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## Criminal Prosecution of Foreigners in Poland: Procedural and Practical Aspects

### Keywords

Aliens, Foreign Investment, Investment, Ownership, Real Estate, Real Property

# Criminal Prosecution of Foreigners in Poland: Procedural and Practical Aspects

DR. MICHAL PLACHTA\*

## I. INTRODUCTION

The real situation, as opposed to the legal status,<sup>1</sup> of an alien<sup>2</sup> against whom criminal proceedings are conducted in a foreign country has seldom been studied. No empirical survey on this topic has been made in any of the Eastern European countries. In those states, the general statistical data concerning prosecution and conviction of foreign defendants are not readily available.<sup>3</sup> The aim of this study is to present the procedural situation of a foreign defendant prosecuted in Poland as found through empirical research. Since the analysis is concentrated on procedural and practical aspects, the problem of sanctions imposed by Polish courts will not be addressed.

Two assumptions underlie the study. First, the legal and procedural status of foreign defendants, determined both by domestic and international law, is not fully compatible with the proceedings carried out by the criminal justice authorities, especially in comparison with native defendants. Second, the contemporary legal system does not provide a separate and special procedure "only for foreigners."<sup>4</sup> Therefore, the basic problem is an "adaptation" of the existing legislation to the particular needs of foreign defendants. The questions that arise are whether these provisions are flexible enough, and whether the legislature considers, to a substantial degree, the specific situation of a foreign defendant.<sup>5</sup>

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1. See Filar, *Legal Position of an Alien in Polish Criminal Law*, 12 *PALESTRA* 52-67 (1977); Lammich, *Die strafrechtliche Behandlung von Ausländern und von Straftaten mit Auslandsberührung in Polen*, 20 *JAHRBUCH FÜR OSTRECHT* 67 (1979); T. PUSYLEWITSCH, *DIE RECHTSTELLUNG DES AUSLÄNDERS IN POLAND* 251-57 (1977).

2. Plachta, *Remarks on the Term "Foreigner" in the Light of Criminal Law and International Law*, 9 *PANSTWO I PRAWO* 73-82 (1986).

3. In Poland, the statistics concerning the number of foreigners convicted by courts have been made available since 1982 to a relatively small group of people by the Ministry of Justice, Department of Statistics.

4. Damaska, *Road Traffic Offenses Committed by Foreigners*, 3-4 *REVUE INTERNATIONALE DE DROIT PENAL* 15 (1971)[hereinafter R.I.D.P.].

5. It is noteworthy that the newly introduced preventive measure into the Hungarian domestic legislation (i.e., bail) may be applied merely to foreigners residing permanently outside the territory of Hungary (Law of 1985). See Georgy & Lammich, *Entwicklung des*

In answering these questions, an unavoidable comparison of a native's situation with that of a foreigner is made, commonly followed by the demand to grant equal rights to both. At the same time, such an equalization of two different defendants, speaking different languages, and originating from different cultural backgrounds, may easily prove to be detrimental to the foreigner. There is no greater inequality than the equal treatment of unequals<sup>6</sup> (i.e., *idem non est idem*). If there is no legal ground to differentiate between these two groups of defendants, it has often been done in the practical application of criminal law by the authorities.<sup>7</sup> This can be seen in the milder treatment of a foreign offender as compared with a native, a practice which is legally sanctioned in some countries.<sup>8</sup>

Because of the paramount importance of communication between the criminal justice authorities and foreign defendants, the appointment of an interpreter and the scope and effectiveness of his services will be examined in section III of this article. Since the structure of preventive measures applied to foreign and native defendants varies, the decision-making concerning detention on remand and release on bail of an alien will be analyzed in section IV. Finally, the role of the defense counsel for the foreign defendant will be discussed in section V, and the role of the diplomatic and consular representatives will be looked at in section VI.

## II. METHODOLOGICAL CONSIDERATIONS

There are some indications that Polish courts do not cope satisfactorily with the problems and difficulties encountered by foreigners in criminal proceedings.<sup>9</sup> The primary reason for carrying out this empirical research was the need to verify hypothetical and intuitive opinions on this subject, and also to discover the most significant modifications which might be expected in criminal proceedings and in the application of the regulations in such cases.

The research is based on an analysis of criminal cases against foreign

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*Strafrechts, der Kriminalität und der Strafzumessungspraxis in Ungarn seit dem Inkrafttreten des Strafgesetzbuches von 1978*, 100 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 987 (1988).

6. *Dennis v. United States*, 339 U.S. 162, 184, 70 S. Ct. 519, 94 L. Ed.2d 734 (1950) (Frankfurter, J. dissenting).

7. A similar problem has been reported in English practice. See N. WALKER, *SENTENCING: THEORY, LAW AND PRACTICE* 405 (1985).

8. For example, the Circular No. 34 of 25 September 1967 issued by the Swedish Public Prosecutor recommends "milder" treatment of foreigners who have committed traffic offenses. See Steen, Sundberg & Sundberg, *Les infractions routières des étrangers en Suede*, 3-4 R.I.D.P. 268 (1971). Similarly, in Great Britain, if the offense is a minor one, the fact that the perpetrator is due to return to his home country before he can be properly tried sometimes persuades the police to warn him instead. This reason is mentioned in the internal instructions of some police forces. See N. WALKER, *supra* note 7, at 404.

9. Gardocki, *Criminal Cases of Foreigners Before Polish Courts*, 1 PROBLEMY WYMIARU SPRAWIEDLIWOSCI 107-121 (1980).

defendants who were sentenced, or whose proceedings were suspended from 1975 to 1978. The cases were chosen based on whether the defendant was a Polish citizen. Not only were the files of the cases available, but with the permission of the Minister of Justice and the General Procurator, so were other courts' and procurators' documents (e.g., reference files).

The cases were from three districts: Gdansk, Warsaw and Katowice. The choice of these districts was based on the data from the Ministry of Justice and the General Procurator's office which revealed that the majority of criminal cases against foreigners were concentrated in these areas, as a result of border crossing and tourist traffic. Since the files of all cases concerning common offenses and one third of cases concerning offenses against regulations on foreign currency exchange were analyzed, it may be assumed that this research is representative of all the criminal cases involving foreigners in Poland.

Although these cases dated from 1975 to 1978, the results obtained are not merely of historical significance. Based on the information gathered from the Ministry of Justice and the General Procurator's Office, as well as from numerous talks with judges and procurators, there are constant and deeply rooted habits and patterns in handling the cases of foreigners which have not been abandoned. Furthermore, the judgments of the Supreme Court and the opinions expressed in the doctrine<sup>10</sup> confirm that the findings of the research truly reflect the main tendencies regarding prosecuting foreigners in Poland. Interestingly enough, they are consistent, to some extent, with the reports from other countries.<sup>11</sup>

The research sample includes 308 cases with a total of 364 defendants. Most cases never reach the court either because they are discontinued, conditionally discontinued, or suspended by the procurator in the pretrial stage.<sup>12</sup> Two groups of cases were distinguished:

Population I: 215 cases with 59 defendants which were heard by the court; and

Population II: 93 cases with 105 suspects which were decided by the procurator.

Although the great majority of foreigners visiting Poland (about

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10. Kolodziej, *Comment to two Judgments of the Supreme Court of 13 May 1981: V KRN 79/81 & V KRN 83/81*, 10 *PROBLEMY PRAWORZADNOSCI* 63-67.

11. J. SCHUTTE, *TRANSFER OF CRIMINAL PROCEEDINGS: THE EUROPEAN SYSTEM*, IN *INTERNATIONAL CRIMINAL LAW* 320 (M. Bassiouni ed. 1986).

12. Article 15 of the Polish Code of Criminal Procedure [hereinafter CCP] of 1969 provides that if an impediment arises which prevents the conduct of proceedings for a lengthy period and, in particular, if the accused cannot be arrested or cannot participate in the proceedings because of mental disease or other serious illness, the proceedings shall be suspended until such impediment is removed. See *CODE OF CRIMINAL PROCEDURE OF THE POLISH PEOPLE'S REPUBLIC* (M. Abrahamowicz & H. Horbaczewski eds. 1979). As a typical "impediment" in cases of foreigners, it was invoked that "the suspect has left Poland."

90%) have been nationals of socialist countries, the research revealed a completely different proportion between defendants from socialist and non-socialist countries. Among the 364 defendants mentioned above, there were only 92 persons from socialist countries (26%), and as many as 264 persons from non-socialist countries (74%). This can be explained, to some extent, because in the majority of cases against citizens from European socialist countries, the criminal proceedings are transferred to the appropriate authorities in their home countries for prosecution. This international assistance and cooperation in criminal matters does not apply to citizens of the non-socialist countries,<sup>13</sup> despite the fact that bilateral agreements provide for transfers of this kind.<sup>14</sup>

### III. THE RIGHT OF THE FOREIGN DEFENDANT TO AN INTERPRETER

#### A. *Duty to Appoint an Interpreter*

In criminal proceedings carried out against an alien originating from a different cultural and linguistic background, it is of particular importance to provide an interpreter to assist the alien defendant in dealing with the criminal justice authorities. The criminal process is particularly terrifying to a foreign defendant who does not understand the official language well enough to communicate with the court or his counsel nor understand the testimonies presented against him. Moreover, without the assistance of an interpreter, the probability of prejudicial error towards the defendant is great, and the likelihood of detecting such error is low. The quality of justice a defendant receives should not depend on his ability or inability to speak a foreign language. Moreover, an interpreter who is not only fluent in the language spoken by the defendant but who also has a sufficient knowledge of the law, may be more important and valuable to such defendant than the defense counsel, particularly if the defense counsel does not speak the language of his client.

