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# POLISH-RUSSIAN AGREEMENT FROM 1993, ITS OMISSION IN THE FORMING OF THE PROCESS OF INVESTIGATION ON THE CAUSES OF POLISH AIR FORCE TU-154 CRASH IN SMOLENSK AND THE FORMULA OF ES- TABLISHING THE AGREEMENT BETWEEN THE GOVERNMENTS OF THE POLISH REPUBLIC AND RUSSIAN FEDERATION ON THE INVESTIGATION ON ITS CAUSES ACCORDING TO THE RULES OF THE CHICAGO CON- VENTION FROM 1944

**Key words:** air crash in Smolensk, Chicago convention, investigation, tacit agreements, oral agreements, treaty-making procedure

### Abstract

On 10<sup>th</sup> April 2010 Polish Air Force Tu-154 carrying the President of the Republic of Poland Mr. Lech Kaczyński, the First Lady Maria Kaczyńska and 92 other high Polish officials and members of the crew, crashed in Smolensk. Following the crash, Polish and Russian governments by series of acts and omissions agreed for the investigation procedure according to the Chicago Convention from 1944, notwithstanding the existence of the binding Polish-Russian agreement from 1993 applicable to military aircrafts.

## **The Prime Ministers' agreement – 10<sup>th</sup>–15<sup>th</sup> April 2010**

Media footage on the following days, straight after 10<sup>th</sup> April 2010, the day of Polish Air Force Tu-154 crash in Smolensk, informed about the Chicago Convention from 7<sup>th</sup> December 1944 on International Civil Aviation<sup>1</sup> as the legal basis to examine its causes<sup>2</sup>. Taking into account the direct contact between the Prime Ministers of the Polish Republic and the Russian Federation that took place on 10<sup>th</sup> April 2010 on the spot of the crash, it was (and still is) obvious that one can make an assumption that due to their position in the hierarchy in the authorities as well as the posts held these individuals were obvious and the only, in the decision making sense, architects of the agreement. Hence, the agreement was the deed of theirs, and the act of agreement of the parties was held either already on 10<sup>th</sup> April or right afterwards during the following days<sup>3</sup>. Therefore,

<sup>1</sup> Dz. U. (Journal of Laws) from 1959, No 35 pos. 212.

<sup>2</sup> Although, in later media footage analysing more broadly the possibility of other than Chicago Convention legal basis to investigate the Smolensk crash it was pointed out that the first spontaneous reactions of the Polish and Russian sides immediately after the accident implied the readiness for actions on the basis of the department agreement of the national defence departments of the Polish Republic and the Russian Federation from 7<sup>th</sup> July 1993 on the rules of military aircrafts traffic in the air space of both countries, it was commonly perceived that the decision was made straight after the meeting of the Prime Ministers on 10<sup>th</sup> April 2010. See also – <http://lotniczapolska.pl/Prokuratura-Generalna-o-porozumieniu-z-1993-roku,14800>.

<sup>3</sup> See A. Kunert-Diallo, M. Żylicz, *Potrzeba zmian w prawie lotniczym (wnioski po katastrofie smolenskiej)*, Państwo i Prawo, nr 4/2012, p. 15. The authors remark that, "After a couple of days there was an agreement between the Polish and Russian sides that the investigation would be conducted according to the detailed rules and procedures of Annex 13 of the Chicago Convention on international civil aviation". There might have been the following signals implying the agreements between the governments: firstly, there could have been the decision of the Russian Prime Minister, made with the intention of fulfilling them, from 13<sup>th</sup> April 2010, and operationally the act of undertaking the direct steps executing the Prime Minister's decision by MAK (International Aviation Committee). It resulted in issuing a decree no 8–498 by the Head of MAK and establishing the Technical Commission to investigate the causes of the crash and initiate its work; secondly, accepting Russian activities post factum by the Polish Prime Minister. This formula of agreement seems to be signalled by the response of the minister of internal affairs and administration, based on the authorisation by the Prime Minister, to interpellation (no 15734) on 14<sup>th</sup> June 2010. Minister Miller stated there that, "(...) the Russian side initiated the investigation of the accident according to the procedure described in the Chicago Convention, and particularly in Annex

both Prime Ministers agreed in reference to the particular solution, that the crash would be investigated on the basis of the Annex 13 to the Chicago Convention<sup>4</sup>. The agreement on the issue had not been recorded in written form.

## **The international obligations of the Republic of Poland and the Russian Federation on the question of the procedures of the research on aircraft accidents**

The exposition of the sources of international law binding the Polish Republic and the Russian Federation on the date of 10<sup>th</sup> April 2010 on the question of department of aircraft accidents, apart from the common international agreement, i.e. the Chicago Convention on civil aviation [further: CHC44], included another international agreement. It was the Agreement between the Ministry of National Defence of Poland and the Ministry of Defence of the Russian Federation on the

13. After acquiring the opinion of Polish specialists who had confirmed the validity of applying this procedure and basing on the analysis, the Polish side consented on undertaking the cooperation with the Russian side on the grounds of this legal regulation". See <http://www.adamgaweda.pl/wp-content/uploads/2010/02/Interpelacja-nr-15734-Odpowiedz.pdf>.

<sup>4</sup> The convention on civil aviation signed in Chicago on 7<sup>th</sup> December 1944, Dz. U. (Journal of Laws) from 1959, No 35 pos. 212, art. 3 Civil and State Aircrafts, "a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft"; Article 26 Investigation of accidents, "Investigation In the event of an accident to an aircraft of a of accident contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicting serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, In accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State". Annex 13 to the Convention on Civil Aviation; Chapter 5 Investigation, Responsibility for Instituting and Conducting the Investigation, Accidents or Incidents in the Territory of a Contracting State, "The State of Occurrence shall institute an investigation into the circumstances of the accident and be responsible for the conduct of the investigation, but may delegate the whole or any part of the conducting of such investigation to another State or a regional accident and incident investigation organization (RAIO) by mutual arrangement and consent. In any event, the State of Occurrence shall use every means to facilitate the investigation".

rules of mutual air traffic of military aircrafts of the Polish Republic and Russian Federation in the air space of both states, made on 14<sup>th</sup> December 1993 [further: Agreement]. It was a bilateral, department international agreement. The headlines of the agreements signal their different subjects, and their contents determine precisely this difference in subject.

The application of CHC44 refers to, as it states itself in art. 3a) “(...) exclusively civil aircrafts”. Hence, CHC44 does not refer to the activity of aircrafts of other character. It is emphasised by the statement that, the convention does not apply, “(...) to state aircrafts”. And further on it points in art. 3b) that other than civil, i.e. state aircrafts, are, “The aircrafts used in military, customs and police services (...)”.

Therefore, activities of civil and military aircrafts are different ones. In case of their accident process of investigation on them means, from the legal perspective, separate regulations by each of the agreements, different procedures.

The department agreement signals this in art. 11, stating that, “Elucidation of aviation incidents, failure, catastrophe (...) caused by military aircrafts (...)” of the sides, that happened in their territorial space will be performed according to the procedures and regulations determined by the Agreement.

### **The legal premises of the selection of procedure on the research on aviation accidents**

The natural reaction of every subject confronted on the Smolensk crash on the day of the tragedy, was the obvious statement on the dramatic and exceptional character of the event due to the personal and public dimension of the crash effects.

Therefore, the inclusion of the flight of TU 154-M in the stream of circ. 30 thousand flights (statistically) of civil aircrafts that happened on this day in the European air space, because of its tragic consequences for the Polish Republic must have been excluded not only emotionally but also legally if one takes into consideration the regulations of the Polish Republic law that excludes the qualification of TU 154-M flight as the civil aircraft.

This exclusion of the TU 154-M flight from the civil aviation was the consequence of regulations accepted and valid in the Republic of Poland. Their particular significance was determined by the Agreement and the

literal transposition of its regulations into the Polish system of law. It is particularly visible in the mirror – like reflection of the regulations of the Agreement in the Polish law in particular rules accepted in the act on 3<sup>rd</sup> July 2002 [further reference: Aviation law]<sup>5</sup>. In the light of both regulations the flight of TU 154-M was the flight of “a military aircraft”.

