The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication

Dr. Gerard Conway, Brunel University London* - © Copyright and not for reproduction without the consent of the author

Abstract

From a contemporary perspective, the Arbitral Tribunal for Upper Silesia appears remarkably well developed as a type of international jurisdiction, regarding both its substantive personal and material jurisdiction and the mechanisms and procedure for its enforcement. For example, the Arbitral Tribunal had the competence to determine questions of nationality in claims brought by individuals, which even today the Court of Justice of the European Union, often considered the most developed international court, does not have.

Introduction

From a contemporary perspective, the Arbitral Tribunal for Upper Silesia ('the Tribunal') of the Inter-war period appears remarkably well developed as a type of international jurisdiction, and its experience may well, have informed later international courts.[1] Regarding

* BA (Limerick), BL (King's Inns), M.Juris (Uppsala), PhD (Brunel), Senior Lecturer in Law, Brunel University London

[1] Rolin noted that the rules on standing of the Arbitral Tribunal for Upper Silesia largely prefigured the jurisdictional rules of the European Communities: Rolin, H. 'Le Contrôle Internationale des Juridictions Nationales (Partie II)' (1968) *Revue Belge de Droit International* 161, at 165.

both its substantive personal and material jurisdiction and the mechanisms and procedure for its enforcement, the Tribunal was far-reaching and generally successful, even by today's standards. For example, the Arbitral Tribunal had the competence to determine questions of nationality in claims brought directly by individuals, which even today the Court of Justice of the European Union (ECJ), often considered the most developed international court, does not have. As the other contributions to this volume will evidence, the success of previous international courts or tribunals was mixed at best. The earliest example of an international court in the modern sense, the Central American Court of Justice (CACJ), only delivered a few judgments before it was dis-established. Following the conceptual and historical approach of this edited collection, the historical background and operation of the Arbitral Tribunal for Upper Silesia is first outlined and discussed, followed by an assessment of its significance for and contribution to the development of international law.

Section 1: Factual Background and Historical Context of the Tribunal

The Tribunal arose from a provision of the Treaty of Versailles stipulating that a plebiscite should be held in Upper Silesia to decide whether it should be part of Germany or Poland.[2] The somewhat unexpected vote in the plebiscite held in 1921 in favour of Upper Silesia remaining a part of Germany resulted in a reference of the matter of the Council of the League of Nations. The Council of the League of Nations decided to partition the territory, which in turn resulted in the negotiation of a German-Polish Convention of 1922 (the 'Geneva Convention'[3]) to manage this transition and provide a dispute settlement procedure for disputes arising from the Convention. The Council considered that the complex industrial territory being partitioned meant that this transition would likely last for up to 15 years, and the Geneva Convention was meant to regulate the transition in a way that ensured a continuing open market within the territory by protecting minority interests.[4]

[2] Treaty of Peace with Germany (Treaty of Versailles), signed at Versailles on 28th June 1919, 225 CTS 188, Article 88.
[3] At the initiation of the Council of the League of Nations, Germany and Poland adopted the German-Polish Convention concerning Upper Silesia, signed at Geneva on 15th May 1922, 9 LNTS 46.
[4] See generally F. Gregory Campbell, 'The Struggle for Upper Silesia, 19919-1922', 42(3) *The Journal of Modern History* 361-385 (1970).

Upper Silesia was an area of approximately 4,000 square miles that was ruled over prior to World War I by Germany and Austria. Campbell well summarises the economic and social context of Upper Silesia after World War I as follows:

'At the junction of Central Europe's three old empires lay one of the richest mineral and industrial areas of the continent. A territory of some 4,000 square miles, Upper Silesia was ruled by Austria and Prussia throughout modern history. The northern sections and the area west of the Oder River were exclusively agricultural, and inhabited largely by Germans. In the extreme Southeastern corner of Upper Silesia, Polish peasants tilled the estates of German magnates. Lying between the German and the Polish agricultural areas was a small triangular area of mixed population containing a wealth of mines and factories. That Upper Silesian "industrial triangle" was second only to the Ruhr basin in Imperial Germany; in 1913 Upper Silesian coalfields accounted for 21 percent of German coal production. At the close of the First World War Upper Silesia lay in the midst of dissolving empires; it contained a mixed German and Polish population, and it included a vital economic area of Central Europe.'[5]

As Campbell goes on to note, both Germany and Poland laid claim to the area at the end of the War, but it could not left as purely a dispute between them and the issue was addressed at the Versailles peace conference.[6] Due to the influence of Lloyd George, the conference decided that a plebiscite should be held to determine the future ownership of the territory, whether with Poland or Germany. The Treaty of Versailles took effect in January 1920, until which time Germany had control over the territory, albeit that there was civil disturbance against the German administration. When the Treaty came into effect, an Inter-Allied Plebiscite Commission assumed responsibility for the territory, with France, Italy and the UK participating in the Commission. France sent the bulk of the troops sent to enforce the Allied administration and controlled a majority of the districts.[7] After some controversy over the entitlement of non-resident people born in Upper Silesia to vote, it was agreed that they would be allowed to do so.

The plebiscite was held in March 1921.[8] Non-resident voters born in the area were permitted to vote, thanks to the diplomatic support of the United Kingdom for the German side. The result was a majority for remaining with Germany, but that did not determine the ultimate issue of sovereignty as an outcome. Only Germany favoured complete German sovereignty over the area. Importantly, the relevant provisions of the Versailles Treaty left open the consequences of the plebiscite. Paragraph 5 of the Annex to Article 88 of the Treaty of Versailles stated:

[5] *Ibid*, 361.
[6] *Ibid*.
[7] *Ibid*, 366.
[8] Most of the following paragraph follows Campbell, *ibid*.

‘On the conclusion of the voting the number of votes cast in each commune will be communicated by the Commission to the Principal Allied and Associated Powers, with a full report as to the taking of the vote and a recommendation as to the line which ought to be adopted as the frontier of Germany in Upper Silesia.’

Article 90 stated that ‘Poland under-takes to permit for a period of fifteen years the exportation to Germany of the products of the mines in any part of Upper Silesia transferred to Poland in accordance with the present Treaty’. So the decision was ultimately for the Entente Powers (United Kingdom, France, and Italy) as ‘masters’ of the Versailles Treaty. The recommendation of the Plebiscite Commission was important if not entirely binding. The Commission could not agree and submitted two recommendations, which reduced the importance of its advice. Both recommendations favoured partition, the disagreement was on how favourable to Germany or Poland the division should be. The situation then became complicated by a Polish insurgency that seems to have had semi-official support from Warsaw and that occupied a substantial part of the province, which in turn was pushed back by German paramilitary forces, who also had unofficial support from their own government. French forces did not intervene, and the UK government felt compelled to send 5,000 troops to aid in stabilising the situation and to avoid outright conflict or even German military involvement. France and the UK, however, could not agree on how to proceed, and with the UK distracted by affairs in Ireland, the matter was turned over to the League of Nations in August 1921. It was this turn of events that eventually led to the establishment of the Tribunal.

Section 2: The Process of Negotiation and Adoption of the Geneva Convention Provisions on the Tribunal

This section examines historical material on the process of negotiation and adoption of the Geneva Convention regarding the provisions on the Arbitral Tribunal (somewhat scattered throughout the Convention), which was given jurisdiction over all cases concerning the interpretation and application of the Convention. A main purpose of the section is to examine evidence of the extent to which previous experience of international courts and tribunals (chiefly the Central American Court of Justice) influenced the mechanisms adopted for the Arbitral Tribunal, while also situating it within the context of the League of Nations as a new phenomenon of international governance (i.e. was the Arbitral Tribunal conceived of as part

of the broader phenomenon of the League of Nations as a new form of internationalisation of disputes or more narrowly as a discrete or localised mechanism).

