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REMARKS ON *ZASADA EFEKTYWNOŚCI W PRAWIE MIĘDZYNARODOWYM* [PRINCIPLE OF EFFECTIVENESS IN INTERNATIONAL LAW] BY JANUSZ SYMONIDES: ON THE ANNIVERSARY OF THE CONCLUSION OF THE POLISH-GERMAN TREATIES OF 1950, 1970 AND 1990

Abstract: *The present article combines some reflections on the late Prof. Janusz Symonides' most interesting book on the concept and role of effectiveness in international law (Zasada efektywności w prawie międzynarodowym, UMK, Toruń: 1967), with reflection over the anniversaries of the most important Polish-German treaties which not only constituted the basis for bilateral relations between Poland and Germany, but were also of importance for East-West relations. The analysis that follows deals mostly with the significance of effectiveness in the context of boundaries and their recognition, as well as with nationality. The article shows that most of the concepts and ideas of Prof. Symonides still remain actual today.*

Keywords: border treaty, effectiveness, Germany, international law, Poland, Symonides

INTRODUCTORY REMARKS

The year 2020 marked the passage of 70 years since the conclusion of the Zgorzelec/Görlitz Agreement between Poland and the German Democratic Republic (GDR) on the delimitation of the existing state border; 50 years since the conclusion of the Treaty between Poland and the Federal Republic of Germany on the normalization of mutual relations; and 30 years since the conclusion of the Treaty between Poland and the (united) Federal Republic of Germany (FRG) on the confirmation of the border between them. Another Polish-German agreement: the Treaty on good-neighbourly

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relations and friendly cooperation, oriented toward the future relations between the two States, was signed in 1991. Thus, the border dispute that had been in progress since World War II (WWII) came to an end. The dispute formed one of the axes of conflict between the Eastern bloc and the democratic (or free) world.

The legal conflict between Poland and the GDR and FRG played an important role in the development of the Polish international legal thinking. Generations of lawyers presented reflections on the legal status of the territorial dispute and its consequences. In this contribution we focus on the Polish legal writings,[1] as a rule omitting works by German authors. Polish lawyers played a somewhat reactive role in the Polish-German dispute, largely confining themselves to polemics with various theses presented in the (West) German doctrine. On the other hand, a characteristic feature of the German position was the fact that it was based on the judgments of the Federal Constitutional Tribunal of 1973 and 1975, which greatly strengthened the normative foundations of the legal position of Germany, but on the other hand made the German arguments quite homogeneous and repetitive. An important and impressive number of publications on the legal status of Germany after WWII were published in Germany – one could get the impression that once a year every German scholar in law was expected to write a study on general or specific aspects of this issue. The responses of Polish authors were definitely less numerous and were intended to refer to particularly important and/or interesting aspects of the border dispute. Inasmuch as the positions of the Polish and German authors differed in a fundamental way – in fact there were almost no common points between them – it would be difficult to describe the exchange of views as a discussion. The situation changed only after 1989, when it became obvious that the condition of German reunification, that was to achieve the most important political goal of the West, had to be reconciled with the existing territorial order in Central Europe.

[1] A. Klafkowski, *Umowa poczdamska z dnia 2.VIII.1945* [The Potsdam agreement of 2 August 1945], PAX, Warszawa: (1st ed.) 1960, (2nd ed.) 1986; M. Lachs, *The Polish-German Frontier. Law – Life and Logic of History*, PWN, Warszawa: 1964; K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* [The Polish western border in the light of the treaties], Instytut Zachodni, Poznań: 1975; L. Gelberg, *Normalizacja stosunków PRL-RFN. Problemy polityczno-prawne* [The normalization of PPR-FRG relations. Political and legal problems], Książka i Wiedza, Warszawa: 1978; L. Janicki, *Republika Federalna Niemiec wobec terytorialno-politycznych następstw klęski i upadku Rzeszy* [Federal Republic of Germany and territorial and political consequences of the defeat and fall of the Reich], Wydawnictwo Poznańskie, Poznań: (1st ed.) 1982, (2nd ed.) 1986; W.M. Góralski (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego traktatu o dobrym sąsiedztwie i przyjaznej współpracy 1991-2011* [The breakthrough and challange. 20 years of the Polish-German treaty on good-neighbourly relations and friendly cooperation], Dom Wydawniczy Elipsa, Warszawa: 2011 (in particular the chapter by J. Kranz, *Polsko-niemieckie kontrowersje prawne – próba syntezy* [Polish-German legal controversies – an attempt as assessment], p. 477); W. Czapliński, B. Łukańko (eds.), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal problems in Polish-German relations at the beginning of the 21st century], Wydawnictwo Naukowe Scholar, Warszawa: 2009; J. Barcz, *Dwadzieścia lat stosunków między Polską a zjednoczonymi Niemcami. Budowanie podstaw prawnych* [Twenty years of relations between Poland and united Germany. Building legal foundations], Dom Wydawniczy Elipsa, Warszawa: 2011.

