XXXIV POLISH YEARBOOK OF INTERNATIONAL LAW 2014
DOI 10.7420/pyil2014m
PL ISSN 0554-498X

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TREATY INTERPRETATION BY THE POLISH ADMINISTRATIVE COURTS: A CASE STUDY OF THE INTERPRETATION OF THE 1972 PRAGUE CONVENTION

Abstract:
This article analyses the practice of the Polish administrative courts with respect to application of the Vienna Convention on the Law of Treaties, based on a case study of the judgment of the Voivodship Administrative Court in Warsaw of 6 May 2014 (case no. II SA/Wa 117/14), which concerned the recognition of distance learning degrees awarded by Ukrainian universities pursuant to the 1972 Prague Convention. It is argued herein that the reasoning of the court suffers from four major drawbacks: 1) it is at variance with the text, object and purpose of the Prague Convention; 2) it does not take into account the practice in the application of that treaty; 3) it misinterprets the silence of the preparatory work to the Prague Convention on certain issues; and 4) it is inconsistent with international judicial decisions as regards the interpretation of the "special meaning" of one of the terms used in the Convention.

Keywords: 1972 Prague Convention, Polish practice in international law, VCLT, Vienna Convention on the Law of Treaties.

INTRODUCTION

The problem of treaty interpretation has undoubtedly always been one of the most pertinent issues of treaty law, if not even international law as a whole. Still, the way in which the national courts interpret treaties and, above all, their consistency with the international jurisprudence on the matter, has not been given proper attention until recently.[1] The following article aims to help fill this gap through an analysis of

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[1] With a few notable exceptions (*e.g.* the works of L. de Naurois, *Les traités internationaux devant les juridictions nationales*, Librairie du Recueil Sirey, Paris: 1934, and R. Falk, *The Role of Domestic Courts in the International Legal Order*, Syracuse University Press, Syracuse: 1964) there were very few serious studies on the subject until the 1980s and 1990s.

the jurisprudence of the Polish administrative courts regarding the interpretation of the 1972 Prague Convention, concluded between the States of the former Soviet bloc and dealing with the mutual recognition of academic degrees. Particular attention will be paid to the most recent judgment on the issue, delivered by the Voivodship Administrative Court in Warsaw on 6 May 2014.[2] Some earlier decisions on this issue will also be referred to.[3] It is argued herein that, at least with regard to the recognition of the degrees pursuant to the Prague Convention, the Polish administrative courts applied the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT) incorrectly, by unjustifiably favouring extra-textual factors over the text of the treaty itself, disregarding the practice in the application of the treaty, misinterpreting the silence in the preparatory work to the treaty on certain matters, and failing to ensure compliance with international judicial decisions concerning assessment of the existence of the "special meaning" of a term contained in a treaty.

The applicant in the case decided by the Voivodship Administrative Court in Warsaw on 6 May 2014 was a former part-time student enrolled in a course at a Ukrainian university which was offering courses in Poland through distance learning. She appealed against a decision of the Polish Minister of Science and Higher Education denying the issuance of a certificate recognising the equivalence of the degree from the Ukrainian university she graduated from to a corresponding Polish degree. After examining the case, the Court dismissed the application. The judges observed that, according to Polish law, a graduate degree obtained abroad may be considered equivalent to one granted in Poland either pursuant to a treaty or, in the absence of an applicable treaty, by way of a special procedure for the recognition of professional qualifications provided for in national law. The Court identified two international agreements applicable in the case at hand:[4]

1. the Convention concerning the validation and reciprocal equivalence of diplomas issued by institutions of intermediate, specialized intermediate and higher education and documents attesting to scientific and teaching qualifications,[5]

[2] Judgment of the Voivodship Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of 6 May 2014, II SA/Wa 117/14.

[3] In particular the judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 23 April 2004, OSK 179/04, which may be seen as a landmark case in this respect and was extensively quoted by the Voivodship Administrative Court in the case under discussion.

[4] The judges rightly pointed out that, although at the time of deciding the case both treaties were no longer binding since Poland had denounced them, with effect from 6 August 2004 and 25 September 2005 respectively (see the reply of the under-secretary of state for Education and Science to the parliamentary question no. 1130 on the withdrawal by the Republic of Poland of the Prague Convention and the Warsaw Agreement, dated 8 March 2006, available at: http://orka2.sejm.gov.pl/IZ5.nsf/main/48003C97 (accessed 20 April 2015), they were nevertheless applicable in the case because they were in force when the contested decision had been adopted.

[5] The treaty in question does not have an official English title. The one given above appears in several documents, including UNESCO, *Preparation of a Preliminary Draft Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and Oceania, Information note by the Director-General*, ED-80/WS/168 Rev., Paris, 26 January 1981, p. 6, available at: http://unesdoc.unesco.org/

signed in Prague on 7 June 1972[6] (the Prague Convention or the 1972 Convention); and

2. the Agreement between Poland and the USSR on the equivalency of documentation on education, learned degrees and titles awarded in Poland and the USSR,[7] signed in Warsaw on 10 May 1974[8] (the Warsaw Agreement, or the 1974 Agreement).[9]

Surprisingly, the Court did not find it necessary to examine the actual provisions of either of the treaties. Instead it noted – most unexpectedly – that the evidence before it demonstrated "a fact which was crucial to decide the case", namely, that the course the applicant had completed was a distance learning one, because she lived in the territory of one State and studied in another State. According to the judges, this fact alone confirmed that the decision of the Minister who refused to issue the certificate of equivalence at the request of the applicant was right, since neither the Prague Convention nor the Warsaw Agreement was applicable to distance education.