Within the framework of historical institutionalism,[9] it is not difficult to see the League of Nations and its post-War context were a critical juncture that enabled the quite rapid process of establishment of the Arbitral Tribunal. Indeed, the Arbitral Tribunal could be taken as a case in point in this regard. It was the inability of the two major powers on the Inter-Allied Commission, France and the United Kingdom, to agree an outcome in the form of partition that prompted the reference to the League of Nations, and it was the League that established the Tribunal. Prior to the coming into existence of the League, the dispute would have remained unresolved, with a possibility of the interim Inter-Allied administration continuing indefinitely. Prior to the League, 'congress of Europe'-style negotiations between major powers were the only international means of peacefully and diplomatically settling disputes, possibly with the help of an intermediary State (or occasionally through arbitration or mixed commissions by the mutual consent of the parties[10]). This is another example, following the establishment of the Permanent Court of International Justice (PCIJ), of an international organisation (the Inter-allied commission) accompanied by a judicial dispute settlement in lieu of more traditional inter-State negotiations and 'big power' politics.

It seems reasonable to suppose that the establishment of the Arbitral Tribunal was informed by prior such experiences. The writings of the President of the Tribunal, the Belgian jurist and politician George Kaeckenbeeck, indicate an acute sensitivity, even from a contemporary perspective, of how to achieve enforcement and impact for Tribunal judgments. A rich literature has developed on this topic regarding contemporary courts,[11] while the same issues of enforcement arose for earlier judicial experiments. It is instructive in this context to compare commentary in the 1900s on the Central American Court of Justice (CACJ) with that of the Arbitral Tribunal. The CACJ was established by the Convention for the

[9] See generally Fioretos, O., Falleti, T.G. and A. Sheingate, (eds), *The Oxford Handbook on Historical Institutionalism* (Oxford University Press, 2016).

[10] The oldest international dispute settlement body is the Central Commission for the Navigation of the Rhine, established in 1815 by the Treaty of Vienna (and the origin of which was an agreement between France and the Holy Roman Empire in 1804). See Rolin (1968), 182-185; Cançado Trinidade, A.A. 'Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century' (1977) 24 *Netherlands International Law Review* 1 373-392, pp. 373-375.

[11] See, e.g. Dothan, S. 'A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States' (2017) 7 *Duke Journal of Comparative and International Law* 141.

Establishment of a Central American Court of Justice ('the Convention of 1907').[12] The CACJ was essentially a failure. It delivered a small number of judgments before it was des-established due to a lack of cooperation from participating States. This experience was not lost on commentators at the time.[13] The CACJ ceased its activities on 12 March 2018.[14] This resulted from a decision of Nicaragua to terminate the relevant underlying treaty, chiefly as a result of a ruling by the CACJ against it.[15] Article 19 of the General Treaty of Peace and Amity of 1907,[16] the treaty establishing the Union of Central America of which the CACJ was the judicial organ, had provided that it should remain in force for ten years, counted from the day of the exchange of ratifications, and that if by one year before the expiration of this term, none of the parties had given special notice of intention to terminate the treaty, the period of ten years should be extended until one year after such notice. In 1917-1918, the United States was not supportive of the continuation of the Court, although it had been at its establishment, due to a perception that the CACJ was not politically neutral enough and that its judgments were in the general political interests of the area.[17] A further cause of the US attitude at this time as was the political embarrassment of the same judgment against Nicaragua in 1916, which concerned an agreement between Nicaragua and the United States and which the CACJ had found to be contrary to prior treaties.[18] Writing in 1932, Manley Hudson (professor of international law at Harvard University and also a judge of the Permanent Court of International Justice) summarises reasons for the failure of the CACJ in this passage:

[12] 20th December 1907, (1908) 2 *American Journal of International Law Supplement* 231; 1907 Papers Relating to Foreign Rel. U.S. 697 (1910).

[13] Hudson, M. 'The Central American Court of Justice' (1932) 26 *American Journal of International Law* 759. More recently, Jordison, S.M. 'The Central American Court of Justice: Yesterday, Today and Tomorrow?" (2009) 25 *Connecticut Journal of International Law* 183; Romano, C. PR., 'Trial and Error in International Adjudication' in Romano, C. PR., Alter, K. and Y. Shany, (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013), pp. 111-133, pp. 128-129; Riquelme,, R., 'Latin America and the Central American Court of Justice', in Wojcikiewicz Almeida, P. and J.-M. Sorel, (eds), *Latin America and the International Court of Justice* (Taylor & Francies, 2016), pp. 46-58; Ridley, C. 'The Central American Court of Justice (1907-1918): Rethinking the World's First Court', (2018) 19(1) *Diálogos: Revista Electrónica de Historia*, available at < https://revistas.ucr.ac.cr/index.php/dialogos/article/view/27966/31243 > .

[14] Hudson (1932), at 781.

[15] *Costa Rica v. Nicaragua*, judgment of the Central American Court of Justice, 30 September 1916, (1917) *AJIL* 11 181.

[16] General Treaty of Peace and Amity concluded by Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, Washington, 20 December 1907, 206 CTS 63.

[17] Ripley (2018) (section headed 'The Court's Demise' and text immediately before that).

[18] Marshall Brown, P. 'Editorial Comment: *Costa Rica v. Nicaragua*', (1917) 11 *American Journal of International* Law 1 156, pp. 157-158. The agreement was the Convention between the United States and Nicaragua ceding rights for construction of ship canal by Nicaraguan route, etc., concluded in Washington D.C., 5 August 1914, 39 Stat. 1661 (1916).

'Appreciation of the Court. It would seem that the Central American Court of Justice was doomed to failure from the outset. The provisions of the convention of 1907 gave it no chance to succeed, and opened to the justices temptations which were bound to wreck their efforts. In the first place, the justices were given no independent position; even if the five-year term was not too short, the method of selection, the national oath, and the way in which salaries were paid, prevented their enjoying sufficient independence of their governments. The deposing of Justice Paniagua Prado in 1910 indicates that they had no security of tenure. In the second place, the jurisdiction of the court was too large. Even if it was proper, in view of the widespread conception of Central America as a unit, to allow individuals to bring suits against governments, it was improper to give the justices the temptation to initiate proceedings on the court's own responsibility, and the optional clause accepted by four states was merely a courting of trouble. Contemporary opinion in Central America seems to have regarded the court not simply as a judicial institution, but also as a political agency for conciliation and mediation and for the maintenance of peace. Was it not the guardian of "the national conscience of Central America"? No court could hold a judicial prestige which undertook the offices assumed by the court in the revolutions in Nicaragua in 1910 and 1912. In 1917, a Nicaraguan communication to the United States accused the court of having "degenerated . ..into a center of lively intrigues." In the third place, the court never developed a satisfactory procedure. The extent of its jurisdiction was such that its requirement of a preliminary determination of admissibility may have been necessary, but it was surely a mistake to make that determination without the ordinary safeguards of judicial action.'(footnotes omitted)[19]

The CACJ was thus invested with the competence to determined highly politicised matters, but without the surrounding context of institutional independence and acceptance of a transnational court as desirably an apolitical institution.[20] At this time (and largely until today also), international law in South America did not seem to attract much European academic interest, at least in terms of publications. The passage just quoted identifies a number of problematic design features: a lack of judicial independence, the Court's competence to assert its jurisdiction *motu proprio*, and a perception of it having a political character in the context of it having to address highly politicised disputes.[21]

