

POLISH YEARBOOK OF
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IV

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INTERNATIONAL LAW

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Droit maritime en Pologne. Création, développement

par LEON BABIŃSKI

LEON BABIŃSKI was professor of the Szczecin Technical University. In 1939 he lectured at the Hague Academy of International Law. Since 1947 he was a member of the Institute of International Law. His principal works are: "Zarys wykładu prawa międzynarodowego prywatnego" [Outline of the Study on Private International Law] 1935; "Zagadnienia współczesnego polskiego prawa międzynarodowego prywatnego" [Problems of Contemporary Polish Private International Law] 1956. He died in 1972.

Appelée à reprendre sa place parmi les États libres d'Europe dans les frontières fixées par le Traité de Versailles en 1919 et par les Accords de Potsdam en 1945, la Pologne a trouvé et atteint sa ligne frontière du nord par les rivages de la mer Baltique s'étendant en 1919 sur 146 kilomètres et élargie en 1945 à 694 kilomètres, avec 3 ports maritimes importants. La souveraineté territoriale en 1945 n'est plus partagée avec qui que ce soit, tandis qu' en 1919 elle se trouvait limitée en faveur de la Ville Libre de Gdańsk (Dantzig) et au profit de la Société des Nations.

La Pologne reconstituée en 1919 comme État avait sur le champ législatif une grande série des problèmes à résoudre. Il fallait organiser un État uniforme à la base des législations de 4 systèmes juridiques d'autrefois. Sans entrer dans l'examen de l'ensemble de ce problème, limitons-nous à l'envisager du point de vue de la législation maritime. Or, il faut dire que, depuis des siècles, durant l'existence et le fonctionnement de l'appareil étatique de la Pologne indépendante avant les partages du XVIII^e siècle, la législation polonaise ne s'intéressait pas, avec de rares exceptions (p. ex. Commission maritime du roi Sigismond-Auguste en 1569), au développement du droit maritime, laissant ce domaine aux autorités autonomes de la ville de Gdańsk et à ses juridictions. La nouvelle situation politique de l'État reconstitué en 1919 demandait une prise de position aussi quant à la législation maritime à appliquer. La question du

choix entre les textes législatifs antérieurs ne s'est pas posée sérieusement, car les cas de l'application au cours du XIX^e et au début du XX^e siècle des textes russes, autrichiens et français ne se présentait jamais dans la vie quotidienne et même en ce qui concerne le livre II du Code de commerce français, publié au Journal des Lois du Grand Duché de Varsovie, il n'eut jamais d'application pratique et constituait du point de vue juridique une lettre morte. Il fallait pratiquement continuer l'application des textes juridiques allemands, naturellement de ceux, qui n'étaient pas contradictoires à la nouvelle conception de l'État reconstitué — la Pologne. Cette situation a conduit à admettre l'application du livre IV du Code de commerce allemand de 1897 et de quelques textes de droit administratif, par exemple de celui de l'Ordonnance de 1902 sur le travail des marins (*Seemannsordnung*) ou de celui (avec les adaptations nécessaires) sur les tribunaux maritimes (*Seeaemter*) dans la rédaction polonaise de 1925. Pour ce qui concerne les règles à appliquer sur les routes maritimes, on suivait les prescriptions de la loi allemande de 1906 (*Seestrassenordnung*). Pourtant dans d'autres domaines, il fallait créer dès le début de nouveaux textes, par exemple en ce qui concernait la nationalité des navires et le droit de se servir du pavillon polonais. Naturellement, il fallait créer le système administratif des autorités maritimes centrales à Varsovie (le ministère de la Guerre d'abord et le ministère du Commerce et de l'Industrie ensuite) et locales à Gdynia et au sein du Commissariat Général de la Pologne à Gdańsk.

La création du nouveau port maritime polonais à Gdynia, depuis 1922, a exigé la publication de beaucoup de textes administratifs nécessaires au fonctionnement du port.

La création et les devoirs de la marine de guerre, le fonctionnement de la marine marchande demandaient pour leur développement normal la publication constante des circulaires. Pensons, par exemple, à la création de nouvelles lignes de transport maritime, à la publication des tarifs, aux prescriptions douanières, etc. Tout ceci a occupé les autorités centrales et locales polonaises chargées d'assurer le fonctionnement du commerce maritime polonais.

Au point de vue international, la Pologne adhère formellement en 1936 aux Conventions de Bruxelles de droit maritime civil dans le commerce international. Une société polonaise de droit maritime destinée à collaborer avec le Comité Maritime International (Anvers) est fondée à Varsovie sous la présidence du premier président du Haut Tribunal Administratif à Varsovie, M. Hełczyński. La Pologne signe la Convention pour la sauvegarde de la vie humaine en mer de 1929 (ainsi que les rédactions suivantes de 1948 et de 1960), elle signe la déclaration de Barcelone de 1921 sur la reconnaissance du droit au pavillon des États dépourvus du

littoral maritime, de même les textes de Lisbonne de 1930 relatifs aux signaux maritimes. Elle adhère aussi à un grand nombre de conventions internationales préparées par le Bureau International du Travail à Genève et qui se rapportent à la protection du travail des marins.

Une ordonnance du Président de la République de 1932 fixa les limites de la mer territoriale en Pologne à 3 milles marins et en plus, pour la zone contiguë, aussi à 3 milles marins (texte toujours en vigueur sauf une limitation, en 1970, pour les pêcheries s'étendant à 12 milles).

Mais nonobstant cet « armement » juridique important et nécessaire, le gros « morceau » — les règles de droit civil (commercial) maritime, les prescriptions du Code de commerce allemand de 1897 sont à peine touchées dans les travaux législatifs et demanderont beaucoup de temps pour être révisées et codifiées à nouveau.

L'enseignement du droit maritime dans les écoles supérieures commence. Le premier cours est donné à l'École Navale de Tczew-Gdynia (A. Majewski) ; en 1926, il est introduit à l'École Supérieure de Commerce à Varsovie (L. Babiński), peu après, à l'Université de Varsovie (W. Sowiński). Les cours sont suivis par l'édition des manuels (Majewski, Sowiński).

Les années entre les deux guerres sont en Pologne une période de grands travaux juridiques ayant pour but l'unification de la législation formée différemment suivant les frontières politiques au cours du XIX^e siècle. Une Commission Gouvernementale Centrale de 40 membres est fondée, chargée de préparer les textes uniformes. Ses travaux n'ont pas été terminés au cours des 20 années de son existence (1919 - 1939), le travail fut repris par d'autres organismes officiels et couronné de succès dans la nouvelle situation d'après-guerre, et adapté à la nouvelle formation d'État socialiste.