Quoting extensively from an earlier judgment of the Supreme Administrative Court of Poland of 23 April 2004 in a very similar case (case no. OSK 179/04),[10] the Court took the view that the fact that the 1972 Convention had been drafted more than 30 years earlier, under different political and economic conditions, must obviously affect the interpretation of its provisions. There were no references to any future, anticipated forms of education, including distance learning, in the text of the Convention itself. Nor was there any confirmation of any intention expressed by the negotiating States to recognise distance learning degrees, as the preparatory work was silent on this issue. It could not be therefore assumed, the Court argued, that the parties to the Prague Convention[11] wished to recognise the equivalence of the documents certifying successful completion of higher education based on unplanned, let alone unexpected,

images/0004/000431/043180Eb.pdf (accessed 20 April 2015), and UNESCO, *Preliminary Report by the Director-General on the Preparation of a Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific*, ED-81/WS/88, Paris, 16 November 1981, p. 6, available at: http://unesdoc.unesco.org/images/0004/000466/ 046617EB.pdf (accessed 20 April 2015).

[6] Konwencja o wzajemnym uznawaniu równoważności dokumentów ukończenia szkół średnich, szkół średnich zawodowych i szkół wyższych, a także dokumentów o nadawaniu stopni i tytułów naukowych, O.J. 1975, No. 5, item 28.

[7] The English translation of the title of the treaty is taken from: G. Ginsburgs (ed.), *A Calendar of Soviet Treaties: 1974-1980*, Martinus Nijhoff, Dordrecht: 1987, p. 492.

[8] Porozumienie między Rządem Polskiej Rzeczypospolitej Ludowej i Rządem Związku Socjalistycznych Republik Radzieckich o równoważności dokumentów o wykształceniu, stopniach i tytułach naukowych, wydawanych w PRL i ZSRR, O.J. 1975, No. 4, item 14.

[9] Both remained in force between Poland and Ukraine based on the special agreement concluded between both countries on 18 May 1992 (available at: http://www.nauka.gov.pl/g2/oryginal/2013_05/4c4458c25787b157aa9cb7891e79ed54.pdf, accessed 20 April 2015).

[10] Judgment of the Supreme Administrative Court of 23 April 2004.

[11] The Supreme Administrative Court consistently used the word *sygnatariusze* (signatories) while referring to the parties of the Convention. Although deplorable and at variance with the Vienna Convention on the Law of Treaties, this practice is quite common among the Polish judiciary and will not be discussed any further. All references to "the signatories" will be adjusted to "the parties".

new educational methods, including cross-border distance learning. Consequently, the parties could not be regarded as bound by the Convention with respect to these degrees. The Voivodship Administrative Court concluded that the decision of the Minister of Science and Higher Education to refuse recognition of the applicant's degree was correct.

The reasons for the 2014 judgment of the Voivodship Administrative Court reveal a fundamental misunderstanding of the rules of interpretation of international treaties. Particularly striking is the way in which Arts. 31 and 32 of the VCLT were applied. Ideally, both provisions should have served as a starting point for the whole analysis and as guidelines on how to approach the problem. However, as will be demonstrated below, in the case at hand their role was reduced to a fig leaf to cover the deficiencies in the reasoning of the court.

1. THE TEXT AS A POINT OF DEPARTURE

According to Art. 31.1 of the VCLT, the main provision of the Convention regarding treaty interpretation, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[12] The wording of this provision clearly puts the emphasis on the text of the treaty under interpretation as the primary source of obligations between the parties, not their intentions or other extra-textual factors. "The ordinary meaning" of the terms of the treaty should be determined in the context in which such terms occur and in the light of the object and purpose of the treaty itself, having due regard to the principle of good faith. As put forward by the late Judge Fitzmaurice, "the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended." This is because "the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so."[13] The VLCT's approach, based above all on the principle of objectivity, is deeply rooted in customary law and international practice.[14] The basic

[12] Vienna Convention on the Law of Treaties (adopted 27 January 1980, entered into force 27 January 1980) 1155 UNTS 331.

[13] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 British Yearbook of International Law 203 (1957), p. 205; H. Waldock, *Third Report on the Law of Treaties*, 2 Yearbook of the International Law Commission 4 (1964), A/CN.4/167 and Add. 1-3, p. 56. Note that G. Fitzmaurice and H. Waldock were the last two Special Rapporteurs of the International Law Commission charged with the task of drafting the VCLT.

[14] *See e.g.* PCIJ, *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels, Advisory Opinion*, PCIJ Rep. 1931, Series AB, No. 42, p. 144; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion*, PCIJ Rep., Series AB, No. 44, p. 29 and 40; ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Rep. 1994, p. 6 ff., para. 41, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12

rationale for this approach is the need to ensure global consistency in the interpretation, by various international subjects and bodies, of treaties concluded by different parties. Placing the main emphasis on the text of a treaty or other text-related objectified criteria not only facilitates the settlement of disputes by international courts and tribunals,[15] it also considerably simplifies the application of the treaty on a daily basis by the organs and agents of the parties to the treaty.[16]

In the judgment in question, the Voivodship Administrative Court blatantly disregarded the letter and spirit of Art. 31. Neither the 1972 Prague Convention nor the 1974 Warsaw Agreement invoked in the case under consideration provided any grounds for refusal to recognise any degree based on the way in which the underlying education was delivered. On the contrary, both treaties were drafted in very general terms and the notions used could cover all kinds of university degrees and various forms of higher education. Art. 1.2 of the Prague Convention provided that the parties to the Convention agreed to recognize "all documents certifying successful completion of higher education (at a university, technical university or in a university institute) allowing their holders to hold a degree." Art. 1.4 of the Warsaw Agreement confirmed the equivalence of "a diploma issued after graduation from an institution of higher education in USSR [Ukraine]", provided that it entitled the holder to pursue further doctoral studies.