The extent to which the Arbitral Tribunal of Upper Silesia was an advance on the CACJ on the crucial issue of enforcement mechanisms is apparent from Kaeckenbeeck's contemporary writings. He identifies a wide range of features for its success that have a remarkable echo with the later experience of the European Court of Justice (ECJ). While caution must be present in making assumptions about the actual influence of the Upper Silesia model on later developments, it is possible to observe similar successful design features of each. For example, unlike the CACJ, the Arbitral Tribunal had the consistent support of the participating States, Germany and Poland, as a way of avoiding reopening very thorny

[19] Hudson (1932), at 785.
[20] Generally, on the influence of past experiments on later courts and the tendency in the literature to just focus on successful examples, see Romano (2013), at 122. Romano lists 20 'condemned' or dormant institutions, noting the lack of literature on most of these (pp. 113-114, 122). His chapter itself focuses on the International Prize Court, the Permanent Court of Arbitration, the Tribunal of the Southern African Development Community, the Court of Justice of the West African Economic and Monetary Union, the Court of Justice of the Common Market of Eastern and Southern Africa, and various Central American adjudicative bodies, including the CACJ (on the latter, see pp. 128-129).
[21] Hudson (1932), at 785; Romano (2013), 128-129.

political and diplomatic questions that could have complicated the already fraught context of post-war tensions between Germany as a former occupier of Poland and a nationalistic and assertive new Polish State (which had already gone to war with the Soviet Union during its short existence). Secondly, the Arbitral Tribunal had a more specific jurisdiction to do with the rights of citizens, rather than big controversial issues of power politics between States, which the CACJ had to address. The Arbitral Tribunal was confined to narrower issues, although within that context, the Convention contained a wide range of provisions. The Arbitral Tribunal's work was thus of a more technical and less overtly political character. Thirdly, the Convention contained a norm conflict clause, in Articles 1(4) and 605, of supremacy in favour of Arbitral Tribunal judgments over conflicting judgments of national courts, and also in Article 588 pre-empted the application of national law by the Convention when both regulated the same subject matter. Even later international courts did not enjoy this kind of Treaty recognition of their hierarchical authority, but in the salient case of the ECJ fashioned, relatively slowly, a supremacy doctrine and pre-emptive doctrine itself. Looking retrospectively and by comparison, the ECJ was in a position that avoided many of the pitfalls of the CACJ: its judicial independence was guaranteed and the capacity to remove judges vested in the Court itself,[22] it did not have any *motu proprio* jurisdiction, and in its early period was perceived as having an essentially technocratic character.

Section 3: The Procedural, Personal and Material Jurisdiction of the Tribunal

This section examines in detail the provisions on jurisdiction of the Tribunal, both *rationae personae* and *rationae materiae*. It also considers the appointment and status of the judges, the degree of judicial independence and State support that it enjoyed, the range of its procedures, and the linking mechanisms to national jurisdictions where the Arbitral Tribunal's judgments were enforced.

The Arbitral Tribunal was established along with a Mixed Commission and two Conciliation Commissions. The role of the Mixed Commission was a general supervisory and administrative one concerning the application of the Convention. The role of the Mixed Commission was set out in Articles 577-586. The Conciliation Commissions consisted of a

[22] Under its Statute, its judges can only be removed from office by the Court itself. The ECJ also has also benefited from being consistently promoted within the legal profession by senior figures from practice, academic and the judiciary.

representative of each State and their role was to settle disputes on nationality (Articles 55-57) or circulation permits (Articles 294-300) without the need for the Arbitral Tribunal to address a dispute through proceedings, a type of alternative dispute resolution essentially. The Arbitral Tribunal was intended to address disputes involving private parties, but this included disputes with either the German or Polish governments, including those that could not be addressed by the Conciliation Commissions. The provisions on the jurisdiction of the Arbitral Tribunal were somewhat complex, but Kaeeckenbeeck usefully summarises its jurisdiction as including the following:

i. the payment of indemnities by either state for the suppression or diminution of vested rights (Article 5 – "settled directly");
ii. disputed questions at last instance of nationality, of rights of option, or of the right of residence (Article 58 – go to Conciliation Commission first);
iii. disputed questions at last instance concerning circulation permits (Articles 296-298 – automatically seized);
iv. disputed concerning certain rights of banks, including jurisdiction to award damages (Article 313);
v. the equivalent of what would not be called 'a preliminary reference procedure', evocation from a German or Polish court, tribunal or authority concerning any provision of the Geneva Convention (Article 588).[23]

The Arbitral Tribunal consisted of three members, a German and Polish member and a neutral third member as president. The parties agreed to appoint Georges Kaeckenbeeck as President. Kaeckenbeeck was at the time of his appointment employed in the legal department of the General Secretariat of the League of Nations, having previously worked as a legal advisor to the Belgian Foreign Ministry. Members of the Tribunal were to be independent and free from any instructions of their Government (Article 563) and were to enjoy diplomatic immunity (Articles 570, 572). State representatives were to serve as intermediaries, whose role was to act as contact points, including as regards settling disputes (Article 569).

[23] Kaeckenbeeck, G. 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935) 21 *Transactions of the Grotius Society: Problems of Peace and War, Papers Read Before the Society in the Year 1935* 27, at 29 ['Character and Work (1935)']. The wording of Article 588(2) includes as follows: "An Upper Silesian case shall mean a case brought in the first instance before any tribunal, including administrative tribunals, in the plebiscite area, or before administrative authorities of the said area who do not receive orders from higher authorities." Logically, this would include matters not resolved by the Conciliation Commissions.

Section 4: Caselaw

(a) Overview of some of the principal cases:

This section provides a brief survey of some of the leading cases of the Arbitral Tribunal, including its approach to legal reasoning and how it articulated and exercised its own institutional role. The judgments or decisions it issued were published in German and Polish, however, some have been digested into English in the *Annual Digest of Public International Law Cases* or *International Law Reports*[24] or made available as League of Nations archival documents,[25] and the President of the Tribunal published in English a book-length commentary in 1942 on the Arbitral Tribunal's work that gives access to considerable material.[26] From the perspective of design features, an unusual aspect of the framework of the Arbitral Tribunal of Upper Silesia was the procedure under Article 147 of the Geneva Convention for bringing a decision of the Arbitral Tribunal before the Council of the League of Nations, effectively a type of political review of a judicial decision. Article 147 stated:

'The Council of the League of Nations is competent to pronounce on all individual or collective petitions relating to the provisions of the present Part and directly addressed to it by member of a minority. When the Council forwards the petitions to the Government of the State in whose territory the petitioners are domiciled, the Government shall return them, with or without observations, to the Council for examination.'

The survey here is necessarily limited, and indeed a large work could be written just on this topic based on the judgments published in German and Polish, but does give a flavour of the approach of the Arbitral Tribunal. Article 592(1) of the Geneva Convention provided that its judgments were to be published when these were of real jurisprudential interest or '*lorsqu'elles sont de réel intérêt jurisprudentiel*'. Between 1922 and 1937, the Arbitral Tribunal decided approximately 3,727 cases of which 127 of the leading cases were published in Polish and German, while the official collection in German and Polish comprises seven volumes published from 1929 to 1937.[27]

[24] Albeit quite a small number of the 127 judgments published in German and Polish were digested in the *ILR* (13).
[25] Some of these can be found online from the archives of the UN as PDF documents (e.g. the *Plonka* judgment discussed below).
[26] Kaeckenbeeck, G., *The International Experiment of Upper Silesia: A Study in the Working of the Upper Silesian Settlement, 1922-1937* (Oxford University Press, 1942) '['*International Experiment* (1942)']. For an earlier study, see Stone, J., *Regional Guarantees of Human Rights: A Study of Minorities Procedure in Upper Silesia* (Macmillan, 1933).
[27] International Law Commission, *Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary General*, A/CN.4/6 and Corr.1, 1949, p. 49; Gross, L. *Essays on International Law and Organization: Volumes 1-2* (Springer, 2014), at 67.