Il est clair que le soin concernant le droit maritime entrait dans le programme de la Commission de Codification de 1919 - 1939. En ce qui concerne cette branche de codification, il fallait se concentrer autour du droit de transport maritime, c'est-à-dire aux matières contenues dans le livre IV du Code de commerce allemand, ou au livre II du Code de commerce français. Le rapporteur était M. J. Sułkowski, professeur du droit commercial à l'Université de Poznań. M. Sułkowski a préparé un avant-projet qui, entre autres, se caractérisait par la réunion dans un même texte des règles sur le droit commercial maritime et sur le droit commercial fluvial. Le projet de M. Sułkowski n'a jamais été adopté formellement avant 1939, et les travaux d'après-guerre dans ce domaine ont suivi un autre cours.

Les matières du droit commercial maritime ont pris après la guerre un cours long et séparé, en comparaison avec les travaux de codification en

d'autres domaines (droit civil, droit pénal, procédures, etc.). Il va sans dire que, en attendant le succès final de cette branche principale de la codification de droit maritime, les besoins urgents de l'administration maritime nécessaire suivaient leur cours. L'administration centrale des matières de commerce maritime a été confiée au ministère de la Navigation après une courte période, où cette branche de travail avait été confiée à l'administration du commerce extérieur. L'administration locale a été confiée aux bureaux maritimes séparés de l'administration générale, situés dans les villes de la mer Baltique. Les tribunaux maritimes continuaient leur travail basé sur les prescriptions de la loi de 1925, leur nombre a été augmenté par la création du tribunal à Szczecin.

L'administration des ports maritimes a pris la forme (après 1950) d'une entreprise commerciale soumise aux règles générales dans ce domaine. Le fonctionnement du système a causé la création d'autres entreprises commerciales destinées à aider le fonctionnement du commerce maritime dans les conditions du régime d'État socialiste. Ainsi furent créées des entreprises d'État s'occupant des intérêts d'armateurs (agences maritimes), des propriétaires de la cargaison (frets maritimes), du contrat de commission de transport (spédition maritime), ainsi que les grandes compagnies d'État de transport maritime (PLO, PŻM) à Gdynia et à Szczecin et toute une série d'entreprises collaborant nécessairement avec les grands promoteurs et animateurs de l'exercice du commerce maritime polonais — par exemple les entreprises de contrôle des cargaisons, les registres des navires, suivant les exemples de différents Lloyds, le sauvetage, les assurances, etc., toujours dans les cadres du système général socialiste — des entreprises industrielles et commerciales d'État.

En ce qui concerne les relations internationales conventionnelles, la politique adoptée entre les deux guerres, c'est-à-dire une collaboration active est continuée. La dénonciation par la Pologne de la Convention de Bruxelles de 1926 sur les immunités des navires d'État ne change rien quant à la participation active de la Pologne aux travaux du Comité Maritime International et à la participation aux conférences diplomatiques de Bruxelles, — un court intervalle de 1951 et 1952 n'a pas de signification — les nouveaux textes de la Convention SOLAS de 1948 et de 1960 sont adoptés par la Pologne, de même la nouvelle rédaction de 1966 de la Convention sur les lignes de charge, ou encore les nouvelles conventions — d'Oslo de 1947 pour l'adoption d'un système uniforme de jaugeage des navires et celle de Londres de 1965 visant à faciliter le trafic maritime international. La Pologne participe aux travaux de l'IMCO et aux réunions internationales s'occupant de la lutte contre la pollution de la mer. Elle prend part aux conférences de Genève de 1958 et de 1959, destinées à fixer les règles sur le droit de la mer, signe les conventions qui ont été

élaborées par les conférences et ratifie 2 de ces textes sur le régime de la haute mer et sur le plateau continental. Le nombre des conventions du Bureau International du Travail auxquelles adhère la Pologne s'élargit chaque jour et se chiffre aux environs de 20.

Pourtant le plus grand travail en ce qui concerne le droit maritime c'était toujours dans les années écoulées, sans aucun doute, le droit commercial maritime comme une grande branche séparée de codification. Les projets de la Commission de Codification, dont une mention a été faite ci-dessus, n'ont pas atteint leur phase finale avant le commencement de la Seconde Guerre mondiale et il fallait reprendre le travail à nouveau. Mais les travaux relatifs à la codification du droit maritime n'ont pas été inclus dans les cadres de la législation la plus urgente, celle qui visait l'unification finale du droit civil, du droit pénal, du droit de famille avec le système de la fixation des actes de l'état civil, de la procédure civile et pénale. La nouvelle codification du droit commercial maritime n'a pas été considérée comme très urgente, quoique importante. Dans ce domaine, la question pratique à résoudre a été l'application du texte obligatoire du livre du Code de commerce allemand de 1897, qui pour le *Reich* était amendé en 1937, donc sans effets législatifs pour les territoires régis par le même code en Pologne dans ses frontières d'entre-deux-guerres. La Pologne reconstituée avait un besoin vital d'être régie par un texte unique. On a choisi la solution la plus logique, c'est-à-dire à faire appliquer à toute la Pologne jusqu'à la nouvelle ligne frontière Odra - Nysa le même texte, celui de l'ancien Code de commerce allemand de 1897, sans les modifications de 1937. Un texte de la loi y relative a été publié dès le début de la période d'après-guerre, en 1945.

Cependant et dans les conditions présentées ci-dessus les juristes polonais et les autorités n'abandonnent pas l'idée de la nécessité pour une nation « maritime » d'avoir un texte de la loi nationale pour le droit du commerce maritime. On se met au travail, d'abord de façon plutôt semi-officielle, puis avec le concours et l'initiative de plus en plus grands des autorités d'État. Les associations professionnelles de juristes y jouent un rôle important. La presse juridique (journaux, périodiques trimestriels et mensuels) facilitent une discussion. Avec le temps c'est le ministère des Transports maritimes beaucoup plus que le ministère de la Justice qui se trouve à la tête des travaux y relatifs de codification nouvelle en patronnant à la coordination du travail. Plusieurs projets ont été discutés dans les commissions spéciales pour parvenir à un texte élaboré par une commission des juristes spécialistes travaillant sous le patronage du ministère des Transports maritimes sous la présidence de M. Matysik, professeur et recteur de l'École Supérieure de Commerce à Sopot. La commission travaillant sous sa présidence n'était pas nombreuse. Elle réunissait des

professeurs et des spécialistes de Gdynia, Gdańsk, Szczecin, Varsovie, Poznań. Son projet discuté depuis 1956 et adopté en 1958 a été remis au ministère des Transports maritimes qui s'est chargé de toutes les formalités administratives gouvernementales en ce qui concerne les projets de loi. Les efforts ont abouti à la présentation du projet à la Diète pour l'approbation. En même temps, coordonné avec ce projet de la loi sur le commerce maritime, un nouveau projet de la loi sur les tribunaux maritimes a été préparé. Les deux textes, après une discussion à la Diète, ont été votés le 1^{er} décembre 1961. Leur date d'entrée en vigueur a été fixée au 16 juin 1962.

