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ASSESMENT OF THE INTERNATIONAL COURT OF JUSTICE JUDGMENT TO 2012 AND THE SUPREME COURT JUDGMENT IN POLAND TO 2010

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ABSTRACT

The article concernes the issue of foreign courts' jurisdiction and their relations with the particular states' legal systems in the context of sovereign state's immunity and its temporary limited interpretation. Several cases are analyzed, from midwar period, through the Cold War era, up to the end of the first decade od XXI century, including assesement of not only International Court of Justice and Polish Supreme Court but also sereral examples of assesement of European and American courts.

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The issue of legal proceedings in Poland, the FRG should be seen primarily in the context of the Supreme Court (Polish Supreme Court – PSC) decisions and the decisions of international judicial bodies, including the very important judgment of the International Court of Justice of 2012[1] mostly because of the implications of this verdict for the development of the law of jurisdictional immunities and future litigation on civil claims against foreign states. The ICJ judgment is without any doubt of great importance to national courts, including the Supreme Court in Poland, as well to legislatures on the doctrine of sovereign immunity.

The ICJ judgment is final and binding on the states but does not bind other judicial bodies such as the European Court of Human Rights or the European Court of Justice. Judges hold in this case that Italy had violated its obligation to respect the jurisdictional immunity to which Germany was entitled under international law, and interestingly referred also to the judgment of the Polish Supreme Court of 20 October 2010[2].

In the Polish domestic law, there is no regulation exempting foreign sovereign state from the national jurisdiction. Poland is not a party to the Brussels European Convention on State immunity Brussels of 1972[3] neither to the 2004 Unit-

1 Case – Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*) Judgment of 3 February 2012.

2 The Italian courts had allowed civil claims to be brought against Germany based on violations of international humanitarian law committed between 1943 and 1945, and had granted measures of constraint against German state property and allowed enforcement in Italy of decisions of Greek courts against Germany, based on similar violations of *ius cogens* in Greece.

3 Poland has not ratified the European Convention on State immunity in 1972. (European Convention on State Immunity), ratified the Brussels Convention of 1926 and the Protocol in 1933. After World War II, the Polish government decided to withdraw, which began back in 1976; see A. Reinisch, *European Court Practice Concerning State Immunity*

ed Nations Convention on Jurisdictional Immunities of States and Their Property, which is not yet in force[4].

The Brussels treaty differentiates between activities of a governmental or public nature carried out by a foreign State or one of its subdivisions, which qualify for State immunity under the modern doctrine of restrictive and activities of a commercial nature carried out by foreign State or one of its subdivisions or agencies, which acts are not immune from the jurisdiction and process of local courts under the modern doctrine of restrictive foreign sovereign immunity.

An analysis of situations in which FRG may enjoy immunity from jurisdiction – Polish Parliament may implore the passage of the domestic Immunities Act, based on legislative practice of other states – requires the evaluation of judicial practice, which reflects customary international law.

Source of jurisdictional immunity of foreign states and its organs can be found in international practice. The doctrine assumes that the existence of a customary rule requires the existence of two elements, namely the practice of the country (*usus*) and the belief that this practice is required, prohibited or permitted, depending on the nature of the standards, by law (*Opinio Juris sive necessitatis*). The International Court of Justice in the in *the North Sea Continental Shelf cases* in 1969 came to conclude that: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *the Opinio Juris* of States"[5]. The ICJ position on this issue is also reflected in the agreement between Poland and Germany of 1991, in which the contracting parties state that in shaping their relations "(...) confirm the direct applicability of the universal norms of international law in national law"[6].

In Polish practice in the past, commonly the doctrine of absolute immunity from jurisdiction had beed used, which states that a sovereign and independent state as an entity of international law is not subject to the law of another state[7]. Poland also refers to the immunity from jurisdiction in proceedings before national courts for damages in connection with the postwar and expropriation acts on Polish territory.

American courts mostly accepted this approach. It is worth to mention the case from 2002 *Theo Garb v. Republic of Poland*, *Ministry of the Treasury of Poland (the Treasury) and John Does # 1-100*[8], where the descendants of Polish Jews in the expropriation class action lawsuit accused the Polish government

from Enforcement Measures, "European Journal of International Law", 2006, 17 (4) p. 803–836.

4 As of 1 February 2012, the United Nations Convention had been signed by 28 States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument.

5 J.-M. Henckaerts, *Study norms of customary international law,* Center for the Dissemination of International Humanitarian Law, Board of the Polish Red Cross, Warsaw 2005, p. 8 and following.

6 Article 2 of the Treaty between the Republic of Poland and the Federal Republic of Germany on Good Neighbourhood Relationships and Friendly Cooperation of 17 June 1991.