Steiner and Gross v. Polish State[28] is one of the most important cases in that it dealt with a key practical issue and clarified the supremacy principle applicable to the Geneva Convention regarding conflicts with national law. The case is still quite regularly cited. The result was based squarely on the text of the Convention, in Articles 1(4) and 605, and so represents a very standard approach to legal reasoning and in that sense was quite predictable:

'Article 1
…
4. The clause of Polish Laws which provide that these laws are to come into force in Polish Upper Silesia as from the date of the transfer of sovereignty shall be null and void in so far and so long as they may relate to provisions which would be contrary to those of the present Convention.

Article 605
1. Si contrairement aux autorités nationales, la Commission mixte ou La Tribunal arbitral admettent leur competence, c'est law decision de la Commission mixte ou du Tribunal qui l'emporte.
2. Les effets juridiques de cette decision seront r églées comme des questions relevant de la jurisdiction intérieure de l'État.'

On the facts, a Polish citizen and Czechoslovak citizen both sued Poland. Poland argued that it was a general principle of international law that a state could not be sued by its own citizens nor by a citizen of another state and that the Geneva Convention should be interpreted in this light. The text clearly supported the conclusion of the Arbitral Tribunal rejecting Poland's argument, making Poland's argument somewhat surprising given that it had just recently ratified the Geneva Convention. In his later book, Kaeckenbeeck observed:

'The Polish Government Representative argued that the Tribunal had no jurisdiction on the ground that it was contrary to international law that citizens should sue their own government in an international court. He overlooked the fact that the Geneva Convention was a *lex specialis*, and that its provisions had to be interpreted according to the letter, the spirit, and the purpose of the Convention.'[29]

It can be observed also in the judgment that there was an implicit teleology in the Arbitral Tribunal's reasoning in that it also relied on a guiding principle of the Geneva Convention being the respect for private rights and the economic unity of Upper Silesia. This purposive interpretation is consistent with general practice in international law (as reflected later in Article 31 of the Vienna Convention on the Law of Treaties[30]), in that the text was the primary justification, with the object and effect of the Convention being an adjunct or

[28] 30 March 1928, *Decisions of Upper Silesian Arbitral Tribunal*, Vol. 1 (1928), at 2-36; *Annual Digest of Public International Law Cases* 1927-1928, (1928), Case no. 188 at 291. The case is discussed in Kaeckenbeeck, *The International Experiment* (1942), pp. 47-55.
[29] Kaeckenbeeck, *The International Experiment* (1942), at 49.
[30] 1155 UNTS 331, 8 ILM 679, entered into force 27th January 1980.

secondary justification (this is reflected also in the quote just above from Kaeckenbeeck). The Arbitral Tribunal also rejected, in this way,4 the argument that it did not have jurisdiction concerning a Czech citizen based on a literal reading of the expression 'having right' ('*l'ayant droit*' in French). The Arbitral tribunal similarly rejected an argument about the general principle of international law of exhaustion of local remedies, noting the use of the word 'directly' ('*directement*' in French) in Article 5.

Niederstrasser v. Polish State addressed a number of important issues as well as also reflecting a traditional approach to interpretation. It considered the meaning and application of acquired (private) rights in the context of State succession, as well as the relationship between general and particular international law.[31] The facts concerned interference with private rights by Polish legislation, specifically, the suppression of the right of a worker to exercise qualification as engine foreman as a result of the worker being held responsible for a workplace accident. Other issues addressed included non-discrimination against aliens, the interpretative maxim *expressio unius est exclusio alterius*, and the arbitral Tribunal's jurisdiction to decree a remedy *restitutio in integrum*. Article 4 of the Geneva Convention was the main legal basis in issue, addressing the issue of vested rights. Article 4§1(1) stated:

'Without prejudice to the provisions of Article 256 of the treaty of Versailles, Germany and Poland will recognise and respect the rights of every kind, and in particular concessions and privileges acquired before the transfer of sovereignty by private individuals, companies or bodies corporate, in their respective parts of the plebiscite area, in conformity with the laws relating to the said rights and with the following provisions. …'

Article 4§§2-3 of the Geneva Convention set out an indemnification principle, whereby Germany and Poland undertook to compensate for the suppression of concessions or privileges or subjective rights. Kaeckenbeeck described this as special international law (recognising thereby the *lex specialis* principle), noting that general international law did not prohibit legislative curtailment of concessions, but did prohibit their arbitrary suppression.[32] Kaeckenbeeck (who was of course the presiding judge) provides a good summary of the net issues in the case:

[31] 6 June 1931, *Decisions of Upper Silesian Arbitral Tribunal*, Vol II (1932), p. 156; *Annual Digest of Public International Law Cases* 1931-1932, (1902), Case no. 33 at 67. The case is discussed in Kaeckenbeeck, *The International Experiment* (1942), pp. 64-69, 72-76.
[32] Kaeckenbeeck, *International Experiment* (1942), p. 67.

'If we now turn to the case of Niederstrasser, we find that his qualification as engine foreman neither falls under the category of concessions or privileges nor under that of subjective rights not conceded by the state, nor finally under the enumeration of No. 4 [i.e. the fourth of four principles listed in Article 4(2), listing particular professions]. Thus is [sic] does not fall under any of the three groups of rights for the suppression or curtailment of which the payment of damages is expressly provided for.

The question therefore arose whether the operation of principles of general international law did not permit to deduce from Art. 5 G.C., combined with § 1 of Art. 4, a legal norm on which could be based the payment of damages for the suppression or curtailment of rights such as that of Niederstrasser, even though they were not covered by the express rule of § 2 of Art. 4. The Arbitral tribunal found that this was not possible.'[33]

As Kaeckenbeeck went on to note, Article 4§1(2)-(3) went a long way further than any rule deducible from general international law, since it even provided for indemnification from the application of general statutes.[34] The Arbitral Tribunal itself followed this line of reasoning, and held that it was only authorised to grant indemnities as specified in Article 4§§. On this ground, the claim failed, as the occupation in question was not listed, and as the subsection did not state that the list was only by way of illustration, it must be regarded as exhaustive. This is a careful, restrained, text-bound approach. It is an instance of applying the maxim *expressio unius est exclusio alterius*, or something enumerated excludes that which is not enumerated. This privileges the express text over implication or extra-textual considerations. Kaeckenbeeck went on to note that a "wider interpretation would soon have plunged the Arbitral Tribunal into a sea of troubles and would surely have led it to an untimely end."[35] An argument was also addressed to the Arbitral Tribunal concerning Article 5 of the Geneva Convention, The Arbitral Tribunal followed the text and found that this did not confer any jurisdiction beyond indemnity, such as to restore the parties to their previous position or *restitutio in integrum*. Kaeckenbeeck went on to note in his discussion of this case, in characteristically lucid and articulate prose, the importance of international judges adhering to a "treaty rule or express criterion in general and not to avoid it even for very equitable reasons:

'Representatives of States are not, as a rule, prone to stop half-way in their triumphant deductions (though the world might be happier if they were!), and the responsibility which would be incurred by international judges who introduced indefinite possibilities into express arrangements is incalculable. Advocates and critics, who are free from that responsibility, may give their clever constructions a much wider scope.'[36]

[33] *Ibid*, 66.
[34] *Ibid*, 67.
[35] *Ibid*, 68.
[36] Ibid.