There are two possible viewpoints regarding the availability of the interpreter's services. The first viewpoint assumes that this should be considered as a separate and fully independent procedural right vested to a defendant.<sup>15</sup> In such a case, there must be a precise determination of

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13. Plachta, *Transfer of Proceedings and Transfer of Prisoners: New Instruments of Cooperation in Criminal Matters among the Socialist Countries of Eastern Europe*, 3 CONN. J. INT'L L. 320-22 (1988).

14. See, e.g., *Treaties on Legal Assistance in Criminal Matters* signed by Poland with the following states: Austria, 14 DZIENNIK USTAW (JOURNAL OF LAWS) (1980)[hereinafter Dz.U.]; Algeria, 10 Dz.U. (1982); Morocco, 14 Dz.U. (1983); Tunisia, 11 Dz.U. (1987); and Libya, 13 Dz.U. (1987).

15. An attitude assuming that a non-English speaking defendant has a constitutional right to an interpreter is represented in American doctrine, although no absolute right to an interpreter has been established. See, e.g., *The Right to an Interpreter*, 25 RUTGERS L. REV. 145 (1970); Cronheim & Schwartz, *Non-English Speaking Persons in the Criminal Justice System: Current State of the Law*, 61 CORNELL L. REV. 289 (1976); Safford, *No Comprendo: The Non-English Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & CRIMINOLOGY 15 (1977).

the sources and grounds of that right, as well as its scope, and the admissibility of a waiver of that right. The second viewpoint sees the appointment of an interpreter in terms of conditions assuring and protecting fundamental procedural rights accorded to a defendant. Therefore, the necessity and duty to appoint an interpreter are derived from a foreign defendant's right to cross-examination, to effective counsel, and to confront adverse witnesses.<sup>16</sup> The latter attitude prevails in Polish doctrine and domestic law.

Recently, there has been a tendency in contemporary legislation to depart from full discretion of the criminal justice authorities in appointing an interpreter towards the duty to do so as imposed by the legislature.<sup>17</sup> Its scope and grounds vary in different countries. In Poland, the duty to appoint an interpreter is provided in Articles 62, 159, and 354 of the Code of Criminal Procedure (CCP).<sup>18</sup> Moreover, the 1985 law on the organization of common courts<sup>19</sup> has introduced a new regulation pursuant to which a defendant who is unable to speak Polish has a right to make and to give statements and to express his opinions in his native language through an interpreter. The authorities carrying out the criminal proceedings, such as the police, procurators, and courts, are therefore obligated to appoint an interpreter if a defendant has "unsuitable command of the Polish language" (Article 62 of the CCP), or if he is a "person without a command of Polish" (Article 159 of the CCP).<sup>20</sup>

Of the 364 defendants, only one in every five had a suitable command of Polish. In determining such a command, the authorities took into account the various circumstances indicating the relationship between foreign defendants and Poland (e.g., birth place or residence in Poland, marriage with a Pole (38.6% of all defendants concerned)). Those circumstances were usually revealed during the interrogation or they were derived from documents concerning the family situation or the defend-

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16. Plachta, *Role and Function of an Interpreter in Polish Criminal Procedure*, 10 PALESTRA 53 (1979).

17. O. CHANNAN, *THE ROLE OF THE COURT INTERPRETER* 23-28 (1982).

18. When the accused does not have a suitable command of the Polish language, the order of the presentation of charges against him, the charge sheet, and decisions subject to review or concluding the proceedings shall be delivered to the accused or announced to him with a translation. CCP, *supra* note 12, art. 62. Article 159(1) of the CCP provides that an interpreter shall be summoned whenever it is necessary to examine a person without a command of Polish. An interpreter should also be appointed whenever it is necessary to translate into Polish a document written in a foreign language, or to translate a Polish document into a foreign language. *Id.* art. 159(2). Finally, if the accused has communicated with the court through an interpreter, at least the final conclusions of the arguments shall be translated to him before he is allowed to present his closing argument. *Id.* art. 354.

19. 31 Dz.U. No. 137 (1985).

20. Similar criterion of the duty to appoint an interpreter can be found in the majority of countries. *See, e.g.*, France, Code d'instruction Criminelle, arts. 344, 497.; G.D.R., Code of Criminal Procedure (CCP) § 383; Bulgaria, CCP, arts. 11, 70 and 98(7); Sweden, Code of Judicial Proceedings, ch. 5 § 6; Denmark, the Law on Criminal Justice, art. 149; Canada, the Chart of Rights and Freedoms, art. 14.

ant's citizenship. The statements made by both the customs officer (25%) and the defendant himself (13.5%), in determining the defendants' command of Polish, where no additional circumstances were presented to support such a contention, have created some controversies. Evidently, the suspects interrogated by the police and procurators during pretrial investigations felt forced to say that they had a "suitable command of Polish" in order "not to cause troubles" for these authorities and to free them from their duty to appoint interpreters. In such instances, the courts have often discovered at trial that the defendant could hardly speak or understand Polish. As a result, the courts then faced the difficult problem regarding the validity of the procedures which were followed during the preliminary investigation in the absence of an interpreter.

#### B. *Scope of the Interpreter's Services*

The wording of Article 62 of the CCP<sup>21</sup> does not state precisely and categorically the form in which the translation of the decisions should be made available to a foreign defendant. One might, therefore, conclude that it is enough to provide him with an oral interpretation of the decisions, especially when they are announced orally. However, this reasoning is not convincing. If the content of a decision has been made available to a foreign defendant only through an oral interpretation, the passage of time may prove this form insufficient and make his defense very difficult. For example, it is almost impossible to prepare an adequate appeal and to seek review if the details and the reasoning of the decision are forgotten and if a copy of the decision is available only in a language foreign to the defendant. Therefore, the defendant should be provided with two documents:<sup>22</sup>

1. A copy of the decision mentioned in Article 62 of the CCP;  
and
2. a written translation in defendant's native language.

The research revealed that these recommendations have not been followed by the procurators or the courts. In the majority of cases, foreign defendants with no command of Polish were provided only with the oral interpretation of the decisions. An order presenting charges to the suspect<sup>23</sup> is a good example: In only 4 percent of the cases where the foreign defendant did not speak Polish, an order was not translated, but as many as 88 percent of those defendants receiving a translation were provided only with an oral interpretation. Written translations were available only in 8 percent of such cases. The rate of written translations were around

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21. CCP, *supra* note 12, art. 62.

22. A different solution has been adopted in Soviet criminal procedures where "the investigation and trial documents are handed over to a defendant translated in a foreign language." Basic Principles of the Criminal Law of the U.S.S.R. and Union Republics of 1958, art. 11.

23. CCP, *supra* note 12, art. 269.



15 percent with respect to other orders.

One of the characteristics of a practice in this context is the rate of decisions which have not been translated in violation of the provisions, providing *expressis verbis* a duty to appoint an interpreter. The research revealed that an order requesting extension of the detention on remand was made available to the foreign defendant in his native language. Similar orders issued by the procurator were not translated for 58 percent of foreign suspects. Where only 9.3 percent of the orders on preliminary detention were not translated, the rate increased to 78 percent in cases where the second order had been issued in the same case. At the same time, the rate of the written translations decreased from 43 percent to 7 percent, respectively. The discrepancies were even more apparent where the courts' decisions were concerned.

For procedural purposes, the duty to appoint an interpreter or to provide translation is expressly imposed in only two provisions of the CCP: Article 159 (interrogation) and Article 354 (closing arguments). As a consequence, the interpretation at the trial, although highly desirable, is not mentioned *expressis verbis*. Such a brief and incomplete regulation may neither be approved nor recommended,<sup>24</sup> since it has had an undesirable impact on practice.

One of the most important actions at the preliminary investigation (i.e., the acquaintance of the suspect with all the materials and evidence gathered at that stage and the inspection of the record by the suspect himself)<sup>25</sup> was carried out without providing an interpreter to one-fifth of the foreign suspects with no command of Polish. Furthermore, there were hardly any annotations in the trial records which would have indicated an interpretation of at least the final conclusions of the parties' arguments. It seems advisable that the trial record of a particular case be made available to the foreign defendant through an interpreter.<sup>26</sup> To this end, not only the mere presence of the interpreter at the trial should be recorded, but also his translations should be documented in the record.