7 In Polish literature prevails the view that the foreign state does not enjoy immunity for their acts performed *jure gestionis*, more W. Siedlecki, *An action against a foreign state and a foreign state before the Polish courts*, "Palestra", 1936, no. 5/1936, p 451, cf. Also E. Wengerek*, Enforcement of foreign states immunity*, SP 1967, no. 17, p. 124; H. De Fiumel, *Asset liability and Legal states* Ossolineum 1979.

8 *Theo Garb v. Republic of Poland, Ministry of the Treasury of Poland (the Treasury) and John Does # 1-100* U.S. District Court (Edna 2001), Civil Action, no. CV 99-3487 (ERK), Judgment of June 24 2002, 207 F. Sups.2d 16 (Edna 2002), no. 02-8744 (2d Cir. 2003), certiorari granted, june14, 2004 542 U.S., SC referred the case to the Court of Appeal for 2 circle for reconsideration, taking into account the decision of SC on Altman (*Republic of Austria v. Altmann*, 541 U.S. 2004), by assessing the participants in this collective action by the Treasury in Poland is more than 170 000 Jewish properties that were nationalized, see also matters: *Haven v. Republic of Poland*, 68 F. Supsa. 2d 943 (ND Ill. 1999In re Holocaust Victim Assets Litigation, 105 F. Supsa. 2d 139, 149 (Edna 1998); see L. A. Loy, *Expectations of Immunity: Removing the Barrier to Retroactive application of the FSIA to Pre-1952 Events*, "International & Comparative Law Review", 2003, no. 25, p. 697; V. Wernicke, *The "Retroactive" application of the FSIA in Recovering Nazi looted Art*, "University of Cincinnati Law Review", 2004, no. 72, p. 1124 and following.

that Polish People's Republic after World War II took assets belonged to plaintiffs and reap the benefits of the property, which violated, according to the claim, the Nüremberg principles, the provisions of the Hague Convention of 1970., the Polish Minorities Treaty of 1919 and the Geneva Convention of 1929. Plaintiffs demanded that the defendants turn over the income and profits of the property and sought restitution from the Polish government. The court rejected the whole lawsuit against the Treasury of Poland, applying the principle of limitation to the events of the years 1940 to 1950, where claims arose after the facts have become obscure through the passage of time, and concluded that Poland has not waived its immunity in 1984[9].

In another case *Schmidt v. Polish People's Republic,* appealed later to the US Supreme Court[10], concerning the issue of government bonds in 1929, the claimants filed a restitution claim for Polish Jewish property which was taken away after World War II by the Communist regime. The judges determined that the negotiations between the Polish and Finance Corporation of Delaware were held in New York and Pittsburgh, and thus satisfied the requirement of the connection of commercial activities with the government of the United States. Poland could not rely on immunity, because the court concluded, basing on the previous judgment in case *Texas Trading & Milling Corp.. v. Federal Republic of Nigeria,* 647 F. 2d 300 (2d Cir. 1981), that defendant failed to comply with the contract bonds (purchase of shares in Poland by an American corporation) which took place on U.S. soil, therefore Polish actions have had a direct effect on the American territory. Additionally the District Court for the Northern District of Illinois in case *Haven v. Republic of Poland*, where plaintiffs brought suit against Poland for the seizure and expropriation of their real property during World War II, denied the Republic of Poland's motion to dismiss for lack of subject matter jurisdiction.

Similarly English courts often relinquished jurisdiction over a foreign state. House of Lords in case *C. Czarnikow Ltd. v. Foreign Trade Cenrtala "Rolimpex"* from 1978, granted immunity only after the intervention of the Polish government. The court agreed to the arbitration award, stating that the defendant – Polish corporation – created and controlled by the Polish government, has not had a distinct legal personality and enjoys the freedom to conduct normal business operations[11]. Anyway the court could also grant defendant *Rolimpex* relief from jurisdictional immunity even in situations where such procedure would involve the action taken in the exercise of a foreign government.

Currently the Polish doctrine and judicial decisions as a source of immunity principle generally accepts international custom. The adopted rule recognizes that the foreign state has immunity from jurisdiction only in matters relating to the activities of a governmental or public nature carried out by a foreign State or one of its subdivisions – *Acta iure imperii,* but not entitled to *Acta jure gestionis* – activities of a commercial nature carried out by a foreign State or one of its subdivisions or agencies. Only *Acta jure imperii* qual-

9 The theory of waiver of immunity by a foreign country by taking action in breach of *ius cogens* was formulated by the Court of Appeals for the District 2 in case *Smith v. Socialist People's Libyan Arab Jamahiriya* 101 F.3d 239 (2d Cir., 1996), Court stated that the sovereign state enjoys immunity even if his actions violate *ius cogens*. Other federal appellate courts have adopted the same position of file: *Sampson v. Federal Republic of Germany* 250 F3D 1145 (7th Cir 2001), *Princz v. Federal Republic of Germany* 26 F.3d 1166 (DC Cir 1994) and Siderman 965 F.2d 719, [in:] *Garb v. Republic of Poland.* The court ruled in that case that the Treasury is the organ of state based on the argument in this matter on the *Haven v. Republic of Poland*, 68 F. Supsa. 2d 943, (ND III 1999), aff'd 215 F. 3d 727 (7th Cir., 2000), cert. denied 121 S. Ct. 573 (2000).