This dimension was (is) the derivative of fulfilling the directive of art. 1 of the Agreement by Polish Parliament in the process of work on the Aviation Law Act. Art. 1 of the Agreement left the task of determining the parameters of features of “a military aircraft” flight to the internal law of the sides of the agreement. And in case of an accident of such an aircraft in their territorial space its causes will be examined by both sides in accordance to the rules of procedures accepted in the Agreement.

Thus in the light of the Polish law, the side of the Agreement, in the act on aviation law the term “a military aircraft” was included in the term “a state aircraft” (art. 3, p. 1). Apart from “military aircrafts” the term includes the aircrafts of border guard, police, state fire department and custom services, i.e. “the aircrafts of public order services aviation” (art. 2 p. 2a) and b) Therefore, the fact that a particular aircraft belongs to the category of “state aircrafts” is decided upon by a subject which uses it, ergo the public order services named in the act along with the Military Forces of the Polish Republic.

Taking into account, frequently mentioned obligation of obeying the rule of the order of law, according to the above mentioned agreements, “In the light of the legal regulations valid on 10<sup>th</sup> April 2010 there is no doubt that the flight of the plane TU 154-M with the side number 101 was a military one. This aircraft was used by 36<sup>th</sup> Special Transport Airborne Regiment and was flown by the pilots of this formation of the Polish Military Forces. The commander of the crew was active in military service. On the board there were generals of Polish Military Forces as well as the Commander in Chief of the Polish Military Forces. In the flight schedule it was given “M” (military) marking, and determined as belonging to the Military Forces of the Polish Republic. It should be emphasised that the aircraft had symbols reserved for the Polish military aviation, white and red checkerboard”<sup>6</sup>.

<sup>5</sup> Act of 3<sup>rd</sup> July 2002 – Aviation law, Dz. U. (Journal of Laws) from 2002, No 130 pos. 1112.

<sup>6</sup> P. Pszczółkowski, The legal basis of investigating Polish Air Force Tu-154 crash in Smolensk, The Conference Materials,

## Features of applied procedures of investigation on aviation accidents

Comparing the mechanisms of investigation on accidents of civil aircrafts (Annex 13 to CHC44) and military ones (Agreement) it ought to be pointed out that they differ extensively in their fundamental premises.

Annex 13 to CHC44 in art. 5.1 states that, "The State of Occurrence shall institute an investigation into the circumstances of the accident and be responsible for the conduct of the investigation, but may delegate the whole or any part of the conducting of such investigation to another State or a regional accident and incident investigation organization (RAIO) by mutual arrangement and consent. In any event, the State of Occurrence shall use every means to facilitate the investigation".

According to Annex 13 art. 5.18 the state of the aircraft (TU 154-M) registration in case of independent investigation of accident causes by "the state of occurrence", was (is) merely entitled to "appoint an accredited representative to participate in the investigation..." and was (is) according to art. 5.24 entitled to "appoint one or more advisers to assist the accredited representative in the investigation...".

Art. 11 of the Agreement, on the other hand, states that, "The investigation on aviation incidents, failures, accidents caused by Polish military aircrafts in the air space of the Russian Federation or Russian military aircrafts in air space of the Polish Republic will be conducted by proper Polish and Russian organs in cooperation (author's remark). At the same time the parties of the Agreement will provide the access to necessary documents applying the proper rules of protecting state secrets".

The contrast between the act of including an "accredited representative with one or more advisers..." of the state of registry, i.e. Poland in the investigation process modelled entirely by "the state of occurrence", i.e. the Russian Federation, and the process of investigating an accident, "by proper Polish and Russian organs in cooperation" is obvious and different to a great extent.

This contrast is even deepened by art. 3.1 of Appendix 13, noted in the assessment of both mechanisms, which states that, "The sole objective of the investigation of an accident or incident shall be the prevention

of accidents and incidents. It is not the purpose of this activity to apportion blame or liability...". Hence, it indicates that the analysis of assumptions concerning causes of an accident is complete after the analysis of technical inadequacies and/or pilot ones that led to it, aiming at the prevention of such incidents in the future. Therefore, it does not comprise the wider context of events enabling the assessment of organizational matters concerning a flight as well as the responsibility of services and other subjects for its conduct.

## The Prime Ministers' agreement, April 2010, international convention

Since the moment the decision made by the Prime Ministers was revealed there have appeared numerous opinions on both its factual accuracy and the essence of the "act" of agreement, queries on its nature. One of them being and still remaining valid, despite passing time, the question on how the relation between the Prime Ministers, its effects and practical consequences ought to be assessed from the perspective of international law? More precisely, whether, and if so, in which legal form such a procedure of investigation, mutual legal obligation on this method of investigation of Smolensk accident, had been accepted by the parties?

By making attempts to answer the questions we assume that on those April days of the year 2010 arrangements (steps) taken (and accepted) by the Prime Ministers had indeed established an international agreement. Qualifying this agreement as "informal" or "semiformal"<sup>7</sup> one does not in any way deprive it of validity, but merely emphasises the lack of formal, written form of the arrangements. Obviously, such a circumstance rises the question on the possibility of making unwritten international agreements, i.e. verbal-oral agreements or tacit agreements also referred to as "de facto agreement" or agreement by implication, thus a phenomenon of verbalised, yet "unwritten" obligations or agreements made "merely" as a consequence of implying the will of making it, however "without writing or word".

This natural conclusion proves the need of pondering upon the following issues.

<sup>7</sup> A. Kunert-Diallo, Żylicz, *op.cit.*, p. 17. P. Pszczółkowski, *op.cit.*, 361; see Ch. Lipson, Why are some international agreements informal?, International Organization, vol. 45/4/1991, p. 495–538.

Firstly, the validity of the thesis on the existence of verbal and tacit international agreements. Secondly, the juxtaposition possible, from the procedural perspective and humble practice of states, options of applying them in practice<sup>8</sup>. Finally, referring the findings to the facts that took place on 10<sup>th</sup> April 2010 or straight afterwards, along with indicating features (premises) of making the agreement by the two Prime Ministers.

### Verbal or tacit international agreements

Accepting the thesis on verbal/"tacit" international agreement paradoxically requires, at the initial point, conducting the evidence to prove their presence in international public law. It stems from the humble practice of making such agreements and still present, basing on this fact opinions of eminent representatives of the doctrine denying the approval of such forms of international obligations. Example being here the opinion of McNair, who remarked that, "...".

We ought to assume here that eventually rejecting the doubts concerning both verbal and "tacit" agreements and including them in the definition of a treaty results from accepting the Vienna convention on the Law of Treaties (1969)<sup>10</sup> (further referred to: VC). It states in art. 3 that, "(...) the present Convention does not apply to international agreements (...) not in written form" and adds that this circumstance, "shall not affect the legal force of such agreements", as well as "the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention (...)". Although the formula of verbal/"tacit" agreement is not

referred to directly in the convention, *expressis verbis*, the regulation of the convention takes into account "the past", recorded, however humble practice of their making, thus implying the existence of agreements "other" than the ones made in writing. The fully justified right to take advantage of such agreements should also be concluded, simultaneously to the one signalled by the interpretation of art. 3 of VC, from the international common law regulating treaties/agreements. (which actually is signalled in art. 3 itself explicitly, the whole of Vienna convention being the code of the treaty law itself, i.e. the record of common norms, emphasises)<sup>11</sup>. The presence of "tacit" agreements signalled in judicature of international courts, i.e. the International Tribunal of Justice and International Tribunal of Marine Law is also a practical and valid proof of the existence of agreements "other" than made in writing<sup>12</sup>.

Let us make then the review of agreements „other than made in "written form".

### Oral, verbal agreement – deriving from "conversation" of the entitled subjects

#### The sides of "a conversation"

Oral, verbal agreement deriving from a conversation, taking into consideration the subjective aspect, refers to the cases of "conversations" conducted directly in a narrow, as a rule, circle of subjects state officials. The above quoted McNair undermining the value of such agreements, beside the elusive nature of words, remarked on the fact that it is impossible to solidify them in a permanent way, hence this formula seems inadequate in upright and predictable shaping of legal transactions, and at the same time undemocratic in its essence. He emphasised this flaw of verbal agreements<sup>13</sup>, pointing

<sup>8</sup> The examples of oral agreement in modern times referred to most often in doctrine are: the alliance made in 1697 by tsar Peter the Great of Russia with Frederick III, Elector of Brandenburg, or the agreement made in 1883 between the minister of foreign affairs of France and charge d'affaires of Austro-Hungary prolonging to the following year the validity of the trade treaty made a year before. See K. Widdows, *On the Form and Distinctive Nature of International Agreements*, 7 *Australian Yearbook of International Law*, 1976–1977, p. 117.