The monograph of J. Symonides, which is focus issue of the present article,[2] was not linked to the legal dispute between Poland and the FRG *per se*, but was devoted to purely international legal issues. *Prima facie* it corresponded with another monograph on international law published some years later by B. Wiewióra,[3] however the subject of that study was only indirectly linked to the Polish-German conflict. Finally, the essential object of the conflict was to recognize the final character of the Oder and Neisse border. In this context, the question arises as to whether the choice of topic, research issues, and the arguments of J. Symonides had any influence on shaping the Polish legal position in relations with the FRG. Of course, it must be recalled that the book by Symonides was published in 1967, i.e. before the government in the Federal Republic was taken over by the Social Democratic Party, which initiated a new Eastern policy under Chancellor W. Brandt, and that the Polish-German legal dispute reached its apogee in the mid-1970s. It is all the more interesting to look at the possible use of the principle of effectiveness in discussions with the German doctrine.

1. LEGAL POSITIONS OF POLAND AND GERMANY IN THE DISPUTE CONCERNING THE BOUNDARY ON THE ODER AND LAUSITZER NEISSE RIVERS

The present author does not intend to present the legal positions of both countries in detail, so we refer to the most important elements. The Polish legal position referred primarily to the results of the Potsdam Conference, treating the instrument adopted within its framework as an international agreement constituting the basis of the post-war European order. The conference participants had the right to decide about the shape of post-war Germany, including its borders. This stemmed from the unconditional surrender of Germany, which was more than just a military surrender, but included the submission of the entire state to the will of the victors. The legal expression of the seizure of power over Germany by the Allied powers was the Berlin Declaration of 5 June 1945.[4] In it, the powers announced the assumption of supreme power over Germany, with a reservation that they did not intend to annex Germany. Hence the victorious

[2] J. Symonides, *Zasada efektywności w prawie międzynarodowym* [The principle of effectiveness in international law], UMK, Toruń: 1967.

[3] B. Wiewióra, *Uznanie nabytków terytorialnych w prawie międzynarodowym* [Recognition of territorial acquisitions in international law], Instytut Zachodni, Poznań: 1961.

[4] A key text of the Declaration reads as follows: "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany. The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of

Allied powers had the competence to organize the Potsdam Conference and adopt territorial regulations there, including the administration of the territory of Germany. On the same day, the Allied Control Council of Germany was established to organize life in Germany after the war. The Berlin Declaration posed the question of whether Germany survived as a state following the military capitulation and the collapse of state power, which is, after all, one of the elements of the definition of a state. Two views clashed in the Polish literature. According to the first of them, the German Reich collapsed as a state in 1945; according to the second, the collapse came with the establishment of two German states, East Germany and West Germany in 1949. However, as a new state, Germany could not question the border on the Odra and Neisse rivers established in the Potsdam Agreement. There was scant reference in the Polish legal doctrine to the view of the continuity and identity of the Federal Republic of Germany with the German state established in Versailles in 1871, known as the German Reich.

According to the Polish position, the Potsdam Agreement settled in a binding fashion the legal situation in the areas transferred by the Allied decision to Poland. Firstly, the Agreement established that the former German eastern territories were transferred to the Polish administration, even if it provided that the final fate of these areas was to be determined by the future peace settlement.[5] Secondly, the competence of the Allied Control Council of Germany did not extend to the territories transferred to Poland and the USSR. Third, the demarcation between Poland and the USSR in the territory of the former East Prussia was to be made on the basis of an agreement between these countries, excluding any competences of Germany in this respect. Fourthly, the agreement provided for the resettlement of German people from Poland (as well as from Czechoslovakia and Hungary) to Germany, i.e. to the four occupation zones and Berlin. The first argument cited is of particular interest. In the Polish doctrine of the 1960s, there was a view that the concept of administration was in fact tantamount to a transfer of sovereignty, which was meant to result from the English understanding of the expression "administration." The subsequent international legal practice (for example in relation to Mostar or Kosovo in the 1990s) does not support such an interpretation. It also seems important that in the Polish legal writings, as well as in the social sense, in the late 1940s there was a widespread view that the Potsdam regulation was not final at all, and German ownership of the property would be returned to former owners after the land was returned to Germany. Relics of such thinking could still be found in the practice of the Third Polish Republic, whereby in regulating ownership matters, the government of Prime Minister L. Miller proposed a differentiated treatment of property in the pre-war territory of the Republic of Poland and the former reclaimed lands, in connection with the transformation of

any area at present being part of German territory," available at: https://en.wikisource.org/wiki/Berlin_Declaration_(1945) (accessed 30 May 2021).

[5] In relation to Germany, the Potsdam Agreement used the term "peace settlement," unlike it wording with respect to the allies of the Reich, in respect of which a peace treaty was envisaged. Thus, the regulation with regard to Poland differed from that applied to the Königsberg area. In this case, the transfer to the USSR was intended to be final, and the Allied powers declared their support in the future peace settlement.

perpetual usufruct into the right of ownership. This is all the stranger as, according to the 1997 Constitution, the territory of the Republic of Poland is indivisible and uniform.