### C. *Persons Appointed as Interpreters*

Proper qualifications of an interpreter guarantee the adequacy of the translation and make the communication between the court and a foreign defendant possible. In cases where foreign defendants are not assisted by

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24. Plachta, *supra* note 16, at 55.

25. CCP, *supra* note 12, art. 277.

26. The relevant provision to that effect has been embodied in the CCP of the G.D.R. § 3. A similar opinion has been expressed by the American and Soviet Supreme Courts. See *Negron v. New York*, 434 F.2d 386, 387 (2nd Cir. 1970); ZBORNİK POSTANOVLENIJ PREZYDJUMA I OPREDELENIJ SUDEBNOJ KOLLEGI PO UGOLOVNOM DIELAM WIERKHOVNOGO SUDA [Collection of Judgments and Decisions of the Criminal Chamber] 278 (1981). The Illinois courts have, however, rejected the contention that the proceedings must be immediately and fully translated to the defendant. See *People v. Torres*, 18 Ill.App.3d 921, 926, 310 N.E.2d 780, 784 (1974) (*citing* *Tapia Corona v. United States*, 369 F.2d 366 (9th Cir. 1966)).

a defense counsel, an interpreter performs a more sophisticated role of a "procedural guide," (i.e., someone between a "court assistant" (in terms of the court's clerk) and the counsel for the defense). They do not expect from him only precise translation, but also an explanation of the legal terms as well as the meaning and consequences of a procedural action. Ideally, the interpreter's knowledge of a particular language would go hand in hand with his knowledge of the law and the legal parlance.<sup>27</sup>

Since the provisions relating to court experts are applicable to interpreters (Article 159(3) of the CCP), not only can a professionally sworn interpreter be appointed, but also, any person generally recognized to have sufficient command of a particular foreign language may act as an interpreter if he is properly qualified. This does not mean that sworn interpreters should not be preferred.<sup>28</sup> Unlike professional interpreters, other persons performing this duty are inclined to explain rather than translate to the foreign defendant.

The research revealed the difficulties in ensuring that a sworn interpreter be available when needed. The research also showed that a great number of the various persons appointed had, more or less, formally performed the duty of an interpreter. The main objection against this practice derives from the fact that a considerable number of those persons were legally unqualified (i.e., they could not be appointed as interpreters in accordance with CCP provisions).<sup>29</sup> It is interesting to note that despite the lack of geographical, legal, and other proximities between Poland and the United States, Polish practice is similar in that respect to American practice, where judges have not hesitated to use partisan translators.<sup>30</sup> Moreover, only in rare cases have the judgments been reversed

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27. Gillissen, *L'application des lois penales aux militaires a l'étranger dans les rapports intra-Europeens*, DROIT PENAL EUROPEAN 37 (1979); Womnner, *Der Auslander vor dem Strafrichter -der Strafrichter vor dem Auslander*, No. 2, 26 BEWAHRUNGSHILFE 122 (1979).

28. A tendency towards employment or appointment of professional interpreters has been manifested in the Anglo-Saxon countries. See, e.g., the American Court Interpreters Act 1978, 28 U.S.C. § 1827 (1982). See also O. CHANNAN, *supra* note 17, at 23. In Poland, the sworn interpreters are employed pursuant to the Sworn Interpreters Law of 1968, 35 Dz.U. No. 244 (1968).

29. CCP, *supra* note 12, arts. 30, 179.

30. Due to the wide discretion given to the trial court regarding whom the court may appoint as an interpreter, convictions have been affirmed despite the use of an interpreter who was the deputy sheriff who helped investigate and arrest the accused (*State v. Firmatura*, 121 La. 676, 46 So. 691 (1908)); the injured complainant (*Sellers v. State*, 61 Tex.Crim. 140, 134 S.W. 348 (1911)); a witness (*Green v. State*, 260 A.2d 706 (Del. 1969)); an employee in the county attorney's office (*Bustillos v. State*, 454 S.W.2d 118 (Tex.Crim.App. 1971)); the defendant in a prior civil suit brought by the accused (*State v. Boulet*, 5 Wash.2d 654, 106 P.2d 311 (1940)); the wife of the witness (*United States v. Addonizio*, 451 F.2d 49 (3rd Cir. 1971)); and even the mother of the raped girls who needed to testify (*Almon v. State*, 21 Ala.App. 466, 109 So. 371 (1926)). In Illinois, policemen, state employees, and co-defendants are not disqualified solely on the ground that they may be interested parties. See *People v. Torres*, 310 N.E.2d at 780; *People v. Rivera*, 13 Ill.App. 3d 264, 300 N.E.2d 869 (1973); *People v. Delgado*, 10 Ill.App. 3d 33, 294 N.E.2d 84 (1973).

due to partisan interpretation.<sup>31</sup> Courts, in both countries, in exercising their discretion, have used and continue to use relatives, witnesses, and friends, or in the alternative, courts have pressed clerical personnel into service.

The findings are therefore not surprising. Within a total of 402 interpreters in the examined cases, there were 185 (46%) sworn interpreters and 217 (54%) other persons. The rate of sworn interpreters from 1975 to 1978, decreased from 69 percent to 44 percent. In 42 percent of these cases, where more than one interpreter was acting, the "division of work" was as follows: A sworn interpreter translated documents, decisions, judgments, statements, etc; whereas, others interpreted during pre-trial interrogation and at trial.

A question arises as to whether the authorities carrying out the criminal proceedings are obligated to provide the foreign defendant, who does not speak Polish, with an interpreter, or whether the statute requirements are satisfied when the court provides an interpretation into a language, other than his native language, that the defendant understands.<sup>32</sup> Although Polish domestic law is silent on that subject, the latter procedure may be approved only if the foreign defendant explicitly states that he understands another language and he agrees to have witness statements, decisions, etc., translated into that language. Of the 263 foreign defendants who did not speak Polish, translations into native languages were provided for 165 (62.7%). That requirement was not satisfied among two thirds of the remaining defendants despite their firm objections against interpretation into another foreign language.

#### D. *Costs of Translation and Interpretation*

A number of international instruments declare the defendant's right to an interpreter "free of charge."<sup>33</sup> Polish domestic law violates Article 14 of the International Covenant of Civil and Political Rights because of Poland's lack of satisfactory regulation concerning payment for the interpreter's services. In some instances, these costs are much higher than a fine imposed. An argument that the foreign defendant does not need to pay in advance, nor to bear the costs of criminal proceedings cannot be accepted since the fear of paying them after the proceedings<sup>34</sup> may impair his rights both to an interpreter and to effective assistance of counsel. The mere declaration of the "right to assistance of an interpreter free of charge" in 1985 Law on the Organization of Courts is not sufficient since

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31. Cronheim & Schwartz, *supra* note 15, at 308; Safford, *supra* note 15, at 26.

32. The former solution is explicitly provided for in the Basic Principles of the U.S.S.R., *supra* note 22, art. 11.

33. See e.g., the European Convention on Human Rights and Fundamental Freedoms of 1950, art. 6.

34. Article 546 of the CCP provides that in the decision concluding the proceedings, the court shall always determine to whom the costs of the proceedings shall be charged. CCP, *supra* note 12, art. 546.

the domestic regulation on the costs of criminal proceedings have remained unchanged. Part XIII of the CCP (Court Costs) has not been mentioned in Part VIII of the 1985 Law as being repealed or amended.<sup>35</sup> As a consequence, pursuant to Article 547(1) of the CCP, a convicted person shall be charged by the court with all costs of the proceedings, including expenses incurred in the course of preliminary investigation. At the same time, the "costs of the proceedings" shall also include the fees of interpreters (Article 554(2)).

The research revealed that nearly two thirds of foreign defendants were charged with the "costs of the proceedings;" hence, they were made responsible for bearing all expenses of an interpreter's services.<sup>36</sup>

#### IV. APPLICATION OF THE PREVENTIVE MEASURES TO FOREIGN DEFENDANTS

##### A. *Grounds and Scope of Application*

The availability of preventive measures for foreigners, as compared to natives, are secured in the domestic laws of many countries in one of the following ways:

1. Broadening of the legal grounds for their application (i.e., circumstances on which the respective decision must be based);
2. relinquishment of some conditions and requirements;<sup>37</sup> and
3. expanding the catalogue of measures applicable to aliens in comparison with natives.<sup>38</sup>

When criminal proceedings are carried out against a foreigner, it is

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35. See 31 Dz.U. No. 137 (1985).

36. In Western Europe, the European Convention on Human Rights and Fundamental Freedoms of 1950 (art. 6) and judgments of the European Court of Human Rights in Strasbourg have decidedly influenced the domestic legislation and judicial practice in member states of the European Council. The Court ruled that the "right to an interpreter" obligates the competent authorities to appoint an interpreter to assist a defendant free of charge regardless of the defendant's financial resources. Consequently, the state agencies have to bear all the expenses incurred because of the translation as well as the interpreters' fees. See Luedicke, Belkacem, Koc v. Federal Republic of Germany, European Court of Human Rights, 29 Ser. A (1978). See also P. VAN DIJK & G. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 271 (1984).