It is likely that the explanation for the peculiarity of the reasoning of the Voivodship Administrative Court in the case at hand lies in the Court's misreading of the passage just quoted. The judges might have interpreted the notion of "graduation from an institution of higher education in USSR [Ukraine]" as requiring the student to pursue his or her education (i.e. participate in classes) within the territory of Ukraine. However, there are no grounds for supposing that the provision in question implied any such obligation. What it basically provided was that in order to be recognized, a degree had to be awarded by a university or a similar institution based in Ukraine. The context in which it appeared did not indicate that any exception for certain modes of education was intended or could be made.

Nor can any confirmation for the conclusions of the Court that distance learning was excluded from the scope of 1974 Agreement be found in the object and purpose of

October 1998, para. 114; Inter-American Court of Human Rights, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion, OC-3/83, September 8, 1983, IACHR Rep. 1983, Series A, No. 3, para. 50.

[15] This aspect has been rightly noticed by K. J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 Vanderbilt Journal of Transnational Law 281 (1998), p. 294, who, however, fervently criticizes the approach taken by the international courts in this regard, arguing that it is the actual intent of the parties which should be given the greatest consideration, not that of an objective third party.

[16] Such organs or agents are usually not in a position to undertake a thorough analysis of the preparatory work of the treaty or other extra-textual factors which may indicate the intention of the parties to the treaty. The principle of primacy of the text significantly raises the probability that in most cases the conclusions reached by them will be coherent with those of the specialized organs, like ministries of foreign affairs, or international courts and organs.

this treaty.[17] The title of the Agreement referred only to the "learned degrees and titles awarded in Poland and the USSR [Ukraine]", once again confirming that the only factors which mattered in the process of certification of equivalence were whether a given document entitled the holder to an academic degree, and whether the institution which awarded that document was located in either of these two States. The sole aim of the Agreement, expressly stated in a very short preamble, was the "furtherance of cooperation [of the parties] in the field of science, education and professional training", which cannot be considered as precluding recognition of distance learning degrees, but rather the contrary. The same applies to the Prague Convention, the aims of which were the "deepening and broadening of cooperation in the field of science and education" and the "furtherance of socio-economic cooperation" between the parties.

2. THE PRACTICE OF THE PARTIES

Art. 31.3 of the VCLT provides that the interpretation of a treaty should also take into account, *inter alia*, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." A study of the practice of the Polish organs regarding the application of the Prague Convention and Warsaw Agreement with respect to the degrees awarded in Ukraine once again raises doubts about the findings of the Voivodship Administrative Court in the case under review.

A short description of this practice can be found in a letter of the Minister of Science and Higher Education to the Speaker of the Senate of 20 February 2012, detailing past practices.[18] As is apparent from that letter, at the beginning of the 2000s the Minister denied recognition of the degrees of the university the applicant studied at because it was determined that the courses were offered in violation of the Polish higher education law. The persons who were refused certificates of recognition lodged complaints with the Voivodship Administrative Court in Warsaw and the Supreme Administrative Court. Both Courts held that there was insufficient evidence to conclude that the degrees awarded did not qualify for recognition under the provisions of the Prague Convention. They pointed out that the Minister was allowed to examine only whether a given document was genuine and whether it "entitled the holder to hold a degree", not how it was obtained.[19] In accordance with these rulings, the Minister issued more

[17] If the object and purpose of a treaty is not expressly stated in a general clause, it should be determined, above all, by having recourse to the title of the treaty and its preamble, *see* O. Dörr, K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Heidelberg: 2012, p. 546, and M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, p. 428.

[18] Letter of the Minister of Science and Higher Education Barbara Kudrycka to the Speaker of the Senate Bogdan Borusewicz, 20 February 2012, Ref. No.: MNiSW-DNS-WUW-185-20358-2/MK/12, available at: http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/dokumenty/stenogram/oswiadczenia/konopka/0401o.pdf (accessed 20 April 2015).

[19] *See e.g.* Judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 January 2003, I SA 1883/02.

than 200 certificates to the applicants. In mid-2006,[20] through an exchange of letters with its Ukrainian counterpart, the Minister became aware that by offering the courses in Poland without a required licence the university in question also violated the Ukrainian law concerning the provision of educational services abroad, and that the degrees awarded by it were invalid. From that time on, the Minister began once again to refuse to issue the certificates of recognition. This time the administrative courts did not question the correctness of her actions.

