet is still insufficiently concerned with internal affairs and it is far from any elaboration of a prospective vision of foreign policy and moreover, to a very large extent the Diet seems to leave the matters to the wisdom of executive power. It can be proved by the example of the Polish-American treaty on commercial and economic relations signed in Washington by Prime Minister Tadeusz Mazowiecki on March 21, 1990. The news itself about the fact came to the Diet only in December 1990 when the mass-media communicated that the U.S. Senate agreed to ratify a treaty which had been unknown to the Polish Parliament. At the same time, public opinion in Poland learned from the Group for International Law of the Legislative Council that Americans had dictated to the Polish party a stronger formula of intellectual property protection than they themselves had. It was because of this matter was given some publicity that the Diet consented to ratification of the treaty, nevertheless it voted an interesting resolution on July 26, 1991, concerning the matter of the treaty.[4] It was stated in the resolution that the Diet was well aware of the importance of charges for the Polish national economy that resulted from the treaty, in particular – the increased fees for utilization of American intellectual property. The Diet recognized also that the provisions of the treaty can not be retroactive. Moreover, the provisions can not be a basis for a demand to withdraw from circulation all computer programmes which, on the day of entering in force of the treaty, had been utilized by their owners – regardless of the way of having acquired them. The Diet also formulated its opinion that the treaty does not limit freedom of the standpoint of the Republic of Poland within the GATT, nor infringes on the

[4] *Monitor Polski* [Official Gazette] 1991, No. 26, item 191.

principle of equality as far as protection of the markets of both parties from excessively increasing imports is concerned. It has also been stated in the final part of this autointerpretation that further interpretation should be done together with the American party, both before exchanging ratification instruments and after entering in force of the treaty.

Yet one can be still impressed by the fact that members of the Parliament do attach relatively little importance to international questions, that they are very often underinformed and do lack even current news of the domain of international relations as well as some more profound prognosis or results of relevant studies. The April amendment tends toward a good direction because it activates the Diet in the sphere of international relations. We could suggest, however, that the Diet should have some more influence on ratification of a much larger range of international agreements that should lead to an increase in the interest of Parliament members in treaty policy of the executive powers because of the necessity of adopting an adequate standpoint. Besides, the Diet should carefully watch the doings of the executive and then well consider the constitutional provision related to the Diet's consent for ratification of international treaties which make the State financially burdened or which need previous legislative changes. For there is a place to gear that the President may evince some inclination to comprehend this provision in a restrictive manner which then could limit the competencies of the Diet. It happened already in February 1992 when the President unfortunately ratified – with infringement of the Constitution – the „Interim Agreement" which just made the state financially burdened and the effect of which was to make enter in force, on March 1st, 1992, commercial dispositions of the Treaty on association of Poland with the European Community (Treaty dated December 16, 1991). This very fact casts its shadow on the whole Treaty in the preamble of which the member-States have expressed their appreciation for „important achievements of the Polish nation in the process of accelerated transition to a new political and economic system of government based on the principle of law" (conf. the original English text of the preamble).

2.2. International law in the Diet's project

The session of the Diet's Constitutional Commission that took place on April 25, 1990, contributed very much indeed to the discussion on the place of international law in the new constitution of the Republic of Poland.[5] Poland's Foreign Minister, Professor K. Skubiszewski, participated in the session as reporter. He repeated his main arguments which he had already explained and presented in January 1987 in fulfilling the commission of the Legislative Council's Group for International Law by the Prime Minister.

[5] *The Bulletin of the Constitutional Commission of the Diet of the Republic of Poland*, vol. IV, Warsaw 1990.

Kern M.P. motioned his reservations to Skubiszewskie argument that not only international agreements, but also international customary law has the primacy in relation to the internal law of the State. He deduced in the discussion that giving customary norms the primacy should inevitably lead to legal chaos. The reporter replied and explained that such a problem appears only very rarely and concerns mainly diplomatic privileges and immunities and the non-claiming of foreign states to Polish courts (principle: *par in parem non habet imperium*).

Professor A. Wasilkowski carried on general controversy with the principle of primacy. He stated, namely, that in many countries prescriptions were not clear enough, that their approach was too far selective and, finally, the courts and administrative organs did restrictively interpret constitutional prescriptions. He suggested then to recognize – after the article 53 of the French Constitution – the primacy of international law, but only on the basis of principle of reciprocity which is to be related only to the countries which recognize the same principle. For pragmatic reasons Professor Wasilkowski declared for an enlargement of the range of manoeuvre, so – against excessive binding by the primacy. Professor Skubiszewski argued with counterargument issuing from the thesis which says that when a state binds itself with an international agreement which proves next to turn inconvenient of unfavourable, the state must seek some legal ways to get out of obligations resulting from the agreement in question (denouncement).

Furthermore, in the debate the participants declared for enlargement of the range of agreements which necessarily need approval of the Diet – because of the fact that particular Ministries show a tendency to conclude agreements out of any control.

On June 21, 1991, the Diet's Constitutional Commission adopted the final version of the constitution project. The provisions concerning the position of international law in internal legal order of the Republic of Poland have been placed first of all in Chapter 1, named „General Principles". Article 3 of this Chapter proclaims that the system of law of the Republic of Poland consists of the constitution, laws and acts issued on the basis of legal authorization, as well as of ratified international agreements. Now we can see very well that, the authors of the project have rejected a larger conception and did not include in the list of sources of law the customary norms of international law nor non-ratified international agreements nor even binding for Poland resolutions of international organizations.

A declaration appears in article 4 that laws of the Republic of Poland are in conformity with ratified international agreements and with generally recognized principles of international law. We can deduce from the fact that the formulation „generally recognized principles of international law" had been agreed up on and mentioned in article 4 – that the authors were well aware of the need to take into account, in this very place, the generally recognized principles of

international customary law – at least the above mentioned principle *par in parem non habet imperium*. So the solution adopted in article 3, without the customary law, is even more astonishing.

Part 2 of article 4 speaks about the primacy of international law. An international agreement ratified with consent of the Diet has primacy if it can not be compatible with the law. Other international agreements have primacy if they can not be made compatible with normative acts lower than the law.

In spite of some opinions raised in the above mentioned discussion, the authors of the project did not renounce the primacy of international law, they did not introduce the principle of reciprocity nor formulated a provision which for pragmatic reasons could be interpreted one way or another depending on virtual needs. At the same time they have ignored customary norms of international law which were binding for the Republic of Poland. This tendency, which is well visible in both articles, is contrary to the fundamental characteristic feature of international law – namely, frequent co-existence within international law of equally valid treaty norms and customary norms, and as such does not permit to positively judge the concerned fragment of the project.

In chapter 2 of the project, which is devoted to human rights, freedoms and duties, one can find many references to international law. Article 13 says that everyone who is placed under jurisdiction of the Polish State enjoys rights and freedoms and is liable to duties formulated in the Constitution and, in conformity with international law, all exceptions from this principle which are related to foreigners – are determined in the provisions of this Constitution. In article 19 the role of international human rights has been exposed because the authors of the project considered it right to introduce a ban on interpreting constitutional rights and freedoms in a way to reduce the individual rights of a human being, rights which belong to every individual on the basis of international law which is binding for the Republic of Poland.

Article 25 does not mention *expressis verbis* international law, but it refers to one particular source of international law, namely – to *general principles of law recognized by the community of nations*. The first sentence of this article speaks about penal responsibility in conformity with the principle *lex retro non agit*. Already in the second sentence an exception from the above principle, appears punishment for an illegal act, which during the time of its perpetration was considered as a crime conformly to the *general principles of law recognized by community of nations*. The formulation we have referred to above is obviously a mutation of a somewhat outdated expression – *general principles of law recognized by civilized nations* – which had been first used in the Statute of the Permanent Court of International Justice in 1920. Just the same formulation was repeated in article 38 part 1 point c of the Statute of the International Court of Justice dated 1945. Surely it is one of the most difficult notions of international law as far as interpretation of this is concerned. The contention arose about the point whether the question was about general principles of

international law or about principles of law in general. Most frequently it is admitted that only principles which are common to all legal systems are concerned here, so common for both internal and international types of law. Here too it must be stressed that these principles have to be effectively recognized by legal systems and practice of all states. In that light the intention itself of the authors of the project becomes obscure and confused for if an act was illegal according to some *general principle recognized by community of nations* it means that this principle does really work in Polish law as well as in practice. So what does it serve to use the vague formulation spooned out of an old act of international law (the Permanent Court of International Justice Statute) — when there is no virtual need to do so.

Perhaps the authors had in mind *generally recognized principles of international law* mentioned already in article 4 of the project. If so they simply used an improper formulation, improper in this context, which moreover has led to some confusion.

Also, articles 37 and 40 do mention norms of international law. Part 4 of the first of them defends compulsory labour except for cases admitted by international norm which are binding for a State. The second of the two in its part 1 guarantees freedom of association in trade unions and unions of employers — except for limitations admitted by binding international norms.

We should greatly appreciate the efforts of the authors of that chapter of the project, efforts aiming at bringing into light the role of international law in the sphere of human rights protection. If a Polish citizen reads his constitution he shall be well aware to how great a degree his own rights, freedoms and duties are influenced by the international system of protection of human rights. It is astonishing, on the other hand, that the authors, when beginning to formulate the duties in article 45 and writing that „everyone is obliged to observe the provisions of the Constitution and of the laws", have forgotten to mention the ratified international agreements they had spoken about in article 3 of the project. If, for instance, it follows from the Vienna Convention on diplomatic relations of 1961 that diplomats in a guest country are vested in immunity from being tried in civil matters — so, a woman-citizen of that state shall be obliged to abstain from the lodging of a petition to establish paternity and child care against a diplomat in a local court and she could do it only in a court of the State the presumptive father comes from. One could multiply similar examples to demonstrate that the authors of the project have made many fundamental omissions.

Article 99 of the project comprises presidential competencies concerning international agreements. The President of the Republic does ratify and denounce international agreements and notifies the Diet as well as the Senate. The authors of the project propose that ratification of international agreements which involve the state's financial charges or a necessity of legislative changes must be preceded by an authorization to be expressed in a legislative way. This

article, as we can see it, follows the path of amendment of 1989 as far as types of agreements to be necessarily ratified are concerned. The reduction to only two types of agreements does not seem justified enough. Why should important agreements such as those on boundary changes, on membership in international organizations or on alliance remain outside this sphere?

2.3. Internationa! law in Senatorial project

The first session of the Senatorial Constitutional Commission took place on the 10th of January 1990. A list of experts was established then. To a considerable extent they were derived from a constitutional group focused by the Catholic newspaper, *Powściągliwość i Praca* (Moderation and Labour). Another decision made on that day was to carry out an inquiry on constitutional problems. Questionnaires were sent out to 32 personages, including 14 eminent Polish lawyers.

From the answers received it follows that the idea of a clear determination of the position of international law in the internal legal order of the Republic of Poland in the Constitution, as well as of perfecting the norms concerning international relations of the Republic, has found many supporters.[6]

Professor J. Wróblewski proposed that a constitutional system of sources of law be included besides general normative acts (organic laws, ordinary laws and decrees with statutory validity), internal acts issued by the State apparatus, regulations, etc., and regional normative acts — also acts of international law with the explanation that not only ratified agreements are concerned but also Charter's dispositions of the organization member of which Poland is. Also Professor Z. Radwański called the attention to the necessity of filling in the actual lacuna in the law. Both professors have stressed in their answers the need of controlling conformity of international agreements with the Constitution of the Republic, the best way to such a control — by means of the Constitutional Tribunal.

Professor W. Szubert announced that he is for the primacy of international law and for command of applying this law by public organs, and finally, for observing it by both natural and legal persons.

The most far-reaching propositions and the most innovative were those of W; Wasiutynski who proposed to declare in the preamble to the Constitution a readiness to defend the independence on the one hand and, on the other, a willingness to unite with other states and transmit some sovereign rights to supranational institutions.

A larger discussion on the position of international law in legal order of the Republic of Poland was not attained in the Senatorial Constitutional Commission. During its session of April 18, 1990, the need of including relevant

[6] *Constitutional Inquiry* — Works of Constitutional Commission of the Senate — fasc. 2, Poznari-Warsaw 1990.

provisions to the text of the Constitution was discussed. One of the speakers, however, warned against a simple transference of all international norms into domestic law for, presumingly, some of them are nothing but the results of a „rotten" compromise between socialism and capitalism. It seems, however, that democratic states should get free from such norms using legal procedures foreseen in the law of treaties (erg., denouncement, nullification). For it is not possible to negate the importance of international law for domestic legal order by means of a bandying argument that international law is an effect of concessions made to totalitarian systems.

Within the framework of debates of the group of experts set by Senatorial Constitutional Commission a project of a charter devoted to relations between international law and domestic law of the Republic of Poland had been elaborated; it was than used partly in the final publication of the Senatorial project.[7]

The Senatorial project of the constitution elaborated in April 1991 became the object of constitutional debate in the Senate on May 24, 1991. The Senatorial Constitutional Commission joined to this project several self-amendments following the voices in the debate and opinions of experts and, last but not least, the public opinion about the project. The final version of the project of the constitution was voted on October 22, 1991.

Professor S.E. Nahlik was quite particularly penetrating in his opinion as far as the points of our special interest here are concerned. He was right to call attention to the fact that among possible sources of law there was no mention of „norms-making resolutions of international organizations" — which eliminates in the future a binding force of resolutions to be voted within the European Community which we are steering toward. Professor S.E. Nahlik has also proposed that agreements concluded with the Holy See be subjected to approval of the Diet expressed in a law on ratification.[8]

The last remark as well as other remarks of Professor Nahlik have not been taken into account while establishing the final version of the Senatorial project.

In chapter III of the Senatorial project in its final version, which is entitled „Sources of law", we can find article 49. In its part 1, sources of law of the Republic of Poland are cited. They are as follows: Constitution, organic laws, statutes, regulations and orders of executive powers and international agreements with international customary law to the extent indicated in the Constitution. So article 49 differs fundamentaly from article 3 of the Diet's project because it takes into account customary norms of international law. Article 56 enumerates types of agreements which need the Diet's approval given in a legislative way in cases of concluding, denouncing or with drawing out of

[7] J. Sandorski: „The problem of relating international law to the internal legal order in the future constitution of the Republic — project of assumptions with commentary", *Works of Constitutional Commission of the Senate*, fasc. 4, Warsaw 1991, pp. 141—147.

[8] S.E. Nahlik: „Remarks to the Senatorial project of the Constitution of the Republic of Poland", *Works of Constitutional Commission of the Senate*, fasc. 5, Warsaw 1991, pp. 93—95.

them. In part 1 (a) of this article, next to peace treaties and alliance treaties, there are unnecessary agreements on military character which have purely technical features as a rule and as so, if they needed an approval of the Diet, it would excessively and unnecessarily charge this organ and, moreover, it would make it more difficult to keep secret certain features important from the military perspective.

Redundant is also implantation, in part 1 (c), of the agreements concerning civic rights, freedoms and duties when we consider that in (f) „agreements relative to the matters regulated in laws or for which the Constitution foresees legislative form" are already mentioned. In article 51 of the project, a provision is put which says that „obligatorily in legislative form must be issued legal acts concerning limits of freedoms and range of rights and duties of the citizens as formulated in the Constitution including their guarantees (part 1 (a)); duties and rights of citizens and social organizations in relation to the state; duties and rights in relations between citizens and social organizations (part 1 (b))". So it is redundant to place part 1 (c) within article 56 since civic freedoms, rights and duties to belong to the matters regulated legislatively and thanks to this, international agreements concerning them should also fall under al. (f).

Article 57 of the project comprises in its part 1 a necessary general clause saying that „the Republic of Poland does observe the international law which is binding for the state". However, part 2 of this article is not very intelligible. The first sentence of it sounds as follows: „validly concluded international agreements after their due promulgation in the Republic of Poland do make part of internal legal order and are directly applied by all State organs, and particularly by court and self-governmental organs except for cases when their application depends on issuing provisions of internal law". The formulation concerning an „application depending on internal provisions of law to be issued" sounds mysterious and confusing. Only those norms of international law are concerned here that are not self-executing and as such they do not suit the purpose of direct application. One can doubt whether the placement of such an obvious assumption in article 57 was necessary at all. What purpose does it serve to write about agreements „validly concluded" whereas we know well that other ones do not come into play? Why write that „particularly courts and self-governmental organs" are concerned while just a moment ago it was said that „all State organs" were concerned?

Article 59 is an important and well done point in the project; it is founded on the primacy of an „international agreement approved by both chambers of Parliament as well as on customary norms of international law" over a law and on primacy of „other agreements binding for the Republic of Poland" over juridical acts lower than laws. The principle adopted in article 58 that the conclusion of an agreement contrary to the Constitution must be preceded by a change in the Constitution and Constitutional Tribunal does evaluate conformity of international law with the Constitution.

In article 94 concerning the competencies of the President of the Republic in relation to international agreements it was said that the President ratifies and denounces the agreements after having consulted the opinion of the Senate, whereas most importan agreements must be preceded by the approval of both chambers of Parliament expressed in legislative form. The enumeration of all thèse arguments in alinea 2 of article 94 is to be regarded as superfluous. It was evidently enough to refer to alinea 1 of article 56 where it was already done. Alinea 3 of article 94 declares that governmental agreements and those of particular Ministries are to be ratified or confirmed by the President himself or by the government upon an authorization by the President.

Here and there one can find in the project provisions referring to international law. Article 84 al. 2 states that it is not admissible to organize a referendum as far as an authorization for ratification of international agreements is concerned. The resolution concerning use of armed forces — when a necessity of hostilities beyond boundaries of the state results from international agreements — is treated in article 129 al. 1.

2.4. International law in the other projects of a new Constitution

The project of Professor Zawadzki's group has brought few original solutions in comparison with the Senatorial project which remains the most advanced in exposing the role of international law. It was said there that agreements ratified by Poland are an integral part of the Polish law system and that laws and other normative acts are in conformity with general principles of international law as well as with international agreements ratified or concluded upon an approval of the Diet expressed in legislative form. The question of ratification has been solved in this project following the pattern of the amendment of April 1989. In the explanatory statement the authors recognize that their project does not determine position of international agreements within the system of sources of law and they propose to refer to a legislative regulation the question of categorization of the agreements, of their legal validity, mode of ratification and procedure of promulgation.[9] It is self-evident that in this project there is no mention at all of customary law nor of norms-making resolutions of international organizations. The question of primacy had been left out.

A similar deficiency is characteristic of the projects of Professors A. Mycielski and W. Szyszkowski.[10] Also these authors refer to laws in questions concerning the binding force of international agreements within internal relations, but they mention at the same time that an international agreement — when ratified by the President of the Republic — is a source of law of the Republic of Poland.

[9] *The Constitution of the Republic of Poland* — A project, University of Warsaw, Warsaw 1990, p. 89.

[10] *Works of Constitutional Commission of the Senate*, fasc. 3, Warsaw 1991, pp. 139—156.

The project of Professors J. Zakrzewska and J. Ciemniewski considers ratified international agreement to be a source of law of the Republic of Poland (see article 3). It also includes agreements of fundamental political or military importance — besides the two types known from the amendment of ApriP89 — to the group of agreements needing an approval of the Diet before the ratification by the President (article 96).[11] It is necessary to stress that this project admits the primacy of ratified international agreements in cases when they are incompatible with a law.

In J. Litynski's project it is locking any provisions on the position of international law within the internal legal order of the Republic of Poland.[12] One can repeat the same about the assumptions of the project of the constitution elaborated by the „Agreement-Centre" Party as materials of its congress.[13] In the project prepared by the Confederation for Independent Poland an idea was presented which we can not find in the other projects.[14] And so in article 3 part 3 it was said that the Republic of Poland — when integrating itself within the framework of a regional political or economic community — doqs conserve its own particular identity, independence and sovereign rights. Well, this article must be treated as an example of wishful thinking for already the treaty on the Association of Poland limits to a great degree execution of sovereign rights because of the great role of the Council of Association. An integration in the capacity of a member even makes this proces more profound, but it does not seem to be necessary to express this in a separate constitutional provision. It is, however, inexpedient to *a contrario* falsify the reality with such a provision as proposed by the Confederation.

The fact of passing in silence over the question of the position of international law in legal order of the Republic of Poland by authors of certain projects proves a lack of a perception of the problems that hide behind as well as ignoring the fact that towards the and of the twentieth century international law plays a more and more important role in the domestic life of every country because of the growing integration processes.

2.5. Conclusions resulting from the reviewed projects' provisions concerning international law

Several conclusions were made from the above considerations:

1. A large majority of the projects' authors explicitly calls for placing ratified international agreements among the sources of law of the Republic of Poland.

[11] *Constitutional Commission, The Bulletin No X*, Warsaw 1990, pp. 19—25.

[12] J. Lityński: *Project of the Constitution of the Republic of Poland* (xerocopied).

[13] *Assumptions for the project of the Constitution of the Republic of Poland* — materials prepared for the Congress of the *Agreement-Centre* Party, March 2—3, 1991, pp. 1—7.

[14] *Programme for the Third Republic, Confederation for Independent Poland*, Warsaw, July 1991, pp. 25—62.

2. The majority of the authors considers that ratification of some types of agreements by the President of the Republic needs to be preceded by an approval of the Diet or, accordingly to the authors of the Confederation for Independent Poland, of the Senate.

3. As far as other questions are concerned the opinions are divided or not signalled clearly enough.

Taking this situation into account we can attempt to formulate some proposals of our own:

1. There should be a place in the new Constitution for a provision saying that the Republic of Poland does observe – both on international and domestic planes – international law, i.e. international agreements, customary international law and law-making resolutions of international organizations. Enumeration of forms in which international law appears is necessary due to the low level of legal knowledge of the Polish population regarding this branch of law. Hardly anybody knows that Poland is already a member of international organizations which are issuing legal acts accordingly to the system of „contracting out", that is acts which directly acquire binding force in all member states (ICAO, WHO). It would be proper, now that Poland is shifting towards the integrated West, that after the example of the Dutch Constitution of 1956 (conf. article 67) the law-making resolutions of international organizations be equalized with other norms of international law in course of applying them inside the country.

2. The provision included in article 32 (g) since the amendment of April 1989 should be extended with some further categories of international agreements. And so the Diet should express its approval not only in relation to agreements which make the State financially burdened and concern the points already regulated legislatively but also in relation to peace treaties, to agreements involving boundary changes, treaties on alliances, treaties on membership in international organizations and treaties concluded with the Holy See. The Diet has to have a real influence on concluding agreements that are important for the existence of the state itself. No one can not take into account the Senate in the process of ratification if we admit that in the two-chamber Parliament it is the second legislative chamber. The law of the Diet regarding a ratification should be subjected to Senatorial debate according to the mode foreseen for other legislative acts voted by the Diet (presently – article 27 al. 1 of the law dated April 7, 1989, on the change of the Constitution of the Polish People's Republic).

3. There is an actual need to insert in the Constitution a provision declaring that state organs of the Republic of Poland do apply international law which is binding for the Republic. Such a provision shall put an end to hesitations of the courts and administrative organs as to whether to apply international law

or not.[15] Up to the present it had been applied with any reservations only when respective laws referred explicitly to international law (e.g., Code of Civil Procedure of 1969) or in cases where the reference was the result of a lack of adequate internal norms (diplomatic privileges and immunities). It is self-evident that we can speak about applying only in relation to self-executing norms, so to norms the execution of which is not depending on adopting other norms of international law by a State nor on creating special internal norms and which are formulated in a way to be directly applied and observed in a State, first of all by its courts. This self evidence does not need to be expressed in the form of a constitutional provision, of course.

The above proposed provision does not admit a necessity of t r a n s f o r m a t i o n conceived as reshaping an international norm into an internal one. The international law should be applied in a given internal legal order „as such" owing to an „explicit approval" of a state to be expressed in a constitutional norm.

4. The Constitution should not miss a disposition declaring that provisions of the law or other acts based on laws are not to be applied when international law which is binding for the Republic of Poland states otherwise. The principle of the primacy of international law should replace the principle binding under communist rule according to which laws and regulations and even very often the so-called „duplicating-machine-law" were prior to international norms.

The international practice which concerns the primacy of international law is rather differenciated. Constitutions do not ften include any hints. The Constitution of the United States puts on the same plane internal law and international agreements, however in jurisdictional practice we can notice a tendency to giving priority to international norms. The French Constitution of 1958 states explicitly that ratified and confirmed treaties do have legal force which is superior to normal laws from the very moment of their promulgation. Article 25 of the Constitution of the Federal Republic of Germany dated 1949 says that „general principles of international law are an integral part of the federal system of law, they have priority to laws and do create directly rights and duties for inhabitants of the federal area". Interpretation of this provision goes towards a recognition that only these general principles are included in article 25 which directly create rights and duties for natural persons. The principle *pacta sunt servanda* is deprived of this characteristic feature so we can not state that all the law of treaties is on this basis presumingly incorporated into the internal legal order of the Federal Republic. A collision between law

[15] The Constitutional Tribunal recently gave its expression to these hesitations when in the beginning of 1992 it decided upon the question deposited by the Spokesman for Civic Rights. The question concerned the right of border guards to appear in the courts. The Tribunal has recognized this right in his sentence and referred to the idea included to the Constitution that Poland is a state of law. Beyond the sentence the Tribunal has reminded international law binding for Poland.

and international agreements is being solved by means of the principle *lex posterior derogat legi priori*, but a norm resulting from a treaty is ften considered as *lex specialis* in relation to posterior law contrary to this norm.

One could continue to consider less or more important reservations, but when regarding the point generally – the principle of primacy itself should be inserted in the new Constitution.

3. Human rights in drafts of new Constitution of the Republic of Poland

3.1. General observations

Every constitution has, among others, an axiological function; a Constitution proclaims protection of values recognized as being fundamental from both individual and social points of view. Protection of these values is stated first of all in the provisions relating to human rights and freedoms.

It is paradoxical that so many amendments to the Constitution of 1952 which have been introduced lately did not concern the chapter on civic rights. There is no reason to justify such neglect – no sufficient reason. The chapter on civic rights does not only brake the coherence of constitutional regulations – already very uncertain – but ridicules contemporary legislature. Archaic provisions which are now 40 years old get the Parliament trapped and both chambers of it are unable to get themselves out of this situation. A question arises whether the principle of the state of law reates also to those constitutional norms which remain in the same shape since 1952 and still have their legal force on – the legislative organ decides sovereignly each time upon the question which norms are still in force and are legally binding and which ones have been derogated by way of some tacit consensus. And since no one has agreed upon such a consensus there is a real danger that not only the Parliament, but also lower rank organs shall decide on a binding force of provisions on human rights. Therefore we plainly share the opinion of former Spokesman for Civic Rights (the Ombudsman), Professor E. Łętowska, that in the sphere of human rights protection our country is still far from the model of a state of law. The condition *sine qua non* is, however, an adoption of relevant constitutional regulations.

One ought to expect from the organ that shapes the system of government in the whole country that when constructing a catalogue of rights and freedoms as well as duties of an individual it shall found it on intelligible axiological basis.[16] Instead there is a common conviction absolute axiology to which every legislator could refer when projecting a catalogue of civic rights, freedoms and duties. Moreover if we follow parliamentary debates and analyse various

[16] Further in: Z. K ę d z i a: „Observations on axiology of the Constitution of the Republic of Poland", *Ethos*, No 11–12, 1990, p. 226 and following.

projects of a new constitution of the Republic of Poland we come easily to the conclusion that controversies concern not only the catalogue of rights and freedoms alone, but first and foremost its axiological assumptions.

The catalogue of rights and freedoms meets, of course, its axiological foundation in essential principles of each Constitution. Nevertheless, almost general is the conviction that the chapter on human rights should have its own axiology, an expression of which is to be the catalogue of these rights. Two variants of procedure are possible during redaction of provisions on human rights.

Firstly — it is a researching of an axiology which should be proper to pluralistic Polish society of today. No need to add here how important a harmonious social and individual development should be to found a constitutional catalogue of civic rights, freedoms and duties on the basis of values that are highly appreciated by the considerable majority of society. However, a question arises as to whether there could be at all an axiology of human rights which is to be specific and characteristic of Polish society exclusively? Our answer is resolutely negative since researching of such an „exclusively Polish axiology" should mean as a consequence an inevitable relativization of certain universal values. Moreover, from a purely pragmatic point of view, such endeavours should be in advance condemned to failure. For we only need to imagine the neverending parliamentary debates on a „Polish axiology" of human rights.

The second variant consists of a renouncement to a relativization of projected solutions to some genuine axiological construction and instead of this to use some patterns that are ready right now. In our opinion the existing international standards in the domain of human rights can and should be such a model. The tendency to refer to international solutions is closely related to the increasing conviction that a state should not arbitrarily fix up which values merit to be protected and that these values do exist independently of the state; a state can and should be only a warrant of their protection. In other words, the point is to be oriented towards an absolutist and not a relativist conception of human rights.[17]

Therefore it is not an outcome of a hazard when we unite in our paper problems of the position of both international law and human rights in projects of the new Constitution of the Republic of Poland. For it is just international law that is nowadays formulating most plainly and most coherently at the same time the modern conception of human rights and designates standards of suitable and profitable treatment of individual in many various situations. International law of human rights has today acquired a position which, in a sense, is superior to each constitutional order. Human rights have been recognized by and within the international community as a value which all

[17] Further in: H. Waśkiewicz: „Human Rights. Notion, history", *Chrześcijanin w Świecie* [Christian World], No 10, 1978, p. 25 and following.

States are interested in respecting. A state which has ratified international instruments on human rights has a international legal duty to guarantee these rights within its own legal order. Moreover, the way and the range of such guaranties are subjected to periodic control by specially appointed international organs.

From the point of view of international law, norms of this law do have their legal binding force even in relation to the constitution; for a state can not be excused because of non-execution or of unsuitable execution of a treaty and refer next to the contents of its own internal law. States are bound with the principle *pacta sunt servanda*.

We are strongly convinced that international treaties which are binding in Poland should be the main instruction for the constitutional legislator as far as redaction of the chapter on human rights is concerned. The point is to take into account, first of all, principles and provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both treaties were voted within the framework of the UN and were ratified by Poland in 1977) as well as those resulting from the European Convention on Human Rights and the European Social Charter. The latter two treaties do function within the Council of Europe and are, as a matter of fact, not binding in our country. Nevertheless, the fact that both treaties were signed last year imposes moral and political obligations for Poland. Furthermore, we must certainly await their ratification, this a constitutional legislator can not ignore them in silence.

. According to almost univocal provisions, of different international instruments – human rights do derive from the dignity of a human being. This idea is clearly expressed in both Covenants on Human Rights as well as in the European Convention and the Social Charter. It follows from this that human rights are an attribute of every individual, that these rights are natural and inalienable. A source of human rights conceived in such a way puts them above the state power which should only recognize and protect, but has no creative competencies in this field.[18]

3.2. Survey and evaluation of solutions proposed in particular projects

Almost all projects of the new constitution of the Republic of Poland refer explicitly or in an implied manner to the concept of natural rights. And so we can read in the Diet's project that „Human dignity is inviolable. The inalienable human rights resulting from the dignity of a human being are a basis for any State or social life" (article 12). The Senatorial project states that „the Republic of Poland recognizes and guarantees a protection of inborn and inviolable

[18] Further in: J. Zajadło, „Dignity of a human being in acts on international protection of human rights"*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [Legal, Economic and Sociological Scientific Paper], No 2, 1989, p. 111 and following.

human rights and fundamental freedoms of a human being..." (article 10). In the project of the Polish Helsinki Committee „The dignity of a human being is a source of all rights and freedoms" (article 1), whereas the Warsaw University project states that „Human dignity is inviolable" (article 29). It seems that differencies between the above mentioned provisions are rather of a redactional than an essential kind. It is also important that these provisions have been inserted in the very beginning of chapters devoted to human rights so that they can serve as a basis for systematic and for teleological interpretation of particular provisions.

The project submitted by the Polish Peasant's Party (the PSL) says that „the Republic of Poland assures its citizens protection of their lives, of bodily inviolability and of respect to their human dignity" (article 10). It seems that in such a conception the „dignity of a human being" is considered rather as one of the values that deserves to be protected, than as a source of human rights. In the project of the Confederation for Independent Poland there is no separate chapter devoted to human rights. To take it formally, only one provision mentions „cardinal rights" which serve the citizens (article 21) and it is placed in the chapter entitled „Citizens of the Republic". In some other provisions of that chapter we can find general principles which also shape a position of an individual in the society and within the state. The Confederation's project is so different from the others — both in its philosophy and in its particular solutions — that it would be very difficult to proceed to a comparative analysis. This project does not refer *expressis verbis* to the idea of natural law while in numerous provisions — first of all in its chapter 1 — it appeals to the principle of sovereignty of the nation. So here too, human rights are placed over any state power. The project of Professors J. Zakrzewska and J. Ciemniewski and the project of J. Lityński do not refer to the idea of natural rights; both projects in the preamble of respective chapters expose the principle of equality before the law. As a result the two projects, in the light of the projects above, seem to be founded rather on positivist ideas; such a description of the two has here no pejorative coloration at all. For any evaluation of a chapter devoted to human rights must be made in the light of the whole of provisions of the projected Constitution and such a task would largely depass possibilities of the authors of the present work.

Almost all projects inserted the chapter on human rights directly after the chapter devoted to regulations of fundamental rules of functioning of the state and the state's society. The authors' intentions seem to be unanimous here; structure of the state apparatus and its competencies are a secondary element when compared to the position of the individual in the society and within the State. So we have here an explicit reference to the doctrine of early liberalism as well as to the school of the law of nature which admitted human nature as being a foundation of any socio-political construction. On the grounds of these conceptions the desired shape of living conditions of a human being had been

firstly determined as well as the complex of rights and freedoms of an individual – and only then and within the framework of such settlements the shape of a State could be designed.

Surely it is self-evident that the conception of human rights admitted in the above discussed projects is nothing but a reaction to the omnipotence and the totalitarianism of the socialist state as well as to hitherto existing constitutional solutions. A question arises here about consequences of admitted doctrinal assumptions. At least a partial answer can be found through an analysis of catalogues of rights and freedom as proposed in particular projects. The idea itself that human rights' purpose is to deserve protection of natural dignity of an individual is close to everyone. But after all – a conceptualization of this axiom appears in the form of special constitutional provisions.

International law concerning human rights begins to acquire a better and better position in Poland's internal order. Therefore the postulate of conformity of constitutional human rights with international regulations seems to be self-evident. It does not at all mean that a respective chapter of the Constitution of the Republic of Poland has to be a copy of an international treaty, though there are some spectacular examples throughout the world of including the whole of the Universal Declaration of Human Rights into the text of a Constitution (in certain post-colonial states).

The projects of the Constitution of the Republic of Poland we have discussed above are in conformity with international instruments as far as their philosophical assumptions are concerned. However, at the same time differences in detailed solutions are very profound and far-reaching. And we must say here that not only in the least second-rate problems are involved.

The fundamental difference between the projects of the Constitution of the Republic of Poland and the international instruments appears in the sphere of guaranties for economic, social and cultural rights. The international community has stressed many times the very close interdependence between guaranteeing individual freedoms and public rights on the one hand, and the realization of socio-economic rights on the other hand. And just this very postulate is being realized in many acts of international law.

A relatively large catalogue of socio-economic rights can be found in the Diet's project. It is, however, very characteristic that many of them have been formulated as freedoms guaranteed to the individual which have no correspondent (or at least generally determined) obligations to be imposed on the state. In the Senatorial project socio-economic rights occupy very little place. And so, for instance, the provision stating that „every citizen has his right to state's protection of his own labour" (article 40 al. 1) – is simply nothing but a hollow phrase that can be subjected to so many interpretations that the only justified action to undertake seems we to remove it from the project. The catalogue which we can find in the project of the Polish Peasants' Party appears to be systematized and internally coherent as far as socio-economic rights are con-

cerned. The proposed provisions do not limit themselves to some general slogans which undoubtedly is the advantage of this project. However, the range of proclaimed rights is still very modest.

Among cardinal rights mentioned in the project of the Confederation for Independent Poland there is — as far as the problems of our interest here are concerned — only and exclusively a right to free primary school education (article 21, al. 1 (i)). The Helsinki Watch Group project proposes following rights: protection of family and children, access to education and to freedom of labour, right to social security, protection of labour, of consumer and of natural environment. The project of the University of Warsaw devotes 12 articles to economic, social and cultural rights. It is, however, worth stressing that „freedoms and rights" are mentioned in the title of the respective chapter. So also in this project any obligations which are to charge the State are scarcely and very carefully put down. We find in the project of Professors J. Zakrzewska and J. Ciemniewski — as it seems — the same philosophy of socio-economic rights which lies as ground for the Senatorial project. So we can read here, too that „labour remains under protection of the State" (article 32 al. 1). In the following part of this provision, just like in the Senatorial project, it is said that every citizen who stays unemployed for the time being as well as in certain other circumstances, has the right to be secured from public funds.

The above quoted provision can serve us as certain exemplification of a more general tendency in what concerns the role commonly designed for the state in the sphere of guarantees for socio-economic rights.

In the projects of the constitution this role differs from that which is assigned to a state by international instruments. The latter bind states to an intense activity in favour of realization of socio-economic rights, whereas projects of the constitution of the Republic of Poland assign to the state exclusively some subsidiary functions: the state has to show its activity only when an individual is unable to profit from his just rights and freedoms.

This conception is particularly visible in the project of J. Lityński which reads that „citizens of the Republic enjoy the right to free economic activity in Poland as well as abroad and the right to possess and dispose of foreign bank accounts. Laws shall determine principles of the creating and functioning of enterprises, companies and other profit-oriented institutions" (article 153). A question arises as to whether this provision inserted in the chapter on „Rights and duties of the citizens" has to replace the traditional provision on the right to employment. To tell the truth, the author foresees in article 160 a preparation of a Polish Charter of Civil Rights which shall be enclosed in the Constitution. If so, a consecutive question arises: what is the function of constitutional provisions on civil rights? This question also remains unanswered.

To take it more generally, the catalogue of proposed socio-economic rights is extremely modest. Such an attitude remains in obvious conflict not only with international instruments, but also with tendencies which rule the international

scene today. A state is assigned an active role and activities in favour of guaranteeing equality for many years have no longer been treated as a menace to the liberty of a human being. The modern concept of the dignity of an individual which is expressed in treaties on human rights is far from the classic liberal model. Meanwhile, the conception presented in the projects of the Constitution of the Republic of Poland does refer back to liberalism in its primary version.

General principles of the constitutional catalogue of rights and freedoms should conform with those on which international treaties are based. It concerns among others: 1) circle of subjects that are able to enjoy the rights and freedoms, 2) form of the principle of equality before the law, and 3) range of admissible limitations. The projected solutions leave much to be desired in this aspect.

Article 13 of the Diet's project is formulated not precisely. It states that „everyone under the jurisdiction of the Polish State enjoys rights and freedoms and is subject to obligations proclaimed in the Constitution". It should be necessary to introduce here – following the example of the Covenants on Human Rights – a clause of personal and territorial jurisdiction. In article 14 we can read: „1. Everyone is equal before the law and has the right to be equally treated by state organs. 2. No one should be deprived of the chances created by social life, if the subject himself is not to blame". The principle of the equality of laws is barely intelligible in al. 1 of the above quoted article, whereas for some unknown reasons the principle of equality before the law has been replaced with the principle of „equal treatment by state organs". The just cited provisions are missing an antidiscriminatory clause, while al. 2, as it sounds presently, can play a stylistic role and not that of a norm of law.

Limitations of rights and freedoms of an individual happen to be introduced in democratic states too, and not only because of „rights and freedoms of other persons or for the reasons of public interest" (article 18 of the project), but also considering security of the state, morality, exigencies of public health, and so on. In our opinion it was better to take into account all of these clauses within the discussed provision. We read in article 18 al. 3 discussed here: „Rights and freedoms established by the will of a majority can not impair the rights of a minority". It is difficult to determine the importance and purpose of this provision; if we admit that it is to protect national minorities (linguistic, religious, etc.) it is an insufficient provision. On the basis of juridical language this provision is simply obscure. Surely it is not a parliamentary majority which is meant involved here, however only this one votes on rights and freedoms.

In the Senatorial project the circle of subjects authorized to enjoy human rights, the principle of equality before the law and the principle of nondiscrimination are regulated, broadly speaking, in conformity with international instruments (article 13). Also, provisions concerning the protection of minorities merit an approval (article 14). On the other hand, some interpretational doubts

arise because of the provision which says that „A human being enjoying his inborn rights and freedoms should have in consideration the common good as well as the rights and freedoms of other persons" (article 12). Is that equal to a deprivation of state organs of any competencies to legislatively limit enjoying rights and freedoms?

In the project elaborated by the Polish Peasants' Party we can find the principle of equality of citizens before the law and the ban on discrimination (article 9). It derives from the literal approach of this article, as well as from certain other provisions that only and exclusively citizens are subjects of rights and freedoms. And this is so in defiance of the title of the chapter concerned („Position of an individual within the State") and against international instruments. Furthermore, the catalogue of criteria which can not be a basis for discrimination is here far more modest than the catalogue which appears in international treaties. The project lacks in provisions aiming at determination of the framework of admissible limitations.

In the project by the Confederation for Independent Poland both the principle of equality before the law and the principle of nondiscrimination are formulated (article 19). The principle of equality before the law, however, concerns exclusively the citizens, while „citizens of a foreign state who live permanently in the Republic of Poland enjoy the protection of law and dispose of rights defined according to the principle of reciprocity" (article 18, al. 4). This is a construction which is absolutely contradictory to the spirit and the letter of international instruments. In the sphere of human rights, the principle of reciprocity is never applied. When a State ratifies a treaty, it commits itself to guaranteeing the rights stated there to every person under its jurisdiction. The spirit of nationalism which charges certain other provisions of this project remains in drastic contradiction to international treaties, not to mention the idea of European integration. We are still unable to accept provisions which say that „citizens of the independent states of Ukraine, Belarus, Lithuania and Czecho-Slovakia who are living in the territory of the Republic of Poland enjoy all civil rights provided that these is a voluntary acceptance of the duties charging citizens of the Republic. The citizens of other than Polish nationality are entitled to protection by the Republic" (article 18, parts 1 and 2). The question of the execution of rights and of limits put to civil freedoms are to be determined according to the discussed project in cardinal laws (article 21, part 4). On the other hand, no framework has been designed for activities of a future legislator.

The „Helsinki" project, both in what concerns general principles and as far as catalogue of human rights is concerned seems to be built up following the pattern of the European Convention on Human Rights. For this reason it merits an approval from the point of view we have adopted here.

The University of Warsaw project is close to the above discussed Diet's project.

In the project of Professors J. Zakrzewska and J. Ciemniewski we can read as follows: „All citizens are equal before the law, regardless of sex, race, nationality, social background, confession, intellectual formation, political opinions and property" (article 10) and just this provision inaugurates the chapter on rights and freedoms. Here too the principle of equality is united with, the principle of nondiscrimination even in an unconvincing manner (conf. our remarks on the Diet's project), and the catalogue of criteria that can not be a basis for differentiation of peoples is here more modest than the one we can find in international treaties. Moreover, the principle of equality is reported in international instruments pertaining not only to citizens, but to all people. This project, too is lacking in general provisions on the range of admissible legislative limitations.

Similar doubts arise on the occasion of the project by J. Lityński. Also here the principle of equality concerns only the citizens and among the criteria which can be a basis for discrimination the author has omitted, among others: birth, political opinions, social condition and property. Since this project foresees the elaboration of a separate Polish Charter of Civil Rights (conf. supra) we must admit that just in that document the fundamental principles mentioned in chapter XVI entitled „Rights and duties of the citizens" are to be developed.

3.3. Conclusions ensuing from the review of projects of provisions concerning human rights in the new Constitution

The above analysis of projects of the new constitution of the Republic of Poland regarding human rights is undoubtedly faulty:

- the authors have taken into consideration only certain projects, though they seem to be the most important ones,
- the analysis of these projects is necessarily fragmentary,
- the analysis was made almost exclusively from the point of view of the projects' conformity with international law.

Nevertheless, we feel authorized to formulate the following final conclusions:

1) particular projects differ so much one from another that jointly they can not make a basis of materials for the Constitutional Commission;

2) generally speaking, all the discussed projects do stray to a large degree, from international standards of human rights;

3) human rights are a constitutional matter which is of very special interest to the society, whereas in the Diet, in the Senate and even in the mass-media the problems of human rights are given the least attention of all when the new constitution of the Republic of Poland is being considered.

4. Human Rights Charter

4.1. „Smal! Constitution"

The road to a new constitution will be longer and more difficult than it was expected three years ago. The change of political system is a complex process which shall take time and require much consistence.

In April 1992 the Parliament passed a „constitutional law on the procedure of the adoption of the new constitution".According to this law, the constitution draft shall be prepared by the Constitutional Committee which consists of 46 members of the Parliament and 10 members of the Senate. The President, the Government and the Constitutional Tribunal have their representatives in this committee. They do not, however, have the right to vote.

The constitution is to be adopted by a two-thirds majority of the National Assembly, i.e., the Parliament and the Senate combined. The President shall have the right to challenge some of the provisions of the new constitution. In this case, the President's objections can be dismissed only by the same two-thirds majority of the National Assembly needed to adopt the Constitution. Finally, in the last instance, the Constitution shall be approved by a popular nationwide referendum.

In the meantime, the Extraordinary Commission of the Parliament has been working out the project of the „interim constitution" submitted in February 1992 by the Democratic Union. This constitution (the so-called „Small Constitution") was adopted on October 17th, 1992, and came into effect on December 1st, 1992.

The Small Constitution has created an institutional mechanism to govern Poland effectively in spite of the lack of a clear and durable parliamentary majority. It has to foster constitutional stability during the indeterminate period in which the elaboration and adoption of the proper constitution shall continue to take place.

The Small Constitution did away with the declaration that the Parliament was the highest authority of state power and introduced in its place the concept of separation of powers and real mechanisms of checks and balances. The President has important checks on Parliament (veto power) and the government (veto over its decrees). The Parliament has checks on the President (countersignature) and on the government (vote of no confidence).

The interim constitution significantly increased the power of the government. It has allowed for the drafts submitted by the government to benefit from an expedited legislative process in certain circumstances. The Parliament can grant to the government the decree power in some matters. The Constitution introduced also the so-called „constructive vote of no confidence" thus making the government less dependent on the purely negative power of the Parliament. Finally, the interim constitution gave the President and the Prime Minister the

power to change ministers without asking Parliament for its consent. The government has some measures of freedom, both from the President's and the Parliament's interference, though it can never act without restraints.

The shortcoming of this arrangement is that it is limited to checks and balances between executive and legislative powers without bringing judicial review into picture. Similarly, there are no provisions for the protection of fundamental human rights.

4.2. Some critical remarks on the Human Rights Charter

On November 12, 1992, President Lech Wałęsa submitted to the Parliament a draft Charter of Human Rights to be passed as a constitutional law. The Charter is designed to supplement the Small Constitution.

The draft was prepared in mid–1991 by three members of the Helsinki Committee: Marek A. Nowicki, Marek Nowicki and Andrzej Rzepliński. In the fall of 1992, they were joined by Professor Ewa Łętowska, former ombudswoman, and Professor Wiktor Osiatyński. In November 1992, the Helsinki group worked with the President's legal staff on the final wording of the Charter.

The President took strong interest in the Human Rights Charter. In his letter to the Parliament Wałęsa argued that the Charter would set limitations on the powers that were allocated in the Small Constitution. „Those most basic limitations of the power of state in democratic society", wrote the President, „are citizens' rights and freedoms". In his letter he emphasized the enforceability of rights and contrasted this with the exhortatory character of the communist legal order. He also pointed out that the catalogue of rights and freedoms in the Charter is the most basic possible. The draft leaves out all matters of dispute. This catalogue can be extended in the future constitution and in constitutional practice.

The Charter is divided into six chapters. The first chapter contains three fundamental principles of human rights protection: a) inalienable dignity of a human being as a source of all human rights, b) freedom of everyone to undertake all actions that are not prohibited by laws, c) equality before the law and the equal treatment by public authorities.

The rights and freedoms contained in the Charter are directly binding for public authorities (article 1.2). This provision is really revolutionary where as the catalogue of human rights in the former Constitution has been perceived as a set of programmatic goals rather than binding law.

No authority may arbitrarily limit the rights and freedoms proclaimed by the Charter. The rights can be limited by statutes only and when the limitations are permitted by an explicit provision of the Charter. Such limitations are permitted exclusively for the protection of public health, internal peace and state security. The rights and freedoms may be limited only to the extent that is absolutely necessary for the protection of the values cited above.

Chapter II contains „Fundamental rights and freedoms". They are: right to life, right to personal liberty and security, freedom of conscience and religion, freedom of thought and conviction, right to information, freedom of assembly, freedom of association, right to privacy, right to citizenship, freedom of movement, right to ownership, freedom of economic activity, right to participation in public life, right to local self-government, right to address a petition, rights of the child, right to equal access to public service, right to court, rights of the accused, the principle of retroactivity of penal law, the prohibition of extradition of Polish citizens, right of asylum, right to consular protection.

Generally speaking the catalogue of human rights is inspired by the UN Covenant on Civil and Political Rights and especially by the provisions of the European Convention on Human Rights.

In the field of economic and social rights the authors of the Charter were looking for a compromise between tangible promises and expectations of the society.[19] Economic and social rights are divided into two categories. The first one includes those rights that can be enforced by the same means as provided for the civil and political rights and fundamental freedoms. There are five rights of this kind in chapter III of the Charter: right to education, freedom of employment, right to safe working conditions, right to health care, right to social security.

All of these rights are directly enforceable by the means of protection provided in the chapter IV.

The other social rights have been formulated in the chapter V as tasks to be accomplished by public authorities. There are seven principles of this kind: the protection of employment and the best possible conditions of work, the protection of the family, the protection of health, the protection of education beyond the basic level and professional training, the protection of consumers, the protection of cultural values and the protection of environment. The public authorities shall perform these duties according to their economic possibilities (article 48). The fulfilment of these duties can be executed only by political means and not by judicial or legal instruments.

Enforcement procedures are described in chapter IV entitled „Means of protection of rights and freedoms". First of all, the Charter guarantees to all individuals the right to judicial complaint. Its provisions can be adduced directly as the grounds of such claims.

Everyone whose rights of freedoms have been infringed upon may lodge a demand with the court to stop such an infringement. Everyone has the right to demand, via the court, realization of that right. Cases of infringement of rights and freedoms are settled by provincial courts. The Supreme Court is competent in cases of infringement of the right to judicial proceedings (article 35).

[19] See on this subject: W. Osiatyński, „A Bill of Rights for Poland", *East European Constitutional Review*, vol. 1, No 3, p. 31 et seq.

In the case of violation of the rights and freedoms guaranteed by the Charter, the victim of this violation has the right to pecuniary compensation for the harm suffered. Everyone who has suffered a damage as a result of violation of human rights formulated in the Charter has the right to claim for redress for that damage. The state agency and the perpetrator of violation are responsible together and have the obligation to compensate the victim. In connection with this the Charter contains the provision explicitly stating that „an official has the right to refuse an unlawful order and is responsible for giving or fulfilling such an order".

Another very important mechanism of enforcement is the right of every citizen to file a complaint to the Constitutional Court for a ruling of the constitutionality of a statute or any other legislative act. The decision of the Tribunal in such cases is final (article 38).

Everyone has the right to apply to the Ombudsman for assistence in protecting his rights and freedoms in accordance with the principles of the Charter (article 39).