Le Code maritime (ainsi est-il appelé par le législateur) se présente comme une oeuvre bien méditée et préparée soigneusement. Ses auteurs ne disposant pas d'une longue tradition nationale en ce qui concerne le droit maritime devaient chercher des exemples dans la législation et la pratique des États plus expérimentés dans ce domaine. On a procédé à une étude soignée des textes des nations plus avancées en ce qui concerne le droit maritime et le commerce international.

Les articles 1 - 11 constituent dans une certaine mesure une introduction de fond et déterminent l'application du nouveau texte spécial (Code maritime) dans le système général de codification et de législation polonaise en vigueur. L'article premier commence par expliquer que le Code maritime est destiné à régler les relations juridiques en ce qui concerne le transport maritime (donc sans toucher les pêcheries). Mais aussitôt surgit la question des relations du Code maritime et du droit civil codifié. Le Code maritime appelé à régler les situations spéciales doit garder la priorité pour résoudre les problèmes civils qui se posent dans les situations du transport maritime. Mais il y a aussi le Code civil en vigueur comme un texte juridique général utile et nécessaire dans toutes les situations de la vie sociale. Il fallait donc indiquer, et c'est ce que nous trouvons dans l'al. 2 de l'art. 1, que dans les situations de droit civil non prévues dans la réglementation du Code maritime on doit appliquer les prescriptions du droit civil, c'est-à-dire en premier lieu du Code civil — donc une priorité pour le Code maritime. Il est indiqué aussi dans le même article que les questions du droit de travail ne sont pas réglées par le Code maritime. Suit l'art. 2 qui ouvre largement les portes au droit dispositif basé sur le principe de l'autonomie de la volonté des parties qui peuvent régler toutes leurs relations juridiques à l'exception de celles qui sont indiquées comme soumises aux règles obligatoires du droit.

Dans les articles suivants, nous trouvons les règles quant à la définition du navire de commerce. La définition du navire est descriptive : nous lisons dans l'art. 3 al. 2 que constitue le navire maritime tout objet destiné à naviguer ou employé à exercer la navigation maritime dans la mer, sur

les eaux qui communiquent avec la mer et sont utilisées par les navires de mer. Une indication spéciale est donnée pour définir les navires maritimes de commerce — ce seront les navires maritimes destinés au transport des marchandises et des passagers, à la pêche maritime ou à une autre exploitation des richesses de la mer, au remorquage, au sauvetage, à l'extraction de la propriété perdue en mer, en général à toute exploitation économique dans les profondeurs de la mer. Dans les articles suivants (art. 4 - 7) on indique les différentes catégories spéciales des navires de mer (expéditions scientifiques, vaisseaux de la marine de guerre, navires de la police, etc.) auxquels s'appliquent seulement certaines règles du Code maritime — pas toutes.

Dans les articles 8 - 11 sont indiquées les règles spéciales du droit international privé en ce qui concerne le commerce maritime (dans les aspects du transport). Ces quelques prescriptions sont de nature spéciale, mais elles n'éliminent pas, le cas échéant, l'application de la loi générale polonaise sur le droit international privé, c'est-à-dire de la loi du 12 novembre 1965. Parmi les règles spéciales du Code maritime notons la préférence pour la loi du pavillon à bord du navire se trouvant en pleine mer, le partage de la rémunération attribuée dans les cas de sauvetage. Les règles spéciales s'appliquent pour les cas de l'avarie commune, pour les cas de collision de mer, pour le sauvetage, suivant les cas spécifiques décrits dans le Code, par exemple au profit de la législation du port d'arrivée, au profit de la législation commune des parties, surtout si elles sont de nationalité polonaise. — Le dernier article dans cette série d'articles reprend le principe de l'autonomie de la volonté à l'exception des règles de droit obligatoire (ordre public) conformément à l'art. 2 déjà indiqué plus haut.

Dans le système élaboré par les juristes polonais ce qui frappe tout d'abord, c'est l'inclusion des règles se rattachant au navire envisagé du point de vue du droit administratif : non seulement sa description et sa définition, mais toute une série des règles se rapportant, par exemple, à la nationalité du navire, au registre des navires, à la classification des navires; les règles se rapportant au contrôle de la sûreté du navire et de la navigation (inspections, certificats de contrôle, etc.), la documentation nécessaire à entreprendre les voyages de mer, etc. Le cabotage est réservé aux navires battant le pavillon polonais. Dans la même partie du Code maritime on trouve encore les principales règles spéciales de droit civil touchant le navire — les droits réels, tels que la propriété, le gage, les privilèges. Toute cette partie est traitée largement dans 58 articles (12 - 70), elle comprend les indications nécessaires quant à la compétence des tribunaux maritimes chargés du contrôle et de l'application de cette partie importante du droit maritime, notamment la nationalité, les registres, les

certificats de sûreté du navire, etc. Une telle réglementation générale, c'est-à-dire surpassant le côté commercial de la navigation, constitue une nouveauté par rapport au texte antérieur du droit commercial maritime allemand en vigueur en Pologne. Elle s'approche dans une certaine mesure de la législation soviétique (Code du commerce maritime de 1929) tout en gardant sa pleine originalité.

Les règles susindiquées n'épuisent pas l'ensemble des problèmes généraux nécessaires à une bonne application de la nouvelle législation.

Les chapitres suivants se rapportent aux personnes de l'armateur et du capitaine. Pour le premier, le Code maritime reprend la notion traditionnelle et ceci contrairement au système du Code soviétique, qui ne connaît que le propriétaire du navire. Le Code polonais définit l'armateur comme la personne qui s'occupe de l'exploitation du commerce maritime sur un navire appartenant soit à lui-même, soit à une autre personne. Les expressions sur les gains à réaliser, auxquelles on est habitué dans les formulations juridiques dans le monde capitaliste, n'existent plus ici. De cette façon le Code polonais admet une différence (théorique plutôt, en Pologne au moins) entre l'armateur et le propriétaire du navire.