The foregoing version of events is not, however, fully corroborated by the judgments referred to in the letter. An analysis of them points rather to late 2004 as the date on which both courts began to refuse to recognise the equivalence of the degrees in question.[21] Moreover, it demonstrates that the decisions issued between 2004 and 2006, unlike the post-2006 ones, did not address the issue of the violation of Ukrainian law at all and focused only on the lack of compliance with the Polish law.[22] Lastly, it shows that in parallel with the 2004 change, the courts suddenly began to advance the argument that the Prague Convention did not contain any references to future developments in the field of education and therefore must be interpreted as excluding the recognition of distance learning degrees, which did not exist at the time when the treaty was concluded. This unexpected, dramatic shift in the interpretation of the treaty in question was further confirmed, according to the decisions, by a study of the preparatory work of the Convention, which did not indicate that it was the intention of the parties that distance learning or other future degrees should be covered by the scope of the Convention.

It is highly probable that the change in practice which occurred in late 2004 was in fact motivated by a wish to ensure full compliance with the *acquis communautaire* of the European Union (EU), which Poland joined on 1 May 2004. Many concerns were voiced at the time that the recognition of degrees pursuant to the Prague Convention would be incompatible with EU law. Also, there was a growing discontent in the academic community that the education standards in many post-Soviet states, including Ukraine, were much lower than in Poland, and that many people took advantage of that situation by studying abroad and then seeking recognition of their degrees in

[20] In fact the courts started to question the equivalence of these degrees in late 2004; see below.

[21] The distance-learning degrees were recognised in, *inter alia*, judgments of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 January 2003, I SA 1881/02 and I SA 1883/02. Probably the first judgment refusing to recognise such degrees was the one issued on 23 April 2004, OSK 177/04.

[22] *E.g.* judgments of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 23 April 2004, OSK 177/04, OSK 178/04 and OSK 179/04, judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 November 2004, OSK 181/04. Compare the post-2006 decisions: e.g. judgment of the Voivodship Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of 13 December 2007, I SA/Wa 1616/07 and judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 18 July 2008, OSK 491/08 or judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 12 December 2008, OSK 538/08, as well as the judgment being discussed in the present article, which referred to the violations of the Ukrainian law as well, albeit marginally.

Poland.[23] These concerns later led to the denouncement of the Prague Convention and the Warsaw Agreement by the Polish government.[24] It seems that the Polish administrative courts, aware of the minor importance that Ukraine attached to the issue, took these considerations into account under the pretext of reassessment of the applicable rules of international law.

Hence the practice of Polish courts relating to the recognition of the degrees awarded by the university of the applicant should be divided not into two, but into three different periods. In the first period, up to 2004, the courts recognised the degrees pursuant to the Prague Convention and Warsaw Agreement and underlined that the violations of Polish higher education law had no bearing on the cases. In the period between 2004 and 2006 the violations of the Polish higher education law were accepted as legitimate grounds for denial of recognition,[25] with the lack of references to distance learning education in the text of the Prague Convention being a subsidiary but important argument.[26] Finally, after 2006, the courts included the violations of the Ukrainian law as an additional ground justifying their refusal to recognise the degrees in question.

Surprisingly, all these developments met with no response from Ukraine. On the basis of information in the judgments and in the 2012 letter referred to above, the most plausible explanation of this inaction is that initially the Ukrainian side tacitly approved the practice of recognition of the degrees as perfectly compatible with the agreements between Poland and Ukraine. Later, when it became aware that the university of the applicant offered courses in Poland in violation of Ukrainian law, and that the Polish courts refused to recognise the degrees awarded following completion of these courses, it had no tangible interest in questioning the interpretation adopted by the Polish side, particularly as the cases concerned only Polish citizens and the Prague Convention was no longer in force between Poland and Ukraine. Thus, even though the underlying rationale of the decisions of the courts was wrong, the Ukrainian side remained indifferent since the decisions suited its interests.

Still, it clearly follows from the above analysis of the Polish administrative and judicial practice regarding the interpretation of the Prague Convention and Warsaw Agree-

[23] *See* Letter of the Minister of Science and Higher Education Barbara Kudrycka, *supra* note 18, and the Polish government's justification for the request to denounce the Prague Convention, 10 July 2003, available at: http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/1775/$file/1775.pdf (accessed 20 April 2015).

[24] *See* the Polish government's justification for the request to denounce the Prague Convention, *supra* note 23, and the reply of the under-secretary of state for Education and Science to the parliamentary question no. 1130, *supra* note 4. These arguments appeared also in the judgments issued before the Prague Convention and the Warsaw Agreement were denounced, listed above.

[25] According to the wording of the provisions of the Prague Convention and the Warsaw Agreement, only the "documents certifying successful completion of higher education" or "diplomas" could be recognized. In the absence of any guidelines on how to assess whether a document was eligible for recognition or not provided for in the treaties, decisive importance must attach to the law of the State in which it was issued. It was therefore only the Ukrainian law which was of relevance in the case, not Polish law.

[26] It needs to be underlined that the Convention and Agreement remained unchanged until their denunciation in August 2004 and September 2005 respectively.

ment that at least for some time both treaties were considered as sufficient grounds for the recognition of the distance learning degrees awarded by the university of the applicant. Consequently, they should not be interpreted as precluding the recognition of the Ukrainian degrees based on how the latter were obtained. If that were the case, the courts would not have accepted them at any time. Their earlier acceptance of them can be understood as a confirmation that the distance learning format was not excluded from the scope of the 1972 Convention and the 1974 Agreement.

3. THE ROLE OF THE PREPARATORY WORK

As already pointed out, in the case in question and in other similar cases decided since 2004, the Polish administrative courts referred to the preparatory work of the Prague Convention in order to prove that the parties did not intend to recognise the degrees awarded following the completion of courses taught via distance learning or any other forms of education which did not exist at the time of the conclusion of the Convention. Although perhaps plausible at first sight, this argument is unconvincing.