<sup>9</sup> See. A.D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 8.

<sup>10</sup> Vienna Convention on the Law of the Treaties, Dz. U. (Journal of Laws) from 1990, No 74 pos. 439; see S.E. Nahlik, *The Code of the Law of Treaties*, PWN, Warsaw 1976, p. 73–75; see O. Corten, P. Klein, *The Vienna Conventions on the Law of Treaties; A Commentary*, vol. I, Oxford University Press, 2011, p. 69–71.

<sup>11</sup> O. Corten, P. Klein, *op.cit.*, p. 39.

<sup>12</sup> The judgement on the territorial and marine disagreement between Nicaragua and Honduras on the Caribbean Sea – ICJ, Judgment of 8<sup>th</sup> October 2007, p. 659, s. 735 par. 253; "(...) The Court must (...) determine whether there was a tacit agreement sufficient to establish a boundary"; The judgement of International Tribunal of the Law of the Sea from 14<sup>th</sup> March 2012 on the delimitation of the marine boundary between Bangladesh and Myanmar in the Bay of Bengal [further: judgement ITLOS– 2012/16], see. p. 39, par. 100; "The Tribunal will now consider whether the conduct of the Parties evidences a tacit or de facto agreement relating to the boundary in the territorial sea".

<sup>13</sup> The Author means the agreement from 23<sup>rd</sup> October

at the limited circle of subjects able to make them, and approved by them formula of law making, stemming from the uniqueness of political roles played by them, which is secret, not consulted, therefore socially/politically uncontrolled when it comes to its content. McNair noticed that, "..."<sup>14</sup>. One may assume that nowadays political anxieties signalled by McNair ought to be rejected. It is appropriately and concisely justified by Degan, who remarks that, "..."<sup>15</sup>.

This assumption, condition of a priori authorization of verbal commitment resulting from "common agreement of constitutional heads of states and governments" by "competent authorities", is undertaken in VC itself, more precisely in its art. 7.2<sup>16</sup>. It points at the group of state organs authorised to make agreements (hence including the ones in other form than written one) "on the grounds of its position"<sup>17</sup> regardless of its particularly formulated treaty making power by the state legislation. Therefore this circle includes individuals holding three posts, according to the rule accepted in VC, namely the chief of state, the chief of government, and the minister of foreign affairs<sup>18</sup>.

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1949 made by General Franco and the President of Portugal, Salazar, on the possibility of Spanish military intervention in the air space of Portugal.

<sup>14</sup> A.D. McNair, *op.cit.*, p. 7–8.

<sup>15</sup> V.D. Degan, *Sources of International Law*, Martinus Nijhoff, 1997, p. 480.

<sup>16</sup> Art. 7.2 "Due to the held functions, without the need of authorisation, the following are considered to be representing the state: (a) the heads of states, the heads of governments, the ministers of foreign affairs – in all cases associated with treaty making (author's remark); (...)"

<sup>17</sup> S.E. Nahlik, *op.cit.*, p. 112.

<sup>18</sup> See, art. 7 VC in connection with art. art. 2 and 3 VC; see also Nahlik, *op.cit.*, p. 111–115. The implication of a circumstance that the ones holding the above mentioned posts are "as a rule" authorised to make binding commitments in international policy, not only in written form, derives from the statement of the unrecorded fact that from the perspective of international public law treaty making power may be performed in particular circumstances by further, "(...) other state organs, as well as individuals whose position itself does not presume such a competence", see Nahlik, *op.cit.*, p. 111. A particularly spectacular example being here, taking into account the circle of subjects making a commitment and the form of agreement, so called "special arrangement" on implementing the guarantees expressed in III and IV of the Geneva Convention from 1949. And so the Comment regarding art. 6 III of the Convention on treatment of POWs remarks that, these arrangements "(...) verbal agreement" – see. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Commentary, art. 6, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=28843>

## The formulas of "a talk"

"Talks" being the source of commitment, when one takes into account the formula of a contract, may result from the straightforward contact of presidents, prime ministers, ministers of foreign affairs, "a face to face" meeting or the one in a broader circle, emphasising, however, the straightforward decision making relation of the above mentioned on the basis of the posts held by them. When it comes to the form of a contract, they may also be made "on the phone, radio or fax"<sup>19</sup>. The indication of these forms also justifies adding to the list other forms of conducting talks, such as telegram, telex, or even e-mail<sup>20</sup>.

## Recording the agreements of a "talk" – their formal dimension and message

Provisions of each of the above mentioned formulas of verbal agreement, communication, basing on the previous authorisation of a competent authority, are unimaginable especially in a democratic system, without being publicised. The publication of agreement implies, obviously, the making of a detailed record of verbal provisions authorised by parties before conducting it. The making of signalling record, referring to "the routine" context of any international agreement, ought to take into account its fundamental elements on: the object of an agreement between subjects indicated with their names, the reasons for making it and the planned objective the sides aim at reaching by applying it, the configuration of objective rights and duties of the sides within the process of its implementation, as well as mechanisms serving the verification by each of sides the accuracy in the process of application of an agreement. The following structure of a made and publicised recording, lets us make an assumption that indeed there has been accomplished, due to such a detailed recording, an act of mak-

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FBBBDBCD4EAC12563CD00425411. These arrangements are also referred to the Commentary to art. 7 IV GC from 1949 which states that "(...) – see Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary, art. 7, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3DD8F708BDB97179C12563CD0042A777>.

<sup>19</sup> V.D. Degan, *op.cit.*, p. 482.

<sup>20</sup> A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2003, p. 16.

ing an international agreement, a treaty, in writing<sup>21</sup>. This natural, assumingly civic, “reaction” of authorities, within the democratic order, to let the public be aware of a content of verbal agreement authorised by the sides, appears to place the pondering on verbal agreements (including the interpretation on its existence on the grounds of articles 2 and 3 of VC) in however justified, yet purely theoretical sphere of speculations<sup>22</sup>.

This “0/1” perspective of perceiving treaty/agreement circulation, i.e. the real dimension of written agreements and theoretical of verbal ones, is not confirmed in contemporary practice. It is implied by constantly broadened forms of negotiations and accepted formulas of reflecting their agreements, concluding them. Although it is (...) occasionally difficult to draw a clear line between “written” and “unwritten” agreements (...)”<sup>23</sup>, the existence of such a line between agreements, ergo their real being, is signalled by VC itself (!!!) not only in the mentioned articles 2 and 3. It is done by accepting the entire openness of when it comes to forms of making a commitment, and in consequence the unpredictability of their particular (actually formal) parameters. The essence of the solution accepted by VC is accurately presented by Reuter, who remarks that, “Neither VC from 1969, nor the work of the Code of International Law include the precise definition of a treaty made in the written form; and even though the definitions exclude purely verbal agreements, not to mention tacit ones, it is not clear whether the terms used in it apply merely to the condition stating that the written agreement is a specially designed tool to achieve the aim, or it is sufficient to express the text of an agreement in writing (author’s remark) In the letter case agreements stemming from “an ordinary” letter exchange may be considered as written agreements, in the same way as an agreement based on protocols of a meeting approved of by the sides which have verbally expressed their will and declarations which have been

recorded in protocols, and imply the act of agreement between the sides. Before art. 11<sup>24</sup> was accepted, there had been the space for hesitation between the two solution, however it seems that the problem was successfully solved by accepting the broader option, since the article states (also author’s remark) that the approval of states to be bound with an agreement may be expressed, “in any other agreed manner”. It is entirely clear that the agreement may be achieved in other than a written form and (this other than written form) two forms of agreement, which are commonly applied in the practice of international organizations, more precisely the one achieved by exchange of letters and the one in the form of process-verbal meetings accepted by sides involved, are included in this category”<sup>25</sup>.

Comparison between articles 2 and 11 clearly proves that the creators of VC intended, taking into account the acts of approval to make agreements, to include the open range of them<sup>26</sup> by completing the provision in art. 11 with the statement, “in any other agreed manner”<sup>27</sup>. Thus, accepting also oral, verbal way using the above mentioned (see point 2.2) formulas of communication. Agreements made in this way are then “recorded”. This act, regardless of the possible qualification of produced, and authorised record, e.g. as the evidence of an agreement made in written form<sup>28</sup>, is

<sup>24</sup> Art. 11 VC.