10 *Schmidt v. Polish People's Republic* 579 F. Supp 23 (S.D.N.Y. 1984), 742 F.2d 516 (2d Cir. 1984).

11 Judgment *C. Czarnikow Ltd. v. Foreign Trade Cenrtala "Rolimpex"* [1979] AC 351, [1978] 2 All ER 1043 (House of Lords), [in:] J. H. Jacob, op. cit., p. 293, *passim.*

ifies for state immunity under the modern doctrine of restrictive foreign sovereign immunity[12].

Based on this principle, the District Court in Warsaw, in the case of July 2011 *the Ambassador of the Republic of Serbia* denied granting defendant's immunity because court qualified Embassy activities as *Acta jure gestionis*[13].

Lower courts based granting foreign state immunity on art. 1111 § 1 of the Polish Civil Procedure Code (PCPC), such approach has been criticized by the Polish Supreme Court[14]. During the postwar period, the Supreme Court in its judgment of 14 December 1948 *Aldona S. v. The United Kingdom*, expressed the view that the question of jurisdiction of Polish courts over foreign states cannot be based on the provisions of art. 4 and 5 of the old PCPC[15]. The district court dismissed the action holding that as it was brought against a sovereign state the district court was barred by the civil procedure rules from deciding on the merits. The decision was also upheld by the Court of Appeal, which ruled that a person who enjoyed diplomatic immunity cannot be subjected to the civil jurisdiction of Polish courts.

The PSC ruled that another is the legal basis of judicial immunity of a foreign state, and another of diplomatic representatives. The explanatory memorandum stated that when dealing with matters relating to judicial immunity of foreign states the court's decision should be based on general principles of public international law, among which the most important is the principle of reciprocity between Poland and other states. This principle consists in one state's recognition of denying jurisdictional immunity with respect to another state to the same extent as this recognizes or denies immunity in relations to other states. British courts generally accorded immunity to foreign states sued in England. The court explained that, given the consistent application by the courts of the United Kingdom sovereign immunity, which also includes Poland, the court has no jurisdiction to consider the action, especially given the fact that at the heart of the dispute was British entity. The basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet judicium*)."

In its decision of 26 March 1958, the Supreme Court in the case *Zdzislaw, Margaret and Anna J. and P. v. French Consulate in Cracow*, adjudged that according to international law, is not permitted to sue a foreign country in the domestic court, in addition stressed the existence of reciprocity of the French Republic[16].

The judges decided *inter alia* that: "The issue is not settled in the Code of Civil Procedure, the state cannot exercise power of jurisdiction over another country. Differences emerge only on the admissibility of exceptions to this rule"[17].

In his comments lawyer Berezovsky drew attention to the resolution of the Institute of Inter-

12 Germany v. Italy, Amnesty International 2011, London, p. 9.

13 District Court Order case number V of the Act 2109/11.

14 Case (1 PKN 562/99), which states that the practice of the courts, the immunity derived from art. 1111 is wrong, [in:] A. Wyrozumska, *Polish courts against a foreign state immunity*, PiP 2000, no. 3, p. 33 a few decisions of Supreme Court are binding in this matter and have significant affect on the practice of lower courts.

15 The Court also held that the concept of a foreign state does not correspond to the definition of a foreigner state and cannot be used in relation to the provision of Art. 5 CCP [Now Art. 1111, paragraph 1 point 3].

16 *Zdzisław, Margaret and Anna J. and P. v France Consulate in Cracow*, the Supreme Court ruling of 26 March 1958, 2 CR 172/56 (TSO, 1959, No 6, pos. 160) with the voice of C. Berezovsky, PiP, no. 2/1960, p. 327, W. Siedlecki discussion in the Review of Jurisprudence, NP., no. 6/1960, pp. 327, ILR 1958, no. 26, p. 178, [in:] T. Ereciński, J. Ciszewski, *Commentary on the Code of Civil Procedure. The third part, the international rules of civil procedure*, ed. 2 Warsaw LexisNexis, 2003, p. 122.

17 The judgment of the Supreme Court 16.03.1958 r., 2 CR 172/56, OSPiKA 1956, no. 6 pos. 160, with the voice of C. Berezovsky, PIP 1960, no. 2, p. 327 and followng, a thorough analysis of the Polish legislation and the courts ruling on sovereign immunity of foreign states passed July 17, 1979. the UN Secretariat, see *Analysis of Polish Domestic Legislation and Decisions of National Tribunals Regarding Jurisdictional Immunities Status and*

national Law of 1954, which recognizes only state immunity in proceedings concerning acts of state done in the exercise of sovereign power[18].