37. In Norway and the Netherlands, the legislators have struck down certain minimum penalty for an offense as a condition of preliminary detention (six months and four years, respectively). As a consequence, an alien can remain in custody irrespective of the offense he is deemed to have committed. In the Netherlands, preliminary detention of a perpetrator of a traffic accident is valid when he is intoxicated or an accident has resulted in the death or serious bodily injury of a victim; however, a non-resident can be detained on remand if he has perpetrated any traffic offense. See Berling, *Les infractions routiers des étrangers aux Pays-Bas*, 3-4 R.I.D.P. 237 (1971).

38. In Romania, the G.D.R., and Hungary, bail may be posted and a defendant released on remand provided that he is either a foreign national or resides permanently abroad. See Romania Law of 1970, art. 5, CCP § 136 of the G.D.R.. See also Georgy & Lammich, *supra* note 5, at 957.

often assumed by judges and public prosecutors that his temporary stay in Poland *eo ipso* justifies the presumption that he might abscond.<sup>39</sup> In many instances, the brief formula that "the defendant resides permanently abroad," which is involved in an order of detention, seems to satisfy the statute's requirements.<sup>40</sup> We cannot, however, take for granted that whenever an alien legally returns to his home country, this automatically means he has absconded.

Although most contemporary legislation makes no distinction between "nationals" and "non-nationals," but rather "residents" and "non-residents," the fact remains that a foreigner most likely does not have residence in Poland. In such cases, the danger of absconding is deemed to exist. Therefore, in practice, judges will more readily order a foreigner to be detained on remand than someone whose appearance in court seems to be guaranteed through his work, fixed abode, family ties, etc.<sup>41</sup>

The frequent use of preliminary detention in cases including alien defendants can be, to some extent, attributed to the ways that legal grounds and requirements are formulated. At the same time, it must be borne in mind that the penological and psychological impact, as well as the social consequences of a particular preventive measure, may be different depending on whether it is imposed on a native defendant or on a foreigner. For example, the duty not to leave one's place of residence and to report to the police station is considered by native defendants as a relatively unobtrusive measure, whereas it is viewed quite differently by foreign defendants. The latter group finds it much more restrictive because they are forced to remain in a foreign country against their will and to the detriment of their interests. Overall, one cannot actually expect that the preventive measures imposed on foreigners will serve any "rehabilitative" or "preventive" purposes.<sup>42</sup>

### B. *Structure of the Measures Applied*

The research revealed significant differences in the practical application of preventive measures between Polish and foreign defendants. The differences refer to the structure of the measures imposed, their legal grounds and functions as well as forms and amount of bail. The following table illustrates the structure of preventive measures imposed on foreign defendants as compared to those applied to Polish defendants from 1975 to 1978.

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39. See other examples cited by Damaska, *supra* note 4, at 18.

40. Jeurissen, *Les infractions routiers des étrangers*, 3-4 R.I.D.P. 115 (1971).

41. In Denmark (art. 780 of the CCP) and Sweden (§ 2, Ch. 25 of the Code of Judicial Proceedings), an order to detain on remand can be based on the very fact that the defendant resides abroad.

42. The "rehabilitative" and "preventive" functions of preventive measures are pointed out and extensively discussed in Polish doctrine. See, e.g., Z. IWASZKIEWICZ, SOCIAL GUARANTEE AS A PREVENTIVE MEASURE 114 (1971); F. PRUSAK, NON-CUSTODIAL PREVENTIVE MEASURES IN CRIMINAL PROCESS 98 (1978).

TABLE 1  
Structure of preventive measures by nationality in Poland: 1975-1978

	Preliminary detention		Bail		Non-financial guarantee		Surveillance by the police		Total	
	N	%	N	%	N	%	N	%	N	%
Total defendants <sup>1</sup>	45,693	67.8	6,236	9.2	10,004	14.8	5,522	8.2	67,456	100.0
Foreign defendants <sup>2</sup>	131	45.9	143	49.8	2	0.1	12	4.2	288	100.0

<sup>1</sup> Data provided by the Office of the Procurator General.

<sup>2</sup> Findings of the author's empirical research.

Unlike other countries where foreigners remain in custody more often than natives pending trial,<sup>43</sup> the role of preliminary detention as applied to foreign defendants is of minor importance in Poland. The detention rate within this group of defendants is 45.9 percent as opposed to 67.8 percent among native defendants. That lower rate is attributable not only to the more frequent use of bail, but also to the common police practice of temporary seizure of foreigners' passports and other travel documents. Although a receipt is issued, the absence of a legal ground for such practice is obvious. Since this measure offers some advantages to such defendants (e.g., the foreign defendant is prevented from leaving Poland without the need to be kept in custody), it should be embodied in the CCP catalogue of preventive measures. Only in this way, a guarantee of the rights of foreign defendants can be secured. At the same time, the statute regulation would restrict the police arbitrariness.

Bail plays a dominant role as a preventive measure. Its rate is five times higher with respect to foreign defendants as compared to Polish defendants. The rate of preliminary detention and bail is 95.7 percent; others are of marginal importance. The highest rate of detention occurred among Arab defendants. This rate may be explained, to some extent, by the nature of offenses committed (i.e., mainly violent crimes). Whereas, the rate of bail was highest among defendants from the Federal Republic of Germany and other highly developed Western countries.

Another indicator, such as the frequency of applying preventive measures, may be used in revealing differences in such application by both groups of defendants.<sup>44</sup> The frequency proved to be as high as 79.1 percent in cases of foreigners, whereas it was three times lower with respect to Polish defendants — between 26.8 percent and 28.3 percent from 1975 to 1978.<sup>45</sup> This discrepancy is even more evident where non-custodial measures are taken into account — 43.1 percent for Polish defendants as opposed to 8 percent for foreign defendants.

### C. *Detention on Remand*

#### 1. Grounds for Application to Foreigner Defendants

The CCP and other statutes have no provisions concerning grounds

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43. In the Netherlands, the detention rate among foreign defendants is twice as high as that among Dutch defendants (27% and 13%, respectively). See J. SCHUTTE, *supra* note 11, at 320. Similar tendencies are reported in the Federal Republic of Germany. See A. JEHLE, *UNTERSUCHUNGSHAFT ZWISCHEN UNSCHULDSVERMUTUNG UND WIEDEREINGLIEDERUNG* 114 (1985); for France, see Sole, *Delinquance et Immigration*, *LE MONDE* 21, 19 December 1985.; and for Switzerland, information provided by the Bundesamt für Statistik: Rechtspflege, Bern, 15 January 1990.

44. It is expressed by the relation of the total number of measures imposed to the number of defendants.

45. Bienkowska, Pyrzak, Skupinski & Tokarczyk, *Social Guarantee and Other Preventive Measures in the Years 1970-1982*, 17 *STUDIA KRYMINOLOGICZNE, KRYMINALISTYCZNE I PENITENCJARNE* 88 (1986).

for application of preventive measures that expressly refer to foreign defendants in terms of having a special or discriminatory treatment. Therefore, it cannot be assumed that, apart from procedural reasons, "important social considerations" require preliminary detention of an alien offender.<sup>46</sup> Finally, The CCP does not provide any legal ground for preliminary detention of a defendant merely because he is a foreigner. Pursuant to Article 217 of the CCP, preliminary detention may be imposed on a defendant if:

1. There is a good reason to fear that the accused may go into hiding, particularly if he has no established residence in this country,<sup>47</sup> or when his identity cannot be established;
2. there is a good reason to fear that the accused would induce other persons to give false testimony or attempt to obstruct the criminal proceedings in some other manner;
3. the accused has been charged with a felony<sup>48</sup> or with a relapse into criminal activities under conditions provided in the Penal Code;<sup>49</sup> and
4. the accused has been charged with an act which creates a serious danger.

The latter ground raises the most serious objections, for its vague formulation may threaten the defendant's rights. Despite a proposal aimed at repealing that provision,<sup>50</sup> preliminary detention was and continues to be most frequently used by Polish procurators and courts.<sup>51</sup> The research confirmed this pattern when foreign defendants are concerned. Nearly every second order of detention (47.4%) was based merely on section (4), and in the majority of cases, the reasoning was limited to the Code's formula. At the same time, section (4) may be used cumulatively with others. The research proved that this section was invoked in as many as 80 percent of all orders.

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46. Velu, *Le régime de l'arrestation et de la détention préventive à la lumière de l'évolution du droit international*, 8 REV. D. PENAL & CRIMINOLOGIE 721 (1965).

47. At this point, I cannot follow the translation of the CCP by Abrahamowicz and Horbaczewski, where the term "permanent residence" is used. Abrahamowicz & Horbaczewski, *supra* note 12, at 139. All that is required in art. 217(1)(1) of the CCP is that the place of residence not be established or defined. It is not, however, the same as not having a permanent residence. *Id.* art. 217(1)(1).

48. A felony is an offense threatened by the penalty of deprivation of liberty for a term of not less than three years, Penal Code of 1969, art. 5(2).