The above presented, by necessity briefly project of the Charter of Human Rights arises different reflections.

First of all, the catalogue of individual liberties and the one of public rights and freedoms undoubtedly deserves to be approved. This catalogue had not only been inspired by provisions of adequate international instruments, but some formulations are even directly spooned out of international norms. No doubt that such a construction is pertinent. We feel sure enough to express here our opinion that the above mentioned catalogue of rights and freedoms does not only meet the expectations of the Polish society, but it also provides for its aspirations in the future.

Secondly, our own opinion on the catalogue of economic and social rights is a bit different. We understand very well the intentions of the Charter's authors whose purpose was to include only those rights which could be really guaranteed by the State. The intention that duties of the state, as far as protection of certain economic and social rights is concerned, can be claimed in judicial proceedings extremely precious to us is. However, it is not out of place to attract attention on some infirmity of such a juridical construction. The point is that some provisions included in chapter III belong rather to the category of individual freedoms than to economic or social rights. For example – instruction shall not infringe upon the convictions of the believers and nonbelievers (article 29), compulsory work shall be prohibited (article 30). It is clear that within this scope the means of protection provided in chapter IV can be easily applied.

As far as certain other questions are concerned the Charter renvoys to the national legislation. And so, for example, the principles of organization of strikes shall be formulated in a statute (article 30), the extent of the right to safe working conditions shall be specified by a statute (article 31), the maximum

length of the working hours, holidays and the minimum annual salary shall also be specified by a statute (article 31), as well as, finally, the extent of basic health care shall be specified by a statute (article 32). The above mentioned rights cannot be claimed on the grounds of the Charter itself. It may be done exclusively on the basis of the legislation in force. So within this scope the Charter cannot be recognized as being self-executing as it is in the cases of individual freedoms and public rights and liberties.

As far as the second group of economic and social rights is concerned – which is included in chapter V and determined as „tasks of public authorities" – it is proper to cite in this place the subtitle of the already mentioned article by W. Osiatyński: „A new charter presents an opportunity to ask some old questions". There is one relevant question to be asked: what rights shall be included in the Constitution? On this paper we have opted for a constitutionalization of possibly a large catalogue of economic and social rights. In order to not return to the justification of our position, we would like to complete it here with only one argument. Namely, the Polish society, at least the overwhelming part of it, does await a guarantee of some minimum standard of economic and social security. A guarantee of this kind could be a somewhat larger constitutional catalogue of social and economic rights, though we are well aware of the difficulty of uniting a free market economy and political liberalism with an adequate range of state interventionism.

Thirdly, the system of the protection of rights and freedoms offered by the Charter merits our particular approval. Thanks to it the rights and freedoms have acquired the character of legal norms, as opposed to the declaratory character of those under communist rule, and provisions which are self-executing are in the majority. Thus the postulate that has been formulated so many years ago by groups of progressive lawyers has finally got its been fulfilled.

4.3. The question of the position of international law related to human rights and freedoms within the Polish legal order

Article 40 of the project of the Human Rights Charter claims that „the norms concerning the rights and freedoms specified in this Bill shall be interpreted in accordance with the Universal Declaration of Human Rights and the international agreements on rights and freedoms ratified by the Republic of Poland". We are licensed to mean à propos that an „instruction for interpretation" formulated in such a way in the Charter's project does not solve the problem at all and is nothing but one more example for „incompleteness" which is characteristic of the whole of this project. The odd and curious breaking up of the constitutional law into three pieces (i.e., „Small Constitution", Human Rights Charter and the rest of the July Constitution from 1952) due to the total incapability of the Parliament to vote a genuine and suitable constitution does not authorize in any measure the adoption of such incomplete solutions such as many features of Juridical absurdities".

Provisions of not all of the international agreements which are binding for the Republic of Poland have only been entered to the text of the Charter's project. It does make the impression that the other international acts remain situated outside the range of the legal order in force in Poland. So a moderate declaration saying that the norms concerning the rights and freedoms shall be interpreted in conformity with international law proves to be insufficient. What is needed instead is to state unanimously that the acts of international law which are binding for Poland do integrally enter Polish legal order.

We should all require that article 40 of the project reads as follows: „The Republic of Poland observes international agreements which are binding for the Republic, international customary law and law-making resolutions of international organizations concerning human rights and freedoms".

The general principle of observation of international law in Poland should find its place in the „Big Constitution". But even before such a constitution is voted on – still an undetermined date – some fragmentary constitutional solutions seem to be necessary provided that they be of some more resolute character. The adoption of such a solution as far as human rights and freedoms are concerned shall eliminate the possibility of admission by a Polish court of the much criticized by the anticommunist opposition and theoretically possible even today argumentation of the Labour Law and Social Insurance Chamber of the Supreme Court issued on August 25, 1987. This Chamber has rejected the appeal of the Fundatory Committee of the „Solidarność" Trade Union from the Szczecin Shipyards against non enrollment of the Union to the register. The Division has thus recognized that it is not bound by the provisions of Convention 87 of the International Labour Organization as well as by article 22 of the International Covenant on Civil and Political Rights. Such a position of the Supreme Court was justified by the fact that the July Constitution from 1952 „does not regulate the impact of ratified norms of international law on national law" and, on the other hand, „it results unanimously from article 62 of the Constitution that judges are authorized to apply exclusively the Polish national law". In the present day hardly anybody shares the above position, but international law is still not included in the list of sources of municipal law.

Another point should be also added to article 40 of the project, and the contents of that additional point could be as follows: „The state authorized agencies of the Republic of Poland apply international law binding for the Republic and concerning human rights and freedoms. Both natural and legal persons do observe this kind of law – by virtue of which they acquire rights placed under legal protection".

The adoption of some general norm proclaiming that the state agencies of the Republic of Poland shall apply international law binding for the Republic should be an accomplishment of postulates and demands for those experts in international and constitutional law who for many years had been expressing their dissatisfaction because of the actually existing state of matters. Considering

the tone of the above mentioned article 62 of the July Constitution, Polish courts have adjudicated almost exclusively on the basis of national law. Also administrative agencies have been avoiding applying international law in their practice. Only the jurisprudence of the Constitutional Court is here – during the last period – a glorious exception from the practice that became a principle, a principle of ignoring international law. For example, let us cite the decision issued on October 21, 1992, where the Tribunal accorded with the motion of Professor Tadeusz Zieliński, the Ombudsman, to recognize the amendment to the statute on foreigners as being contradictory to the Constitution. One could find in the provisions called in to question, among others, an absurd provision according to which an alien could be deprived of liberty for a period of up to 90 days by a decision undertaken by the highest regional executive officer (the voivode). The Tribunal has emphasized in its decision that the provisions of the Constitution which guarantee civil liberty do concern not only Polish citizens but also aliens, thus the Tribunal took into consideration international standards. Yet this fact, the position taken by the Tribunal, is still not the swallow who makes summer in the jurisprudence of Polish courts as well as in the practice of administration. From the above it is evident that there is a great need to the matter as clearly and explicitly as possible within the Charter of Human Rights and Freedoms.

The second clause of the proposed additional point contains a very important, although of course, self-evident constatation. Namely, that all natural and legal persons must observe the norms of international law because by virtue of the same norms those persons could be brought to justice in a civil or criminal case for not having observed the norms concerned. The lesson taught to the whole world in 1946 by the Nuremberg Tribunal as well as another one which is to be taught in the near future by another such Tribunal in relation to the perpetrators of crimes against humanity in former Yugoslavia – are both the best illustrations of all the difficult problems that lie here.

At the same time, all human rights are protected just by virtue of international law, so both natural and legal persons – in the case of an imminent menace or violation of their rights – can await and vindicate judicial protection by national law. Furthermore, they can exercise the protection foreseen within the international system. By adopting the European system of protection of human rights, Poland is necessarily connected with just such a concept of the position of an individual in modern international law.

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Europe Agreement EEC — Poland (Legal Concept of a Scheme)

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The signature on 16 December 1991 of the first three so-called „new-generation" agreements between the European Community and Czechoslovakia, Hungary and Poland – initialled on 22 November 1991 – concluded the negotiations officially started one year earlier on 20 December 1990.[1]

According to the Commission communication of 27 August 1990[2] these agreements should serve as the foundation for the new European architecture and enable partners in Central and Eastern Europe to participate in the wider process of European integration. These treaties ought to be linked to completion of the Community internal market and the intensification of relations with the EFTA countries as they prepare themselves for joining the European Economic Area.

I. What kind of Community Treaty?

Calling the treaties under consideration the „Europe Agreements" might suggest that the Commission wished either to highlight the special nature of relations to be established or just to underline the geographical scope of intended agreements as opposed to ACP or Mediterranean agreements. In any case this qualification answers none of the basic problems concerning the legal character of relevant agreements. „Europe Agreement" is a new notion having no ground in EC constitutive treaties themselves or precedents in the earlier Community treaty practice. Therefore, the true meaning of this notion should be looked for in the history of relevant agreements as well as in provisions contained therein.

Thus, in the course of preparation for the Special Meeting of The European Council in Dublin on 28 April 1990, both Council of Ministers and the Commission qualified a new generation of treaties which were to be negotiated with

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[1] These treaties were followed by similar agreements with Bulgaria initialled on 22 December 1992, and with Romania initialled on 1 February 1993; see: *Together in Europe* (1993), No. 21 and No. 23.

[2] *COM* (90) 398 final.

countries of Central and East Europe as „association agreements" within a meaning of Article 238 of the EEC Treaty.[3]

However, considering the great variety of treaties falling under the eagis of the association agreement, the qualification of Europe Agreements as belonging to this particular category of Community treaties still leaves many important legal questions unanswered.

1. Therefore it is worth stressing, that subject to the content of the association agreement its conclusion procedure may differ substantially. An ordinary procedure provided for under Article 238:2 is that association agreements are concluded by the Council acting unanimously, after receiving the assent of the European Parliament which in turn acts by an absolute majority.

All the same, whenever a substantive scope of a given treaty goes beyond exclusive competence of the Community itself and falls, at least partially, into the jurisdiction of Member Countries, such a treaty needs to be approved by both the Community organs and those of all Member Countries. This so—called „ mixed procedure" was developed in EC practice to secure full effectivity of respective agreements at both Community level and within domestic jurisdiction of its Member Countries.[4] As it ensues from Article 121 of the Europe Agreement with Poland and respective provisions of the like treaties with Hungary and Czechoslovakia, they are all subject to the latter procedure of approval. However, the above feature of these agreements does not influence in a negative manner their legal status within the Community legal order.

In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non—Member country concerned, but also and above all in relation to the Community which has assumed responsibility for the performance of the agreement. That is why the provisions of such an agreement, as the European Court stated in its judgement of 30 April 1974 in Case 181/73, on the legal effect of association agreement with Greece which was a „mixed agreement", form an integral part of the Community legal system.[5] As the Court stated in Case 104/81, it follows from the Community nature of such provisions that 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 States.[6]

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[3] See: *Agence „EUROPE"*, No. 5239 or April 21, 1990 at pp. 6 and 9.

[4] „Mixed procedure", as such was first dealt with by the European Court of Justice in the Natural Rubber Agreement Case; *Opinion* 1/78 (1979) European Court Reports (ECR) 2871; for wider comments see: D. O'Keefe and H.G. Schermers (eds): *„Mixed Agreements"*, Deventer 1983; also Jean Groux: „Le Parallélisme des competences internes et externes de la Communauté economique européenne", 14 *Cahiers de droit européennes*, 1978; T.C. Hartley: „The Foundations of European Community Law", Second Edition, 1988, at pp. 154—175.

[5] See: Case 181/73, *Haegaman* v. *Belgium*, (1974) *ECR* 449.

[6] See: Case 104/73 *Hauptzollamt Mainz v. C.A. Kapferherg & Cie KGa.A.*, (1982) *ECR*, 3641. The ECJ has no jurisdiction under Article 177 of the EEC Treaty „to give a ruling on the interpretation of international law which binds Member Countries outside the

As a result, being part of the Community corpus juris these treaties may be placed not only before the Etiropean Court (ECJ) but also before national courts of Member States and thence referred to ECJ for interpretation under Article 177 of the EEC Treaty.[7]

2. According to Article 238:2 of the EEC Treaty, association agreements are characterized by „reciprocal rights and obligations, common action and special procedures". As the European Court of Justice put it in the Demirel Judgement[8], they create „special, privileged links with a non–member country which must, at least to a certain extent, take part in the Community system". Thus, in general, association type agreements are concluded to give shape to far–reaching ties with third countries. All the same, three basic types of association are distinguished in the EEC practice.[9] These are:

– (a) association as a preliminary to membership of the Community,
– (b) association as a substitute for membership and
– (c) association as a special form of development assistance.

It is not necessary to argue how important it is to which of the above identified types of association Europe Agreement with Poland belongs.

Qualification of „Europe Agreements", quoted earlier in the Commission's communication of August 1990, as „the foundation for the new European architecture" could well suggest that these agreements were contemplated to serve as a new legal instrument for the gradual enlargement of the Community as well as to be a lega vehicle for a seperate, though Community – related scheme for wider European cooperation. If the latter concept would have to be the case, than this would go counter to the most vital interests and aspirations of the associating countries as they themselves consider them to be. In fact, at the beginning of the process, positions of the negotiating parties were quite remote one from another. These have led to significant understatements.

Thus, on the one hand, as the second indent of the Preamble to Europe Agreement EEC – Poland suggests, the treaty aims at establishing „close and lasting relations" between the parties. On the other hand, however, the Council and the Commission have deliberately left open the question of possible links between this agreement and subsequent full membership of the Community. As a matter of fact, the original position of the Community organs boiled down to that the agreement should not affect subsequent membership of the Community either way.

framework of Community law; see: Case 130/73 *Magdalena Vanderveghe et al.* v. *Berufsgenossenschaft fur die Chemische* Industrie, (1973) *ECR* 1329, at 1333.

[7] See: for wider comments and writings on that topic in: D. Lasok, J.W. Bridge: „Law & Institutions of the European Communities" Fourth Edition, at pp. 289–330.

[8] See: 12/86 *Demirel* v. *Stadt Schwäbisch Gmund,* 30 September 1987, (1987) *ECR.*

[9] See: P.J.G. Kapteyn and P. Verlasen van Themaat: „Introduction to the Law of the European Communities. After the coming into force of the Single European Act.", Second Edition, at pp. 829–845.

After months of protracted negotiations the Community eventually agreed on the final indent of the Preamble to provide for recognition of „the fact that the final objective of Poland is to become a member of the Community and that this association, in view of the Parties, will help to achieve this objective".

Moreover, in Article 1 of the Agreement the Parties thereto clearly recognized, among the aims of the Agreement, that it should „provide an appropriate framework for Poland's gradual integration into the Community. To this end, Poland shall work towards fulfilling the necessary conditions".

If the above quoted requirement of „fulfilling the necessary conditions" were to mean fulfilling an acquis Communautaires, so — as to the substance — no particular reservation could be made thereto. Still the association agreement should provide much more clear guidance to the timing of negotiations on future membership.

As it was rightly put in the European Parliament's Report. „A signal of this kind is politically and psychologically important to the associated countries. The Community's credibility is at stake here, as it was in the case of Spanish, Portugese and Greek accession. There, too membership was granted on political rather than economic grounds". „What is important" — the Report stressed — „is a mutual commitment to consider the future accession of associated countries hand–in–hand with the implementation of the association agreements. Such a commitment must be incorporated in the agreement".[10]

For a time, however, this voice of a creative imagination of the European Parliament was left unanswered by the Council and the Commission, and consequently no commitment of the proposed kind had been incorporated in the Europe Agreement. That omission has, in turn, led to a recurrent diplomatic initiatives of the three associating countries insisting on filling that gap.

Till early Autumn 1992, these initiatives, with the notable and very encouraging exception of the United Kingdom approach toward the problem, continued to be side—tracked by the so—called „hard—core" members of the Community. As addressing the European Parliament on 15 September 1992, Mr Frans Andriessen, the EC Commissioner for External Relations put it, the Central European Countries „shall fully participate in the building of a »larger Europe«, but this shall not create any illusions as to the date of eventual accession".[11]

Still, as a dialog between the Parties continued to intensify some positive evolution in the approach of the Community towards membership of the three Central European countries began to be seen.[12]

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[10] Report of the Committee on External Economic Relations on a general outline for association agreements with the countries of Central and Eastern Europe, 13 March 1991, at p. II (A3—0055/91), Doc. EN/RR/105815.

[11] See: *Together in Europe*, 15 September 1992, No. 14 at p. *2*; or ibidem in No. 17 at pp. 1—2.

[12] See: a joint statement issued following the first meeting of the „Trio" foreign ministers with the EC Council in Luxemburg on 5 October 1992, *Together in Europe* No. 16, at pp. 1—2.

On September 11, 1992, the Ambassadors of Hungary, Czechoslovakia and Poland submitted to the Commission, as well as to the British Presidency of the EC Council in London, a joint memorandum calling for the Community to set up a framework permitting the negotiations on the accession of the three countries to the Community to be finished before the end of the decade. „The three governments – the Joint memorandum stressed – expect that the Edinburgh Summit will bring a joint declaration, setting up a general approach, framework and time perspective for the accession. This would be a very important political act".[13] The Memorandum also called upon the Community and the Member States to make a statement to the effect that the full membership of the three Central European countries in the European Community, is the aim of the Community itself.

The above diplomatic move prompted EC foreign ministers to initiate preparation by the Commission of a special report on a future relationship of Poland, Czech Republic and Hungary with the Community. The Report entitled, „Towards New Association with the countries of Central and Eastern Europe" was presented to the European Council on 11 December 1992.[14] Among its highlights the Report recognized that the European Council should now confirm that it accepts the goal of eventual membership in the European Union for the countries of central and eastern Europe when they are able to satisfy the conditions required.

Although, in view of the Report, the general conditions for accession are established by the Europe Agreements, nevertheless at the appropriate time, political decisions will be needed which take into account the particular situation of each applicant as well as the following considerations:

– the capacity of the country concerned to assume the obligations of membership (the so–called „acquis communaitaire");

– the stability of institutions in the candidate country guaranteeing democracy, the rule of law, human rights and respect for minorities;

– the existence of a functioning market economy;

– the candidate's endorsement of the objectives of political, economic and monetary union;

– its capacity to cope with competitive pressure and market forces within the European Union, and

– the Community's capacity to absorb new members while maintaining the momentum of European integration.

The European Council „welcomed" proposals contained in the Report of the Commission, and for the first time, explicitly recognized that preparation for full membership of the EC is the aim of Europe Agreements.[15] Thus, the Edinburgh Meeting closed–up a certain phase in the evolution of the Com-

[13] See: ***Together in Europe***, No. 19, at p. 1.
[14] See: ***Together in Europe***, No. 20, at p. 2.
[15] See: ***Together in Europe***, No. 21, at p. I.

munity approach towards objectives of Europe Agreement, marking a positive breakthrough after the lines of expectations of the associating countries. A date of commencement of accession negotiations and other related problems were to be decided at the next European Council meeting in Copenhagen in June 1993. They did not, all the same the Edinburgh declaration on membership was confirmed.

As far as conditions for membership are concerned, the one which refers to the Community's own „capacity to absorb new members" seems debatable because of its very subjective and discretionary character. Therefore, further clarifications will be necessary. The same, to the extent, refers to another requirement which makes membership conditional upon an applicant's „capacity to cope with competitive pressure and market forces within the European Union". Firstly, the problem should become immaterial with the completion of a free trade programme as provided for under Europe Agreements prior to full membership. Secondly, as in other cases of accession of poorer countries the process of economic accommodation should effectively be helped by the Community itself. The sooner such a special assistance programme is agreed upon and put into operation, the better. Aid for restructuring the Polish agricultural sector, as well as steel and coal industries should be at the top of the list of priorities of great urgency. There are no compelling reasons for which Poland as well as other central European Countries should be treated less favourably under the association preliminary to membership of the Community, than other countries that passed through the like process before.

II. The Objective Scope of Europe Agreement EC — Poland and legal effects of relevant provisions

The objective scope of the Agreement was structured in a somewhat uneven, though at the same time quite flexible manner. It covers a wide spectrum of subject—matters systematized in the following seven substantial problem areas:

- political dialog;
- free movement of goals;
- movement of workers, establishment, supply of services;
- payments, capital, competition and other economic provisions, approximation of laws;
- economic cooperation;
- cultural cooperation, and
- financial provisions.

Separate titles deal with „The General Principles" and „Institutional General and Final Provisions". They are supplemented by Joint Declaration two Individual Declarations, 18 Annexes and 6 Protocols.

1. So composed, Europe Agreement, as compared with earlier agreements providing for association with the Community, is distinctive on at least two

accounts. On the substantive side, it is the first time when a „political dialog" and rules of competition, have ever been incorporated in an association agreement. These inclusions reflect completion of the Single Internal Market, as well as preparation for the transformation of the Community into the European Union.

On the other hand, however, unlike previous association agreements with countries like Greece, Turkey, Malta or Cyprus, which originally, explicitly or implicitly, were meant to bring participating countries gradually into the Community, the Europe Agreement did not provide for the creation of a customs union. All the same, establishment of such a union is in no way a condition to be fulfilled prior to membership. Neither Denmark, Portugal, Spain, nor the United Kingdom had customs union with the EEC before they acceded thereto. The Creation of a customs union is also alien to the treaty establishing European Economic Area between the EEC and EFTA countries. It seems that today there is no need for the opposite, because for as long as a given country is not a member of the Community, there are developed rules of origin of goods which for every practical purpose may effectively substitute for the functions of a customs union.

On the procedural side, in order to avoid unnecessary waiting for the entry into force of Europe Agreement as a whole, its „trade and trade–relevant matters", falling into exclusive competence of the Community commercial policy, had been made operational as of 1 March 1992 by means of an Interim Agreement[16], that is well before all ratification instruments between the Contracting Parties were exchanged.

2. As it was mentioned earlier, not all subject–matter provisions of Europe Agreement are of the same precision and thoroughness. Since the main thrust of that Agreement is on the gradual establishment of a free trade zone for industrial products, it's quite natural that relevant provisions are among the most detailed. For agricultural and processed agricultural products, the Parties have agreed to grant each other mutual concessions on a reciprocal basis.

Article 1 of the Interim Agreement provides for a total elimination of barriers to trade in industrial products within a maximum period of ten years. The programme is characterized by the so–called – asymmetrical approach" in the sense that the Community agreed to phase–out its barriers more rapidly (up to 5 years) than Poland which has up to 9 years for completion of that process. Enclosed Annexes provide for a detailed schedual of relevant reduction n particular products.

Goods in a bilateral trade are to be classified under the rules of the Combined Nomenclature – CN. The basic customs duty rate, to which the duty

[16] See: Council Decision of 25 February 1992, *Officiai Journal of the European Communities* (OJEC), No. L 114/1 (30.04.92) and a positive Opinion of the European Parliament, *OJEC* No. C 39 (17.02.1992).

reduction is to be applied to, for every product shall be the one used *erga ormes* on the day prior to the Interim Agreement coming into force. If, after it has come into effect, there is any duty rate reduction according to erga omnes rule and particularly as a result of tariff agreement within the GATT Uruguay Round, such reduced duties shall replace the basic ones from the date of such reductions coming into effect.

Pursuant to Article 19 of the Interim Agreement upon the commercial part of Europe Agreement coming into effect (except for the provisions referring to agricultural products) a standstill rule will apply to trade between Poland and the Community which means that no new customs duties on exports or imports or any other charges having equivalent effect shall be introduced by either partner to the Agreement, nor shall those already applied be increased. The same refers to quantitative restrictions on imports or exports and the like trade measures.

The parties to the Agreement have also committed themselves not to apply any measures or practices of any internal fiscal character which may directly or indirectly cause discrimination between the products of one party and the products coming from the territory of the other. A special regard should be given to the provision of Article 21 of the Interim Agreement according to which the maintenance or establishment of customs unions, free trade areas or arrangements for frontier trade are not precluded as long as they do not alter the trade arrangements provided for in that Agreement. Those questions, if requested, shall be consulted within the Association Council (Article 21).

The Interim Agreement also contains a set of general provisions serving the purpose of accomplishment of the free trade rules, hence counteracting discriminatory practices. The most important among them are various safeguard clauses defining the cases and procedures in which the parties are entitled to restore restrictions on imports and exports or to introduce new ones. Customs duties shall be imposed on or increased in respect to the industrial products, except for textiles which are to be subject to a special safeguard mechanism until the quantitative limitations are entirely eliminated.

In virtue of Article 15 the parties to the Agreement have reserved a certain freedom for themselves in respect to agricultural–foodstuff products to introduce new restrictions and to choose their form. The safeguard clauses may be applied, for example, in two cases:

1) when the import increase brings with it a serious injury to domestic producers of one of the parties to the Agreement or serious disturbances in any sector of the national economy or in any region (so-called a general clause conformant to the GATT rules – Article 24).

2) Poland may unilaterally and for a limited period of time take appropriate measures in the form of customs duties if the import from the Community is to be a threat for newly established industries, sectors privatized or to cause serious social costs (so–called restructurization clause – Article 22). The

reestablished customs duty may not be higher than 25 % *ad valorem,* it may include at most 15% total industrial import from the Community in the year prior to introduction thereof. The Polish party may impose or increase customs duties not later than 3 years after all the duties and quantitative limitations and the like means are abrogated and the period for which they are restored may not be longer than 5 years (unless the Association Council decides otherwise), and application thereof must be ceased upon expiration of the interim period at the latest. The Agreement also contains certain safeguard clauses against:

a) dumping (Article 23),

b) disturbances on the agricultural product market (Article 15),

c) abuses of a dominant or monopolistic position and on subsidization from public funds undermining or frustrating competition (Article 33),

d) disturbances in balance of payments (Article 34).

The safeguarding measures to be taken up must, according to the Agreement, be notified to the Association Council and shall be subject to periodical consultations within the Council in order to settle the programme of elimination of them as soon as the circumstances allow. As far as anti–dumping is concerned it is worth stressing that general Community rules in that domain are made applicable. That ends the State–trading treatment towards Poland. Of particular importance are also the provisions of Articles 23 and 27 of the Interim Agreement according to which the Association Council must be informed in advance of any intended anti–dumping action. As Marc Maresceau rightly observed, „it is true that the associated countries cannot on their own block a Community anti–dumping action but the procedure offers at least an additional forum for further reflection on the merits of specific anti–dumping measures".[17]

According to Article 29 of the Agreement nothing prevents from applying prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

Particular restrictions in access to the Cemmunity's market for exports from Poland were reserved for the benefit of Portugal and Spain. That is regulated under provisions of Protocol No. 5 to the Europe Agreement EEC–Poland. These restrictions are a derivative of special protection granted to markets of those two countries for the duration of the so-called „interim period" of their Community's membership.

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[17] See: Prof. More Maresceau: *General Introduction. The New Association Agreements in the Framework of the European Community's External Policy* (Draft) item 12. TEPSA Seminar: The Implementation and Prospects of the New Association Agreements between the European Community and Poland, Hungary and Czechoslovakia (Brussels, 17.12.1992).

These are not the only departures from the general rules of treatment of goods in trade between Poland and the Community in the course of creating a free trade area. Generally the problem consists of the fact that the majority of those departures from the liberalization regime refers to sensitive products in Polish exports to the Community like steel, coal or textiles. As to the principle, agriculture is also excluded. As we have pointed out before, a good majority of the agricultural products were just left outside the scope of free-trade in goods between the Parties. While the agricultural products traditionally play a big role in Polish exports, that sector employs together over 25 % of the labour force. Hence, that is a very serious economic and social problem. For only these reasons, since the very beginning of the process of implementation of Europe Agreement the fullest possible use should be made of Article 20:6 which provides that: „Taking account of the need for an increased harmony between the agricultural policies in the Community and Poland, as well as Poland's objective of becoming a member of the Community, both Parties will have regular consultations in the Association Council on the strategy and practical modalities of their respective policies".

Another weakness of a free trade system, a envisaged under Europe Agreement, consists in that it falls short-of the concept of an „internal market" within the meaning of Article 8A of the EC Treaty, because unlike the latter the former refers only to goods and to not other components of the market as well.

In turn the rules of origin of goods stipulated under Protocol 4 to Europe Agreement do not consider in proper proportion the consequences of the trade agreements on free trade areas which Poland is a party to. Those rules guarantee area privileges in trade between Poland and the Community only in respect to the goods produced wholly or at least in certain proportions on the territory of the other contracting party. The possibility of spreading area privileges also onto the goods produced on the territories of Czechs, Slovakia and Hungary has been made, subject to condusion by these countries and Poland, of an agreement on a free trade area on the principles identical to those in the Europe Agreement. Such an Agreement was actually signed in the city of Kraków, Poland, on 22 December 199218 and entered into force on 1 March 1993.19 According to that treaty „the Parties shall gradually establish a free trade area in a transitional period ending on 1 January 2001, at the earliest".[20] Rules of origin provided for in Protocol 7 thereto are closely patterned after Protocol 4 of Europe Agreement.

Europe Agreement EC-Poland as well as Protocol 4 on Rules of Origin do not admit spreading of territorial privileges onto the goods produced with

[18] The so-called „CEFTA" or Central Europe Free Trade Agreement concluded by the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic.

[19] See: Article 40 of CEFTA.

[20] See: Article 1 of CEFTA.

participation of EFTA countries. But Poland concluded an agreement on free trade with EFTA countries[21] too. This Agreement entered into force on 1 April 1993.22

It provides for the gradual establishment during a transitional period ending on 31 December 2001 of, a free trade area within the meaning of Article XXIV of GATT.[23] Like Europe Agreement, the Agreement EFTA–Poland also envisages an asymmetrical approach toward the elimination of trade barriers in favour of Poland.[24] Also rules of origin provided for under that Agreement are, with minor departures, basically like those in Protocol 4 to Europe Agreement.

On the other hand, the EFTA countries (except Switzerland) entered the European Economic Area with participation of the Community. The net of all these agreements should be considered as a whole and thus the rules of origin modified accordingly to ensure that trade between all members of that system are treated in the same way. For that purpose the rules of origin in the European Agreement should be multilaterally cumulative.

Such a solution would reflect the very nature of the legal relationship between the parties concerned and correspond to the wishes of both the Community and EFTA business circles to have as wide as possible and an increasingly harmonized economic space in Central Europe. It is clear that such a space could serve as a natural and suitable extension of the European Economic Area on the one hand, and a bridge towards that Area and the Community on the other hand. It would facilitate expansion of foreign investment by means of free trade and gradual liberalization of movement of capital and serviced including freedom of establishment, thus substantially contributing to market–driven convergence of the economies of all the parties taking part in that system.

3. Among subject–matters of Europe Agreement other than trade, this is a political dialog which tops the list. This dialog, as Article 2 puts it, „will facilitate Poland's full integration into the community of democratic nations and progressive reapprochement with the Community". It will also „bring about better mutual understanding and an increasing convergence of positions on international issues" and – this deserves particular emphasis – „on those issues likely to have substantial effects on one or the other party". Targeted in such a manner those consultations ought to „enable each party to consider the position and interests of the other in their respective decision–making processes". This dialog is to be maintained by the means of a multi–level consultation mechanism.

At the top, consultations shall take place between the President of the European Council and the President of the Commission of the European

[21] See: Agreement Between the EFTA States and the Republic of Poland, signed on 10 December 1992.

[22] See: Article 39 of the above Agreement.

[23] See: Article a of the above Agreement.

[24] See: Article 4 of the above Agreement.

Communities on one side, and the President of Poland on the other. Just below that level, consultations shall take place within a framework of the Association Council composed of the members of the Council of the European Communities and members of the Commission on one side, and of members of the Government of Poland on the other.

Political dialogue at the parliamentary level shall take place within the framework of the Parliamentary Association Committee consisting of both the representatives of the European Parliament and the Polish Parliament.

Europe Agreement also provides for setting up by the Parties several other consultation fora at the executive and technical levels, and in particular:

– meetings at a senior official level of political directors on the one hand, and the Presidency of the Council of the European Communities and the Commission on the other;

– taking full advantage of all diplomatic channels including regular briefings by Polish officials in Warsaw, consultations on the occasion of international meetings and contacts between diplomatic representatives in third countries;

– providing information to Poland on European Political Cooperation which shall be reciprocated as appropriate, as well as to sake

– any other means which would make a useful contribution to consolidating, developing and stepping up this dialogue.

Besides the autonomous importance of the above characterized mechanism, there are good reasons to see this mechanism within a wider context of both Title III of the Single European Act[25] and Title V of the Treaty on European Union[26] and to apply the former in accordance with the letter and spirit of the latter two. Through active use in the aforesaid manner, of the consultation mechanism for political dialog Poland may accelerate the convergence process with the Community's and of her Member States, political and security structures, and this opportunity should not be missed.

4. Non – political matters other than trade that fall into the „Four Freedoms" of the Community and the flanking problems are dealt with in Europe Agreement in rather a general, and in some cases, even a cursory manner, though not without concrete anchors contained most often in enclosed Annexes.

4.1. As far as movement of workers is concerned, Articles 37 – 43 of Europe Agreement essentially provide only for non – discrimination of workers that are legally employed and address the problem of coordination of and technical

[25] See: in particular Article 30 of the Single European Act as well as provisions of Articles 1 – 3; *Bulletin EC*, Suppl. 2/86 also: Commission's White Paper „Completion the Internal Market", COM(85), 310; Seventh General Report on the Activities of the European Communities (Brussels – Luxembourg, 1973) at p. 502 et seq.

[26] See: *Europe Documents*, No. 1759/60, 7 February 1992, Title V, Articles: J – J. 11, at pp. 31 – 33.

assistance in the creation of social security systems. Separately, member countries are encouraged to favourably consider the possibility of concluding bilateral agreements on access to labour markets. The latter stipulation may suggest exclusion of the movement of workers from the scope of subject—matters which are to be dealt at he Community level and within the framework of Community regulations proper. If this has to be the case, then it would be a very detrimental restriction of the legal status of Poland as the associated country on the road to full membership of the Community. Fortunately, according to Article 42 of Europe Agreement EC—Poland, during the second stage of the association period „the Association Council shall examine further ways of improving the movement of workers, taking into account inter alia the social and economic conditions and requirements in Poland and the employment situation in the Community. The Association Council shall make recommendation to such end". Thus, the aforesaid mechanism keeps the door ajar for at least gradual integration of movement of workers into the mainstream of the Community regime in this domain.

4.2. With regard to the right of establishment[27], the Parties have agreed, in principle, to grant each other national treatment that extends to operations of their companies and nationals from the entry into force of Europe Agreement on the side of the Community and on the Polish side according to the detailed schedual provided for in Article 44 and Annexes thereto, However, the association partners are allowed transitional periods of up to 10 years inter alia for financial services and firee—professions whereas certain activities, such as the acquisition of natural resources and agricultural land, are excluded altogether.

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

Moreover, the Association Council shall during the whole transitional period examine regularly the possibility of accelerating the granting of national treatment in the sectors singled—out in relevant annexes and the inclusions of areas or matters excluded as to the principle from the national standard treatment within the scope of application of that standard.

On the other hand, the association partners may derogate from national treatment during the transitional period for industries which are undergoing restructuring or facing serious difficulties and for newly emerging industries.

Separately, in addition to national treatment, the Association Council will examine the steps necessary to be taken for the mutual recognition of qualifications.

[27] See: Tille V, Chapter II of Europe Agreement EC—Poland.

4.3. With regard to services the partners are obliged under the Agreement to allow progressively for their free supply across the borders. Special rules, apply to transport services. Again, as in other areas of activity analysed in this Section, Europe Agreement provides in Article 55 para. 3 that, „the Association Council shall take the measures necessary to implement progressively" the relevant provisions.[28]

4.4. Among the objectives of Europe Agreement EC—Poland is to guarantee the free movement of payments in convertible currency related to the movement of goods, services, persons and direct investments. Here too, the parties agreed on the gradual application of Community rules on the free movement of capital.[29]

4.5. Provisions on economic cooperation covers cooperation in all possible areas of mutual interest. This cooperation is generally guided by the principle of sustainable development thus taking account of environmental and social consideration. particular attention is devoted to measures capable of fostering regional cooperation.[30] Separate provisions refer to cultural cooperation, including cooperation in promotion of the audiovisual industry.[31]

4.6. Stopping short of containing a financial protocol, the Agreement assures temporary financial assistance from the Community in the form of grants and loans to Poland. This financial assistance includes all forms of assistance that inter alie are provided under PHARE and, EIB loans within quantitative limits and for a period to be determined by the Community upon consultation with Poland.[32]

In addition, the Community will, in case of special needs, examine the possibility of granting temporary financial assistance to support currency convertibility and medium—term stabilisation and structural adjustment efforts, including balance of payments assistance. Such macro—economic assistance is subject, amongest others to IMF—supported programmes and will be granted in the G—24 context, as was the case before, the conclusion of Europe Agreement.[33]

Thus structured Community's financial assistance should be evaluated in the light of needs, absorbtion capacity and repayment ability of the bearers as well as the progress made by them towards a market economy system. From this perspective the system in operation is both too passive and too fragmented.

[M] See: Title IV, Chapter III of Europe Agreement EC—Poland.
[29] See: Title V, Chapter I of Europe Agreement EC—Poland.
[30] See: Title VI, Articles 71—94 of Europe Agreement EC—Poland.
[31] See: Title VII, Article 95 of Europe Agreement EC—Poland.
[32] See: Title VII, Articles 96—101 of Europe Agreement EC—Poland.
[33] See: Document — 10324/91 (Presse 240—G) at p. F—8.

Various financial schemes of the Community are coordinated with contributions from different international sources such as already mentioned G–24 and IMF as well as the IBRD and EBRD in particular. Such a diversified, multi–level–multi–sources system of financial assistance has both its strong assets and weaknesses. As hitherto practice and experience gained thereupon suggest, in the ultimate balance the latter effects seem to prevail. For this very reason and for better coordination of assistance programmes with adjustment requirements of the Polish economy to those of the Community, the scheme under consideration should be renegotiated or at least some new solutions agreed upon that would be more closely and directly related to preparation of Poland for membership in the Community or the European Union as the case may be.

4.7. As is was already mentioned, Europe Agreement contains a set of rules on competition.[34] Those rules are similar to the EEC rules. However, during the first five years after entry into force public aid granted by Poland to sectors or regions will be favourably considered. Moreover, non–discriminatory access to public contract award procedures is provided for under the Agreement. Finally, with respect to the protection of intellectual, industrial and commercial property rights Poland undertook to provide by the end of the fifth year a level of protection similiar to that existing in the Community.

Worth separate emphasis are stipulations of Article 63 para 2, according to which any practices contrary to the competition rules provided for in the Agreement „shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty Establishing the European Economic Community". The Association Council shall, within three years from the entry into force of Europe Agreement, adopt by decision the necessary rules for the implementation of the above mentioned provisions.

With regard to public undertaking, and undertakings to which special or exclusive rights have been granted, the Association Council is obliged to ensure from the third year following the date of entry into force of Europe Agreement, the principles of the Treaty establishing the European Economic Community notably Article 90, and the principles of the concluding document of the April 1990 Bonn Meeting of the CSCE on enterpreneurs' freedom of decision.[35] Therefore requirements in the area of competition imply a quite intensive adaptation process almost since the entry into force of Europe Agreement.

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[34] See: Title V, Chapter II of Europe Agreement EC–Poland.

[35] On adjustment or approximation of Polish rules of competition with the respective EEC rules see in particular: T. Skoczny: „Reguły ochrony konkurencji w Traktacie Rzymskim, Traktacie Stowarzyszeniowym i polskim prawie antymonopolowym", contribution to the Conference on the Consequences of Association with the Community for Polish Legal System, Warsaw University, Center for Europe, Warsaw 4–6 June 1992.

4.8. Approximation of laws of Poland to Community's requirements is recognised as a major precondition for its integration in the Community. To that end Poland was obliged to gradually adjust and harmonize its legal system, both present and future legislation with Community's standards and the Community will provide technical assistance for this purpose. Among priorities in the field of approximation, Article 69 of Europe Agreement lists customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the work place, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment. Article 66 of the Agreement and enclosed thereto Annex XIII list international conventions Poland should accede to in order to provide a level of protection in respective domains similiar to that existing in the Community, including comparable means of enforcing respective rights. These are: Munich Convention on the Grant of European Patents of 5 October 1973, Paris Convention on Protection of Industrial Property Rights under the Act of Stockholm of 1964 (the so-called „Paris Union"), Madrid Agreement on Registration of Trade Marks („Madrid Union") and Washington Treaty of 1970 on Patent Cooperation.[36] Separately, Poland also agreed to comply in its internal legislation, and before the end of the first five-year period of the association, with Nice Agreement on International Classification of goods and services for the purpose of registration of marks (Geneva 1977, amended in 1979).

5.1. As it was shown in the preceding items, none of the fundamental freedoms of the Community other than free movement of goods are envisaged under Europe Agreement. At the same time none of the provisions of this Agreement dealing with respective matters preclude in a negative manner a possibility of gradual incorporation into the legal regime of the association status, some or even all of those freedoms. The answer to the question which of the respective freedoms, when and to what extent would or would not be incorporated, was left to the development of association relationship. Then, as circumstances require, the Association Council could, by the means of recommendations or decisions, initiate desirable extension of implementation of the Agreement, acting in respective domains either independently on its own or in

[36] See: Materials submitted to and presented at the Conference organized by the Office of the Councilor Ministers of Republic of Poland in Jadwisin, 22-23 October 1992 on Priorities of Harmonization of Polish Law with the Law of the European Community and in particular: S. Sołtysiński: „Najpilniejsze problemy harmonizacji prawa polskiego z prawem europejskim"; M. du Vail: „Umowy licencyjne w świetle prawa antymonopolowego"; M. Poźniak-Niedzielska: „Najbliższe cele harmonizacji prawa własności intelektualnej"; A. Szajkowski: „Problemy dostosowania polskiego prawa patentowego do prawa europejskiego", as well as a paper submitted to the Conference quoted above in footnote 35, by J. Szwaja on „Ochrona własności przemysłowej w Polsce w świetle traktatu o stowarzyszeniu".

conjunction with the EC Council or the Commission with the latters having the final voice, as the case may be.

This kind of resolution could be named an „end–open" regulation. Therefore, it is the Parties themselves and Poland in particular whose actual behaviour and practical approach to the employment of tools offered by the Agreement will predusle the ultimate shape and content of the association status and of its outcome.

In addition to the „end–open" character of provisions on free movement of goods, capital, services as well as workers and on flanking areas, the very extensive scope of harmonisation of Polish law with that of the Community as envisaged under Europe Agreement, for which there would be no need within the confines of a free trade scheme only, confirms the evolutionary and expansive nature of Polish association with the European Community. Thus, in spite of its original limitations, the above character of the scheme affords for its gradual extension to all fundamental freedoms of the Community in part or in their entirety by means of decision process and relevant subsequent domestic legislation if necessary.

5.2. Authority of the Community organs to extensive implementation of Europe Agreement could not be challenged for at least as long as that activity would refer to any of the Four Freedoms and flanking domains covered by the EEC Treaty. As in Germany v. Commission Case of 1987 the ECJ held, whenever a provision of the EEC Treaty confers a specific task on the Commission, that provision must also be regarded as implicitly conferring on the Commission „the powers which are indispensable in order to carry out that task"[37]. Earlier, in the frequently quoted Demirel Case, the Court inter alie observed that since freedom of movement of workers was one of the fields covered by the EEC Treaty „it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238".

In other words – as M. Maresceau correctly observed – the existence of internal Community competences... is enough to consider these competences as a sufficient basis for Community action under Article 238".[38]

It is worth emphasizing that unlike the EEC Treaty rules on movement of workers, establishment and services, the whole system of the free movement of capital and the freedom of payment expressly contain provisions relating to movement in relations with third countries.[39] Therefore, neither internal capacity nor external authority of the Community to regulate relevant matters with

[37] See: Cases 281 and 283–5, and 287/85, (1987) ECR; (1988) 1 Common Market Law Reports 11 (Thereafter: CMLR).

[38] See: footnote 35 above, M. Moresceau: *The Legal Basis for A Free Trade zone Between the EC and Poland – An Analysis from a Community Law Perspective* (Draft) at p. 10.

[39] See in particular: COM (85) 310 final; Directive 72/156 (EEC) in Official Journal of the Communities, 1972(1), at p. 296; also Directive 88/361 (O.J. 1988, L 178/5) as well as Article 16:4 of SEA.

third countries, could be put in question whether done directly by the means of treaty provisions or indirectly through decision-making process within a framework of joint organs provided under relevant arrangement.

Accordingly, Article 103 of Europe Agreement EC-Poland says that: „The Association Council shall, for the purpose of attaining the objectives of the Agreement, have the power to take decisions in the cases provided for therein. The decisions taken shall be binding on the Parties which shall take the measures necessary to implement the decisions taken. The Association Council may also make appropriate recommendations...".

5.3. At least two kinds of important consequences result from the above quoted provision. Firstly, if power of the Association Council to make decisions is limited only to cases explicitly provided for in the Agreement, it is free to make recommendations on any matter covered by the Agreement, though within the confines of the objectives and functions thereof. Therefore, recommendations could serve in the hands of the Association Council as a flexible and dynamic soft-law instrument for creative influencing of the association status.

Secondly, since by virtue of Article 228 para. 2, Member States of the Community are bound by Europe Agreement, and since also decisions of the Association Council are „binding on the Parties" - that is on the Community and its Member States on the one hand, and Poland on the other - then as far as the former are concerned, legal actions provided for under the Community law could be instituted by or against them before the ECJ.[40] In particular, this could be action of the Commission taken under Article 169 of the EEC Treaty against any Member State for its violation of international commitments of the Community.[41] Action could also be taken under Article 170 of the EEC Treaty by one Member State against another for failure to fulfil an obligation under the Treaty[42], as well as against Community organs under Article 173 for, annulment or against failure to act.[43]

The latter kind of action occupies in practice a central place among the judicial remedies provided for in the EEC Treaty.[44] As the ECJ observed in Case 60/81 „according to the consistent case-law of the Court any measure the legal effect of which are binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position is an

[40] See: observations on that subject by M. Maresceau (in:) supra, footnote 36, at pp. 11-12.

[41] See: e.g. Case 181/73, *Haegeman v. Belgian State* (1974) *ECR* 449; Case 85/75, *Bresciani v. Amministrazione Italiana della Finanze*, (1976) *ECR* 129; Case 65/77 Razanastimba (1977) *ECR* 2229 or Case 270/80, *Polydor Ltd. et al. v. Harlequin Record Shop et al.*, (1982) *ECR* 329.

[42] See: e.g. Case 141/78, France v. United Kingdom, (1979) *ECR* 2923.

[43] See: Bebr, *Development of Judicial Control of the European Communities*, Dordrecht 1981, at pp. 119-155.

[44] Brown and Jacobs, *The Court of Justice of the European Communities*, London 1983 (Second Ed.), Chapter 6.

act or decision which may be the subject of an action under Article 173 for a declaration that it is void".[45] Moreover the Court added, that „the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article".[46]

5.4. Among key problems related to legal status of Europe Agreement is the extent to which its provisions may have „direct effect". Judgements of the ECJ in both Polydor v. Harlequin[47] and Cassis de Dijon Cases[48] hardly preclude the scope of direct application of provisions contained in Europe Agreement as a whole. Without getting into details, the problem boils down to whether or not the relevant provisions contain clear and precise obligations which are not subject, in their implementation or effect, to the adoption of any subsequent measure. According to the test set–out by the Court in van Gend Case relevant provisions to have direct effect should be: (1) clear, (2) unconditional and (3) immediate.[49]

However, the judgement in van Gend applied only to the EEC Treaty. The question whether treaties with third States could have direct effect was answered by the Court much later in Case 104/81. The Court confirmed in that Case, that direct effect describes the quality of giving rise to the rights upon which an individual may rely in a domestic court. A treaty provision can give rise to rights and therefore be called directly effective if it imposes a clear, immediate and unconditional obligation.[50] As was explained by the Court in Sevince Case, direct effect is not limited to the agreements as such, but also apply to common decisions implementing relevant agreements. In other words, once measures are implemented the Association Council's decisions themselves may (if they satisfy the above characterized conditions of direct effect) be invoked by individuals before national courts of Member States of the Community.[51]

All the same, the situation seems far from clear as far as legal effects of those acts in the Polish legal system are concerned. Europe Agreement EC–Poland, as opposed to the EEA Treaty does not contain interpretative stipulations which oblige the Parties to interpret and apply the provisions of

[45] See: Case 60/81, *International Business Machines Corporation* v. *Commission*, (1981) *ECR* 2639 at 2651.

[46] Ibidem. Worth noting in this context are observations of the Court „that whilst measures of purely preparatory character may not themselves be subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step", ibidem; compare: Case 54/65, *Campagne des Forges de Chatillon, Commentary et Neuves–Maisons* v. *High Authority*, (1966) *ECR* 185 at 195.

[47] Case 70/80, (1982) *ECR* 329.

[48] Case 120/78, *Rewe–Zentrale AG* v. *BundesmonopolverWaldung fur Branntwein* („Cassis de Dijon"), (1979) *ECR* 649.

[49] See: Van Gend and Loos, Case 26/62, (1963) *ECR*.

[50] *SQQ: Hauptzollamt Mainz* v. *C.A. Kupferberg & Cia KG a.A.* Case 104/81, (1982) *ECR* 364; also: Bresciani, Case 85/75, (1976) ECR 129, and Demirel, Case 12/86.

[51] E.C.J., C–192/89, 20 September 1990 (not yet published).

the former Agreement in conformity with relevant rulings of the ECJ. Therefore, unless otherwise clearly provided for in Europe Agreement in each particular matter, the Community legal system, past and present, remains alien to the Polish legal system. At the same time, under the latter system the doctrine of „direct effect" could, at best, be applied to self-executive provisions of Europe Agreement itself.[52] Therefore, to overcome the lacuna resulting therefrom, two kinds of legal action seem to be highly advisable. Firstly, an additional Agreement EC-Poland should be concluded on interpretation and application of Europe Agreement in conformity with relevant rulings of the European Court of Justice, and on binding effect of decisions made by the Association Council in domestic legal order.[53] Secondly, to ensure that decisions taken by the Association Council in accordance with the provisions of Article 104 of Europe Agreement will have binding effect in Polish domestic legal order, a statute should be enacted providing for obligatory publication in Journal of Laws of all decisions made by this Council.

It is also clear that the actual progress achieved in the process of harmonisation of the Polish legal system with the requirements of the Community legal order will have a tremendous impact on direct application of relevant regulations in legal transactions and other kinds of legal relations between the Parties to Europe Agreement and of their legal and natural persons before organs of the Parties. No doubt, a pace of this progress will differ in particular areas of legal regulations and thus the actual scope of direct effect accorded to relevant provisions of Europe Agreement and acts issued thereon will differ accordingly as heightend in Article 106 of this Agreement. For all these reasons it seems that acceleration of building an acguis communitaire lies in the best interest of Poland.

HI. Europe Agreement EC-Poland and GATT

As Europe Agreement provides for establishment of a free-trade area between European Community and Poland a problem arises of its conformity with relevant requirements of General Agreement on Tariffs and Trade (GATT). Among most sensitive requirements to be met are the following:

1) the purpose of a free trade area „should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties" (Article XXIV:4);

2) duties and other restrictive regulations of commerce should be eliminated on substantially all the trade between the constituent territories in products originating in such territories (Article XXIV:9);

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[52] See: „Konstytucja RP a integracja europejska" an interview with prof. A. Wasilkowski (in:) *Rzeczpospolita* (daily) Nr 148 (3186), 25 czerwca 1992 r. (*Ekonomia i Prawo* IX) also A. Wasilkowski conference paper, supra footnote 35.