<sup>25</sup> See 1973 Yearbook of International Law Commission, vol. II; Doc. A/CN.4/271 – Second report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur, p. 81.

<sup>26</sup> Commenting the content of art. 11 Nahlik remarks, “The development of international contacts are taking still new forms, it is then necessary for the convention to assume that the set of manners (of making treaties) known nowadays may be still widened”. S.E. Nahlik, *ibidem*, p. 125.

<sup>27</sup> “In written form” i.e. in the formula worked out during negotiations of the treaty document – the document with a certain structure determined by: title, preamble, directive, the closing remarks, indication of the place and time of signing, the number of copies, and languages the document was written in. This document only solidifies and exclusively reveals the will of sides. The act of making commitments determined in the document is the derivative of signing it or also, if such is the will of sides, it is signalled (after signing and accepting the text of agreement-document) the subsequent act, i.e. the act of ratification, acceptance, confirmation, accession. “Written way” means also the process of solidifying of the treaty document in the collection of (two or more) notes exchanged by the sides, which are the result of binding the sides with a treaty in the form of the note exchange.

<sup>28</sup> The unquestioned example of such a fully acceptable

<sup>21</sup> A. Aust, *ibidem*, – “But, even though the modern practice is for original text of treaty to be typed or printed, there is no reason why treaty should not be contained in a telegram, telex, fax message or even e-mail, or rather, constituted by an exchange of such communications. Provided the text can be reduced to a permanent, readable form (even if this is done by down-loading and printing-out from computer), it can be regarded as in written form”.

<sup>22</sup> Compare A.T. Guzman, *The Design of International Agreements*, p. 13, see <http://www.law.berkeley.edu/files/guzman.pdf>.

<sup>23</sup> V.D. Degan, *ibidem*, p. 482.

actually but a written confirmation of commitments made orally, the confirmation of making an agreement between sides in the form of “oral agreement recorded post factum. Whether it is with the intention to induce it the feature of a written agreement or without it, depends on the decision of the sides<sup>29</sup>.

### **Oral, verbal agreement so-called pure oral agreement – deriving from unilateral acts**

#### **Pure oral agreement – the genesis of the structure**

The verbal formula of making international commitments is also associated in the doctrine, due to scarce cases I of judicature, with cases/practice of making them by undertaking unilateral acts by state subjects.

Such a perception of statements, unilateral acts bearing legislative features, of the highest rank state officials was initiated by the ruling of STMS in the case of The legal status of Eastern Greenland<sup>30</sup>. It qualifies the positive response of the minister of foreign affairs of Norway, Nils Ihlen, to the question of Danish ambassador (forwarded on 22<sup>nd</sup> July 1919) on the willingness of respecting the entity of Danish rule in the space of Eastern Greenland by Norway, as a unilateral declaration creating with this act only, legal international commitment of Norway respect the exclusive Danish rule in this area.

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practice being the ICJ judgement in the case of continental shelf of the Aegean Sea, in which assessing the Brussels communicate from 31<sup>st</sup> May 1975 informing on the agreement between the Prime Ministers of Greece and Turkey regarding the cognizance of ICJ in ruling, defined by the sides and determined by the communicate the factual matter of argument; without any signature or initials; publicised unilaterally by the Greek side – the Court stated as follows, see ICJ, Judgement of 19<sup>th</sup> December 1978, p. 39, par. 96, (...).

<sup>29</sup> See the discrepant opinions of the sides (Bangladesh and Myanmar) as to the assessment of the role and functions approved of by the negotiating side of agreements written in so called Agreed Minutes as well as conclusions of the Tribunal pointing at the reasons not giving any basis to treat the agreements as legally binding, written agreement as expressed in art. 15 of the United Nations Convention on the Law of the Sea, See ITLOS 2012–16, p. 28–38, par. 60–98.

<sup>30</sup> See The case of “The legal status of Eastern Greenland” (Denmark vs. Norway, 1933 Permanent Court of International Justice (ser. A/B) No 53. See also International Public law. The Selection of case-law, ed. P. Daranowski, J. Połatyńska, C.H.Beck, 2011, p. 60–64.

The issue of studying the phenomenon of verbal agreements requires paying attention to and analysing, in the context of qualification accepted by STMS, the standpoint of Judge Anzilotti in the case. The standpoint he expressed in a separate opinion<sup>31</sup>. He noticed in Ihlen’s statement the reflexion of the act of agreement constituted purely (exclusively) with verbal declarations. The declarations of the minister of foreign affairs of Norway and “the previous one” (!) also a unilateral act, of the Danish side. This way of reasoning stemmed from historical events, centuries – old entangling of the territories of Norway and Denmark, and the practical consequences of a treaty decision on dismantling the union, made in 1814. The act of dismantling was itself the source of doubts and territorial argument between the separating territories. The arguments concerned the details of the range of Danish rule over (the whole of) Greenland, as well as the rule of Norway over the Isle of Spitzbergen. The doubts and arguments concerning the jurisdictional rights over these territories were settled in a certain sequence of events<sup>32</sup>. The one strongly, or even exclusively emphasised, due to the decision of the Tribunal, stage of the process is the above mentioned declaration of Ihlen, which was a response to the request/inquiry of the Danish ambassador. According to Anzilotti, this event held in the capital of Norway, Christiania, was associated factually with the previously revealed standpoint of Denmark during the debate at the peace conference in Versailles devoted to the issue of the status of the Isle of Spitzbergen (which took place in April 1919). Throughout the work Denmark stated that it, “will not object to the wishes of Norway concerning the issue”, which meant the approval of the fully sovereign rule of Norway over the island on the Danish side.

During the further meetings of the Danish ambassador with the minister of foreign affairs, Ihlen, the Danish diplomat while requesting the confirmation of the fullness of Danish rule over Greenland, associated Ihlen’s reaction as well as the response to the forwarded request with the Danish statement presented in Versailles in the analogous object issue of the territory, which both parties were vitally interested in, i.e. the Danish statement confirming the fullness of Norway’s rule over Spitzbergen. Therefore, the Danish side treat-

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<sup>31</sup> *Ibidem*, par. 212–308.

<sup>32</sup> Widely on Danish-Norwegian relations and the territorial aspects see O. Doors, *Kompandium volkerrechtlicher Rechtsprechung*, Mohr Siebeck Tubingen, 2004, s. 105–108.

ed both issues, of Spitzbergen and Greenland, jointly and in consequence, its own statement made in Versailles and Ihlen's statement from 22<sup>nd</sup> July 1919, were organically related as to the object.

Taking this into account, and in consequence the formula of creation between the sides of the agreement, Anzelotti stated as follows, "When we refer to the form, it ought to be pointed out that both Sides agree as to the existence and content of these declarations. The question of conducting the evidence on this issue does not take place. Furthermore, it does not seem that there is any rule of international law requiring the written (author's remark) form of this kind of agreement to validate it"<sup>33</sup>.

### Pure oral agreement – its essence

The conclusion made here provides the grounds for considering and accepting the option of so called pure verbal agreement. The agreement being the combination of spontaneous and unanimous declarations of the sides concerning the same issue (*consensus ad idem*) and the public confirmation of the fact of making them, which can also be expressed by publication of declared contents by both sides independently. As stated by Widdows, emphasising the spontaneity of coincidence of unilateral acts creating the agreement referring to the same matter, "(...) there are cases of forwarding similar or identical declarations by two or more states, in which one does not find the evidence of consent or the history of negotiations leading to the agreement on the legal basis"<sup>34</sup>. However, taking into consideration the qualification of Ihlen's statement accepted by STMS and asking whether the promise made by one state requested by the other one ought to be interpreted as an agreement or unilateral declaration, Widdows remarks that, "(...) it will depend on circumstances " and predicts that, "(...) the response will be much more frequently perceived as a unilateral promise, than as an agreement. In case of similar or identical declarations it will be more probable that they will be treated as unilateral declarations due to the lack of actual *consensus ad idem*. Their binding nature, however, will be doubtless as long as such was the intention of the sides involved"<sup>35</sup>.