The legal position of Germany was broadly developed and internally coherent. It was based on the thesis that the German state had survived the military surrender,[6] military occupation, and the creation of two German states within some weeks of each other in autumn 1949. The German Reich[7] continued to exist after WWII as a passive subject of international law, unable to act under international law. The FRG was identical with the Reich (albeit only partially identical as to its territory).[8] The Potsdam Agreement (or any other inter-Allied agreement on Germany) was not binding on the German state as *res inter alios acta* – Germany did not participate in the Potsdam Conference. The existence of the German state (including its borders) was guaranteed by the rights and responsibility of the four powers for Germany as a whole, which rested with the Allies. Any decisions on German territory could only be taken by the German sovereign after the reunification of Germany. The 1950 agreement in Zgorzelec between Poland and the GDR was irrelevant as far as the legal status of the former German Eastern territories (FGET) was concerned. Since the sovereignty over the FGET remained with the German state, Poland – which was in charge of these areas – had no right to change their ownership structure. Private property should remain in the hands of the original owners, and any expropriation carried out by the Polish administration was subject to indemnity. The maintenance of the special status of former German Eastern territories led to the introduction by the FRG of a specific structure of the territorial triangle. All territories were divided into foreign areas (*Ausland*), the internal territory of the Federal Republic of Germany (*Inland*), and neither foreign nor FRG areas from the perspective of West German legislation. The latter included the Polish western and northern territories.

The territorial changes after WWII were clearly linked to population changes. The FRG did not accept the legality of the resettlement of the German population from Poland, Czechoslovakia and Hungary to post-war Germany (which included both German states and Berlin). It also claimed that a German minority remained in the former German Eastern Territories. This was a certain manipulation. Indeed, the concept of a "German minority" was based not on an ethnic, but on a political and legal criterion. Art. 116 of the German Basic Law (Constitution) defines the concept of "German," which is linked to German nationality. According to the Federal Law (based on the Law of 1913 on the nationality of the Reich), a German was any person who had German nationality, even if they had no direct link with the German state.

[6] Effects of the surrender were in that way restricted to purely military issues, separating them from a demission of the government of chancellor K. Doenitz.

[7] Terminology used in German practice and writings in order to describe German statehood (Reich, Germany, German State, FRG) shows a certain confusion.

[8] The concept of partial identity was a significant weakness in the legal position of Germany. From the point of view of international law on the succession of states, the identity of the state means the identity of international rights and obligations, not the territory, population and state authority. If Germany was identical to the Reich, it could, through its international law activities, change the legal situation of the German state.

From the perspective of the FRG, its relations with the GDR were specific. They were not international, but so-called inter-German. According to the FRG, the division of Germany into two states was of a temporary nature. An expression of these special relations was evident in, among other things, the protocol to the Treaty of Rome on inner-German trade, which aimed at the removal of barriers to the movement of goods between the German states.[9] This opened the way for East German products to enter the EEC market – which, of course, communist propaganda was ashamed of. The idea of special relations between the FRG and the GDR was maintained by the Federal Republic both under the so-called *Alleinvertretungsanspruch* (claim to sole representation), known as the Hallstein doctrine,[10] and after 1973, following the entry into force of the normalization agreement between the two German States.

The dispute over the legal nature of the border on the Odra and Nysa was of key importance for the political conflict between the Eastern and Western blocs in Europe. J. Kranz, writing about specific legal solutions, stated that Poland, in the context of its border with Germany, had become a hostage in the game for the reunification of Germany. This was probably not exactly the right analysis and conclusion. I would risk the thesis that Germany was willing to accept the loss of the FGET (as evidenced by the conclusion of the standardization treaty in 1970), but it could not do so because it would thus lose an important legal link between the two German countries. On the other hand, the Chancellor of the FRG, H. Kohl, offered several ambiguous opinions about the recognition of the Polish western border in the period preceding the reunification of Germany, which in turn would confirm the thesis of J. Kranz.

2. J. SYMONIDES' POSSIBLE INPUT TO THE LEGAL POSITION OF POLAND

2.1. Effectiveness and territorial competence of states

After having analyzed the theoretical aspects of the concept of efficiency, in particular assessing it as a principle of international law, Symonides discussed the emergence of a state in the context of the efficiency requirement. His analysis is important from the perspective of the specific, allegedly dualistic nature of the German state. On the one hand, the German Reich existed as a passive entity, deprived of legal capacity to

[9] Treaty establishing the European Economic Community, Protocol on German Internal Trade and connected Problems, 25 March 1957, 11957E/PRO/ALL, available at: https://bit.ly/3x5hC1C (accessed 30 May 2021); *cf.* E. Grabitz, A. von Bogdandy, *Die Europäischen Gemeinschaften und die Einheit Deutschlands – die rechtliche Dimension,* 14(2) Integration 47 (1991); W. Czapliński, *International Legal Aspects of Relations between the GDR and the EEC – A Polish View*, 22 Common Market Law Review 69 (1985).