According to the Art. 32 of the VCLT, if the interpreter of a treaty wishes to confirm the meaning of a certain provision of the treaty resulting from the application of Art. 31, or if the interpretation of a treaty leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion as a supplementary means of interpretation. There is a serious disagreement among scholars whether this provision establishes a formal hierarchy of the means and methods of interpretation. The majority argues that the recourse to the preparatory work is allowed only in cases when the application of Art. 31 proves unsatisfactory,[27] while others assert that Art. 32 does not preclude the recourse to the preparatory work even if the meaning of the text seems clear.[28]

What is undisputed by all authors, however, is that the study of the preparatory work and the circumstances of the conclusion of the treaty cannot simply replace the analysis of its text. Regrettably, this is in essence what happened in the case in question, since after identifying the treaties applicable in the case, the court did not consider it

[27] *E.g.* R. Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 491 (1967), pp. 495-96; Dörr & Schmalenbach, *supra* note 17, pp. 571-72; U. Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not – Interpreting the Rules of Interpretation?*, 54(1) Netherlands International Law Review 133 (2007), pp. 136, 153-54; Fitzmaurice, *supra* note 13, p. 211; G. Schwarzenberger, *Myths and Realities of Treaty Interpretation*, 9(1) Vanderbilt Journal of International Law 1 (1968-9).

[28] *E.g.* S. M. Schwebel, *May Preparatory Work Be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, Kluwer Law International, The Hague: 1996, pp. 543-47, J. G. Merrills, *Two Approaches to Treaty Interpretation*, Australian Yearbook of International Law 55 (1968-9), pp. 60-64, S. E. Nahlik, *Kodeks prawa traktatów* [The code of treaty law], PWN, Warszawa: 1976, pp. 206-207.

necessary to assess whether it was possible to apply their provisions to all degrees awarded by the Ukrainian institutions of higher education. Instead, it focused straightaway on the analysis of the circumstances of the conclusion of the Prague Convention and its preparatory work. In this regard, it observed that the socio-political and economic circumstances prevailing at the time of the conclusion of the Prague Convention were entirely different compared to the ones prevailing at the time the case was decided, and that this fact must have an impact on the interpretation of the provisions of the Convention. The Court's argument went as follows: since there were no indications in the text of the Treaty that it would also cover future forms of education, and since the preparatory work did not give any clear indication in this respect, it could not be presumed that the parties to the Convention wished to recognise the equivalence of the degrees awarded after completion of courses taught using new forms of education, including cross-border distance learning. As a consequence, the parties could not be regarded as bound by the Convention in relation to these degrees.

The most disturbing feature of the above part of the reasoning of the court is the fact that its conclusions regarding the scope of obligations of the parties to the Convention actually lacked any sound legal basis. Under international law, unless a treaty specifically provides otherwise, questions of the validity and binding force of a treaty are exclusively governed by the VCLT.[29] As the Prague Convention was silent on these issues, the only law applicable in this regard was the VCLT, with Art. 62 seeming to be the most relevant. According to this provision, a party to a treaty may invoke a fundamental change of circumstances as a ground for terminating, withdrawing from or suspending the operation of a treaty, if there is a fundamental change in the circumstances which constituted an essential basis of the consent of the parties to be bound by a treaty, the change was not foreseen by the parties at the time of the conclusion of the treaty, and it leads to a radical transformation of the extent of obligations still to be performed.[30]

A comparison between these requirements and the part of the reasoning of the court presented in the current chapter suggests that in the view of the judges two of the above-mentioned conditions were certainly met: the parties to the Prague Convention agreed to be bound by that treaty only under certain circumstances, and did not foresee that the latter would change between the time of the conclusion of the treaty and the time of its application in the case at hand. However, supposing the court really wished to invoke the fundamental change of circumstances to the case, its final conclusion – that despite the subsequent radical change of the said circumstances (i.e. the development of entirely new methods of cross-border education), the actual scope of the obligations of the parties to the Convention remained the same (i.e. limited to the degrees taught using the methods of education existing at the time of the conclusion of the Convention) – should have been different. In fact, the court should have argued the opposite, i.e. that

[29] *See* the Preamble and Part V of the VCLT, particularly Art. 42.

[30] Although accepted as a general rule, the principle *rebus sic stantibus* remains highly controversial and is often seen as potentially threatening the stability of treaties (*e.g.* Dörr & Schmalenbach, *supra* note 17, p. 947). It must therefore always be applied with great care.

due to technical progress and new educational trends the actual scope of the obligations of the parties indeed substantially changed (which, arguably, was the case).

Alternatively, it could be argued that the court was aware that the extent of the obligations of the parties had become radically transformed, but for some reason (*e.g.* a mental leap) it did not acknowledge that in the judgment. In such a case, all the conditions of the fundamental change of circumstances would have been met, and the conclusion of the court that the obligations of the parties to the Prague Convention remained unaltered could be regarded as a desperate remedy in reaction to that change. However, in the light of other remarks made by the court in the case, which expressly questioned the possibility of extension of the scope of the Prague Convention to distance learning degrees and the like, such an argument cannot be sustained.