Hochbaum concerned the division of competences between the State parties and the Arbitral Tribunal concerning expulsion of a person on grounds of national security.[37] The Arbitral Tribunal concluded that it was not competent to enquire into the adequacy of the reasons of the German authorities for exercising expulsion under Prussian regulations. However, it re-iterated its previous authority to the effect that the order of expulsion must set out the facts grounding he exercise of the power of expulsion acknowledged in Article 44 of the Geneva Convention, which provided for expulsion for reasons internal or external security, or for any other police reason, in particular, reasons of public health, the safeguarding of morals or public assistance. The wording of Article 44 is similar to the derogations from residence rights to be found in EU law,[38] but the approach of the Arbitral Tribunal is different from that of contemporary courts in that it was not willing to exercise any kind of proportionality review as a general principle of law:

'The exercise of the right was expressly reserved under Article 44 of the Geneva Convention to the free discretion of the Contracting Parties. The reasonableness of the decision is not subject to review by the Tribunal. If the authority in question is in a position to adduce reasons of a serious nature justifying expulsion, then the Tribunal is not entitled to reject these reasons as unimportant or insufficient'.[39]

The narrow and technical approach to its jurisdiction is apparent from the decision of the Arbitral tribunal in *Jablonsky*.[40] The plaintiff argued that his exclusion from the practice of being an attorney on the grounds his being a Jew amounted to a suppression of a right that entitled him to an indemnity under Article 4 of the Geneva Convention. The Arbitral Tribunal approach the issue as being about the definition of an established business as the object of a subjective right under Article 4, and this notion did not as a rule extend to a more general idea of the freedom to sue one's working capacity and to exercise a profitable activity, in contrast to the power of an established business embodied in a definite undertaking

[37] 20 December 1934, *Decisions of Upper Silesian Arbitral Tribunal*, Vol. V, p. 140; *Annual Digest of Public International Law Cases* 1933-1934, (1940), Case no. 134 at 325. The case is discussed in Kaeckenbeeck, *The International Experiment* (1942), pp. 211-212.

[38] See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely with in the territory of the Member States, 30.04.2004, OJ L/158, p. 77-123, Articles 27-33.
90/364/EEC, 90/365/EEC and 93/96/EEC

[39] 20 December 1934, *Decisions of Upper Silesian Arbitral Tribunal*, Vol V, p. 140, at 162; *Annual Digest of Public International Law Cases* 1933-1934, (1933-34), Case no. 134 at 325, at 327.

[40] 24 June 1936, *Decisions of Upper Silesian Arbitral Tribunal*, Vol VI, p. 234; *Annual Digest of Public International Law Cases* 1935-1937, (1945), Case no. 42 at 138.

recognised and protected as the material foundation of a relationship analogous to property. The latter was protected by Article 4 if it fell within the enumeration in that Article.

Upper Silesian Language of School Certificates Case[41] illustrates a somewhat more flexible approach to interpretation than other cases suggest, although it simply reflects reliance on more general law in the absence of specific regulation of a point, i.e. a gap was addressed through more general principles. Article 132 f the Geneva Convention provided that the language of instruction in minority schools should be the language of the minority in question. In this case regarding schools in Upper Silesia, Polish authorities insisted that testimonials should be in Polish only, whereas the German minority asked that testimonials be issued in both German and Polish. The Arbitral Tribunal found that the fact that the Geneva Convention contained no express provisions on the point was not decisive, as it was impossible in this context to regulate all the details of school administration in the treaty. In the absence of special regulations, the general provisions of the treaty should be relied on to yield an answer, and a fundamental principle of the treaty as intended by the makers of the treaty was that the entire educational activity should be available in the language of the minority, so that testimonials should be issued in both languages. This is an example of systemic interpretation.

Another, somewhat different, example of systematic is *Hausen*, where the reference in Article 4 to respect for all rights (‘*droits de toute nature*’ in French) was to be qualified by other provisions of the Geneva Convention making it clear that it only extends to private rights and not public rights.[42] For example, Article 1 stated that the provisions of substantive law in the plebiscite areas ceded to Poland shall remain in force only so far as this was not inconsistent with the change of sovereignty, meaning that sovereignty was unimpaired.

Plonka concerned Léon Plonka, who was recognised as a German national by the Prussian government.[43] The German authorities (Breslau Police) confiscated his German passport, which Plonka argued violated Article 83 of the Geneva Convention in view of the fact that

[41] 15 November 1925, *Decisions of Upper Silesian Arbitral Tribunal*, Vol II, p. 73; *Annual Digest of Public International Law Cases* 1925-1926, (1929), Case no. 237 at 311.
[42] 16 November 1934, *Decisions of Upper Silesian Arbitral Tribunal*, Vol V, p. 27; *Annual Digest of Public International Law Cases* 1933-1934, (1940), Case no. 40 at 102.
[43] 7th December 1931. A translation of the judgment in this case is available in the transcript of a petition arising from it under Article 147 of the Geneva Convention that has been made available online through the UN archive: < http://biblio-archive.unog.ch/Dateien/CouncilDocs/C-805-1931-I_EN.pdf > .

his acquisition of German nationality would have automatically deprived him of the prior Polish nationality that he had, meaning he would now be in effect stateless. Article 83 stated that the Contracting Parties undertake to assure full and complete protection of life and liberty to all inhabitants of the plebiscite territory, without distinction of party, nationality, language, race or religion. Plonka had not succeeded before the Conciliation Commission, nor did he before the Arbitral Tribunal. Plonka was born in Russian territory (now, i.e. at the time of the proceedings, part of Poland) to German parents in 1878 and moved to Germany in 1896 where he remained until moving to German Upper Silesia in 1917 and to Polish Upper Silesia in 1921. He then moved back to Beuthen in German Upper Silesia in 1926. The Beuthen police authorities issued him a passport in 1926 recognising his German nationality. The German police authorities in Breslau later took this from him on the grounds that he was not a German national. In reply to a petition by Plonka, he was informed by the Breslau Regierungsprâsident in accordance with the instructions of the Prussian Minister of the Interior that under the Vienna Convention of 30 August 1924, between Germany and Poland, he had on 10 January 1920[44] acquired Polish in addition to German nationality and had accordingly lost his German and retained only his Polish nationality.

Plonka applied to the Conciliation Commission and asked for the fact of his German nationality to be established. On 25 November 1928, the Commission informed him that under the Geneva Convention, he had not acquired Polish nationality, and that the Commission was not competent to decide whether he had acquired it in any other fashion. Essentially, therefore, the Conciliation Commission did not consider itself competent to fully decide the question of his nationality, considering itself only competent to rule on the Geneva Convention itself. The Arbitral Tribunal took a different approach, considering itself competent to rule both on the Geneva Convention and other applicable national and international law.

Plonka sought a judgment from the Arbitral Tribunal that he had not acquired Polish nationality through having resided in Polish Upper Silesia, but had retained his German nationality. Plonka argued before the Arbitral Tribunal that the question of his nationality should be decided on the basis of the Geneva Convention, Articles 25 and 26 of which specify which German subjects acquire Polish nationality in consequence of the cession of

[44] German-Polish Convention Concerning Questions of Option and Nationality, signed at Vienna on 30th August 1924, 32 LNTS 332.