[53] The above could be settled after the pattem of Article 6 and Article 7 of Agreement on the European Economic Area.

3) the adoption of an „interim agreement" is permitted provided that:

(a) the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of a free–trade area or the adoption of an interim agreement leading thereto to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free–trade area, or interim agreement (Article XXIV:5(6));

(b) any interim agreement referred to above shall include a plan and schedule for the formation of such a free–trade area within a reasonable length of time (Article XXIV:5(c)).

Therefore, to answer a guestion of compatibility of the free–trade scheme provided for in Europe Agreement EC–Poland with requirements of GATT each of the above conditions must be confronted with relevant regulations of the former treaty.

1. As for conditions set–out in Article XXIV:4 are concerned, no reservation could be raised in the light of clear and explicitly positive provisions of the Preamble to Europe Agreement which inter alie confirms „the commitment of the Community and Poland to... compliance with the rights and obligations arising out of the General Agreement on Tariffs and Trade". This general statement gains further confirmation in operative provisions of the Agreement and in particular in Articles 7, 20(5) and 29 as well as in enclosed Annexes and Protocols on specific rules governing trade in particular products.

2. Compatibility with the second condition may seem less apparent, at least at first glance. Article XXIV:4 of GATT requires „substantially all the trade" to be covered by a free–trade scheme whereas Europe Agreement focuses on establishment of a free–trade in industrial products leaving – as to the principle – trade in agricultural goods out of that programme.

Such a limitation is, however, hardly exceptional and the problem was debated in GATT on a number of occasions. Thus the Committee report, adopted on 29 November 1957, on the examination of the EEC Treaty provisions for the association of overseas territories notes that the EEC States proposed the following definition of the term „substantially all":

„a free trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade".[51]

Many members of the Sub–Group said that each case of a proposed customs union or free–trade area had to be considered on its merits and that it was, therefore, inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers without running counter to

[54] See: *Basic Instruments and Selected Documents*, Sixth Supplement (thereafter: S., preceded by the relevant number), here at p. 99, para. 30 (6S/99, para. 30).

the definition in paragraph 8(b) of Article XXIV. A matter to be considered was whether the provisions of a free-trade area pointed towards a gradual increase of barriers affecting the trade between the constituent parties or a gradual reduction of such barriers.[55]

For the purpose of appraisal of Europe Agreement EC-Poland of particular interest could be observations contained in the Working Party report, adopted on 4 June 1960, on the examination of the EFTA Stockholm Convention. The view was put forward that, as the provisions of the Convention relating to the elimination of barriers to trade in the free-trade area did not apply to trade in agricultural products, i could not be maintained that duties and other restrictive regulations of comers were being eliminated on „substantially all the trade".[56] In their defence the Member States of EFTA argued that consistency of the Convention with Article XXIV:8(b) should be assessed from the broader point of view and take into account the fact that the agricultural agreement concluded by the Parties to the Stockholm Convention „did facilitate the expansion of trade in agricultural products even though some of the provisions did not require the elimination of the barriers to trade. Moreover, insofar as both qualitative and quantitative aspects were concerned it was incorrect to say that the agricultural sector was excluded from the free-trade area. In fact barriers would be removed on one third of total trade in agricultural products between Member States".[57]

The general course of the EFTA Countries' reasoning presented above appears to correspond quite closely with the actual approach towards trade in agricultural products in Europe Agreement EC-Poland. In the latter case too, the Parties undertook to, at least, substantially liberalize trade in a great many agricultural and other non-industrial farm products „taking account of the need for an increased harmony between the agricultural policies in the Community and Poland: and „the possibilities of granting each other further concessions" beyond those already described in relevant Annexes.[58]

Worth attention are comments on drafting history of the phrase „substantially all the trade" made by the EFTA Countries in the Working Party debate. They point-out that this phrase was proposed against the background of the possibility of a free-trade area being established in Europe in which the United Kingdom, in particular, might wish to retain some barriers against certain imports from its partners mainly as a result of its preferential arrangements. It was envisaged, therefore, that an individual member of a free-trade zone should have a certain latitude in respect of some products, and there was an inference that this latitude would be used particularly with respect to agricultural

[35] Ibidem, at pp. 100-101, paras. 33-38.
[56] 95/83, para. 48.
[57] 9S/84, para. 49.
[58] See: Chapter II: Agriculture, Articles 19 and 20, paras. 1-5 of Europe Agreement EC-Poland.

products.[59] Eventually no agreement was reached within the Working Party on the meaning of the debated phrase and the problem continued to attract attention in later debates on that subject.

Thus, the Working Party report, adopted on 19 October 1973, on „European Communities – Agreement with Portugal" notes the view that „no exact definition of the expression' substantially all the trade existed and that the precise figures would vary from case to case according to several factors".[60] Various Working Party reports on agreements presented for view under Article XXIV of GATT also record statements that the meaning of „substantially all the trade" had never been defined in GATT.[61] On the other hand, however, statements were made that exclusion of the whole sector, no matter what percentage of current trade it constituted was contrary to the spirit of both Article XXLV and GATT in general.[62]

The Working Party report, adopted on 10 November 1980, on „Agreement between the EFTA Countries and Spain" notes the following statement: „... although the precise meaning of «substantially all the trade« was nowhere defined, it was clear that it meant less than all trade... The fact that the agricultural agreements did not cover all trade in that sector was not relevant in this connection, as one could not approach an agreement of this kind on a sector – by – sector basis. The GATT required a coverage of «substantially all the trade«, not «trade in substantially all products«; agricultural trade would have to be seen as part of and a contribution to the total coverage.[63]

In the light of the above there are hardly any grounds on which Europe Agreement EC–Poland could be legitimately challenged for incompatibility with the requirement of Article XXIV:8 of GATT.

3. Also, fulfilment by Europe Agreement EC–Poland of the requirements set–out in Article XXIV:5(b) and (c) does not seem controversial. Firstly there is nothing in the Agreement that could an intention of either Party thereto to sharpen trade regulations with regard to goods imported form third countries as compared with their treatment prior to the conclusion of an Interim Agreement and formation of a free–trade area. Secondly, a maximum period of ten years provided under the Agreement for the establishment of a free–trade area meets even the toughest criteria developed for this purpose in GATT diplomacy and practice.

It should be noted that at the time of drafting of GATT the South African proposal to replace the term „reasonable" by a definitive time limit was not taken up.[64] Two decades later, at the examination of the 1970 Agreement

[59] See: 9S/84, para. 51.
[60] See: 20S"171, 176, para. 16.
[61] See: 18S/164, para. 23; 21S/80, para. 13; 27S/132, para. 15.
[62] See: 21S/79, para. 12.
[63] See: 27S/127, 132, para. 15.
[64] EPCT/C. 11/38 at p. 8 and EPCT/C. 6/34 at pp. 4–5.

between the EEC and Spain, the parties to the Agreement noted that the term „reasonable length of time", which must be appreciated in conjunction with that of „interim agreement" had never been defined.[65]

The Working Party report, adopted on 29 May 1972, on „EEC—Agreement of Association with Malta" records the majority view according to which „from the point of view of the General Agreement, an evolutionary time—table... was preferable to a precise and detailed schedule in the case of countries with different levels of development... . The very term (interim) as applied to notions of (plan) and (reasonable length of time) made it clear that they did not necessarily have to be fixed at the outset in an absolutely specific and detailed manner".[66]

In turn, the Working Party report, adopted on 15 July 1976, on „Agreement between the European Communities and Israel" records that: „there was nothing in Article XXIV to prevent the time—table for the fulfillment of the reciprocal obligations being phased differently if the parties so agreed...".[67] Those latter observations correspond closely to the asymmetrical approach towards the achievement of free—trade in Europe Agreement EC—Poland.

Worth separate emphasis is that in the course of GATT Uruguay Round Negotiations even the staunchest spokesmen of rigorousity of discipline under Article XXIV suggested that as far as quantitative criteria for the duration of interim period are concerned, a „standard, e.g., ten years, should be established".[68]

What in the light of the above consideration seems to be of particular importance was general recognition among founders of GATT that with regard to agreements leading effectively to the establishment of a free—trade area the Contracting Parties of GATT have no other choice but to accept them. Thus in the course of the final stage of preparatory negotiations in Geneva between April and October 1947, it was clearly agreed that „there must be no question" of the Contracting Parties of GATT „having any power to approve or disapprove" an agreement if they find that proposal under review will in fact lead towards customs union or free—trade area in a reasonable period of time. „They must approve it. They have no power to object"[69], and this interpretation has never been changed as far as an official position of GATT is concerned.

[65] See: 18S/172, para. 22.

[66] See: 19S/90, para. 3 and pp. 92—93, para. 11; compare with observations in Working Party report on „EEC—Agreement of Association with Turkey", 19S/103, para. 3 and at p. 105, para. 8.

[67] See: 23S/63, para. 23.

[68] See: MTN. GNG/NG7/W/66 (22 December 1989), at p. 4, item (3) (a).

[69] See: EPCT/TAC/PV/11, at p. 37.

IV. Closing Remarks

„Alternative Scenarios for Central Europe" published in the January 1992 issue of the „MONITOR" grasped certain key problems and dilemmas resulting therefrom for the countries of that region.[70]

Some observations are very accurate, others less so. As usual, a lot depends on the perspective from which relevant problems are observed and assessed. Thus, what sometimes seems obvious to the western observer, for us, the Poles, is a distorted 18th century perspective. For example, we could wholly agree that „the nations of Central Europe have common historical and cultural roots" with Western European nations of that the former „being part of the western current of Christianity and deeply influenced by cultural developments in Western Europe did share more in the cultural field with Western Europe than did the orthodox eastern half of Europe". Also none of us would dispute the view that central Europe served as a bridge between the West and the East. The idea, however, that „Czechoslovakia, Hungary and a part of Poland, were part of the territory of the Habsburg monarchy" or „like the Hungarian nation, the Polish nation boasts a history of a thousand years, although the Poles seldom had their own state" makes one's hair stand on end. One can hardly think of a better muddle of evident historical facts, improbable simplicities and pure nonsense.

It is enough to remember that except for the period of the partition of Poland (1793—1918) the Poles had uninterrupted independent statehood. For over 700 years the kingdom of Poland experienced sustained territorial expansion. The Polish sovereigns used to rule over what later became „a part of the Habsburg empire" as well as over former Kievian Ruthenia, Great Dutchy of Lithuania and a number of lands to the north and west of Poland's present borders. While the southern part of East Prussia was an integral part of the Kingdom of Poland for over 350 years, the northern part with its capital in Konigsburg (Polish „Królewiec") remained a Polish fief for over 200 years. For Moscow, Poland used to be „the damn Latinist" and a symbol of the past Roman empire, which is very well shown in the opera BORYS GODUNOV. True, those are past glories which should not blind us to the real problems of today and tomorrow. Still, our Western collègues should sometimes show more sense of measure and of restraint in teaching us lessons. In fact we have a lot to learn from one another. The following is an example from the author's own not so distant experience.

The organisers of the November 1990 LSE conference on the Emerging European Economic Area recognised it as intellectual fantasizing when the author of these words advised to stop talking about the Soviet Union and to

[70] Hans von Zon, „Alternative Scenarios for Central Europe (Poland, Czechoslovakia, Hungary)", publ. FAST, Commission of the European Communities Science, Research and Development, FOP 226 rev. MONITOR, January 1992, pp. 1–7 with annexes enclosed.

start thinking about countries to emerge in its place, and envisage that those new states are likely to associate within a structure like free—trade area and loose confederation —at least some of them.

As it is with the representatives of the hard—core Western Europe or „Charlemagne Europe" who sometimes are lacking accurate knowledge and understanding of the events occurring to the east of the present borders of the Community, we, in Central Europe, are often lacking the indepth understanding of some techno—economic processes of key importance for effective functioning of modern market—democracies.

For these and similar reasons, „Alternative Scenarios..." seems a particularly interesting contribution. The author —Hans van Zon —accurately identifies the main economic and social problems facing the Central European countries.

„All Central European countries, as he rightly observes, opt for membership of the EEC as soon as possible". One must also agree with him that reaching that aim will depend upon behaviours of both the parties.

Hans van Zon sketches out 5 main scenarios of the further evolution of the relationship to occur in the Central European countries.

„The first scenario is the laissez—faire/capitalist—path scenario. Here the driving force is the with to create favourable conditions for free enterprise and all other considerations are secondary... Thus scenario resembles the Big—Bang—strategy which was chosen by the Polish government... Such a strategy does not seem to be long—lasting and soon a shift towards another scenario may occur, most probably the nationalist (populist) authoritarian scenario... ".

„The second scenario is the *populist—authoritarian* scenario, in which the government strives towards the introduction of a market economy but to a certain degree secluded from the world market... ".

„The third scenario is the *leaning—upon—the West scenario*. Here a weak government predominates, leaning heavily upon the recommendations of the European Communities and various Western institutions like IMF and the EBRD. The policy is to opt for membership of the EC as soon as possible... In this scenario Central Europe becomes a kind of protectorate...".

„The fourth scenario is the *sustainable development scenario*. In this scenario the option of a broadly defined well—being of future generations is kept in mind...".

„The fifth scenario is the *muddling on scenario*...".

These are more a less realistic scenarios. Their main weakness consists in the very manner in which they are presented, that is as if the Central European countries could freely make a reasonable choice from among them to elect and to follow. They did not. The fourth scenario, no doubt, must be regarded as the most attractive. The only trouble with it is that it is the most costly one and only wealthy countries may afford it. Poorer countries like those of Central Europe may take the path of that scenario only by way of joining the wealthy

ones. That is why, independent of differences occurring in their internal policies, the governments of the Central European countries so persistently solicit for membership of the Community as soon as possible.

And if the Polish government took the Big–Bang strategy in the initial phase, it was with the purpose to break the deadlock of the atrophic innertia of the socialist system and to generate domestic resources in an accelerated pace, thus to facilitate joining the Community in the not too distant future. Unfortunately, this dramatic effort has not yet been met half–way with strong enough response of the other side to bring about cumulative feedback. However, in our deeply interdependent environment it would amount to hypocrisy to expect the Central European countries to overcome on their own all the difficulties of transformation they are confronted with, and in addition, to do it in a painless and elegant manner.

In general terms the problem should be put in the following way; if the Central European countries are to avoid the destructive consequences of the second and fifth scenarios, the Community should show willingness and true understanding for the need to assist the transition process in these countries actively by means of a massive aid for economic restructuring and through wide opening of its (the Community's) market. It would be a factor of great importance to institutionalize stimulation of massive flow of foreign direct investment to the countries of Central Europe.

If the Community assists the Central European countries to the same extent it has helped Greece, Ireland, Portugal and Spain on their way to membership, the former will not become the „Community's protectorates" just like the latter have not and real partnership relations can be established within the Community widened with the countries of the Central Europe. Such a scenario would best reflect a strategic approach to what should be done for the sake of European stability and security as well.

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Protection of Wildlife in International Law

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International environmental law has become nowadays one of the most rapidly developing domains of international law. This is due to a strengthening awareness of the international community that only comprehensive and harmonious cooperation of the nations, based upon widely accepted legal basses and efficient active institutions, can be the very response to the present-day challenges connected with the threats to the natural environment. Changes occurring in the natural environment have resulted in disappearance from the globe of a considerable number of wild plants and animals. This phenomenon, unprecedented in the history of the mankind, rooted in a peculiar equilibrium between man and nature, has recently grown drastically vital. Fifteen per cent of the total number of fauna species will have disappeared from the earth during the next quarter of the century. 30,000 hectares of the tropical rain forests – the richest ecosystem and the "green lungs" of the planet – are being destroyed each day.

The first international treaties concerning the protection of wildlife were concluded in the latter half of the 19th century.[1] Several further wildlife treaties were signed in the first half of the 20th century.[2] In the 1970s the number and importance of the conservation treaties significantly increased. Undoubtedly, preparatory works and the results of the United Nations Conference on the Human Environment held in Stockholm in 1972 were an incentive to have states take initiative in this realm. According to the 2nd Principle of the Declaration adopted during the Conference: "The natural resources of the earth, including the air, water, land, flora and fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate". According to the 4th Principle: "Man has a special responsibility

[1] The first treaty of this kind, the Treaty Concerning the Regulation of Salmon Fishing in the Rhine River, was signed in 1886 by Germany, Luxemburg, the Netherlands, and Switzerland.

[2] For a detailed discussion of these treaties, see S. S. Hayden: *The International Protection of Wild Life*, New York 1942, and E. Bougault: *La protection des animaux et le droit international* [The Protection of Animals and International Law], Bordeaux 1937.

to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development".[3]

International treaties pertaining to wildlife protection form nowadays an extensive complex of legal instruments of the states' cooperation, differing in the territorial scope of action, the object of international protection, methods of protection and organizational solutions.

The aim of this paper is to categorize these treaties following the afore-mentioned elements taken as classification criteria. Fisheries treaties have been overlooked; although they contain protectionist provisions, still they are mainly directed to the economic exploitation of the seas and oceans. Secondly, treaties regulating different ranges of the states' cooperation, dealing incidentally with the protection of nature, have also been omitted.

1. The geographic scope of wildlife treaties

The after-mentioned presentation of wildlife treaties does not comprise all treaties that can be embodied in each category, but primarily the most representative and the most important ones.

1.1. Global treaties

Four global treaties forming the centerpiece of international wildlife law were concluded in the 1970s. They are: the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, adopted in the Iranian town of Ramsar on February 2, 1971, came into force on December 21, 1975 (generally known as "Ramsar Convention");[4] the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on November 16, 1972, came into force on December 17, 1975 (the "World Heritage Convention");[5] the Convention on International Trade in Endangered Species of Wild Fauna and Flora adopted in Washington on May 3, 1973, came into force on July 1, 1975 ("CITES"),[6] and the Convention on Conservation of Migratory Species of Wild Animals, adopted in Bonn on June 23, 1979, came into force on November 1, 1983 (the "Bonn Convention").[7]

Although all these treaties have an open and global character, the accession to them as a party was specified in a different way. Thus it is possible for any

[3] Text of *Declaration, International Protection of the Environment. Treaties and Related Documents*, compiled and edited by B. Rüster; B. Simma, New York 1975, vol. I, pp. 118–143.
[4] *International Legal Materials (ILM)*, 11 *ILM* 963 (1972).
[5] 11 *ILM* 1358 (1972).
[6] 12 *ILM* 1088 (1973).
[7] 19 *ILM* 15 (1980).

member of the United Nations, either of its specialized agencies or the International Atomic Energy Agency, or a party to the Statute of the International Court of Justice to adhere to the Ramsar Convention (Article 9). The World Heritage Convention elaborated under the auspices of the United Nations Educational, Scientific and Cultural Organization is open for the states members, as well as other states invited to accede to it by the General Conference of the UNESCO (Articles 31 and 32). Only states may hitherto be parties to CITES; however, an amendment to Article XXI was adopted on April 30, 1983 to enable regional economic integration organizations to adhere to the Convention (the amendment is not yet in force). The link connecting these four treaties – differing in their origins, protected objects as well as methods of protection – can be found in a statement that wild animals and plants are irreplaceable parts of the natural system of the earth to be conserved through international action for the benefit of mankind.

The International Tropical Agreement adopted in Geneva on November 18, 1983, came into force on April 1, 1985, is also considered a global treaty.[8] It may be acceded to by a state (state parties are divided into two categories: producing countries with tropical forest resources, and consuming countries) – Article 35, and an intergovernmental organization having responsibilities in respect of the negotiation, conclusion, and application of international agreements, especially concerning commodity agreements (The European Economic Community included) – Articles 2 and 5.

The list of global wildlife treaties will be extended in the future by the Convention on Biological Diversity adopted in Rio de Janeiro on June 5, 1992.[9] According to the provisions of Articles 34 and 35, the Convention is open to states and regional economic integration organizations. Therefore, it can be deduced that a new provision is often included in wildlife treaties to allow regional economic integration organizations to accede to the former as parties.

1.2. Regional treaties

Nowadays there are three most important regional treaties concerning the protection of wildlife on the American continents, in Africa and Europe. The oldest one is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (the "Western Hemisphere Convention") adopted on October 12, 1940, came into force on April 30, 1942.[10] The Convention was open for signature to member states of the Pan-American Union – now the Organization of American States. Then came the African Convention on the Conservation of Nature and Natural Resources ("the African Convention")

[8] *BGBL* 1986 II 172.
[9] 31 *ILM 822* (1992).
[10] 161 *UNTS* 194 (1953).

adopted in Algiers on September 15, 1968, in force since June 16, 1969.11 As it opened to member states of the organization of African Unity, it was preceded by two wildlife treaties concerning the African continent: the Convention for the Preservation of Wild Animals, Birds and Fish in Africa, adopted in London on May 19, 1900,[12] and the Convention Relative to the Preservation of Fauna and Flora in their Natural State, adopted on November 8, 1933.13

A convention on wildlife protection in Europe was adopted in Bern on September 19, 1979 and came into force on June 1, 1982. The Convention on the Conservation of European Wildlife and Natural Habitat (the "Bern Convention")[14] is open to member states of the Council of Europe, non-member states having participated in its elaboration, other states invited by the Committee of Ministers, and the European Economic Community (Article 19).

The Convention on the Conservation of Antarctic Marine Living Resources ("CCAMLR"), adopted in Canberra on May 20, 1980 and in force since April 7, 1982, is a treaty of continental scope.[15] It is open to states, parties to the Antarctic Treaty of 1959, and other states involved in research or harvesting activities relative to the Antarctic marine living resources, as well as to regional economic integration organizations established by sovereign states (Articles XXVIII and XIX). The difference between CCAMLR and the afore-mentioned regional conventions lies in that the regionalism of the former is connected with the object of protection only, while the latter also deals with participation of the states situated in a definite geographic area.

The regional document preceding CCAMLR and concerning protection of the Antarctic animals and plants is entitled *Agreed Measures for Conservation of Antarctic Fauna and Flora*.[16] This act was adopted by the Third Consultative Meeting of the Antarctic Treaty held in Brussels on June 2, 1964. Another document to view broadly protection of the environment in Antarctica is the Protocol on Environmental Protection to the Antarctic Treaty signed on October 4, 1991.17

Apart from treaties of continental scope there also exist several subregional ones. Benelux states adopted two such agreements: the Benelux Convention Concerning Hunting and Protection of Birds, concluded in Brussels on June 10, 1970, came into force on July 1, 1972,[18] and the Benelux Convention on Nature Conservation and Landscape Protection concluded in Brussels on June 8, 1982, came into force on October 1, 1983.19 On April 3, 1982 Mediterranean

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[M] 1001 *UNTS* 4 (1976).

[12] E. Bougault: op. cit. — Text of the Convention in French, pp. 127—133.

[13] CLXXII *LNTS* 242 (1936).

[14] *European Treaty Series (ETS)*, 104 ETS 2 (1979), N° 104, pp. 2—27.

[15] 19 *ILM* 841 (1980).

[16] *Internationales Umweltrecht — Multilaterale Verträge*, (ed.) W. E. Burhenne, Vol. III, 964: 41.

[17] 30 *ILM* 1461 (1991).

[18] 847 *UNTS* 264 (1972).

[19] *Internationales Umweltrecht*, Vol. V, 982: 43/11—12.

states adopted in Geneva the Protocol Concerning Mediterranean Specially Protected Areas.[20]

Some subregional wildlife agreements bind African states: the Convention on Game Hunting Formalities Applicable to the Tourists Entering Countries in the Conseil de l'Entente (Benin, Ivory Coast, Niger, Togo, Upper Volta), adopted in Yamoussoukro on February 26, 1976 and came into force on January 1, 1977;[21] the Agreement on the Joint Regulations on Fauna and Flora (Cameroon, Chad, Niger, Nigeria), adopted in Enugu on December 3, 1977;[22] the Protocol Agreement on the Conservation of Common Natural Resources (Sudan, Uganda, Zaire), adopted in Khartoum on January 24, 1982;[23] the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (adopted by parties to the Convention for the Protection, Management and Development of Marine and Coastal Environment of the Eastern African Region, concluded in Nairobi on June 1985), adopted at a date and place of the last Convention.[24]

States interested in protection of the environment in the South Pacific Area concluded two treaties: the Convention of Nature in the South Pacific, adopted in Apia on June 12, 1976,[25] and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region adopted in Noumea (New Caledonia) on November 24, 1986.[26]

A document getting the states to maintain a balance between the socio-economic development and conservation of the environment was adopted in Brasilia on July 3, 1978 as the Treaty for Amazonian Cooperation (in force since August 12, 1980).[27] A few declarations to protect wildlife were made by Amazonian States (Boliwia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, Venezuela) within the framework of the Treaty.

An important subregional act was adopted by member states of the Association of South East Asian Nations (ASEAN): the Agreement on the Conservation of Nature and Natural Resources (the "ASEAN Convention") was signed in Kuala Lumpur on July 9, 1985.[28] This Agreement, prepared with a technical assistance of the International Union for Conservation of Nature and Natural Resources, is considered the most modern regional instrument ever adopted in the field of conservation of the natural environment.

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[20] Ibidem, Vol. V, 982: 26.
[21] Ibidem, Vol. V, 976: 17.
[22] Ibidem, Vol. V, 977: 90.
[23] Ibidem, Vol. V, 982: 10.
[24] Ibidem, Vol. V, 985: 47.
[25] Ibidem, Vol. V, 976: 45.
[26] 26 *ILM* 14 (1987).
[27] 1202 *UNTS 11* (1980).
[24] 15 *Environmental Policy & Law*, 2/64–69 (1985).

1.3. Bilateral treaties

A multitude and great variety of bilateral treaties on protection of wildlife makes their complete presentation impossible. The practice of concluding such treaties is neither limited to a specific geographic region nor predetermined as to particular objects or methods of wildlife protection.

The first important bilateral wildlife treaty was concluded between the United States and Great Britain on August 16, 1916 – the Convention for the Protection of Migratory Birds.[29] Similar treaties were concluded between Denmark and Sweden – the Agreement Regarding Certain Provisions for the Protection of Migratory Game-Birds (Stockholm, October 9, 1931);[30] between the United States and Mexico – the Convention for the Protection of Migratory Birds and Game Mammals (Mexico, February 7, 1936), supplemented by the Agreement of March 10, 1972;[31] between Japan and Australia – the Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment (Tokyo, February 6, 1974);[32] between the United States and Japan – the Convention for the Protection of Migratory Birds in Danger of Extinction and their Environment (Tokyo, March 4, 1972), amended by *Exchange of Notes* (Washington, September 19, 1974);[33] between the United States and the USSR – the Convention Concerning the Conservation of Migratory Birds and their Environment (Moscow, November 19, 1976).[34]

Several bilateral agreements were also concluded to protect wildlife in the Amazonian territories: between Brazil and Peru – the Agreement for Conservation of Flora and Fauna of the Amazonian Territories (Lima, November 7, 1975);[35] between Bolivia and Argentina – the Convention on the Protection of Forests and Fauna, and the Integration of Frontier Parks (La Paz, March 16, 1976);[36] between Ecuador and Colombia – the Agreement on Amazonian Cooperation (Quito, March 2, 1979);[37] between Colombia and Peru – the Agreement for the Conservation of Fauna and Flora in the Amazonian Territories (Lima, March 30, 1979).[38]

The aforesaid treaties form only a small portion of bilateral wildlife treaties; the others will be discussed further.

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[29] *International Protection of the Environment. Treaties & Related Documents*, Vol. IV, pp. 1638–1641.
[30] Ibidem, Vol. IV, pp. 1691–1692.
[31] Ibidem, Vol. IV, pp. 1723–1726 and Vol. V, pp. 2217–2220.
[32] Ibidem, Vol. V, pp. 2370–2308.
[33] Ibidem, Vol. V, pp. 2192–2216.
[34] Ibidem, Vol. XXII, pp. 453–457.
[35] 1056 *UNTS* 132 (1977).
[36] *International Protection of the Environment. Treaties & Related Documents*, Vol. XXII, pp. 441–446.
[37] Ibidem, Vol. XXII, pp. 474–478 (in Spanish).
[38] Ibidem, Vol. XII, pp. 479–482.

2. Object of protection

Wildlife treaties specify the object of international protection in various ways. The first category endeavors to protect wildlife species, the second one deals with the protection of areas and habitats. The next one commits to the conservation of the ecosystem treated as a whole, often designated ''nature", or the joint conservation of flora and fauna. A new trend in international wildlife law lays a special emphasis on the concept of biological diversity.

2.1. Species

The qualification of protected species is usually based on a biological taxonomy. The protection is extended over particular species and, sometimes, subspecies, as well as some entities located higher in the biological classification, such as families, orders, classes.

A dramatic decrease in the polar bear population made states of the Arctic region conclude the Agreement on the Conservation of Polar Bears in Oslo on November 15, 1973, in force since May 26, 1976.[39] According to the preamble to the Treaty, ''the polar bear is a significant resource of the Arctic Region which requires additional protection".

A species to be given a strong international protection is vicuna — wild relative of the camel, found in the high Andean region of South America. Vicuna is one of the most valuable species in that continent, mainly because of its finest and most expensive wool in the world. The first treaty providing for its conservation was concluded between Bolivia and Peru in La Paz on August 16, 1969, to which Argentina, Chile and Ecuador were the parties.[40] This document terminated on December 20, 1979, the day when the Convention for the Conservation and Management of Vicuna was adopted in Lima; the latter came provisionally in force at the date of its adoption.[41] The Agreement for the Protection and Conservation of Vicuna, concluded between the Bolivian and Argentinean Governments in Buenos Aires on February 16, 1981[42], is the third treaty to decree the protection of this species.

The Caribou Conservation Agreement, signed by Canada and the United States on July 17, 1987, is one of the treaties proclaiming the protection of subspecies. It aims at conserving the Porcupine caribou heard that migrates between Alaska and Canada.[43]

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[39] 13 *ILM* 13 (1974).

[40] *International Protection of the Environment. Treaties £ Related Documents,* Vol. XII, pp. 387—388..

[41] *Internationales Umweltrecht*, Vol. V, 979: 94.

[42] S. Lyster: *International Wildlife Law*, Cambridge 1985, pp. 88—94.

[43] 15 *Environmental Policy & Law*, 5/200 (1987); see also: N. D. Banhes: „A Migratory Caribou Convention", 18 *CanYBIL* 285—300 (1980).

One of the most discreditable evidence of human mismanagement of the earth's natural resources is depletion of a considerable part of the whale population. The first treaty to create legal foundations for the international cooperation in preventing over-exploitation of whales, the Convention for the Regulation of Whaling, was concluded in 1931.[44] The next one to come was the International Agreement for the Regulation of Whaling signed in 1937.[45] These both treaties were superseded by the International Convention for Regulation of Whaling, adopted in Washington on December 2, 1946 and come in force since November 10, 1948.[46]

Seals are other animals to have been seriously depleted in the past by commercial exploitation. Nowadays there are two principal treaties in force to protect this species: the Interim Convention on the Conservation of North Pacific Fur Seals (the "Interim Convention", signed in Washington on February 9, 1957, came into force on October 14, 1957), several times renewed, amended and extended,[47] and the Convention for the Conservation of Antarctic Seals, negotiated in London on February 3-11, 1972 and in force since March 11, 1978.[48] That last is applicable to six species of seals found in Antarctica.

A considerable number of treaties pertain to the protection of birds. Reasons for protecting them have changed over the years. Initially valued as source of food, controllers of insect pest, and sport hunting targets; their ecological and aesthetic qualities have also been recently appreciated, however. Three multilateral treaties concern exclusively birds, and lots of bilateral ones, which often deal with their environment as well (they have been discussed in the foregoing section).

The Convention for the Protection of Birds Useful to Agriculture was the first treaty to aim at preserving of birds (adopted in Paris on March 19, 1902 and enforced on December 6, 1905).[49] It took a strictly utilitarian approach, protecting about 150 species listed in Annex; i.e. mainly passerines, owls and other birds of obvious agricultural value.

A substantial progress in designating of the protected objects was achieved in the International Convention for the Protection of birds, adopted in Paris on October 18, 1950 and enforced on January 17, 1963.[50] According to the preamble of the document, "in the interest of science, the protection of nature and the economy of each nation, all birds should as matter of principle be protected". Yet the purpose of the Convention to protect birds in the wild state (Article 1) has never been satisfactorily accomplished so far. It has therefore become a sleeping treaty of no practical implication for states signatories.[51]

[44] 45 *LNTS* 351 (1935).
[45] 190 *LNTS* 80 (1938).
[46] 161 *ÜNTS* 74 (1953).
[47] 314 *UNTS* 106 (1958).
[48] 11 *ILM* 251 (1972).
[49] 51 *LNTS* 221.
[50] 638 *LNTS* 186 (1968).
[51] S. Lyster: op. dt., p. 66.

The Benelux Convention on Hunting and Protection of Birds was concluded in 1970 in order to preserve game birds, divided into four categories: large game, small game, wild fowl and other game. In its Decision M/72/18 of August 30, 1972, the Committee of Ministers of Benelux Economic Union extended the limited conventional protection to sixteen wild bird listed species and provided the total protection for other non-game species.[52]

Many bird species are migratory and cross borders of states; consequently, the attribute migratory has been often emphasized in treaties on the protection of birds. The migration of different species brings about specific problems as far as their conservation is concerned, and states proceeding in accordance with Recommendation 32 of the Action Plan of Stockholm Conference of 1972,[53] after several years of negotiations, adopted the Bonn Convention to protect all migratory species. Article I defines a ''migratory species" as "the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more jurisdictional boundaries". Appendix I to the Convention enumerates migratory species in danger of extinction throughout all or a significant portion of their population. Appendix II consists of species that have unfavorable conservation status and require international agreements for their preservation or which would notably benefit from the international cooperation in this field.

Migratory species, as defined by the Bonn Convention and listed in its two appendices, can be grouped under four categories, following their migration pattern: 1) marine species breeding in rivers or on shore, but spending all or most of their adult life in the sea (seals, sea turtles, anadromous fish); 2) highly migratory marine species traveling over vast expanses of waters and crossing jurisdictional limits (whales, some species of tuna); 3) terrestrial species with a well established migration pattern between breeding and non-breeding areas — often wintering areas (migratory birds, monarch butterflies); 4) terrestrial or marine species living in border areas, and crossing periodically jurisdictional boundaries (which from the biological point of view may even be considered as sedentary, such as gorilla, elephant, Grevy zebra, dugong).[54]

If discernment of the protected species of the Bonn Convention is to based on their way of living, then CITES should apply to all endangered species of wild fauna and flora. Yet the definition of "species" in Article I of the Convention is not a biological one, but merely a legally necessary clarification: under its terms, ''species" stands for "any species, subspecies or geographically separate population thereof'.

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[52] *International Protection of the Environment. Treaties & Related Documents*, Vol. V, pp. 2136—2141.

[53] Ibidem., Vol. I, p. 127.

[54] C. de Klemm: „Migratory species — A review of existing international instruments", 15 *Environmental Policy & Law*, 3—4/81—91 (1985).

Protected species are listed in three Appendices of CITES. Appendix I contains species currently threatened with extinction, which are or may be affected by trade. To be qualified for Appendix II, species need not currently be threatened with extinction, but there must be an indication that they might become so. Appendix 111 lists species proposed by the states parties as far as international control of trade is needed to provide for their appropriate protection. In 1976 the Conference of the Parties to CITES adopted detailed criteria for the addition of species to Appendices I and II, commonly known as "Bern criteria".[55] To simplify: Appendix I contains endangered species, Appendix II – threatened species, i.e. "potentially" endangered; Appendix III – threatened species in a specific country only, i.e. "locally" endangered.[56]

2.2. Areas

Protected area denotes another category as an object of protection in wildlife treaties. Hence the Ramsar Convention is one of the most typical example of a treaty protecting the wildlife habitat. It applies to wetlands which provide an essential habitat for hundreds of species of waterfowl, fish, amphibians, reptiles, mammals and plants, and form an important productive living-support systems on the earth. Article 1 (1) defines wetlands as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters"; which may also include contiguous riparian and coastal zones. The Ramsar Convention allows its parties to designate unilaterally "suitable wetlands" within their territory for inclusion in the ***List of Wetlands of International Importance*** (states are required to add at least one site when ratifying the Convention). Conferences of the Contracting Parties to the Ramsar Convention adopted detailed ***Criteria for Identifying Wetlands of International Importance for Designation for the List*** under Article 2 of the Ramsar Convention.[57]

The objective of the World Heritage Convention is to protect natural and cultural areas of "outstanding universal value". According to Article 2, the sites shall be considered a part of the "natural heritage", provided they be: 1) natural features consisting of physical and biological formation or groups of such formations, which are of outstanding universal value from an aesthetic or scientific point of view; or 2) geographical and physio-graphical formations and precisely delineated areas that constitute a habitat of threatened species of animals and plants of outstanding universal value from a viewpoint of science

[55] *International Protection of the Environment*, Vol. XXIII, pp. 191–193.

[56] For detailed analysis and comprehensive interpretation of CITES, see: D.S. Favre: *International Trade in Endangered Species. A Guide to CITES*, Dordrecht 1986; W. Wijnsteker s: *The Evolution to CITES*, Lausanne 1990.

[57] 17 *Environmental Policy & Law*, 5/178–181 and 201–204 (1987).

or conservation; or 3) natural sites or precisely delineated natural areas of outstanding universal value from a viewpoint of science, conservation or natural beauty. The states parties to the Convention propose areas within their territories for inclusion in the *World Heritage List*, which is compiled by the World Heritage Committee. The Committee adopted the *Operational Guidelines* dealing with all aspects of its works and criteria upon which to qualify sites for the List. It should be pointed out that the impact of the World Heritage Convention for wildlife protection is limited, as it pertains to the world's most selected areas, other habitats do not benefit directly from its provisions.[58]

The Protocol Concerning Mediterranean Specially Protected Areas of 1982 is also involved in the protection of areas. According to Article 2, the protected areas shall be established to safeguard: 1) sites of biological and ecological value; 2) sites of particular importance owing their scientific, aesthetic, historical, archeological, cultural or educational interest. Such areas may include territorial waters, wetlands or costal sections designated by each of the parties.

2.3. Ecosystems

A considerable number of wildlife treaties provide for a joint protection of species and habitats. Protection of the whole ecosystems embodying plants, animals and their environment is one of the most important indications of the World Conservation Strategy adopted by IUCN, UNÈP and WWF in 1980.59 Living resources and their non-living environment form a dynamic complex based upon interdependencies and connexions. Meanwhile living resources share two essential features, the combination of which differentiates them from non-living resources: they are renewable when conserved, and destructible when not. Many wildlife treaties focused on the protection of ecosystems use the term "nature".

All principal treaties of continental scope pertain to the protection of ecosystems. The Western Hemisphere Convention deals with the protection of nature and the preservation of flora and fauna. According to the preamble of the Convention, parties wish to protect and preserve "in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds and the scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value, and areas characterized by primitive conditions". The Convention was one of the first international treaties to confirm the necessity to protect species and their habitats within national parks, national reserves and strict wilderness reserves established in accordance with its provisions.

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[58] S. Lyster: op. cit. pp. 208–218.

[59] *International Protection of the Environment*, Vol. XXIII, pp. 420–505.

The African Convention also emphasizes the need for conservation of flora, fauna resources and their environment, and other natural resources such as soil and water. It has destined a separate article for each of the objects to protect. Article VIII divides the protected species into two classes, listed in Annex. According to it, a special protection shall be given "to those animal and plant species that are threatened with extinction, or which may become so, and to the habitat necessary to their survival". Preserving species together with their terrestrial and aquatic habitat, and representative ecosystems is particularly vital in Africa, where degradation and loss of habitat has become the very threat to the majority of continental species.

The main objective of the Bern Convention is to conserve the European "wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires cooperation of several states". A particular attention is focused on endangered and vulnerable species, and endangered habitats. Chapter II is devoted to the protection of the habitats and areas of importance for migratory species situation in relation to their migratory routes, as wintering, staging, feeding, breeding or moulting areas. Chapters III and IV deals with the protection of species listed in three Appendices (I – strictly protected flora species, II – strictly protected fauna species, III – protected fauna species).

CCAMLR is also a convention compelling its parties to adopt ecosystem approach in the conservation and rational use of marine living resources. Article 1 defines the Antarctic marine ecosystem as "the complex of relationships of Antarctic marine living resources with each other and with their physical environment". It is noteworthy that CCAMLR was one of the few international wildlife treaties to be concluded prior to having exerted a heavy commercial pressure on the species to protect.

The Benelux and the ASEAN Conventions are typical examples of sub-regional treaties involved in the protection of ecosystems. The objective of the former is to conserve the nature and protect the landscape. According to its preamble and Article 1, protection is given to the natural environment, including living and non-living resources, to natural region and the landscape which is shaped by the interrelationship and interaction of various elements such as soil, sculpture of the earth's surface, water, climate, flora, fauna, and man.

The ASEAN Convention is primarily concerned with the protection of species and ecosystems, but it also comprises the conservation of other natural resources such as soil, water, and air. The Convention lays a particular emphasis on the interdependence of living resources, be it between them and other natural resources or within ecosystems of which they are a part. Special attention is paid to the protection of harvested, endangered and endemic species, and to the conservation of their natural habitat – whether terrestrial or marine, freshwater or coastal band.

2.4. Biological diversity

The Rio de Janeiro Convention introduces a new category of protected objects into international wildlife law. Its purpose is to assure the conservation of the biological diversity of our planet. Although the Convention does not propose to replace the existing treaties, most of them deal with some sectional aspects of the conservation. It has provided a framework within which the effect of these other treaties could be propelled by establishing global priorities, criteria and guidelines.

The Convention avails itself of a concept which – to some extent – seems an abstract, but it also systemizes some notions used in former treaties. According to Article 2, biological diversity means "the variability among living organisms from all sources including *inter alia* terrestrial, marine and other aquatic ecosystems, and the ecological complexes of which they are a part". Such a diversity includes genetic diversity (variability of individuals within each species), species diversity (variety between species), and ecosystem diversity (variety of habitats, biotic communities and ecological processes in the biosphere).

Biological diversity ought to be conserved on each of the three levels. The Convention also defines "ecosystem" as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit", and "habitat" as "the place or type of site where an organism or population naturally occurs". The new Convention has adopted such an incomparable comprehensive approach to the problem of preserving biodiversity that none of the existing legal instruments, even used in combination with one another, will be ever able to perform the task of protecting such an extensive object.

3. Methods of protection

Wildlife treaties indicate methods of conservation to be applied by states parties to ensure the effectiveness of protective activities. These methods are adjusted to the kind of protected object and the type of threat to wildlife the treaties attempt to counteract. Earlier treaties, mainly involved in limiting the number of killed animals, pertain nowadays to the main threat to most species that is not excessive killing, but habitat disruption.

3.1. Prohibition of taking specimens of species

Many wildlife protecting treaties contain provisions which prohibit taking specimens of wild species.

The Polar Bear Agreement puts a ban on "taking" of polar bear, even hunting, killing and capturing (excepted special circumstances stipulated in

Article Ill). According to this last, taking is allowed for scientific and conservation purposes, in order to prevent ill-management of other living resources, using traditional methods by the native people only.

The Convention for the Protection of Birds of 1902 also outlaws taking, capturing, imports, transportation and sale of nests, eggs and young of the species listed in Annex. In terms of Article III, using all methods designed to capture or destroy birds *en masse* is strictly forbidden. Therefore most of the bilateral treaties on birds require states parties to implement prohibition of taking the listed birds, their eggs or nests, with a few exceptions for hunting in certain circumstances. Although they do not define the concept of ''taking", its larger interpretation is presumed to mean any activity leading to the death of a specimen.

The Bonn Convention imposes on the parties a ban of taking specimens of the species listed in Appendix I, with an exception for few limited circumstances. The Bern Convention also prohibits deliberate killing or capturing of animals, as well as deliberate picking, collecting, cutting or uprooting of plants, listed in Appendix 1.

The ASEAN Agreement stipulates that parties shall, whenever possible, prohibit taking of the endangered and endemic species, excepted particular circumstances allowed by the designated authorities of those first.

3.2. Regulation of hunting

Provisions concerning hunting are included in a several wildlife treaties. Thus according to the African Convention (Article VII), parties are required to adopt an adequate legislation on hunting to regulate the issue of permits and forbid unauthorized methods of hunting.

The Yamoussoukro Convention of 1976 deals with game-hunting formalities applicable to tourists. Game-hunting by foreign visitors in the states of the Conseil de l'Entente falls into two categories: big hunting and medium hunting, and consequently, there are two kinds of game-hunting licenses issued to tourists: big-game license — valid for 30 days, and medium-game license valid for 20 days (Articles 1-3). The Convention stipulates conditions of obtaining licenses, possession and exports of skin and trophies, and regulates the use of hunting guides.

The Enugu Agreement of 1977 also contains provisions on hunting in Article 3 which pertain mainly to the hunting of reptiles (varan, python, crocodile). According to Article 4, all hunting offenses, especially poaching, shall be forbidden in states parties.

3.3. Regulation of exploitation

The Whaling Convention of 1946 strives to protect whales from over-exploitation. It has established "a system of international regulation for

the whale fisheries to ensure proper and effective conservation and development of whale stocks". This provision endeavors to bring to a situation where stocks will have recovered enough to sustain a controlled exploitation.

When comparing sealing conventions, it should be emphasized an difference in the approach to the exploited subject. The Interim Convention aims at maximizing harvest levels of the Northern fur seals by adopting effective measures in order "to make possible the maximum sustainable productivity of the fur seal resources". In terms of the Antarctic Seal Convention, parties are allowed to permit "limited quantities" of any species to be killed or captured "to provide indispensable food for men or dogs or to provide for scientific research or to provide specimens for museums and educational or cultural institutions".

Exploitations problems are handled in another way by CCAMLR. The Convention stipulates that harvesting and associated activities shall be regulated to prevent from decreasing of target species population to levels below which its stable recruitment could not be ensured, and that equal consideration shall be given to similar effects of the proposed harvest levels on non-target species and the marine ecosystem as a whole.

3.4. Regulation of trade

CITES is the most important treaty attempting to balance legitimate trade interests in renewable natural resources against the need to protect endangered species. International trade in wildlife has become a surprisingly lucrative business. Consequently, the Convention implements a system of control and restrictions on trading in specimens of endangered species that are listed in appendices. It is operative by means of a permit system; furthermore, each appendix determines the degree of trade regulation, and thus a degree of protection, to be observed. With hardly a few exceptions, international trade in specimens of the listed species is prohibited without a prior grant of the CITES permit.

Trading in the specimens of species listed in Appendix I is strictly controlled and may be practiced provided permits be issued both by the importing and exporting countries. Similarly, export and reexport of the species enumerated in Appendix II require the grant of an export or reexport permit, although no import license is needed in case of imports. As to the species listed in Appendix III, there have been put restrictions on trade in specimens originating from the state that has included them itself. Therefore their imports require presentation of a certificate of origin. According to CITES, a separate permit or certificate has to be obtained for each consignment of the specimens. The Convention requires its parties to penalize a trade which violates its provisions, to designate ports of exit and entry for all exports and imports of wildlife, and to keep records of trade in specimens of the listed species.

Provisions concerning trade in wildlife are also included in other treaties. It is noteworthy that the African Convention (Article IX) and the Western Hemisphere Convention (Article IX) are in one instance stricter than CITES; they also regulate transit and require transit certificates, while it has exempted transit from permit system. Conventions protecting birds and vicuna prohibit trade in specimens of species they cover, too.

3.5. Establishment of protected areas

A considerable number of wildlife treaties require parties to establish protected areas. According to Article II of the Western Hemisphere Convention parties shall explore "the possibility of establishing in their territories national parks, national reserves, nature monuments and strict wilderness reserves" and in all cases where it is feasible, begin creation thereof as soon as possible. Article I contains a detailed definition of each kind of protected area, stating the purpose of its establishment, conservation status and conditions of state control. The Convention sets specific requirements regarding the management of national parks and strict wilderness reserves (Articles III and IV).

The African Convention also emphasizes the need of establishing protected areas which is defined as "any protected natural resource area, whether it be a strict natural reserve, a national park or a special reserve" (Article III (4)). Special reserves, in contrast to former ones, do not necessitate a state control either permits of hunting, killing or capturing of wildlife remaining under direction or control of the reserve authorities. Strict natural reserves appear similar in concept to the strict wilderness reserves established in accordance with the Western Hemisphere Convention.

The Bern Convention states more generally that a "systematic establishment of nature reserves" helps fulfil the task of conservation of species and their habitat (Article 4 /1/). Moreover, detailed provisions on protected areas are included in the ASEAN Agreement. In terms of its Article 13, parties shall, as considered appropriate, establish in areas remaining under their jurisdiction protection areas such as natural parks and reserves.

3.6. Prohibition of deterioration and destruction of the habitat

In some wildlife treaties protection of the species environment is not linked to the establishment of conservation areas. The African Convention, with an exception for creation of national parks and reserves, also deals with the wise use of natural habitats outside particularly protected areas (controlling bush fires, forest exploitation: limitations on forest grazing, land clearing for cultivation, management of aquatic environment – Article 6).

The Bern Convention (Article 6 /b/) prohibits "deliberate damage to or destruction of breeding or resting sites of Appendix II species". This Article

applies to important breeding and resting sites only, while Article 9 allows parties to make exceptions to Article 6 in few limited circumstances. The Convention also requires its parties to coordinate protection of the habitat located in frontier area (Article 4 /4/), and to ban any activity that would damage the site of Appendix I plant.

The Bonn Convention (Article III /4/) stipulates that parties shall endeavor to conserve and restore, wherever feasible and appropriate, the habitats of Appendix I species. Furthermore, the Ramsar Convention (Article 3 /1/) requires parties to promote "as far as possible the wise use of wetlands in their territory", whether they be included in the list or not. A wise use of wetlands entails maintenance of their ecological character for the benefit of nature conservation and sustainable development.

The above presented methods do not encompass all forms of safeguarding activities. Wildlife treaties also provide for others such as: control or elimination of non-native species, development of planning and management policies, obligation to conclude agreements in order to protect species to benefit from international cooperation, promoting instruction of a competent personnel in the fields of protection, conservation and presentation, preparation of inventories and development of data bases to monitor situation in conservation, promoting research and education in wildlife protection, as well as exchange of publications and data.

An extensive and progressive set of protecting methods is presented in the Biodiversity Convention. It includes: identification and monitoring components of the biological diversity, *in situ* and *ex situ* conservation, sustainable use of components of the biological diversity, research and training, public education and popularized programs, impact assessment and minimizing the adverse impact, exchange of information.

Conclusion

Extinction of species, degradation of their habitats and destruction of ecosystems have become a problem of world concern requiring international action based upon international treaties. The international community has grown more sensitive to the plight of wildlife in recent decades. Wildlife treaties cover numerous threats to wildlife so that they have achieved some considerable success in reaction to specific needs of the protection.

International wildlife law reflects changing values assigned to wildlife, changing threats and changing approach to exploitation.[60] The modern trend

[60] See also: S. Lyster: op. cit., pp. 299–301; C. de Klemm: „Conservation of species: The need for a new approach", *Environmental Policy & Law*, 1982, vol. 9, N° 4, pp. 117–128; A. Batchelor: „The Preservation of Wildlife Habitat in Ecosystems: Towards a new direction under international law to prevent species extinction", 3 *Florida International Law Journal*, 307–339 (1988).

goes towards an ecosystem approach and preservation of all biological diversity of the earth. However developing techniques for improving the level of compliance with wildlife treaties has become nowadays an extremely important task.