Les dispositions sur le capitaine du navire sont aussi de portée traditionnelle ; elles admettent et distinguent les deux visages dans la personne du capitaine et de ses fonctions : a) il est à la tête de l'expédition maritime comme navigateur et comme responsable du côté commercial du transport, b) il est, en même temps, gardien des compétences publiques de l'État du pavillon en ce qui concerne le droit administratif, le droit civil et même le droit pénal dans diverses circonstances qui peuvent se présenter au cours du voyage. Ainsi, il est compétent dans diverses situations pour dresser les actes de l'état civil, pour sauvegarder les biens d'une succession ouverte à bord du navire au cours du voyage, pour constater l'authenticité des actes, pour les mesures d'assurer l'ordre à bord du navire allant jusqu'aux mesures de contrainte dans l'exercice de la procédure pénale, etc.

Ce n'est qu'ensuite que se placent les dispositions les plus importantes du Code, pour lesquelles il est créé et qui se rapportent au contrat même de transport. Elles sont destinées à régir le transport des marchandises (articles 94 - 160) et puis celui des passagers (articles 161 - 177). Nous y trouvons décrites toutes les situations traditionnelles du transport maritime (*chartering* et *tramping*) sous la forme du transport massif et sous la forme de l'expédition en forme de colis et paquets (*booking*). Une section spéciale est réservée au document de connaissance. Notons à cette place que les reflexes du régime socialiste de l'économie polonaise se font sentir à côté du Code maritime et en dehors de ses strictes dispositions, par exemple en ce qui concerne la fondation et le fonctionnement de grandes entreprises d'armateurs qui constituent la propriété de l'État;

la concentration aux mains de l'État des entreprises de commission de transport, des dépôts des marchandises dans les ports, etc.

En revenant au texte du Code maritime et à ses dispositions détaillées sur le transport des marchandises — nous y trouvons décrites les situations apparaissant dans les diverses phases du chargement et du déchargement de la livraison et les dispositions concernant la rémunération du transporteur, de ses privilèges sur les biens transportés, de la dissolution du contrat de transport, de la responsabilité du transporteur, etc. Les solutions adoptées par le Code maritime sont, d'une part, basées sur la tradition suivie par les États maritimes dans ce domaine et, d'autre part, tâchent de tenir compte de la codification internationale telle qu'elle apparaît dans les conventions de Bruxelles de 1924 et de 1926 sur le droit maritime, mais en laissant de côté les amendements de 1957. Ceci s'applique en particulier au document le plus important dans le commerce et dans le transport maritime, c'est-à-dire le connaissement dans toutes ses formes, y compris le connaissement direct.

Le contrat de *time charter* est traité à part (articles 178 - 190) comme une sorte de contrat spécial (n'ayant rien de commun avec le contrat de transport du type *chartering* (*tramping*) traité à l'art. 95, qui établit des liens juridiques de louage des biens (navire) entre le propriétaire du navire, le navigateur et l'affrèteur. L'équipage dépend en principe du propriétaire du navire, mais le capitaine doit tenir compte des indications et des instructions de l'organisateur du voyage.

Au transport des passagers le Code maritime a consacré évidemment moins de dispositions, mais quand même s'intéresse à plus de détails que les anciennes codifications. Les dispositions y relatives sont rédigées sous l'influence de la codification internationale de Bruxelles (Convention de 1961 et celle de 1957) avec l'adoption de nouvelles règles de Bruxelles sur les passagers sans billet.

En ce qui concerne les contrats auxiliaires nécessaires pour mettre en action les transports maritimes, le Code se limite à en indiquer 4 et notamment : l'agent maritime, le courtier (*shipbroker*) le pilotage et le remorquage (*haulage*).

Le contrat de transport n'est évidemment pas l'unique source des obligations dans les conditions du voyage maritime. Il y a toujours d'autres possibilités et éventualités, basées directement sur une disposition légale ou bien découlant d'un délit ou quasi-délit. Le Code maritime en indique 4 : l'avarie commune, l'abordage des navires, le sauvetage et le recouvrement de la propriété du fond de la mer. Tous ces cas sont connus aux législations maritimes du monde entier. Mais ce qui doit être souligné dans la réglementation adoptée par le Code polonais, c'est le côté international : le souci de se conformer aux conventions internationales et aux

usages adoptés par la pratique internationale. Ainsi, pour l'abordage et le sauvetage on suit les règles adoptées conventionnellement à Bruxelles en 1910, incluses peu après dans le corps du Code de commerce allemand en 1913, héritées par la Pologne en 1919 - 1920 et en 1945. Pour l'avarie commune on suit, comme tout le monde, les règlements de l'international *Law Association* dans leur dernière rédaction de Copenhague de 1950.

Pour terminer la présentation des règles du Code maritime polonais, il nous reste à noter que son chapitre final, long et détaillé, s'occupe des questions de l'assurance maritime, comprise comme un ensemble distinct des autres branches de législation relatives aux assurances et conforme dans maints détails plutôt à la pratique anglaise ou italienne et non allemande.

Telles sont, présentées en raccourci, les dispositions que contient le nouveau Code maritime polonais de 1961. Le Code envisagé comme un ensemble des dispositions de droit commercial maritime, complété par les dispositions administratives et exécutives nécessaires au bon fonctionnement dans la pratique courante, doit permettre aux juristes et à toutes les personnes engagées dans les services de la marine marchande et du commerce extérieur de mieux accomplir leur tâche et leurs fonctions. Tout ce travail de codification se présente comme une oeuvre nouvelle et originale du point de vue du droit comparé, malgré son caractère éclectique.

Quant aux règles traditionnelles élaborées au cours des siècles on ne peut pas s'isoler des coutumes et des usages admis par le monde entier et suivis par la pratique du commerce international et les transports maritimes. Ainsi, les auteurs du Code ont dû étudier les nouvelles codifications dans ce domaine, entre autres le Code soviétique de 1929, l'amendement du Code néerlandais de 1923, le Code marocain de 1919 et beaucoup d'autres textes de dernières années. Ils ont laissé de côté, conformément au développement du droit maritime, les instructions surannées, telles que le prêt à la grosse ou le type spécial de société d'exploitation maritime connu en Allemagne sous le nom de REDEREI, dépassé par les nouvelles formes des sociétés commerciales (sociétés par actions ou à responsabilité limitée). Ils ont tenu compte surtout et en particulier de la pratique suivie jusqu'alors sur les territoires de la Pologne, en donnant ainsi souvent la préférence à l'exemple de la législation allemande maritime, mais ils ont tenu soigneusement compte de la législation internationale élaborée sous la forme des conventions internationales avec, en tête, les conventions du droit maritime commercial élaborées à Bruxelles sur l'initiative du Comité maritime international.