Even assuming that all the conditions necessary to invoke the fundamental change of circumstances were incurred and fulfilled in the case, neither the Voivodship Administrative Court nor the Supreme Administrative Court would be in a position to question the binding force of the Convention in relation to the distance learning degrees on the basis of such a change. This is because the VCLT expressly stipulates that in order to invoke a ground for terminating a treaty, withdrawing from it or suspending its operation, a party, meaning a State, needs to follow the special procedure provided for in Art. 65, which was not followed in the case in question. Moreover, in line with Art. 44 of the VCLT, the change of circumstances should rather be raised with respect to the Prague Convention as a whole, not to one of its provisions or even one of the possible interpretations of a specific provision, as happened in the case.[31]

4. THE SPECIAL MEANING OF A TERM

The analysis of the text of the Prague Convention and the circumstances of its conclusion, undertaken by the court in the case at hand, is also disturbing for another reason, namely the importance attached to the silence – both of the text of the Convention and in the preparatory work – on the effects of future educational changes. As will be demonstrated below, the conclusions made by the court in this regard were not particularly convincing.

The reason why the silence argument may be considered controversial is because it was used in order to reinterpret the meaning of a term contained in the Prague Convention – "all documents certifying successful completion of higher education (…)

[31] Art. 65 of the VLCT stipulates that a party must notify all other parties of its claim and carry out the measure it has proposed only after the expiry of a period not shorter than three months, provided that no party has raised any objection. If an objection is raised, both parties are bound to seek a solution through peaceful means of settling disputes. Art. 44 of the VCLT provides that "A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty, except as provided in the following paragraphs in article 60" – and although it provides for exceptions when certain conditions are fulfilled, in the light of the reasoning of the court these conditions were not met.

allowing their holders to hold a degree" – in such a way as to exclude from the scope of that term the degrees which were awarded after completion of the courses taught via distance learning or any other form of education which did not exist at the time of conclusion of the Prague Convention. Thus, by reference to an extra-textual factor, the court rejected the ordinary meaning of the term in question in favour of a different one, unrelated to the text of the treaty.

According to Art. 31.4 of the VCLT, "A special meaning shall be given to a term if it is established that the parties so intended." The wording of this provision does not prejudge how the intention of the parties shall be determined. Therefore, it does not explicitly exclude the possibility of inferring conclusions from the silence of a treaty or in its preparatory work on specific issues.[32] Seen in this light, the court's claim that neither the text of the Convention nor the preparatory work indicated the wish of the parties that the scope of that treaty cover any future forms of education, including distance learning, and that the degrees awarded after completion of education in such forms were not eligible for recognition, may at first sight appear legitimate, or at least possibly so.

However, the judgment offers no explanation why the court's interpretation should be preferred over any other one. This is important, since it is an established principle that when invoking the "special meaning" of a term, the burden of proof lies on the claimant.[33] In fact, on the basis of the same text and preparatory work it may equally as well be argued that the parties to the Prague Convention deliberately disregarded the issue of possible future changes in the field of education because they did not consider them important enough to affect the recognition of degrees pursuant to the Convention. Since any diploma meeting the broad definition provided in the treaty[34] would be eligible for recognition, there was no need to reflect on the possible future changes in the forms of education. After all, as has already been observed, the parties to the Convention explicitly intended to deepen and broaden their cooperation in the field of science and education, and must have been aware that over the passage of time this field would inevitably evolve.

The interpretation presented above is at least as legitimate to the one adopted by the court in the case at hand because there is no principle in international law that in cases of doubt, one must prefer the meaning which impairs State sovereignty less (*in dubio mitius*).[35] It is the interpretation which best reflects the intention of the parties to

[32] R. Gardiner, *Treaty Interpretation*, Oxford University Press, Oxford: 2008, pp. 334-36. *E.g.* ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Rep. 2003, p. 16 ff., para. 29.

[33] *See* ICJ, *Western Sahara*, Advisory Opinion, ICJ Rep. 1975, p. 12 ff., paras. 116-18, *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Rep. 1948, p. 57 ff., pp. 62-63. *See also* Dörr & Schmalenbach, *supra* note 17, p. 569; A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements. Theory and practice], Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa: 2006, p. 340.

[34] Namely, a document certifying successful completion of higher education allowing its holder to hold a degree; see above.

[35] *Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)*, Award of the Arbitral Tribunal presided by Judge R. Higgins, The Hague, 24 May 2005, available at: www.pca-cpa.org/showfile.asp?fil_id=376 (accessed 20 April 2015), para. 53. *See also* H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 British Yearbook of International Law 48 (1949), pp. 59 and

the treaty at the time of its conclusion which prevails.[36] However, in cases when there is no clear-cut answer as to which interpretation is correct, instead of favouring one or the other one needs to return to the ordinary meaning of the term in question. This is a logical consequence of the requirement of Art. 31.4 that the intention of the parties must be established in order to give a special meaning to a term.

These conclusions are confirmed by an analysis of international judicial practice, with the advisory opinion of the Permanent International Court of Justice (PCIJ) in the *Night Work* case, the judgment of the International Court of Justice (ICJ) in the 2009 *Costa Rica v. Nicaragua* case and the decision of the WTO Appellate Body in the 1998 *US – Shrimp* case being particularly relevant.[37]

In the first of the above cases, the PCIJ was asked by the Council of the League of Nations, at the request of the Governing Body of the International Labour Organization (ILO), to clarify the meaning of Art. 3 of the 1919 Convention concerning the employment of women at night. According to that provision, women should not be employed "during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."[38]

62; L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21(3) European Journal of International Law 681 (2010), p. 687; *contra*, several cases cited by Crema, pp. 684-85.