It is noteworthy that the Supreme Court judgment of 25 March 1987 *Maria B.-L. v. The Austrian Cultural Institute* is concerned employment by the Institute polish employer, in which the court referring to its earlier ruling in 1948 and 1958, settled that the foreign state enjoys immunity for its acts and stressed that the rules of civil procedure do not allow to adjudicate by the Polish authorities the cases concerning authorized representatives of a foreign country[19]. No sovereign and independent state as an entity of international law can be subject to the law of another state. For this reason, the case cannot apply the provisions of Article. 464 § 1 old PCPC. The court granted defendant's immunity based on the practice of reciprocity, showing by that respect for the sovereignty of Austria before Polish national courts. It should be emphasized that the Austrian judicial practice used for many years the theory of limited immunity, and it would be difficult to expect preferential treatment from the other states based on the principle of reciprocity.

The Supreme Court's case *Andrzej B. and Wieslaw B. v. Automotive Technology Centre in Warsaw* considered the issue whether the jurisdictional immunity enjoyed by the Commercial Representation, which constitutes an integral part of the Soviet Union Embassy, cover also the organizational units subordinated to financed by and acting at the Commercial Representation. Lawyers representing the Soviet Union explained that the Center belonged to the Embassy of the USSR, therefore it constitutes full immunity from the jurisdiction of a foreign state[20].

In judging opinion the automotive technology center as an organizational unit of the Embassy of the Soviet Trade Delegation in the Polish Republic was not subject to the jurisdiction of Polish courts and the Explanatory Memorandum stated that: "The basic premise of a diplomatic mission justifies the exemption of defences from the jurisdiction of Polish courts, because there is a clear and undeniable link between sovereign state immunity and privileges and immunities of its organs." The ground to exclude of a diplomatic representation from the jurisdiction of national courts is the sovereignty of the sending state.

A similar position to the previous judgments of the PSC took the Warsaw District Court, which in its ruling of 16 March 1992 in case *Elizabeth K against the Embassy of Switzerland*, rejected the lawsuit because the activities of a diplomatic mission in accordance with international law, are covered by and entitled to immunity[21].

In another case *The Foundation of Czartoryscy of the National Museum in Cracow v. The Federal Republic of Germany* brought in 1998 before District Court, the claim was dismissed on the grounds, that the ambassador of diplomatic mission can claim jurisdictional immunity and cannot be summoned before the Polish court[22]. The same court has adopted on April 27, 1998 the same findings in case *Slawomir S. against the People's Republic* rejecting the plaintiff's allegation that the Chinese Embas-

Their Property, Transmitted to That Government to the Secretariat on July 17, 1979, [in:] *United Nations Legislative Series, Materials on Jurisdictional Immunities Status and Their Property*, New York 1982, p. 90–91.

18 For more J. Ciszewski, *Commentary on the Supreme Court on March 18, 1998*, "Palestra", 1999, p. 202.

19 Judgment of 25 March 1987. SN on Maria B.-L. against Austria, the Cultural Institute, [in:] A. Wyrozumska, *The State Immunity in the Practice of Courts Polish, Polish Yearbook of International Law 1999-2000*, p. 77; see also R. Sonnenfeld, *Immunity of States and their property: draft Convention submitted by the UN Special Reporting KPM in 1990. letters*, Warsaw 1990, p. 11.

20 Resolution of seven judges of the Supreme Court on 26 September 1990. (III PZP 9/90).

21 Elizabeth K. Against the Embassy of Switzerland judgment of the District Court for the City of Warsaw on September 16, 1992., VII P 1232–1292, [in:] A. Wyrozumska, *Polish courts against a foreign state immunity*, PiP 2000, no. 3, p. 33 and following.

22 District Court In Warsaw decision of 1998 case number II CO 315/98.

sy in Warsaw should not enjoy immunity in accordance with article 1111 § 1 point 3 PCPC[23]. The court ruled the inadmissibility of judicial proceedings and found that workers as embassy representatives authorized to represent the country abroad are exempt from the jurisdiction of the court.

By order dated 27 March 1998 the Court of Labor and Social Insurance in Warsaw dismissed the complaint. The court of second instance held that article 6 § 2 of the Polish Labor Law and the provisions of the employment contract does not waive immunity of the art. 1111 § 1 point 1 PCPC. Despite the fact that the defendant was not the ambassador or other diplomatic agent of a foreign country, only referred to in article 6 § 2 of the Labor Law, court held that a representative of a foreign country is entitled to diplomatic immunity in accordance with the provisions of the Vienna Convention on Diplomatic Relations. The employment contract between diplomatic mission representative and Polish citizens in accordance with art. 31 of the Vienna Convention[24], are immune from criminal jurisdiction and civil administration of the host country[25].