Some special attention must be paid to the establishment of administrative system to monitor and oversee the enforcement of these treaties. Treaties without provisions concerning regular reports of states parties on implementation problems, regular meetings held by the parties to review such implementation and a permanent administrative board to control the enforcement of regulations (as it is the case of the Western Hemisphere Convention, the African Convention and some treaties for protecting birds), are relatively ineffectual and therefore have become "sleeping treaties".[61]

It can be finally emphasized that, given the future outcome of international wildlife law, creation of new treaties to fill the existing gaps is of the same importance as advancement in the compliance with the treaties already in force.

[61] S. Lyster: op. cit., p. 301.

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Agreement on Association of Poland with European Communities (Legal and Economic Issues)*

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1. Attempting to assess the main provisions of the Agreement on Association between Poland and European Communities[1] dated December 16, 1991, I tried to compare it to earlier agreements on association between the Mediterranean countries and the EEC. The successful integration of these states with the more developed countries of the Community constitutes an important argument for Poland to follow the steps of other young democracies in Europe. Discussions held to date have not focused on the concrete provisions of the Agreement. There is no doubt that the majority of the public opinion in this country decisively supports ratification.[2] The debate between the majority and the minority, which believes the treaty will jeopardize Polish sovereignty and increase the influence of liberalism, seems to be a political and ideological dispute rather than one of concrete economic solutions.[3] It is beyond a doubt that integration of Poland with the EEC will result in the limitation of the traditional sovereign state and in major political and cultural consequences. Poland will have to respect not only the economic rules established in Brussels, but also the system of political values which dominates Western Europe, as

*** The article is a detailed discussion on the theory of the report presented at the meeting of the Legal Studies Committee of the Polish Academy of Sciences, Warsaw April 19, 1992. As a participant of the negotiations in Brussels, I would like to point out that opinions presented in this article express only my personal point of view.**

[1] The European Agreement on the Association of European Communities and its Member States and the Republic of Poland (hereinafter referred to as „the Agreement" or „the Association Agreement"). On March 1, 1992 the commercial part of the Agreement whose ratification on the part of the EC did not require consent of the Member States Parliaments went into force. This most important pan of the Agreement, called the „Interim Agreement", was ratified by the President of the Republic of Poland in February 1992.

[2] According to the poll conducted by the Center for Public Opinion Research dated January 1992, more than 80% of reviewed people assume that implementation of the Association Agreement will be absolutely or rather advantageous for Poland.

[3] This issue is demonstrated in the commentary of the Center for Public Opinion Research devoted to the results of the poll regarding the Association Agreement (page 6).

well as the liberal concept of rights and freedoms. This influence on traditional values was demonstrated in the recent case before the Supreme Court of Ireland in which a young victim was allowed to go to the United Kingdom for an abortion, thereby circumventing the constitutional prohibition against abortions in Ireland.

Focusing on the economic aspects of the treaty, I will try to prove that it is far from an ideal model of free trade. The Treaty illustrates the process of establishing transnational trade rules reflecting realistic division of powers in world trade. These rules are far from a free-trade model and, by-and-large, the exceptions from the free-trade model favour the developed countries.

2. Three separate agreements executed on December 16, 1991, in Brussels by the EEC with the Czech and Slovak Republic, Poland and Hungary are jointly called the European Agreements. Although the European Communities have executed agreements in the past on economic cooperation (association agreements, customs unions, trade treaties), the current Agreements are a novelty to the EEC practice of executing treaties, mainly due to the provisions on political dialogue (Art. 2—5), the necessity of adjusting the legal systems of the associated countries to the model of the European Center (Art. 68—70) and due to provisions on cultural cooperation (Art. 94). Is does not mean that the Treaty assures a higher level of political and economic integration in all the fields than in previous association agreements executed between the EC and, for example, the Mediterranean countries. The purpose of the current agreements is to create free-trade areas subject to Art. 24 of the GATT. Such a solution assumes a different model of economic integration than in the case of customs unions (for example, the association agreements with Turkey and Greece). A customs union leads not only to the elimination of customs tariffs between the parties of the agreements, but also to the establishment of unified tariff barriers with respect to third countries.

The latter problem is closely connected with the unsolved issue of Polish membership in the EEC. Establishing a customs union is an indispensable condition for membership in the Community. However, in spite of numerous efforts, the three countries of Central Europe have been unsuccessful in obtaining a declaration of clear support from the EC to eventually join the Community as full members.[4] The preamble of the Agreement executed between the Republic of Poland and the EC, states that Poland's ultimate objective (and not the objective approved by both sides) is to obtain membership in the EEC. The Agreement neither provides the date of association nor the requirements necessary for Poland to satisfy in order to achieve full membership. This approach by the EC has resulted in negative consequences for numerous

[4] **The EEC Commission has officially informed the European Parliament that the European Agreements cannot be treated as a promise of membership in the Community.**

solutions adopted in the European Agreements. In particular, neither Poland, Hungary nor the Czech and Slovak Republic have been successful in obtaining consent from the EC to integrate their agriculture with the European market. They have not even achieved a promise to limit export agricultural subsidies. Such subsidies constitute a significant economic threat for both Poland and Hungary.[5]

The chances to obtain a treaty guarantee for membership in the EEC within a reasonable time period have been further extended after the coup d'etat in the Soviet Union in August, 1991. Originally, the three countries in Central Europe were considered to be the only ones among the post-communist countries which could expect help from the EEC. Since the dissolution of the Soviet Union, strategic help for Russia and the other nations has increased. The European Parliament criticized the EEC for its austere approach with respect to demands from Central Europe regarding the promise by treaty to accept them as members of the Community. Members of the Committee on External Economic Relations noted that the negotiating approach of the EEC was „inappropriate and unsuitable". The Committee pointed out that the promise of membership provided in the previous association agreements with Greece and Portugal, although made only for political purposes, resulted in significant mobilization of pro-European factions in the other Mediterranean countries with respect to their economic programs for European integration.[6] Such an approach did not have any significant influence on the majority of the governments of the Member Countries and the EEC Commission.[7]

The content of the Agreement and its assumptions are based on the Treaty of Rome. Some of its provisions, especially those relating to basic rules of trade liberalization and capital transfer, are taken from that Treaty with only minor amendments. The Agreement anticipates freedom in the transfer of goods, capital and services, the right to establish companies and subsidiaries on the territory of the other party, including rules for national treatment for the companies of the member states which are parties to the treaty (freedom of establishment), unification of anti-trust laws and anti-dumping rules, etc.

According to free-trade theory, the Agreement significantly restricts the ability of Poland or the EEC, by unilateral measures of protecting its market through increased customs duties, establishing import or export quotas or other similar protecting instruments. The parties may take extraordinary measures to protect their markets or balance of payments only within strict limits as

[5] This issue was pointed out by Minister A. Olechowski, Poland's chief negotiator, in one of his interviews delivered after the execution of the Agreement.

[6] „Report of the Committee on External Economic Relations on a General Outline for Association with the Countries of Central and Eastern Europe", *European Parliament*, March 13, 1991, Doc. EN/RP/105815, page 11.

[7] In unofficial discussions in Brussels, I found that the EEC does not want to make any hasty decision to promise membership. The EEC promised membership of the EEC in the Association Agreement with Turkey in 1973, but this commitment has not been fulfilled.

outlined in the Agreement (extraordinary measures include: instruments preventing market disruption or protecting the payment balance, restrictions and prohibitions leading to protection of health and moral values, etc. (see e.g. Art. 29—34, 64). Once the Agreement is in effect, the parties may not establish new customs duties or import-export quotas in their mutual trade. Poland can only use increased customs duties as extraordinary protecting measures, and then only to protect infant industries, sectors under restructuring or areas of significant social problems (e.g. unemployment). However, the provision allowing for the use of these instruments includes a number of material restrictions (Art. 29). For example, increased customs duties should not exceed 25 % of the value of imported goods and the annual volume of imported goods from the territory of the EEC undergoing special protection may not exceed 15 % of the industrial good imported from that EEC territory in the previous calendar year. These measures can be used only during the first five years of the Agreement. After this period, consent of the Association is required, which in practice means consent of the other party.

Chapter VI of the Agreement on economic cooperation covers issues of industrial cooperation, support and protection of investments, cooperation in establishing technical standards, education and professional training, cooperation in nuclear technology and environmental protection, transport and telecommunication, banking and monetary policy. This chapter also includes provisions on the fight against drugs and money laundering.

Apart from economic issues, the Agreement considers in general terms (Art. 2—5) cultural cooperation (Art. 94), social cooperation (Art. 86) and exchange of information (Art. 89). Its final provisions are dedicated to authorities of institutional cooperation appointed to supervise commitments and obligations between the parties. Establishment of an Association Council is anticipated. The Council is responsible for such issues as supervision over implementation of the Agreement, implementation of a number of enforcement measures and dispute resolution. In addition, the Agreement assumes establishment of the Association Committee and the Committee of the Parliamentarian Association.

3. The Agreement anticipates a gradual process of creating a free-trade area within ten years after its entry into force. This process is divided into two five-year periods. In the first period, the EC will remove in advance customs duties, import quotas and other similar restrictions imposed on many goods imported from Poland. According to Art. 9(3) of the Agreement, the EEC will remove the tariff restrictions mentioned above by the end of the fifth year of the treaty. However, the majority of import quotas and customs fees for Polish industrial goods will be annulled during the first year of the Treaty.

The removal of customs duties and import quotas for Polish industrial goods within such a short time frame constitutes, beyond a doubt, a significant

concession. On the other hand, the majority of important goods produced in Poland will gain free access to the EEC markets only after 4–6 years. A much slower approach to trade liberalization is extended to agricultural goods, textiles, coal, steel, fish and other food products, certain chemicals, glass, leather products and furniture. The list of goods considered by the EC as „sensitive products" includes these Polish sectors which have the potential to increase their export market. The list of goods undergoing the more slower pace of liberalization includes almost half of the goods exported to the EEC by the fully-associated countries.[8]

Another significant restriction of access to the EEC market is the requirement depriving the associated country of the benefits of customs exemptions if its exported goods include less than 60% of „local content". These strict rules of origin decrease attractiveness of the associated country as a market for foreign investments since the export value of foreign assembly and foreign components is lost through the local content requirements.

The Agreement allows anti-dumping rules, which are often abused as a means of protection, to apply to Poland and other associated countries. In particular, the Polish steel and chemical industries may, in the future, suffer from such protectionist measures.[9] Safeguards against the abuse of the anti-dumping rules and an as yet undefined instrument of protection against rapid growth of export (Art. 31) is anticipated in Art. 34 of the Agreement.

This provision assumes participation of the Association Council in the resolution of disputes between the parties and the ability to achieve a compromise. It also provides for an obligation to notify the other party before implementation of restrictions. However, if the compromise is not achieved, each party may apply appropriate measures to protect its market.

Removal of the customs tariffs and other track barriers existing in the Polish system will take longer than in the EEC. The majority of Polish customs duties for industrial goods imported from the EEC must be removed between

[8] A. Winters: „The Association Process. Making it Work for Europe", (in:) *Materiały konferencji EWG poświęconej umowom europejskim*, Brussels, February 27, 1992, page 3, 10 (hereafter referred to as „the EEC Conference").

[9] Treating associated countries as „third" countries in the light of the anti-dumping law and introducing an extraordinary means of market protection in the Agreement may result in a loss of interest for foreign investors to invest in Poland in the fields in which the country enjoys the status of a respectful exporter. Another serious problem consists in the treatment of the associated countries as „state-controlled economies". This entails the risk for Polish exporters of being „punished" for selling below a foreign market value, which is established on the basis of an arbitrarily selected „surrogate" free-market producer of the same or similar product. Thus, state-controlled economy exporters risk being found „guilty" of dumping below a price which they cannot control or even predict in advance. However, some „sensitive" products exported by the associated countries could be found sold below the foreign market value even if the EEC Commission would take their domestic prices as the reference point for the purpose of establishing the benchmark for dumping. In the author's opinion, the majority of goods exported from such countries as Poland and Hungary should be treated as goods originating from „free-market" economy countries.

the third and the seventh year of the existence of the Treaty, subject to the timetable in Art. 10. A number of customs duties will be suspended or removed as early as on March 1, 1992 (e.g., for 30.000 automobiles imported duty free in 1992). However, taking into consideration the differences in the level of economic development between the EEC and the Republic of Poland, the opening of the Polish market will be unprecedented in the post-war history of economic relations. The process of removing customs duties and quotas is occurring much more quickly than the similar process among the founding countries of the EEC.[10] In addition, the processes of lowering and eliminating the trade barriers between the EC and the Mediterranean countries (i.e., Spain, Portugal and Greece) also lasted over a much longer time period (20—23 years).

Among the three countries of Central Europe, the slowest process of eliminating customs fees and non-tariff restrictions was negotiated by Hungary (9 years). The nine-year plan of market liberalization is also anticipated in the Interim Agreement on Trade and Related Matters executed between the EC and the Czech and Slovak Republic. However, the latter Agreement assumes the reduction of a significant number of customs fees within five years after the Agreement becomes effective.[11] Poland is subject to the shortest period (seven-years) for opening its markets to industrial goods imported from the EEC (Art. 8 of the Agreement). Although it is necessary to consider the lists of goods undergoing liberalization and the pace of the process of decreasing customs fees during the transition period, it is clear that Hungary negotiated the longest program for opening its market. The cautious approach of Hungary and the „gradualism" which is so characteristic of its economic policy has won praise from many western observers who consider Hungary to have a market of the lowest risk in Central Europe.[12] Since Hungary and the Czech Republic have more developed economies than Poland and their export potential *per capita* exceeds that of this country, it is doubtful this aspect of shock therapy has any chance for success.

4. The Agreement departs from the model of free-trade in two very important economic sectors: agricultural products and fishing products. Poland did not manage to achieve any substantial progress with respect to agriculture, apart from an annual 10% increase of selected quotas, removal of certain quantity restrictions for the import of goods subject to the decision of the EEC

[10] Customs duties and other non-tariff instruments of market protection were annulled among the six founding EEC member countries after eleven years from the execution of the Treaty of Rome (1957—1968).

[11] Compare Art. 4 of the Association Agreement concluded between the EEC and Czech and Slovak Republic (Interim Agreement on Trade and Related Matters dated December 16, 1991) to the provisions of Art. 4 of the analogous agreement concluded between the EEC and Hungary.

[12] *The Wall Street Journal* dated March 2, 1992 quotes a Belgian businessman, L. K a w a n a: „Hungarians are very clever. They move slower and with less noise. That is why Hungary is the most stable country in Central Europe".

No. 3420/83 and a gradual reduction of customs fees for certain food and agricultural products. In exchange, Poland obligated itself to annul import quotas for agricultural goods listed in Annex IX to the Agreement. In other fields, both parties are supposed to provide each other with mutually reasonable concessions during future negotiations over the liberalization of particular agricultural products (Art. 20). The EC refused to obligate itself to the annulment of export subsidies and import quotas which are applicable under the program of Common Agricultural Policy. The Agreement does not anticipate the removal of customs for agricultural products even after 10 years, when the so-called period of transition is over. According to estimates by the German Institute for Economic Research, with respect to agriculture the strategy of the EEC requires urgent reform, since it does not allow the three countries to increase exports during their most difficult period of adjustment.[13] The report points out that the opening of the EEC agricultural market is in the best interest of western consumers and in the interest of environmental protection by preventing overuse of agricultural land in the EEC.

As far as the fishing industry is concerned, the Agreement only ensures continuous negotiations leading to the gradual opening of both markets according to the same formula as that relates to agricultural products (Art. 24).

Agricultural and food products constitute approximately one-fourth of Polish exports to the EEC and constitute the most significant portion of Poland's total export.[14] Continuing the programs of the Common Agricultural Policy by the EEC not only prevents the Central European countries from balancing the EEC's advantage in the export of industrial goods, provision of services and intellectual property, but it is also dangerous for the export of Polish agricultural goods to third countries. The continuation of this program will mainly affect the successors of the Soviet Union. Of course, Poland cannot efficiently support its agricultural producers through export subsidies. In order to better understand the degree of unfair competition faced by Polish agriculture, it is worth mentioning that in 1989 nearly 300 ECU per person were spent for this purpose by the EEC, whereas in Poland only 13—30 ECU (the value of investment in Poland measured in ECU depends on the zloty rate taken for the calculation) were spent per person. Furthermore, the mutual agricultural policy of the EEC, which is strongly supported by the French government and medium developed countries (e.g., Spain), is treated as justification for the program of American export subsidies which will soon enable significant deliveries of agricultural goods to the countries of the former Soviet Union. The unilateral declaration of Poland attached to the Association Agreement expresses a „strong belief that the EEC will undertake remedial proceedings in order to

[13] „Zu den Assoziationsvertragen der EG mit Polen, Ungarn und der Tschechoslovakei", *DIW Wochenbericht* 1991, No. 50.

[14] In case of Hungary, this figure is even higher, since it amounts to one-third of Hungarian export to the EEC, see: *CEC* 1991. Date of 1989.

prevent displacement of Polish goods from the markets of third countries as a consequence of the export subsidies".

The risk of replacement of Polish goods from its traditional markets in the post-communist countries affects not only agricultural products but will also result from fair competition by more efficient Western manufacturers of goods of higher quality. The EEC is aware of this problem. However, so far it has not been solved in a satisfactory way in the European Agreements or anywhere else.[15]

5. Chapter III of the Agreement precedes the negotiations which are being conducted by the GATT on the liberalization of trade and services. Removal of most restrictions on access to markets of the parties of the Agreement by suppliers of a significant majority of services provided by the other party. Art. 56 of the Agreement ensures freedom in transferring the so-called key personnel of the service supplier, and the right of temporary residence of those individuals in the territory of services provided. Natural persons are entitled to temporary residence in the territory of the other party for commercial purposes, such as negotiating and executing contracts, only if they are representatives of or own the company supplying those services. In addition, this chapter allows for the insignificant liberalization of transport.

In the field of services, the asymmetry in the pace of opening markets is even more spectacular. The EEC market becomes open to Polish services on March 1, 1992. The Polish market is to gradually open up during a ten-year period. The benefits of freedom of establishment will be extended to branches and commercial representations of the companies having their seats on the territory of the other party. Thus, EEC companies will be able to set up branches in Poland and vice versa. There are, however, two obstacles impeding this process. The first is of an objective nature: neither Polish banks nor providers of the majority of other services have sufficient capital or experience to benefit from the opening of the EEC markets for a foreseeable future. The second results from the legal restrictions on movement of personnel imposed by the EC. The Agreement allows only for the employment of „key personnel" originating from the country of the supplier and agrees to the employment of Polish staff only with the consent of the country where the services will be provided.[16] Such provisions limit the chances to increase the export of const-

[15] Compare P. Norman: „EEC should expand trade with Eastern Europe", *Financial Times* dated July 5, 1991. Poland, Hungary and the Czech and Slovak Federation have jointly prepared a concrete program of Financing food export and export of other goods from Central Europe to the former Soviet Union. The program was supported without enthusiasm by seven countries with the highest industrial development. The USA law, for instance, includes restrictions, change of which would be difficult, because of such financing of C/E food exports would be against the interests of American farmers.

[16] The term „key personnel" is used in the Agreement. Compare Arts. 53, 54 and 58 of the Agreement. A. Meyhew pointed out significant results of such a restriction imposed on the associated countries: *Association Agreements*, a report on the EEC conference, see above, page 3.

ruction services, for example, where Polish companies may have a competitive advantage due to their cheap labor. On the other hand, such a solution opens gates for the export of EEC construction companies to Poland, which, once they receive orders, may take the advantage of their capital and technology and local employment.

The EEC did not allow for complete liberalization of markets of air, sea, ocean and land transport. Poland hoped to increase selected transport services (e.g., sea and vehicle carriers). However, transport services are strictly protected by legislation of the EEC against foreign competition. Poland must adjust its transport provisions to the EEC requirements, subject to the Agreement. The parties to the Agreement may not execute agreements with third countries, for example, on sea transport services which would be contradictory to the model of free trade.

A. Winters[17] rightly points out that the chapters of the European Agreements related to services anticipate immediate liberalization of markets for services of professionals but limit the chances to export labor intensive services. Markets of services requiring significant capital will be the main beneficiaries of the liberalization. Pursuant to Art. 47 of the Agreement, the Association Council may decide about approval of degrees and professional qualifications necessary to perform professional services, which are subject to special regulations in Poland and the EEC countries.

6. Service liberalization is possible only thanks to the concept of freedom in conducting economic activity by an individual company (freedom of establishment). This term can be understood as the right to establish and operate a company, and its subsidiary or representative office. The majority of services can be provided efficiently only when the business of the supplier has a direct access to the client's market. The rule mentioned above is also important in other industries, such as mining, machine and tool manufacturing, etc. Granting freedom of conducting economic activity to the companies of the other party of the Agreement results in nearly totally equal rights of Polish and foreign economic entities pursuant to the national treatment principle. By granting such status to the companies from EC countries, Poland will no longer be able to apply its current legislation on foreign representative offices and companies with participation of foreign capital. Treating foreign entities equally to Polish entities will resume substantial amendment of existing laws. Art. 8 of the Agreement allows only for the introduction of disciplinary provisions which regulate activity of foreign subsidiaries and representative offices, only to the extent justified by legal and technical differences between the Polish subsidiaries (representative offices) and their foreign counterparts. As far as the activity of foreign banks and financial institutions is concerned, the law provides more description to the parties of the Agreement.

[17] Supra, note 8, at 6.

As in the field of industrial goods, the EEC shall soon open its market which will be available for Polish service suppliers immediately after the Agreement becomes effective. Poland is obliged to open its market in three phases: after the Agreement becomes effective, at the end of the first five-year period and before the end of the transient period (ten years). Poland also reserved the right to introduce, under specific circumstances, regulations aimed at temporarily suspending or delaying the introduction of the freedom of establishment (Art. 51). Such temporary regulations, which are supposed to protect Polish economic entities (e.g., during the period of restructuring and creating new industries), may be introduced unilaterally only during the first 7 years of the effectiveness of the Agreement. Until the end of the second transient period (10 years), Poland will maintain some protective measures in a number of sensitive branches: financial services, acquisition of state property subject to privatization, acquisition of real estate and natural resources, and legal services.

When the whole Agreement enters into force, foreign entities will be allowed to purchase real estate and lease natural resources, agricultural land and forests, if necessary for conducting economic activity in the territory of the Republic of Poland (Art. 45 Sec. 7). This right ill also be granted to subsidiaries and representative offices of the other party within 5 years after the Agreement becomes effective. However, purchase of ownership rights and sale of agricultural land, forests and natural resources will not be included in the list of rights granted while conducting economic activity (Annex XII). At the expiration of the transient period referred to in Art. 6 of the Agreement, after ten years, EEC entities will be subject to the same rules as Polish entities with respect to: bank activity (excluding operations of the central bank), insurance activity, real estate acquisition and privatized state assets of legal persons, conducting real estate transactions and natural resources management, legal services, etc. Temporary extension of any preferential treatment or limitations in favour of Polish entities, after the expiration of the first period anticipated for gradually liberalized economic sectors, may be accomplished only with the consent of the Association Council and subject to the conditions determined by the Council. It is necessary to point out that the plan of liberalization of the Polish service market and the negotiated tools for its protection are a bit more advantageous for the associated country than in the two other European Agreements.

7. The Agreement anticipates free transfer of capital, investors right to repatriate profit and investments and obliges both parties to ensure payment in foreign exchange in trade of services and employment (Art. 60–61). It is assumed that over the next five years in which the Agreement is in force, the Association Council will consider the possibility of introducing all EEC standards, including free transfer of capital between the community and the associated country, which means abolishing the existing Polish currency limita-

tions with respect to investments by Polish entities on the territory of the EC (Art. 62).

Article 66 of the Agreement imposes on Poland an obligation to increase the level of protection of intellectual property to the level existing in EEC countries. The obligation should be fulfilled by the end of 1997 (Art. 66).[18] During that period, Poland obliges itself to conclude a number of agreements on protection of intellectual property (Annex 13). Although these obligations will increase costs of access to technological and cultural innovations during a difficult period for Poland, there are two reasons why Poland did not object to these obligations. The struggle for the pace and direction of strengthening intellectual property monopolies was over when the Agreement on Economic Cooperation between the Republic of Poland and the USA dated March 21, 1991 was ratified. In the field of intellectual property, this controversial agreement imposed on Poland more obligations than the Association Agreement with EEC, which should be fulfilled by the Polish Parliament by the end of 1992. The timetable for the statutory changes agreed with the USA must be implemented in its most significant aspects four years before the dates negotiated in Brussels, because Poland may not introduce to its Parliament standards discriminating, even temporarily, against EEC countries.[19] It is clear that adjusting Polish law in this field is indispensable. The only problem is the pace of changes in the regulations of intellectual property which always benefit the stronger party and it differs in this aspect from the transient periods granted later on to countries more developed than Poland, and which are anticipated by the Code of Protection of Intellectual Property Rights of the GATT (TRIPS).[20] Among the three countries newly associated with the EEC, only Hungary maintained the ability to use the five-year adoption period (Hungary is

[18] Spain and Portugal were granted 6–7year transient periods for introduction of patent protection of chemicals and pharmaceuticals and these requirements constituted a „price" for membership of the EEC. Poland is obliged by an agreement with the USA to introduce such amendments and many other costly modifications by the end of 1992.

[19] The fact that Korea, Taiwan and the Republic of China granted the USA intellectual property rights concessions made the EEC successfully apply for similar preferential treatment to the EEC entities in Korea. Currently, the EEC Commission strongly applies for such concessions from China. Compare, EC protests at China's trade deals with US, *Financial Times dated* February 18, 1992.

[20] *Annex on Trade Related Aspects of Intellectual Property Rights*, with was agreed at the beginning of this year in GATT, grants post-communist countries a 4-year transient period to implement required legislative changes. Compare Art. 65 Sec. 3 of the Code. Also in this point Hungary maintained the possibility to use their privilege and prepare carefully considered legislative changes. Poland, by accepting unreasonably short periods in the Treaty on Economic Cooperation with the USA, not only did not use the transient period but also did not manage to fulfil its obligations to amend its copyright law in accordance with the timetable agreed upon with the U.S. During the negotiations in Brussels, the Polish delegation opposed imposing an obligation on Poland to join such international conventions which have not been yet ratified by certain EEC countries. The final text of Art. 66 Sec. 2 does not clearly resolve this issue.

a leader in patenting its inventions abroad in this part of Europe[21]). Hungary is also the only country which has not executed a bilateral agreement on intellectual protection with the United States.

8. Although service markets requiring substantial capital will be opened, the Agreement does not contemplate liberalization of the employment market or the market for services requiring the work of individuals. The Agreement anticipates only equal treatment of workers legally employed on the territory of the other party with domestic employees of that party with respect to the provisions of the labour law, pensions and various social insurance provisions (Art. 39). In addition, pursuant to the Agreement, the possibility to improve access of Polish employees to the EEC markets will be examined by contracting individual member countries. The Association Council is obliged to analyze the problem of movement of employees and prepare directives for the second stage of the transient period (i.e., the second five-year period). Poland failed in its attempt to legalize the status of Polish citizens who work in EEC countries without official permission. It can only hope for minor improvements in this field through further negotiations with Germany and other EEC countries.

Provisions of the Agreement related to the „stand-still" of movement of workers between the EEC and the associated country are contradictory to the free-market model. The provisions also significantly differ from the preliminary stage of European integration of the Eastern European countries from the integration rules that have applied to all countries currently associated with the EEC. Allowing immigration to work for millions of Turks, Greek and Spanish citizens was the most valuable form of help during the period of economic restructuring in those countries. But given the prolonged recession and the present tensions over the immigration issue in the EEC, it would be unrealistic to expect progress in this field in the foreseeable future.

9. The preamble and numerous provisions of the Agreement clearly specify the final economic model of the country associated with the EEC. The preamble states that the purpose of reforming the Polish economy is transforming the existing system and improving the market economy thereby guaranteeing the rules for economic freedom. An important element of the legal structures of such a model, which is based on the EEC law, are the standards of law on competition and limitations of state intervention in such fields as subsidies and other public aid. All these provisions are copied almost directly from the Treaty

[21] Hungary has the highest index of innovations per citizen in Eastern Europe which are protected in the West. For example in the USA, Hungary patented nearly three times more innovations than Polish entities during the last ten years. Calculating the figures per million of citizens, a number of patents granted to them is ten times higher than analogous index of exclusive rights obtained by Poles. See: G. Ray: „Innovations and productivity in Eastern Europe: An international comparison", *National Institute Economic Review* 1991 No. 4 page 83.

of Rome. The list of rules which regulate competition between member states includes rules of antitrust law (Art. 63 Sec. 1–3); limitations on providing preferential public aid (Art. 63 Sec. III); prohibitions on preferential treatment of the so-called public undertakings (Art. 65); prohibitions and penalties against anti-dumping practices and all non-monetary instruments of import discrimination and manipulation of competition in trade between the parties (Art. 30 and 36); and the obligation for providing access to public procurement and equal treatment of foreign entities during public procurement (Art. 67).

The provisions of the Agreement mentioned above are compatible with the objectives of the economic reforms in Poland. Some of these provisions afford the opportunity to protect Polish entities in trade negotiations with stronger foreign partners (e.g., antitrust laws). However, these provisions do not take into account the difficulties Poland will face by observing these rules during the transient period during which it will be trying to establish a mature market economy. If we consider the fact that as recently as in 1991, a number of EEC countries were applying preferential treatment forbidden by the Treaty of Rome with respect to their state-owned enterprises (e.g., France, Great Britain and Italy), then it is difficult to expect that Poland will be able to observe Art. 90 of the Treaty (Art. 65 of the Agreement) within three years from the date of the entry into force of the Agreement. Each act of state intervention in the form of a preferential credit, import or export concession, or even tax holiday with respect to a state-owned enterprise, company controlled by the State Treasury or a self-governing unit will be an infringement on the provisions of the Association Agreement. At the same time, restructuring the Polish public sector without active participation by the state is not possible. The fact that certain EEC countries still do not obey the provision of Art. 90 of the Treaty of Rome should not be satisfactory for Poland. Poland is not a member country of the EEC and its chances to enter the EEC depend on its ability to meet the obligations it has committed itself to. Thus, its chances of joining the Community may be endangered by failing to observe the Treaty obligations.

It is problematic that the EC applies a particular interpretation of the antitrust and exhaustion of intellectual property rights rules referred to in the Agreement (Art. 36 and 63). In spite of their liberal content, the EEC assumes that the provisions do not apply directly to trade transactions between Polish entities and EEC companies. Therefore, according to the EEC's interpretation, the Agreement does not prohibit restrictive practices, except when such violations of rules on the free movement of goods and/or competition have adverse effects on intra-Community trade. Negative effects on trade between Poland and the EEC are not enough for such practices to be considered automatically null under the Agreement. Having found such an egregious interpretation of Art. 36 and 63 of the Agreement, the Polish party requested a joint declaration clearly stating that Art. 36 and 63 (1–3) of the Treaty directly apply to acts of

infringement of rules of competition and imposing restrictions on trade through the arbitrary exercising of intellectual property rights, when such practices adversely affect trade between the EC and Poland. This proposal was only partially accepted. The joint Declaration, which is attached to the Agreement, anticipates that a special committee will consider legal measures aimed at the elimination of the restrictive provisions imposed under the „old" restrictive business practices which are incompatible with Art. 63 (1 – 3) of the Treaty. It is a crucial problem for a number of Polish importers of technology who in the 1970's and 1980's concluded contracts with EEC companies obliging themselves, for an indefinite period of time, not to export licensed goods do the so-called hard currency markets and to purchase certain goods only through licensed suppliers (tie-in clauses). Another joint declaration explains that the reference to Art. 85 and 86 of the Treaty of Rome in Art. 63 of the Agreement should not be understood to require the adverse affectation of trade between EEC Member States, referred to in Art. 85 of the Treaty, and shall be replaced by the requirement of adverse impact on a prohibited practice on trade between Poland and the EEC. Such a compromise may be significant when the Association Council fulfills the promise to examine the prospect to directly apply certain antitrust rules of the EEC incorporated by the Agreement to trade with Poland. Only then, for instance, will weaker Polish companies be able to apply to the courts and arbitration bodies of EEC countries to request that contracts prohibiting export or imposing other restrictions prohibited by the Treaty and the EEC anti-trust rules should be considered null and void. The majority of trade contracts executed by Polish companies is subject to the jurisdiction of the EEC court and arbitral bodies. At present, it is very difficult to prove that a given restrictive practice adversely affects intra-Community trade and thus violates Art. 85(1) of the Treaty of Rome.

Obviously Poland should incorporate the antitrust laws of the EEC model as soon as possible, and the Anti-Monopoly Office – following the EEC Commission – should prosecute unfair competition of Polish entities by foreign companies. However, the Polish Anti-Monopoly Office has limited resources and few experienced lawyers. Proceedings pursuing antitrust violations are time consuming and extremely expensive. Moreover, due to its limited territorial jurisdiction, the Anti-Monopoly Office is usually unable to force a foreign person to reveal confidential information or to enforce its orders abroad. Therefore, only after can the anti-trust authorities (e.g., the US or the EEC anti-trust agencies) conduct efficient proceedings with respect to foreign companies, who usually exist in these markets through subsidiaries or controlled entities and therefore cannot risk disobeying decisions of the EEC Commission of US Department of Justice. Therefore, the direct application of Art. 63 (1 – 3) of the Treaty to antitrust practices adversely affecting trade between Poland and the EEC would alleviate the problem and contribute to elimination of private barriers to trade between the parties.

What is even less satisfactory is the fact that the EEC refuses to apply directly the prohibition of abusing intellectual property rights to restrict trade between Poland and the EEC. The point is that the EEC refuses to apply Art. 36 of the Treaty of Rome to goods imported from Poland to the Community even if the goods were marketed by the patentee or his licensee. Although the appropriate provision of the Treaty of Rome was incorporated *verbatim* into the Agreement (Art. 36),[22] its interpretation by the Commission deprives it of almost any practical significance. The Commission seems to imply that a ban on parallel imports of patented or copyrighted goods put into circulation in Poland by the patentee or the copyright owner does not violate Art. 36 of the Treaty. By contrast, Article 36 of the Treaty of Rome, as interpreted by the EEC, provides that patent holders and owners of other intellectual property rights may not prohibit the parallel import of protected products (e.g., patented pharmaceuticals or recordings protected by copyright). For example, imports to Germany could not be prohibited if the goods were legally purchased in another EEC country (e.g., the U.K.), from the same company or from any other person authorized to trade with those goods (e.g., a licensee or a company controlled by the patent holder). Freedom of parallel import is a source of competition and provides significant savings to consumers, because goods may then be imported from the cheapest foreign market and the holders of intellectual property rights may not impose a fixed sale price on their licensees operating in various member states. Currently, Poland is not only obliged to grant strong intellectual property rights, which constitutes a crucial concession for the benefit of EEC companies, but also must offer stronger monopolies at its domestic market exclusive rights which may be obtained by Polish authors and patentees in the EEC countries. While foreign holders of intellectual property rights in Poland may fully control import of protected goods to Poland, Polish companies obtaining analogous rights in EEC countries are more limited in parallel by the antitrust laws of the other country.

The three newly associated countries did not notice[23] the fact that in the absence of effective antitrust rules and prohibitions against the abuse of intellectual property to distort trade between those countries and the EEC such rights may be exercised contrary to the idea of a free-trade area. Such practices may lead to discrimination against the countries associated with the EEC and bring an unavoidable risk of introduction of non-tariff barriers in place of customs duties and import-export quotas. Such private trade barriers imposed by technology suppliers are far more harmful for the weaker party than customs duties, because the licensor is fully authorized to dictate the price for introducing a given product into the market or may refuse permission to the product which is protected by patent or copyright. It is worth mentioning that the majority of

[22] Article 36 of the Treaty of Rome was incorporated as Art. 36 of the Association Agreement.

[23] Only Poland's Association Agreement includes the declaration of examination of the possibility of direct application of Arts. 5 and 86 of the Treaty of Rome to trade between Poland and the EEC.

licenses purchased by Polish enterprises in the years of 1970—1985 includes total export bans or limitations allowing export only to the „ruble area".[24]

A Belgian analyst is right when stressing that Poland and the other two countries newly associated with the EEC were not fully aware of the trade risks described above: „It is often forgotten that intellectual property rights are used by the technology supplier to protect its own market and at the same time create barriers for the trade. Lack of appropriate provisions in the European Agreements will result in restriction for the Central European countries to choose export markets when using Western technology for their internal development. Eliminating import quotas by the EEC will be replaced by other instruments leading to analogous results during the period when the Central European countries must improve their export for two reasons: to pay for the technology and for further development of their economies. If the assumption is that the main purpose of technology transfer is modernization and development of East European markets and integration with the world trade system, then it is necessary to find a solution to this problem".[25]

The unwillingness of the EEC to expand its rules on competition for trade with developed countries is a continuation of the policy that enables companies of developed countries to operate against the accepted rules on their territory with respect to foreign parties. Such a policy of indirectly encouraging companies to create export cartels seriously endangers world trade, because, as it was stated in a special report of the Antitrust Committee of the American Bar Association, „it helps manufacturers of one country to exploit importers of another country".[26] Although the EEC supports the idea of global unification of rules on competition under the GATT,[27] our European partners actually maintained the system of discriminatory treatment of economic entities of the associated countries within the free trade area.

10. The process of successful integration with the EEC of certain Mediterranean countries is one of the most important arguments for the European option for the Central European countries. However, comparison of the terms of the Association Agreements with those found in the earlier EEC association and trade agreements reveals a much more difficult task which Poland and the two other Central European countries will have to face.

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[24] According to research accomplished at the beginning of the 80's, approximately three-quarters of patent licenses contained limitations of export to the so-called hard currency countries, which was one of the reasons of export failure and lack of balance between dollar and ruble revenues. Many of such limitations are still effective. Compare S. Sołtysiński, A. Kawecki: „Ograniczenia swobody działalności gospodarczej importera technologii w praktyce polskiego handlu zagranicznego", (in:) *Ochrona własności przemysłowej w obrocie zagranicznym*, Ossolineum 1983, page 108.

[25] I. Govaere: *The Impact of Intellectual Property Protection on Technology Transfer between the EC and the CE European Countries*, J.W.T. No. 5/1991, page 75—76.

[26] Special Committee of ABA Urges Extensive Tailoring to Harmonize Laws, *BNA Antitrust and Trade Reporty* 1992, v. 62, page 156.

[27] Competition and the GATT, *Financial Times* dated February 4, 1992.

The process of eliminating customs duties between the EEC and Turkey had been planned pursuant to the EEC-Turkey Agreement for 22 years. The Association Agreement executed with Greece assumed a twelve-year period for eliminating customs fees for the majority of its products. However, Greece obtained a 22-year long transition period for the elimination of customs duties for the products which were considered sensitive for local industry.[29] The whole process of approving Greece as a member of the EEC lasted 24 years (1961–1985). Spain and Portugal obtained a seven-year long period (!) for elimination of customs duties for industrial products after they became EEC members and after a long period of association of close trade cooperation with the EEC.[30] The process of elimination of customs duties between both Portugal and Spain and the EEC has lasted more than 20 years and will be completed only in 1993.

All these countries, apart from Turkey which was not approved as a member of the EEC, maintained customs duties and other non-tariff measures of market protection for a number of years after becoming EEC members. Integration of the economies of these countries with the economies of the EEC, after obtaining membership, was far easier because they not only had influence over the decisions of the Community but also because they obtained substantial funds for restructuring agriculture and other weak sectors (payment from the Regional and Social Fund). Thus, Portugal with its 9 million citizens obtained one billion ECU when it became a member as a stabilization fund and 700 million ECU for restructuring its agricultural sector. By comparison, Poland was supposed to obtain 15–25 million ECU in 1991 (PHARE program) for its agricultural program. The new EEC members receive a lot of subsidies under the program of Common Agricultural Policy. Access to the EEC agricultural and labour markets is of significant importance to them. Although there are still certain restrictions on the freedom of movements of workers. For instance Spain has about a million and Turkey (an associated country) has almost 3 million citizens employed in EEC companies. For comparison Poland, Hungary, Czech Republic and Slovak Republic have about 100.000 „guest workers" in the Community.

New EEC members were granted much longer transient periods than Poland in order to implement certain costly economic reforms after becoming members. It refers in particular to the reform of protection of intellectual property rights.

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[28] Arts. 10–11 of the Association Agreement with Turkey. The Agreement stated in Arts. 21–22 a 20-year period of annulment of quantity import quotas.

[29] Compare Arts. 14 and 15 of the Association Agreement concluded between the EEC and Greece, *Collected Acts, EEC – Greece Association Agreement*, Gen. 1 4, v. I.

[30] Spain initiated integration of its economy with the EEC under the commercial agreement dated 1970. Negotiations regarding obtaining the EEC membership lasted for seven years. *The Association Treaty between Spain and the EEC*, Art. 31. *Common Markets Reports*, Item 7703 and next. Portugal initiated annulment of customs duties in its relations with the EEC under the Association Agreement of 1972. Since this process will be completed in 1993, it will amount to 20 years, calculating from the date of the execution of the association agreement.

The last dispute between the EEC and the Republic of Poland regarding the division of the amount of 30,000 motor vehicles which were supposed to be imported to Poland duty free in 1992, made me look for analogous concessions on behalf of the EEC motor vehicle industry in the Accession Agreement concluded with Spain. It appeared that even in this regard, Spain managed to obtain more advantageous conditions than Poland at the beginning of the association period. In 1986, Spanish customs fees of 17,4 % *ad valorem* were applied on import quotas of 32,000 motor vehicles.[31]

Countries which were associated earlier with the EEC were granted long-term financial support guaranteed in separate protocols usually signed parallel to the execution of Association Agreements. The protocols provided amounts of loans granted to those countries and purposes for which those loans could be spent.[32]

11. Preliminary political declarations of the EC and also certain provisions in the preamble of the Agreement state that this act is based on the rule of asymmetry of rights and duties in favor of the weaker party. The Preamble assumes that the EEC should grant Poland substantial economic, technical and financial assistance during the process of reconstruction. However, these declarations are not clearly reflected in the contents of the Agreement. The Agreement provides only a declaration of potential financial help from such sources as EBRD, IMF or funds of the G-24 countries (Art. 95—100). Poland may surely count for 200—250 million ECU per year under the PHARE program. However, the amount of this budget is determined only up to the end of 1992. The scope of technical, scientific and professional help, referred to in a number of articles of the Agreement, is even less determined.

The most important EC concessions are the earlier tariff reductions, removal of certain import quotas, increase of other import quotas and the immediate opening of EC markets for Polish service suppliers and access for Polish companies to public procurement. Poland also maintains rights to apply extraordinary instruments of protection to its market. Poland's problem at the moment is that its economy may enjoy significant trade benefits and the right to use efficient instruments of protection for its market for only 4—5 years. However, during this short time period, the preferential customs treatment applies only to the sectors in which Poland's potential is limited (industrial products at the more advanced level of technology and capital consuming services). However, Poland will not be able to use its actual or potential competitive advantage in the five fields mentioned above, which are considered

[31] *Protocol No. 6 concerning annual Spanish tariff quotas on the import of motor vehicles falling within Art. 34 of the EEC (Spain Act of Accession)* 1985.

[32] Compare, for example: *Financial Protocol annexed to the Agreement establishing an Association between the EEC and Turkey dated September 12, 1963,* O.J.L 293 of 1972, page 68. The EEC has also signed protocols of financial help with Greece, Portugal and Yugoslavia.

by the EEC as requiring greater protection. It is necessary to mention that the trade of agricultural and other sensitive products constitutes more than half of Polish exports to the EEC countries. Therefore, the first published economic and legal studies point out that the European Agreements follow the concept of asymmetry of rights for the benefit of the stronger party and in the interest of the least profitable sectors of the EEC.[33] More and more questions are being asked in the West, in what way are the three countries supposed to meet the necessity to increase the export, if the Community does not want to make access to its markets more available than anticipated in the European Agreements.

It will be difficult for Poland to be competitive after the expiration of the first transient period. Five years after the Agreement comes into effect, the current customs duties will be decreased by 60% and for the majority of Western products these lowered tariffs will not constitute a barrier to entering into the Polish market. After this period, Poland will maintain only a minimal right to preferential treatment with respect to customs duties and non-tariff measures, and even this minimal protection requires consent of the other party. From 1997, if no significant amendments are introduced to the Agreement or to Polish law with the consent of the Association Agreement (Art. 6 sec. 3), Poland may face an even less advantageous situation than at the beginning of the transient period. The EEC reserves the right to impose long-term (4—5 years) or undetermined restrictions on the rules of free trade and competition with respect to all the sensitive sectors (agriculture, fishery, coal, steel and textiles). Gradual liberalization with respect to trade in steel and textiles is anticipated. However, no removal of export subsidies or import quotas for agricultural products is promised in the Agreement. The same situation is effective in the fish sector. If Poland increases its export offer for textiles, steel products or chemicals, EEC companies may impose their anti-dumping sanctions as well as any new instrument of protection anticipated in Art. 30 of the Agreement. These measures allow for the introduction of protection in cases where increased import results in a serious loss to EEC manufacturers. Implementation of these sanctions does not require proving that dumping has occurred, nor that the exporter was subject to subsidies. In order to avoid such sanctions, Poland must enrich its export market by creating new production sectors. However, as mentioned above, in order to increase licensed export, it is necessary to eliminate anti-competitive practices which allow the limitation of exports of new products made in the associated country of license and co-operation agreements.

It is improbable that Poland will gain much against the EEC in such important sectors as textiles (Portugal and Greece), steel products, or chemicals

[33] This is the conclusion of such a report as Deutches Institute fur Wirtschaftsordnung, *DIW Wochenbericht*, as above, pages 702 = 704. Compare also A. Winters, supra, notes, at 9.

(Spain), within the next 4—5 years. Three Mediterranean countries and Ireland have been given support of S28 billion over the next five years only from the Regional Fund of the EEC, which doubles the resources designated for this purpose.

After five years, the Agreement imposes nearly all obligations related to opening of the market, protection of investment and obedience to the rules of a free market economy, as all the full-member states must fulfil. However, the Agreement treats Poland, like Hungary and the Czech and Slovak Republic as a „third country" in many important fields, in particular agriculture, freedom of movement of employees, exercising of intellectual property rights, antitrust and anti-dumping law, closing access to the market in cases of rapid increase of import (Art. 30), etc. I have listed only those rules of economic intercourse which are contradictory to the assumptions of free trade. It is worthwhile to quote a final assessment of the European Agreements presented by a British economist A. Winters at the conference held by the EEC Commission: „In all parts of the Agreements, we may find evidence of enemies to the reforms. In spite of the pathetic state of the economies of the Czech Republic, Slovak Republic, Hungary and Poland (CHP), the EEC will maintain its protectionist agricultural policies and during 6 years quantity limitations of textile clothing imports will enable producers of chemicals and steel to attack suppliers from CHP by the anti-dumping law. For five years, sensitive products will be subject to tariffs. At the same time, the three countries will be discouraged to process input imported from other countries. The EEC will not allow highly qualified citizens of the three countries to move to EEC countries, at least for a period of time. However, at the same time it will ensure that the huge potential of labor could not be sufficiently used for export production to the EEC nor increase its efficiency by transferring it to the EEC". The author concludes that these restrictions endanger the process of reform in the countries associated with the EEC.

Limitation to the freedom of trade maintained by the EEC is especially unjust when we take into consideration the fact that the exchange of goods with the three Central European countries amounts to 2.5% of the foreign turnover of the Community, and almost half of it is the exchange with Germany. Germany is the most open to the economic requirements of the „trio". Hungarian sources quoted in „The Wall Street Journal" point out that, liberalization covers only approximately 1% of EEC import, whereas Poland, Hungary, Czech and Slovak Republic obliged themselves to remove barriers for more than a half of their import.[34] The figures illustrate the extent of good will of the EEC countries to help their Eastern neighbours and the scale of the challenge to face.

[34] New Trade Ties to EC Could Intensify Pain for three Eastern Nations, *The Wall Street Journal* dated March 2, 1992, page 1.

12. On the side of our partners, ratification of the Agreement requires not only approval by the Commission but also consent of the EC Council preceded by consultation with the European Parliament (Art. 113 of the Treaty of Rome). The part of the Agreement which refers to the Community of Coal and Steel is ratified by the Commission, due to the fact that the Agreement is mixed. For example it covers not only commercial issues, but also political and cultural ones, the final ratification of the Agreement requires approval of parliaments of all member states (Art. 238 of the Treaty of Rome). The Parties agreed that commercial provisions of the Agreement should enter into force on March 1, 1992.

Performance of the Agreement also requires significant changes in Polish law, especially with respect to harmonization of Poland's economic laws to EEC standards (Art. 68–70). It is necessary to point out that Poland is not obliged to blindly follow EC laws. The Agreement obligates Poland to bring its laws in line with the EC within ten years, although the negotiators have agreed that this period is not binding. Transient provisions of new Polish laws may anticipate effectiveness of entry into force of some provisions based on EEC models only after few years. In addition, for important reasons, it is possible to adopt the EEC standards in order to avoid total incompatibility of Polish needs with Community rules. In principle the obligation to approximate Polish laws to the law of the EEC covers, first of all, those fields which are governed by unified law or EEC directives, or when the Parties have obliged themselves to execute particular international agreements (Art. 66 Sec. 2). Harmonization of legal rules also extend to common juridical standards reflected in the EEC legislation of the member states.

Poland should introduce amendments in its internal law as soon as practically possible. Such amendments should strengthen the anti-monopoly law and curtail the potential of abusing intellectual property rights, by limiting parallel imports and isolation of the Polish market.

13. The fact that rights and duties of the Parties of the Association Agreement are not comparable is not a case for rejecting them. The paradox is the fact that obtaining the status of a European country of third category privilege[35] may be considered an improvement in the current condition of Poland. Advantages of joining the free trade area are, first of all, mitigation of discrimination and gradual opening of the most important market of goods and services for Poland. If the Association Agreement were not executed, the condition of the country may deteriorate in the long-run, since it is unlikely that a strong economic grouping among the post-communist countries is likely in the near future. Neither privileged access to the EFTA, nor to the United States market

[35] According to my evaluation, the first category covers the EEC countries, the second embraces the EFTA countries which by joining the EEC obtained better conditions than Central European countries but had to approve the existing and future EEC law having no influence upon the process of development of the Community law.

could compensate for a worsened situation of Poland from the point of view of competition. The on-going process of integration and establishing competitive economic blocks can only hurt the economic position of a country remaining outside such economic groups as: the EEC, North-American Free Trade Area and the economic group integrating in the countries of the Pacific Rim.

Another advantage of economic grouping comes from concluding multilateral relations with the largest market in the world and from the opportunity to utilize the European experience. The Association Agreement includes a number of institutional guarantees for political, economic, technical, scientific and cultural cooperation, which may be useful in the process of reforms and creation of democratic institutions. Many forms of cooperation anticipated in the Agreement do not have equivalents in any previous association agreement.

The third argument for association is subjective. It is the value of being open to the „European" system of political and cultural values, revealed in various surveys published by the Public Opinion Research Center. I share such preferences. However, I am afraid that the majority of those interviewed in the surveys do not realize that in the period of at least one generation the advantages of successful integration may be felt only by a minority of the society.[36] Difficulties in the integration process, not to mention its failure, may lead to intensification of isolationism and nationalism.