Soulignons et notons qu'à la même date que le Code maritime on a élaboré une nouvelle rédaction de la loi sur les tribunaux maritimes, adaptée

au Code maritime et consacrant un grand élargissement de leur compétence.

Nous sommes en présence de la nouvelle rédaction non seulement de la compétence première concernant l'instruction des cas de collision, mais aussi d'un large éventail des préoccupations d'ordre administratif. En même temps, le problème surgissait quelle est la valeur et la force obligatoire des constatations par les tribunaux maritimes des circonstances de fait et de droit pour la justice normale appelée exclusivement à statuer sur les prétentions civiles. On sait que les tribunaux maritimes ne sont pas compétents de statuer sur ces prétentions, mais pourtant la nouvelle loi dispose que les tribunaux d'arbitrage d'État (et non les tribunaux ordinaires) sont liés par les constatations du tribunal maritime (cet arbitrage spécial tranche les litiges entre les entreprises d'État).

On peut terminer cette étude par remarquer que dans le domaine maritime, tout comme dans d'autres domaines internationaux, on constate une participation constante de la Pologne à la grande oeuvre de la consolidation de la paix entre les nations et à la création des bases juridiques pour la coopération pacifique.

Sources polonaises en langues étrangères

J. ŁOPUSKI : *Le premier Code maritime de Pologne*. « Le Droit Maritime Français » 1962, pp. 240 - 243.

J. ŁOPUSKI : *La codification du droit civil en Pologne et ses implications sur les problèmes de droit maritime*. « Le Droit Maritime Français » 1967, pp. 111 - 114.
The Polish Maritime Code. Traduit et annoté par J. Łopuski et R. Adamski. Gdynia 1964.

T. CIEŚLAK, M. CHORZEŃSKI, M. RADECKA : *Recueil des textes de droit maritime en vigueur en Pologne*. Gdynia 1960.

Une liste des études et des articles parus à l'étranger et consacrés au nouveau Code maritime polonais est donnée dans le manuel sur le *Droit maritime* de S. MATYSIK, éd. 1967, p. 20.

Application of Civil Code in International Legal Cases

by JÓZEF SKĄPSKI

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1. The purpose of the Polish civil law is to regulate civil law relations in this country. And this was how the authors of the Polish civil code understood their task. It is after all a generally recognized method resulting from the very definition of law which is strictly connected with the sovereignty of the State that lays it down through its specially appointed organs. It may be said in other words that the purpose of the civil code is to regulate relations of a purely internal character, none of whose elements step outside the legal territory of Poland. This is not specific for the Polish law alone, since an analogous situation appears in all the other States.

For all that, however, the Polish civil code does contain some exceptional norms which regulate in a direct manner, that is without recourse to a collision norm, legal relations whose elements step outside the legal territory of Poland. We speak in such a case of so-called material norms of international private law.¹ Their purpose is to regulate exceptional relations involving an international element. These norms are contained in provisions introducing the civil code.

Two provisions are connected with the sale, purchase and inheritance of private agricultural farms. In accordance with Article XXIII, for example, inheritors or legatees who are citizens of a foreign State and whose rights to an agricultural farm have been excluded or limited (e.g. because they are not farmers) are entitled to receive from the inheritors in whose favour that exclusion or limitation acted a cash equivalent of the inher-

¹ Cf. Ph. FRANCESKAKIS, *La théorie du renvoi*, Paris 1958, p. 16 ff.

itance or bequest up to the amount of the inheritance or bequest were it not for their right to the inheritance or bequest having been excluded or limited. It may be seen from the above that an inheritor or a beneficiary who is a foreigner receives a better treatment in an analogous situation than a Polish citizen. This provision applies, however, only on the condition of reciprocity in the State whose citizenship is held by the inheritor or beneficiary entitled to the cash equivalent. The existence of reciprocity is taken to mean that Polish citizens are not subject to any limitations in the domain of inheritance and bequests in the State whose citizenship is held by the foreigner. The purpose of this provision was to assist foreigners in the receipt of inheritance from Polish citizens, which in turn helps Polish citizens in claiming their inheritance rights after foreigners. The problem plays a comparatively important role in Poland because of the large number of Polish emigrants.

The other of the above-mentioned provisions (Art. XXIV) says that no limitations with regard to the transfer of property rights to agricultural real estate apply in cases when the citizen of a foreign state transfers his property rights to agricultural real estate situated in Poland, if the beneficiary is a physical person domiciled in Poland. Polish legislation started in this case from the correct assumption that one should not hinder the donation of an agricultural farm by a foreigner to a Polish citizen, if the latter is domiciled in this country, even though the beneficiary might not possess farming qualifications.

Apart from this, the provisions introducing the civil code (Art. VI, para. 2 and 3) contain material norms applicable solely to relations in the field of foreign trade. They pertain to such questions as the right of seizure, moderation of conventional penalty, form of legal operation and seller's liability for the faults of the product he had sold. These are at the same time material norms of international private law applicable to legal relations some of whose elements step outside the Polish legal territory, with the reservation, however, that they must pertain to foreign trade. But of this more anon.

2. In spite of the fact that the principal purpose of the civil code is to regulate legal relations of an internal character, in some situations its provisions may apply to legal relations outside the legal territory of Poland or even, in exceptional cases, to relations which are completely unconnected with this country. This will happen if the applicability of our law results from Polish collision norms,² from international agreements or from

² Collision norms are contained in particular in the law of 12 Nov., 1965 on international private law. They may be also found in other laws: e.g. in the negotiable instruments law of 1936, the cheque law of 1936, the sea code of 1961 and the air code of 1962.

choice made by the parties to a legal operation.³ This is a completely normal occurrence, which might be met in any State. The Polish legal system is no exception here.

The applicability of a material law indicated by a collision norm often encounters difficulties in practice, particularly if the ruling organ must base the settlement on a foreign legal system. Much attention is paid to this problem in the doctrine of the international private law.⁴ Other difficulties result also from the fact that—as has been pointed out before—internal (national) laws are not always adapted to situations which might appear in the regulation of relations outside the territory of a single State.