Exclusion of labor disputes in which the employer is the consul acting as a representative of the sending of the jurisdiction of the host country, should affect the meaning of diplomatic immunity.

In its judgment of 18 March 1998 the PSC in case *Marta M. v. the Consulate General of Federal Republic of Germany*[26] found that the immunity may be granted not only to diplomatic agents, but also the mission of the state, "The use by a diplomatic immunity from civil and administrative jurisdiction of the host country also covers diplomatic agents, acting as an employer."

The lawsuit plaintiffs, because of lack of jurisdiction over the subject matter, was rejected by the District Court[27], this sum did the Court of Appeal, referring to the article The 31 Vienna Convention on diplomatic declaring that a diplomatic agent shall enjoy immunity from its civil of the receiving State[28]. The PSC on 30 October 2000 dismissed the plaintiff's appeal against the order of the Provincial Court, Court of Labor and Social Security in Cracow. Here, the Supreme Court specifically relied on the immunity of a foreign state covered by the provisions of the written law but did not make a reference to the rule of customary international law[29]. In support of the position court relied on the rule of international law, declaring that the representatives of foreign countries are not subject to the jurisdiction of a foreign count due

23 Slawomir S. against China, ruling the District Court for the City of Warsaw on 27 April 1998., VII P 564/98., Cf. Anna matter April 27, 1998. rejecting the complaint, [in:] A. Wyrozumska, *The State Immunity…*, p. 86.

24 Articles. 31 of the Vienna Convention on Diplomatic Relations of 18 April 1961 (Polish Journal of Laws of 1965, no. 37, pos. 23).

25 The wording of Article. 6 Labor Code the employment relationship between a Polish citizen and the agency, mission, or other institution of a foreign state or international organization, operating within the Polish Republic, subject to the provisions of this Code, if the agreements, arrangements or agreements provide otherwise, does not apply here.

26 Marta M. v. the Consulate General of Federal Republic of Germany's Supreme Court ruling of 18 March 1998, PKN 26/98 OSNAPiUS 1999, no. 5, item. 172, [in:] J. Ciszewski, *Commentary on the Supreme Court on March 18, 1999*, "Palestra", no. 9–10, p. 202 and following, see also the voice of J. Wings PIP 1999, no. 10, p. 108 and following.

27 In the opinion of the Court, "the plaintiffs claim cannot be claimed from the exit of persons from the Court because of the validity of the rules on immunity enjoyed by diplomatic missions from Poland ratified the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on Consular Relations of 24 April 1963".

28 The thesis of the judgment: "The use by a diplomatic immunity from civil and administrative jurisdiction of the host country also includes a diplomatic mission, which is the employer." Supreme Court ruling of 18 March 1998, PKN 26/98 OSNAPiUS 1999, no. 5, item. 172, [in:] "Palestra", 1999, no. 9–10, p. 202 with the voice of J. Ciszewski, PIP 1999, no. 10, p. 108 and following with the voice of J. Wings.

29 Order of the Supreme Court – Board of Administration, Labour and Social Security of 11 January 2000., OSP September 18, 2000, p. 581, with the voice of John Ciszewski.

to international agreements and international customs on diplomatic relations.

In contrast to previous years of approach, in highly controversial ruling of 11 January 2000 PSC in the case *Maciej K. v. Embassy,* declined to grant immunity to the embassy of a foreign country[30]. In a court opinion, Polish courts have jurisdiction in case brought by Polish employee against foreign embassy concerning the deficiency of the notice terminating employment agreement. The PSC for the first time departed from applying the concept of absolute immunity of sovereign states, and decided to overrule the decision of the District Court – Labor Court in Warsaw, Prague, 8 December 1997, which rejected the plaintiff's claim that a foreign country should not enjoy immunity.

Provincial Court – the Court of Labor and Social Insurance by order of December 8, 1998. dismissed the plaintiff's complaint and held that article 6 § 2 of the Labor Code and the provisions of the employment contract does not waive immunity of the art. 1111 § 1 point 1 PCPC, the complainant appealed on these grounds.

The PSC has concluded that article applies only to the immunity of a diplomatic agent and does not entitle foreign state immunity from the jurisdiction of the courts. Judges decided that this issue is not regulated by the PCPC and did not take into considerations the conclusion contained in its earlier judgment of 18 March 1998, expressing role of agreements and customary international law, review of legislation and judicial practice of other countries in the development of immunity.

PSC in 2007 in the case *Eugenia C. v. The Dutch Embassy in Warsaw* concerning rented by the defendant's property, come to a conclusion that "the action of compensation for damage caused by the early lease termination of private immovable property situated in the territory of the receiving State are excluded from courts jurisdiction because the ambassador as head of a diplomatic mission under the Vienna Convention enjoys immunity jurisdiction in civil matters, the ambassador holds such property on behalf of the sending State for the purposes of the mission (Article 31. 1)".