The fourth argument for ratification of the Agreement is the belief that only the EEC may provide us with significant and substantial assistance in the transformation process, leading to a market economy. One can hope that in the future, the elimination of the majority of inequitable rules of commercial cooperation will be to the benefit of both Parties to the Agreement. This is also in the political and economic interest of the EEC countries. The Association Agreements are supposed to be one of the basic instruments guaranteeing success to reforms which should result in an increase in national income (GNP) in the EEC to 500 billion ECU by 2000.37 Although the dimension of assistance ensured by the EEC is far smaller than promised in 1989, the member states will obtain three-fourths of the amount intended for Eastern and Central Europe.

The Association Agreement forces us to continue the initiated reforms and provides a good argument to the government against unreasonable demands of protectionism. However, this important argument for integration is valid only if we assume that the obligations to which Poland committed itself are difficult, but not impossible, to be fulfilled, that the established purpose is achievable,

[36] C. Pirzio-Biroli: „The EEC and Central and Eastern Europe", (in:) *New International Realities for the 1990s*, Philadelphia 1991, page 141 and other pages.

[37] The total value of help provided to post-communist countries by the EEC in 1989–1991, including food, amounted to approximately 7 billion ECU. It is an insignificant amount in comparison to $ 150–200 billion of funds provided to Western Europe under the Marshall program.

the government and political elites are capable to implementing the agreed upon program, and, as long as the sacrifices are fairly presented, the majority of the society is willing to commit itself.

The perspective of failure of the Polish economy due to the inability to face competition from a stronger partner which proposes a selective model of free market, should not be neglacted. I admit that without a change of integration conditions it is hard to imagine that Poland can open its market within a period three times shorter than such countries as Greece, Spain or Portugal. We should also remember that these countries did not go through the unprecedented transformation of their economic systems and abrupt loss of their traditional markets. Although there is hardly any hope to renegotiate the Agreement in the near future, forcing such demands too early could complicate Poland's relationship with the EEC. We can hope to change the EEC approach only if the initial stage of the transition period proves hot only the necessity to reduce the restrictions imposed on access of Polish products to the Community market, but also demonstrates actual progress of reforms in Poland. The condition of our economy and state after three years of „shock therapy" proves that successful integration depends not only on changes in the commercial policy of the EEC but also on actual changes in the process of our reforms.

It is very important that any criticism of the Association Agreement not be interpreted by European experts as parochial xenophobia on the part of Poland. I was trying to prove that the basic weak points of the Agreement result from a selective model of „free trade" and lobbying of those sectors of the EEC economy which have benefitted from state programs at the cost of EEC consumers for thirty years.

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International Response to the Human Rights Violations in the Territory of the Former Yugoslavia*

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1. Introductory remarks

The tragic conflicts on the territory of the former Yugoslavia have involved human rights violations on an unprecedented scale in Europe after the Second World War. The events constitute a very serious test and challenge to the international systems of human rights protection. From the very beginning both regional and universal international organizations have been trying to stop the cruel atrocities and to improve the human rights situation in that region. One may ask to what extent these efforts have been successful? The answer should not leave any doubts – they have failed to stop, much less to prevent, the massive and systematic violations of human rights from being conducted unabatedly. Therefore, if the effectiveness of the implementation mechanisms is to be measured by their impact on the human rights situation in a given territory, we have to assume that the international machinery for the implementation of human rights and for the prevention of violations of human rights has proved to be ineffective in the case of Yugoslavia.

The Yugoslav conflict is still far from being resolved. Therefore it is not easy to identify all the reasons for those inefficiencies. The author of this paper is in a difficult position. He is actively participating in the monitoring of the human rights situation in the former Yugoslavia, initially as an expert of the Conference on Security and Co-operation in Europe (CSCE); at present as a staff member of the United Nations (UN) Centre for Human Rights. Thus he views the crisis from the perspective of the activities of the Special Rapporteur of the Commission of Human Rights. Nevertheless, attempts to assess critically the activities of other agencies acting in the former Yugoslavia have been made.

Due to the character of this paper certain important initiatives dealing with the human rights situation will not be presented. Let me mention as one example the role of local non-governmental organizations (NGOs). Also the problem of promoting freedom of expression and free press in the former Yugoslavia will not be discussed in spite of their vital importance for solving the crisis.

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This paper will rather focus on the activities of the United Nations' organs and the CSCE. The role of the European Community (EC) will be touched upon and, finally, it is worth mentioning that the Council of Europe also undertakes activities offering its assistance in the process of improving the human rights situation.[1]

I assume that the gross human rights violations occurring in the former Yugoslavia are well known and that a detailed description of the atrocities is thus not necessary. World public opinion has been shocked by the practices associated with the so-called „ethnic cleansing" including mass killings, rape, torture, the forced expulsion of the population, terror, and inhuman conditions in detention facilities and camps. People have been attacked and terrorized on the grounds of their national, ethnic and religious origin. The above-mentioned abuses are taking place mainly on the territory of the Republic of Bosnia-Herzegovina. That violence did not come as a surprise. The war between the Republic of Croatia and the former Federal Republic of Yugoslavia also brought many examples of human rights violations and violations of humanitarian law.

2. Political perspective[2]

The Yugoslav crisis once again proved the direct link between politics and human rights. What role should human rights play in the process of solving such conflicts and what measures should be adopted to stop massive and gross violations of human rights? Political bodies seem to avoid any answer to that question. Consequently, the above-mentioned failures of the international mechanisms for the protection of human rights can be largely attributed to political development.

It is worth mentioning that in spite of the war in Croatia the United Nations Security Council remained inactive for a long time. Only on 25 September 1991 did the Security Council adopt Resolution 713 in which it expressed its deep concern about the fighting in Yugoslavia and its consequences for the whole region. The Resolution states: „the continuation of this situation constitutes a threat to international peace and security". It should be noted that the above statement according to Article 39 of the Charter of the United Nations will

[1] According to the Committee of Ministers' Resolution 93(6) of 8 March 1993 „At the request of a European non-member Stale, the Committee of Ministers may, after consultation of the European Court and Commission of Human Rights, appoint specially qualified persons to sit on a court or other body responsible for the control of respect for human rights set up by this State within its internal legal system". It is indeed an interesting initiative. It seems, however, that the character of human rights violations on the territory of the former Yugoslavia is not suited for that mechanism.

[2] For a comprehensive analysis of the political development of the crisis in Yugoslavia see M. Weller: „The International response to the dissolution of the Socialist Federal Republic of Yugoslavia", 86 *AJIL*, 569–607, 1992.

allow the use of provisions contained in Chapter VII of the Charter. Consequently the Council, acting under Chapter VII, decided to impose „...a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia". The Security Council appealed for the peaceful settlement of disputes and expressed its full support for negotiations through the EC-sponsored Conference on Yugoslavia. By its resolution, the Security Council invited the Secretary-General to offer his assistance, in consultation with the Government of Yugoslavia and all those promoting the peace efforts.

On 8 October 1991 the Secretary-General appointed Cyrus Vance as his personal envoy to Yugoslavia. In the report issued by Vance, in this capacity, it was stated that the fighting had caused extensive humanitarian problems, including, in addition to losses of life and injuries, some 300,000 displaced persons. This figure later rose to 600,000.

On 18 October 1991 the Presidents of five of the six republics expressed their general agreement to continue working on a draft paper prepared by Lord Carrington, the EC envoy to Yugoslavia, concerning „Arrangements of General Settlement". The arrangement contained elements of the proposed settlement of conflicts including commitments by the republics to the protection of human rights, referring to the Universal Declaration of Human Rights, the International Human Rights Covenants, CSCE human dimension standards, and relevant Council of Europe instruments. Human rights provisions referring to national and ethnic groups were specified and a special status was to be established for areas in which national or ethnic groups form a majority. The President of Serbia refused to consider those proposals as suitable for discussion. Nevertheless, on 4 November 1991, the Lord Carrington conference presented a draft convention for general settlement. The draft included a detailed catalogue of human and minority rights. It provided for the creation of autonomous structures, comprising legislative, executive and judicial functions, in areas where members of a national minority form a local majority.

Compliance with the provisions on human and minority rights was to be ensured by a permanent international monitoring mission, to be established in the territories of the former Yugoslav republics. The new states would be treaty-bound to give effect to the recommendations of the monitoring body. Supreme jurisdiction was to be exercised by the human rights court. The court would be composed of one member nominated by each of the former republics and an equal number plus one nominated by the Community. In addition, the draft convention made provision for a special mixed commission to deal with political problems concerning minorities. Serbia refused to accept the revised terms of the proposed agreement and the EC was unable to enforce its proposals. Since then a more active UN role has been observed.

Vance proposed the deployment of troops and police monitors in certain areas of Croatia, to be designated as „United Nations Protected Areas" (UNPAs). The areas were supposed to be demilitarized and the armed forces in them withdrawn or disbanded. The UN troops were to ensure the implemen-

tation of that plan. It also provided for UN police monitors whose task was to ensure that the local police carried out their duties without discrimination against persons of any nationality of abusing anyone's human rights. Additionally, the presence of the United Nations Protection Force (UNPROFOR) would have facilitated the voluntary return of displaced persons to their homes.

The United Nations Security Council, invoking Article 25 of the Charter of the United Nations, established UNPROFOR by Resolution 743, adopted on 21 February 1992.

On 16 December 1992, at the extraordinary ministerial meeting of the EC in Brussels the EC adopted Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. The following conditions were established:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The Arbitration Commission received applications for recognition from Slovenia, Croatia, Macedonia and Bosnia-Herzegovina. Slovenia and Croatia this occurred in spite of the fact that it did not accept the provisions dealing with the „special status" of minorities. On 6 April 1992 the EC decided to recognize Bosnia-Herzegovina despite the outbreak of hostilities there and the refusal by a part of the population to accept the referendum on independence held on 1 March 1992.

In spite of the decision by the Arbitration Commission that Macedonia had satisfied the conditions for recognition, the EC has not recognized this country to date.

The EC and CSCE initiated a number of measures aiming to prevent the deterioration of the situation in Bosnia-Herzegovina. In spite of all those efforts, including the initiation of the CSCE mechanism for Consultation and Co-operation with Regard to Emergency Situations, the bloodshed in Bosnia-Herzegovina escalated.

Since August 1992 diplomatic efforts to resolve the Yugoslav crisis have been undertaken on the basis of the principles of the International Conference

on the former Yugoslavia, adopted at its London session. On 4 January 1993 during the Geneva round-table talks, the Co-Chairmen proposed to the parties concerned – the Government of Bosnia-Herzegovina, the Bosnian Croats and the Bosnian Serbs – a comprehensive package as the basis for a fair, just and lasting peace. The package included a set of Constitutional Principles along with a map setting out the organization of the country into ten provinces, and a military agreement. All three elements of the package were inextricably linked and could not be implemented separately.[3]

3. The Special Rapporteur of the Commission on Human Rights

3.1 Characteristics of the Special Rapporteur's mandate

On the basis of the principle adopted by the United Nations Economic and Social Council (ECOSOC) in its Resolution 1990/484 the UN Commission on Human Rights is able to organize, in addition to its ordinary sessions, special sessions. In a letter of 5 August 1992 the Permanent Representative of the United States to the UN in Geneva requested the convening of a special session to examine the human rights situation in the former Yugoslavia. This initiative was taken on the day after the publication of reliable information in the international press according to which one of the parties to the conflict, the Serbs in Bosnia-Herzegovina, had set up concentration camps.

The consultation immediately conducted by the Centre for Human Rights was successful. By the established deadline of 10 August 1992, 25 members of the Commission had positively answered the American request. In accordance with the established procedures, a special session of the Commission, the first in its history, was immediately convened and was held in Geneva from 13–14 August 1992.

On 14 August 1992, the Commission adopted by consensus Resolution 1992/S-1/1,[5] which was approved on 18 August 1992, by the ECOSOC decision 1992/305 in which it:

„12. Requests its Chairman to appoint a special rapporteur to investigate first-hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina, and to receive relevant, credible information on the human rights situation there from Governments, individuals, intergovernmental and non-govem-

[3] For an overview of the peace negotiations see the reports of the Secretary-General on the activities of the International Conference on the Former Yugoslavia published as Security Council Documents.

[4] Resolution 1990/48 was adopted on 25 May 1990. It authorized the Commission on Human Rights to hold special emergency meetings between its regular sessions, „as long as the majority of the Member States of the Commission agree" (paragraph 3).

[5] UN Doc. E/CN/.4/1992/84/Add. 1.

mental organizations, on a continuing basis, and to avail himself of herself of the assistance of existing mechanisms of the Commission on Human Rights;

...

14. Requests the Special Rapporteur to visit areas of interest in the former Yugoslavia, and in particular Bosnia and Herzegovina, forthwith and to report on an urgent basis to the Commission on Human Rights, providing a preliminary report no later than 28 August 1992 on the situation of human rights in the former Yugoslavia, including his or her recommendations for bringing violations to an end and preventing future violations, and requests the Secretary-General to make the report of the Special Rapporteur available to the Security Council;

15. Also request the Special Rapporteur to report his or her findings and recommendations to the members of the Commission on Human Rights periodically thereafter until its next regular session, and to report to the General Assembly at its 47th session, as well as to the Commission at its next regular session, under agenda item 12, and requests the Secretary-General to make the reports of the Special Rapporteur available to the Security Council;

16. Further requests the Special Rapporteur to gather and compile systematically information on possible violations of human rights in the territory of the former Yugoslavia, including those which may constitute war crimes, and to make this information available to the Secretary-General, and notes that such information could be of possible future use in prosecuting violators of international humanitarian law;

...

20. Requests the Special Rapporteur to take into account and seek to complement the efforts being undertaken by the Conference on Security and Co-operation in Europe with respect to the crisis in the former Yugoslavia".

It would seem that the following aspects of the Special Rapporteur's mandate according to the above-quoted resolution are of particular interest: (a) a request to investigate first-hand the human rights situation, (b) a request to receive and gather relevant information on a continuing basis, (c) a suggestion that the Special Rapporteur should be assisted by existing mechanisms of the Commission on Human Rights, (d) a request that the Secretary-General should make the reports of the Special Rapporteur available to the Security Council. Tadeusz Mazowiecki, a former prime minister of Poland, was appointed as Special Rapporteur on the former Yugoslavia.

When discussing the form of the mandate of the Special Rapporteur one additional element should be mentioned. The Commission acted under strong pressure. World public opinion has been alarmed at the atrocities committed in Bosnia-Herzegovina. For that reason the initiators of the resolution decided that the function of Special Rapporteur should be entrusted to one of the prominent European political personalities. It was quite obvious that the activities of the Special Rapporteur should raise public conscience about the dramatic human rights situation in the former Yugoslavia. He was requested to act very quickly. The first report based on information gathered during a mission was supposed to have been presented before 28 August 1992. Such an approach, however, hears certain implications, which will be discussed below.

3.2 Activities of the Special Rapporteur between two Special Sessions of the Commission on Human Rights

Human rights violations occurring in the territory of Bosnia-Herzegovina and to a certain extent in some other regions of the former Yugoslavia are massive and systematic. The very nature of these violations conditioned, and in fact still influence, the way the mandate entrusted to the Special Rapporteur by the UN Commission on Human Rights has been implemented. It was quite clear that the realization of the mandate should lead to concrete and immediate effects. In his memorandum addressed to the Secretary-General, Mazowiecki stated,

„it is not possible to limit the mandate to the preparation of reports stating facts and expressing opinions which are submitted to UN bodies. The mandate should lead to prompt and concrete measures benefitting the populations which are suffering and whose rights are being violated".[6]

Immediately after his appointment the Special Rapporteur had to organize a mission. The results of that mission were presented in the report of the Special Rapporteur to the Commission on Human Rights of 28 August 1992.[7] It contained a number of recommendations of a different nature. Let me recall those which are of a procedural character:

The multiplicity of international activities aimed at bringing the conflict and human rights violations in the former Yugoslavia to an end limit the efficiency of such efforts. Consequently, there is an urgent need for concerted international action to improve the fate of victims of human rights violations. The decisions of the London Conference, in particular the creation of the Steering Committee, is a step in this direction. Better co-ordination among the various United Nations agencies and bodies would also contribute to improving the efficiency of such international efforts.

Further implementation of the mandate of the Special Rapporteur requires the appointment of staff based in the territories of the former Yugoslavia, in order to co-ordinate the monitoring of human fights violations together with the other United Nations bodies mentioned above, and the creation of an adequate professional and logistical infrastructure within the UN Centre for Human Rights. It also requires the establishment of a working relationship with other multilateral initiatives, in particular the above-mentioned Steering Committee.

In order to understand the importance of those recommendations it is necessary to describe, very briefly, the kinds of assistance which the UN Centre for Human Rights could offer the Special Rapporteur. In short, it seems like there is a lack of everything but the willingness to help. A shortage of office

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[6] See the Memorandum concerning the implementation of the mandate of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, sent to the Secretary-General on 4 September 1992.

[7] E/CN.4/1992/S-1/9.

space, elementary equipment (word processors), faxing equipment. A very poor system for securely storing the information received and inadequate secretarial service. At the same time the Special Rapporteur has been confronted with great expectations concerning his mandate. Immediately after his appointment the Geneva office received a great number of documents of a different nature. It became clear that without additional resources it would not be possible to carry out the Special Rapporteur's duties.

In the above-mentioned memorandum the Special Rapporteur described the functions of professional staff based in various territories of the former Yugoslavia in the following way: (a) to receive information and complaints of human rights violations, including violations which may constitute war crimes, (b) to prepare the missions of the Special Rapporteur, (c) to promote awareness, understanding and compliance with basic human rights standards, in particular through contacts with local authorities.

When planning his field activities the Special Rapporteur was aware that only by close co-operation with representatives of other UN agencies present in the former Yugoslavia, would he be in a position to implement his mandate properly. Let us not forget that the UN has a sizeable presence in the former Yugoslavia, mainly in the form of UNPROFOR and the United Nations High Commissioner for Refugees (UNHCR).[8] It was to be expected that both agencies could assist the Special Rapporteur in various ways, particularly by providing direct or indirect access to information concerning human rights violations. Both bodies were, and in fact still are, sensitive to human rights concerns and, within the limitations inherent in their respective mandates, have made important contributions to the protection of human rights in the former Yugoslavia. However, the type of action UNHCR and UNPROFOR are able to carry out is limited, because the central part of their mandates is the delivery of humanitarian assistance and peace-keeping, rather than the protection of human rights as such. While they are important sources of information, they cannot respond to the information in the same way as the Special Rapporteur without jeopardizing their primary functions. It was thus of great importance to establish a mechanism for channelling such information to the Special Rapporteur, in particular the first-hand credible information which the Special Rapporteur has been mandated to gather and compile.

Let me quote the memorandum once again:

„Since the mandate of the Special Rapporteur covers several countries, and taking into account the magnitude of the human rights violations and the logistical difficulties resulting from the conflict and other factors, the minimum number of staff required in the field would be four. They would in principle be located in Zagreb, Split, Sarajevo

[8] See F.D. Gaer: *The United Nations and the Yugoslav Crisis*, a paper published by the United Nations Association of the United States of America, August 1992.

and Belgrade. Given the urgency of events, at least some of the field staff should be in place by 15 September (1992)".

Instead of describing in detail the reactions to the above proposals, let me make the following observation – as of 21 March 1993 the Special Rapporteur did not have a single member of staff in place in the field. Only by the end of March did the first field officer take up his post in Zagreb.

In October 1992 the Special Rapporteur conducted his second mission. As a result he submitted reports to the Commission on Human Rights on 27 October 19929 to the forty-seventh session of the UN General Assembly.[10] He was also invited to present his findings before the Security Council which constituted an interesting development.

In both his missions the Special Rapporteur took advantage of the provisions of the resolution of the Commission authorizing him to .invite other Rapporteurs or Working Groups to assist him. Additionally, he requested the Special Rapporteur on extrajudicial, summary or arbitrary executions to carry out a preliminary investigation into allegations that victims of war crimes are to be found in certain mass graves in the former Yugoslavia.

3.3 Second **Special Session of the Commission on Human Rights** and **the Decision of the General Assembly**

Prompted by the information disclosed in the above-mentioned reports the Republic of Turkey, in a letter dated 16 November 1992 to the Chairman of the Commission on Human Rights, requested that a second special session be convened „as a matter of urgency to consider Mr. Mazowiecki's consolidated report".[11] This initiative was supported by the United States in her letter addressed to the Under-Secretary-General for Human Rights.[12]

The Second Special Session of the UN Commission on Human Rights was held 30 November to 1 December 1992 and adopted a resolution[13] in which it notes with alarm the three reports issued by its Special Rapporteur on the former Yugoslavia, and condemns the violations of human rights he identified, demands action to end and reverse ethnic cleansing, affirms that states are to be held accountable for violations their agents commit in the territory of another state and calls on parties to „apprehend and punish those guilty" of human rights and humanitarian law violations. Moreover, it calls for efforts to account for the missing parsons. It also requests the Special Rapporteur to carry out further missions, to report to the Commission, and requests the Secretary-General to continue to make his reports available to the Security Council.

[9] E/CN.4/1992/S-1/10.
[10] A/47/666-S/24809.
[11] See U.N. Doc. E/CN.4/1992/S-2/2 (1992).
[12] See U.N. Doc. E/CN.4/1992/S-2/3 (1992).
[13] 1992/S-2/1.

On 18 December 1992 the UN General Assembly adopted a resolution on human rights in the former Yugoslavia by consensus.[14] In the resolution the UN General Assembly condemned the „abhorrent practice of ethnic cleansing" as presented in the reports of the Special Rapporteur, and placed primary responsibility for such practices on the „Serbian leadership in territories under their control in Bosnia and Herzegovina, the Yugoslav Army, and the political leadership of the Republic of Serbia". The UN General Assembly furthermore condemned specific human rights violations, most of which are caused by „ethnic cleansing", and condemned the „systematic" terrorization and murder of no-combatants. It demanded steps to „apprehend and punish" guilty parties and reaffirmed the individual responsibility of perpetrators of those condoning grave breaches of international humanitarian law. It expressed the opinion that the international community „will exert every effort to bring them to justice", and called for the missing to be accounted for. The UN General Assembly considered acts under duress affecting property ownership to be invalid and recognized „rights of victims" of ethnic cleansing to reparation. It called for the closing of all improper detention centres, and the release of all those arbitrarily or illegally detained; it demanded immediate, unimpeded and continuous access to all camps and detention centres for the International Committee of the Red Cross (ICRC), the Special Rapporteur, the CSCE and other relevant humanitarian organizations. Finally, the UN General Assembly called on all UN bodies, including UNPROFOR and UN Specialized Agencies, to provide the Special Rapporteur with „all relevant and accurate information in their possession" on human rights in the former Yugoslavia and asked the Secretary-General to ensure full and effective co-ordination of the UN bodies and to provide the Special Rapporteur with staff to ensure continuous monitoring and co-ordination with other UN bodies, including UNPROFOR.

3.4 Activities of the Special Rapporteur after the Second Special Session of the Commission

The Special Rapporteur conducted his third mission to the region in January 1993. Within his mandate a mission to investigate allegations of the widespread occurrence of rape had been organized. A team of four medical and psychiatric experts, accompanied by the Director of the United Nations Division for the Advancement of Women and staff of the Centre for Human Rights, visited Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro) to collect and analyse the testimony of victims and witnesses as well as related statistical data and medical records.

In addition to his official missions the Special Rapporteur has conducted several other visits and discussions with political leaders which were aimed at promoting an understanding of the human rights problems in the former Yugoslavia.

[14] **1992 47/147.**

His findings have been presented in his fourth report[15] submitted to the Commission on Human Rights at its forty-ninth session. In his conclusions he stated, *inter alia*:

„To date, international action and an international presence have clearly failed to prevent ethnic cleansing from taking place. Official figures for Bosnia and Herzegovina show that the number of refugees and displaced persons in the second half of 1992 was much greater than in the early stages of conflict there. However, the deployment of UNPROFOR as well as representatives of the ICRC, UNHCR and envoys of charitable organizations has partly alleviated the consequences of the military conflicts in the former Yugoslavia".

He also addressed the unresolved problems of co-ordination of human rights activities in the area by pointing out that:

„The Special Rapporteur acknowledges with appreciation the work undertaken by international and local actors in the field but he must emphasize that the present level of co-ordination leaves a great deal to be desired. Efficient monitoring and investigation of the human rights situation are far from being achieved".

In this context I would also like to quote his following conclusion:

„In his first report ... the Special Rapporteur recommended „the appointment of staff in the territory of the former Yugoslavia". The recommendation has been supported by the subsequent resolutions of the Commission on Human Rights and the General Assembly. Nevertheless, it has not been implemented. The affective fulfilment of the Special Rapporteur's mandate requires that all sectors of the United Nations Secretariat extend their full co-operation and assistance to him. At present, the material and human resources available to the Centre for Human Rights for this task are inadequate, both in Geneva and in the field".

The Commission on Human Rights at its ordinary forty-ninth session adopted Resolution 1993/7 — Situation of human rights in the territory of the former Yugoslavia, in which it:

„32. Decides to extend the mandate of the Special Rapporteur for one year, and requests that he continue his efforts, especially in carrying out such further missions in Serbia and other parts of the former Yugoslavia as he deems necessary, and that he continue to submit periodic reports as the situation warrants on the implementation of this and all relevant resolutions of the Commission concerning the former Yugoslavia, and requests the Secretary-General to continue to make reports of the Special Rapporteur available to the Security Council;

33. Urges all parties to co-operate in determining the fate of thousands of missing persons in the former Yugoslavia by disclosing and exchanging information and documentation with a view to finally locating such persons and alleviating the suffering of their relatives, and requests the Special Rapporteur, in consultation with the Working

[15] E/CN.4/1993/50.

Group on Enforced or Involuntary Disappearances and the International Committee of the Red Cross, to develop proposals for a mechanism to address the subject of disappearances in the former Yugoslavia;

34. Requests the Secretary-General to take steps to ensure the full and effective co-operation of all United Nations bodies to implement the present resolution and, pursuant to paragraph 21 of General Assembly resolution 47/147 of 18 December 1992, to provide the Special Rapporteur, within the overall budgetary framework of the United Nations, with additional resources and all other necessary assistance to enable him to fulfil his mandate and, in particular, to provide for the appointment of field staff in the territory of the former Yugoslavia to provide first-hand, timely reports on observance or violations of human rights in their area of assignment.

3.5 Conclusions

When Mazowiecki accepted the mandate of Special Rapporteur he had to determine his priorities. He decided to concentrate on victims of human rights violations and to contribute to solving the existing crisis. He was less concerned with detailed documentation concerning committed crimes, including the identification of the perpetrators, but rather concentrated on organizing help for the victims. His personal background and life experience contributed to that approach. He has been criticized by various, mainly American, NGOs for neglecting the investigatory aspect of his mandate.

Thanks to the financial assistance which has recently been granted in order to conduct field operations, the Centre for Human Rights has been able to plan comprehensive, on-the-spot activity. It should enable the Special Rapporteur to prepare more detailed reports dealing with concrete human rights issue.[16]

The Special Rapporteur embarked upon very intensive activity. He managed to persuade world public opinion of the dimension of the human rights drama in the former Yugoslavia. His reports contributed to a number of resolutions adopted by various UN bodies. Nevertheless, he has not been able to achieve his main objectives – to put an end to massive violations of human rights. This failure should be partly contributed to the inherent weakness of the mechanism which he represents. The mandates of Special Rapporteurs are very limited. Consequently his position vis-à-vis other actors has proved to be rather weak.

When discussing the role of the Special Rapporteur one has to bear in mind that other mechanisms within the special procedure system are also dealing with various aspects of human rights violations in the former Yugoslavia. Thematic rapporteurs (summary and arbitrary executions, torture, displaced persons, mercenaries), and working groups (arbitrary detention, disappearance) have devoted their attention to the human rights situation in Yugoslavia.

[16] Within the framework of that operation, staff members of the UN Centre for Human Rights conducted on-the-spot mission to the Tuzla region in Eastern Bosnia-Herzegovina. Their findings will be presented in the Special Rapporteur interim reports to be published in May 1993.

There is also another aspect to the Special Rapporteur activities – inadequate assistance offered by the UN secretariat. It seems that an in depth analysis of the question goes beyond the scope of the paper. It is, however, quite clear that without profound changes in the position of the UN Centre for Human Rights within the UN structure, the various UN human rights mechanisms will be condemned to failure.

The quality of the Special Rapporteur reports depends to a large extent on the quality of information received from various sources. Without co-operating with other agencies active in the field he is unable to verify the often contradictory information. Unfortunately, as he mentioned in the above-quoted report, he was not able to secure the co-operation of all those interested. Oddly enough, the civilian branch of UNPROFOR created various obstacles, including a refusal to share information on human rights violations.

One important lesson which may be learned from the situation in Yugoslavia is the problems involved in co-ordinating different activities and initiatives. This issue, however, will be dealt with at the end of this paper.

4. The role of the CSCE

Within the framework of the CSCE various initiatives have been undertaken in order to stop the escalation of the crisis in Yugoslavia. A comprehensive analysis of those initiatives is beyond the scope of this paper. It must be reiterated that all relevant CSCE bodies dealt with the Yugoslav crisis. A statement on the situation in Yugoslavia was issued by the Council of Ministers in Berlin on 19 June 1991 at its first meeting. In the statement the:

„Ministers expressed their friendly concern and their support for democratic development, unity and territorial integrity of Yugoslavia, based on economic reforms, full application of human rights of minorities, and the peaceful solution of the current crisis in the country".

On 1 July 1991 the Consultative Committee of the CSCE Conflict Prevention Centre (CPC) issued an appeal stressing the importance of an immediate and complete cessation of hostilities by all parties involved.

The Declaration on the Yugoslav crisis was approved by the Heads of State and Government at the Helsinki Summit on 10 July 1992.

The Third Meeting of the CSCE Council of Foreign Ministers held in Stockholm on 14-15 December 1992 devoted much attention to the situation in Yugoslavia. The Council, *inter alia,* requested the Chairman-in-Office, assisted by the *Troika:*

„to travel to Belgrade prior to the elections on December 20, 1992 to underline to Serbian Authorities the stark fate and the increased penalties with which they will be faced. She is requested also to visit as soon as possible CSCE missions in former Yugoslavia to highlight their importance and enhanced role".

4.1. Decisions of the Committee of Senior Officials

On 28 June 1991 Luxembourg, on behalf of the EC countries, invoked the just adopted CSCE Mechanism on Consultation and Co-operation with regard to Emergency Situations, in connection with the urgent situation in Yugoslavia. The response of 30 June 1991 from the Yugoslav Government was not considered satisfactory and as a result the first emergency meeting of the CSCE Committee of Senior Officials (CSO) was held on 34 July 1991 in Prague. At that meeting the CSO stated that it „offers its assistance in order to help restore peace in the area and is examining urgently relevant practical steps it can take, in particular the dispatch of observers to Yugoslavia, in consultation and agreement with Yugoslav authorities". The CSO also offered a CSCE Good Offices Mission to Yugoslavia in order „to facilitate the political dialogue among the parties concerned".

At its fourth meeting on 2 October 1991 the CSO agreed to form a human fights rapporteur mission. At the same meeting the CSO issued a statement on the situation in Yugoslavia in which it, *inter alia,*

„reiterates its conviction that those responsible for the acts of unprecedented violence against people in Yugoslavia and for violations of cease-fire agreements be held personally accountable under international law for their actions, including those in contravention of relevant norm of international humanitarian law".

At its seventh meeting on 27-28 February 1992 the CSO examined the need for further action concerning the human rights situation in Yugoslavia. The CSO agreed that the human rights situation, including the situation of national minorities, needed further consideration and consecutive action by the CSCE. To that end, the CSO decided to send a follow-up mission to the Human Rights Rapporteur Mission to Yugoslavia as established by the CSO decision of 22 October 1991.

At its twelfth meeting on 10 June 1992 the CSO decided to send an exploratory mission to Kosovo, Sandjak and Vojvodina.

A very important decision, based on the „consensus-minus-one" principle was taken by the CSO on 8 July 1992 at its thirteenth meeting, according to which the participation of Yugoslavia in the CSCE was suspended. At the same meeting the Steering Group on the Yugoslav crisis was established.

At its fifteenth meeting on 14 August 1992 the CSO decided to establish a rapporteur mission to investigate allegations of human rights abuses — the so-called Sir John Thomson mission — and to establish, in co-operation with the relevant authorities, a continuous presence in Kosovo, Sandjak and Vojvodina, in the form of long-term missions.

At its sixteenth meeting on 16-18 September 1992 the CSO decided to dispatch a CSCE Mission to Skopje to avoid any spill-over of the conflict. The CSO pointed out that CSCE participating states intend to pursue with special vigour any evidence of severe human rights abuses in several regions of the former Yugoslavia.

At its next meeting the CSO requested a follow-up to the above-mentioned Sir John Thomson mission.

4.2. Human rights fact-finding missions undertaken within the framework of the CSCE, including missions under the CSCE Moscow Human Dimension Mechanism

The first fact-finding human rights mission, in accordance with the CSO decision of 22 October 1991 to create a CSCE Human Rights Rapporteur Mission, went to Yugoslavia in December 1991 and January 1992. The mission, in accordance with its mandate, visited Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. It looked at the situation with respect to human rights, including the rights of minorities. The report of the mission was presented to the CSO.

The follow-up mission took place in May 1992. It was requested that particular attention should be given to the human rights situation of ethnic and national communities and minorities in Croatia, to the paralysis of public life in Kosovo and to the propaganda war in the media and its negative effects on individual freedom.

The Sir John Thomson's mission took place in August 1992. Its primary task was, in close co-ordination with the ICRC and the UN Commission on Human Rights, to ensure that all alleged places of detention be inspected within the shortest possible time. The follow-up to that mission took place in January 1993.

The Moscow Human Dimension Mechanism was also used in the Yugoslavia context. The initiative to invoke the mechanism was under-taken by the British government on behalf of the EC. The Rapporteurs were Ambassador Corell, Ambassador Türk and Mrs. Thune. Their mandate was formulated as follows: „to investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such acts". The initial part of their mission to Croatia took place from 30 September to 5 October 1992. Due to the fact that the Rapporteur had been unable to visit Bosnia-Herzegovina, on 24 November 1992 they offered to make an interim report on that state, analysing the relevant penal law, and to draft a convention establishing an international *ad hoc* tribunal to deal with war crimes and crimes against humanity committed in the former Yugoslavia. In its decision on 15 December 1992 the CSCE Council welcomed that proposal. They drew up the report on 9 February 1993 in spite of the fact that they were not able to visit Bosnia-Herzegovina.

4.3 Role of the long-term missions in Kosovo, Vojvodina and Sandjak

The CSO, based, *inter alia*, on conclusions and recommendations presented to it by the exploratory mission to Kosovo, Sandjak and Vojvodina, with reference to chapter III, paragraphs 6-11, of the Helsinki Decisions on the

political management of crises, decided to establish, in co-operation with the relevant authorities, a continuous presence in Kosovo, Sandjak and Vojvodina, in the form of missions of long duration. The mandate of those missions was formulated as follows:

a) to promote dialogue between the authorities concerned and representatives of the populations and communities in the three regions;

b) to collect information on all aspects relevant to violations of human rights and fundamental freedoms and to promote solutions to such problems;

c) to establish contact points for solving problems that might be identified;

d) to assist in providing information on relevant legislation on human rights, protection of minorities, free media and democratic elections.

The missions were also to be involved in „preventive diplomacy". A Memorandum of Understanding with the Federal Republic of Yugoslavia was signed on 28 October 1992.

The missions at present have twenty members based in Belgrade, Kosovo (Pristina and a permanent presence also in Pec and Prizeren), Sandjak (Novi Pazar, with a further permanent presence in Priepolje) and Vojvodina (Subotica). At the meeting of the CSO Vienna Group on 28 January 1993 a budget for increasing the missions to a total of forty members was agreed upon.

4.4 The spill-over mission in Macedonia

An important preventive function is performed by the spill-over mission in Skopje. The mandate of that mission was formulated as follows:

„to seek to monitor developments along the borders of the Host Country with Serbia and in other areas of the Host Country which may suffer from spill-over of the conflict in the former Yugoslavia in order to promote respect for territorial integrity and the maintenance of peace, stability and security; and to help prevent possible conflict in the region".

The mission has its office in Skopje. It consists of eight persons. The EC Monitoring Mission (ECMM) maintains a liaison team of two Monitors in Skopje, working under the operational control of the Head of the CSCE Mission. It co-operates closely with UNPROFOR.

4.5 Conclusions

In addition to the above-described mechanisms the CSCE observed the parliamentary elections in the Federal Republic of Yugoslavia and in Slovenia. The CSCE Office for Democratic Institutions and Human Rights (ODIHR) presented comprehensive reports concerning those elections.

The CSCE, like all other international organizations, was not able to prevent the development of hostilities in Yugoslavia. Nevertheless, it is acting positively

and is playing an important preventive function in such regions as Kosovo, Vojvodina, Sandjak and the former Yugoslav Republic of Macedonia. CSCE missions of long duration are constantly improving their working methods. They also co-operate fully with other international institutions, including the Special Rapporteur. It seems that this mechanism can possibly play an important role in various conflict situations.

It has been observed that there is a certain conflict of interests between mainly preventive functions performed by the missions of long duration and fact-finding missions.

The author of the present study has serious misgivings concerning the confidentiality of CSCE reports. As a rule, reports of CSCE missions are confidential. The results of such CSCE fact-finding missions can be published only after the approval by the CSO, which gives these documents an internal character. The fact that these reports are not available to NGOs and the press has often seriously diminished the effects of important findings of various CSCE missions.

5. Human rights during peace negotiations

Within the framework of the Yugoslav Conferencms should – and to a certain extent to – play an important role. The Co-Chairmen of the Steering Committee of that Conference on various occasions stressed that human rights standards should be observed. Within the proposed peace agreement, the human rights provisions are very carefully elaborated and specified. According to the proposals, the future Bosnian constitution would contain a commitment that the country should ratify and apply a comprehensive list of human rights conventions. In addition, as part of the human rights machinery to be provided by the constitution, there would: first, be a constitutional would provide for the establishment of four ombudsmen, who would initially be appointed by the Co-Chairmen. After conditions become normal, the lower house of Parliament would then make these appointments. The ombudsmen would be vested with the competence to monitor the rights of each of the country"s three communities – the Croats, Muslims and Serbs – as well as of a fourth community of „others" – the Yugoslavs.

Recently, within the framework of the Conference, a discussion on the broad human rights monitoring operation in Bosnia-Herzegovina took place. Nevertheless, one cannot escape the impression that human rights are treated instrumentally within that context. They have been used as an additional element of diplomatic pressure. Negotiators were unable to draw any consequences from the fact that systematic violations of human rights have been committed during the peace negotiations. In spite of verbal declarations the Co-Chairmen were very reluctant to envisage any kind of closer co-operation with the Special Rapporteur. It is characteristic that they did not even inform him about the above-mentioned plans for monitoring human rights.

It seems that the instrumental treatment of human rights standards may be very dangerous. In his last report the Special Rapporteur stated:

„A durable solution to the conflicts in the former Yugoslavia must, above all else, guarantee protection of human fights, and particularly the rights of nationalities. The Special Rapporteur therefore recommends that human rights concerns be given priority in all peace negotiations. The good faith and credibility of the parties to the conflicts should be measured by their proven commitment to respecting human rights".

6. Overview of the role of other un mechanisms and bodies

6.1 Treaty bodies

The Human Rights Committee

The Human Rights Committee (HRC) analyzed reports from Croatia, Bdsnia-Herzegovina and the Federal Republic of Yugoslavia at its 1205 meeting on 6 November 1992. The very fact that the Committee was able to make a quick decision and requested the presentation of the reports should be positively assessed. There are, however, some doubts, particularly regarding Bosnia-Herzegovina. The main perpetrations of human rights violations in that country for obvious reasons could not be asked to report to the Committee. Therefore one may ask if the HRC is adequately equipped to deal with this type o situation.

It was also very unfortunate that the UN Centre for Human Rights did not pay adequate attention to the distribution and publication of the HRC's comments.

The Committee on the Rights of the Child

The Committee on the Rights of the Child informed the Special Rapporteur that it took note, with interest, of his reports. It stressed its deep concerns regarding the conclusions. The Committee, being most concerned about the plight of children in the territory of the former Yugoslavia, raised its concerns during the course of a press conference held at the end of its second session on 8 January 1992. The Committee had also gravely been made aware of reports of the alleged rape of several thousand women and girls in Bosnia-Herzegovina. The Committee invited the Special Rapporteur to participate in the discussion during its session.

The Committee on Elimination of Discrimination against Women

The Committee on Elimination of Discrimination against Women expressed its deep concern about the plight of a great number of women being subjected to cruel violations of their fundamental human rights.

6.2 The United Nations High Commissioner for Refugees

The UNHCR is a leading UN agency entrusted with the task of distributing humanitarian aid and assistance to refugees and internally displaced persons. In accordance with the UN Consolidated Inter-Agency Programme of Action and Appeal for the Former Yugoslavia (adopted on 4 September 1992) it co-ordinates the actions of the United Nations Children's Fund (UNICEF), the World Health Organization (WHO), FAO and WFP.

In fulfilling its functions the UNHCR also collects various evidence concerning human rights violations. Therefore close co-operation between the UNHCR and the Special Rapporteur has been established.

6.3 The United Nations Protection Force

It is beyond the scope of the present report to discuss at length the role of UNPROFOR in the context of the human rights situation in Yugoslavia. Without any doubt the officers and soldiers of UNPROFOR, as well as the field officers of other organizations, belong to the heros of this tragic conflict. Moreover, one can quite easily observe their frustration, their sense of powerlessness in the light of atrocities committed too frequently in their presence. The killing of the Bosnia-Herzegovina Deputy Prime Minister and the death of several people in Konjevic Polje are just a few of many examples. Also the civilian police cannot prevent human rights violations being conducted within areas under their control. Their mandate and rules of engagement are inadequate in the existing situation. There are, however, other aspects of UNPROFOR activities which are not dependent on such rules, but are conditioned by other factors. One may ask, for example, why UNPROFOR quite so frequently chooses to hide, rather than report, evidence of known human rights violations and even war crimes.

6.4 The Commission of Experts established pursuant to Security Council Resolution 780 (1992)

By means of Resolution 780 (1992) the Security Council requested that the Secretary-General establish a Commission of Experts with a view to providing him with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. The Commission commenced its work early in November 1992.

The Commission differs from other bodies established by the UN to investigate human rights violations. It has received a mandate not only to examine and analyse the information provided under Security Council Resolutions 771 and 780, but also the power to obtain information by means of its own investigations of efforts. In presenting its conclusions on the evidence of grave

breaches of the Geneva Conventions and other violations of international humanitarian law to the Secretary-General, the Commission has been called upon to proceed not only as a fact-finding body, but also as investigators whose task it is to establish the evidence that will enable the Secretary-General to recommend further appropriate steps.

The first interim report of the Commission was presented on 10 February 1993 (S/25274). The Commission received a very broad mandate. It was to be expected that it will be able to investigate in depth and verify a great number of evidences of breaching the provisions of international humanitarian law. After less than six months of activities it is impossible to fully assess the work of the Commission. It seems, however, that the Commission will not be able to meet those expectations, *inter alia*, due to the following reasons:

1. The conflict is still far from being resolved. Parties are creating various difficulties in order to prevent conducting objective investigations. Let us also not forget that in large territories, due to the continuity of hostilities, the security of investigations cannot be guaranteed.

2. The structure of the Commission and offered to its disposal seriously limit its activities. Only one member of the Commission — its Chairman — permanently resides in Geneva. Ail other members combine their functions with other obligations. A small staff, consisting of two professionals and two secretaries, assists the Commission.

3. The Commission has at its disposal inadequate financial resources. In order to conduct on-site investigations it has to rely on help offered by governments, NGOs or private donors. As a result the Commission has been forced to adopt a selective approach and to analyse few cases only. So far, it has been unable to conduct comprehensive first hand investigations. It managed, however to create a data bank which should be of great help in any further legal proceedings.

A close co-operation between the Special Rapporteur and the Commission has been established. Mutual exchange of information and opinions take place on a regular basis.

In its present shape and with the resources available the Commission would not be able to effectively implement its mandate.

In this context the problem of the War Crimes Tribunal arises. The personal accountability of the perpetrators of human rights violations plays an important role within the implementation mechanisms of human rights standards. From that point of view the establishment of such a Tribunal should be considered as a welcome step.[17]

[17] See: „Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)", S/25704.

6.5 International Court of Justice

On 20 March 1993 the Republic of Bosnia-Herzegovina went to the International Court of Justice alleging genocide on the part of the Federal Republic of Yugoslavia (Serbia and Montenegro). In an Order of Provisional Measures issued on 8 April 1993 the International Court of Justice called upon Yugoslavia to „immediately ... take all measures within its power to prevent the commission of the crime of genocide". The Court's Order states that Yugoslavia „should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subjected to genocide, of conspiracy to commit genocide, of direct and public incitement to genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethical or religious group", be prevented.

A judgment on the merits of the case will be delivered only after the Parties fully present their case.

7. The role of NGOs

NGOs play an active role in the case of Yugoslavia. To put it briefly, their function can be described as consisting of two elements: (a) documenting the human rights situation, and (b) organizing humanitarian assistance.

Two organizations in particular are active in documenting human rights violations in that region – Helsinki Watch and Amnesty International. Both have produced four reports covering a wide spectrum of abuses.[18]

Needless to say, the leading role in performing the second above mentioned function is carried out by the ICRC. Its tasks can be described as follows: relief for displaced persons and other vulnerable groups in combat zones and isolated emergency areas; medical assistance; supervision of protected zones; visits to and registration of prisoners; tracing missing persons; restoring contact among family members; promoting knowledge and respect of international humanitarian law and the law of war.

To other organizations active in Yugoslavia belong:

a) International Federation of Red Cross and Red Crescent Societies offers logistical and technical support to the national Red Cross societies assisting refugees and displaced persons; surveys the needs among vulnerable groups;

[18] Helsinki Watch has published the following reports: (1) *Rules of War Violations in Croatia by Croatian Forces*, February 1992; (2) *War Crimes in Bosnia-Herzegovina*, August 1992; (3) *Yugoslavia, Human Rights Abuses in Kosovo 1990–1992*, October 1992; (4) report on Bosnia-Herzegovina to be published in April 1993. Amnesty International has so far published the following reports: (1) *Yugoslavia, Torture and Deliberate and Arbitrary Killings in War Zones*, November 1991; (2) *Bosnia-Herzegovina, Gross Abuses of Basic Human Rights*, October 1992; (3) *Bosnia-Herzegovina, Rapes and Sexual Abuse by Armed Forces*, January 1993; (4) *Bosnia-Herzegovina, Rana u dusi, A Wound to the Soul*, January 1993.

provides infrastructure for released prisoners; and prepares for Red Cross involvement in the post-conflict rehabilitation and reconstruction phase.

b) Médecins du Monde distributes medical equipment, assist refugee camps in Croatia and provides psychological aid for children and women.

c) Médecins sans Frontières distributes medical supplies and other basic goods.

8. Summary remarks

Human rights mechanisms cannot stop the war. They can only offer assistance to victims and try to influence policy making bodies. In this paper I have tried to describe the activities of various mechanisms and to identify reasons for their failure. It is evident that, in spite of the large presence in the region and the strong interests expressed by international public opinion, human rights organizations have failed to achieve their aims in the former Yugoslavia. They are unable to offer adequate assistance to victims, they cannot properly register a great number of violations, they are not able to help democratically – oriented movements, they cannot break information blockade and propaganda of hatred. Why?

The conflict in Yugoslavia once again has proved that human rights only play a secondary role in the context of international politics. The international community tolerated massive violations of human rights and of international humanitarian law because they did not create an imminent danger to the interests of the more influential countries. Consequently, during peace negotiations the credibility of parties has never been verified by their human rights record. One may justify the claim that the international community legitimized human rights violators by offering them the status of partners of negotiations conducted under the auspices of the UN and EPC.

The above-described attitude of the international community determines chances of human rights mechanisms to effectively fulfil their functions. We can observe a characteristic paradox. Within the UN and CSCE, human rights mechanisms have received a great deal of attention. A number of formal steps have been undertaken. New mechanisms have been introduced, new methods of work and financial assistance have been offered. It seems that these steps should serve as a substitute or alibi for political inertia. Under these circumstances it is difficult to consider all these formal achievements as a success.

The Yugoslavia case also revealed other inefficiencies more directly connected with the system of international human rights protection. For the purpose of the present paper I would like to identify two types of problems.

(a) There is no single mechanism which can play the role of co-ordinator and stimulator of human rights activities. As a result, we too frequently observe very harmful competition between different human rights bodies. Investigations

of the alleged practice of mass rape can serve as a powerful example. Duplication of efforts and the wasting of limited resources are not the only consequences of this situation. A growing reluctance to co-operate with such missions on the part of victims is also associated with this phenomenon. Attempts to place such a co-ordinating role in the peace negotiating process failed for political reasons.

(b) Within the UN system the country special rapporteur mechanism acquires some elements which may be used as effective measures to cope with cases similar to Yugoslavia. The very fact that the Commission on Human Rights has managed to appoint such a Rapporteur at its first special session speaks for itself. Thematic mechanisms also offered their assistance to the Special Rapporteur. Close co-operation with the UNHCR, the CSCE and the ICRC has been achieved. Also, some treaty bodies actively pursue their function in connection with the situation in Yugoslavia. The Special Rapporteur has been invited to present his report before the Security Council. Finally, for the first time in its history the Centre for Human Rights has established its permanent presence in the region. It is to be hoped that further development in the field operation will be possible. Nevertheless, it is also quite clear that from the administrative point of view the Centre for Human Rights is unprepared for more comprehensive human rights activity, in particular, field operations. The position of the Centre within the UN is too weak. Without profound changes in this field we cannot expect more meaningful effects as far as the results of the work of human rights mechanisms are concerned.

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The Antarctic Treaty as a Customary Law

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The criticism received by the Antarctic Treaty in the last ten years by states which are not parties to it, as well as the recent changes in the Antarctic Treaty System, namely the conclusion by the parties of the Additional Protocol on the Environmental Protection in 1992, incline to some broader reflection on the extent of the freedom of the parties to modify the system envisaged by them in 1959, and on the other hand, the extent of the third parties' effect of the Treaty. The question is complex, but one of its elements seems to be the consideration of the customary character of the norms contained in the Treaty.

The doctrine of international law for a long time has indicated that a treaty norm can transform into customary law and bind states as such.[1] During the work of the I.L.C. on the law of treaties the process was described as „incontestable and generally accepted",[2] and finally reflected in Art. 38 of the Vienna Convention on the Law of Treaties of 1969 (further VCT).[3] Though Art. 38 suggested that the treaty can bind third states „by becoming a generator of international custom",[4] it did not advance any prerequisites of this transformation. The first attempt to elaborate them in practice was undertaken by the

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[1] R. Roxburgh: *International Conventions and Third States*, London 1917, at 75, states: „In practice, this process of the extension of a conventional into a customary rule is not only possible,but of very constant occurrence". Similarly A. Alvarez: La *codification du droit international*, Paris 1912, 148: „The rules have changed their character – they can no longer be regarded as contractual, but as customary". See A.D'Amato: *The Concept of Custom in International Law*, Ithaca and London 1971, 138 *et seq.*; the Rapport of G. Fitzmaurice, *YILC* 1960 II, 95 *et seq.*, enumerating the most known examples of „law-making" or „normative treaties", capable to transform into custom; J. K. Gamble: „The Treaty/Custom Dichotomy: An Overview", 16 *Texas International Law Journal*, 304–319 1981; G.L. Scott, C.L. Carr: „The international Court of Justice and the Treaty/Custom Dichotomy", 16 *Texas International Law Journal*, 347–359 1981; A.M. Weisburd: „Customary International Law: The problem of treaties", 21/1 *Vanderbilt Journal of Transnational Law*, 6 *et seq.* 1988.