### Tacit agreement/de facto agreement/agreement by implication

By definition so called tacit agreement is the one stemming from or conducted from acts or facts which do not derive from written or oral agreement<sup>36</sup>. It is "merely" the consequence of signalling the will of being bound by it "without neither the writing nor word".

In order to be able to state that it took place, "(...) one ought to emphasise that there must not be a shade of doubt as to the agreement to accept the decisions by each side; the need of positive indication of this agreement is necessary"<sup>37</sup>. The doctrine emphasises also that, "agreement must always be made explicitly or as a result of actions that do not mislead (...) not through tacit acquiescence"<sup>38</sup>. This contrasting the act of tacit agreement from tacit acquiescence bases on the differentiation of both acts and their essences. The act of tacit agreement refers to the matter, whose regulation in this manner or another (as well as in any other formal way – either written or verbal) may be either accepted or rejected by a side. Whereas, the act of tacit acquiescence concerns the matters, which do not provide the grounds to conclude the existence of such a right/obligation, which is a derivative of particular neutrality of the matter, as well as the optional nature of the act of acquiescence resulting from it. Therefore, there is a deep contrast between the two acts – the case of tacit agreement involving directly, straightforwardly the interest of a sovereign, and the case in which an acquiescence and even more so its denial does not mention such a relation.

There are but a few examples of using the structure of tacit agreement in practice or referring to them in

<sup>36</sup> <http://www.thefreedictionary.com/tacit> – "Tacit – implied by or inferred from action or statements; "gave silent consent; "a tacit agreement"; (...)".

<sup>37</sup> K. Widdows, *ibidem*, p. 120. See also the example of analysis by ITLOS regarding "the facts" presented in proceedings by Bangladesh (footnote 25), that the Sides acted in accordance with the agreed on delimitation [in Agreed Minutes 1974] throughout over three decades, which is the evidence of tacit or de facto agreement determining the delimitation of boundaries on territorial sea". See ITLOS 2012–16, p. 39, par. 101, p. 39–43, par. 100–118.

<sup>38</sup> E. Lauterpacht, *International Law*, 8<sup>th</sup> ed., p. 898; see also K. Widdows, *ibidem*, p. 120 – "Tacit consent is different from tacit acquiescence. Silence could only amount to consent if there were placed on the party concerned a duty to protest which is not the case here in dealing with the voluntary assumption of obligation".

<sup>33</sup> Footnote 28; par. 287.

<sup>34</sup> K. Widdows, *op.cit.*, p. 124.

<sup>35</sup> *Ibidem*.

judicature analyses. The example most often referred to is the one of armistice as the consequence of hanging out the white flag by one of the fighting sides<sup>39</sup>. It does not, however, mean that despite the insufficient practice it is an accepted formula of modelling the relations of subjects involved.

### The classification of the agreement between the Prime Ministers

While considering possible variants of legalising the decision of authorities, the decisions of the Prime Minister of Polish Republic and Russian Federation regarding the basis of investigating Smolensk crash, we ought to consider which options of a stipulated agreement, „other” than the ones made in „written form” were possible in the light of the above analysis (points 5–7) and which had actually taken place?

### An oral agreement “recorded” post factum?

If we take into account the fact of the direct contact between the prime ministers on 10<sup>th</sup> April 2010 or the possibility of contact through available communication techniques in the following days, we may assume that common decisions regarding the basis of the investigation had been accepted, as signalled in art. 11 VC “in another agreed manner”. Hence, due to the circumstances, by the means of oral agreement, which in order to honour democratic values, were confirmed with a recording signed/authorised by the sides of the dialogue.

As a consequence of recording the verbal agreement a joint declaration of the prime ministers might have come into existence. The agreement made in such

a form would have been fully valid<sup>40</sup> and (most probably) would gain validity the moment it was signed<sup>41</sup>. It would have been an agreement made in writing.

It might have also result in issuing a statement signalling the essence of the prime ministers’ agreement<sup>42</sup>. Referring to Reuter’s study, the agreement, „(...) based on protocols of the meeting approved of by the sides which had made oral statements and announcements, which were coded in protocols and whose content allows the conclusion that the act of agreement had been accomplished”. The statement including the content of (minuted) agreement would have been publicised, individually or jointly, by the press services of the prime ministers according to their verbal agreements. In case of the prime minister of Poland it would have been done by CIR (Government Information Centre)<sup>43</sup>. It would have been a statement informing on the basis of the investigation on the causes of the Smolensk crash approved of by the sides. The statement, if we follow the regulations of ICJ<sup>44</sup>, due to “the use of terms and (...) particularly circumstances it had come into existence in” would have been an obvious reflexion of “a bilateral agreement” regardless of the fact of complementing it with the feature of either written or oral agreement.

<sup>39</sup> J. Klabbers, *The Concept of Treaty in International Law*, Martinus Nijhoff 1996, p. 53 – The author remarks: “Treaties then, being agreements, must somehow be based on communication. Most often, this communication will be verbal, be it oral or written. Yet, there may be situations where agreements arise through non-verbal communication, though presumably their range is fairly limited. The only example that comes to mind is the waving of flags in battle to indicate a truce or cease fire”. This way of making agreement includes the term of agreement expressed in the Rules of Law and Customs of War on Land – IV Hague Convention respecting the Laws and Customs of War on Land from 1907, Dz. U. (Journal of Laws) from 1927, No 21 pos. 161, Chapter V: Armistices, art. 36. “An armistice suspends military operations by mutual agreement between the belligerent parties. (...)”.

<sup>40</sup> The example of such an agreement being the Declaration signed by the presidents of Nigeria and Cameroon on 1<sup>st</sup> June 1975 (so called Declaration from Maroua) determining in a particular manner the shape of the maritime boundary between the states. The ICJ referred to the Declaration in the following way: “The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (...), and which in any case reflects customary international law in this respect. See. ICJ, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Judgement of 10<sup>th</sup> October 2002, par. 263, p. 429.

<sup>41</sup> *Ibidem*, par. 264, p. 429–230.

<sup>42</sup> See footnote 26.

<sup>43</sup> “CIR (Government Information Centre) in the structure of government is a unit responsible for the relations and contacts of the Prime Minister and the Council of Ministers with media and citizens (author’s remark).(...)” ITLOS 2012–16, p. 39, par. 101 – s. 39–43, par. 100–118.

<sup>44</sup> *Ibidem*.

### **A pure agreement – derivative of convergence of unilateral acts?**

If we consider the case of making an oral agreement, pure oral agreement, we ought to take into account the following pattern of subsequent events. Making by the sides, the prime minister of the Polish Republic and the prime minister of the Russian Federation, independently yet convergently when it comes to the time (10<sup>th</sup> April 2010 or the following days) unilateral statements proving the will of accepting Annex 13 of the Chicago Convention as the basis of the further proceeding. The convergence of unilateral act of such content would have suggested consensus ad idem of the sides and the creation of a pure oral agreement. Such a situation would have been signalled by the press services of both prime ministers independently.

### **The tacit agreement of the prime ministers**

The above mentioned (8.1/8.2) variants of possible agreement on the basis of the investigation on Smolensk crash ought to be rejected since according to the information of CIR publicised in the mid April 2011<sup>45</sup>, regardless of the context the remark was made in, there, “had been no separate decision of either the Council of Ministers or the Prime Minister referring to this matter”<sup>46</sup>.

The information of CIR also stated that the Polish side, “had agreed upon the cooperation with the Russian side following the rules of legal order suggested by the latter one, i.e. basing on the regulations of Convention on International Civil Aviation from 7<sup>th</sup> Dec. 1944 and its Annex 13”. It also signalled that arrangements between Polish and Russian side, “had not been done in written form”.