[10] The political doctrine of the Federal Government in 1954-1969, which consists of the claim by the FRG to represent the German state in its international relations and to deny the GDR's statehood. It assumed, among the other things, that the FRG had not maintained relations with third countries recognizing the GDR.

act, while the ability to modify one's own legal situation is a key element of international personality. On the other hand, a state must be effective, and therefore real. Meanwhile, the passively functioning German Reich did not meet these conditions. A state is effective when its government exercises effective power over the territory and over the population. It does not seem necessary that this effective power should apply to the entire territory of a state. Part of it may (temporarily) be under the sovereignty of another state, e.g. in the form of military occupation or control by insurgents, which does not mean that a state is no longer effective. However, with regard to the German Reich, its Eastern territories were to be separated from the German state. Its power as a state in relation to those territories state did not apply (in the winter of 1945/46 German administration bodies began to appear in the western occupation zones, but they functioned at the local level only). Thus, the German statehood underwent a significant transformation as a result of the lost war, what led to a dispute over the possible collapse of the German state after 1945.

Symonides pointed to the key role of recognition in the process of establishing a state, stressing the importance of efficiency in assessing its existence. He suggested that in granting recognition, states must comply with the objective criterion of the effectiveness of the new legal order. A state can only be recognized if it meets certain factual, not political, criteria. This approach is based on the declarative nature of recognition, meaning that recognition must be based on factual and not legal circumstances, which is not entirely true. Recognition (or its refusal, i.e. the obligation not to recognize unlawful situations) may depend on the decisions of international organizations or bodies, such as the UN Security Council or the European Union and its institutions. Such considerations and views are characteristic of the classical doctrine of international law and, in fact, have not changed even today, which is confirmed by the work of the ILA Committee on Recognition Non-recognition.[11]

Symonides emphasized two consequences of the principle of effectiveness in the case of state recognition. The first is the prohibition of premature recognition; and the second – the need to distinguish recognition of a state from recognition as a belligerent or insurgent party. From our perspective, the former issue is more important.

The ban on premature recognition is discussed generally by authors dealing with the issue of recognition.[12] Recognition is premature when – as Symonides states – it has been granted, despite serious doubts about the stability and durability of the new territorial organization. He deals with this issue in the context of recognition as a belligerent

[11] ILA Committee on Recognition/Non-recognition in International Law, *Report of the Seventy-Eight Conference Sydney 19-24 August 2018: Forth (Final) Report*, available at: https://bit.ly/3qoXRzz (accessed 30 May 2021).

[12] *See* in Polish legal writing *e.g.* E. Dynia, *Uznanie państwa w prawie międzynarodowym* [Recognition of a state in international law], WUR, Rzeszów: 2017, pp. 57 et seq.; S. Zaręba, *Skutki braku uznania państwa w świetle prawa międzynarodowego* [The consequences of the lack of recognition of a state from the point of view of international law], INP PAN, Warszawa: 2020, pp. 106 et seq.; *cf. also* O. Corten, *Déclarations unilatèrales d'indépendence et reconnaissances prématurées: du Kosovo à l'Ossétie du sud et à l'Abkhazie*, 112(4) Revue generale de droit international public 721 (2008).

and/or as insurgents (the author of this text advocates the collective treatment of such entities as groups striving to exercise their right to self-determination).

Symonides pointed to an interesting example of making the recognition of a state conditional on the fulfillment of factual conditions, namely the note of the British Secretary of State Canning to the Spanish government from 1825, setting out the circumstances for the recognition by Great Britain of new states in South America. These included the exercise by the government of effective power in a given territory, and the uniformity and stability of this power. The problem, however, is that the conditions mentioned there are not universally accepted, but were formulated *in casu*, for the needs of a specific group of states, i.e. former Spanish colonies that had declared independence. So Symonides contradicted himself, and it is hard not to conclude that the conditions listed in the note were politically determined.[13]

Oft-cited examples of premature recognition are: the recognition of the USA by France in 1778, i.e. 4 years before the conclusion of the peace treaty between Great Britain and the United States, and the recognition of Croatia (sometimes also Slovenia) by certain European Union member states in 1992. If the US was recognized, such recognition had an unambiguous political goal – to strengthen the new state created as a result of the secession of the former British colonies. Great Britain accused France of interfering in the internal affairs of the United Kingdom by its recognition (to use the language of modern international law). Yet its recognition met the condition of effective territorial control, despite the ongoing war. As for Croatia and Slovenia in 1992, this recognition was not technically premature, since both of them met the criteria of statehood within the meaning of the definition of a "State" in the 1930 Montevideo Convention on the Rights and Duties of States. On the other hand, this recognition was made in breach of the obligations arising from Community law, i.e. the guidelines for the recognition of states in Eastern Europe and in the area of the former USSR.[14] Germany and Austria, which recognized them, thus tended to accelerate a process of recognition by the international community of new states in the area of former Yugoslavia, despite the fact that at the time in question neither new state met the conditions for the protection of minorities as required by the aforementioned Guidelines. Moreover, the available sources do not mention whether any measures were undertaken by the EC against the states that supported the recognition of both states.