Interesting is the decision of PSC of 26 March 1958, 2 CR 172/56 (TSO, 1959, No 6, pos. 160) where in a case in concerning the French Consulate in Cracow the court ruled that the diplomatic missions do not have the legal personality of the domestic law of the host country and that foreign missions are not authorized to initiate trial proceedings in domestic courts. The PSC has consistently held that the organs of the foreign states such as diplomatic mission are not entitled to legal proceedings.

In the end short evaluation of PSC judgment in 2010 On 29 October 2010, case *Vinicius Natoniewskiego v. The Federal Republic of Germany – The Chancellor's Office in Berlin*[31], where FRG was granted immunity[32]. On 29 October 2007 plaintiff demanded a payment of PLN 1,000,000 as a redress for injuries he suffered as a result of the alleged activities of the German military forces during World War II. The Circuit Court, Appellate Court and the Supreme Court rejected the lawsuit ruling that

30 The thesis of the judgment: "Polish labor courts have jurisdiction of actions against the embassy of a Polish citizen to recognize the ineffectiveness of termination of employment". Supreme Court ruling of 11 January 2000, 1 PKN 562/99, OSNAPiUS 2000, vol 19, pos. 723, with commentary by J. Ciszewski, [in:] "Palestra", 2000, no. 11–12, p 213; for granting limited immunity in favor of such Casimir Piaseczki, more K. Piaseczki, *Code of Civil Procedure, Commentary*, vol. II, Warsaw 1997, p. 1301 contend that one can defend the view that the foreign state does not enjoy immunity for acta jure gestionis.

31 Supreme Court judgment case number IV CSK 465/09; The German Federal Republic's Constitutional Court determined in 2006 that victims of war crimes are not entitled to individual indemnity payments from the German state (2 BvR 1476/03 – Resolution of 15 February 2006).

32 Supreme Court of the United States of 7 June 2004 on *Maria Altmann v Austria* (see Section II.9h letter of 02/26/2010 of the Ministry of Justice, and Attachment 57 to this letter). According to the Court, there is no obstacle to the derogation provided for in the law of immunity also be used in matters that relate to events occurring before its entry into force, including the events of World War II.

the State immunity of the Federal Republic of Germany excluded the jurisdiction of Polish courts. The PSC founded that State immunity is applicable to *acts de iure imperii* committed on the territory of the forum State during an armed conflict even though they may amount to war crimes seems to be correct. The Court refused to engage in a law-making activity by declining to endorse interpretation, which would permit to reject State immunity by attaching superior importance to human rights. Based on customary international law (such as *jus cogens* or peremptory norms), application domestic jurisdiction to WW II events would "impair rights a party possessed when he acted". The current norm of customary public international law, excludes, in judges opinion, tort claims from more than 50 years, and jurisdiction and procedural rules may not apply retroactively to transactions which took place prior to 1945. Polish courts do not enjoy jurisdiction to adjudicate damages, including compensation for offenses against people or property that took place in the territory of the forum by organs of a foreign country that was present in the territory when the offense took place, even if it was *Acta jure imperii*"[33].

The Court referred among others to The European Convention art. 35 which provides that when a State has become a Party to this Convention after it has entered into force, the Convention shall apply only to proceedings introduced after it has entered into force with respect to that State. Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.

Explanatory Report recognizes the retrospective nature of the Convention, in contrast to American law, which does not have adequate legislation, which largely contributed to the diverse and inconsistent interpretation of the principle *Lex retro non agit* by state and federal courts[34]. The Federal Court for the State of New York, decided on the *Corporacion Venezolana de Fomeno Sales Corp. v. Vintero* of 1980 (the court took the same position on the 1993 *Djordjevich v. Bundesminister des Finanzen, Federal Republic of Germany*[35]) that admission to the law on immunity does not contain any indications of retaining the retroactive effect of this law in situations where its use may adversely affect the previous rights of the parties[36].

In the present case the PSC in 2010 did not apply the provisions of the Basel Convention, and precisely excluded the reference made by the respondent to the jurisdiction in matters of compensation for injury or damage caused to the property if the damage or injury arose as a result of events that took place in the territory of the forum, and the perpetrator was present in the territory when it came to these events.

In some countries, courts considering disputes involving sovereign state does not grant the defendant's immunity in cases involving claims of tort committed in a forum.

An example would be the Greek Supreme Court judgment of 4 May 2000 on *Prefectury*

33 In 1996 the U.S. Congress amended the FSIA by creating an additional exception to the immunity of certain foreign states for a limited range of human rights violations.274 Notably, the newest FSIA exception requires no territorial connection to the United States.