Due to the above information of CIR, only the consent of the Polish side regarding the formula of proceeding, because of the lack of any documents (protocols) reconstructing the content, conduct and arrangements “between the Polish and the Russian side”, may be associated with the act of tacit agreement between the sides, i.e. the post factum agreement of the Polish side on the activities already undertaken by the Russian side, the non-consulted procedural solutions, the solutions settled unilaterally by the Russian authorities on the basis of the Prime Minister’s of the Russian Federation decision. The Polish side signalled its approval of the above by initiating the proceedings according to Chicago regulations, which was shown by the act of accreditation of an authorised representative of “the state of registration” of the aircraft that was the object of an accident i.e. the Republic of Poland at MAK. The act was held on 15<sup>th</sup> April 2010 by fulfilling the directive of clause 5.18 of Annex 13<sup>47</sup>. The act of accreditation, subliming the tacit consent of “the Polish side” on the tacit agreement as to the approval of Annex 13 as the

<sup>45</sup> The information delivered in response to the letter of a representative of a part of casualties’ families addressed to PM Donald Tusk in which, “(...) they requested access to public information on the issue of: 1. the form and content of bilateral international agreement between the Polish Republic and Russian Federation regarding the regulation of the rules of organisation and conducting examination as well as establishing the causes of the aviation incident, namely the accident of the government aircraft TU-154M no 101 (...) on the basis of the regulations included in Annex 13 of the Convention on International Civil Aviation from 7<sup>th</sup> December 1944, particularly the ones agreed upon in the above mentioned agreement methods of arbitrating arguments concerning its application and interpretation; 2. the manner of making the agreement, especially taking into account appointment of a person of an authorised representative of the Polish Republic, who negotiated and established the content of the agreement, the grounds of his authorisation in this respect as well as the organ, which expressed the consent on the agreement, and the individuals who participated in negotiations and establishing the content of the agreement”.

<sup>46</sup> See <http://www.stefczyk.info/publicystyka/opinie/ro-galski-idzie-do-sadu,seealsohttp://www.rp.pl/artykul/646103.html> – in the information of CIR it was stated, “The con-

sent on the application of legal order by the Russian Federation was granted in conclusive form. There was no separate decision of PM and the Council of Ministers in this matter. The consultations in this respect were conducted on a day-to-day basis and in work manner, within the time enabling the immediate initiation of investigation the causes of the crash. Therefore they were not in form of documents as expressed in art. 6 par. 2 of the Act from 6<sup>th</sup> September 2001 on the access to public information”. In another place the information points out, that the decisions were taken after the consultations conducted, “with the management of the Government Centre of Legislation, the Ministry of Justice and the Ministry of Foreign Affairs”.

<sup>47</sup> Annex 13 Participation in the Investigation, Participation of the State of Registry, the State of the Operator, the State of Design and the State of Manufacture, 5.18 “The State of Registry, the State of Operator, the State of Design and the State of Manufacture shall each be entitled to appoint accredited representative to participate in the investigation” See more broadly <http://www.transport.gov.pl/files/0/1793069/ocenaprawnaPKBWlkomisjasejmowa.pdf>. Edmund Klich, the head of the State Commission of Investigating Aviation Accidents, was appointed the accredited representative of the Polish Republic.

basis of investigating the causes of Smolensk crash, revealed this agreement on the plane of the international law, in public space. CIR had accurately described this act as to the formula of making commitments, stating in its statement that, “The agreement on the legal order applied by the Russian Federation had been made in a conclusive form”, which was further on confirmed by the Minister of Justice 2.5 year later<sup>48</sup>.

Completing the qualification of the accreditation act, as the act of tacit consent/tacit agreement we ought to emphasise that, taking into account its essence, that the act concerned the matter whose ruling in this manner might have been approved of or rejected by the side. “Polish side” had not rejected it. It approved of this manner and accepted it without any comments.

Binding oneself with the Chicago convention, “in a conclusive, i.e. implied manner”, merely by tacit act of accreditation, is strongly emphasised by the lack of any documents making the content and conduct of “consultations between the Polish and Russian sides” reliable. It may be perceived as merely conveying information on undertaken activities by the Russian side and their approval by the Polish side, without any comment, as the only rational method of conducting investigation<sup>49</sup>. This circumstance of passive approval of Russian decisions is strongly confirmed by the fact that there is no trace of recording referring to independent standpoint, factual decision of the Polish side concerning this matter before consulting the Russian side. The CIR statement explains the desisting the revelation of the content and the conduct of the Polish internal consultations, as well as their outcome and documentation of the Polish

side attitude, as follows, “Consultations were conducted up-to-date, in the time that allowed the immediate initiation of the investigation of the accident causes. Therefore, they were not in the form of documents as regulated in art. 6 point 2 of the Act from 6<sup>th</sup> September 2001 on the access to public information”. The statement signals that the consultations were conducted with, “the management of the Government Legislation Centre, the Ministry of Justice and the Ministry of Foreign Affairs”. The CIR statement does not name who the consultations were conducted by. However, if they were conducted (between 11<sup>th</sup> and 15<sup>th</sup> April) with the heads of the mentioned nominally the subjects of the state administration, i.e. the ministers of the justice and foreign affairs departments as well as the head of the Government Legislation Centre, there is no doubt that if there had been a document determined in art. 6 point 2 of the Act<sup>50</sup>, it would have had to be signed by the subject superior to interlocutors and entitled to contact them directly, which means the Prime Minister of the Polish Republic.

The obvious fact of associating the “assumed” consent for the accreditation of the representative of the country of registration at MAK with its source (of decision), i.e. the Prime Minister of the Polish government is in no way excluded by the CIR information stating that, “there was no separate decision (..) of the Prime Minister regarding this matter”.

Accepting Annex 13 as the legal basis of the investigation process of Smolensk crash causes, as a result of undertaking by the Prime Minister the decision on official accreditation of the Polish representative starting on 15<sup>th</sup> April 2010 at the International Aviation Committee, which was the response to the decision on initiating the procedure in this formula on 13<sup>th</sup> April 2010 by the Prime Minister of the Russian Federation and making in this way tacit agreement on the issue, is justified beside the rules of international law, not only by the rules of rational and responsible process of undertaking political decisions by responsible authorities in a democratic state, but also the very own words of the Prime Minister. The words pronounced at the 22<sup>nd</sup> assembly of the Polish Parliament on 27<sup>th</sup> September 2012 devoted to, “The information of the minister of

<sup>48</sup> The minister of justice explained analogically the formula of binding Polish Republic with the rules of Chicago Convention as the basis for the investigation of the Smolensk crash at the Polish Parliament assembly on 27<sup>th</sup> September 2012. He stated, “(...) the Chicago convention as the basis of investigation of the crash causes was accepted by the Polish side in the conclusive way, i.e. conjectural. There was no separate, particularly documented decision of the Council of Ministers in this respect”.

<sup>49</sup> Shorthand at the 22<sup>nd</sup> assembly of the Polish Parliament on 27<sup>th</sup> September 2012, [http://orka2.sejm.gov.pl/StenoInter7.nsf/0/42C30B066EFB3F9CC1257A87000336EF/%24File/22\\_b\\_ksiazka.pdf](http://orka2.sejm.gov.pl/StenoInter7.nsf/0/42C30B066EFB3F9CC1257A87000336EF/%24File/22_b_ksiazka.pdf), p. 223 – The parameters of method’s rationality were described by the minister of justice in the following way, “We need to remark that it was the only available at that time legal instrument describing the procedure of conduct in such a case. Taking advantage of another legal basis would have required previous detailed arrangements with the Russian side, which would have made any immediate actions impossible (...)”.

<sup>50</sup> Art. 6.2 “An official document according to the act is the content of the expression of will or knowledge, recorded and signed in any form by a public official as expressed in the regulations of code of criminal law, within the range of his competences, addressed to another subject or filed”.

justice on actions regarding the granting appropriate procedures of conduct with the corpses of the Smolensk crash casualties on the territory of the Russian Federation". Prime Minister Tusk stated during the debate, "(...) as far as I am concerned, being politically responsible for the state, Polish government and in this meaning also this extremely complicated and dramatic operation, I take the whole burden of responsibility for all actions of our services (...)"<sup>51</sup>.

### **The assessment of the tacit agreement of the Prime Ministers**

#### **The direct reason of assessing the agreement of the Prime Ministers**

The circumstances of undertaking the decision, as well as practical effects of procedural solutions, and more precisely, obvious doubts concerning the honesty and professionalism of the investigation process itself<sup>52</sup> but also POST WYJASNIAJACE conducted by Military Prosecutor Office of the Polish Republic, taking into account the perspective of the time since the day of Smolensk crash, lead to a couple of reflexions.