The best, and also classic, example of (and controversy over) premature recognition in this context is Kosovo. The number of countries that have recognized the youngest country in Europe is now 117, including its recognition by Israel in February 2021. However, there is still a group of EU Member States (Cyprus, Greece, Romania, Slovakia, Spain) that do not recognize Kosovo as an independent state. The ongoing dispute over

[13] In particular as the last of these conditions made the recognition of the state conditional on the abolition of slavery.

[14] Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union, adopted at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991, available in: 4 European Journal of International Law 72 (1993).

the legal status of the Palestinian state is also far from being resolved, and Palestinian actions raise serious concerns in a significant part of the international community.

Recognition also plays an important role in relation to the continuity and identity of a state. Both concepts are related to crisis situations that may affect the international position of a state and its international legal obligations. The continuity of a state means the uninterrupted existence of a state, from its creation until its eventual collapse. On the other hand, the identity of a state means that when comparing the condition of a state before and after the crisis, we can say that we are dealing with the same subject of international law. We have already mentioned the importance of the concepts of continuity, identity, and succession of states for the assessment of the legal situation of Germany in the context of the surrender of the Reich on 8 May 1945. Note that there are no clearly defined criteria for the continuity and identity of a state. The doctrine does however list certain factors that may be helpful in this regard. Some of them will certainly not matter (name of a state, capital city, constitution and other acts of internal law, territorial changes, etc.). On the other hand, it would be difficult to indicate those that will undoubtedly break the continuity – perhaps with the exception of the physical liquidation of a state (e.g. as a result of the flooding of a state as a result of rising ocean levels) or conquest and annexation by another state. However, even in such a situation the assessment may be controversial. For example, the authorities of Tuvalu, which is in danger of being submerged by the ocean in this century, are negotiating the possibility of moving the population (about 11,000 inhabitants) to one of the islands of the Fiji archipelago or buying territory from Australia. An interesting question which arises is whether, in the case of the implementation of these scenarios, the continuity of a state will be maintained? The key role should be played by the presumption of the continuity of a state, which means that a state exists as long as we cannot – with certainty – confirm its permanent and final collapse. The problem is that the assessment of the legal situation of the state may only be possible from a distant time perspective. The legal situation in Germany is a good example in this regard. The identity and continuity of the German state was only confirmed by the unification treaty between the FRG and the GDR, and "2 + 4" treaty on the final settlement with respect to Germany (1990). The reunification of Germany took the form of the accession of the GDR Länder to the existing Federal Republic of Germany, i.e. annexation – and not the unification of states within the meaning of the law on state succession. If there was a union, the united Germany would be a new state, and such a solution would be unacceptable, especially from the perspective of Germany's membership in the NATO and the European Communities.

In conclusion, Symonides' statement that recognition is always political remains valid. The concept of premature recognition, to which we have devoted the above considerations, is not correct because, from the perspective of the recognizing country, it can always say that the conditions for recognition have been met. This assessment is individual and subjective and is not subject to control by other subjects of international law.

2.2. The Polish-German Boundary

Janusz Symonides devoted Chapter VI of his monograph to the mutual relationship between effectiveness and the borders of a state's territory. He pointed out that states strive to delimit their territorial competences in order to avoid conflicts. The problems of border delimitation and demarcation are thus at the center of attention of states. He confirmed that the basis for delimiting the border is usually an agreement (arrangement) between neighboring countries, but it may also be a court or arbitration decision or a decision of a competent international body. An example of adjudication cited by Symonides concerned the decisions of the Conference of Ambassadors, established by the peace treaties of 1919. The author also pointed out that while the concept of a border appears in relations between European countries at the turn of the 13th-14th centuries, the "linear" border first appeared in the treaties concluded by post-revolutionary France in 1797 and 1801, in the Treaty of Paris of 1814, and in the Act of the Congress of Vienna of 1815. Finally, Symonides' statement emphasizing that the key role in resolving territorial disputes is played by the effective exercise of territorial rule, which takes precedence over ineffective possession, is signicant. This stance is confirmed by the arbitration award of 1928 in *Island of Palmas*,[15] as well as the judgment of the International Court of Justice in the *Temple of Preah Vihear* case.[16]

As already mentioned above, the dispute over the course of the Polish-German border was, next to the Berlin Wall, one of the axes of the conflict between the East and the West. The final confirmation of the border's course can be found in the treaty of 14 November 1990. In Art. 1, it reads that the border line delineated by the Zgorzelec/Görlitz treaty of 6 July 1950,[17] and confirmed by the normalization treaty of 7 December 1970, marks the Polish-German border. The 1990 treaty also refers to the sovereignty and territorial integrity of both parties and provides for the mutual renunciation of territorial claims now and in the future. The dominant view in the literature is that the 1990 treaty is of a declarative nature.