[2] See J.M. Ruda, *YILC* 1964 I, 111, G. Amado, 110; *YILC* 1964 II, 184.

[3] See Ch.L. Rozakis: „Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law", 35/1 *ZaoRV*, 25 *et seq.* 1975. See also Art. 43.

[4] H. Waldock: *Sixth Report on the Law of Treaties*, G.A.O.R., A/CN.4/186/add. 2, 220 1966.

I.C.J. in the North Sea Continental Shelf case.[5] Trying to find out the customary character of art. 6(2) of the Convention on the Continental Shelf of 1958 the Court took into account the „norm-creating" character of art. 6(2), the representativeness of the parties to the treaty and the existence of the *opinio iuris* and the practice of states. It seems that the same method can be applied to the Antarctic Treaty.

1. „The Fundamentally norm-creating character" of the Antarctic Treaty

The term „fundamentally norm-creating character", though used by the I.C.J., was not defined. It appears, however, that the application of the term together with the expression „general rule of law" suggests that the norm has to be as general as possible to be universally applied or, as the Court further added „could be regarded as forming the basis of a general rule of law".[6] At first sight it looks like the Court was applying the familiar distinction between law-making treaties and contracts, or concrete or abstract norms, but finally the reasoning of the Court leads to the conclusion that, as R. Baxter sums it up, „if a rule does pass into customary international law, it is „norm-creating" and that the result of the process will therefore be decisive for the nature of the rule".[7]

The same distinction is also made by some authors. For example, by M. Villiger[8] or D'Amato,[9] but they in fact seem to arrive at the similar conclusion, that in some cases even concrete norms (e.g. norms of the Vienna Convention of 1815 on neutralization of Switzerland)[10] can become a general custom, and every normative content may eventually pass into customary law. Consequently, Villiger rightly asserts that it should rather be acknowledged that the criteria of abstract or general rules enable the identification of the processes through which norms become customary. Thus, since customary law is mostly „general", the process of transition of a treaty norm into a customary one is smoothe if the rule is general. Moreover, abstract conventional rules, according to Villiger,

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[5] Judgement, *I.C.J. Rep.* 1969. See A. Reynaud: *La Volonté La nature Et Le Droit Les Différends Du Plateau Continental de La Mer Du Nord Devant La Cour Internationale De Justice*, Paris 1975; I.M. Sinclair: *The Vienna Convention on the Law of Treaties*, Manchester 1973, 24 et seq.; A.D'Amato: op. cit., 110 *et seq.*; and also „Manifest Intent and Treaty Rules", 64 *AJIL*, 892–902, 1970; R.R. Baxter: „Treaties and Custom", 129 *RCADI*, 62 *et seq.* 1970; W. Friedmann: „The North Sea Continental Shelf Cases – A Critique", 64 *AJIL*, 229–240, 1970; Bin Cheng, Custom: „The Future of General State Practice in a Divided World" (in:) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory"*, (ed.) R.St.J. Macdonald, D.M. Johnston: Hague-Boston-Lancaster 1983, 542 *et seq.*; M. Villiger: *Customary International Law and Treaties*, Dordrecht-Boston-Lancaster 1985, 190 *et seq.*

[6] *I.C.J. Rep.* 1969, 42.

[7] R. Baxter: op. dt., 62.

[8] M. Villiger: op. cit., 190.

[9] A.D'Amato: op. dt., 104–109.

[10] The ILC gave this example as the illustration of the „objective regime" valid erga omnes under Art. 38 of the VCT, *YILC* 1964 II, 184, para. 1–3.

become customary if they are accompanied by broad state practice. The concrete regimes, on the contrary, offer only few occasions for active practice of third states and depend mostly on the qualification of the acquiescence of third states. They need as well far more time for transition into customary law.[11]

It is worth while mentioning here that Art. 38 was introduced in the VCT deliberately, to encompass these objective regimes whose effectiveness towards third states cannot be explained by their consent,[12] and it follows from H. Waldock's commentary that it was supposed to pertain to „general lawmaking treaties" as well as „purely contractual treaties".[13]

The preliminary conclusion might be that eventually qualifying the Antarctic Treaty as a concrete regime (regional or objective) does not exclude its custom-creating capabilities. No doubt the Antarctic Treaty contains abstract norms. Though they allude to the manner in which the state can use strictly defined territory (they are applied to a determined geographical region), they refer potentially to all states willing to use the Antarctic territory, since the Treaty pertains to the interests of all states, not only to its parties (this intention is reflected in Art. X but also in the preamble to the Treaty in the phrases stating that the Treaty was concluded „in the interest of all mankind", „in the interest of science and the progress of mankind" and for „the continuance of international harmony in Antarctica"). Moreover, the norms of the Treaty, in the words of van Hoof, are concrete enough as to point to the content of the customary rule.[14] There is no doubt that Art. V(1) for example, may potentially generate custom:

„Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited"

or Art. 1(1):

„Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons".

Authors supporting the thesis that the Antarctic Treaty generated customary law indicate as the essential elements of this process the following facts:

1. the Treaty was preceded by the practice coinciding with its fundamental norms for example, the freedom of scientific research and non-military use

[11] M. Villiger: op. cit., 190–191.

[12] See *YILC* 1964 II, 184, 185, where the Antarctic Treaty was enumerated.

[13] „Although law-making treaties are, no doubt, the most important and commonest cases where this process occeurs, it is not confined to such treaties. Purely contractual treaties may have the same result if principles which they formulate are subsequently endorsed and acted on by other States", *YILC* 1964 II, 34.

[14] G.J.H. van Hoof: *Rethinking the Sources of International Law*, Antwerp-Boston-Frankfurt-London 1983, 109.

of the continent, thus the Treaty crystallised the manner of use of the continent;[15]

2. „the world interest" existed and still exists in respect to the subject-matter of the Treaty;[16]

3. the general formulation of basic principles of the Treaty, and specially Art. X – obliging each party to exert appropriate efforts to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the treaty, effect to at least fundamental rules of the Treaty;[17]

4. the lack of protest[18] of third states.

The authors pointing out the above mentioned factors seem to describe a kind of sociological process – consisting of many elements – taking place in the international community, which has created the general customary law. One of the essential elements of this process is the Antarctic Treaty itself. This is how the process of generating customary law by the treaty was seen by judges M. Tanaka and M. Sorensen in their separate opinions on the judgement in the North Sea Continental Shelf case.[19] The test applied by them to prove the customary character of the Geneva Convention of 1958 can also be applied to the Antarctic Treaty. Both treaties created new legal norms in the field which „urgently required legal regulation",[20] or using the expression of judge

[15] See e.g., Lonergan: *The Legal Status of the Antarctic Airspace*, Institute of Air and Space, McGill University 1972, 38–46 (quoted by W.N. Bush: *Antarctica and International Law*, London-Rome-New York 1982, 102). D.W. Greig: „Territorial sovereignty and the status of Antarctica", 32 *Australian Outlook*, 120: 1978 „(...) (it) seems to have become established, despite objections by claimant States that »scientific« expeditions (including those designed to explore the region) were tolerated before such arrangements became more formalised with the IGY discussions. In addition, there was at least a tacit understanding between a number of Slates to avoid any military involvement in the area, although it needed a formal commitment to prevent a confrontation between the United Kingdom, Argentina and Chile". i.W. Kindt: „A Regime for Ice-Covered Areas: The Antarctic and Issues Involving Resource Exploitation and the Environment", (in:) *The Antarctic Legal Regime*, (ed.) Ch.C. Joyner, S.K. Chopra, Dordrecht-Boston-London 1988, 190): „(...) a strong argument could be made that the Antarctic Treaty was reflective of customary international law when it entered into force in 1961, and that the Antarctic Treaty has become a part of customary international law *per se* during the time since 1961".

[16] See Lonergan: op. cit., 103.

[17] See J.I. Charney: „The Antarctic System and Customary International Law", (in:) F. Francioni, T. Scovazzi: *International Law for Antarctica*, Milano 1987, 86; P. Birnie: „The Antarctic Regime and Third Stales", (in:) *Antarctic Challenge II*, (ed.) R. Wolfrum, Berlin 1986, 255.

[18] See J.I. Charney: op. cit., 86–87; P. Birnie, op. cit., 255; similarly Lonergan (op. cit., 45): „in the history of the Treaty there has not been any general non-recognition of the arrangement – either by signatories or by outsiders" (quoted by Bush, op. cit., 103). P. Birnie emphasises: „no objections were raised to the treaty at its inception or in the decade following. Even today most States approve its general objectives and intent, though it is subject to criticism (...) concerning its decisions making process and the ATCPs extension of their role in subsequent Antarctic Treaties", op. cit., 255.

[19] According to M. Sorensen all the conditions of the process should not „be considered as alternative conditions which could be examined and rejected one by one. The proper approach, in my opinion, is to examine the relevant elements as interlocking and mutually interdependent parts of a general process" (Dissenting opinion, *I.C.J. Rep.* 1969, 246).

[20] M. Sorensen: Dissenting opinion, *I.C.J. Rep.* 1969, 246.

Tanaka, where a legal vacuum existed.[21] Another essential factor influencing the process of generation of customary law pointed out by judge Tanaka is also present in the case of the Antarctic Treaty — legal, scientific and technical regulations provided for by the Treaty are such that they can „influence society",[22] and there is no doubt that at the moment the Treaty was concluded there was an urgent necessity to avoid international conflicts and discord.

Some other factor are also important in that sociological process, for example, the representativeness of the parties to the treaty (their political power, quantity, etc.) which in turn can be an important motivation of third states' observance of the treaty rules and influence which M. Villiger calls „persuasiveness of rules",[23] D.P. O'Connell — „moral persuasiveness",[24] and H. Waldock — „persuasive authority".[25]

On the other hand, the authors, rejecting any „custom-creating" capabilities of the Antarctic Treaty, argue that:

1. there is no clear indication that the Consultative Parties consider themselves as possessing any right to enforce customary rules generated by the Treaty towards third states. In the view of Bush „this would seem to arise from perceived inability of the treaty to bind non-parties".[26] Bush turns back to Art. X of the Treaty and to the fact that up until now the means and methods which can be used against third states were applied in a very moderate form, what can be seen, for example, in the recommendation of the VII Consultative Meeting:

(...) it would be advisable for Governments to consult together as provided for by the Treaty and to be ready to urge or invite as appropriate the state or states concerned to accede to the Treaty, pointing out the rights and benefits they would receive and also the responsibilities and obligations of Contracting Parties.[27]

This may suggest that the parties do not think that the norms of the Treaty in any way (also through custom) bind third states. But on the other hand, the counter-argument can be found in the statements issued by the parties in the UNGA during the debates on the Antarctic Question, e.g.:

The Antarctic Treaty has succeeded in replacing a potentially explosive situation, involving unilateral and divergent claims and policies, with an objective framework, valid *erga omnes*, and a flexible system based on freedom of access and to carry out scientific research".[28]

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[21] **M. Tanaka: ibidem, 177.**

[22] **Ibidem.**

[23] **M. Vi11iger: op. cit., 192.**

[24] **D.P.O'Connell:** *International Law*, **London 1970, 1, 23.**

[25] **H. Waldock: „General Course on Public International Law", 106 *RCADI*, II, 83 1962.**

[26] **W.N. Bush: op. cit., 101—103. Similarly Y.S. Bhadauria: „The Antarctic Treaty and its Legal Implications", 23** *The Indian Journal of International Law*, **586, 1983; „It is pertinent to note that the contracting parties cannot take any action on the pretext of self defence consistent with the Charter of the UN, since the Treaty is not an international norms—creating—treaty".**

[27] **D.AT 30101972.01 para. 16 quoted by W.N. Bush: op. cit., 101.**

[28] **From the opening address of the Ministry of Foreign Affairs of Belgium, XIII Consultative Meeting, U.N.Doc. A/C.1/40/P.V.53, 39—40.**

The same tone was present in the statements of Chile, Germany, Brazil, France, Hungary,[29] Norway, Poland, Uruguay.[30]

Secondly, it is not clear why the obligation under Art. X was to bind in the sphere of customary law. It would be possible if Art. X could possess its parallel customary norm, but this raise the question as to the „norm-creating" character of Art. X, etc.

Thirdly, it seems that the pressure exerted upon third states up until now, even if it was only to urge them to become party to the Treaty, does not prejudice potential possibilities envisaged in Art. X. It is true that Art. X has functioned in the sphere of popularization of the Treaty norms in the international community, but this can equally mean that this scope was sufficient, especially as J.I. Charney emphasises:

„The record of the past 25 years demonstrates that this obligation has been undertaken seriously. The states party to the Treaty have maintained strict solidarity in their efforts to promote the norms of the Antarctic Treaty system. Any indication that third states, private parties, or international organisations plan to undertake Antarctic activities that might, in any way, be incompatible with the norms established by the Antarctic Treaty system have been met with swift, united and successful actions by the Treaty parties. When states have developed an interest in undertaking activities in Antarctica they have placed themselves under the norms of the Treaty system, either by joining the Treaty or by acting in conjunction with a Treaty party".[31]

2. The Antarctic Treaty has a transitory character. Art. IV imposes only a moratorium on claims, thus the definite regulation of this issue is not its purpose. There are no norms on resource allocation, and the question of jurisdiction is only partially settled.[32] Moreover, the treaty is subject to revision and unilateral denunciation.[33] „This interim nature, reflected most prominently in Art. IV, embraces the Treaty as a whole, including demilitarization and management of Antarctic affairs55.34 Moreover, „(...) if one had to look for a textbook example of a treaty provision that is not potentially norm-creating, Art. IV of the Antarctic Treaty would certainly be first choice55.35

Three questions seem to arise here. Firstly, it is difficult to deny that the Antarctic Treaty did not regulate the issue of sovereignty, resource allocation or that it insufficiently regulates issues of jurisdiction. But this does not signify that the treaty norms are only temporary. The intention of the parties to settle definitely the other essential issues of using the Antarctic territory clearly follow

[29] Report of the Secretary–General, U.N.Doc. A/39/583, Part II, II in order 28–30, 82, 10–12, 66–67, 83.

[30] U.N. Doc. A/C.1/39/P.V.52, in order 7, 37–38, 56. See also J.I. Charney: op. rit., 65–66, 20.

[31] J.I. Charney: op. cit., 86.

[32] W.N. Bush: op. cit., 103.

[33] See B. Simma: „The Antarctic Treaty as a Treaty Providing for an »Objective Regime«", 19/2 *Cornell I.L.J.*, 189 1986; Bush: op. cit., 103.

[34] B. Simma: op. cit., 203.

[35] Ibidem. G. Triggs: *International Law and Australian Sovereignty in Antarctica*, Sydney 1986, 147 *et seq.*, does not exclude the possibility of transition of Art. IV into customary law.

from the preamble of the Treaty (e.g., „recognizing that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes (...)", or „convinced that the establishment of a firm foundation for the continuation and development (...)".

Secondly, undoubtedly not every stipulation of the Antarctic Treaty is of a „potentially norm-creating" character. The rules referring to the formal sphere of the functioning of the Treaty certainly are deprived of that feature, as for example rules on revision, unilateral denunciation of the Treaty, etc., or these concerning the contractual sphere of the Treaty, e.g., Art. IX containing provisions of the organizational nature; Art. IV freezing existing territorial claims expressly while the Treaty is in force. It is necessary, however, to make it clear that this is a sweeping statement. It happens quite often that the provisions of a treaty are not homogeneous and they can contain some general rules as well. Art. IV, for example, seems not to have a purely contractual character and refers also to non-parties, at least when it says that „no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force".[36] Similarly, Art. Ill can be understood as the duty to cooperate.[37] Besides, even if some of the Treaty provisions do not possess a „potentially norm creating" character, this does not deprive the other norms of that character. An that is exactly that phenomenon we are dealing with in the case of the Antarctic Treaty.

The third issue mentioned above is the question as to whether the right to denounce the Treaty deprives its norms of a „potentially norm creating character". This thesis shall be grounded in the judgement of the I.C.J. in the North Sea Continental Shelf case where reference was made to the right of making reservations to Art. 6 of the Geneva Convention on the Continental Shelf of 1958.38 The Court held that:

„(...) the faculty of making reservations to Art. 6, while it might not in itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention (...) — it is the Convention itself which would, for the reasons already indicated, seem to deny the provisions of Art. 6 the same norm-creating character as, for instance, Art. 1 and 2 possess".[39]

The position of the Court was highly criticised by some judges. In their opinion, the right of to make reservations does not necessarily have to be linked with the generation by the treaty of customary norms since it acts only

[36] Art. IV(2). G. Triggs: op. cit., 149 states that there is „slender evidence", that Art. IV(2) is now a customary rule.

[37] In that way R. Lagoni: (in:) op. cit., *Antarctic Challenge //,* 298.

[38] See *I.C.J. Rep.* 1969, 42. See also R. Baxter who states that „the provisions regarding the denunciation or revision of the treaty should be seen in the same light" as the right of making reservations, op. dt., 65—66.

[39] *I.C.J. Rep.* 1969, 42.

in the contractual sphere.[40] Besides, there are some well known cases where the treaty, despite the reservations made to its provisions, passed to customary law for example, the Geneva Convention on the High Seas of 1958 (the preamble to the Convention states that the Convention is the codification of the customary law in the field), or generally recognized as being transformed into custom – the IVth Hague Convention of 1907 to which five reservations were made and its Art. 8 provides for unilateral denunciation.

Furthermore, the Court itself did not recognise the right to make reservations as a factor which in every case was able to exclude the „norm creating" character of the norm. Several times the Court stressed:

„Naturally this would not in itself prevent this provision [that is Art. 6(2) – A.W.] from eventually passing into the general corpus of customary international law".[41]

It seems that the problem can as well be viewed differently: by assessing rather the fact that despite the right of making reservations or unilateral denunciation the parties have not used it. In the opinion of R.R. Baxter „for the purpose of determination of the declaratory character of the treaty, the ability to bring about these changes in treaty relations is what matters. For the purpose of determination of the constitutive character of a treaty, it is whether States have in actuality availed themselves of that privilege that carries weight".[42]

Andy finally, it should be added that the right to withdraw or to revise the Antarctic Treaty was formulated in Art. 12 not as a right to denounce the treaty at any moment and under any circumstances. Art. 12(1) provides for withdrawal from the Treaty only when a modification or amendment made to the treaty has not entered into force within a period of two years after the date of its communication to all the Contracting Parties. The right of revision of the Treaty after the expiration of thirty years from the date of entry into force of the Treaty provided for in para. 2(a) is not obligatory. The Treaty can potentially be permanent since it was not concluded for limited time.[43]

2. The representativeness of the parties to the Antarctic Treaty

Though some authors seem to overlook the representativeness of the parties to the treaty for evaluation of its custom-creating capabilities, the I.CJ. paid considerable attention to it and held that:

„With respect to the other elements usually regarded as necessary before a conventional rule can be considered, to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and

[40] See *I.C.J. Rep.* 1969, dissenting opinions of judge M. Morelii, 198, M. Lachs, 223–224, M. Sorensen, 248, V. Koretsky, 163.

[41] *I.C.J. Rep.* 1969, 40, 42.

[42] R.R. Baxter: op. cit., 64.

[43] See J.I. Charney op. cit., 86; P. Birnie: op. cit., 255; Lonergan: op. cit., 45–46; W.N. Bush, op. cit., 103.

representative participation in convention might suffice of itself, provided it included that of States whose interests were specially affected".[44]

In 1992, 40 states were the parties to the Antarctic Treaty. If one would like to enter into statistics, as Judge Ammoun did in his individual opinion to the judgement of the I.C.J. of 1969,[45] one can easily come to the conclusion that 40 states to about 180 belonging nowadays to the international community (including the „newborn" European states) is not impressive. But the statistical method is in such cases illusive. Thus Judge Lachs rightly contrasted the number of the parties to the Geneva Convention of 1958 to the number of states directly interested in the subject matter of the convention, excluding, for example, states which cannot possess the continental shelf (the landlocked states).[46] He argued as well that it is not the number of states, but rather their importance that determines the representativeness of the parties, the fact that the parties represent „States of all continents among them States of various political systems, with both new and old States representing the main legal systems of the world".[47]

Consequently, to evaluate the representativeness of the Antarctic Treaty parties it is important that the parties include all seven states with territorial claims to the Antarctic territory, five great powers, states of almost all continents (though only one African), and states representing highly developed states as well as developing ones. It is also not without meaning that all states actively interested in Antarctica, for example those leading scientific research, in the end acceded to the Treaty.

There are thus 140 states beyond the Treaty (some of them have just gained their independence in 1990's). Many of these states, at least until 1983 (the beginning of the UN involvement in the Antarctic Question), never expressed any interest in Antarctica and at the moment do not have potential capabilities to take any activity on the continent. Besides, as Lonergan noticed, according to Art. XIII(1) any UN member, or any other state with the consent of the Consultative Parties, can accede to the Treaty.[48] In that light the representativeness of the parties to the Antarctic Treaty seems to be well established.[49]

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[44] *I.C.J. Rep.* 1969, 42.
[45] *I.C.J. Rep.* 1969, 105.
[46] Similarly Judge Tanaka, *I.C.J. Rep.* 1969, 176.
[47] *I.C.J. Rep.* 1969, 227.
[48] Lonergan: op. cit., 45, quoted by W.M. Bush: op. cit., 103.
[49] See P. Birnie: op. cit., 255; W.M. Bush: op. cit., 103. Contrary opinions were expressed in the UNGA debates on the Antarctic Question, e.g., Ghana (A/C.1/40 P.V.52, 26): ‚Antarctic Treaty lacks the universality of membership which alone would ensure that issues of global concern, such as the protection of the fragile ecosystem and negotiations for minerals regime, command the widest possible participation". There is equal geographical representation, there is no Arab or African state, and on the other hand, the apartheid regime is possessing the status of the Consultative Party (Malaysia (A/C.1/40/P.V.48, 9)). Some other states underlined that „(n)otwithstanding that lack of universal participation, the Antarctic Treaty contains many praiseworthy objectives" (Sri Lanka, (A/C.1/40/P.V.48, 46)). The criticism referred rather to the „contractual aristocracy" (Morocco (A/C.1/40 P.V.52, 8–13) of the Consultative Parties and their competence to elaborate the Antarctic minerals resources regime.

3. Practice of states and opinio iuris

3.1. Treaty as an element of practice

There is no unanimous opinion as to the „formal" role of a treaty in the custom-creating process. Many authors consider a treaty which potentially can generate custom as an element of practice of states.[50] Others see it as the expression of *opinio iuris* of its parties.[51] Some of them pay attention to the content of a treaty. „All that matters (...) is what we can infer from the face of the treaty"[52] — as D'Amato ascertains.

Nevertheless, a treaty is not considered as the sole source of custom. Some authors hold that a treaty to create custom requires only the proof of opinio iuris.[53] Though „it is true that treaties may be considered usus", as G.J.H. van Hoof states, „a number of things should be kept in mind in this respect... The *opinio juris* should not be lightly presumed, if the State concerned has in no way participated in the practice".[54]

A slightly different opinion is presented by R. Baxter who requires the existence of practice of third states as well as their opinio iuris, but adds that:[55]

„The rigidity of the requirement laid down in the North Sea Continental Shelf Cases was rightly criticised by Judges Tanaka and Lachs, who alluded to the difficulty of finding opinio juris, as thus defined, in particular cases and to the paradox that a belief in the existence of a legal obligation is a prerequisite to the creation of that legal obligation".[56]

That is why, according to Baxter:

„(...) *opinio juris* is presumptively present unless evidence can be adduced that a State was acting from other than a sense of legal obligation".[57]

The most convincing seems to be Villiger who rightly concludes that the content of a treaty cannot be overestimated. Firstly, in the North Sea Continental Shelf case the I.C.J. did not attach great importance to the text of a treaty, ascertaining only that the norm has to be of a „norm-creating character". Secondly, quasi-legislative functions or intentions cannot be read into a conventional text. Normally it is not clear which of the eventual conventional

[50] A.D'Amato: op. cit., 103–166; M. Akehurst: „Custom as a Source of International Law", 47 *BYILy* 42–52, 1974–1975; H. Meijers: „How is international law made? — The stages of growth of international law and the use of its customary rules", 9 *NYIL*, 15, 1978; H. Thirlway: *Customary Law and Codification*, Leiden 1972, 58–59; G.J.H. van Hoof: op. cit., 109; M. Villiger: op. cit., 196.

[51] Ch.L. Rozakis: op. cit., 33.

[52] A.D'Amato: op. cit., Manifest Intent..., 895.

[53] G.J.H. van Hoof: op. cit., 109; M. Akehurst: op. cit., 44: „treaties, like other norms of state practice, must be accompanied by opinio iuris in order to create customary law".

[54] Ibidem.

[55] R. Baxter: op. cit., 64.

[56] Ibidem, 68.

[57] Ibidem, 69.

rules are regarded as „new" and can, therefore, serve as the basis for the generation of new customary rules. Thirdly, the treaty cannot have a constitutive effect. A text performs functions solely in conjunction with concomitant state practice.[58]

3.2. The behaviour of third states to the Antarctic Treaty

It seems, therefore, that a treaty itself cannot play any decisive role in the custom-creating process. It can be considered only as one of its elements. The other relevant factor is the behaviour of other states towards the treaty provisions, since „the formation of a customary rule depends primarily on the practice of non-parties and not on the practice or intentions of the parties".[59]

First of all, a few cases where the Antarctic territory was used by third states without the infringement of the Treaty provisions can be indicated, for example by Italy[60] (in 1975 established its scientific station), India,[61] Brazil,[62] German Democratic Republic,[63] Federal Republic of Germany,[64] Austria,[65] Canada.[66] These states organised, often with the aid of the parties to the Treaty, scientific expeditions to Antarctica (thus they used the freedom of scientific research). All these states later became parties to the Treaty. Activities in Antarctica are also undertaken by private persons, for example tourism (Spain, Italy),[67] or private scientific expeditions. Until now there were no cases of flagrant breach of treaty provisions by third states (lack of contrary practice).[68]

The practice of third states is also manifested in the statements[69] made since

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[58] M. Villiger: op. cit., 195–196.

[59] M. Villiger: op. cit., 196. Similarly G.J.H. van Hoof: op. cit., 109.

[60] „Italian Expedition works off west coast of Antarctic peninsula", 7 *Antarctic*, 304–305 1976, quoted by P. Birnie: op. cit., 249, 27. See also F.M. Auburn: *Antarctic Law and Politics*, London 1982, 115–116. In 1981 Italy became party to the Treaty, a Consultative Party since 1987.

[61] J. Lans: „India claims a role in Antarctica", *Round Table 289*, 45–46, 1984; Kuljit Ahluwalia: „The Antarctic Treaty: Should India become a party to it?", 1 *IJIL* 473–483, 1960–1961, (see P. Birnie: op. cit, 249). India became party in 1981, since 1983 a Consultative Party.

[62] Party since 1975, a Consultative Party since 1983. See P. Birnie: op. cit., 256, note 45.

[63] Party since 1974, a Consultative Party 1987.

[64] Party since 1979, a Consultative Party since 1981.

[65] Party since 1987.

[66] Party since 1987.

[67] F.M. Auburn: op. cit., 115.

[68] „(I)n the history of the Treaty there has not been any general non–recognition of the arrangement – either by signatories of by outsiders", Lonergan: op. cit., 45, quoted by W.M. Bush: op. cit., 103.

[69] The recognition of verbal forms of practice is evident, for example, in the Asylum Case. The Court referred not only to actual practice in granting diplomatic asylum, but also to the official views expressed on different occasions" {*I.C.J. Rep.* 1950, 376, 377). In examining the practice of states in 1985 concerning the continental shelf the Court took into account not only „the actual practice" of states (Continental Shelf Libyan Arab Jamahiriya/Malta, *I.C.J. Rep.* 1985, 29), but also „the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea" (45). See G.M. Danilenko: „The Theory of International Customary Law", 31 *GYIL*, 24–25 1988. Danilenko rightly states that: „The recognition of verbal forms of practice does not suggest the denial of the specifics of custom. As a source of law, custom

1983 during the debates on the Antarctic Question in the UNGA. Despite the criticism of the Treaty, many states expressed their acceptance of the fundamental provisions of the Treaty.[70] The prohibition of nuclear weapons and radioactive waste in Antarctica, for example, was supported by Algeria, Canada, Cape Verde, Nepal, Uruguay,[71] Antigua et Barbuda, Egypt, Pakistan, Zambia, Syria, Yugoslavia,[72] Bangladesh, Sri Lanka, Jamaica, Libya, Sierra Leone,[73] Malaysia, Ghana, Trinidad and Tobago, Indonesia and Tunisia.[74] It is worth while mentioning the Rapport of the Secretary General noting „a clear consensus among all delegations participating in the General Assembly's deliberations that maintaining Antarctica free from nuclear weapons and from involvement in the nuclear arms race was vitally important for the peace and security of the entire world"[75] and that until 1984

„(a)ll nuclear-weapon Powers have refrained from carrying out nuclear explosions, dumping nuclear waste materials or installing nuclear weapons in Antarctica; in fact, no country, whether or not a Party to a Treaty, has attempted to violate the provisions that make Antarctica free of nuclear weapons".[76]

The freedom of scientific research was accepted by all above mentioned states as well as Senegal, Thailand, Nigeria, Oman and Kenya.[77]

These facts lead J.I. Charney to conclude that these rules are binding toward third states, but he adds, „while a large number of states may be so bound, many states, albeit the least interested, would not be".[78] In some other place he acknowledges:

„While states are not necessarily legally bound by statements made at the United Nations on the record, those statements may provide evidence which is relevant to a search for international law".[79]

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continueras before, to be based primarily on real and concrete legal relations. For this reason, the significance of relevant declarations on the development of customary law depends on the specific situation and should be evaluated each time against the background of actual practice. The specifics of custom lies in the fact that the «public expression of views« in itself cannot lead to the creation of customary rules" (24).

[70] See J.I. Charney: op. cit., 71 et seq. On the debates in the UNGA seeT.B. Millar: „Australia, Britain and Antarctica", (in:) *Papers of a Conference held at the Australian Studies Center*, 4 June 1986, (ed.) T.B. Millar; S. Eilers, „Antarctica Adjourned? The U.N. Deliberations on Antarctica", 19/4 *The International Lawyer* 1985; P.J. Beck: „Antarctica at the United Nations", 1985: „The End of Consensus?", 23 (143) *Polar Record*, 159–166 1986; *The United Nations and Antarctica*, 1986: *The Failure to Restore Consensus*, Kingston Polytechnic, (Jan. 1987).

[71] U.N. Doc. A/C.1/40 in order Algeria.: P.V.54, 13; P.V.53, 28–30, 36, 26–27, 44, 46.

[72] Rpt. Secty–Gen., op. cit., in order Antigua.: Part 11, 1, 3–4; 11, 46; Ill, 32–33, 136, 78, 134.

[73] U.N. Doc. A/C.1/38 in order Bangladesh.: P.V.46, 7, 13; P.V.45, 28–29; P.V.44, 15–16, 13.

[74] U.N. Doc. A/C.1/39 in order Malaysia.: P.V.50, 8, 11; P.V.53, 46, 51, 23, 26; P.V.54, 32, 36, 31.

[75] Rpt. Secty–Gen., op. rit., Part I, 45.

[76] Ibidem, 46.

[77] In order Senegal...: Rpt. Secty–Gen., op. cit., Part II, III, 52, 80; U.N. Doc. A/C.1/39/P.V.53, 16–17; P.V.55, 2; A/C.1/40/P.V.54, 18.

[78] J.I. Charney: op. cit., 74.

[79] Ibidem, 87.

Equally cautious was the representative of Italy, who, during the debates of the First Committee of the GA, stated that the acceptance obtained by some Treaty provisions allows to say that they are „in the process of being recognized as belonging to customary international law".[80]

P. Birnie goes much further. She concludes that the lack of protest toward the Treaty and the acceptance of its general purposes (despite the criticism) resulted in the objective validity of the general principles of the Treaty.[81]

Contrary opinion is expressed by B.Simma who asserts that the silence of third states cannot be taken as tacit consent or opinio iuris since the intention of the parties to the Treaty was not that broad. The parties agreed to set aside disputed question of territorial sovereignty to exclude the continent from the weapon race, to facilitate scientific research and to protect the environment. They always claimed that they act in the general interest and they do not claim any benefits which might result from that activity. In these circumstances, Simma concludes, the natural attitude of third states is „let's wait and see". The necessity of their reaction appeared together with the issue of elaboration of a new regime of the Antarctic natural resources „Their silence, therefore, cannot be qualified as tacit acceptance of an obligation, i.e., as submission to a customary law regime initiated by the Antarctic Treaty".[82]

Simma seems to base his reasoning on two assumptions. Firstly, that the parties can oppose the creation of the customary law when they restrain themselves from applying treaty rules as customary ones in their relations with third states, or if they reject the existence of any customary law parallel to the treaty. Secondly, that the transformation into customary law refers to the whole Antarctic Treaty. One can agree with the first assumption[83] only partially since there are in practice well known examples where the treaty generated custom without the intention or contrary to the intentions of the parties (Hay-Pauncefote treaty of 1901). Secondly, though the true intention of the Antarctic Treaty parties is not clearly manifested, their cautious attitude in that respect, the lack of any statements that the Antarctic Treaty binds third states as a customary law, may result from the very specific situation – the objection of

[80] U.N. Doc. A/C.1/40/P.V.49, 3.

[81] P. Birnie: op. cit., 255; See D.W. Greig: op. cit., 120, 128; R. Lagoni: „The United nations and the Antarctic", 33 *Law and State* , 122, 1986; V. Golitcyn, H. Neuhold, R. Lagoni (in:) *Antarctic Challenge II*, op. cit., 271, 276, 298. J. Symonides: (ibidem, 280) holds that Art. I, II and V of the Treaty are ius cogens and „general customary norms which consequently create an objective status"; R. Lefeber: „The Exercise of Jurisdiction in the Antarctic region and the Changing Structure of International Law: The International Community and Common Interests", 19 *NYIL*, 123, 1990.

[82] B. Simma: op. cit., 204. This conclusion seems to be in concordance with the findings of the P.C.I.J in the Lotus case where the Court warned that the silence of states, an „absence of protest is, (...) of very relative value (...). Abstention from counter-action (...) is only of significance in establishing acquiescence to the extent to which vital interests are affected", *P.C.I.J.* Série A, No. 10 (1927), 28.

[83] See M. Villiger: op. cit., 196.

third states against the attribution by the Consultative Parties of the competence to elaborate the Antarctic mineral resources regime and the willingness of the parties to appease the relations with third states (till 1983 that kind of statements of the parties was not necessary). On the other hand, there are no statements that the Antarctic Treaty has not transformed into customary law.[84]

As to the second argument, Simma rightly concludes that the Antarctic Treaty, as a whole, has not transformed into customary law. In that respect the evaluation of silence of third states till 1983 and the subsequent protest seems correct and convincing. It does not, however, exclude the conclusion that the fundamental rules of the Antarctic Treaty as the prohibition of any military use of Antarctica (art.I), the freedom of scientific research (art.II), the duty to cooperate (art.III), the prohibition of nuclear explosions and the disposal of radioactive waste material (V), or even widely supported during the UNGA debates, the duty to preserve the Antarctic environment (not expressly formulated by the Treaty, inferred from Art.IX) – may become the customary rules independently on the fate of the Treaty regime as a whole. Nevertheless, having in mind extremely specific circumstances of the case, it cannot be stated that this effect has been attained at the moment. Only few examples of the positive practice of third states, their silence and few statements in the UNGA do not develop practice broad enough to create custom. They can only prove that the states are aware, or rather are becoming aware, of the vital importance of the above-mentioned rules to the international community, but not that the rules have customary character.

[84] See e.g., the explanation of the statement of the United Kingdom in the UNGA First Committee: „It is not the purpose of the Antarctic Treaty to purport to confer rights on State parties. Such rights as the instruments in question do create are in principle limited to what is necessary to ensure that the objectives of the Antarctic treaty are achieved and operate only as between the parties" – quoted by J.I. Charney (op. cit., 90) who concludes that this does not necessarily have to mean the exclusion of the existence of custom.

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Towards a New World Air Transport System

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Introduction

The world air transport system is extremely inadequate, if in reality it exists at all.

The deficiencies of the global air services network include inter alia:

1) inadequate coverage of large geographical areas and population centres,

2) discrimination of less privileged routes and centres in terms of service/price options,

3) the predominant position of some partners with no equal opportunity for others to compete, to develop their services and to offer lower prices,

4) distribution channels compromising the neutrality of agents and fair information to the public, and

5) unjustifiable burdens imposed upon air carriers.

As a cumulative result, the network as a whole is not working and developing in a way that allows for the most effective utilization of air transport potential nor that provides better quality or less expensive service to more people. It is presented here that the causes of the inadequacy of the world air transport system originate in conflicting governmental air transport policies, and in the relevant regulations which are bringing about the disintegration and disaggregation of the legal regime and impeding sound development of the system.

Policies affecting regulatory system

Conflicting air transport policy goals

Since the world air transport has grown into a big business with more than S200 billion US of yearly revenues, and since international air services have become a significant part of international trade, national governments have developed policies involving distinct air transport related goals and instruments.

The specific economic objectives of air transport activities are diversified in different countries and regions. Air transport may: serve the society and other

sectors of economic activities as a part of the infrastructure; provide purely commercial, profit-making operations; earn foreign currency as an export industry or otherwise help the national balance of payments as an anti-import activity. There may be a combination of various objectives.

One can, however, derive the two general (basic) goals of national air transport policies from the variety of specific objectives:

Goal 1: Public service optimization. It can be defined as the provision of adequate air transport service at a reasonable (lowest possible) price to meet the needs of society, other sectors of the national economy and travelling public – subject to a general economic rationality test.

Goal 2: Optimization of the national share in international air transport trade. It can be defined as maximizing, as long as economically justifiable, a nation's share in international air transport operations and earnings, which is tantamount to protecting or improving the national balance of payments in the international air transport sector.

While these two basic air transport policy goals are pursued by all, their impact on international air transport relations and regulation is quite different. The public service optimization may easily become a common objective for two or more nations. On the contrary, the objectives of different countries aimed at optimizing and, for a still stronger reason, maximizing their respective share in international air transport services trade are, by definition, opposed to and in conflict with each other. That conflict weighs upon the whole regulatory system.

The sound condition of national airlines, and airport enterprises as well, is a basic prerequisite of any successful air transport policy. Thus, one can see it as the third (implicit) basic policy goal.

Liberalization vs restriction

The instruments that the state may use to achieve its air transport policy objectives within the sphere of its jurisdiction, in confrontation with opposing policy objectives and action of other states, differ widely. The state may be directly involved in air transport activities. This is now disappearing, however, along with the development of aviation as a mature industry. The most common way of carrying out national policy is through direct or indirect regulation – national or by international agreements. Finally, a state may chose deregulation as a means of achieving its air policy goals.

In fact, in the governmental foreign air transport policy, regulation or deregulation and, in particular, the option between protection or liberalization of the international air transport industry, constitute the key problems. There are three factors of basic importance in determining and diversifying national foreign air policy.

Factor 1: Geography. The policy of a state is determined by the size of its territory, its situation in relation to the territories of other states, and its

attractiveness for international airline operations (the latter can be increased by investment). As a general rule, the larger, better located and better equipped the territory of a country, the stronger its position in bilateral air negotiations. As a result, traffic rights may become more difficult to obtain from that country, however liberal might be its policy regarding other aspects of air transport trade – unless better utilization of local facilities is sought. Less geographically privileged states are usually more inclined to liberal exchanges.

Factor 2: Market potential. International air service performance cannot be localized in any one single country. Thus it would not be possible to assign an international air transport market to one single state. However, many states claim some priority rights with respect to air transport operations involving traffic originating in (sometimes also destined to), or contracted and/or paid for in their respective territories. The large traffic generating countries are usually inclined to favour serving their own traffic by their own national airlines, and to regulate rather than liberalize international airline operations. On the contrary, a country that does not generate sufficient amount of its own traffic will usually oppose the idea of national market appropriation, and favour the concept of joint traffic ownership resting with two countries directly concerned – with possible traffic apportionment. The aviation liberals strongly oppose both traffic appropriation and traffic apportionment ideas, claiming free access to international air transport market for everybody regardless of traffic origin.

Factor 3: Competitive strength of national airlines. The size, quality and, in general, the competitive strength of national airlines is last, but not least, a factor determining national air policy. A state with strong and competitive airlines must – caeteris paribus – favour liberal international air transport trade. The usual attitude of states whose airlines are not strong enough to stand competition from more powerful foreign companies is to protect national airlines through various modes of regulation and restriction.

Yet the liberalization vs restriction contest cannot be reduced to an inter-action of the above policy determining factors or their combinations. The problems of civil aviation form only a part of the general problems of liberalization or regulation of the whole world economy and trade.

There is no doubt that liberalization and – to some degree – deregulation, through increased competition and self-regulation, produces beneficial results for the development of a sound air transport system. And that the present over-regulation is probably the main obstacle to the optimization of the system.

However, besides geographical, market and national airline industry related factors, there may be other reasons why governments choose restrictive policies. There is a widespread belief that deregulation brings a waste of resources, anarchy detrimental to the safety and quality of air services, as well as over-concentration detrimental to competition. The fear of elimination of national airlines from the market under an unrestricted competition regime is shared by a large number of aviation countries. Even the most developed

aviation countries, including the United States, question unrestricted freedom of foreign airlines' operations and favour the ideas of „equitable exchange of economic benefits", „economically equivalent rights", „market equivalence", etc. There is a common fear of an unequal deal. Particular restrictive tendencies were attributed to non-market economies in the Eastern Bloc, although most of the restrictions encountered there were initiated or invented elsewhere, or applied against the airlines from that region; yet some restrictions were due to particular market deficiencies and unconvertability of local currencies. Finally, restrictions may also have a corrective, retaliatory, repressive or coercive character, and may be applied for general political (non-aviation) reasons as well.

The multiplicity of factors, conflicting interests and motives determining national foreign air policies is the main reason why the establishment of a common, world-wide international air transport regime was not possible.

Disintegrated regulatory regime

Generally recognized principles

In the absence of a universally accepted international agreement governing international air transportation, with existing treaties covering only some aspects of regulation or binding upon a limited number of states – reference has to be made to customary international air law. The customary rules, however important, do not provide sufficient premises for the development of an optimized system of air transport services. First of all, the generally recognized principle of complete and exclusive sovereignty over the territorial airspace is tantamount to denial of freedom of international air navigation (except over high seas) and makes it subject to state or treaty regulation – which implies restriction. Other generally recognized rules, including: recognition of a national status of aircraft, involving control, responsibility and the right of protection assigned to the state of the flag; prohibition of use of weapons against civil aircraft in flight; the right to require landing or to give other instructions in cases of unauthorized flights; recognition of exclusive (limited in scope) jurisdiction of the territorial state and of the state of aircraft nationality; and concurrent jurisdictions in other areas of aviation activities – do not address economic aspects of international air transport.

The Chicago System

The system consisting of the Chicago Convention on International Civil Aviation, International Air Services Transit Agreement, International Air Transport Agreement, and the technical Annexes to the Convention, is a great achievement of international collaboration, except for commercial aspects of international air services. It actually provides:

1) uniform general principles governing international air navigation, including inter alia: reconfirmation of generally recognized customary law referred to above, obligation to make air navigation more efficient and safer, obligation of non-discrimination between contracting parties, some provisions relating to air transportation, and settlement of disputes;

2) uniform technical standards and recommendations concerning safety and efficiency of international aviation, including some minor aspects of facilitation of international air transport;

3) an important mechanism of international collaboration and regulation, within the scope of the Convention, for technical, economic, legal and mutual assistance matters (except for economic regulation) – the International Civil Aviation Organization (ICAO).

However, the Chicago System failed to provide a general (albeit regulated) freedom for commercial air services. Instead, the freedoms of the air have been disaggregated, so that:

– the freedom to operate non-scheduled flights under Article 5 of the Convention is subject to regulations, conditions and limitations imposed by individual states as far as commercial transport is concerned;

– the two (technical) transit freedoms for scheduled air services are covered by a separate agreement, accepted by only 60 percent of ICAO member states;

– the five (technical and commercial) freedoms for scheduled flights are covered by another separate agreement, accepted by less than 10 percent of ICAO member states.

ICAO has not been empowered to regulate commercial aspects of international air transportation, nor has it been successful so far in working out a new international convention that would deal with them.

Other international air law conventions in force, in particular those belonging to the Warsaw System governing private law issues of international carriage by air and the Tokyo/Hague/Montreal System of criminal air law, do not touch public law aspects of commercial air services regulation.

Regional agreements

Regional air transport regulatory systems are, by definition, oriented to regional and not global problems, sometimes creating separatist blocs of defensive character. Promising achievements achieved in one region, in particular in the European Communities, may bring about much success inside the community, and in its external relations as well. The same arrangements are unlikely to be extended to all other regions because of their unequal level of maturity, and cannot create a basis for development of a world-wide regime. However, much can be learned from the European experience as compared with American deregulation. It is relevant to note that, contrary to the US air transport deregulation, the EC liberalized system is developing progressively and, at the same time, appropriate safeguards are provided therein to prevent abuses and to protect the weakest parties – at least for a transition period.

Bilateral agreements

In the absence of an adequate multilateral framework, the essential part of commercial international air transport regulation is the out-come of bilateral negotiations. For all their merits (as the only practical alternative, flexible enough to reconcile particular conflicting interests), bilateral agreements are to blâme for the main deficiencies of the existing legal system: its disintegration; the absence of generally agreed upon long-term objectives, principles and criteria; disregarding interests of third parties; as well as the multiplicity of constraints and barriers hindering the rationalization and optimization of the world's air services network.

National laws and jurisdictions

Conflicting and restrictive national laws, filling the gaps in the international agreements, and concurrent national jurisdictions, including extensive (extra-territorial) application of domestic rules, add to the total disintegration and disaggregation of the international air transport regulatory regime.

Quasi-regulatory inter-airline arrangements

Multilateral inter-airline arrangements, such as the International Air Transport Association mechanism of consultations and agreements, cannot and must not replace the inter-governmental regulation, the aim of which is to secure overall public interests. The same is to be said in respect to particular inter-airline agreements, complementing air transport regulation; they were required under bilateral air agreements in many parts of the world — now their conclusion is prohibited or resticted in an increasing number of countries.

Conclusion

The existing international regulatory system which, because of its main features, can be called the Chicago/bilateral system, does not respond to the requirements for the rationalization and optimization of the global international air transport network.

Efforts to establish an improved multilateral regime

Past failures and new challenges

During the Chicago Conference, 1944, which did not achieve an agreement as to the extent of mutual authorization in a multilateral instrument of different categories of commercial air operations, the decision was made to continue the

relevant efforts within the provisional and then permanent International Civil Aviation Organization (ICAO). A special conference was called in Geneva in 1947 to discuss a draft multilateral agreement on the exchange of commercial rights in international civil air transport. However, the ICAO member states proved completely unprepared to approve any multilateral commitments of this kind. On the contrary, with only one dissenting vote, the conference declared that the multilateral agreement would not impose any obligation to exchange commercial traffic rights, with these rights remaining entirely discretionary for the parties concerned. „It is difficult to imagine a greater demonstration of separateness, of unbridled self-assertion, of a narrower nationalistic approach", wrote D. Goedhuis in his comments on the results of the Geneva Conference. Further attempt to revitalize that problem within ICAO, as well as the European initiatives to standardize the administrative clauses at least for bilateral agreements, failed due to the opposition of a considerable majority of ICAO member states. On the same ground, attempts to achieve multilateral regulation of commercial air transport by three ICAO air transport conferences (1977, 1980 and 1985), convened primarily to meet the desires of developing states, have not been successful – apart from a set of „soft" recommendations. Even the idea of recommending a comprehensive study by the ICAO on the relevant issues (strongly voiced by Poland) was rejected at that time. Finally, due to the reluctant attitude of a majority of its members, ICAO was unable to react in time to GATT initiatives (discussed below).

Nevertheless, the idea of building up a new multilateral system of international air transport regulation has received a new boost in the developed world in the last decade with a more extensive governmental movement towards economic disengagement, and an increase in consumers' expectations within mature markets. The US deregulation and Western European liberalization, as well as similar moves in some other regions, provided examples of new regimes to be followed or otherwise to be met by outsiders, albeit merely to survive increased competition. Instead of forming counter-blocs and new protective measures, some of the third parties may now be more inclined to common multilateral solutions. The recent developments in Central and Eastern Europe, and in East-West relations, have also created new challenges, with new questions calling for a multilateral response.

Within the air transport industry itself, along with the liberalization of the most developed markets, there is a growing tendency towards increasing expansion of the leading airlines or strengthening the position of weaker ones through cross-border plans involving: marketing and other alliances, investments, acquisitions and mergers. There are realistic prospects for the emergence of new multi-national mega-carriers or global airlines.

The problems of balancing rights, opportunities and benefits in international air transport become more and more complex as new elements, such as hub and spoke advantages, code sharing, computerized reservation systems, cabo-

tage or close-to-cabotage facilities, or sixth freedom rights, appear on the agenda of aviation negotiations – and all these issues affect the interests of third parties as well.

The existing Chicago/bilateral system does not appear to be any more adequate to meet all these new challenges. It has to be modernized – and not just because the leading aviation countries seek new solutions to facilitate the expansion of their airlines. „Those governments and airlines which shelter behind bilateral protectionism are" – as rightly stated experts in a Think-Tank Report – „likely to find that their strategy, like that of the ill-fated Maginot Line, will be out-flanked". Yet the war may be long-lasting and wasteful for everyone. All parties must make joint effort to achieve an agreement combining liberalization with necessary safeguards to protect basic national interests and, in particular, the interests of the developing airlines as a prerequisite for world-wide acceptance of any new regime.

The GATS concept

According to the Punta del Este Declaration (1986), it was decided that the trade in services should be included in the Uruguay Round of GATT negotiations. A Group of Negotiations on Services (GNS) has been established to deal with these matters. The progress of GNS work was slow, as was the whole process of the Uruguay Round. Nevertheless, the draft General Agreement on Trade in Services is almost ready for acceptance by the parties (members), and the negotiation of initial commitments of the members are proceeding in the meantime. Schedules of specific commitments shall be annexed to the agreement and shall enter into force at the same time as the agreement.

The general provisions of the agreement shall be applied to all service sectors by all members in accordance with and subject to derogations provided in sectoral annexes.

The most important general obligation is that concerning most-favoured-nation (MFN) treatment. With respect to any measures covered by the agreement, each member must accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country. It is relevant to note that the MFN concept was rejected at the Chicago Civil Aviation Conference in 1944, but the non-discrimination principle was adopted in a number of provisions of the Chicago Convention. According to GATS, exemptions from the MFN treatment obligation are admitted under certain conditions.