49. This applies to a situation when an offender sentenced to imprisonment after having served at least 6 months of the penalty, commits an intentional offense similar to that for which he had been sentenced within 5 years of his release from prison, Penal Code of 1969, art. 60(1).

50. Waltos, *The Model of the Polish Criminal Procedure de lege ferenda*, 3 PANSTWO I PRAWO 35 (1981); Murzynowski, *Arrest and Detention on Remand in Criminal Proceedings*, 3 RUCH PRAWNICZY EKONOMICZNY I SOCJOLOGICZNY 11 (1984).

51. S. WALTOS, *CRIMINAL PROCESS: AN OUTLINE OF A SYSTEM* 305 (1986).



## 2. Duty to Notify the Diplomatic and Consular Office

Even if the domestic law does not allow any differentiation, a foreign detainee may be under severe practical impediments in obtaining the same treatment as a detained Polish national. Language difficulties may be compounded by ignorance of the legal system and the rights it affords in the country of detention, as well as lack of family or other contacts to make arrangements for legal representation. Traditionally, international practice has allowed consular access to such persons so that the consular authorities might assist the redress of this imbalance. Such access is, however, not possible until the diplomatic or consular office receives the relevant information from the competent authorities of the host state. The latter are therefore obliged to inform the consular representatives of the sending state that a national of that state has been arrested, committed to prison or to custody pending trial, or has been detained in any other manner. The duty to convey this relevant information is regulated both in the domestic law and at an international level. In Poland, this duty is required by Article 539 of the CCP<sup>52</sup> and in two executive legal acts.<sup>53</sup> In international relations, the respective norms are embodied in three kinds of commitments:

1. Common international instruments, such as the Vienna Convention on Consular Relations (Article 36);<sup>54</sup>
2. customary international law;<sup>55</sup> and
3. bilateral consular conventions.

The importance of the latter example is highlighted by the fact that the Polish legislature has attributed priority to the relevant norms embodied in international conventions and treaties over the provisions of Part XII of the CCP ("Proceedings in Criminal Cases in International Relations"), which provides, *inter alia*, for the duty to notify the consular office.<sup>56</sup>

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52. Art. 539 of the CCP provides that whenever an alien is subjected to preliminary detention, the consular office of that foreign state having territorial jurisdiction or, if there is no such office, the diplomatic mission of such state should be promptly notified. CCP, *supra* note 12, art. 539.

53. Circular of the Minister of Justice, Instruction on International Legal Assistance in Civil and Criminal Matters, Dziennik Urzędowy Ministerstwa Sprawiedliwości of 1970, May 25, 1970, No. 4, item 14, §§ 150-152; Instruction of 4 February 1974 issued by the Procurator General on criminal proceedings in international relations, § 16 (not published).

54. Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 262 (this convention has not been ratified by the socialist countries of Eastern Europe). *See generally* J. SUTOR, *DIPLOMATIC AND CONSULAR LAW* (1977).

55. *See* H. SEN, *A DIPLOMAT'S HANDBOOK ON INTERNATIONAL LAW AND PRACTICE* 323 (1965); Fitzmaurice, *Draft Convention on Consular Relations*, [1960] *BRIT. Y.B. INT'L L.* 48. *But see* L. LEE, *CONSULAR LAW AND PRACTICE* 124 (1961).

56. *See* CCP, *supra* note 12, art. 541(1). This article provides that the provisions of the Part XII shall not be applicable if an international agreement to which Poland is a party resolves the matter otherwise. This regulation has an exceptional character because in Po-

All the bilateral conventions require that the appropriate authority of the sending state be informed of a detention within a defined time. This fact is of paramount importance to the foreign detainee.<sup>57</sup> The defined time, however, varies. Of thirty bilateral consular conventions concluded by Poland,<sup>58</sup> such terms as "immediate" or "without delay" are used in eleven, whereas a specific time limit is provided in nineteen. In the majority of conventions, the specific time limit within which notification must be made is relatively short. For instance, in eight conventions it is up to three days,<sup>59</sup> and in seven conventions it is four days.<sup>60</sup> Only the conventions with China and Iraq provide a maximum time of 7 days, and the limit with Algeria is eight days. Typically, the conventions concluded with socialist countries use the phrase "immediate" and "without delay" (except for Yugoslavia, North Korea, Romania, and Vietnam), whereas these terms can be found in only two conventions concluded with non-socialist countries (France and Mexico). We can therefore conclude that specific time limits are a feature of agreements between "Western" States, on one hand, and "Eastern bloc" States, on the other.<sup>61</sup> Interestingly enough, this method has been used in all consular conventions concluded by Poland after 1976, both with socialist and non-socialist countries (except for Mexico).

The research revealed that the duty concerned is not easily fulfilled and practice can hardly be considered satisfactory. Although in six cases

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land both the Supreme Court and some authors attribute domestic law priority over international instruments. See Kochanowski, *Zur Problematik der Verkundung von Strafgesetzen in Polen*, [1986] JAHRBUCH FÜR OSTRECHT 341-42; Daranowski & Sonnenfeld, *Die Stellung der volkerrechtlichen Verträge in der Rechtsordnung der Volksrepublik Polen*, 2 OSTEUROPA RECHT 96 (1988). Others are of the opinion that conflicts between a domestic statute and an international treaty should be resolved by referring to the general derogative rules (e.g., *lex posterior derogat legi anteriori*, or *lex specialis derogat legi generali*). See Rozmaryn, *Effectiveness of International Agreements*, 12 PANSTWO I PRAWO 962 (1962); Klafkowski, *International Treaty and Domestic Act*, 4 RUCH PRAWNICZY EKONOMICZNY I SOCJOLOGICZNY 11 (1965). One author recommends a provision to be embodied in the Constitution which would allow the courts and other authorities to apply directly the conventional norms. See Skubiszewski, *Relationship Between Polish Domestic Law and International Law in Light of the Constitution*, 10 PANSTWO I PRAWO 143 (1987).

57. Williams, *Consular Access to Detained Persons*, 29 INT'L & COMP. L.Q. 238, 238-41 (1980).

58. Poland has signed and ratified consular conventions with the following countries (ratifications as of 31 December 1989): Afghanistan (1984), Algeria (1983), Austria (1974), Belgium (1972), Bulgaria (1972), Kampuchea (1987), China (1984), Cuba (1972), Czechoslovakia (1972), Cyprus (1980), Finland (1971), France (1976), G.D.R. (1972), Greece (1977), Hungary (1973), Iraq (1980), Italy (1973), North Korea (1982), Libya (1982), Mexico (1985), Mongolia (1973), Romania (1973), Syria (1971), Tunisia (1985), Turkey (1987), United Kingdom (1967, as amended in 1976), U.S.A. (1972), U.S.S.R. (1971), Vietnam (1979), and Yugoslavia (1982).

59. Treaties with Turkey, Austria, Greece, Yugoslavia, Romania, United Kingdom, Vietnam, and Italy.

60. Treaties with Iraq, Afghanistan, Cyprus, France, North Korea, Libya, and Tunisia.

61. See Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 309, 314-15 (1974) (explaining reasons for the time limits).

(5% of the total foreign detainees) notification was made on the day of detention, and in fourteen cases (11.7%) on the next day, a required three-day time limit was observed in only 55 percent of the cases. In one third of the cases, the notification was not made until after a week or more. In eleven cases (9.5%) notification did not occur at all.

The duty to inform specific persons or authorities of detention is regulated not only by the "special norm" (Article 539 of the CCP) but also by "general provisions" referring to all detainees, irrespective of their nationality (Articles 220 and 221 of the CCP).<sup>62</sup> These two groups of provisions do not exclude each other, meaning that Article 220, in particular, should be applied equally in cases of foreign and domestic defendants. The research revealed, however, that the competent authorities (e.g., the procurator and the court) informed neither the next of kin, nor any other person indicated by the detainee. By the same token, no foreign employers were notified. Such practice not only violates the respective Code provisions, it also creates an impression that the "general provision" has been excluded and substituted by the "special norm."

Another problem arises in this context. Pursuant to Article 541(2) of the CCP, the provisions of Part XII need not be applied to a foreign state with which Poland has not concluded an agreement in consular matters, and which does not guarantee reciprocity. Article 539 of the CCP,<sup>63</sup> imposing a duty to notify the relevant consular office on detention of a foreigner, undoubtedly comes within the scope of that norm. On the other hand, since the operation of Article 220 is not excluded, the foreign detainee to whom Article 541(2) refers, has a right to indicate a private person who should be notified of his detention, and this right has not been specifically limited in any manner. As a consequence, the procurator or the court imposing preliminary detention on a foreigner are relieved from the duty of notification only in the situation provided for in Article 541(2), that is when the detainee requests that his diplomatic or consular office be informed. However, if he indicates a private person, notification should be made, regardless of the nationality and function of that person.