#### **The agreement between the Prime Ministers – "white flag"/the act of capitulation**

To begin with, there is the foundation to perceive and qualify the behaviour of the Polish side in the process of settling the basis of investigating the Smolensk crash with the Russian side in the following way – as the act equalling in all, both formal and material aspects, *mutatis mutandis*, the parameters of a tacit agreement, described in art. 36 of the Rules of laws and customs of land war in IV Hague Convention from 1907 [further

on: The Rules]<sup>53</sup> The article mentions the possible act of the truce agreement between the sides of a military conflict, which may be expressed (completed) by unwritten and non-verbal but tacit gesture of one of the sides, tacit consent, such as hanging out a white flag. The lack of signal, *urbi et orbi*, on the side of the Polish authorities of undertaking any attempt to: (i) negotiate with the Russian side the appointment of an independent commission or procedure of investigating the issue, immediately after the crash due to the political scale of the event<sup>54</sup>; (ii) consistently negotiate *bona fide* with the Russian side (before and during the investigation) putting into practice the guarantee of participation of the Polish side in the process of investigation as expressed in Appendix 13, makes one assume that the April decision of the Polish Prime Minister ought to be perceived and compared to the act of hanging out the white flag. This obvious failure in undertaking action in the interest of Poland leads to further conclusion on associating the Prime Minister's decision, *mutatis mutandis*, with art. 35 of the Rules, which refers to the act of surrender. Hence, in case of the „Polish side” decision, in April 2010 the act of not only civic but also political capitulation took place by agreeing unconditionally on applying Annex 13 of the Chicago Convention indicated by Prime Minister Putin as the legal basis to investigate the Smolensk crash.

### **The Prime Ministers' agreement and the Polish Republic law on concluding international agreements**

#### **The Prime Ministers' agreement – the authorisation of the Polish Prime Minister to undertake actions and its consequences**

Another reflexion, which regards the necessity of an *a priori* authorisation of a state organ making verbal commitment to fulfil it by a constitutional organ holding treaty making power, rises following questions: does

<sup>51</sup> See *ibidem*, p. 220.

<sup>52</sup> The measure of which are the arrangements accepted in so called report of Tatiana Anodina (Final report on the accident on 10 April 2010, on Smolensk "Severny" airdrome, to the Tupolev Tu-154M tail number 101 of the Republic of Poland) and Polish reports: Final report from the examination of the aviation accident no 192/2010/11 involving the Tu-154M airplane, tail number 101, which occurred on April 10<sup>th</sup>, 2010 in the area of the SMOLENSK NORTH airfield (so called report of Jerzy Miller), [https://doc.rmf.pl/rmf\\_fm/store/rkm\\_en.pdf](https://doc.rmf.pl/rmf_fm/store/rkm_en.pdf); so called Maciej Lasek report of 4<sup>th</sup> July 2013.

<sup>53</sup> IV Hague Convention respecting the Laws and Customs of War on Land from 1907.

<sup>54</sup> As professor Żylicz states, the Russian side and more precisely International Aviation Committee did not provide the Polish side with, "as required with the norms of art. 5.25 of Annex 13, the full access to investigative actions, documents, and information", neither "did it undertake the attempt to reconcile the report (final) taking into account Polish remarks and conclusions, as expressed in art. 6.3 of Annex 13".

the authorisation concern also cases of tacit agreement, and if so did the Prime Minister hold such an authorisation? If, due to the course of events while undertaking „talks” and „contacts” with the Prime Minister of the Russian Federation, he did not hold it, was the act of accreditation of a representative of the „country of registration”, i.e. the Polish Republic, accepted on 15<sup>th</sup> April 2010 according to the directive of the clause 5.18 of Appendix 13 the object of pondering (and minuted acceptance) of the Council of Ministers on doing it, which would have stemmed from its position and role (i.e. its treaty making competence expressed in art. 146 of the Polish Constitution, which is made precise regarding the particular formulas of realisation the Act on international agreements accepted on 14<sup>th</sup> April 2000 [further on: the Act]<sup>55</sup>? The adequacy of these questions is in no way undermined, but on the contrary emphasised and underlined by a remark made by the minister of justice on the 22<sup>nd</sup> assembly of the Polish Parliament, in which he stated describing the participation of the Council of Ministers in the process of selecting the legal basis to investigate the Smolensk crash that”, In this matter there was no separate, especially documented (author’s remark) decision of the Council of Ministers<sup>56</sup>. Since it was made, the minister’s remark does not exclude, in given circumstances, the legal authorisation of the Council of Ministers to take decisions in this matter, including the „documented” one, made on the grounds of the above mentioned Act, which is obvious.

### **The Prime Ministers’ agreement – breaching the obligations of the Polish law**

The statement regarding the lack of “documented decision of the Council of Ministers” ought to be understood in the following way in the light of this act: taking the decision (on the basis of art. 5.2 of the Act) on the independent conduct of the negotiations<sup>57</sup>, after

consulting it with the minister of foreign affairs (as required in art. 5.1 of the Act) due to the extraordinary situation, the Prime Minister decided to initiate them without applying procedures required by art. 6.1 of the Act, i.e. the procedure of forwarding a motion to the Council of Ministers to grant the consent on conducting the negotiations. We ought to note that the procedure of forwarding a motion to the Council of Ministers on granting the consent to conduct negotiations regards an agreement, as stated in art. 2 of the Act, which is determined in it as, “(...) an agreement between the Republic of Poland and another subject/other subjects of international law, regulated by international law, (author’s remark) regardless of the fact whether it is included in one or more documents, or its name or whether it is made on behalf of a state, government or a minister of the administrative division responsible for the matters the international agreement refers to”. The legal definition, even if emphasising the multitude of documents an agreement consists of, does not imply that the legislator intended strictly to regulate the treaty making only in “written way”, more widely, merely in forms determined in art. 11 VC, i.e. “in consequence” of nominally indicated acts of binding agreement (signing, exchanging documents, in which a treaty is made, ratifying, accepting, confirming or joining), as well as acts performed “in any other agreed on manner”. In this case the definition of an agreement accepted in art. 2 of the Act would be modelled on the definition of a treaty expressed in VC, explicitly perceiving it in written form only, which expressis verbis states that, a treaty” means an agreement between states made in writing (author’s remark) and regulated in international law, regardless of the fact whether it is expressed in one document or two linked with each other, and no matter what its name is”.

This message is confirmed further on in art. 2, which despite referring in its point 2 to the process of making

<sup>55</sup> Act on international agreements, Dz. U. (Journal of Laws) from 2000, No 39, pos. 443; see. art. art. 5.2; 6.1; 6.4; 13.1; 13.2. point 4).

<sup>56</sup> See footnote 46.

<sup>57</sup> The perspective of the meeting between PM Tusk and PM Putin on 10th April 2010 implied, its negotiating context. It implied initiation of talks, including the necessity of mutual arrangements, and the PMs agreement on issues resulting from special circumstances, like the legal basis of the crash investigation, starting negotiations. By definition “Negotiations – the

manner of making agreements. They are about mutual interaction of sides in order to make an agreement (author’s remark). Throughout negotiations the sides exchange vital information, form assessment and arrange the content of agreement progressively”. See [http://pl.wikipedia.org/wiki/Negocjacje\\_\(prawo\)](http://pl.wikipedia.org/wiki/Negocjacje_(prawo)) This obvious negotiating dimension of the PMs’ contact on 10<sup>th</sup> April, as well as during the following days, as a result of the direct meeting, is distanced and „lost of sight” by the grotesque information of CIR from 8<sup>th</sup> August 2013 which states that, “(...) from the talks of the Polish and Russian Prime Ministers held on 10<sup>th</sup> April 2010 there are no notes, since they were of courteous character”.

an agreement to classical process of negotiating “in written form” that prevails in practice, in its point 3 states that, “binding with an international agreement includes all of the activities mentioned in international law, (author’s remark) and particularly in VC on the treaty law (...), as a result of which the Polish Republic becomes the side of this agreement (author’s remark)”. Therefore, the act of making an obligatory commitment in consequence of “all the activities mentioned in international law” means also possible result of activities not included in VC. The clause 3 like the clause 1 of art. 2, taking into account common practice of written form in making agreements, emphasises (merely!) that this practice (merely!) is “particularly” determined in VC. Undoubtedly, while constructing this clause the constitutional legislator must have taken into account the message of art. 3 of VC pointing at the possibility of existing of agreements other than in written form, as well as capability (possibility) of making by the Polish Republic agreements as a result of undertaking “any activities (author’s remark) mentioned in international law”.