34 For *Yessenin-Nrpin v. Novosti Press Agency, TASS*, 443 F. Supsa. 849 (1978), see also *National Amercian Corporation v. Federal Republic of Nigeria,* 448 F. Supsa. 622 (1978).

35 *Djordjevich v. Bundesminister des Finanzen, Federal Republic of Germany,* 827 F. Supsa. 814 (D.D.C. 1993) see *Slade v. United States of Mexico*, 617 F. Supsa. 351 (DDC 1985), aff'd 790 F.2d 163 (DC Cir., 1986).

36 Similarly, the district court decided the state of PA on Onthrup Inc. v. Firearms Center. of 1985. who refused the use of retro-active nature of the Act, cf. case *Corporacion Venezolana de Fomeno Vintero Sales v. Cors*., 629 F.2d 790 (2d Cir. 1980); Onthrup Inc. v. Firearms Center, 516 F. Supsa. 1281 (E.D.Pa. 1981), aff'd mem. 760 F.2d 259 (3d Cir. 1985), see also V.C. Samuels, *Retroactive application of the FSIA*, "George Washington Journal of International Law and Economics", 1985, no. 19, p. 871, A. KA Martara, *The Case against retroactive application of the FSIA of 1976*, U Ch LR 2001, no. 68, p. 253.

Voiotia v. the Federal Republic of Germany, called the matter Distomo or by a decision of the Italian Court of Cassation of 11 March 2004 on the *Ferrini v Federal Republic of Germany*[37]. At this point the references should be made to a Stuart Kreindler article appearing in the journal "Dickinson Journal of International Law", showing that during the presidency of Bill Clinton State Department there were signed two international agreements with France and Germany, settling lawsuits filed by American Jews for compensation for losses incurred during World War II[38].

In another case *Margellos v. Germany* Greek Special Supreme Court, ruled on 17 September 2002[39] that art. 31 Basel Convention does not include war crimes, whose prohibition is a *jus cogens* rule and therefore hierarchically higher than any other rule of international law. In the opinion of judge war crimes cannot be considered as part of an armed conflict to justify departure from the general principle of public international law, as expressed in art. 11 Basel Convention.

Similar position was taken in 1993 by the federal court in the state of Washington DC, who decided in case *Djordjevich v. Bundesminister der Finanzen, Federal Republic of Germany*[40], that the German Government shall have absolute immunity from claims for restitution of World War II.

In the beginning of Polish case from 2010 First Court of Appeals made on 13 May 2008 an attempt of service of the order and the plaintiff's complaint through the Polish Embassy in Berlin, to the Ministry of Foreign Affairs of the Federal Republic of Germany. The Ministry returned the correspondence forwarded with a note, that such manner of service violates the immunity from jurisdiction of the Federal Republic of Germany. PSC dismissed the cassation complaint of the plaintiff on the basis of art. 398 PCC[41].

It seems that the PSC could rely on conclusion from earlier case 2007 when judges decided that: "There is no national jurisdiction in a case in which the foreign state and its highest authority have been sued for damages for tort on account of their *acts iure imperii* covered by the foreign state immunity".

It should be noted that Vinicius Natoniewski's action against Poland and the FRG has been brought to the European Court of Human Rights, in which the plaintiff alleged violation by the defendants the four provisions of the Convention for the Protection of Human Rights and demanded 250 thousand euro compensation[42].

37 Italian Court of Cassation's judgment on *the Ferrini v Federal Republic of Germany*. It recognizes that the obligation to respect the immunity of the respondent State is not applicable where, as indicated in this case deportations to forced labor – the category of crimes under international law. The crimes under international law is a serious violation of mandatory standards to protect human rights.

38 See. Agreement Concerning the Foundation "Remembrance, Responsibility and the Future", United States – Federal Republic of Germany, July 17, 2000, State Dep't, no. 00–129, 2000 WL 1863131 [hereinafter German Agreement]; Agreement Concerning Payments for Certain Losses Suffered During World War II, the United States – France, John. 18, 2000, State Dept, no. 01–36, 2000 WL 416 465 [hereinafter French Agreement]; see also R. Goodman, D. Jinks, Filartiga's business footing: International Human Rights and Federal Common Law, FLR 1997, no. 66, p. 463; S. Murphy, *Contemporary Practice of the United States*: U.S. increment in Claims by victims of the German Holocaust or Their Heirs, AJIL 1999, no. 93, p. 883; D. Vagts, *Restitution for historic wrong, the American Courts and International Law*, AJIL, 1998, no. 92, p. 232; S. Kreindler, *History's accounting; Liability issues surrounding German companies for the use of slave labor by corporate Their forefather*s, "Dickinson Journal of International Law", 2000, no. 18, p. 343.