Other general obligations and disciplines under the agreement relate to: transparency; increasing participation of developing countries; economic integration; recognition of professional qualifications; monopolies and exclusive service providers; business practices; emergency safeguard measures; payments and transfers; restrictions to safe-guard the balance of payments; government

procurement; general and security exceptions; and subsidies. In fact, except for transparency, the above subjects remain beyond the scope of the Chicago Convention, yet are often subject to the provisions of regional (e.g., EC) and bilateral agreements.

Specific commitments under GATS are provided for market access and national treatment. With respect to market access of services and suppliers of any other member, each member shall accord treatment no less favourable than that provided in specific commitments set forth in its national schedule. And in the sectors inscribed in such a schedule, each member shall grant services and service suppliers of any other member treatment no less favourable than what it accords its own like services and service suppliers. The specific commitments and corresponding national schedules are to be negotiated, agreed upon and modified according to the procedures of progressive liberalization. Such procedures were never before applied to air services negotiations, but national treatment clauses can be seen in the Chicago Convention and other air agreements – except for traffic rights.

The sectoral annex on air transport services contains provisions applicable, in principle, to both scheduled and non-scheduled air services, and ancillary services as well. However, the same annex states forth an important exception to the application of the GATS provisions for measures affecting:

– traffic rights covered by the Chicago Convention, including the five freedoms of the air, and by bilateral air services agreements, and

– directly related activities which would limit or affect the ability of members to negotiate, to grant or to receive traffic rights, or which would have the effect of limiting their exercise.

The above exceptions do not apply to aircraft maintenance services, to the selling and marketing of air transport services, and to computer reservation services. The annex will also probably include a provision dealing with cases of national schedules covering air transport services. The text makes reference to the application of GATS dispute settlement procedures after exhaustion of procedures provided for in aeronautical agreements. Finally, it states that air transport services and the operation of the annex shall be reviewed periodically or at least every five years.

It would be premature, at this stage, to evaluate the significance and possible effects of application of the GATS, including its air transport annexe and the relevant national schedules, for the operation of the world air transport system. However, the following can already be stated:

– the basic („hard") traffic related rights have been excluded in principle from the GATS system which means that the Chicago/bilateral (or any alternative) system of traffic rights regulation is supposed to operate beyond the scope of the GATS;

– other (ancillary or „soft") rights, which were usually negotiated along with traffic rights as one package, will have to be subject to a double (GATS and aviation) regime, or excluded from aeronautical agreements;

– conflicts between the two regimes will be unavoidable;

– states which used to offer extension of traffic rights in exchange for extension of ancillary rights, and vice versa, will now be unable to do so with the two categories of rights subject to different regimes of negotiations;

– as a result, the process of liberalization of aviation exchanges may be jeopardized;

– the general and unconditional application of the MFN treatment with respect to non- traffic rights may also slow down the process of liberalization of these rights in a number of countries.

Having the above in mind, and before the exact meaning and implications of the operation of the new (double) regime are clarified, one can only conclude that the prospects of that regime are still unclear and the effects of its adoption on the liberalization and improvement of the present system are unpredictable.

Extensible plurilateral concepts

The idea of seeking a multilateral agreement between a limited number of states, not necessarily belonging to the same geographical region but prepared to exchange liberalized commercial rights for international air services, with a possibility for other states to join at a later date when convinced of its effectiveness, has developed parallel to the GATS concept. The initiative came from the Netherlands, but it found support form experts representing liberal aviation centres in other countries as well. The concept was discussed at specialized colloquia in Holland (1981) and Marakesh (1989), and developed by a small group of experts called the Think Tank on Multilateral Air Transport Liberalization established in 1990 with H. Raben as chairman.

An expanding multilateral would be appropriate in the case of GATS covering ancillary (soft) rights only, and even more important in case of GATS failure in the air transport sector. Under the proposed regime, the airlines of contracting states should be free to operate between any international airports with no restrictions on capacity or frequency of services. Cabotage should possibly also be considered. Prices should be a matter for the market. Competition rules should prohibit anti-competitive agreements, predatory behaviour and the abuse of a dominant market position. Subsidies disturbing competition should be eliminated. Non-discriminatory business rules should be agreed upon. There should be no nationality limitations on airline ownership. Transparency requirements and procedures for the settlement of disputes should also be provided for. The agreement should be opened for expanding membership, with possible transitional measures to secure wider acceptance of the new regime.

The plurilateral concept looks interesting and realistic, capable of harmonization with the existing Chicago/bilateral system. It also contains elements taken from the EC experience. Its wider acceptance will certainly depend on

what transitional measures and safeguards, if any, will be offered to developing aviation countries. Unfortunately, there was no wider consultation on the subject which was dealt with in an exclusive club atmosphere. One may expect that the concept will be considered by ICAO experts and conferences as well.

Recent ICAO developments

After a long period of suspension due to lack of support from its member states for the organization's action on air transport economic regulation, the ICAO Council decided to convene a World-wide Air Transport Colloquium (Montreal, April 1992) and to establish a Study Group to explore new regulatory arrangements for international air transportation. The Study Group is supposed to address the following topics:

1 – the basic objectives for entry into such arrangements,
2 – the equitable delineation of market access including route, traffic and operational rights,
3 – broadened criteria, beyond national ownership and control, for airline use of such access,
4 – the nature, purpose and specific kinds of safeguards required to ensure fair competition,
5 – potential structural impediments, including subsidization of airlines and physical restraint on access,
6 – relationship with the broader regulatory environment, including that of competition law,
7 – treatment of doing business issues, and
8 – such other topics as may be identified.

The Study Group is not expected to work out a single world-wide arrangement which the Colloquium saw as not feasible in the forseeable future, but will consider the possibilities for plurilateralism in air transport regulation. Other aspects to be taken into consideration include: movement of more states into market-oriented economies; increasing needs and wants of consumers/users and communities; globalization of service industries; liberalization of air transport regulation, including quests for open skies; privatization of airlines; partial foreign ownership of airlines along with the creation of inter-airline alliances.

At the same time the Study Group is supposed to consider frequently expressed concerns that:

– significant disparities in the size and competitive strength of airlines, particularly when so-called mega-carriers from various world regions are involved, could generate harmful consequences for airlines perceived to be weaker;

– an aggregation and expansion of negotiating strength by states acting as a group (including a non-regional group of „like minded" states) could adversely impact outside states and airlines;

– air transport relations may fall under the control of trade negotiators or, alternatively, the above concerns could blind air transport regulators to potential benefits of applying various trade principles, practices and mechanisms to international air transport;

– states with limited air transport systems ought to have the opportunity to participate in future regulatory arrangements on a progressive and viable basis, presumably one that recognizes their developing status while not altering the essential, new character of such future arrangements.

The results of that exploration should form a reasonably comprehensive whole (if each topic is explored with the others in mind), and are expected to provide a substantial volume of substantive content for the agenda of the Fourth Air Transport Conference likely to be convened in 1994.

The above description of the task of the Study Group, taken from an excellent note of its Coordinator J.R. Chesen, marks a tremendous progress in ICAO's approach to future regulatory arrangements for international air transport. Poland can also be satisfied as its proposals concerning ICAO action in this field have not been disregarded. Yet, we have to await the outcome of the work.

Concluding Remarks

The establishment of a liberalized multilaterally negotiated system aimed at radical improvement, if not optimization, of international air transport operations, for the benefit of all nations, remains a remote goal. Neither Western European integration and liberalization nor US or other deregulatory concepts, adopted to internally developed markets, have found a sufficient number of followers in other nations. These nations have sought regulatory protection rather than unrestricted competition. Reconciliation of different interests and policy objectives will be an extremely difficult task – even between countries representing similar aviation and market development level. It will be even more difficult to reconcile the interests and objectives of unequally developed parties. There are severe doubts as to whether the present efforts, as described in the previous section, are likely to produce anything more than instruments acceptable to a limited number of most developed aviation countries.

To solve the problems at the global scale there must be a common desire to seek an improved multilateral system and a conviction that it would be worth giving up a part of what each party might prefer. There will be no world-wide liberalized agreement unless:

– developed aviation countries, in exchange for considerably increased opportunities for expanding their strong airlines, agree not only to liberalize access to their markets for developing foreign airlines, irrespective of non-equivalent markets, but also to accept some provisions to ensure a reasonable share for a weaker party, and

— developing aviation countries, in exchange for such concessions, agree to liberalize not only traffic rights, capacities and tariffs, but also all ancillary rights, thus alowing for increased competition sought by developed parties.

To make all multilateral agreement even more widely acceptable, one should consider some temporary, transitional arrangements, or optional packages of liberalization within the same multilateral system, allowing for progressive liberalization.

It is submitted, that substantial improvements in the world air transport system through its liberalization with built-in safeguards is feasible, and multilateral arrangements may become widely acceptable, but each party must yeld a part of its individual expectations to achieve the common goal.

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1) Selected jurisprudence of the Supreme Court and the Constitutional Court comprising cases connected with Public and Private International Law, published in 1992

I. Judgment of die Polish Constitutional Court of January 7, 1992 (K. 8/91), published in the Jurisprudence of the Constitutional Court, 1992, item 5

In this case the Constitutional Court dealt with the joint application of the President of the Supreme Administrative Court and Polish Ombudsman claiming Article 36 al. 2 of the Law of October 12, 1990 on the Border Guard to be inconsistent with Articles 1 and 67 al. 2 of the Polish Constitution as well as with Articles 14 and 26 of the Covenant on Civil and Political Rights.

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The Constitutional Court decided: the provision of Article 36 al. 2 of the Law of October 12, 1990 on the Border Guard (Official Journal n° 78, item 462) in its part excluding for the members of the Border Guard the possibility to bring before the independent court their claims resulting from the official relations is dissent with articles 1 and 67 al. 2 of the Constitution of the Republic of Poland

Outside its sentence the Constitutional Court states that Article 36 al. 2 of the Law on Border Guard of October 12, 1990 is incompatible with articles 14 and 26 of the Covenant of Civil and Political Rights (Official Journal of 1997 n° 38, items 167 and 168).

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Reasoning:

Considering all the circumstances of the given case the Constitutional Court found out that the Law on the Border Guard is the only legal act in Poland which would exclude for the group of state employees the access to justice in

the protection of their rights violated in the service relationship. At the same time the Court found no reason for such a discrimination of the members of the Border Guard since all the legal acts governing service relations of the other groups of state functionaries like: police, and soldiers, do not comprise similar regulation.

In consequence, the Court recognized that Article 36 al. 2 of the Law on the Border Guard violates Article 1 of the Polish Constitution stating: „The Republic of Poland is a democratic state of law realizing the rules of social justice". The right of access to independent court is considered as one of the fundamental rules of the democratic state.

The Court stated also that the afore of the Law on the Border Guard is mentioned pronsion contrary to Article 67 al. 2 of the Constitution containing the rule that all Polish citizens are equal before the law. This rule obliges state organs to treat all the subjects of law without discrimination or favorisation. The service relationship of the members of the Border Guard does not contain any characteristic feature which could explain this exceptional interdiction on the access to justice.

As to the second charge of the application — the inconsistency of Article 36 al 2 of the Law on the Border Guard with Articles 14 and 26 of the Covenant on Civil and Political Rights the Court expressed its view outside the given sentence. In its opinion the law in force does not give it the competence to examine the conformity of the Polish law with the international treaties concluded by Poland.

The stand point of the Constitutional Court as to the force of the international treaties in Polish internal relations is that they are directly applicable within Polish municipal law. They should be applied by Polish state organs and in particular by courts ex proprio vigore because their binding force results from the ratification by the Polish state. The only exception concerns the treaties which are not self-executing, but the Court does not precise on what ground these treaties can be applied in Poland.

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Commentary:

The discussed judgment is important not only for its main solution comprised in the sentence and consisting in declaring the incompatibility of the Law on Border Guard with the rules of Articles 1 and 67 al. 2 of the Polish Constitution. The grounds for this solution are clear. The Constitutional Court is competent to control the conformity of the acts of the lower rank with the Constitution and the discrimination of the members of the Border Guard is not discutable.

The annexed part of the sentence concerning indirectly the position of international treaties within the Polish legal system is of great importance. This question remains unsolved in the post—war history of Poland because of the lack of sufficient regulation in the Polish Constitution. Discussing the problem the majority of the doctrine declared the application of the norms of international law ex proprio vigore, while the jurisprudence did not take uniform

position. The jurisprudence never clearly expressed its acceptance for the application of the international treaties ex proprio vigore, but in numerous cases either the Supreme Court or the district courts applied or at least referred to international treaties neither expressly transformed nor evoked to by Polish municipal law.

In the presented case the Constitutional Court has adopted the position that the ratified international treaty is binding for the Polish state, and in consequence, should be applied by courts ex proprio vigore. It means that rights and obligations can derive for Polish citizens from international treaties without prior transformation to the Polish law. The only exception concerns treaties which, because of their contents, are not self-executing.

The next problem arising from the judgement of the Constitutional Court concerns its competence to examine the inconsistency between the international treaty and Polish law. The Court considers itself incompetent according to the existing law. This opinion can be regarded as justified when considering the treaties which are ratified exclusively by the President. However, the new Constitutional Law of October 17, 1992 on the organization of the state authorities and division of competences (Official Journal n° 84, item 426), as well as the prior amendement of 1989 to the Constitution of July 22, 1952 introducing to the Constitution Article 32 g p. 2 demanding prior acceptance by the Diet before the ratification of certain international treaties by the President, brings new elements to the discussion. In particular, the acceptance of the international treaties by a bill of the Parliament can be regarded as the mean of transformation of international treaty to the Polish municipal system. In consequence, the international treaty would have a rank of a law in Polish legal system and could be controlled by the Constitutional Court as to its conformity with the Constitution. This practice could authorize the Constitutional Court to evaluate also the conformity of the acts of lower rank, like Law on Border Guard, with the international treaties.

In the presented judgment the law on Border Guard is declared to be contrary to the Constitution while its disagreement with the international treaty is only signalized and will not have any influence on its application in Poland.

H. The Judgment of the 7 judges of the Penal and Military Chamber of the Supreme Court of Poland of October 17, 1991 (H KRN 274/91), published in the Jurisprudence of the Supreme Court. Penal and Military Chamber, (OSNKW) 3—4/92, item 19

This judgment of the Supreme Court has been enacted in the extraordinary appeal proceeding, instituted by the President of the Supreme Court in favor of the accused. The President of the Supreme Court claimed that the decree on martial law of December 12, 1981 (Official Journal n° 29, item 154) was contrary to the principle lex retro non agit, formulated in Article 15 of the Covenant on Civil and Political Rights, ratified by Poland in 1977.

The Supreme Court considered the appeal of the President of the Supreme Court justified, changed previous sentences and pronounced the accused innocent.

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The Supreme Court decided: The interdiction formulated in Article 15 of the Covenant on Civil and Political Rights belongs to the category of the norms of international law, which can be directly applied in the municipal systems of the states-parties to this agreement (self-executing norms).

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Reasoning:

The accused had been tried and sentenced by virtue of Article 46 al. 1 and 2 of the decree on martial law for organizing and leading the strike in the coal mine from 14 till 17 December 1981. His acts did not constitute crimes by virtue of the Polish Penal Code. According to the Article 61 of the martial law the restrictions on civil and political rights imposed by this act were in force from the day of its passage and not from the day of its promulgation in the Official Journal, which is the normal practice in Poland according to Article 25 al. 2 of the Polish Constitution. The retroactive force of the decree on martial law was contrary to the rule of Article 1 of the Polish Penal Code as well as to Article 15 of the Covenant on Civil and Political Rights. Article 4 of the same Covenant declares that the rule lex retro non agit cannot be abrogated even if an extraordinary danger is officialy declared to threaten the existence of the nation.

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Commentary:

The judgment of October 17, 1991, of the Supreme Court confirms indirectly the rule dominating in the Polish legal writing that international law is valid ex proprio vigore in domestic legal system. The direct application refers to those treaties which were ratified and promulgated in the Official Journal. The direct application is confirmed by the Supreme Court for the self-executing treaties, among which the provision of Article 15 of the Covenant on Civil and Political Rights can be classified.

The judgment of the Supreme Court does not explain the notion of the self-executing treaty. According to the legal writing, the norm is self-executing if it can be included into the legal system of the state and its application does not depend on the state legislation. On the other hand the contents and construction of this norm must allow its application and observance in the internal relations. In consequence, the self-executing norm can be understood as the norm which is directly applicable – without the transformation into the municipal legal system, but also as the norm which has the direct effect – can be applied by courts without any executive act of Polish law.

These norms can be classified in two categories (as to their contents): norms with the direct negative effect and norms with the direct positive effect. The negative effect consists in the obligation for the state organs to refrain from certain acts defined by the norm, while positive effect obligates the state agencies

to realize the rights and obligations of the citizens deriving for them from the international treaty.

The rule of Article 15 of the Covenant on Civil and Political Rights can be ranked among norms with the negative direct effect what means that state agencies are obliged to refrain from the application of the provision of internal law dissent with the international norm. The court before which the case is tried can only confirm this negative character of the international legal norm and by this fact the state is obliged to refrain from certain activities.

Another important conclusion results from the reasoning of the Supreme Court in this case. The Court recognizes the priority of the earlier international treaty (Covenant of 1966) before the later Polish legal act (Decree on martial law). The problem of the priority in case of inconsistency between Polish and international norms remains unsolved because of the silence of the Polish Constitution on this matter. The stance of the Supreme Court in this judgement brings a new element to the discussion but this controversy should be finally regulated in the new Polish Constitution.

III. The Resolution of the 7 judges of the Civil Chamber of the Supreme Court of June 12, 1992 (UI CZP 48/92), published in the Jurisprudence of the Supreme Court, Civil and Labour Chamber, (OSN) 10/92, item 179

The President of the Supreme Court submitted the following questions to be answered by the Supreme Court:

1) Does the rule declaring the priority of the adoption by the Polish family in the light of Article 220 al. 3 and Article 21 b of the Convention on the Rights of Child (Official Journal of 1991 n° 120, item 526) adopted by the UN General Assembly on November 20, 1989, in force in Poland since July 7, 1991, mean that the adoption of a child by parents residing permanently abroad depends on the prior establishing by the competent organs that former efforts undertaken within Polish territory to place the child in the substitutional family environment turned out to be useless?

2) Do the provisions of Article 21 e as well as Article 35 of the Convention restrict the possibility to conduct the payable, individual mediation in the adoption procedure and to what extent; is there an obligation within the existing structures to use as an intermediary exclusively the specialized extra—judicial institutions cooperating with corresponding foreign organizations by virtue of the appropriate agreements and treaties?

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The Supreme Court has passed the following resolution:

1) The adoption of the Polish child which would involve replacement of the child to the foreign country can take place when there is no possibility to place the child on the equivalent conditions in the substitutional or adoptive family in Poland. In this procedure the superior in terest of the child should be considered as the decisive factor (Article 20 al. 3 and Article 21 b of the Convention on the Rights of the Child).

2) The provisions of Article 21 d and e as well as Article 35 of the Convention require the mediation in the international adoption procedure to be conducted by the competent and specialized agencies, in cooperation with the appropriate foreign organizations by virtue of the appropriate agreements and treaties. These provisions do not directly restrict the number of subjects engaged in the adoption procedure.

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* *

Reasoning:

The Supreme Court has expressed its view on two questions: the admissibility of the international adoption and the legal mediation in the international adoption procedure. The necessity to solve these problems arose after the ratification by Poland of the Convention on the Rights of the Child of 1989. The interpretation of the appropriate provisions of the Convention — and in particular of the notion of „the superior interest of the child" — led the Supreme Court to the acceptance, with some restrictions, of the international adoption. Earlier the adoption of Polish children by foreigners has been rejected by some authors as dissent with Article 21 of the Convention.

The Supreme Court states that the superior interest of the child does not require the interdiction of the international adoption in every case, especially when the only alternative would be the placement of the child in the state institution providing care for abandonned children and orphans. It is a duty of the independent court to establish in every single case which solution would be the most advantageous for the child. Even the consent by the natural parents required by national law can not be treated as the only important and binding premise in undertaking the decision concerning the admissibility of the international adoption, either when it militates for, or against it.

The Supreme Court has also adopted a very liberal position as to the authorization for different individuals and institutions providing services in organizing international adoption. In its opinion the only restriction is that such individuals and institutions must be professionals. Their activity cannot be of exclusively commercial character and they cannot make unfair profit from their services.

In addition to the principal question the Supreme Court expressed its opinion on the problem of the application of the international treaties in Polish domestic relations. According to the Court, the delivering of its view on this matter was necessary because neither Polish family law nor rules of civil procedure contain special provisions concerning international adoption, and it was important to find grounds for the application of the international law in these cases. It seems that the Supreme Court avoided to formulate a general opinion by restricting itself to the problem of the application of the Convention on the Rights of the Child in the Polish municipal legal system.

The court recognized the law enacted by the Parliament and comprising the approval for the ratification of the Convention by the President as the mean of transformation of the treaty to the Polish internal system. Through this act of transformation the Convention acguieres validity egual to the Parliament's law and can be applied by the courts.

Commentary:

Since the Convention on the Rights of the Child entered into force in Poland, the opinion of the Supreme Court on the interpretation of the provisions of this treaty concerning international adoption became necessary. The extended interpretation of the Article 21 of the Convention led some lawyers to the conclusion that the international adoption is prohibited by the Convention. On the other hand the growing number of the demands for adoption of Polish children by foreigners required the clear position of the Polish organs as far as this subject is concerned.

The Supreme Court rightly observed that the rule of the superior interest of the child constituted the most important premise in resolving all questions regulated by the Convention. The preservation of the national identity of the child militating against the international adoption can not be deliberated in isolation from this general rule influencing all the provisions of the Convention. The priority of the adoption by Polish parents can not be understood as the absolute value.

Neither the possibility of the creation of the private agencies destin to provide mediation in the international adoption procedure can be excluded a priori. The monopoly of one or few state agencies could more possibly lead to abuse of the rights of the child than the authorization given to several institutions.

In its opinion related to the position of the international law in the Polish municipal system, the Supreme Court expressed the more restrictive view than one in previously discussed judgments of the Constitutional Court and the Penal and Military Chamber of the Supreme Court.

Although the Supreme Court accepted the application of the Convention in the Polish domestic relations but its force within Polish territory derives from the transformation of the international treaty by virtue of an act of Parliament comprising the prior approval by the Diet of the ratification by President. This act of the Parliament introduce the Convention into the Polish legal system with the force of a law. According to the Supreme Court the very parliamentary procedure and not the ratification and promulgation of the international treaty authorizes courts to apply the international treaty in Poland. The Convention is in consequence applied not ex proprio vigore but as the part of the Polish legal system.

The analysis of the contents of Article 20 and 21 of the Convention leads to the conclusion that norms included in these provisions are not self-executing because their application in Poland demands enactement of the executive act of the lower rank. The amendements to the Polish Family Code, Code of the Civil Procedure and Private International Law will also be necessary. Until these legislative undertakings take place the courts and other state agencies must create such a practice in the application of Polish law which would assure the conformity of these acts with the requirements of Articles 10 al. 3 and 21 of the Convention.

The Supreme Court did not resolve the problem of the priority of the international treaty over the national law leaving this question to be decided by the new Polish Constitution.

IV. The Resolution of 7 judges of the Civil Chamber of the Supreme Court of March 30, 1992 (DI CZP 17/92), published in the Jurisprudence of the Supreme Court, Civil and Labour Chamber, (OSN) 11/1992, item 185

The Supreme Court examined the question submitted by the President of the Supreme Court: Which law is applicable to evaluate the legal effects of the purchase by a Polish citizen of the car stolen abroad?

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* *

The Supreme Court has undertaken the following resolution and has given to it the force of the rule of law:According to the regulation of Article 24 al. 2 of the Polish Private International Law (Law of November 12, 1965 – Official Journal n° 46, item 290) Polish law is applicable to evaluate the legal validity and effects of the bill of sale concerning the car stolen abroad and situated in Poland at the moment of the conclusion of the contract.

*
* *

Reasoning:

The Polish Private International Law requires the application of lex rei sitae to all questions concerning the property and other real rights on movables. The acquisition and the loss of the property are governed, according to Article 24 / 2 of the Private International Law, by the law of the state in which the movable object is situated at the moment when the events influencing the transfer of that property take place. The transfer of property can be the result of the legal act of other event. The establishing of the applicable law is relatively easy when all the elements of the factual state leading to the change of proprietor take place in one state, but in the presented case the robbery of the car depriving the proprietor of the possession took place abroad, while the conclusion of the bill of sale between the person having no right to dispose of the car and the purchaser occured in Poland.

The Supreme Court recognized that the robbery of the car had no influence on the property right. The conclusion of the bill of sale which took place in Poland, was decisive for the choice of law so the transfer of property resulting from this agreement was governed by Polish law. In Polish civil law the acquisition of the movable property from person not entitled to dispose of the thing is regulated by Article 169 of the Civil Code (Law of April 23, 1964 – Official Journal n° 16, item 93 with the posterior changes). Article 169 al. rules that the purchaser of the stolen object can become the proprietor of it not earlier than after 3 years from the date of the robbery. Another condition which must be fulfilled is that the buyer has to act in good faith.

Taking into consideration that the legislations of different countries can comprise the regulations governing the conditions of the sale of movables by a person not entitled to dispose of it, in different ways the Supreme Court adopted the opinion that the period during which the owner can legaly vindicate his car should be counted starting from the moment when the car entered the Polish territory.

* * *

Commentary:

The analysed resolution of the Supreme Court is of great importance because of the numerous transactions concerning cars stolen abroad concluded by Polish citizens. The Choice of the proper law governing these transactions can lead to the application of the legal system radically different in relation to the discussed matter from the law of the country whose citizen the owner is. For example, the substantial inconsistence exists between the German and Polish laws, since according to the 935 of the German Civil Code the purchaser of the stolen car can never legały become its owner, while Article 169 al. 2 of the Polish Civil Code only shifts this acquisition in time.

As to the rules of the conflict of laws, they are similar at this point in many countries what means that the majority of legal systems adopt the rule lex rei sitae for the transfer of movable property. The conclusion is decisive for the choice of law of the bill of sale. In the discussed case the conclusion of the contract took place in Poland and in consequence the Polish law is applicable to evaluate the legal effects of the acquisition of the stolen car. The place of the robbery could be decisive only for the establishment of the applicable law for the delictual responsibility of the offender (Article 31 al 1 of the Private International Law).

However, the solution adopted by the Supreme Court with respect of the manner in which the passage of time necessary for the purchaser to become owner of the car should be counted is controversial. The Supreme Court designates the moment of entering the Polish territory by the car as the beginning of this term. It seems that as Polish law applies to the effects of the bill of sale, the conditions of the transfer of the property should be governed entirely by Polish law. Article 169 al 2 of the Civil Code counts the 3 years' term of protection of the rights of the owner starting from the day of the robbery. This solution would be more practical in case when the car is transferred across the border even several times before the passage of the period of protection. In every country applying different term of protection for the owner (for example 5 years in Switzerland) the organs of this state could count this term starting from the day of the robbery. Another argument for this solution is that Article 169 al. w of the Polish Civil Code should be applied without deformations resulting from the attempts of adaptation to the legal systems which are not applicable in this case.

The choice of the Polish law as the law applicable for the evaluation of the legal effects of the bill of sale concerning the car stolen abroad protects the rights of Polish citizens acting in good faith and assures the internal harmony of the judicial practice. On the other hand it is necessary to admit that the situation of the purchaser of the car can become difficult if the solution resulting from application of Polish law is not recognized under the legal system of the country the citizen of which the former owner is.

EWA SKRZYDŁO-TEFELSKA

2) International Treaties Entered into Force with respect to Poland in 1991 and 1992

The list published below comprises the most important international agreements, both bilateral and multilateral, which became biding on Poland in 1991 and 1992. The list does not include inter-departmental agreements (agreements concluded on the level of ministers) and presents only agreements concluded on behalf of the Republic of Poland or the Polish Government. Protocols, plans and executive programs have not been included either.

Under the Polish Constitution, the President has the power to ratify and denounce international treaties. On each such occasion, the President is required to inform the Polish Parliament. Prior authorization of the Parliament is necessary for ratification or denunciation of international treaties concerning state borders, defence alliances or treaties which will entail financial encumbrance for the state budget or the necessity of changes in legislation.

Pursuant to the Joint Resolution of the Council of State and the Council of Ministers of December 28, 1968 concerning the conclusion and denunciation of treaties, the procedure of ratification is to be applied to treaties of special importance:

- peace treaties and treaties of friendship, cooperation and mutual assistance;
- other treaties of political character;
- treaties concerning matters regulated by acts of Parliament in internal law;
- treaties containing regulations different from those found in internal legislation;
- other treaties with which Poland has committed herself to apply the procedure of ratification in order to satisfy the legal requirements of the other contracting party or if the parties have chosen this procedure for special reasons.

The 1968 Joint Resolution does not specify which treaties must be submitted to the procedure of approval.

All ratified treaties are published in Dziennik Ustaw (Journal of Laws), an official journal in which laws and regulations are published. There is no complete collection of treaties binding on Poland.

Bilateral treaties are presented below according to the names and countries in alphabetical order, according to the following pattern: title of treaty, place and date of its signature, way of expressing consent to be bound by the treaty, date of entry into force with respect to Poland. Multilateral treaties follow the same pattern.

Bilateral Treaties 1991

Austria

- Agreement on the mutual enforcement of judgments in criminal matters; Vienna, April 19, 1990; ratification; March 1, 1991;
- Agreement on readmission; Warsaw, 2 August 1991; signature; August 2, 1991.

Brazil
– Agreement on the abolition of diplomatic and service visas; Brasilia, July 29, 1991; signature; July 29, 1991.

Bulgaria
– Agreement on trade and payments; Sophia, April 29 1991; approval; November 12, 1991.
– Protocol on the regulation of reciprocal payments and fiscal liabilities in connection with the changing of settlements to exchangeable currencies; Sophia, April 29,1991; approval; November 15, 1991.

Canada
– Agreement on the promotion and reciprocal protection of investments; Warsaw, April 5, 1990; notification; November 22, 1990.

Finland
– Agreement on the promotion and reciprocal protection of investments; Helsinki, April 5, 1990; notification; February 21, 1991.

Germany
– Agreement on the promotion and reciprocal protection of investments; Warsaw, November 11, 1989; ratification; February 24, 1991.
– Agreement on social security; Warsaw, December 8, 1990; ratification; October 1, 1991.

Greece
– Agreement on the avoidance of double taxation with respect to taxes on income and on capital; Athens, November 20, 1987; ratification; September 28, 1991.

Israel
– Agreement on the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Jerusalem, May 22, 1991; notification; December 30, 1991.

Sweden
– Agreement regarding assistance in customs matters; Warsaw, April 16, 1991; approval; November 15, 1991.

Switzerland
– Agreement on the reciprocal abolition of the visa requirement; Berno, September 2, 1991; approval; September 3, 1991.

Turkey
– Agreement on legal assistance in criminal matters, on extradition and on the transfer of convicted persons; Ankara, January 9, 1989; ratification; June 8, 1991.

United States
– Agreement regarding cooperation and mutual assistance between customs services; Warsaw, August 8, 1990; ratification; January 15, 1991.

Uruguay
– Exchange of notes regarding the abolition of the visa requirement for holders of diplomatic, official and service passports, and for ordinary citizens; Montevideo; August 2, 1991; exchange of notes; August 2, 1991.

Multilateral Treaties

– Convention on the Rights of Children adopted by the General Assembly on November 20, 1989; ratification; July 7, 1991.

Bilateral Treaties 1992

Albania
– Agreement on the abolition of visas for holders of diplomatic passports and service passports and service passports of the Ministry of Foreign Affairs, as well as for their family members, January, 20 and 21, 1992; exchange of notes; April 25, 1992.

Argentina
– Agreement on the promotion and reciprocal protection of investments; Buenos Aires, August 31, 1991; approval; September 1, 1992.

Australia
– Agreement on the reciprocal promotion and protection of investments; Canberra, may 7, 1991; notification; March 27, 1992.
– Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Canberra, May 7, 1991; ratification; March 4, 1992.

Belarus
– Agreement on the establishment of diplomatic relations; Warsaw, March 2, 1992; signature; March 2, 1992.
–. Agreement on the organization of transport; Minsk, March 30, 1992; signature; March 30, 1992.
– Agreement on the basic principles of cross–border cooperation; Warsaw, April 24, 1992; approval; October 20, 1992.
– Agreement on cross–border points; Warsaw, April 24, 1992; approval; October 15, 1992.
– Agreement on the establishment of a Polish–Belarussian commercial bank; Warsaw, April 24, 1992; approval; August 6, 1992.
– Agreement on cross–border train communication; Minsk, May 20, 1992; approval; December 10, 1992.

– Agreement on international read transport; Minsk, May 20, 1992; approval; December 28, 1992.
– Agreement on economic and trade cooperation; Warsaw, October 10, 1991; approval; June 10, 1992.
– Agreement on cooperation in the field of science and technology; Minsk, November 18, 1992; signature; November 18, 1992.

Costa Rica
– Agreement on the abolishment of the visa requirement for citizens of both states; July 8, 1992; exchange of notes; July 8, 1992.

Czech and Slovak Federal Republic
– Agreement on cultural and scientific cooperation; Prague, September 16, 1991; notification; February 20, 1992.
– Agreement on good neighbourhood relations, solidarity and friendly co-operation; Cracow, October 6, 1991; ratification; May 4, 1992.

Estonia
– Agreement on trade and economic cooperation; Tallin, November 20, 1991; approval; May 25, 1992.
– Agreement on cooperation through regions and local self–governments; Tallin, July 2, 1992; approval; September 30, 1992.

France
– Treaty on friendship and solidarity; Paris, April 9, 1992; ratification; November 7, 1992.
– Agreement concerning the broadening of the scope of conditions for members of families in connection with Annex No. 1 of the agreement concerning the employment of seasonal workers in France; June 15 and 9 September 1992; exchange of notes; September 9, 1992.

Germany
– Treaty on the confirmation of the existing border between Poland and Germany; Warsaw, November 11, 1990; ratification, January 16, 1992.
– Treaty on good neighbourliness and friendly cooperation; Bonn, June 17, 1991; ratification; January 16, 1992.
– Agreement on Polish–German cooperation among youth; Bonn, June 17, 1991; approval; June 12, 1992.
– Agreement on the status of the Committee on the Polish–German award; Warsaw, July 29, 1992; exchange of notes; July 29, 1992.
– Agreement on cross–border points and types of cross–border traffic; Bonn, November 6, 1992; signature; November 6, 1992.

Hungary
– Treaty on friendly and good neighbourly cooperation; Cracow, October 10, 1991; ratification; June 15, 1992.

Israel
– Agreement on trade and economic cooperation; Jerusalem, May 22, 1991; approval; may 20, 1992.
– Agreement on the promotion and reciprocal protection of investments; Jerusalem, May 22, 1991; approval; April 6, 1992.
– Agreement on cultural, scientific and educational cooperation; Jerusalem, May 22, 1991; ratification; January 29, 1992.

Italy
– Agreement on aid in criminal matters; Warsaw, April 28, 1989; ratification; March 1, 1992.
– Agreement on judicial aid and the recognition and enforcement of judgments in civil matters; Warsaw, April 28, 1989; ratification; march 1, 1992.

Japan
– Note on the prolongation and supplementation of the Stabilization Fund for Poland; Warsaw, February 14, 1992; signature; February 14, 1992.
– Agreement on the acceptance of the Japanese program of cooperation of the volunteers corps; Tokyo, October 2, 1992; signature; October 2, 1992.
– Agreement on the supply of equipment for the University of Warsaw; Tokyo, October 2, 1992; signature; October 2, 1992.

Lithuania
– Agreement on international road transport; Szczecin, March 18, 1992; approval; November 17, 1992.

Latvia
– Agreement on cooperation through regions and local self–governments; Riga, March 14, 1992; approval; September 21, 1992.
– Agreement on cultural, scientific and educational cooperation; Riga, July 1, 1992; approval; December 24, 1992.

Morocco
– Agreement on the abolition of visas for holders of diplomatic passports and service passports of the Ministry of Foreign Affairs for a period of 90 days; April 13, 1992; exchange of notes; April 13, 1992.

Moldavia
– Agreement on trade and economic cooperation; Warsaw, Febmary 10, 1992; approval; April 25, 1992.

Philippines
– Agreement on the abolition of visas for holders of diplomatic passports and service passports of the Ministry of Foreign Affairs; October 14, 1992; exchange of notes; November 13, 1992.

Russia

– Additional Protocol on the sale of movable property of the Russian troops; Moscow, May 20, 1992; signature; May 20, 1992.

– Treaty on the withdrawal of Russian troops from the territory of Poland; Moscow, May 22, 1992, signature; May 22, 1992.

– Agreement on transit through the territory of Poland of Russian troops withdrawn from Germany; Moscow, May 22, 1992, signature; May 22, 1992.

– Agreement on the settlement of transport issues connected with the withdrawal of Russian troops from the territory of Poland; Moscow, May 22, 1992; signature; May 22, 1992.

– Protocol on the settlement of financial and other matters connected with the withdrawal of Russian troops from the territory of Poland; Moscow, May 22, 1992; signature; May 22, 1992.

– Agreement on the cooperation of north–east voivodships of Poland and the Kaliningrad Region of Russia; Moscow, May 22, 1992, approval; October 22, 1992.

– Agreement on cross– border cooperation; Warsaw, October 2, 1992; approval; December 7, 1992.

South Africa

– Agreement on the abolishment of the visa requirement for holders of diplomatic and service passports; Warsaw, February 7, 1992; approval; March 8, 1992.

South Korea

– Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Seoul, June 21, 1991; ratification; February 21, 1992.

Switzerland

– Convention for the avoidance of double taxation with respect to taxes on income and on capital; Berno, July 31, 1992; ratification; October 29, 1992.

Thailand

– Agreement on the abolishment of the visa requirement for holders of diplomatic and service passports; Warsaw, July 31, 1992; approval; October 29, 1992.

Ukraine

– Treaty on good neighbourhood relations, friendly relations and cooperation; Warsaw, May 18, 1992; approval; December 30, 1992.

– Initial agreement concerning cultural and scientific cooperation; Warsaw, May 18, 1992; signature; May 18, 1992.

United Kingdom

– Agreement concerning the abolition of the visa requirement for citizens of both states; July 1, 1992; exchange of notes; July 1, 1992.

Vietnam

– Agreement on cultural and economic cooperation; Warsaw, May 28, 1992; approval; September 9, 1992.

Multilateral Treaties

– Protocols additional to the Geneva Conventions of August 12, 1949: relating to the protection of victims of international armed conflicts (Protocol I) and relating to the protection of victims of non–international armed conflicts (Protocol II); Geneva, June 8, 1977; ratification; April 23, 1992.

– Interim Agreement on trade and trade related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Poland, of the other part; Brussels, December 16, 1991; notification; March 1, 1992.

IWONA CIESIELSKA
JOANNA GOMUŁA

OBITUARIES

Judge Manfred Lachs (1914—1993)

Professor Manfred Lachs, Judge at the International Court of Justice, died in the Hague on January 14, 1993

In his activity of nearly fifty years duration one can indicate four principal fields: research, teaching, diplomacy and international justice. Joining them together, he gave an incomparable example of the skill of using a deep knowledge of international law in the practice of international relations.

Born on April 21, 1914 in Stanisławów, Judge Lachs graduated from the Faculty of Law of the Jagellonian University of Cracow and obtained his doctorate there in 1937 (the promotion was solemnly renewed in 1987). He studied also in Vienna and in London, where he stayed at the beginning of World War Two. His activity in London was devoted to the problem of punishing war crimes, and was crowned with his first monograph: *War Crimes — an Attempt to Define the Issues* (1945). At that time he also took part in elaborating the legal system of the United Nations.

After his return to Poland he started his career at the Foreign Office, where he stayed until 1967. He was director of the Legal Department from 1947 to 1960, and then legal adviser to the Minister in the rank of Ambassador. He represented Poland during twenty sessions of the UN General Assembly, three times presided over its Legal Committee, and for many years over its Sub—Committee for Space Law. In 1961 he became a member of the International Law Commission, contributing in important measure to the preparatory works on the law of treaties, in particular defending the principles of inviolability of treaties and *jus cogens*. He had a strong theoretical background — his well—known monograph *Multilateral Treaties* was published in 1958 (and subsequently also in Russian, Hungarian and Spanish). His activity dealing with space law began first in the Hague lectures, and then with the monographs: *The Law of Outer Space. An Experience in Contemporary Law—Making* (Alphen an den Rijn 1972) and *El Derecho delEspacio Ultraterrestre* (Madrit 1977). His fascination for the newest field of law was joined with the comprehension of influence of the development of technology upon the development of social sciences.

From 1961 to 1967 Professor Lachs concentrated upon his research activity, which in fact be never ceased — since 1952 he was professor at the Faculty of

Law of the University of Warsaw. In this period he was Director of the Institute of Law Studies of the Polish Academy of Sciences, he organized the session of the Institute de Droit International (1965) and invited to Poland a number of the most eminent specialists in different fields of law. Under his direction, the Institute acquired the international position which it has kept to this day. In this period he also joined the Board of Editors of *Państwo i Prawo,* an important Polish law journal.

At the 1987 Session of the UN General Assembly, Professor Lachs was elected Judge at the International Court of Justice. At the age of 53 he was the youngest member of this distinguished institution. Thanks to his knowledge and ability to resolve the most complicated problems in a pragmatic way he gained a great authority: six years after having joined the Court Judge Lachs was elected its President. It is clear that his earlier output had an important influence upon this election: he was Member of the Institute de Droit International (1963), Member of the Polish Academy of Sciences, Honorary Member of the International Academy of Astronautics and Member of the Mexican Academy of International Law. But this honour, granted for the second time to a Polish international lawyer (from 1961 to 1964 the Court was presided over by Judge Winiarski) was first of all an expression of appreciation by his colleagues from the highest international judicial organ. It is therefore hardly surprising that during the election for the next judicature he obtained the highest number of votes, and subsequently he was reelected for the third period of nine years, interrupted by his death about one year before its termination.

As the deliberations at the ICJ are secret, it is hard to appreciate fully the influence of Judge Lachs upon judicial practice and advisory opinions of the Court; it is beyond any doubt that he left his impression on many judgments and advisory opinions. He attached special attention to the advisory function of the Court. he wrote in his letter to the Institute of Law Studies in which be expressed his gratitude over the publishing of the Collection of Essays for his 70th anniversary: *I always considered the advisory opinions being much more important for the development and interpretation of international law than the settlement of disputes.*

An analysis of his dissenting and individual opinions testifies to his contribution to the activity of the ICJ. One can hope that it will be subject to detailed studies in Polish and international writing.

Further works by Professor Lachs were created during his stay in The Hague. One of them – *The Teacher in International Law. Teachings and Teaching,* The Hague 1977 (published also in French *Le monde de la pensée an droit international. Théories et pratique,* Paris 1989) deserves special attention because of the presentation of the ancient and contemporary Polish science of international law. We should remember the particular care of Professor Lachs as Vice–President of the Curatorium of the Hague Academy of International Law over the participation of Polish professors and young research workers in

thé activities of the Academy. Every year he granted scholarhips for Polish participants. he was in continuous contact with Poland, Polish lawyers and Polish science, where he participated in the works of the Polish Academy of Sciences.

In the lecture at the Hague Academy entitled *The Development and General Trends of International Law of our Time* held in 1980 (*RCADI* vol. 169) Professor Lach formulated his vision of the role of a contemporary international lawyer: ... *in order to perform his task the jurist cannot be parochial or myopic; he must be imaginative and critical, fight against myth and falsehood, have a vision of coherent law which must rhyme with history and do his utmost to influence events for the betterment of inter-State relations.*

This quotation reflects fully the Professor's philosophy. He did not treat juridical considerations as an aim in itself but he tried to use all instruments at his disposal to influence events in order to achieve the fundamental premise: amelioration of inter-state relations and consequently amelioration of the situation of human beings. These instruments were numerous and he used them in a masterly manner.

He achieved extraordinary esteem among his contemporaries. He was granted eighteen honorary doctor's degrees. He obtained also numerous prizes like the prestigious *Weteler International Peace Prize* (1977), the prize of the *Encyclopaedia Britannica* (1987) and many others. He appreciated them as evidence of esteem for his work. But what he appreciated the most was the awareness that his life's work did not disappear in the law libraries but was still vivid in the minds of those who had met him.

JERZY MAKARCZYK

Stanisław Edward Nahlik (1911—1991)

Professor Stanisław Nahlik died in Cracow on November 5, 1991, due to a long, incurable disease. He was a man of extraordinary personality

Born on May 8, 1911 in Lvov, he graduated from the Faculty of Law and Diplomatic College of the Jan Kazimierz University in Lvov (on June 14 and 24, 1933 respectively) and subsequently started to work as a research assistant at the Chair of the Law of nations and General Science on State of the Jan Kazimierz University, chaired by Professor Ludwik Ehrlich.

In 1935 he published his first study *Le problème du contrôle et les travaux de la Conférence du Désarmement*, in: *La securité collective* edited in Lvov. In 1936 he entered the diplomatie service. His experience acquired during this time was fruitful for his research work. After a period at the Polish General Consulate in London and work at the Ministry of Foreign Affairs, he took up the duties of the First Secretary of the Polish Legation in Bern (till 1946). Because of his function during the war he participated in the evacuation of the staff of the Polish Embassy in Rome through Switzerland, organized help for numerous Poles in Switzerland and contributed to the regulation of Polish soldiers interned in this country.

He came back to Poland in 1946. He was employed at the Ministry of Foreign Office but was forced to leave the diplomatic service forever due to the purge of 1949. At that time, however, he had just started his work as research worker at the Academy of Political Science. In 1948 he obtained a doctor's degree for the disertation: *Prawo rozrodczości na tle nauki o stosunkach międzynarodowych*, under the direction of Ludwik Ehrlich. However, his prewar experience played an important role in his fate again. In 1950 he was let go from the Academy of Political Sciences. Fortunately he was employed at the Ministry of Culture and Art — till 1957, in the last years as the head of the Department for Vindication and Reparations. One owes to him in large extent the restitution of numerous objects of art taken away by the USSR after 1944, as well as precious documentation: *Straty wojenne zbiorów polskich w dziedzinie rzemiosła artystycznego* (Warszawa 1953, vol. I—II), *Międzynarodowa ochrona dóbr kulturalnych* (Warszawa 1962), *Sprawa zbiorów polskich ewakuowanych do Kanady*, vol. I (1958) and II (1961).

The well-known book *Grabież dziel sztuki. Rodowód zbrodni międzynarodowej* (Ossolineum 1958, p. 482) was his monumental work. It became a classic position concerning the international protection of cultural goods. The author referred to it later on, also in his works published abroad.

In October 1956, a scientific career became open for Professor Nahlik again. He joined the Polish Institute of International Affairs as scientific secretary and head of the Dept. of International Law and International Politics. At the same time he taught at the Chair of International Law of the Main School of Foreign Service. In 1958 he was nominated assistant professor.

In connection with the dissolution of the School he became the head of the Chair of International Law of the Nicolaus Copernicus University in Toruń in 1959–1960. Then in 1962 he was appointed head of the Chair of Public International Law of the Jagellonian University and moved to Cracow. He soon became one of the most characteristic personalities in the scientific and cultural society of the town. He was for a long time President of the Cracow Branch of the Polish–Austrian Society, member of the Scientific Council of the National Museum, Polish Historical Society, Society of Historians of *Art*, etc.

Research activity was however the most important trend of his life. In 1967 he published *Wstęp do nauki prawa międzynarodowego* (p. 432) considered as the introductory part of the systematic work of four volumes devoted to principal notions, history and sources of international law. Unfortunately, the following volumes were not published. Then (1971) *Narodziny nowożytnej dyplomacji* was published, full of by the author's erudition, research invention and professional skill of a historian.

The effect of the author's active participation in the Vienna Conference on the Law of Treaties (1968–1969) was his *Kodeks prawa traktatów*. One should indicate also other publications, studies, articles, book reviews and polemics by Professor Nahlik amounting to 300, the majority of them being of strictly scientific character. They were published in prestigious Polish and foreign law journals.

Professor Nahlik also published publicistic articles and memoirs, dealing not only with international law but also with problems of culture. He published a piece of historic fiction *Sen Olbrachta*. The first volume of his memoirs *Przesiane przez pamięć* was edited by Wydawnictwo Literackie; the second volume dealing mostly with his diplomatic activity in Bern awaits publication.

Owing to his extraordinary memory he could move freely through different fields of knowledge. For example, during the promotion for his doctor's degree he was able to quote by heart the complete oath in Latin. He belonged to the best experts of the works of Shakespeare – half a year before his death he prepared a series of talks about Shakespeare for the Polish Broadcast.

Perfect knowledge of four languages and a passive knowledge of several others were particularly important in his extensive international contacts. It is

hard to recall all of the international conferences he participated in or all the universities he visited. Let us indicate only his lectures at the Hague Academy of International Law on the international protection of cultural relations. During his illness he was able to present a paper at the Cracow CSCE conference dealing with the protection of cultural heritage in June 1991.

His teaching activity was highly appreciated by his students. He educated more than 300 graduates, many doctors and several successful professors.

His achievements were appreciated to larger degree abroad than in Poland. He was granted two honorary degrees by the Universities of Bordeaux and Bochum, he was member of numerous international scientific societies and appointed as rapporteur during international conferences. At the same time, he had to wait 5 years for his appointment as extraordinary professor (1969); he was nominated Ordinarius 5 years before his retirement. Finally he became a member of the newly reactivated Polish Academy of Arts and Sciences.

Neither difficulties nor personal tragedies were able to make him sour, to deprive him of readiness to friendship and sympathy. He always appreciated people according to their advantages and not their shortcomings. He was ready to act in favour of science, culture and the University. It is true that there are no irreplaceable persons; but it is also true that there are people one cannot forget. Professor Stanisław Nahlik belonged to them.

STANISŁAW WALTOŚ

BOOK REVIEWS

JAN BARCZ, *Stosowanie prawa Wspólnot Zachodnioeuropejskich w państwach członkowskich (Problemy konstytucyjnoprawne), [Application of the Law of the European Communities in the Legal Systems of the Member States (Problems of Constitutional Law)]*, Warszawa 1991 (PISM), pp. 127.

The subject dealt with by the author is of great importance regarding the association of Poland with the EC and its expected membership in the Communities. An interest observed recently to the Community law is connected also with the establishing of the common market from December 31, 1992. It is beyond any doubt that a program „Europe 1992" will have important implications not only for the Member States, but also for their political and economic partner.[1] These factors promote further studies on European law, legal systems of the Member States and interrelations between them.

The European Communities are qualified as supranational organizations, whose main features are: originality and autonomy of their legal systems, and a competence to create legal norms directly binding and applicable within municipal legal systems of the Member States. This concept has been elaborated by the European Court of Justice in the *Costa* v. *ENEL* case.[2] The Court ruled that the Communities have created an autonomous legal order, different from municipal law of the Member States and from international law. The European Court has emphasized that the Member states have created an autonomous, European public authority, the acts of which being directly effective within internal legal systems of these states without any need of transformation of recognition by a legislative. Direct effect and direct applicability are provided even if Community rules are contrary to respective domestic norms.