Polish Upper Silesia. The Polish Government's representative submitted before the Arbitral Tribunal that, under Article 25§1(2) of the Geneva Convention, Plonka had not acquired Polish nationality, and had retained his German nationality. The Arbitral Tribunal reached its conclusion quite directly and first pointed out that Article 26 of the Geneva Convention refers to persons born in Polish Upper Silesia and was therefore inapplicable to Plonka as he was born in Russian territory to German parents, territory that was now part of Poland (but not part of Upper Silesia), and was a German national at birth. Further, Article 25, from which Plonka inferred that he had not acquired Polish but retained German nationality, was equally inapplicable to his case, since it specified that German nationals, who at the time of the transfer of sovereignty were domiciled in Polish Upper Silesia, acquire Polish nationality, whereas on 15 June 1922 (the date of the transfer of sovereignty), Plonka was domiciled in Polish Upper Silesia, but Article 25 did not apply to him because on that day he was already a Polish national and could therefore not again acquire Polish nationality.[45] The Arbitral Tribunal's decision that Plonka was a Polish national already at this date was set out as follows:

'The fact is that Leo Plonka, a German subject by birth, had already acquired Polish nationality on January 10th, 1920, because his birthplace, Boles^avice, district of Wielun, was in former Russian Poland, which is now Polish territory, and the Court of Arbitration can undoubtedly base its decision on the fact that Plonka's parents were domiciled at the time of his birth in 1878 on what is now Polish territory – according to the unrefuted evidence laid before the Court, the family only removed to Germany in 1896.

Accordingly, in the case of Leo Plonka the conditions of article 4 of the Minorities Treaty concluded on June 28th, 1919 between Poland and the United States of America, Great Britain, France, Italy and Japan, are complied with; in addition Article 2 (3) of the Polish law of January 20th, 1920 (Legal Gazette, IJo.7 §44), expressly recognises the applicability of that Treaty.'[46]

However, the Arbitral Tribunal decided that he had also remained a German national:

'… since he was at the time domiciled in German territory at Kreuzburg, German Upper Silesia (Article 7 of the German-Polish Convention for the interpretation of the Minorities Treaty, dated August 30th, 1924); as from January l0th, 1920, therefore, he possessed both Polish and German nationality. Plonka's possession of German nationality did not have the effect, however, of making article 25 of the Geneva Convention applicable to him, since the fact of his being a Polish national precludes the application of this provision in his case.'[47]

In its judgment, the Arbitral Tribunal applied standard methods of reasoning in international law, rather than asserting any special status for the Geneva Convention:

[45] *Plonka*, 7 December 1931, para. 8.
[46] Ibid, paras. 9-10.
[47] Ibid, para. 11.

'The petitioner cites Section X of the Final Protocol of the Vienna Convention to the effect that the provisions of that Convention shall in no way affect the provisions of the Geneva Convention, in support of his contention that the question of his nationality should be determined in accordance with the Geneva Convention, But this stipulation means that the provisions of the Vienna Convention shall not affect the provisions of the Geneva Convention. The two Conventions, moreover, are not incompatible in cases such as the present where the person whose nationality is to be determined does not come under the provisions of the Geneva Convention at all owing to his having acquired Polish nationality before the Convention came into force.'[48]

The Arbitral Tribunal ruled that this section X did not make Articles 25 and 26 as worded applicable to those who already had Polish nationality, as was the case with Plonka. The Arbitral Tribunal's judgment thus centred around a close reading of the wording of Articles 25 and 26 of the Geneva Convention.[49] The Arbitral Tribunal did not need to rule on a conflict between the two Conventions, although the Vienna Convention itself dealt with this possible scenario by providing it was without prejudice to the Geneva Convention. So the Tribunal did not need to resort to norm conflict rules such as *lex superior* or *lex posterior*. The Arbitral Tribunal went on to refer to the intention of the contracting States to the Geneva Convention as consistent with this result:

'There is no ground for assuming that it was the intention of both the Contracting Parties to the Geneva Convention to consider Polish nationality acquired before June 15th, 1922 as null and void if the party was domiciled on that date in Polish Upper Silesia.'[50]

The Arbitral Tribunal evidenced in support the decision of the Conference of Ambassadors of 20 October 1921 requiring that Germany and Poland should determine in the Convention the nationality of the resident population of Polish Upper Silesia in accordance with Article 91 of the Peace Treaty of Versailles and Articles 3, 4, 5 and 6 of the Minorities Treaty of 28 June 1919.[51] Article 91 of the Peace Treaty and Article 3 of the Minorities Treaty related to the acquisition of Polish nationality in virtue of domicile.[52] Article 25 of the Geneva Convention corresponded to Article 91 and Article 3 respectively, while Article 26 of the Geneva Convention corresponded to Article 4 of the Minorities Treaty, but only referred to persons born in Polish Upper Silesia.[53] Plonka's argument would imply that in the case of persons born in Polish territory, the acquisition of Polish nationality would be conditional on their having been domiciled in Polish territory or in the German part of the Upper Silesian

[48] Ibid, para. 12. The Vienna Convention referred to is the German-Polish Convention concerning Questions of Option and Nationality, signed at Vienna on 30 August 1924.
[49] *Plonka*, 7 December 1931, para. 13.
[50] Ibid, para. 14.
[51] Ibid, paras. 14-15.
[52] Ibid.
[53] Ibid, para. 16.

plebiscite area since January 1st 1909, which was not supported in the wording of the treaties referred to.[54]

The Arbitral Tribunal thus engaged in systematic interpretation of related laws, having decided that these were within its jurisdiction. It elaborated on the scope of its own jurisdiction in the second part of its judgment, referring to Articles 56, 58, 563 and 591 of the Geneva Convention. Articles 56 and 58 set out that the Arbitral Tribunal was competent to decide questions of nationality. Article 563(3) of the Convention expressly stated that in its decisions, the Arbitral Tribunal was not confined to an application of the Geneva Convention, but could in addition apply the "laws in force". Article 591 further provided that the decisions of the Arbitral Tribunal regarding the nationality of a party in accordance with Part 2 of the Convention or under a procedure of evocation *erga omnes* have full legal force in the territories of both Contracting States.[55]

The Arbitral Tribunal concluded with what may seem a paradoxical observation:

'...it is the Court's duty to see whether the applicability of the Geneva Convention is excluded in the case of the plaintiff owing to his having already possessed Polish nationality on June 15th, 1922. This is a preliminary question which the Court of Arbitration has to decide in accordance with existing legislation without being confined to a simple application of the Geneva Convention. If it concludes, however, that the Geneva Convention cannot apply to the petitioner's case then, in the absence of a provision in that Convention, the Court of Arbitration is not competent to give a binding decision regarding the nationality of the petitioner.'(para. 22)

Effectively, the Arbitral Tribunal concluded that it could determine nationality for the purpose of determining the applicability of the Geneva Convention, but that a conclusion of nationality in this regard was not binding for other purposes. This conclusion is supported by the text of the Convention and makes clear the limits of the Arbitral Tribunal's jurisdiction. In this way, the Arbitral Tribunal was careful to avoid what might be termed today as 'competence creep'.

Section 5: Successful Reception of the Tribunal's Caselaw

This section examines the mechanism in the Geneva Convention whereby its judgments took effect as national judgments and the factors that influenced its success. Its success can be

[54] Ibid, paras. 16-18.
[55] Ibid, paras. 20-21.

measured by the acceptance of its jurisprudence, as well as the regular recourse had to it from Upper Silesia. As well as the statistics noted above, worth noting are the 7,741 cases approximately dealt with by the Arbitral Tribunal over the full course of its existence from 1922-1937[56] (many more were dealt with by the Conciliation Commission). Kaeeckenbeeck attributed this success to two conditions:

'… it may not be amiss to lay once more stress on two of the essential conditions of its success: first, art. 591 col. 2 and art. 592; the absolutely binding character of the arbitral tribunal's decisions on nationality, and the general binding force as precedents for all courts and authorities of the two States, of decisions published by the Arbitral Tribunal. … The second condition was the conception of the right to a nationality according to the treaty provisions as a subjective right on which the arbitral tribunal was competent to pass.'[57]

This passage refers to what could be termed supremacy and direct effect as the two conditions. Here, supremacy also encompasses a notion of binding precedent, perhaps surprising for two countries within the civil law tradition, but which reflects the principle of formal justice that like cases be treated alike and the status of the Arbitral Tribunal as a sort of appellate procedure (e.g. reflected in the procedure of evocation, or preliminary reference in today's language).