#### D. Bail

##### 1. Functions

Whether or not the interest of defendants in obtaining a pre-trial

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62. The court or procurator is obligated to promptly notify the next of kin of the accused that preliminary detention has been imposed. CCP, *supra* note 12, art. 220(1). On a motion of the accused, another person may be notified instead or in addition to the person indicated above. *Id.* art. 220(2). Moreover, the court or procurator is obligated to promptly notify the employer or the educational establishment in which the accused is employed or enrolled. *Id.* art. 220(3). The court or procurator should notify, *inter alia*, the Social Assistance Department if care is needed for a disabled or ailing person who formerly was under the care of the detainee. *Id.* art. 221(1).

63. *Id.* art. 539. See also *supra* note 52.

release is actually a "fundamental right,"<sup>64</sup> there are convincing arguments supporting efforts aimed at expanding "alternatives" to traditional custodial measures. In spite of this, the rate of the use of these alternatives is low in Poland (see table 1), and sometimes a regress is observed.<sup>65</sup> Procurators, who are responsible to a great extent for the structure of preventive measures applied in practice, are reluctant to impose bail; it is considered "non-democratic" because it prefers rich defendants.<sup>66</sup> Release on bail is not viewed in terms of "rights" or "guarantees" of a defendant, but rather in terms of an option which lies within the discretionary power of the procurator or court.

The attitude and practice of the competent authorities changes significantly when criminal proceedings are carried out against a foreign national. Not only is bail used more frequently (see table 1), but its functions have also been extended beyond the statutory one in spite of the lack of legal grounds. Traditionally, two state interests and purposes behind the bail decision can be discerned: the interest in assuring that defendants will appear in court once summoned; and the interest in protecting the community and the judicial process from defendants deemed to be dangerous. Pursuant to Article 209 of the CCP, bail may be applied in order to "secure the proper conduct of the proceedings." However, in cases of foreigners, bail seems to serve three additional purposes.

First, bail is treated as a guarantee that at least part of the judgment will be executed, including possible fines, confiscation of property, indemnity for victims, and costs. This conclusion can be drawn from two circumstances revealed by the research. First, the amount of time and costs expended was fixed by the court, taking into consideration the amount of bail paid. In the great majority of cases, these amounts were identical. In some cases, a court ruled explicitly: "Admittedly, a fine should be higher, but we may not ignore the amount of bail posted." In the second circumstance, when bail ceased to be necessary (e.g., where a fine or conditional sentence was imposed) that property and the sum of money posted were not released — as required by Article 229(2) of the CCP — but instead were secured on account of fine and costs, even though the court was not competent to do so.<sup>67</sup>

Second, bail provides a "substitute (makeshift) penalty."<sup>68</sup> This func-

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64. In the United States, a Federal District Court asserted that "the right to pretrial release under reasonable conditions is a fundamental right." *Ackies v. Pardy*, 322 F. Supp. 38, 41 (S.D. Fla. 1970)

65. Jankowiak, *On Significance of Bail: Why Regress?*, 19 GAZETA PRAWNICZA 5 (1979).

66. See Szwedek, *Code of Criminal Procedure in Practice*, 11-12 PALESTRA 23 (1980).

67. *But see* Judgment of Supreme Court of 23 December 1958, II K 1019/58, OSPIKA 1959, No.234 (expressing a contrary opinion). *See also* CODE OF CRIMINAL PROCEDURE: A COMMENTARY 308 (E. Mazur ed. 1976) (approving remarks on the Supreme Court's opinion by Bednarzak).

68. It is noteworthy to remember in this context the words of Judge Bazelon: "It is not the purpose of the bail system either to punish an accused again for his past crimes, or to punish him in advance for crimes he has not yet been shown to have committed." *See* White

tion is fulfilled outside the scope of the (substantive) criminal law<sup>69</sup> through the forfeiture of the property or bail money. In view of the fact that a foreign offender will leave Polish territory, only in this way can he suffer for the wrong he committed.<sup>70</sup>

Finally, bail enables the foreign defendant to return to his home country before trial. Forty percent of foreigners detained on remand were subsequently released on bail.

## 2. Person Posting Bail

The Polish CCP does not provide any conditions or requirements which must be met by an individual in order for him to be eligible to post bail. Therefore, bail may be offered and paid by either a foreign national while staying in Poland or by a person residing permanently abroad. A Polish citizen domiciled in Poland is allowed to post bail for a foreign defendant, because posting bail, whether in Polish zlotys or foreign currency, does not constitute a fiscal offense.<sup>71</sup> However, the legal person may not pay bail. Despite a wide range of discretion to make the assessment concerning suitability of a prospective surety, the competent authority may not disregard information revealing that person's social and financial situation, family ties, and other relevant circumstances.<sup>72</sup> While considering this question, at least the following circumstances should be taken into account:

1. Financial resources;
2. character or previous convictions; and
3. proximity (whether in terms of kinship, place of residence, or otherwise) to the person for whom he is to post bail.

The research revealed that neither Polish procurators nor courts were interested in who offered or paid the sum of money required. In no case was an inquiry carried out aimed at establishing the above factors. It was clear that the only concern of the procurators was that the relevant amount of money be paid.

While in cases with Polish defendants, the great majority (75%) paid the bail themselves,<sup>73</sup> less than one-third of the foreign defendants (31%) posted their own bail.<sup>74</sup> Other persons that paid the required sum on be-

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v. United States, 412 F.2d 144, 145 (D.C. Cir 1968).

69. Gardocki, *supra* note 9, at 113.

70. One author is of the opinion that such phenomenon disclose rather "factual or unauthorized opportunity (expediency)" towards prosecution of foreigners in Poland. F. PRUSAK, *supra* note 42, at 48.

71. Judgment of the Supreme Court of 1 October 1964, VI KO 20/64, OSNPG 1964, No. 110. Contrast Koch, *Currency Regulation Imposed on Foreigners in Poland*, 12 PALESTRA 67 (1977); Lammich, *supra* note 1, at 80.

72. C. CHATTERTON, *BAIL: LAW AND PRACTICE* 197 (1986).

73. F. PRUSAK, *supra* note 42, at 88.

74. That rate should be even lower because in some cases the authorities treated the

half of foreign defendants consisted mainly of embassy or consulate representatives (12%), foreign nationals (30%), Polish citizens (13%), and representatives of the Marine Agency (5%). Posting bail by a family member was not very frequent (18%).

### 3. Form and Amount of Bail

Despite the variety of admissible forms of bail provided by the CCP,<sup>75</sup> bail posted in cases of foreign defendants was limited and continues to be limited to traditional cash deposits,<sup>76</sup> either in foreign currency or in Polish zlotys. The research revealed that the former prevailed by a margin of 65.5 percent to 34.5 percent. Among foreign currencies, American dollars and German marks were used most often (41.5% and 14%, respectively).<sup>77</sup> When using these currencies, bail was paid with particular frequency by a defendant and his consular representatives.

One of the most crucial points concerning bail, both in its statutory regulation and in practice, is fixing an amount which the competent authority is willing to accept "in exchange for" not imposing preliminary detention before trial, on the one hand, and which shall "secure the proper conduct of criminal proceedings,"<sup>78</sup> on the other. This involves striking a delicate balance between the prohibition against "excessive bail"<sup>79</sup> and the interests of the criminal justice system. However, it is not the amount of bail itself which is decisive at this point, but rather the prerequisites chosen and the method of fixing that amount.<sup>80</sup> Not until the manner of making this assessment is taken into account and examined can an estimation be made of whether the amount of bail is correct and just from the point of view of both conflicting interests, the state and the defendant.

If the amounts of bail are separated into three categories — low, medium, and high<sup>81</sup> — it can easily be proven that bail required from foreign defendants is much higher than from Polish citizens. The low amounts were paid by nearly three fourths of Polish defendants (72.3%),<sup>82</sup> whereas the same was true in only one tenth of foreigners' cases. Moreover, the

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foreign defendant as if he himself paid the bail even though from the "record of the deposit of bail," it was clear that bail had been posted by another person.

75. Bail may be posted in the form of cash, securities, a bond, or a mortgage. CCP, *supra* note 12, art. 226(1).

76. The pledge of a car was the subject of bail in only three cases.

77. In one case, the foreign defendant deposited bail in six different currencies.

78. CCP, *supra* note 12, art. 209.

79. "Excessive bail shall not be required . . ." U.S. CONST. amend. VIII. *See also* Article 10 of the English Bill of Rights.

80. The European Court of Human Rights pointed out the inappropriate method of fixing or establishing an amount of bail in *Neumeister v. Austria*, 8-I Eur. Ct. H.R. (ser. A) (1968).

81. More precise figures, illustrating amounts of bail, are not advisable because of the high inflation rate in Poland.

82. F. PRUSAK, *supra* note 42, at 88.

highest bail in the cases of Polish defendants was only a "medium" amount, whereas one-third of all foreign defendants had to pay "high" amounts.