However, none of the Polish-German treaties, nor the German judicial practice (including jurisprudence of the German Federal Constitutional Court in its judgments of 7 July 1975 on normalization treaties with Poland and USSR,[18] nor its order of 5 June 1992 on the 1990 Treaty between Poland and the FRG),[19] unequivocally made precise the date of the actual transfer of sovereignty in relation to the former German Eastern Territories. In the Polish doctrine it is assumed that the Potsdam Agreement was of a constitutive nature, and the boundary was determined by that instrument. In German publications, the authors refer to the demarcation of the border by the

[15] *Island of Palmas Case (The Netherlands v. USA)*, Award, 4 April 1928, RIAA II 829, available at: https://legal.un.org/riaa/cases/vol_II/829-871.pdf (accessed 30 May 2021).

[16] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgement, ICJ Rep 1962, p. 6.

[17] Interestingly, the agreement of 1950 referred to the Polish-German border, instead of the border between Poland and the GDR.

[18] BVerfGE 40, p. 141.

[19] Case 2 BvR 1613/91, NJW 1992, 3222.

Zgorzelec/Görlitz agreement, the normalization treaty of 1970. or the boundary treaty of 1990. Each of these proposals has advantages and disadvantages, and none of them is completely convincing. However, it turns out in practice that setting the date is of the secondary importance, especially in light of the dismissal by the European Court of Human Rights of the complaint by the *Preussische Treuhand* (Prussian Trust) against Poland.[20] That case concerned German private property claims against the Polish state in connection with the confiscation of German property in the post-war territory of Poland. In fact, it contrasted the hypothetical German sovereignty, requiring the maintenance of the property rights of the previous owners, with the real, effective sovereignty of Poland, which had *ipso facto* acquired the competence to regulate property relations in its territory. Poland's competence (i.e. effective territorial rule) has thus been confirmed in a significant aspect by the Strasbourg tribunal.

When considering the issue of the Polish-German border, we can recall one more important theoretical point. The arguments of both sides of the conflict reflect the dispute between the supporters of the primacy of effectiveness and the proponents of the principle of legalism. For if we assume the variant, which is the least favourable from Poland's point of view, that the allied occupying powers – parties to the Potsdam Agreement – had no legal title to dispose of the territory of the Reich and to establish the post-war borders of Germany, we must assume that Poland annexed the former German territories with the consent of the international community and no one else except Germany (before 1970) questioned Poland's sovereignty in the Western and Northern Territories. Moreover, under the 2 + 4 process, the confirmation by united Germany of Poland's western border was a condition for consent to reunification. This explains Poland's admission to the Paris round of unification negotiations.

2.3. Effectiveness and the competence of a state over persons

It has already been mentioned above that one of the key consequences of the German legal position was the conflict between Poland and the FRG regarding nationality.[21] The construction of German citizenship was based on the constitutional concept of "German" within the meaning of Art. 116(1) of the Basic Law,[22] connected with the

[20] ECtHR, *Preussische Treuhand GmbH & CO. Kg A. A. v. Poland* (App. no. 47550/06), 7 October 2008A. *See* A. Jasińska, *Problemy międzynarodowoprawne w sprawie Preussische Treuhand v Poland przed ETPCz* [International law problems in the *Preussische Treuhand v Poland* case before the ECtHR], in: W. Czapliński, B. Łukańko (eds.), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal problems in Polish-German relations at the beginning of the 21st century], Wydawnictwo Naukowe Scholar, Warszawa: 2009, p. 230.

[21] W. Czapliński, *Obywatelstwo w procesie normalizacji stosunków RFN-PRL i RFN-NRD* [Citizenship in the process of normalization of relations between FRG-PPR and FRG-GDR], Instytut Zachodni, Poznań: 1990, passim.

[22] Art. 116(1): "Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person."

Statute of 1913 on the citizenship of the Reich.[23] The status of "German" on this basis was enjoyed by people living in the former German eastern territories (in the Polish nomenclature called "Northern and Western Territories"), the so-called "autochtones," i.e. persons who descended from German nationals living in the Eastern territories of Germany.

The notion of "German" cannot be identified with German ethnicity. German citizenship is constitutionally regulated in the Basic Law, while German nationality is defined in the Federal Expellees Act (BVFG). According to § 6 of the 2020 amended version of the BVFG, a German is someone who "has committed himself to the German nationality in his home country, provided this commitment is confirmed by certain characteristics such as descent, language, upbringing, culture." German nationality thus has both a subjective and an objective side: on the one hand, the commitment to German nationality; and on the other hand, objective confirmation features such as descent, language, etc.