More generally, it might be said that the surrounding political situation was key to its success. Both Germany and Poland were willing to accept the process because the alternative seemed open conflict between Germany and Poland (since neither seemed willing to compromise on Upper Silesia), possibly dragging in the Entente powers.

Kaaeckenbeeck proposed that a particular weakness concerned the provisions on remedies or redress in the Geneva Convention, but that the caselaw itself helped to address this.[58]

Section 6: A Prospective and Retrospective View – The Tribunal in the Context of the Development of International Courts and Tribunals

This section examines the extent to which the mechanism of the Arbitral Tribunal represented an advance on previous such bodies and, more briefly given the historical approach of the edited collection, how it may have influenced future international developments, as its President Kaeckenbeeck considered that it would in an article he published in 1935. Kaeeckenbeeck noted that Article 4 of the Geneva Convention "constitutes a special law

[56] Kaeckenbeeck, *International Experiment* (1942), pp. 130-131.
[57] Ibid, pp. 213-214.
[58] Ibid, pp. 192-193.

valid only between Germany and Poland in Upper Silesia, and modelled on the particular circumstances of that territory. It is therefore somewhat dangerous to look for precedents or for illustrations of international law in the decisions of the Arbitral Tribunal in this matter".[59] Kaeckenbeeck went on to note the differences between normal international law and the special international law of the Geneva Convention applicable to Upper Silesia for 15 years. Nonetheless, the successful reception of the caselaw of the Arbitral Tribunal has some striking parallels with the later success of the ECJ in achieving a successful reception of its caselaw. In his later work, Kaaeckenbeeck took a broader perspective on the role of 'trial and error' in informing a greater understanding of the dynamics of international life and politics:

'For us, who believe in the necessity of international organization and law, for the sake of humanity, the task of observing international life and registering experiments, and not that of juggling with traditional principles or concepts, is compulsory and urgent. The knowledge of the facts and data of international life under a great variety of circumstances appears to us to be a prerequisite of the statement and teaching of international law. And it will be readily admitted that, at the present stage of development of international relations, there is hardly a more vital question than that of securing the fair application of conventions, once they have been entered into. … There are a thousand degrees and shades, there are a thousand doubts and difficulties, which only a close observation of international practice can reveal. Ways and means to obviate or solve many of them, and to secure definite results, have been tried with varying success. Experience in this respect is of the highest importance both to statesmen and to jurists, and it would not seem to be amiss if more of the writers on international subjects would turn their attention to the faithful collection and dissemination of it.'[60]

Several aspects of the practice and experience of the Arbitral Tribunal are worth highlighting as being of broader relevance:

1. Direct effect: Article 5 of the Geneva Convention authorised individuals to bring claims against Poland or Germany, which included their own State. That individuals could sue their own states before an international tribunal was, as Gormley notes, "… so revolutionary that in the case of *Steiner and Gross v. Polish State* [above] – an action brought against Poland by two of her own nationals – the Polish agent contended that the Convention could not be interpreted in such a manner as to give private parties – belonging to minority groups – the right to bring an action against the sovereign State of which they were nationals".[61] Traditionally, the latter tended to

[59] Kaeckenbeeck, 'Character and Work (1935)', p. 36.
[60] Kaeckenbeeck, *The International Experiment* (1942), at 2.
[61] Paul Gormley, W. *The Procedural Status of the Individual before International and Supranational Tribunals* (Springer, 2012), at 41

support the old doctrine considering individuals as subjects,[62] but it is logically distinct from it, i.e. an individual could be a subject, but still be required to exhaust local remedies (as a subject of international law) before resorting to an international jurisdiction (as a subject of international law) or not be required to exhaust local remedies. The idea of direct effect interacts with the exhaustion of local remedies. The Arbitral Tribunal held that it was clear from the text of Article 4(2) of the Geneva Convention that individuals had this right and the Tribunal could not interpret exceptions or limitations in to it:[63] 'The right to appeal to the courts, administrative tribunals, or to the competent authorities may not be withdrawn by legislative amendments.' As Kelsen noted in his 1952 treatise *Principles of International Law*, several other treaties from this period also conferred such rights on individuals (referring to two treaties between Poland and the City of Danzig, as did Articles 297 and 304 of the Versailles Treaty).[64] Individuals who were not of German or Polish nationality, but whose rights came within the scope *rationae materiae* of the Geneva Convention could also bring claims before the Arbitral Tribunal.[65]

Cançado Trinidade indicates that the Arbitral Tribunal for Upper Silesia was of particular note regarding the procedural status of individuals:

> Of all minorities systems placed under the guarantee of the League of Nations the most advanced — in so far as the procedural status of individuals was concerned — was that of Upper Silesia (1922-1937), a unique and remarkable experiment in international law set up by the German-Polish Convention on Upper Silesia of 1922.47 For the purposes of this study the first noteworthy point in the Upper Silesian system was its *multiplicity of remedies.* In fact, by virtue of some of the clauses of the Convention the individuals concerned could not only address a direct petition to the League Council but also resort to the two controlling international agencies set up by the Convention, namely, the Mixed Commission and the Arbitral Tribunal.[p. 381, footnotes omitted]

Steiner and Gross also decided that the regime set up by the Convention did not require the exhaustion of local remedies, which Kaeckenbeeck noted was another way in which (apart from the right of individuals to sue the Polish or German government) the Geneva Convention differed from general principles of international law.[66]

---

[62] See generally Cançado Trinidade (1977). He notes the "international system on the navigation of the Rhine, comprising a special Rhine jurisdiction, is regarded as the oldest of international jurisdictions", i.e. granting procedural status to individuals (*ibid*, at 373) (it was provided for by the Congress of Vienna in 1815 and established in 1816), who could appeal from national courts either to a national appellate court or an international Central Commission for the Navigation of the Rhine.
[63] As noted in Gormley (2012), at 41.
[64] republished by the Law Book Exchange Ltd. in 2003, pp. 141-143, and references therein.
[65] Kaeckenbeeck, 'Character and Work (1935)', at 36. See, e.g. *Steiner & Gross*.
[66] *Ibid.*

The procedure under Article 147 of the Geneva Convention for petitioning the Council of the League of Nations could be invoked without first going through the machinery of the Commissions or the Arbitral Tribunal, but it could also be invoked following them.[67] Gormley observes that the procedure under Article 147 led to many worthless claims being brought before the Council of the League of Nations as a way of challenging decisions of the Arbitral Tribunal, including petitions for the political purpose of embarrassing the authorities, and that this encouraged a restriction of the right to bring such petitions before both the Council and later international adjudicative bodies.[68] Comparing this to later adjudicative bodies as a design feature, it has generally been omitted from subsequent adjudicative bodies in the international legal system.

2. Supremacy (Articles 1(4) and 605): The Geneva Convention expressly dealt with the issue of supremacy, providing that the Convention was to prevail over contrary national law. This might be thought to be a simple expression of *lex posterior* as a norm conflict rule, but the issue of nationality is a constitutional one and so the supremacy clause is a notable example of national law willingly being dis-applied in favour of transnational law.