It is understandable that analogous difficulties might emerge in the application of Polish law if it is applicable to a given relation. The problem assumes particular importance in the regulation of foreign trade. Polish literature drew attention to this question already in the course of codification work and after the civil code came into force.⁵ The question was asked namely whether the civil code will contain norms adequate for international trade, whether the norms of the new civil code will be elastic enough to satisfy the requirements of modern foreign trade between countries with different economic and social systems. In spite of the spreading of various theories on the isolations of an autonomic international trade law out of national laws and the significance of the so-called self-regulatory contracts,⁶ the applicable law, that is law indicated by the collision norm or chosen by the parties, continues to play an important role in the

³ Polish collision law admits the choice of law in regard to contractual obligations, both in the international private law (Art. 25 - 30 and Art. 32 - 33), the sea code (Art. 11 para. 1) and the air law (Art. 12). Cf. J. SKAPSKI, *Autonomia woli w prawie międzynarodowym prywatnym* [Autonomy of Will in International Private Law], Kraków 1964, p. 67 ff.; also para. 29 of the Rules of the Panel of Arbiters at the Polish Chamber of Foreign Trade, binding as of 1 Jan., 1970.

⁴ Cf., e.g., K. PRZYBYŁOWSKI, *Prawo prywatne międzynarodowe* [International Private Law], 1935, p. 147 ff; P. NEUHAUS, *Die Grundbegriffe des internationalen Privatrechts*, 1962, p. 223 ff.; G. KEGEL, *Internationales Privatrecht*, 1964, p. 184 ff.

⁵ E.g. J. JAKUBOWSKI, *Kodyfikacja prawa cywilnego a handel zagraniczny* [Civil Law Codification and Foreign Trade], "Handel Zagraniczny," 1960, No. 7; J. FABIAN, *Niektóre zagadnienia obrotu zagranicznego w projekcie kodeksu cywilnego PRL* [Some Problems of Foreign Trade in the Draft Civil Code of the Polish People's Republic], "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1960, No. 4, p. 69 ff.; C. PRZYMUSIŃSKI, *Kodeks cywilny a międzynarodowy obrót cywilny* [Civil Code and International Civil Relationships], "Przegląd Ustawodawstwa Gospodarczego," 1965, No. 2, p. 33 ff. and No. 3, p. 64 ff.; J. JAKUBOWSKI, *Zagadnienia kodyfikacyjne w zakresie handlu zagranicznego* [Codification Problems in the Domain of Foreign Trade], "Prawo w Handlu Zagranicznym," 1965, No. 9, p. 11 ff.; J. JAKUBOWSKI, *Umowa sprzedaży w handlu zagranicznym* [Sales Contract in Foreign Trade], 1965, p. 261 ff.

⁶ H. BATIFFOL, *Aspects philosophiques du droit international privé*, 1956, p. 96 ff.; C. M. SCHMITTHOFF, *Das neue Recht des Welthandels*, *Rabels Z.* 1964, p. 67 ff. As re-

field of contractual obligations. For it is this law that settles such problems as flaws in the declarations of intent, form of legal operations, obsolescence of claims, in other words such questions as are regulated as a rule by absolutely binding provisions (*ius cogens*). There might also appear sometimes the problem of an auxiliary application of dispositive provisions of the proper internal law to issues which the parties did not regulate in the contract.

Further on I will endeavour to present and explain as far as possible certain problems which might arise in connection with the application of Polish civil law to legal relations connected with international trade. I confine my remarks to these problems, because they are of crucial importance for the development of international trade relations. This in turn exerts a strong influence on the economic development of the country. Another reason is that these problems have aroused the highest number of doubts in our legal literature. The size of the present work permits me, of course, to draw attention to the most essential questions only.

3. Some doubts and difficulties arise from the principle of unity of civil law accepted in the course of codification work and contained in the civil code now in force.⁷ According to this principle the code regulates the whole of civil law relations, that is not only relations between physical persons and between physical persons and socialized economy units, but also relations between the latter (Art. 1 of the civil code). This became the source of a problem whether civil code provisions pertaining to socialized trade are applicable to cases in which obligations in the field of international trade are subject to the Polish civil law. The problem existed already before 1 January, 1965, that is before the civil code came into force. At that time the situation was different inasmuch as detailed rules pertaining to socialized trade had been contained in separate legal acts and not in the code of obligations which came into force on 1 July, 1934. The main point at issue was whether international trade transactions in which Polish foreign trade companies participate are subject to the detailed, often very rigoristic and as a rule absolutely binding, regulations issued for the needs of home trade. This pertained in particular to the short (mostly one-year) terms of the obsolescence of claims, as is usually the case in transactions between socialized economy units. Polish arbitration and Polish legal doctrine have settled this problem long ago. Only generally binding civil law provisions are applicable to international trade transactions, even as re-

gards criticism of this standpoint in Polish literature Cf. J. SKĄPSKI, *op. cit.*, p. 115 ff. and J. JAKUBOWSKI, *op. cit.*, p. 149 ff.

⁷ W. CZACHÓRSKI, *Przebieg prac nad kodyfikacją prawa cywilnego PRL* [The Course of Work on Civil Law Codification in the Polish People's Republic], "Studia Prawnicze," 1970, No 26/27, p. 19; C. PRZYMUSIŃSKI, *op. cit.*, p. 34.

guards trade with the socialist countries. Provisions pertaining to socialized trade are not applicable in this respect.⁸ Such a standpoint is fully justified by the law now in force. The principle of unity of civil law is not equivalent to the principle of uniformity of civil law.⁹ For we can find in a single legal system provisions which pertain only to certain subjects and certain types of legal operations. A similar situation may be met when a State, apart from a general civil law, has also a commercial law whose scope is usually determined both objectively and subjectively (i.e. that it pertains to commercial operations performed by merchants). This was the case in Poland when she had a code obligations and a commercial code of 1934.

The civil code contains a large number of provisions clearly pertaining to trade between socialized economy units.¹⁰ There can be no doubt that this means Polish socialized economy units listed in Article 33 of the civil code. The relevant provisions cannot be applied, therefore, to foreign trade transactions, since Polish socialized economy units can never be parties to them. This means that in situations when the Polish civil law is competent for the evaluation of a given legal relation in the field of international trade, then Polish legal norms pertaining to relations between two subjects of the Polish socialized economy lose automatically their applicability.

Doubts remain, on the other hand, in cases when the civil code contains detailed provisions pertaining to legal relations in which one party is a socialized economy unit and the second another subject. This concerns mainly provisions which give a privileged treatment to state organizational units (i.e. not all the socialized economy units).