Poland consistently argued that the (West) German legal regulation was inconsistent with international law because it was based on a fictitious, artificial relationship between the supposedly still existing German Reich within the borders of 31 December 1937.

J. Symonides devoted Part IV (including, in particular, Chapter VIII) of his monograph to the issue of effectiveness as the basis for the competence of a state over persons. He began his deliberations with the statement that the competence to legally regulate state citizenship is a function of state sovereignty, although this freedom is not absolute, but remains subject to certain limitations imposed by international law. This principle is well established in international law, in particular taking into account the Advisory Opinion of the Permanent Court of International Justice (PCIJ) on nationality decrees in Tunesia and Morocco,[24] and Arts. 1-2 of the Hague Convention of 12 April 1930 on Certain Questions Relating to the Conflict of Nationality Laws.[25] Although the latter Convention did not enter into force due to having too few ratifications, it is nevertheless generally regarded as a codification of customary nationality law. The most important of these restrictions concerned the regulation of nationality in cases of state succession. In the interwar period, the practice of automatic change of nationality in cases of succession became established, leading to the acquisition of the nationality of a new sovereign (successor). This was important for determining the nationality of the inhabitants of the former Eastern territories of the German Reich, which fell to Poland after 1945.

Key to Symonides' considerations is the conflict of laws on nationality, which can lead to multiple citizenship (and on the other hand, to statelessness). This conflict

[23] Nationality Act (Staatsangehörigkeitsgesetz, StAG) of 22 July 1913 (Reichsgesetzblatt I, p. 583 – Bundesgesetzblatt III 102-1), as last amended by Art. 1 of the Second Act Amending the Nationality Act of 13 November 2014 (Bundesgesetzblatt I, p. 1714).

[24] PCIJ, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, Advisory Opinion, 1923 PCIJ (ser. B), p. 24.

[25] LNTS 179, p. 89.

should be resolved in accordance with the principle of effective citizenship, as indicated particularly by the ICJ judgment in the *Nottebohm case*[26] (although Symonides also refers to previous examples of conflict resolution in the laws on citizenship in the jurisprudence of international courts). It is interesting that the author emphasized that the principle of effectiveness is not unequivocally based on positive law, but rather results from a certain trend in the internal legislation and practice of an increasing number of countries. The author also points to various aspects of effective nationality. On the one hand, the principle of effectiveness is intended to guide third states when it is necessary to decide on the basis of which premises they should decide upon the law applicable to citizens with dual nationality. On the other hand, effectiveness should be important in assessing whether the acquisition of the nationality of a given state complies with the requirements of international law. This is because no state should grant its nationality to people who are not effectively connected or do not show a genuine link with that state.

It should be recalled here that in both situations discussed it is about an assessment from the point of view of international law. From the perspective of national law, granting citizenship to a specific group of people will always be effective, even if from the perspective of other countries it was in breach of international law. This statement is very important from the point of view of assessing the conflict between Germany and the People's Republic of Poland over citizenship. The Polish government has consistently argued that the maintenance of German citizenship by persons residing in the territories transferred to Poland is inconsistent with international law, as it allows for treating as "Germans" persons not remaining in an effective relationship with the German state. Since Germany recognized in the standardization system of 1970 that the western border of Poland ran along the line of the Oder and Lausitzer Neisse, it should be the duty of Germany to adjust the legal status of individuals to the treaty, and thus deprive this group of people of German nationality. Germany, in turn, has claimed that under German law it is not possible to deprive anyone of German citizenship without their consent.[27] The Germans living in the Polish western and northern territories under communist rule had no factual or legal opportunity to comment on the issue of their citizenship. Finally, Germany referred – as mentioned above – to the hypothetical structure of the "suspended" (passive) German Reich, pointing to the relationship of people with dual Polish and German citizenship with the Reich.

Symonides also pointed out that in the practice of Nazi Germany, legislation on citizenship was an instrument of state policy, including granting citizenship to the inhabitants of the areas annexed by the Reich: the Sudetenland, Klaipeda (Memel), the Free City of Gdańsk, the Belgian districts of Eupen-Malmedy-Moresnet and the

[26] ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase Judgment, ICJ Rep 1955, p. 4.

[27] Art. 16(1): "No German may be deprived of his citizenship. Loss of citizenship may occur only pursuant to a law and, if it occurs against the will of the person affected, only if he does not become stateless as a result."

French regions of Alsace and Lorraine. None of these annexations (with the exception of the Sudetenland) were recognized by the international community.[28] This practice was obviously contrary to international law, which forbids changes to the status of the population in occupied territories. In this context, a reference to the equitable doctrine of clean hands also sometimes appears. It boils down to the question of whether a state may plead that a certain conduct constitutes an internationally wrongful act, when it itself previously acted in a similar incriminating manner in its own practice. The status of this doctrine is unclear under international law; it has not been unequivocally confirmed in the practice of international courts or in the doctrine. Its roots are derived from Roman law, namely from the maxims *ex dolo malo non oritur actio*, *nullus commodum capere potest de injuria sua propria*, *and ex injuria jus non oritur*. However, we are far from saying that every maxim of ancient Roman law should be recognized as a general principle of law within the meaning of Art. 38 of the ICJ Statute.