[36] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Rep. 2009, p. 213 ff., para. 48.

[37] The three cases listed and discussed below are just examples of a more general trend. The jurisprudence of the European Court of Human Rights is particularly instructive in this regard. The Court insists that the provisions of the European Convention on Human Rights must be interpreted "in the light of present-day conditions" and in such a way that the rights under the Convention are "practical and effective". The Convention is considered "a living instrument". *See inter alia*, *Tyrer v. the United Kingdom* (App. no. 5856/72) Chamber, ECHR 25 April 1978, para. 183; *Marcx v. Belgium* (App. no. 6833/74) Plenary, ECHR 13 June 1979, para. 41; *Soering v. the United Kingdom* (App. no. 14038/88), Plenary, ECHR 7 July 1989, paras. 103-104; *Christine Goodwin v. the United Kingdom* (App. no. 28957/95), ECHR 11 July 2002, para. 74, all available at http://www.echr.coe.int. *See also, inter alia*, the cases before the ICJ: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, p. 16 ff., paras. 52-53, 55 and *Aegean Sea Continental Shelf*, Judgment, ICJ Rep. 1978, p. 3 ff., para. 77, and Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, UN Doc. A/CN.4/L.682, para. 478; *see also* M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, pp. 444-45 and J. Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 The Law and Practice of International Courts and Tribunals 443 (2010), pp. 444-45 who argue that the ordinary meaning of a term may change over time. *Contra*, *South West Africa (Liberia v. South Africa), Second Phase*, Judgment, ICJ Rep. 1966, p. 6, para. 16, *Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia*, Award of the Eritrea-Ethiopia Boundary Commission, 13 April 2002, pp. 21-22, available at: www.pca-cpa.org/showfile.asp?fil_id=121 (accessed 20 April 2015) and J. Sozański, *Współczesne prawo traktatów* [Contemporary treaty law], Polskie Wydawnictwo Prawnicze Iuris, Warszawa/Poznań: 2005, p. 104.

[38] Convention concerning Employment of Women during the Night, 28 November 1919, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C004 (accessed 20 April 2015).

In the course of the work of the ILO, it turned out that there was a great divergence of views between the members of the ILO as to whether or not Art. 3 was meant to apply to certain categories of women who were not engaged in manual work, for instance to those who held supervisory or management positions.

The PCIJ found that the wording of Art. 3 was clear, free from ambiguity and general enough to cover all categories of women contemplated by the question submitted to the Court. The terms of Art. 3 were perfectly consistent with the title of the convention, its preamble and other provisions, which referred to the employment of women in general, and not to certain groups of women.[39] The majority rejected the argument that the application of the Convention to women occupying senior or managerial positions was never considered by its parties because at the time of adoption of the Convention very few women held such positions and that, as a result, the Convention could not be regarded as covering them. In the opinion of the majority of the judges, this argument did not by itself justify ignoring the unambiguous text of the treaty: "The mere fact that, at the time when the Convention on Night Work of Women was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms."[40]

In the case concerning the *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)* of 2009, decided more than 70 years after the advisory opinion of the PCIJ in the *Night work* case, the court was dealing with the disagreement over the meaning of a term appearing in the Treaty of Limits (the Jerez-Cañas Treaty) concluded between Costa Rica and Nicaragua on 15 April 1858, which delimited the boundary between both parties. Although the treaty established Nicaragua's sovereign jurisdiction over the waters of the San Juan River, it recognized Costa Rica's navigational rights "con objetos de comercio" on the lower course of the river. The parties differed over, *inter alia*, whether the term in question encompassed only the transport of goods to be sold in commercial exchange (because, as claimed by Nicaragua, in 1858 the word "commerce" referred exclusively to the merchandise and did not extend to services) or whether it also included the transport of passengers, including tourists (as argued by Costa Rica).[41]

The Court noted that the term "comercio" was a generic term, "referring to a class of activity", and that the parties to the treaty must have been aware that its meaning

[39] PCIJ, *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, Advisory Opinion, PCIJ Rep. 1932, Series AB, No. 50, p. 373.

[40] *Ibidem*, p. 377. It is interesting to note that at a conference which met in May 1931, the parties to the Convention rejected a proposed amendment to the effect that the Convention would not apply to "persons holding a responsible position of management, who do not ordinarily perform manual work" (*see ibidem*, p. 371).

[41] *Dispute regarding Navigational and Related Rights*, paras. 58-59. Costa Rica went even further, trying to argue that the use of the river for purposes of navigation by certain Costa Rican public officials also fell within the scope of the term "comercio". This was, however, surely an over-interpretation, and was rightly rejected by the court.

was bound to evolve over time.[42] Hence, it was the meaning at the time the case was decided, not the original meaning of the notion, which had to be accepted for the purposes of applying the treaty in the case, and the question whether or not services fell under the category of "commerce" in the mid-nineteenth century was irrelevant. The court found that the transport of persons could be "commercial in nature" and that, accordingly, the right of free navigation of Costa Rica extended to both the transport of persons and goods as activities "for profit making purposes."[43]

Finally, in the *US – Shrimp* case the WTO Appellate Body was faced with the task of deciding whether sea turtles constituted "exhaustible natural resources" for the purposes of Art. XX(g) of the General Agreement on Tariffs and Trade. If so, the measure adopted by the United States to protect these turtles could fall under an exception provided for in that article and, as such, be compatible with the Agreement.[44] The Members of the Body held that even though Art. XX(g) had been drafted more than 50 years before, the term "natural resources" was a generic one and "not static in its content or reference but (…) by definition, evolutionary."[45] Therefore, it had to be interpreted in the light of "contemporary concerns of the community of nations about the protection and conservation of the environment"[46] and was not limited to the conservation of "mineral" or "non-living" resources, as argued by India, Malaysia, Pakistan and Thailand, which referred to the drafting history of Art. XX(g).[47] Consequently, sea turtles were found to be an "exhaustible natural resource" by the Appellate Body.