The research revealed that there was no statistically significant correlation between the amount of bail and the financial situation of the accused or other person posting it. The lack of this desirable and expected correlation is even more evident in cases of foreigners, since actual financial resources can hardly be established when the competent authorities usually have nothing but a statement of the foreign defendant disclosing his resources. No such correlation was established with three other variables which should be considered significant in this regard:<sup>83</sup> the gravity of the damage caused,<sup>84</sup> the nature of the offense committed and the scope and amount of data concerning the accused established in the course of criminal proceedings.

#### 4. Forfeiture of the Property or Sum of Money

Traditionally, where bail has been posted and a defendant, after being properly summoned, has failed to appear before the court or other authority carrying out criminal proceedings, the court may order that the property, sum of money, or security constituting bail be forfeited, unless the court is satisfied that the defendant had reasonable cause for such failure.<sup>85</sup> The Polish CCP distinguishes between obligatory and optional forfeiture (Article 228 (1)). The court shall order forfeiture if the accused takes flight, goes into hiding, or fails to appear to serve his sentence. The court may order forfeiture if "the course of the criminal proceedings is otherwise hindered" by the defendant.

The research revealed that in the great majority of cases, an order of forfeiture was based on the failure to appear before the court or other organ (police or procurator). Such circumstances were commonly considered grounds for obligatory forfeiture. Instead, it should be viewed as an "other hindrance," since not every failure to appear can be automatically considered absconding by the foreign defendant. In 17 percent of the orders, the courts reasoned simply that "the accused had left Poland."

Forfeiture was ordered in 66 cases (i.e., 47% of all cases in which bail had been posted). That rate could have been even higher; in some cases, the court was unable to order the sum of money forfeited simply because the formal (statutory) requirements had not been satisfied (e.g., the per-

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83. Article 226(2) of the CCP requires that the amount of bail be fixed with due regard to the financial resources of the accused and the person posting bail, the gravity of the damage and the character of the act committed. CCP, *supra* note 12, art. 226(2).

84. It should be borne in mind that the concern of fixing the amount of bail to be furnished by a detained person solely in relation to the amount of the loss imputed to him does not seem to be in conformity with the procedural purpose of that measure. Bail is designed not to ensure the reparation of loss but rather the presence of the accused at the hearing. See *Neumeister v. Austria*, 8-I Eur. Ct. H.R. (ser. A) (1968).

85. See, e.g., *Chatterton*, *supra* note 72, at 116, 146.

son posting bail had not been notified that the accused had been summoned (Article 227), or the accused had not been properly informed of his rights and duties (Article 228(2)). Therefore, in cases of foreign defendants, if the function or purpose of bail is viewed merely as "securing proper conduct of the criminal proceedings," one must conclude that the degree of its effectiveness is very low since the fulfillment of that aim proved to be impossible in the majority of cases. This may indicate that other, "extra-procedural" purposes are "built-in" and assumed when bail is applied to foreigners.<sup>86</sup>

The use of the chi-square distribution test revealed a statistical correlation between an order of forfeiture on the one hand and the following factors on the other:

1. The amount of bail: the greater the sum of money, the higher the probability that it will be forfeited; and
2. the person posting bail with the rates of forfeiture being as follows: representative of the Marine Agency (87%); foreign national (65%); foreign defendant (43%); and Polish citizen (15%).

Of sixty-six total cases in which bail was forfeited, as many as sixty-three foreign defendants (95.5%) had permanently left Poland before judgment was passed. The following pattern is, therefore, commonly practiced in cases of foreigners: Arrest and seizure of the passport (and other documents); payment of bail; the defendant's departure from Poland; suspension of the criminal proceedings; and forfeiture of the money constituting bail. It should be borne in mind that Poland is not the only country in which the criminal cases of foreigners are handled in this way.<sup>87</sup>

#### V. ASSISTANCE OF THE DEFENSE COUNSEL FOR THE FOREIGN DEFENDANT

It is remarkable that counsel for the defense is appointed much more frequently in cases of foreign defendants than Polish citizens. More than half of foreigners in the cases examined were assisted by the defense counsel (196 persons or 53.8%). That rate increased from 40 percent in 1975 to 57 percent in 1978. The rate varied significantly, however, depending on the group of cases examined: 70 percent (181 defendants) in population I as opposed to 14.3 percent (15 suspects) in population II. This discrepancy may be explained by the fact that in the majority of cases, the defense counsel was not appointed until the charge sheet had been filed with the court. Of 181 defendants in population I (i.e., where the proceedings reached a trial), as many as 143 defendants (79%) were appointed defense counsel in the judicial stage. In fact, in one-fifth of the cases, defense counsel was appointed during the preliminary investigation

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86. See *supra* notes 67-70 and accompanying text.

87. Similar practice is reported in Turkey. See Shuttler, *The Prisoner Transfer Treaty with Turkey: Last Run for the "Midnight Express,"* 84 *DICK. L. REV.* 696 (1980).



carried out by the police and procurator, even though these pretrial proceedings may last from several days to more than one year.<sup>88</sup>

Paradoxically, defense counsel was appointed more frequently in cases in which the foreign defendant spoke Polish. Furthermore, the statistical analysis revealed a correlation between appointment of defense counsel and the character of stay of foreign defendants in Poland (see table 2).

TABLE 2

Appointment of the defense counsel for foreign defendants by the character of their stay in Poland

	Character of stay in Poland:					
	Private visit		Business visit		Permanent residence	
	N	%	N	%	N	%
No defense counsel	104	42.4	51	49.0	7	53.8
Defenses counsel appointed by the court	91	37.2	20	19.3	—	—
Defense counsel retained by the defendant	50	20.4	33	31.7	6	46.2
Total	245	100.0	104	100.0	13	100.0

$\chi^2=52.38$ , significance level 0.01

Like in the majority of jurisdictions,<sup>89</sup> neither the Code of Criminal Procedure, nor any other statute in Poland, provides for the mandatory defense of the defendant. This is true regardless of whether the defendant wants a lawyer, or whether he does not understand or speak Polish even though it would be advisable and desirable.<sup>90</sup> It is worth noting that

88. Article 266(1) of the CCP requires that an inquiry be completed within one month of the date of institution, but according to Article 266(2), the procurator may extend this period for up to three months, and then for a specified additional time limit. See CCP, *supra* note 12, art. 266(1), (2), (3). No maximum time limit is designated.

89. However, counsel for a defendant who does not speak the language used in the court is provided in the R.S.F.S.R. (art. 49 (1), (4) of the CCP), Bulgaria (art. 70(1), (4) of the CCP), and Hungary (art. 47 of the CCP). The West German Criminal Procedure Code also empowers the presiding judge to appoint the defense counsel — apart from the grounds for mandatory defense stipulated in § 140(1) — if “it appears that the accused is unable to defend himself.” § 140(4).

90. See S. WALTOS, *supra* note 51, at 380. As early as 1916, Rasch argued that a defendant who originated from a foreign cultural environment and did not speak the language of the host country should be considered unable to defend himself. See Rasch, *Das Verhandeln vor Gericht mit blinden, stummen, tauben und fremdsprachigen Personen*, 20 DAS RECHT 8 (1916).

counsel for the defense and an interpreter are in charge of different functions and therefore they cannot replace each other.<sup>91</sup>

Oddly enough, the majority of defense counsels were appointed by the court (102 lawyers or 52.3%). Over two thirds of them were appointed pursuant to Article 273(2) of the Fiscal Criminal Law. It provides procedures for the court to conduct proceedings even when a foreigner has left Poland. In 9 cases, the court's decision was based on Article 69 of the CCP,<sup>92</sup> and in 17 cases, no legal ground was specified. These two groups of cases, constituting 25.4 percent of the total, are particularly noteworthy. An analysis of documents in the respective files and the circumstances accompanying appointment of a lawyer enables one to draw the following conclusion: In practice of Polish courts, there exists an additional, extra statutory ground for appointing defense counsel to assist the foreign defendant who does not speak Polish.<sup>93</sup> Detention on remand of that defendant was not considered a necessary condition for appointing a lawyer in such a situation.

Procurators also tend to share this opinion. In several cases, they attached a motion to the charge sheet filed with the court requesting an appointment of defense counsel *ex officio* because, "the foreign defendant does not reside permanently in Poland, he does not have his family here and he does not speak Polish." In 15 cases, foreign defendants themselves asked the court to appoint a lawyer for them. The following circumstances were frequently indicated: "I am a foreigner but my country does not have its diplomatic or consular representative in Poland;" "I do not understand the Polish language;" "I do not know Polish criminal law;"<sup>94</sup> and "I have neither family, nor acquaintances in Poland."

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91. When the defense counsel does not speak the language used by his client, it may be argued that two interpreters should be simultaneously appointed in order to insure the defendant's right to counsel is effective; one of them would be designated by the court, whereas the other would translate communication between a lawyer and his client. See Chang & Araujo, *Interpreters for the Defense: Due Process for the non-English Speaking Defendant*, 63 CALIF. L. REV. 821, 822 (1975).

92. If the accused can prove that he is unable to pay the defense costs without prejudice to his own or his family's support and maintenance, he may demand that defense counsel be appointed for him *ex officio*. CCP, *supra* note 12, art. 69.