In connection with this conflict, the granting of Polish nationality should be assigned to people living in the former German Eastern territories (Polish Western and Northern territories). The consequence of assuming sovereignty by Poland in the western and northern territories was the obtainment by the local population of the competence to acquire Polish citizenship. The binding force of Polish legislation in these areas was extended on 27 November 1945, by virtue of the decree on the administration of the regained territories. However, in the doctrine (including foreign) and in judicial decisions, this date was turned back to 2 August 1945, as German legislation was treated as inconsistent with the Polish *ordre public*. It is not clear whether this also applied to the Citizenship Act of 1920. In practice, granting Polish citizenship to local people was preceded by nationality verification. In this way, the group of people excluded from resettlement to Germany was defined. These persons then obtained Polish citizenship, granted in accordance with the Act of 28 April 1946 on the citizenship of the Polish State to persons of Polish nationality residing in the Recovered Territories,[29] together with executive acts. The Polish citizenship of this group of people was confirmed by the Act of 8 January 1951 on Polish citizenship. Doctrine was divided as to the meaning of both laws, especially whether they were declarative or constitutive. Polish legislation has traditionally been based on the principle of exclusivity of Polish citizenship, rejecting dual citizenship. Due to the effective relationship with the Polish state (for example through the place of residence), the Polish citizenship of these people was emphasized, while their German citizenship was rejected.

International law has not changed significantly since the publication of the book by Symonides. The events of the early 1990s confirmed the practice of the consequences of state succession (territorial changes) in relation to nationality. It was also reflected in

[28] Symonides, *supra* note 2, p. 136; more details in Czapliński, *supra* note 21, p. 54.

[29] Journal of Laws of 1946, No. 4, item 30. The notion of "recovered territories" was an effect of efforts of communist propaganda trying to present territorial acquisition after the WW2 as a return of former Polish areas (lost in fact in Middle Ages in favour of Czech Kingdom and the German states).

the work of the UN International Law Commission (ILC), which adopted draft articles on the succession of states with regard to nationality.[30]

After WWII, and especially as a result of the territorial changes of the 1990s (the reunification of Germany and the dissolution of Czechoslovakia, the USSR, and Yugoslavia), the practice shifted towards the successor's right to grant its nationality to people linked to the acquired territory. In this way, the principle that each state is free to make decisions with regard to its people was preserved. This was confirmed by the ILC, pointing to the presumption that citizenship is acquired by the population of the acquired territory, with the proviso that territorial changes may not lead to statelessness. The ILC also emphasized that the successor state should regulate the legal status of the population as soon as possible by passing appropriate legal acts.

One might expect that after the conclusion of the Polish-German treaties in 1990/1991, Germany would change its law on citizenship, adapting it to territorial regulations. Indeed, some modifications were made to the so-called Status-Germans, i.e. persons having the status of Germans within the meaning of Art. 116(1) of the Basic Law, but not having German nationality, i.e. in practice displaced from Germany.[31] Further modifications were introduced by amendments to the Nationality Act of 1913 adopted on 15 July 1999.[32] However, Art. 116(1) was still upheld – although it should be noted that it plays a decidedly marginal role after Poland's accession to the EU and is no longer a subject of disputes.

FACIT

At the time when Symonides was formulating his considerations on effectiveness, the German problem was not yet the subject of dialogue between the Western democracies and the Eastern bloc. This discrepancy was further intensified by the German policy after the change of political course and the initiation by the SPD-FDP government coalition of a new eastern policy in Germany after 1969. Janusz Symonides – unlike other Polish authors of works in the field of international law – did not deal with German issues. Nevertheless, a number of arguments presented by him in favour of the role of the principle of efficiency in law and international relations were not only important for the analysis of the legal position of both sides of the territorial conflict, but also have remained valid to this day.

Symonides' book remains – despite the fact that many years have passed since it was published – substantively up-to-date, which also demonstrates that international law has not undergone any profound changes during this interim. Its development has more concerned entering into new areas rather than modifying the existing legal order.

[30] Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries), 3 April 1999, Supplement No. 10 (A/54/10).

[31] Amendments added by Kriegsfolgenbereinigungsgesetz, BGBl. 1992, Teil I, p. 2094.

[32] The statute was renamed as politically neutral Staatsangehörigkeitsgesetz.

It is also worth noting that the most important conflict of values raised by the author, i.e. between effectiveness (the actual state) and legalism, has not been resolved either. The methodology proposed by the author and the way of presenting his views remain actual and can be compared with both past and modern studies on effectiveness and the theory of international law. Regrettably, the book remains largely unknown to foreign readers because of the language issue – it should have been translated and published in English, even if by a local publisher. This is one of the telling examples of the advantages of publishing legal studies in English or other international languages.