The three cases discussed above confirm that it is the text of a treaty which must be given priority in cases where the exact intention of the parties regarding the 'special meaning' of a term is unclear. As a result, if the meaning claimed by a party is narrower than the text of the treaty suggests, a high burden of proof is on the claimant to prove

[42] *Ibidem*, para. 66. This was particularly the case, according to the Court, when the treaty had been entered into for a very long period or was "of continuing duration". Since the Prague Convention was concluded for an unlimited period (though providing for the possibility of denunciation), this remark also applies to the case reviewed by the Voivodship Administrative Court and discussed in the present article.

[43] *Ibidem*, paras. 70-71. As rightly observed by R. McCaig, *Further Evolution of the Evolutionary Approach to Treaty Interpretation*, 69(2) Cambridge Law Journal 250 (2010), p. 251, if followed strictly, the original meaning of the respective provision of the 1858 Treaty would equally lead to prohibition of the free navigation for the purposes of trade in cars, computers and x-ray machines, since they were invented after the treaty was signed.

[44] It should be noted that in order to be compatible with the Agreement, the measure in question also had to be applied by the United States in a manner which did not constitute arbitrary and unjustifiable discrimination between Members of the WTO. This was not the case, so in the end the US measure was found to be incompatible with the Agreement.

[45] Appellate Body Report, *US – Shrimp*, para. 130.

[46] *Ibidem*, para. 129.

[47] *See* Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, paras. 263-75. The debate during the conference focused on "raw materials", "products" and "minerals" but living resources were not explicitly excluded. (The same can be said about the future possible changes in the field of education in the course of the preparatory work to the Prague Convention in the case discussed in this work).

that the parties indeed intended to give such a meaning to a given term.[48] On the contrary, if the term is broad enough to cover the new proposed meaning, it is presumed that its scope includes this meaning as well, particularly if it is a generic term, i.e. one which refers to a class of objects.[49] Whether the term is generic or not depends on the intention of the parties, but since "the intention of the parties to give a term an evolutionary character is rarely, if ever, explicitly stated in a treaty",[50] it usually must be inferred from the language used by the parties.[51]

In the case discussed herein the Voivodship Administrative Court chose its own way of dealing with the problem and, instead of following the rules set out by the international judicial bodies, held that the meaning of a treaty term does not change over time and remains unaltered throughout its operation. This claim was, unfortunately, not supported by any substantial arguments, but only by a quote from Art. 31.1 and 32 of the VCLT. This is regrettable, although making a convincing case for this particular claim would have been a highly demanding task.

CONCLUSIONS

The analysis of the practice of the Polish administrative courts with regard to the application of the Prague Convention, and in particular the decision of the Voivodship Administrative Court in Warsaw of 6 May 2014, reveals that they were not unanimous in their views as to the interpretation of that treaty. What is surprising is that unlike in most other cases, the Polish administrative courts changed their view on the matter from a more to a less convincing one and began to use the silence of the text and the preparatory work to the Prague Convention with respect to future educational changes as an argument that the degrees obtained via distance learning were not eligible for recognition pursuant to the Convention.

As demonstrated above, this argument was unconvincing for several reasons. Most importantly, it ignored the wording of the text of the Prague Convention itself, which is drafted in general terms capable of covering all kinds of degrees. It also ignored the object and purpose of that treaty, which was aimed at "the deepening and broadening of

[48] This burden was met, for instance, by France in the Morocco case, see *Case concerning rights of nationals of the United States of America in Morocco*, Judgment, ICJ Rep. 1952, p. 176 ff., pp. 188-89.

[49] Arato, *supra* note 37, p. 476, argues that "in terms of judging a treaty evolutive, the evidentiary standard is quite low" and indeed rightly so.

[50] *Ibidem*, pp. 468-69.

[51] According to the Conclusions of the work of the Study Group on the Fragmentation of International Law: *Difficulties arising from the Diversification and Expansion of International Law*, Report of the 58th Session of the ILC (2006), UN Doc. A/61/10, a concept in a treaty may be considered capable of evolving if: "(a) The concept is one which implies taking into account subsequent technical, economic or legal developments; (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances."

cooperation in the field of science and education". Instead of focusing on these critical factors, it placed way too much emphasis on the preparatory work and the circumstances of the conclusion of the treaty. Moreover, it applied the doctrine of fundamental change of circumstances in a manner which clearly deviated from the provisions of the VCLT with respect thereto. Finally, it attributed a "special meaning" to one of the terms found in the Prague Convention in a manner which is very difficult to reconcile with the international jurisprudence on the subject.

The assessment of the judgment in question and a number of similar decisions can therefore be only negative. It is probable that the dramatic change in the practice of recognising distance learning degrees, which occurred around 2004, was driven by the fear that the further application of the Prague Convention would result in Poland's non-compliance with EU law. If that indeed was the case, then the judicial expediency shown by the Polish administrative courts does not deserve praise.