Consequently, membership in the Communities requires not only a fulfilment of precise economic premises, but also the adoption of constitutional legal premises aimed towards a preparation of a internal legal system to apply legal regulations enacted by a foreign authority. J. Barcz undertook an attempt to discuss the problems confronted by a internal legislator of a Community member state, and in particular: constitutional provisions enabling the membership, transfer of powers and opening a internal legal system towards Community law; a participation of a parliament in accession proceeding, in particular in concluding a treaty of accession; an introduction of legal premises necessary for the direct effect and applicability of Community law in domestic legal systems; constitutional limits of openness towards the Community legal system and

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[1] Cf. J. Jaskiernia: „Stany Zjednoczone a jednolity rynek wewnętrzny" *[The US and a single internal market]*, *SM* 1991, No. 9, p. 29 ff; J. Adamiec: „Strategia krajów EFTA wobec Jednolitego Aktu Europejskiego" *[The Strategy of the EFTA-countries towards the Single European Act]*, ibidem, 1991, No. 10, p. 69 ff.

[2] Case 6/64, *ECR* 1964, 1251 (July 15, 1964).

a possibility of control by internal courts (in particular constitutional courts) of the conformity of Community law with constitutions of interested states. The author analysed these problems with respect to all EC member states; subsequently, he exposed different approaches to these questions by respective states and proposed certain solution *de lege ferenda* for the Polish legal system.

The author divided constitutions of the Member States into two groups. The first one is formed of constitutions of the founder States which were not prepared for a membership of this kind. In such a case the role of constitutional provisions is limited and practical consequences of the membership and their legal justification must be precised by judicial practice. The other group consists of states which joined the Communities and could therefore prepare their constitutions for the membership in such a way that the accession to the Communities did not lead to any constitutional legal controversies (at pp. 106-107). Poland will belong to the latter group. The preparation of the Polish legal system will be of great importance for a participation in intensive integration processes. Constitutional provisions should constitute a legal basis for harmonization of Polish municipal law with the Community legal system. J. Barcz states correctly that experiences of replacing of such constitutional provisions by judicial practice have not been positive; in particular the accession to the advanced integration system do not leave time for the development of practice (at p. 111).

In connection with the preparatory works on a new Polish constitution the author indicated the following problems of treat importance (at. p. 112).

1) the decision on the accession should be taken by the Parliament on a form of a law *{ustawa)*, if necessary, by qualified majority vote;

2) direct effect and direct applicability of European law within the internal legal system should be secured by constitutional provisions. Community law should be applied even if it does not conform to internal norms;

3) the development of the Communities shows that limitations of the scope of a transfer of sovereignty would not be reasonable. However, mechanisms of such a transfer should be established;

4) the Constitutional Court and other domestic courts should not be competent to investigate conformity of Community law with the constitution of its legality.

These proposals stem from the analyse of experiences of the Member States of the EC and should be recognized as standard solutions deserving recommendations. It does not mean that their formulation in a future constitution of Poland will constitute an automatical formality. The problem of limitation of state sovereignty for the benefit of other international subjects is controversial and elicits emotions. It is regrettable that the author did not confront his opinions with existing drafts of a constitution which dealt with the procedure of concluding and implementing international legal norms.

It is clear that the Parliament cannot be ignored in the process of deciding on the accession to the European Communities. A qualified majority vote will be indispensable if a character of future regulation so requires. It can be connected simply with the necessity to modify the constitution. The problem of the relationship between Community and municipal norms should be generally regulated in the constitution — except if one accepts a view that the accession to the Communities is a special aspect of a general question of implementation of international norms within the Polish domestic legal system. In such a case any special regulation of this problem would not be necessary.

We agree with the view that the establishing of any barriers limiting the transfer of any sovereign rights in favour of the Communities would be groundless. This opinion

results from the pragmatic appreciation of usefulness of such barriers. The serious constitutional problems in the FRG and Italy did not result from the existence of such barriers themselves, but rather from the requirement to emphasize that the transfer of sovereign rights cannot violate basic structures on a constitution and fundamental human and civic rights. The former premise is of a formal character (in the case of the FRG it has dealt with the federal structure of the state), while the latter one refers to universal values. It is also accepted by Poland. Arguments against introducing any barriers in this field should be based on the fact that these values are protected by the legal system of the Communities; it is therefore not necessary to secure them by additional constitutional provisions. This problem can, however, create certain difficulties as the perception of a transfer of sovereign rights by different social and political forces is not unique.

The exclusion of the competence of the Constitutional Court and other internal courts to control the conformity of Community law with the domestic legal system should not lead to difficulties. The practice of the Member States is clear and there is no reason to adopt another solution in Poland.

The suggestions proposed by J. Barcz are fully correct. It can be asked whether it was necessary to analyse legal systems of all EC Member States to formulate them. Difficulties of some states were caused exclusively by the fact that they were forced to adjust their constitutions being in force before the establishing of the EC with European law. Poland will not be confronted with such an issue. A part of the comparative studies by the author is exclusively of historical character and does not correspond directly with Polish constitutional legal problems. However, the analysis by the author is useful because it demonstrates the usefulness of the existence of constitutional regulation (the necessity of resolving difficulties by the judicial practice can create additional problems).

The book by J. Barcz constitutes a compendium for every person involved in formal and substantial problems created by the application of Community law within the Polish legal system. A comparative study is useful for future elaboration of a new constitution of Poland, even if it is rather of a general, model character. Exhaustive research will certainly be continued by important teams in the forthcoming years, in order to enable a correct legislative policy in the process of harmonization of Polish law with the legal system of the European Communities.

Jerzy Jaskiernia

REMIGIUSZ BIBRZANEK, *Studia nad społecznością międzynarodową. Źródła prawa międzynarodowego. [Studies on the International Community. Sources of International Law]*. Published by the Maria Curie–Skłodowska University, Lublin 1991, pp. 188.

The book written by Nestor of Polish international lawyers, expert in the theory and history of international law and eminent erudite, deals with the transformation of the international community and its consequences for the philosophy of law. The author

deals in particular with the sources of international law and seeks an answer to the question of the basis of its binding force. These problems have interested illustrious lawyers and philosophers for centuries. Professor Bierzanek refers to their writings, attempts to systemize and critically analyse them. First of all, however, he confronts different doctrines and current opinions with the new problems and tendencies connected with the development of the international community and its needs in the sphere of law. This issue constitutes the principal value of the book and its importance for the theory of international law.

It is difficult to assume an attitude towards all considerations of the author and his conclusions. One can state only that the author's reasoning is very precise, and he presents the most complicated and controversial problems in a clear and relatively compact way. It leads us to believe that Professor Bierzanek communicates here his considerations cumulated gradually during many years of his extremely active activity, and that this book simply had to be written.

In the introduction the author deals with the international community in its historical development, with the notion and classification of the sources of law with the opinions about the sources of international law. He rejects the views contesting the utility of the notion of the source of international law and proclaims himself — in the light of contemporary experience — for the usefulness of this notion, both in formal and substantial meaning.

In connection with this conclusion the author analyses in the subsequent chapter the formal sources of international law. His considerations on the topic of general principles of law, soft law (which is treated by him as the rule of the period of great changes and not as a kind of pathology) and relations between the different formal sources of law are of particular interest.

The chapter dealing with the substantial approach to the sources of international law contains a variety of problems of great theoretical importance. The author characterizes different problems justifying the binding force of international law. Attempting to settle controversies he indicates eight possible approaches to the problem: Grotian and natural law, positivism, historical, theory of natural subjective rights, theory of common will, normativism, sociological and philosophical school, neonatural law. Furthermore the author critically presents the opinions by main schools dealing with this problem. Finally he analyses the controversial question of the limits of binding force of international law considering the self-defence and state of necessity, war, reprisals and the rebus sic stantibus clause.

On a wide background the next chapter of Professor Bierzanek's book *(Sources of International Law and Changes in the International Community)* presents the author's idea of the basis of binding force of international law. This opinion refers to the theory of Florian Znaniecki, the sociologist acting in Poland and the United States, and in particular to the concept of the so-called cultural necessity. Professor Bierzanek — contrary to the majority of other theorists — is of the opinion that the basis of the binding force is created by a certain group of factors and not only one element selected in an arbitrary manner (e.g., the will of states or any other, depending on the respective school). The motivation of this view belongs to the most interesting parts of the book from the theoretical point of view.

The author links his theoretical opinions with his own appraisal of the evolution of international relations. According to this appraisal we follow the time at which the

relatively weakly interrelated society of States transforms into the more integrated community of States. Such a stance gives rise to the number of not only theoretical, but also practical consequences for the development of international law and for the reflections upon this law. The author presents them in the last chapter entitled *Conclusions*.

Andrzej Wasilkowski

GENNADY M. DANILENKO, ***Law-Making in the International Community***, Martinus Nijhoff Publishers, Dordrecht-Boston-London 1993, pp. 343.

G.M. Danilenko, promising scholar from the Russian Academy of Sciences, published a number of books and articles dealing with different aspects of sources of international law, in particular with customary law (e.g. *Obychai y sovremennom mezhdunarodnom prave*, Moscow 1988). The book recently published by the Nijhoff Publishers constitutes the summary of the research of the Author in the field of international law-making.

After having presented the concept of sources of international law and the system of sources according to Article 38 of the Statute of the ICJ, Danilenko starts with the analysis of treaties as uncontroversial source of international law. He accentuates modem trends in treaty making, in particular the lack of formalism and the concept of general mutilateral treaties (we agree with Author that even these treaties cannot impose obligations upon third states without their consent, notwithstanding the eventual formation of customary rules on their basis). Finally the Author is sceptical as far as the concept of objective regimes is concerned.

Considering the formation of customary rules, Danilenko emphasizes correctly the importance of international judicial practice for ascertaining legal norms. He presents also the opinion that official statements by states play an important role in elucidation of contradictory state practice (in fact, these statements are tantamount to the *opinio juris* — however, at another place the Author indicates that inconsistent practice can be interpreted as an element of formation of a new rule of customary law). In my opinion, state practice instead of official statements should be viewed as the most important element of formation of customary law. It is interesting that Danilenko presents himself as partisan of the consensual theory of customary law (at 104 ff). Similarly to opinions expressed by Professor Wolfke in his book reviewed in the present volume of the *Yearbook*, Danilenko diminishes the role of treaties in the formation of customary law (in particular the ratification of particular treaty does not constitute a presumption in favour of the customary character of conventional norms). In my opinion, this statement is correct — the ascertaining of the customary character of the norm requires the confirmation of the two elements of custom in the practice of the state non-parties to the convention.

Distinct chapter of the book is devoted to the concept of international *jus cogens*. The Author seems to suggest the treatment of *jus cogens* as separate category of sources of international law. However, the analysis seems to ignore the fact that *jus cogens* is far from being universally accepted by the contemporary international community (under these circumstances the lack of estalished procedures of creation of peremptory norms is less important). We also do not agree with the remark that the peremptory character of the norm can be stated in the process of its creation. *Jus cogens* consists of universal norms — Le. constitutes element of general (customary) international law. It is hard to suppose that there will be a general consensus among states as to its peremptory character at the stage of formation of the norm. Normally it will be created as ordinary customary law and than acquire peremptory (higher) character. The ascertaining of such a status seems hardly imaginable in the diversified international community of today.

Among other interesting problems dealt with by Danilenko one should indicate general principles of international law (the Author identifies them with the basic principles of municipal legal systems of universal acceptance) and the emphasize on a limited scope of new possible sources of international law (including consensus and resolutions of international organizations). The Author finishes with the general conclusion that we observe deep changes in contemporary international law making, first of all in the field of customary law. We recommend the book to all scholars and practicians dealing with sources of international law.

Władysław Czapliński

JOST DELBRÜCK et al (editors), Neuntes deutsch-polnisches Juristen-Kolloquium: ***Der internationale und nationale Schutz der Menschenrechte***, Nomos Verlagsgesellschaft, Baden Baden 1992, pp. 186.

Traditional meetings of Polish and German international lawyers have taken place every three years since 1972. The book contains materials of the latest seminar organized in Wildbad-Kreuth in 1990, devoted to different aspects of human rights protection in international and municipal legal systems. They concern: implementation of human rights, protection of minorities, system of protection under the European Convention of 1950 and within the European Communities, and — finally — relations between Polish law and international law of human rights.

R. Wieruszewski presented an introductory report on the methods of implementation of human rights treaties, composed of four elements: a periodic reporting system, inter-State complaints, procedure for the consideration of complaints by individuals, and fact-finding procedures. Special implementation measures are provided by several international instruments, according to which special organs supervising their implementation have been created. These organs act as expert bodies and not a state representatives. The author emphasized in particular a deep change in the attitude of Central and East European states towards monitoring and reporting systems.

Similar problems were considered by J. Delbrück who analysed problems of the enforcement of human rights by UNESCO. He remarked that except for the UN Security Council, no international organization was actually competent to implement human rights directly and to react against violations of human rights (which would mean in fact that human rights do not belong to a category of obligations *erga omnes).* However, the system of monitoring and implementing of human rights created by UNESCO within its competence is a model one. It is based upon communications concerning cases and questions of violations of human rights in the fields covered by UNESCO activities. Communications can be passed to the UNESCO organs (the Executive Board and the General Conference) without having exhausted available local remedies (which is exceptional in the practice of international organizations).

Two further studies, by K. Hailbronner and H. Suchocka, deal with problems of protection of minorities. The former presents a development of minority protection, indicating difficulties on defining minorities. Hailbronner shows that according to the European standards formulated in the Copenhagen documents states are obligated to act towards the protection of minorities – in our opinion such a statement goes too far and states are under an international legal duty to tolerate minorities only. Considering the problem of the scope of minority rights, the author emphasizes the right to autonomy, but does not mention an eventual right of an oppressed minority to secede. Finally he discusses dangers for minorities stemming from growing nationalist movements but he limits their importance to Central and Eastern Europe, while the same trends can be observed also in the Western countries. H. Suchocka presents the historical development of minority protection in Poland, as well as existing constitutional provisions. She declares a necessity of granting special rights to minorities in order to ensure them a *de facto* equality; at the same time she opposes, however, the passing of a special minority bill as contrary to certain provisions of the constitution. Finally, she emphasizes the importance of the principle of minorities loyalty to the state of residence.

Studies by E. Riedel and P. Badura concern two important aspects of the development of a West European system of protection of minorities. The paper by Riedel discusses the main features of the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 including institutional mechanisms, as well as the possible effects of accession by Central and East European states to the Council of Europe (at the time the study has been pregared these states were not members of this organization). D. Badura deals with the development of human rights protection within the European Communities, introducing, in particular, problems connected with the *Solange-II* judgment of the German Constitutional Court. He states that the role of the Community legal instruments will grow after the entry of the Single European Act into force, and national implementation measures should secure individual rights and freedoms against an intervention by Brussels organs. In fact, it has often been underlined by the European Court of Justice that human rights constitute part of the Community legal order, and individuals can refer to the European convention before the Court if their rights are infringed.

Finally, Z. Kędzia and L. Kański present problems concerning the implementation of human rights in the Polish municipal legal system. According to the Polish constitution, human rights covenants (as well as other treaties directly creating rights and obligations for individuals) should be ratified by the President after acceptance by the Parliament. Uncertainties existing at the time the papers were presented have been to

a large extent eliminated by the constitutional law of 1992 (provisional constitution) and by the recent judicial practice of the Constitutional Court and Supreme Court. They declared that provisions on human rights formulated in the constitution create guarantees for all residents in Poland and not only for Polish nationals, that international law binds *ex proprio vigore* within Polish municipal law and human rights treaties (in particular the Covenants on Human Rights) are directly applicable. Both authors presented also remarks on the implementation of the catalogue of basic human rights and the prospectives for the future. Here again, developments were different than expected: the new provisional constitution does not contain provisions dealing with human and civic rights. The gap has been filled by the President's initiative of the Charter of Rights, actually being dealt with by the Parliament. Numerous statements by the authors are therefore no longer actual.

Władysław Czapliński

JOST DELBRÜCK (ed.), ***The Future of International Law Enforcement. New Scenarios — New Law?*** *Proceedings of an International Symposium of the Kiel Institute of International Law,* March 25 to 27, 1992. Duncker & Humblot Berlin 1993, pp. 188.

Among different methods of the views exchange among people who belong to world of science, conferences which are organized for a limited circle of prominent scholars present to the most effective. The book being reviewed contains proceedings of the German-American symposium devoted to the recent developments in the field of international law enforcement, in particular with the peace-restoring operations. The four introductory papers (W.M. Reisman, T. Farer, J.A. Frowein, B. Simma), and comments there included (A.P. Rubin, Ch. Schreuer) constituted basis for a discussion which deal mostly with the possible political scenarios, necessities of using existing instruments or of amending the UN Charter. This instruments are created for better respond to the current and future threats, including the role of regional organizations in conflict solutions, and finally with the obligations *erga omnes* as category of norms particularly connected with the use of force and reactions to it.

W.M. Reisman, in his work, presented six different possible threats to international peace which were classified according to a territorial scope of a conflict, using the number and the character of states involved and weapons used. Each of a such conflicts would require a different respense — the speaker emphasized the fact that a big powers which play the most important role in the world's policy are often not interested in intervening in the conflict which does not infringe their rights in a direct way. The generalized conclusion of the author seems to reflectly the concept of the self-defence provided in provision of the Article 51 of the Charter. This provision will still maintain its importance (this conclusion seems to be correct, as actions in collective self-defence are able to replace intervening by the UN).

T. Farer also discussed different kinds of international conflicts and possible reactions to them by the international community. He concentrated upon practical approach commenting on the issues connected to the Gulf War (indicating that the reaction of states for the aggresion against Kuwait exceeded traditional scope of the collective self-defence). He indicated finally reactions of the UN on different forms of the use of force (which are not very conclusive – e.g. armed reprisals were in many cases tolerated by the UN Security Council).

J.A. Frowein declared himself to be in favor for the solutions adopted in the UN Charter, suggesting that the use of the measures being in the competence of the international community according to articles 39 and 42. Moreover I. A. Frowein stressed the role of the UN Security Council in the peacerestoring process. He also confirmed the right of states to use system of reprisals in the cases of the violations of international law – in particular against the violators of the obligations *erga omnes*.

Finally B. Simma in his work stated that the bilateral reactions were not sufficient to eliminate threats to the peace. Therefore, the organized international community should dispose collective measures of law enforcement against states violating fundamental olbigations. Obligations *erga omnes* should play a special role in the international life. However, even though there is a general agreement as to the substance and the rank of these norms (Simma, similarly to the majority of speakers, stressed out the absolute character of the ban on the use of force), the lack of generally recognized enforcement mechanisms diminishes their importance.

The discussion indicates that there is no unanimity among scholars with respect to the scope of the article 2.4 of UN Charter, possible application of Chapter VII (participants were generally of the opinion that existing instruments of reaction provided under this Chapter are sufficient and referred to the Gulf War – the events in former Yugoslavia occuring after the symposium took place proved rather the contrary), delegation of powers to regional organizations and the existence of *jus cogens* and obligations *erga omnes* (these categories of norms were not confirmed by particular enforcement measures what in our opinion is a prerequisite of their recognition). It was also interesting to remark that the divergence of opinions is not in respective to the geographical origin of respective scholars. Taking these premises into account, the book being reviewed constitutes the important element in the contemporary discussions on the future of a international legal order.

Władysław Czapliński

MAŁGOSIA FITZMAURICE, *International Legal Problems of the Environmental Protection of the Baltic Sea*, Graham Trotman/Martinus Nijhoff, pp. 313.

A regional approach offers the possibility of creating more precise and restrictive norms and more useful institutions by narrowing the consensus-forming community to those states that have either a close geographical relationship or common attitudes toward the range of environmental problems that might affect them. This approach is attractive to traditional researchers such as Małgosia Fitzmaurice, who contained in her book a study of environmental issues relating to the Baltic Sea.

In chapter one, „The Baltic Sea", she attempts to introduce the Baltic as a Region (its geographical connotations) and marine regionalism (as a mechanism designed to implement various types of cooperative activities among the Baltic States).

The cooperation in the Baltic region reflects political changes sweeping through Central and Eastern Europe. Two waves of these changes symbolized by the recognition of the German Democratic Republic (in 1970's) and the reunification of Germany (in 1990) are emphasized. The author believes that cooperation between the Baltic States already exist. She seems to be very optimistic in her judgment. As a matter of fact, the evolution of marine regionalism here is still at the stage of isolation.

Chapter two provides the authoritative background information needed to handle environment and natural resource conditions of the Baltic Sea and its drainage area as well as the pollutants (nutriens: nitrogen and phosphorous, heavy metals, chlorinated hydrocarbons, new harmful substances, oil, other pollutants, including radioactive substances) and sources of pollution (land-based pollution, dumping, the exploration and exploitation of the sea-bed and its sub-soil).

Małgosia Fitzmaurice shares the traditional perspective of international law in the light of which treaties receive the greatest attention. Chapter three, a survey of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (The Helsinki Convention) contains a fine brief presentation of the international legal order as a framework of co-operation. The main function of this regional agreement is not to promote legislative unity on a global scale, but to protect the rights of separate states. Moreover, the Helsinki Convention does not propose any sanctions for acts that contravene its provisions. Lack of critical reflections makes this book more elegant.

Internationalists may be attracted to this work because its most striking feature is the degree of exposure given to the role of international organizations in international law. The author explores the legal nature of the acts of the Baltic Marine Environment Protective Commission (HELCOM) and outlines the functions of this international organization. HELCOM seems to be a community of experts which contributes to national policies. The legal position of this organization is rather weak.

The evolution of regional customary practice is not ignored by „regionalism". In chapter four, titled „The Helsinki Convention in Practice", Małgosia Fitzmaurice surveys the practice of three Committees of HELCOM: the Scientific–Technological Committee (STC), the Maritime Committee and Combatting Committee as well as numerous Working Groups. Special attention has been given to the establishment of the Baltic Monitoring Programme and the regime relating to marine scientific research in waters under the national jurisdiction of the Baltic States.

The international instruments and organizations other than the Helsinki Convention and HELCOM are still relevant to the protection of the environment of the Baltic Sea. Chapter five accomplishes this goal quite well. The authors overview of global arrangements relating to the environmental protection of the Baltic (the London and the MARPOL Convention, the Geneva Conventions, etc.) and European arrangements relevant to environmental protection of the Baltic Sea (the European Air Pollution Convention, the Paris Memorandum of Understanding, etc.) as well as bilateral and trilateral cooperation between the Baltic States, provide a good starting point to understand the general concept of the protection of marine environment.

Rules aiming to solve transfrontier pollution problems are based on „territorial sovereignty" rather than on „territorial integrity". For this reason, national environmental protection still plays the leading role in the battle for clean seas. Małgosia Fitzmaurice seems to share this view since she gives a comprehensive analysis of the subject-matter, including national environmental protection systems in the Baltic States. It appears, from chapter six, to be a uniform practice of the Baltic States to implement treaties and the recommendations of international organizations in domestic law.

The fact that Denmark and Germany belong to both the Baltic region and the EC could facilitate the integration among all Baltic States. As the Baltic Region prepares its strategy for the year 2010, the systematic exchange of ideas and relevant information between the European Community and HELCOM will be important. Of interest, therefore, in chapter seven on law and practice of the EC in relation to environmental protection in the Baltic Sea Area.

A word should be said about the physical appearance of the book, which was beautifully printed on acid-free paper in the Netherlands. It is a great pleasure to hold and read.

Undoubtedly this book provides a passionate commitment to the discussion of efficient legal measures for the protection and conservation of marine resources. It is worth reading for the valuable knowledge and insight into important scientific and international political activities affecting the region. It must be on the bookshelf wherever international environmental law is practiced, researched or learnt. Hopefully a new edition (taking into consideration the new Helsinki Convention of 1992 and Task Force Programme) will be with us soon.

Zdzisław Brodecki

WOJCIECH KOWALSKI, ***Restytucja dzieł sztuki w prawie międzynarodowym*** *[The Restitution of Works of Art in International Law]*, Katowice 1989, Uniwersytet Śląski, 164 pp.

The problem of restitution of cultural property in international law was not hitherto the subject of separate monographic studies in Polish scientific literature. This issue was analysed within frameworks of studies on broader topics connected with the liquidation of the effects of war, or with territorial changes.

The book under review is an innovatory study dealing with the theoretical aspects of restitution and its rules, presented with a wide historical background, and with in-depth analysis of the allied restitution law introduced after the World War II.

The book is partitition ed into three chapters: theoretical, historical and the last one devoted specifically to restitution in allied law. It seems to be serviceable to divide the third part, for the better clarity of reasoning, into fragments marked with numbers, assuming precisely substantial enterions. The remarks concerning sources of law are mixed in this part with the considerations based on the criterion of territorial scope of restitution and its character.

The chapter devoted to the meaning of the notion of "restitution" locates it among the related terms as reparations, compensations, revindications. These terms do not have an explicitly designated range and are applied interchangeably. The author expresses the opinion that in case of reparations composing the form of responsibility for the violation of international obligations, the losses are globally estimated, not on precise assessment, whereas compensation assumes the shape the gratification of the losses in reality. Refering to the institution of "restitutio in integrum" W. Kowalski comes to the conclusion that it defines the aim of the stated responsibility whereas restitution is an instrument to achieve this aim. This part of the book also deals with the forms of the restitution: direct restitution consisting of simply, the return of looted property, restoration of properties, rights and interests; the restitution "by distribution" as result of which the loser state obtains the equivalent proportional with the suffered losses; restitution in kind, when direct restitution is not possible, which means giving an equivalent instead of the particular lost property.

Chapter II presents a survey of the development of a rule of customary international law concerning the principle of the restitution of works of art. The author pays some attention to opinions of representatives of the international law doctrine (among others, J. Przyłuski, H. Grocjusz, G. F. Martens, E. de Vattel) dealing with the protection of cultural property during the war and its restitution in the case of plunder. International practice has been forming slowly, though in the 16th century, occasional cases of the return of looted sacral property can be noted. The clauses devoted to restitution are more frequent in the peace treaties in the 17th century. The restitution operations, on large scale, were realised after Napoleon's defeat and embodied the cultural property looted during the Napoleonic Wars. Initially the prohibition of looting was motivated by the character of the objects (res sacrae), their uselessness in achieving the aim of war, and respect for the works of the eminent masters. Later, this was fortified by the negative estimation of the circumstances of the plunder (the recognition of such spoils of war as "praede illicita"), and finally by the rule of protection of the integrity of national cultural heritage. The author analyses several cases of restitution of works of art, looted during the war and connected with the territorial changes.

The third, and the most extensive chapter deals with the problem of the restitution of the works of art after the Secand World War. In the beginning, the author emphasizes that the existence of the restitution's obligations was at that time unquestionable, because of international customary law providing such obligations and confirmed by peace treaties concluded after World War I. The author also remarks that the problem of restitution had been separated from the war compensations. The set of the sources of the allied restitution law taken into consideration is extensive and contains the legal acts of occupational authorities, bilateral and multilateral treaties, the act of capitulation

and armistice agreements. The criterion of the systematization of the contents is the territory of the state from which the restitution took place. The author pays special attention to the restitution from Germany and Austria, formulating and analysing the rules of this restitution: the rule of "public international law," the rule of identification, the rule of "criteria of use of force or coercion," the rule of the territoriality and the rule of the formal procedure. The subject of in-depth analysis is: the acts restitution of special importance to Poland (among others - the Polish-Czechoslovakian treaty, 1946 and the Polish-French treaty, 1947) and the regulation concerning the changes of the Polish borders. Taking into account the magnitude of the cultural losses of Poland during the Second World War, anyone would agree with the author's opinion that the restitution actions which have been realised hitherto are not fully satisfactory. It is hoped that the author who is now the government's plenipotentiary of Polish cultural heritage abroad, is not only engaged in is scientific work, but also in practice will undertake and help to solve our problems of restitution.

The conclusion contains, apart from the summing up of the former considerations, also the, synthetic survey of the continuation of the states' activities in the field of restitution of works of art. These activities are conducted under auspices of UNESCO with the participation of the special intergovernmental committee. It seems to be worthy to develop this topic of the survey in another separate study.

It can be specially appreciated that a very rich set of bibliographical items was consulted in the book (the list contains more than 270 items). The sources' materials were also professionally collected, competently analysed and estimated. The author has not limited his scientific research to studies of the literature and the sources, he got at persons who had participated in the activities concerning the record and the restitution of the Polish cultural property taken abroad during the war. He included the contents of the conversations and correspondence in his work. That testifies to his emotional commitment to in scientific research. The author's knowledge and erudition in the domain of the history of art is evident.

A critical remark can be made of the practice of very frequent quotation of extensive fragments of other authors' statements and of documents in the language of the cited study or act. That inserts the discordance into the survey written in Polish and impedes the perception of the text.

The editorial quality of the book is worthy of mention. The book is well produced, enriched with the pictures of cultural property which should be or was involved in the restitution.

As a final remark, I want to emphasize that monography — the author's habilitation dissertation not only complied with the formal requirements denominated for the achievement of the scientific degree, but is a remarkably erudite and heavily documented study important from the practical point of view and a valuable contribution to juridical literary output. This book asks to be judged by the very highest standards.

Anna Przyborowska-Klimczak

CEZARY MIK, *Zbiorowe prawa człowieka [Collective Human Rights]*, Wydawnictwo Uniwersytetu Mikołaja Kopernika. Toruń 1992, p. 270.

Cezary Mik carries out the detailed analysis of widely understood „collective human rights" in his book. The author is an international lawyer, though he not only extends his considerations to international law, but to the philosophy and sociology of law as well, which is the undeniable value of this study.

C. Mik sees the sources of human rights based mainly in the system of moral norms. He emphasizes that human dignity, as an element of natural law, is a basic source of human rights (chapter I, p. 25). In such a situation, international law is only a guarantor of existing rights and it does not create them.

In the first and the second chapter the author considers such issues as subjectivity, subject matters and rights and duties arising from human rights. He also presents various philosophical theories regarding the social nature of man. Next, C. Mik deals with the terminology of collective human rights, taking into consideration binding and non-binding acts of international law, international judicial decisions and Polish as well as foreign jurisprudence. On the basis of his study he draws the following conclusion: rights of peoples and the third generation of human rights (solidarity rights), rights executed in a community with other members of a group and social, economical and cultural rights may only pretend to the name of „collective human rights" (chapter II, p. 67).

In the next chapters the author characterizes each kind of the above mentioned rights. He is of the opinion that such rights of peoples as the right to self-determination and the right of equality of nations are not identical to traditional human rights and they have their own, specific nature so that they cannot be included into the group of collective human rights.

The basic element of the concept of rights executed in a community with other members of a group is that only a man can be an object of human rights. People possessing so called *appetitus societatis* create various social groups which are the continuity of rights of individuals. According to the author's opinion a group is only the means of carrying individual rights into effect. Such rights as the right to create trade unions or freedom of association are situated in the system of individual rights and they do not transgress this system. These kinds of rights make the system more understandable and dynamic and just for this reason the rights executed in a community deserve to be named „collective human rights" (chapter IV).

In opposition to the rights executed in a community, social, economical and cultural rights absolutely cannot be acknowledged as „collective human rights" because they hardly contributed to the development and consolidation of the system of human rights (chapter V).

A considerable part of the book is devoted to the place of minority rights in the system of human rights. The author states that minority protection can not be matched with classical human rights because of the specific nature of minority rights. Minorities can not be protected only by ensuring the rights of individuals because such protection is not sufficient for them. On the other hand, the minorities' rights would not be included into the system of peoples' rights or the solidarity rights because of their specific nature.

The minority problems, the peoples' rights and the third generation of human rights are theoretically very attractive, but simultaneously are very controversial issues. The author attempts to bring nearly all aspects of these issues by means of analysis of documents and doctrine, but first of all he proposes his own solutions of problematical matters and just for this reason the book by C. Mik deserves the special attention of readers.

Barbara Mikołajczyk

STEFAN OETER: ***Neutralitaet und Waffenhandel***, Beitraege zum oefFentlichen Recht und Voelkerrecht, Vol. 103, Max—Planck—Institut fuer auslaendisches oeffentliches Recht und Voelkerrecht. Springer—Verlag, Berlin — Heidelberg — New York 1992, 290 pp.

The book concerns development, problems, and mutual relations of the concept of neutrality, and arms trade. Actually, there are very important and full of present interest questions in the contemporary world which all the time is not so peaceful one as we would like to have it.

In first parts of the book, the Author describes the detailed history of development of the concept of neutrality. He points out the importance of three conventions of the Hague Conference of 1907 for this process, and particular of the Third Convention concerning problems of beginning of the war on the sea, the Fifth Convention on the neutrality in the land war, and the Thirteenth Convention on the neutrality in the sea war. He denots later on the importance of the First and the Second World Wars in the field, the result of which was first of all the introduction of some provisions concerning the neutrality into the UN Charter. It was connected with the discussions on „collective security" and „new world order", which in the opinion of the Author, however, were too idealistic and located too far from the reality of life after 1945. He describes his survey on the state practice in important international armed conflicts after 1945, and he concluds that the results of this survey show the following picture: „...states have continued to use the rules of neutrality law in their diplomatic and political postures; analysis also shows that the use of the laws of neutrality remained linked to the existence of a (state of war), which, contrary to some statements of certain prominent authors, still represents an important feature of international law" (at 256).

The third part of the book contains the description of the development of regulations concerning the arms trade from the time after the First World War until nowadays, when we observe more and more complicated situation on the arms market, and more and more restrictions concerning arms trade. The Author concentrates upon the national regulations on the control of arms export of the United States, France, Great Britain, Federal Republic of Germany, Italy, three neutral states (Sweden, Switzerland, and Austria), and two states of the Third World (Brasil and Israel).

There are different models of the control. However, the Author rightly states that as long as there is no general obligation to control arms exports, the problem cannot be solved.

The last part is devoted to the problems connected with an embargo of arms, and especially the question of the responsibility of states in the context of „private" arms trade, and the state control. There arise in this field some important and difficult complications concerning e.g. the „principle of priority", the „complicacy" of the state because of its tolerance concerning state enterprices activity, and also because of the „hidden transactions". There arise also some complications connected with definitions of arms and other objects which should or do not be covered by this category.

All these questions press for the quick development of the concept of neutrality, and for changes of its old principles and rules. We observe nowadays the dynamics of this process as some very dynamic one, and even there is possible to say — concludes the Author — that „the basic features of the modem laws of neutrality have become clear in the course of recent years" (at 258).

The book of Stefan Oeter seems to be highly interesting, even for the people who are not specialists in the field. It offers a lot of information and documentation, and is written in precise language.

Ewa Bieńkowska

RENATA SZAFARZ, ***The Compulsory Jurisdiction of the International Court of Justice***; Martinus Nijhoff Publishers; Dordrecht-Boston-London 1993; pp. XII -f 190.

This book written by Professor Szafarz has appeared initially in Polish, under the title *Obowiązkowa jurysdykcja Międzynarodowego Trybunału Sprawiedliwości*, published by Ossolineum in 1991. This is an updated version translated into English, appearing in the well-know and highly estimated series *Legal Aspects of International Organization*, as Volume 14.

The book under review is the first monograph dealing specifically with the compulsory jurisdiction of the International Court of Justice (the „ICJ" or the „Court") since the book by R.P. Anand *Compulsory Jurisdiction of the International Court of Justice* published in 1961. Distance of over thirty years between both publications was marked by significant development of case law of the Court and numerous writings by commentators (extensive bibliography to this book being an evidence of the latter). Therefore one should welcome Professor Szafarz's initiative to take up the matter, apparently not new, but lacking a comprehensive contemporary analysis.

Before more systematic comments are presented, one general reflection takes place. It is really amazing that the issue of jurisdiction of the international court much less occupied than *e.g.* the European Court of Justice or the European Court of Human Rights attracts so many international lawyers representing all political systems and

legal cultures. This phenomenon occurs despite the commonly shared belief that it is the lack of compulsory adjudication that constitutes a distinct, albeit not the only one, mark of international law, differentiating it from municipal law. Why then lawyers dealing with the ICJ concentrate their writings more often than not on the issue of jurisdiction, and in particular on this part of it called „compulsory"? Is this a subconscious longing to the municipal system, where existence or lack of jurisdiction is an initial question to be resolved by lawyers in settlement of any dispute? Or is this a manifestation of a lawyer's inherent desire to „get the case to a court of law"? Whatever reason this may be, the interest of international lawyers in the compulsory jurisdiction of the ICJ is a well established fact, and this constitutes a preliminary ground for the book under review to be read with curiosity by many.

However, not only the subject matter of the book, but also a manner in which it is written, deserve special mentioning. Readers of the former books by Renata Szafarz (all of them being published solely in Polish language) shall fmd here the same method and style. Professor Szafarz, as always, presents close scrutiny in examination of sources and writings of other authors. This is particularly well seen in the chapter dealing with reservations to declarations recognizing the compulsory jurisdiction. Just to show one example, opinions of no less than fifteen writers concerning the Connally Reservation are referred to in the footnote 79 (to p. 54). This extensive treatment of the existing literature is, unfortunately, made at expense of presentation of own interpretation by the author. Professor Szafarz often limits herself to exact description of the conflicting opinions concerning a controversial issue, and then indicates her preference. It is to be regretted that she is so restrictive in pursuing her own analysis, especially that in these rare occasions when opinions of the author are presented in their full dimension, they are entirely convincing (see *e.g.* the comments on whether the Court transgressed the permissible limits of interpretation by way of upholding its jurisdiction in the *Nicaragua* case — p. 69).

Getting to the more systematic review of the book, it should be noted that the term „compulsory jurisdiction" is understood broadly by the author. Despite the established practice that has linked the notion of the „compulsory jurisdiction" with the system originating from Article 36 sec. 2 of the Statute of the ICJ, Professor Szafarz uses this as covering both the jurisdiction based on the unilateral declarations and on judicial clauses contained in treaties. The reasoning behind is logical: compulsory jurisdiction *sensu stricto* has not been introduced in the system of the ICJ, and therefore „compulsory" should mean such jurisdiction that originates by an unilateral application submitted by a party, with no requirement of express consent of the other party to these very proceedings. In other words, the compulsory jurisdiction is tantamount to the jurisdiction *ante hoc* (as opposed to those *ad hoc* and *post hoc* — p. 4).

As it was said before, the reasoning is quite convincing, but a reader may be surprised that half of the book (excluding annexes) deals with the jurisdiction based on treaties, and not on declarations submitted under the system of Article 36 sec. 2.

The chapters discussing, respectively, jurisdiction of the Court based on treaty provisions and on the optional clause, are preceded by an outline of general problems concerning the Court's jurisdiction as such. Among the issues of general nature, differentiation between the Jurisdiction" and the „competence" is discussed extensively (pp. 1-2). The author does not opt for precise distinguishing of these notions, and shows that the practice of the Court gives no basis for the said separation.

The other issues dealt with in the first chapter include bases for the jurisdiction of the Court (notion of consent of States and means of expressing this consent) and decisions of the Court on the jurisdiction *(compétence de la compétence)*.

The author has limited the scope of the analysis to the issues of jurisdiction, and therefore the question of admissibility of a case is discussed only marginally. The more systematic comparison of the jurisdiction and the admissibility would be, however, helpful, particularly if included in the first chapter.

Chapter II dealing with the compulsory jurisdiction originating from treaty provisions discusses both general treaties for peaceful settlement of disputes (multi- and bilateral) and compromissory (or judicial) clauses in treaties concerning other matters. Among the former category, relevant provisions of the General Act of 1928, of the Pact of Bogotá of 1948, and of the European Convention on Peaceful Settlement of Disputes of 1957 are quoted.

The latter group (treaties with compromissory clauses) is divided into three sub-categories: treaties providing for compulsory jurisdiction, those containing clauses for voluntary jurisdiction, and those in which it is hard to find *prima facie*, which type of jurisdiction is provided for. The first of these sub-categories is rightly discussed as containing legal basis for the jurisdiction being subject of the book under review. It consists of treaties (multi- or bilateral) which provide for settlement of a dispute concerning interpretation or application of that treaty (or relating to expressly contemplated selected issues under the treaty) by a judgment of the Court, seized at an unilateral request of any party to the dispute. Among these treaties, the Genocide Convention of 1948 and the 1957 Convention on Nationality of Married Women are rightly quoted as examples (p. 26).

The second of the sub-categories has, in fact, nothing to do with the compulsory jurisdiction. It consists of the treaties that contain clauses providing for the recourse to the ICJ at the joint request of all parties to the dispute. It may be said that including those clauses in any treaty is legally irrelevant or superfluous, as the Court may be lawfully seized via joint request of all parties irrespective of any clauses, by virtue of Article 36 para. 1 of the Statute of the ICJ. Accordingly, it should be recommended not to include such clauses in any treaty, at least for reasons of *elegantia juris*, namely, that no legal document should contain provisions legally irrelevant. It must be added, however, that the author's opinion on this matter does not go so far as presented above.

The last sub-category is opposed to the two former in that sense that a treaty should specify whether it provide for the compulsory jurisdiction (the first sub-category) or not (the second one). If the treaty is silent on this issue, still the jurisdiction may be either compulsory or voluntary, so the third category does not constitute any specific type of the Court's jurisdiction, but simply introduces an element of legal uncertainty. The author convincingly argues that if the clause provides for the jurisdiction, and it is not apparent that this jurisdiction is voluntary, it is presumed that this provision establishes the compulsory jurisdiction (pp. 29-30).

Chapter III of the book discusses the jurisdiction based on the optional clause of Article 36 para. 2 of the Statute. Among various matters examined in this chapter, the issue of reciprocity merits particular attention. Applicability of the reciprocity principle to reservations to the declarations submitted under the optional clause system, and differentiation of this situation from lack of reciprocity for the formal conditions is the issue that frequently appears in the litigation before the Court. The author follows the

line drawn by the Court in its judgments, in particular in the „*Certain Norwegian Loans*" and the „*Military and Paramilitary Activities in and against Nicaragua*" cases (pp. 44–46 and 64).

Reservations are categorized as *ratione materiae*, on *ratio decidendi, ratione personae, ratione fori* and *ratione temporis*. The author presents a very thorough survey of various formulations, discussing reservations made by the States in their historical context.

The issue of formal conditions, *Le*. possibilities of unilateral renunciation or modification of the declarations, is discussed in light of the practice, and of opinions of various writers. The author gives the practice the predominant place, and comes to the conclusion that the rule has emerged allowing the states to attach to the declarations the formal conditions providing for renunciation or modification of the declaration with immediate effect.

The book is densely packed with statistical information. Lists of treaties with compromissory clauses, particular types of reservations, and cases based on a particular legal basis are frequently provided. This feature makes the book not so easily readable, but this minor drawback is matched by the usefulness of the compiled data.

It should be also stressed that Professor Szafarz summarized the most important conclusions in 66 points presented at the end of the book.

Annexes to the book contain current texts of the declarations recognizing the compulsory jurisdiction, and the lists of contentious cases submitted to the ICJ and its predecessor.

The book is impressive despite its brevity. Its usefulness for any lawyer dealing with the issue of international adjudication is beyond doubt. The unequivocally positive attitude of the author to the compulsory jurisdiction of the Court seems to correspond well with the trends in Central and Eastern Europe in this respect.

Rudolf Ostrihansky

JERZY TYRANOWSKI, ***Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*** *[Territorial Integrity, Inviolability of Frontiers and Self–Determination in International Law]*, Państwowe Wydawnictwo Naukowe, Warszawa–Poznań **1990, p. 327.**

The author has considered the development, actual status and mutual relations between the three principles, approaching the problem from the point of view of changing international law.

The notion of territorial integrity has gained a special position on the ground of Art. 10 of the Covenant of the League. This provision guaranteed the independence and territorial integrity of the member-States, however, it did not exclude a so-called peaceful change. On the ground of the UN Charter the problem of territorial integrity is strictly connected with the application and interpretation of the ban on the use of force, as well

as with the principle of non-intervention. Summing up his considerations on the principle of territorial integrity, the author states that its autonomous character is emphasized in particular by socialist (East European) authors and that this principle is not applied in respect to aggressor states. The latter question requires some comments. The scope of a political (not limited to reparations) responsibility of an aggressor state is not firmly established as alleged customary rule. One refers in this context to the measures applied against Germany and its allies after the Second World War as element of state practice. However, these steps were confirmed by special provision of the UN Charter (Art. 107) which could indicate their extraordinary character. Perhaps such a responsibility will be developed on the ground of the concept of a crime of state proposed by the ILC.

The inviolability of frontiers constitutes the most important element of the territorial integrity. Tyranowski expresses the opinion that the practice of African states (the uti possidetis rule established in the framework of the OAU) and European states (initiated in the mutual relations of socialist States and subsequently accepted by the Final Act of the CSCE) transformed this concept into a separate principle of international law, the role of which consists of protecting the state territory against illegal (political, not based upon international law) claims. Unfortunately we cannot present here interesting considerations by the author dealing with the relationship between political and international legal norms. His statement that the elements of the principle of inviolability of frontiers constitute jus cogens is correct in our opinion exclusively as far as this principle is connected with the principle of the nonuse of force.

The last part of the book concerns the relationship between the principles of territorial integrity and self-determination. Tyranowski seems to limit the application of the right to self-determination to colonial territories; in his opinion, this element plays an important role as a criterion for the creation of a state (together with effectiveness). Finally he rejects the international legal right to secede, but he states that the secession per se does not violate the principle of territorial integrity. In our opinion, secession constitutes more of a political than an international legal issue (there is no precise difference between a minority entitled to autonomy and a people entitled to self-determination). It belongs therefore to the domain of facts which are not appreciated from the point of view of law. Recent developments in Europe (the reunification of Germany, dismemberment of the USSR and Yugoslavia) show that there is a strong tendency towards acceptance of priority of the principle of self-determination; however, it is too early to confirm its general acceptance.

Władysław Czapliński

BOGDAN WIERZBICKI, ***Sytuacja prawna uchodźcy w systemie międzynarodowej ochrony praw człowieka [Legal Status of a Refugee in the System of International Protection of Human Rights/*, Białystok 1993, pp. 203.**

B. Wierzbicki for several years has been addressing the problems of asylum and political offenders. Recently he has modified his field of interest and concentrated on the question of refugees in international law. The problem of refugees has not attracted the interest of politicians and research workers from former communist states, as these countries were to a large extent emigration countries and not immigration ones. However, the evolution of the position of the Western World towards refugees (in particular towards economic immigrants), and especially the conclusion of agreements of Schengen and expected changes in the German asylum legislation involve a change in the attitude of Central and East European states towards the problem of freedom of movement and refugees. This book by Wierzbicki reconsiders recent developments in the field of refugee law.

The author presents basic elements composing the system of protection of refugees: international legal protection (both universal and regional) and protecting measures on the national level (ironically, measures adopted recently in certain states are directed more towards a protection against undesirable refugees than towards a protection of refugees). The universal protection is still based on the Geneva Convention of 1951 which is still individually oriented; however, the practice of the UNHCR shows a tern dency towards group protection. Wierzbicki analyses subsequently different notions connected with the term *refugee* {*de facto* refugees, B-refugees, displaced persons), the international legal position of a refugee (in particular such questions as non-refoulement, recognition of foreign administrative decisions dealing with the granting or devial of refugee status, and a scope of rights granted to a refugee under international and municipal law of respective states). Wierzbicki notes that the decision granting a refugee status is of a declaratory character (even if it causes constitutive effects for a particular refugee) and does not bind third states; he maintains also that the non-refoulement rule does not obligate a state to allow a refugee entering its territory unconditionally, though such a norm seems to be *in statu nascendi* /in our opinion, recent developments within the Schengen group do not justify such an opinion).

It is hard to agree with Wierzbicki's opinion on the responsibility of a state towards the international community and to other states for forcing its nationals to flee from danger (political persecution, etc.). Contrary to his view, states are not allowed to freely expel their nationals. The mere damage to another state without having committed an internationally wrongful act can be hardly considered as a premise of a state responsibility. In fact, according to recent practice of the 1CJ (in the *Teheran Hostages and Nicaragua* cases) and the position by the ILC, damage is not considered as an element of a wrongful act.

Further considerations by Wierzbicki deal with regional systems of protection of refugees. In the case of African and Latin American ones the scope of protection is larger than on the universal plan; while the European system (under elaboration, based upon the activities of the Council of Europe and the agreements of Schengen) seems to be relatively restrictive. However, the criticism by Wierzbicki of the Schengen system is modest and timid.

Finally, Wierzbicki, presents solutions adopted recently in different West European states with respect to the protection of refugees and asylum regulations, as well as the Polish regulation in this field (actually, a new aliens act is under elaboration).

The book is based on English language literature (in many points the author refers simply to positions taken by some leading authors like Grahl-Madsen or Goodwin-Gill, without presenting his own views). It constitutes a compact manual of refugee law, very useful for practitioners as well as for laymen. We would like to emphasize a rare advantage of the study: it differentiates precisely between legal norms and state practice which does not amount to customary law.

Władysław Czapliński

KAROL WOLFKE, ***Custom in Present International Law***, 2nd ed. (rev.), Martinus Nijhoff Publishers, Dordrecht-Boston-London 1993, pp. 192.

The book by K. Wolfke was the first published in Wroclaw in 1964 and belonged from its very beginning to the most outstanding and often quoted studies which has dealt with international customary law. After nearly 30 years Professor Wolfke has published a new edition of his study. Although he has stated that the present edition has been brought up-to-date with only some changes and omissions, one should stress out that these supplements deal with the issues belonging to the most acute and important problems of international law: the inter alia hierarchy of sources of international law, peremptory norms of international law, binding force of customary law in respect to the states opposing the formation of custom (persistent objectors), relationship between customary and conventional rules etc. It should be to emphasized that the study to large extent is based on the jurisprudence of the International Court of Justice, which includes important decisions which has been passed since the publishing of the first edition of the book. This book is influencing the state of international customary law: the *North Sea Continental Shelf* case, the *Nicaragua* case and the rich practice dealing with the delimitation of maritime areas of the eighties.

Professor Wolfke consistently presents himself as partisan of the voluntary theory of customary law, accentuating the role of the willingness of the states in formation and application of international law principles. This opinion has been based upon the recent practice of the World Court. Analysing the elements of a custom in the practice of the Court he emphasized the requirement for both elements by the Court *(general practice accepted as law)*, as well as by the ILC. He states that the new elements have been introduced into the formation and ascertaining of the customary norms: such as a short duration of the practice and the participation of specially affected states *(North Sea Continental Shelf case)* – that shows the constant development of theory and practice of customary law. Notwithstanding the fact of this development, Wolfke defines the acceptance of the practice as element of state's will. The state practice seems to play more important role in the Author's considerations, as he states that in ordinary

situations one can speak of a presumption that the particular state is bound by the customary rule. A consensual character of customary rules is emphasized, according to the Author, through the concept of a persistent objector.

It is interesting that Wolfke minimizes the importance of international agreements as a element of the formation of customary law (at 71 and 145); at the same time he indicates the great role which is played by binding acts of international organizations (it is disputable whether their binding force results from customary character of their norms or from the authority of constitutive treaties of respective organizations).

Even though we fully agree with the Author that although the *jus cogens* concept refers mostly to the universal customary law, there still lacks convincing evidence of its recognition and identification by the state practice (at 91). In respect to other categories of special customary norms like norms concerning territory, acquisitive prescription (accepted by the ICJ in its decision in the *Nauru* v. *Australia* case passed after the completing of the book) and objective regimes, one could expect more detailed analysis. We also do not agree with the Author's support for the passage of the *Nicaragua* judgment of 1986 on the simultaneous validity of conventional and customary norms dealing with the same issue (it would be hardly possible to ascertain the practice of the parties to the agreement as constituting the element of customary law process).

The impressive documentary material and great erudition of the Author's will result that the book will remain an important source of authoritative knowledge on customary law and practice for all those who are interested in the forthcoming years.

Władysław Czapliński

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