In accordance with Article 461, paragraph 3 and Article 496 of the civil code, no right of seizure exists in relations with a State organizational unit. While in accordance with Article 490, paragraph 3 of the civil code, the contracting party of a State organizational unit must not refrain from the fulfillment of its obligation towards that unit even if the fulfillment by the unit in question of the reciprocal obligation becomes doubtful in

⁸ Cf., e.g., H. TRAMMER, *The Law of Foreign Trade in the Legal System of the Countries of Planned Economy*, in a collective work edited by C. M. SCHMITTHOFF, *The Sources of the Law of International Trade*, London 1964, p. 41; J. JAKUBOWSKI, *Prawne ramy obrotu handlowego między krajami socjalistycznymi* [Legal Framework of Trade Turnover between Socialist Countries], "Państwo i Prawo," 1961, No. 10, p. 536.

⁹ C. PRZYMUSIŃSKI, *op. cit.*, p. 34.

¹⁰ E.g., detailed provisions on the applicability of statutory limitations to claims between socialized economy units (Art. 117 and 118 of the civil code), on the fulfillment of obligations between socialized economy units or provisions regulating certain kinds of contracts which may be concluded between socialized economy units only (e.g., delivery contracts—Art. 605 and following of the civil code; building work contracts—Art. 647 and following of the civil code).

view of its financial position.¹¹ The purpose of the above provision is the protection of the interests of State units. For the exercise of the right of seizure or the refraining from the fulfillment of an obligation could impede the implementation of their planned tasks. These provisions have in a certain sense their equivalents in the executory provisions contained in the code of civil procedure, which limit in a more radical manner the possibility of execution against the State Treasury and state legal persons. In principle the execution of monetary debts is admissible solely against State enterprises, but only by laying arrest on the banking account of the debtor (Art. 1060 and following of the code of civil procedure).

However, the above provisions of the civil code should not be applied in cases when a Polish (State) foreign trade company is the contracting party in a foreign trade transaction, and the obligation is subject to Polish law. A number of arguments support such a standpoint. As has been said already, the main purpose of these provisions is the protection of interests connected with the performance of planned tasks. These tasks, however, are of a purely internal character and can in no measure affect the rights of foreign contracting parties which, according to the fundamental principle of civil law, must be treated on the principle of absolute equality with their Polish partners, irrespective of whether the transaction concerns a State or a different kind (e.g. cooperative) of a foreign trade company.¹² Neither must one forget the wording of Article 40 of the civil code which says that the State Treasury is not liable for the obligations of State enterprises.¹³ To deprive a foreign contracting party of the possibility to use the right of seizure and refraining from the fulfillment of an obligation could be regarded in such a situation as depriving it of the only effective defence of its rights if a Polish foreign trade company can-

¹¹ The legal right of deposit vested in a lessor (Art. 670, para. 2 of the c.c.), an agent (Art. 764 of the c.c.), a commission agent (Art. 773, para. 3 of the c.c.), a carrier (Art. 790, para. 2 of the c.c.) and a storage contractor (Art. 857, para. 2 of the c.c.) is also excluded on the strength of detailed provisions in relations with a State organizational unit. Further arguments with regard to the right of seizure pertain also to the legal right of deposit, because the exclusion of the right of deposit with regard to State units was made for identical reasons as the exclusions of the right of seizure.

¹² Quite rightly attention is drawn to this by J. JAKUBOWSKI, *Umowa sprzedaży...* [*Sales Contract...*], p. 207, who considers the principle of the equality of parties in foreign trade relations as a fundamental interpretative principle of the Polish civil code.

¹³ It must be pointed out that the provisions of Art. 461, para. 3 and Art. 496, as well as Art. 490, para. 3 do not seem to be sufficiently harmonized with Art. 40 of the civil code. There is a certain irritating inconsistency. The lack of liability of the State Treasury for the obligations of a State enterprise admits the possibility that the enterprise might become insolvent. The limitation of the rights of creditors in relation to State enterprises does not seem therefore justified.

not meet its financial obligations. Even though such cases of the insolvency of a State company rather do not happen in practice, a foreign contracting party is entitled to demand full protection of its rights. Last but not least, it should be remembered that where foreign trade relations are concerned, Article VI, paragraph 2 of the provisions introducing the civil code retained in force Articles 518 - 524 of the commercial code pertaining to the right of seizure to which merchants are entitled in their mutual trade relations. This mercantile right of seizure operates much more widely than the right of seizure provided for in the civil code. What is more, there are no limits to its application in regard to State units. This is understandable, as the Polish legislators were aware of the fact that Polish foreign trade is mostly in the hands of State companies. If, therefore, widely understood right of seizure may be used with regard to state enterprises, it can hardly be excluded from the civil code in foreign trade relations. Neither can a foreign contracting party be deprived of the right to refrain from the fulfillment of an obligation due to a Polish foreign trade company.

A separate mention is due to the provisions of Article 2 and Article 384 of the civil code. Accepting the principle of the unity of the civil law, Polish legislators confined themselves to regulating socialized trade in a general way only, rightly considering that too detailed a control could hamper the natural development of the various forms of this trade. And if one wished to avoid it, it could soon become necessary to amend the civil code, which would most certainly be undesirable. Hence there arose the need of a compromise solution. Without infringing the principle of the unity of the civil law it became necessary to create grounds for an elastic legal control which would be at all times consistent with economic conditions. The observance of this principle may be seen in the civil code provisions quoted above. In accordance with Article 384 of the civil code, for example, the Council of Ministers or other supreme organ of State administration authorized by it may set suitable general conditions or models of contracts for a certain category of contracts between socialized economy units and between these units and other persons.

The provisions of the general conditions or models of contracts may define to what extent they are absolutely binding. Provisions issued on the basis of Article 384 of the civil code have the character of norms of objective law and they are binding on the strength of the law itself, without the necessity of quoting them in the contract. They may pertain, however, only to contractual obligations, and refer to questions which the civil code regulates by dispositive provisions.

Different, on the other hand, is the scope of rights resulting from Article 2 of the civil code. When special needs of turnover between socialized

economy units require it, the Council of Ministers or other supreme organ of state administration authorized by it may regulate the relations of this turnover in a manner differing from the provisions of the civil code. The above norm gives the right to issue detailed provisions also outside the scope of contractual obligations, and with regard to matters regulated by absolutely binding provisions. This constitutes a sort of safety valve in case the provisions of the civil code prove at some moment inadequate to the needs of socialized trade. The provision has been used so far in exceptional and very rare cases.¹⁴

The provisions of the general conditions and models of contracts (Art. 384 of the civil code), as well as provisions issued on the basis of Article 2 of the civil code, will be inapplicable (except in one case, of which more below), to legal relations in the field of international trade, for which Polish law will be competent. This problem cannot arouse any doubts as regards those general conditions which pertain to trade between socialized economy units. For it has been pointed out already that this applies to subjects participating in the Polish internal trade. Only extremely few general conditions pertain to services rendered to physical persons by socialized economy units. This means that they, too, will never apply by the very nature of things to relations in the field of international trade.