39 Federal Republic of Germany v. Miltiadis MARGELLOS, Special Highest Court of Greece 6/17-9-2002 Case, Decision of 17 September 2002

40 *Djordjevich v. Bundesminister der Finanzen, Federal Republic of Germany*, 827 F. Supsa. 814 (DDC 1993), Judgment aff'd, 44 F. 3d 1031 (DDC 1993).

41 T. Milej, *The Position of General Rules of Public International Law in the Polish Legal Order, in* LES PRATIQUES COMPARÉES DU DROIT INTERNATIONAL EN FRANCE ET EN ALLEMAGNE (Charles Leben et al. eds., 2011); see also M. Kaldunski, *State Immunity and War Crimes: The Polish Supreme Court on the* Natoniewski *Case*, "30 Polish Yearbook of International Law", 235, 247 (2010).

42 Judgment of the Court of Justice of the European Union on 15 February 2007 on the Eirini Lechouritou and others

The position of the PSC since 2010 is somehow "strengthened" by the ICJ Decision in Jurisdictional Immunities of the State (Germany v. Italy) of 2012 concerning the dispute between Italy and Germany[43]. The ICJ rejected the plaintiff's position that Germany enjoyed state immunity does not apply to war crimes and crimes against humanity, committed by an army of one country in the territory of another state[44]. Its decision in case *Jurisdictional Immunities of the State* rejected Italy and Greece[45] attempt to create an exception to sovereign immunity in civil cases based on claims of grave human rights abuses.

After a careful survey of existing treaties, domestic legislation, and judicial practice, the ICJ determined that German state is immune from lawsuits by victims of Nazi crimes, following the path taken several in domestic courts[46]. Sovereign immunity from civil suits rests firmly on the concept of sovereign equality of states, which it described as "one of the fundamental principles of the international legal order". Another fundamental principle, however, is that "each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory". Vindication of sovereign equality through immunity thus impairs a sovereign's jurisdiction over events on its territory, such as the war crimes that Germany committed on Greek and Italian soil.

It is necessary to emphasize that by ICJ indications that there exists no *jus cogens* exception to immunity from judicial jurisdiction, *the Jurisdictional Immunities* judgment may imply that there also exists no such exception to immunity from prescriptive jurisdiction[47].

Based on this brief analysis of Supreme Court decisions, it can be concluded that the FRG enjoys immunity under the provisions of the Polish Code of Civil Procedure which cannot be used in respect of any counter or the admissibility of execution measures, except when the state expressly waives sovereign immunity[48].

In conclusion it is worth noting that the Polish legal system provides the court in the article 1116 PCPC with possibility of issuing by the Minister of Justice an opinion on the application of the domestic law governing the exemption from the jurisdiction of the courts[49]. In case of

v Federal Republic of Germany (European Court Reports 2007, p. I–1519).

43 ICJ judgment had fallen by a vote of 12-3, led by President Hisashi Owada of the Court President Owada wrote the opinion, in which eleven other judges joined. Judges Cançado Trindade, Yusuf (Somalia) and Gaja (an *ad hoc* judge from Italy) dissented, although only Cançado Trindade asserted that international law generally privileges human rights claims over rules based on the underlying state structure of international law; It means that privileging of universal civil jurisdiction, which most U.S. human rights litigation does, violates international law.

44 Italy was during World War II ally of Germany, the Nazis interned many Italian citizens and forced them into slave labor.

45 Excerpt from the Greek Foreign Ministry: "However, it is important that the Court finds that the fact that a State enjoys immunity before national courts of another state this does not affect the question of international responsibility and the concomitant obligation to provide compensation. Also, the Court, referring to the issue of compensation for Italian prisoners of war and other requirements of Italian society, which have not been resolved, said that these issues could be resolved through bilateral negotiations. In this way the Court confirms that these issues have not been closed. The Greek government will study the decision carefully, in light of the constant and longitudinal position that the issue of German compensations remains open."

46 Among other things, Italian Court of Cassation of the Corte di Cassazione of 11 March 2004 on the Ferrini v Federal Republic of Germany, Italy judgment of 11 March 2004. on Ferrini, the Greek Supreme Court judgment of 4 May 2000 on Prefectury Voiotia against the Federal Republic of Germany.

47 Paul Stephan, the John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia and a former counselor on international law in the U.S. Department of State, has the following analysis of the International Court of Justice's decision Friday in Jurisdictional Immunities of the State (Germany v. Italy).

48 Exemption from the polish courts jurisdiction applies to civil cases referred to in Article. 1 and PCPC and it seems that it is unacceptable to request for an injunction and the injunction proceedings (Article 730 et seq of the Code) against another foreign country.

49 According to the provisions of Article 1103 point 3 in fine of the Code of Civil Procedure, in the event of an obligation resulting from a prohibited act the court of the country

any doubts the court may have it may ask for the opinion of the Ministry of Justice, which issues it with cooperation with the Ministry of Foreign Affairs.

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in which such an obligation arose shall be competent for examining the case.

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