This manner of reasoning is strengthened by the procedure of forwarding a motion to the Council of Ministers in order to be granted its consent on negotiations in case of “unsigned international agreements” (art. 6.4 of the Act). Although, initially the unsigned agreements might refer to the ones concluded in writing, made yet unsigned commitments, the examples being information of the sides, agreement made in consequence of the exchange of letters, or an oral agreement of the sides (recorded in writing) in “proces-verbal” form, the obligation of acquiring the consent might (must) also regard the cases of creating oral commitment in yet other variants, as well as the ones made as a result of “conclusive acts” creating tacit agreement.

It is explicitly expressed in art. 13.1 of the Act which states that, “Polish Republic might be bound with an agreement (...) by signature, exchange of notes or any other means if so agreed in international law (author’s remark)”. The above statement, however, must not be associated with the one expressed in art. 11 of VC on possible manners of making agreement, beside the acts listed in it (signature, exchange of notes...etc.) also “by any other means if so agreed”. The point being here is not in “agreeing” by the sides, in writing or word, confirmed further on by recording, on the binding act of commitment, which is expressed (the latter one created with the word), let us repeat it, the above mentioned examples of, announcement the exchange of let-

ters, or proces-verbal. The point being, in “agreed in international law, therefore more broadly, the widest range of formulas of binding states with international agreement, complementing the basic list deriving from art. 11 of VC. Hence, also in tacit agreement formula, “agreed on in international law”, which the legislator meant.

In its point 4, art. 13 authorises also such other manner of binding with an agreement accepted by international law, including tacit agreement, in cases “(...) when it is required (...) by particular circumstances (...)”. The decision of Prime Minister Putin from 13<sup>th</sup> April 2010<sup>58</sup> and the one of Prime Minister Tusk from 15<sup>th</sup> April 2010<sup>59</sup> establishing tacit agreement, were without any doubt made in such a situation.

The above review of the regulations of the Act enables the full comprehension of the decision on the immediate initiation of bilateral talks between the Prime Ministers on 10<sup>th</sup> April 2010. However, the Act does not provide any legal grounds to justify the lack of taking any steps towards post factum consent of the Council of Ministers on the Prime Minister’s activities or deeds regarding the negotiations. There was no debate, which apart from the obvious obligation of the Council of Ministers to approve of the prime Minister’s actions as not only logical but also legal, would have had to refer factually to the Prime Minister’s information on the course of “the conversation” with the prime minister of the Russian Federation and its consequences, including the premises of decisions made by the Prime Ministers on 13<sup>th</sup>/15<sup>th</sup> April 2010. The lack of the debate signals the lack of any attempt, the will to clarify on the side of the Prime Minister, the Council of Ministers itself, and the ministers, especially the minister of foreign affairs, the Prime Minister’s decision on making tacit consent on tacit agreement regarding the legal basis of investigating the Smolensk crash, the premises of initiating it as well as its validity.

The act of clarification regarding the circumstances of the undertaken decisions made by just the minister of internal affairs and administration, on the basis of the authorisation of the Prime Minister, responding the MP’s interpellation (no 15734) on 14<sup>th</sup> June 2010, is literally astonishing in the context of the above mentioned regulations of the Act and their analysis.

<sup>58</sup> See footnote 3.

<sup>59</sup> The above mentioned sequence of events fully reflects the definition of “negotiations” expressed in footnote 54.

### **The agreement of Prime Ministers – the breach of the requirements of the democratic order**

However, if one assumes that the above made interpretation of the regulations of the Act is wrong due to the fact that the Act determines the treaty making activities of the Polish authorities taking into account only and exclusively the processes of making agreements in written form as expressed in art. 11. Therefore, assuming that the Act conscientiously implements only these regulations, one ought to pay attention to the following fact.

The treaty law, does not mean only the rules included in VC, but also the ones of common law, which both in a part determined in VC and not, i.e. in common dimension, determine the making of treaties. In part not determined in jurisprudence.

VC, it is the rules of common law that enable to identify, beside oral agreements in all their forms, the sense and essence of tacit agreements, the process of their making, as well as while they are made the obligation of fulfilling them bona fide. Their phenomenon has been characterised in this study when it comes to their fundamental parameters. Taking into account the decisions of Prime Ministers, the sequence of events during 13<sup>th</sup>/15<sup>th</sup> April 2010 constituting the tacit agreement between the Polish Republic and the Russian Federation is the practical display of using it. This act of taking advantage of common law norms by the Polish Prime Minister in establishing the agreement with the Prime Minister of the Russian Federation is clarified, justified and emphasised by art. 9 of the Constitution, which states that, “The Polish Republic respects international law that binds it”. This constitutional rule includes the norms of common law into the very tissue of Polish legal order, which is expressed not only in the opinions of jurisprudence<sup>60</sup>, but also judicature<sup>61</sup> interpreting art. 9 of the Constitution.

Yet, this act of tacit agreement, justified by both international and Polish law, does not clarify another essential circumstance, signalled already in point 9.3.1,

namely the lack of any attempt of consultations with the Council of Ministers regarding the accreditation of a plenipotentiary by the Prime Minister, as well as subjecting the decisions of tacit agreement between the Prime Ministers to the process of actual approval by the Council of Ministers, regardless of the awareness of the fact of non-existence of clause requiring the consent of the Council of Ministers on making commitments in such a form. It would have been an obvious and basic evidence of respect for the process of democratic control over the Prime Minister’s actions by the Council of Ministers directly, and indirectly, after having publicised it, respect for the society’s control over the actions of executive authorities. In no way can one treat the above mentioned information of CIR (addressed not to the citizens of the Polish Republic (*pro publico bono*) but only to the legal counsel, plenipotentiary of the crash casualties’ families), as well as brief explanation presented by the minister of justice as an adequate and professional clarification of decisions and arrangements made by the Prime Ministers.

### **The agreement of the Prime Ministers and the value of the openness of treaty making**

The third reflexion, the expectations concerning the public announcement of the content of Prime Ministers’ talks, as well as the reference to (probable) consequences of tacit agreement by the Council of Ministers would have stemmed from the respect towards the particular value of the openness of treaty making within the international community. In case of agreements made in “written form” it is signified by registering them in by sides in the UN office and as a result publicising its contents en block. Nowadays, the opinion on marginal role of verbal (and tacit) agreements is (was) also deriving from the conviction that it was the inability of registering agreements other than in written form that favours marginalisation. Referring this circumstance to the scarce practice of oral agreements and taking it into account, it was stated that, “This is the practice of olden days when secret diplomacy was common”<sup>62</sup>. This statement does not, however, dismiss the question concerning the premises of making the decision on selecting the basis to investigate the Smolensk crash, since the Polish Republic had been bound with

<sup>60</sup> W. Czapliński, A. Wyrozumska, *International Public Law, The System Issues*, 2004, C.H. Beck, ed. 2, p. 523 – “Constitution equipped a Polish judge with a good basis to deduce the direct application of common law in the state law, i.e. art. 9, which states that the Polish Republic obeys the international law it is bound with”.

<sup>61</sup> See the decision of the Supreme Court from 13<sup>th</sup> March 2008, III CSK 293/07, OSNC-ZD 2009, nr B, poz. 33.

<sup>62</sup> O. Corten, P. Klein, *op.cit.*, p. 71.

the Chicago Convention and its Annex 13, “in conclusive, i.e. conjectural way”, which means not secret. Detailed and thorough clarification of solutions accepted by the Prime Ministers would have been signalled, which is obvious, by the involvement of the Polish Republic in making the signalled values real.

### **The Prime Ministers’ agreement – the input of the Polish Prime Minister, the minister of foreign affairs and the Council of Ministers in enriching the Guinness World Records**

Lastly, the decision of “the Polish side”, taking into consideration the object of the regulation and the circumstances of making the agreement with the Russian Republic, surprisingly “enriches the vestigial (both now and in the past) practice of tacit agreements. The review of matters actually or potentially regulated by tacit agreement in modern case-law, as mentioned before, regards, as to the object, delimitation of borders in marine space. Responding to the tragic catastrophe, in which an independent state loses its political elite, with the above described sequence of actions performed by “the Polish side” between 10<sup>th</sup> and 15<sup>th</sup> April 2010 concluded in the making of tacit agreement regarding the way of investigating its causes, is (will be) a particular input of the Polish Prime Minister, the minister of foreign affairs and the Council of Ministers in “enriching” the lists of cases of treaty making in this formula, recorded in books on international law as well as Guinness World Records.

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