3. Preliminary references: the right of evocation was the term used by Kaeeckenbeeck to describe what would now be termed both pre-emption of national law and a preliminary reference procedure under Article 588 of the Geneva Convention. Evocation before the Arbitral Tribunal by the courts of Germany or Poland, a procedure Kaeeckenbeeck described as "a new departure in international life".[69]

4. Technical character: It was noted above that by comparison with the CACJ, the Arbitral Tribunal had a narrower, more technical, less politically contentious jurisdiction. This is true to an extent, but it is worth noting that the Arbitral Tribunal had to determine issues of nationality, which even today are still considered sovereignty-sensitive. That said, the Arbitral Tribunal was focused on a small territory and was exercising judgment over a very detailed convention agreed by both

[67] Cançado Trinidade (1977), at 381, citing Franz Berheim, League of Nations doc. C.366.1933.1, in: League of Nations *Official Journal* **[**1933J-II**,** pp. 934/935.
[68] Gormley (2012), at 42.
[69] Kaeckenbeeck, 'Character and Work (1935)', at 40.

> Germany and Poland at the prompting of the League of Nations, when neither country had much political space for seeking to achieve its maximal outcome in Upper Silesia through traditional diplomacy and power politics.

Undoubtedly, the context post-World War I was central to the establishment of the Arbitral Tribunal. The inability of the entente powers – chiefly France and the United Kingdom – to agree on how to deal with the partition of Upper Silesia led them to refer the problem to the League of Nations. In previous times, a settlement without the use of force would have involved some eventual agreed trade-off of territory between the German and Polish governments. Gormley notes that there is some disagreement whether legally speaking the inter-War system of minority protection resulted from treaties between States or was imposed by decisions of the League of Nations.[70]

Kamusella suggests that Upper Silesia is an example of how ethnolinguistic identity came to replace religion after World War I (primarily Protestant versus Catholic) and that this was *imposed* from outside and did not really replace older ties of communal belonging an identity not related to the national capitals of Berlin or especially Poland.[71] The immediate political context of the referral of Upper Silesia to the League of Nations does suggest the intensity of the conflict there as essentially the product of competing Polish and German nationalism, with France and the United Kingdom competing for influence in the background and backing different sides, partly due to a differing attitude to the treatment of Germany. Thus, the broader phenomenon of nationalism as the strongest expression of cultural identity, but more importantly this sense of identity translating into political aspirations and demands (and not just socio-cultural expression) supported by central nation States, is apparent from the support given by both Germany and Poland to unofficial or irregular forces during the Upper Silesian conflict prior to the plebiscite.

The concept of the League of Nations essentially was for States to cooperate in an established forum for resolving disputes between them. This was always the task of diplomacy and perhaps could be seen as a formalisation of the Concert of Europe 'system' of the 19th century, but what differentiated the League from prior experience of international relations

[70] Gormley (2012), at 42, citing Bageley, T.H., *General Principles and Problems in the International Protection of Minorities: A Political Study*, PhD Thesis, Geneva, No. 77, 1950, pp. 95-96] (perhaps it could be said that in fact and in substance it resulted from both).

[71] Kamusella, T., 'Upper Silesia in Modern Central Europe: On the Significance of the Non-national in the Age of Nations', in Kamusella, T., Bjork, J., Wilson, T. and A. Novikov, (eds), *Creating Nationality in Central Europe 1880-1950: Modernity, Violence and (Be)Longing in Upper Silesia* (Routledge, 2016), pp. 17-19.

was that it made issues of a multilateral character by design and that it was accompanied by the establishment of an international court in the form of the Permanent Court of International Justice (PCIJ). Indeed, a number of disputes related to Upper Silesia that were now within the jurisdiction of the Conciliation Commission or Arbitral Tribunal went before the PCIJ, and in its judgments the PCIJ clarified important principles of international law that remain valid today (especially in *Chorzow Factory*[72]). It seems reasonable to suppose that having accepted the principle of the PCIJ, judicial settlement became more normalised as a solution to 'chronic' problems of international relations, i.e. problems persisting over time. However, this would perhaps draw too swift a conclusion if not qualified carefully. The Arbitral Tribunal was established on the basis of a detailed convention where established rules of international law existed. It was perhaps the existence of a reasonably comprehensive body of law that could be applied that enabled Germany, Poland and the *entente* powers to accept the idea of judicial settlement. Thus, the Arbitral Tribunal was the outcome of a pre-existing process of development of legal rights, but crucially it offered the possibility of an apparently neutral forum, which courts of the States of Germany or Poland could not realistically be expected to do, even if only at the level of appearance. Thus, the Arbitral Tribunal was to an extent the outcome of the development of legal rules agreed between States.

As the above discussion of the approach it took to legal reasoning indicates, the Arbitral Tribunal did not take a radical approach to develop the law: it carefully applied a generally comprehensive set of rules. Given the fraught political context of Upper Silesia, the Arbitral Tribunal had a delicate task to perform in maintain confidence as to its impartiality.

That it concluded its work successfully indicates the extent to which it maintained confidence of relevant audiences, but it was also fortunate that it came to the end of its mandate shortly before the political events in Germany overtook any attempts to settle complex disputes between States relating to nationality and minority status through cooperative or legal means.

Kaaeckenbeeck concluded from the experience of the Arbitral Tribunal:

> As to the experience of the Arbitral Tribunal in this matter … it appears to me conclusive in showing the great advantage of an international judicial control. … It demonstrated the value of some such notion of an individual's right to one's nationality, the acquisition or loss of which should be a matter of law, and not simply one of discretion for national authorities. It also proved the usefulness of letting individuals claim and defend their right to a nationality before bilateral and even international judicial organs. [73]

[72] See, e.g. *Factory at Chorzów, Germany v. Poland, Jurisdiction*, Judgment, PCIJ Series A No 9, ICGJ 247 (PCIJ1927), 26th July 1927.
[73] Kaeckenbeeck, *International Experiment* (1942), at 521.

The German Convention was a bilateral one, although it might be considered that the context of its agreement was a multilateral one involving the League of Nations and the Entente powers.

Conclusion

The success of the Arbitral Tribunal contributed to the later development of international courts. As Devereux has recently noted, Prof. Bentwitch's 1944 study on the problem of statelessness after World War I[74] and Kaaeckenbeeck's writings influenced, for example, Australia to propose an international human rights court at the Paris peace conference in 1946 and appear to have influenced the establishment of the European Court of Human Rights.[75] Weiss notes that the case for such international tribunals to resolve issues of nationality is especially strong regarding statelessness, as stateless persons have no state to protect them or espouse their cause.[76] Nonetheless, the significance of the Arbitral Tribunal of Upper Silesia is considerable beyond its role regarding nationality issues. Its jurisdiction extended to a whole range of civic and socio-economic concerns in a way that demonstrated the potential breadth of the material scope of international institutions and jurisdiction. As such, it was an important precedent in the trend over the course of the twentieth century towards placing more competence and trust in the hands of international institutions. Certainly the writings of George Kaeeckenbaaack, as the Arbitral Tribunal's presiding judge and later leading commentator on its work, demonstrated a clear sensitivity to what might be called today design features that enabled the success of the Arbitral Tribunal. Kaeckenbeeck's writings suggest at the same a certain caution and restraint in the face of the practical realities of power politics, but a willingness to assert in clear jurisprudential terms the competence and jurisdiction of an adjudicative body. The work of the Arbitral Tribunal was certainly helped by the comprehensiveness, both procedurally and substantively, of the underlying Geneva Convention and facilitated by the ready acceptance of both Germany and Poland of the usefulness and even necessity of such a forum.

---

[74] Bentwitch, N., 'Statelessness through the Peace Treaties after the First World War' (1944) 21 *British Yearbook of International Law* 171.
[75] Devereux, A., *Australia and the Birth of the International Bill of Human Rights 1946-1966* (Federation Press, 2005), pp. 180-181.
[76] Weiss, P., *Nationality and Statelessness in International Law* (Brill, 1979), pp. 255-256 and references therein.