93. The courts in the Federal Republic of Germany hold that the defense counsel should be appointed *ex officio* to the foreign defendant, particularly when he has no command of the German language, OLG, Hamm, decision of 17 May 1979, *Anwaltsblatt* 1980, at 31; his command of that language is insufficient, Landgericht, Osnabruck, decision of 14 November 1983, *Straverteidiger* 1983, at 506; KG, Berlin, decision of 16 July 1985, *Strafverteidiger* 1985, at 449; he has been brought up under completely different social and cultural conditions, Landgericht, Heilbronn, decision of 23 October 1984, *Strafverteidiger* 1984, at 506; or he originates from a country whose legal system differs considerably from that in the F.R.G., Landgericht, Itzehoe, decision of 18 August 1983, *Straverteidiger* 1983, at 454; OLG, Hamm, decision of 17 May 1979, *Anwaltsblatt* 1980, at 31.

94. On the ignorance of criminal law among foreign defendants, see Plachta, *Ignorance of Law as a Mitigating Circumstance in Criminal Cases of Foreigners*, 7-8 NOWE PRAWO 67 (1987); Plachta, *Validity of the Rule "Ignorantia Iuris Nocet" in Criminal Law with Respect to Aliens*, 2 RUCH PRAWNICZY EKONOMICZNY I SOCJOLOGICZNY 51 (1986).

Polish law of criminal procedure provides that the power of attorney authorizing the defense counsel should be given by the defendant himself.<sup>95</sup> Nevertheless, in 15 cases, a so-called "consular authorization" was discovered to have been issued by the diplomatic or consular officer enabling a lawyer to act as defense counsel until the defendant was permitted to meet a foreigner under detention on remand. Then the detainee himself retained the lawyer. If the Polish domestic legislation is to be in accord with the obligations embodied in international conventions on consular relations, which allow the consular officers to arrange for legal representation, then the relevant provision of the CCP (Article 73(1)) should be supplemented by the term "consular authorization." A new section should expressly provide that the defense counsel may be appointed not only by the defendant or his legal representative and next of kin, but also by the diplomatic or consular representative of his home country.

#### VI. ROLE OF THE DIPLOMATIC AND CONSULAR REPRESENTATIVES

The assistance provided by diplomatic and consular representatives for their nationals prosecuted in foreign states can hardly be overestimated. Their role is of vital importance for those imprisoned abroad, as the latter are usually under particularly severe impediments in attempting to obtain equal treatment as compared to native defendants.<sup>96</sup> These problems are, however, seldom regulated in the law of criminal procedure, even though they directly affect the procedural position of an accused. They are embodied in the consular conventions instead.<sup>97</sup>

The functions of the diplomatic and consular representatives have already been discussed with respect to: (a) the notification of detention on remand by the court or procurator;<sup>98</sup> (b) the person posting bail,<sup>99</sup> and (c) the appointment of the defense counsel.<sup>100</sup> The so-called "service address" should also be mentioned in this context.<sup>101</sup> Of 351 defendants residing permanently abroad, nearly half did not designate an address in Poland at which the service of documents, decisions, summons, etc., could be made.<sup>102</sup> They explained that they had come to Poland for the first

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95. Article 67 of the CCP provides that if the accused is either a minor or incompetent, his legal representative or the person maintaining custody may appoint defense counsel. Furthermore, the CCP provides so called "temporary (provisional) authorization," empowering the next of kin to retain a lawyer when a defendant is deprived of liberty (detained on remand). CCP, *supra* note 12, art. 67.

96. F. DAWSON & I. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 23 (1971).

97. L. LEE, *supra* note 55, at 118-19, 123-24.

98. See *supra* notes 52-63 and accompanying text.

99. See *supra* notes 73-74 and accompanying text.

100. See *supra* note 95 and accompanying text.

101. Pursuant to Article 124 of the CCP, a foreign defendant is required to designate an address in Poland at which the service of documents can be made. CCP, *supra* note 12, art. 124.

102. In one third of all cases, there were no data in the files which would enable one to establish whether the foreign defendant had been informed of the duty to designate such an

time, their visit was short, they did not know a reliable person in that country, and therefore, they were unable to comply with the duty to name a Polish address.<sup>103</sup> Of the others, thirteen (6.8%) designated the embassy (consulate) of their country as an addressee for service of documents.<sup>104</sup> Unfortunately, in many cases (and this was a rule with respect to the representatives of the Arab countries) the diplomatic and consular offices refused to serve documents and summons sent by the court or procurator to the defendant. The refusal was based on the fact that such service exceeded the scope of diplomatic and consular functions, or the residence of the defendant was unknown.

The rights of consuls should be pointed out with respect to the interests of foreign nationals under detention abroad. Pursuant to the Polish consular conventions, the following privileges may be mentioned:

1. The consular officer has a right of access to the detained national without delay;
2. the consular officer may visit a foreigner at any time ("on application")<sup>105</sup> or at certain intervals;<sup>106</sup>
3. free conversation between them should be assured;
4. communications to a consular officer by a detained national shall be forwarded to that officer without delay;
5. the consular representative may arrange for legal representation for his national; and
6. packages with food, clothes, reading materials, etc. from the consular office to a detained national should be allowed.

The research revealed that the diplomatic and consular representatives of foreign states made very seldom use of the right to visit their nationals under detention. Of a total of 118 detained foreigners, only one-fifth (21.2%) received consular visits.<sup>107</sup> At the same time, no application

address.

103. If the foreign defendant fails to comply with this duty, a document is sent to his last known address in Poland or, failing this, it is filed with the record of the case and is deemed to have been served. CCP, *supra* note 12, art. 124.

104. Other addresses designated by foreign defendants were: defense counsel, 19 cases (5.2%); relatives, 35 cases (18.4%); employer, 15 cases (7.8%); acquaintances, 75 cases (39.4%); and location of the defendant's temporary stay in Poland, 42 cases (22.1%). In the latter cases, it was obvious that the foreign defendant was unable to designate a proper "service address" but he felt compelled to do so. This dilemma is not easily solved, especially when one considers that an address of the hotel in which an alien had spent a couple of nights is useless from the point of view of an effective service of summons.

105. In the majority of bilateral conventions concluded by Poland, there is no limitation placed on the frequency of the consul's visits to a detained national.

106. As provided in the bilateral treaties with Romania, Yugoslavia, and the United Kingdom.

107. In certain other countries, the "non-action and disinterest" of the consular authorities is reported. See *Survey on Foreign Prisoners, Preliminary Report of the United Nations Social Defence Research Institute* 23 (Rome 1975).

for such a visit was refused. It must be pointed out that in none of those cases were conversations or communications between the consular officer and the foreign defendant "free" since the visits were "supervised" by the judge or procurator. Both the procurator (or the judge) and an interpreter were present at such meetings.<sup>108</sup> The majority of bilateral conventions concluded by Poland accord foreigners the right to be informed of their rights under the appropriate convention.<sup>109</sup> This duty imposed on the authorities carrying out criminal proceedings is not limited to those instances in which an alien is detained on remand. The research revealed, however, that the relevant information was provided to foreign defendants extremely rarely. Only 15 defendants were informed. On the other hand, none of the Polish conventions require any prior request by a foreign national before an obligation arises to provide notice of the detention to the consular authorities.<sup>110</sup> In effect, the convention is itself a request to notify.

## VII. CONCLUSIONS

The following factors determine the real position of a foreign defendant in the criminal proceedings:

1. Legal norms addressed specifically to foreign nationals;
2. adaptation of the "general" provisions of the law of criminal procedure to the particular situation of foreign defendants; and
3. practice of the criminal justice authorities.

The order of these factors is by no means incidental. The "special norms" occur extremely infrequently, and the degree of the "capability of adaptation" of general provisions is not, as a rule, very high. As a consequence, final resort can, and sometimes must be made to practice where the particular needs and difficulties encountered by foreign defendants might be taken into consideration.

This phenomenon is manifested also in the practice of the Polish authorities with respect to the use of bail, application of the "extra-statutory" preventive measures, and appointment of defense counsel. Although these "corrections" and "deviations" are either *contra legem* or *praeter legem*, the findings of the empirical research do not warrant an entirely critical or negative appraisal of the model of criminal prosecution of for-

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108. The only legal ground for such practice on the part of Polish authorities can be found in Article 64(2) of the CCP. It provides that in preparatory proceedings, before the charge sheet has been filed with the court, the procurator who issues permission for a detainee's communication with his lawyer may stipulate that he or a person authorized by him shall be present at the meeting. CCP, *supra* note 12, art. 64(2).

109. The English treaty practice is completely different at this point. See Williams, *supra* note 57, at 240.

110. Compare The Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261, art. 36(1)(b), which provides that notification of the detention of a foreigner should be made only "if he so requests."

eigners as applied in practice. Rather, they reflect an antinomy between the real position of an alien when abroad, on the one hand, and the unsuitability of the law of criminal procedure, as well as attempts to solve it, on the other.