All this shows that on the basis of the interpretation of the norms of the civil code and provisions issued on its basis, it is easy to come to the conclusion that the detailed provisions pertaining to socialized economy units are inapplicable for purposes of the evaluation of legal relations in the field of international trade, if the Polish law is competent in the given case.¹⁵ This means that paragraph 110, item 2 of the General Conditions of Delivery of the Council for Mutual Economic Assistance of 1968 which say that material law of the seller's country means general (in the sense of universal) provisions of the civil law and not special norms adopted for relations between the institutions and socialized economy enterprises of the seller's country, is consistent with the general rule binding in the Polish law.

4. The provisions of Article 384, and Article 2 of the civil code are of some importance, however, for the legal regulation of relations in foreign

¹⁴ On the question of the interpretation of Art. 2 and Art. 384 of the c.c. compare S. ROZMARYN, *Treść i zakres art. 2 k.c. i podstawy prawa obrotu uspołecznionego* [The Substance and Scope of Art. 2 of the c.c. and the Bases of the Law of Socialized Trade Turnover], "Państwo i Prawo," 1969, No 8/9, p. 211 ff.; S. GRZYBOWSKI, *Koncepcja jednności prawa cywilnego na tle postanowień art. 2 i art. 384 k.c.* [Conception of the Unity of Civil Law in the Light of the Provisions of Art. 2 and Art. 384 of the c.c.], "Studia Prawnicze," 1970, No. 26/27, p. 40 ff.

¹⁵ J. JAKUBOWSKI, *Umowa sprzedaży...* [Sales Contract...], p. 267; C. PRZYMUSIŃSKI, *op.cit.*, p. 64.

trade. It must be borne in mind that the General Conditions of Delivery of the Council for Mutual Economic Assistance of 1968, binding as of 1 January, 1969, had been introduced by order of the Minister of Foreign Trade of 7 November, 1968 (Official Gazette of the Ministry of Foreign Trade No. 15/1968) precisely on the strength of Article 2 and Article 384 of the civil code. Such a solution might give rise to certain reservations. There is no doubt whatsoever that it was dictated by the intention to base the General Conditions of Delivery of the CMEA on grounds that would remove any doubt as to the general character of the CMEA conditions.

Polish jurists, like jurists in the other CMEA countries, discussed the question of the legal character of the 1968 General Conditions of Delivery of the CMEA and the general conditions of technical service and assembly, of 1962. For these general conditions were not accepted in the form of an international agreement, and this is why the norms contained in them are not in the nature of conventional norms. From the point of view of international law, the resolution on the general conditions is only a recommendation addressed to the member countries concerning their practical introduction in accordance with the internal legislation of the individual States (Art. IV of the CMEA Statute). In the execution of this recommendation, the General Conditions of Delivery of the CMEA of 1968 and the general conditions of technical service and assembly were introduced in practice by order of the Minister of Foreign Trade. It was discussed in literature whether this manner of the practical introduction of general conditions was proper and sufficient. It concerns after all legislative acts which introduce special norms for a certain group of relations in the field of civil law, collision law and trial law, that is matters which in the Polish legal system are regulated by legislation. The question was asked whether the above general conditions are not binding on the parties only after being referred to in an agreement (*lex contractus*). The view prevailed in the end that the general conditions contained norms of objective law and were binding regardless of the will of the parties. It was conceded that when he issues an order on the introduction of the general conditions, the Minister of Foreign Trade acts on the basis of his legal powers aimed at the observance of the constitutional principle of the monopoly of foreign trade.¹⁶ Such a solution is certainly consistent with the purpose for which the CMEA general conditions had been introduced, but it might appear

¹⁶ J. SKAŃSKI, *Wybrane aktualne problemy polskiego prawa międzynarodowego prywatnego w zakresie zobowiązań z umów* [Selected Current Problems of Polish International Private Law in the Field of Contractual Obligations], in: *Księga pamiątkowa dla uczczenia pracy naukowej K. Przybyłowskiego* [Memorial Book in Honour of K. Przybyłowski], 1964 p. 276 ff.; J. JAKUBOWSKI, *Umowa sprzedaży...* [Sales Contract...], p. 209 ff.

doubtful from the point of view of the doctrine on the sources of law. Hence Polish literature postulated that the general conditions should be enforced by way of an international agreement.¹⁷

This means that the basing of the CMEA General Conditions of Delivery of 1968 on Article 2 and Article 384 of the civil code was aimed at quoting such a legal base that would remove any vagueness as to the legal character of these general conditions. The quoting of Article 2 was also made because the General Conditions regulate the application of statutory limitations to claims, that is problem which concerns absolutely binding provisions. Thanks to this method, the provisions of the General Conditions became formally a part of the Polish legal order.

But is this operation to be regarded as a correct solution? It appears that not all doubts have been eliminated, and that new questions emerged. Doubtful first of all is the reference to Article 2 of the civil code, since this provision makes it possible to introduce different provisions only with regard to turnover between the national units of socialized economy. Neither should one forget that the provisions referred to above permit the issuance of special provisions only with regard to matters covered by civil law, while the CMEA General Conditions of Delivery of 1968 contain norms from the field of collision law (para. 110) and jurisdiction (para. 90 and following).

This means that Article 2, let alone Article 384 of the civil code, cannot be used as grounds for the detailed regulation of these questions. Moreover, in some situations this might lead—at least seemingly so—to a paradox. In spite of the fact that the CMEA General Conditions of Delivery of 1968 have become a part of the Polish legal order and constitute formally a *sui generis* extension of the civil code, if the seller is a contracting party from another State, then one would use auxiliarily the norms of the civil law of that State and not the Polish civil code (para. 110 of the CMEA General Conditions of Delivery of 1968). As a result of such a regulation there has appeared a dualism as to the basis of the legal force of the CMEA General Conditions of Delivery. The general conditions of assembly and technical service continue to be binding on the competence norm of the Minister of Foreign Trade, while the CMEA General Conditions of Delivery are based on Article 2 and Article 384 of the civil code. Luckily, these doubts of a theoretical nature do not play any role in the practical application of the general conditions.

¹⁷ *Inter alia*: J. JAKUBOWSKI, *op.cit.*, p. 217 and *Integracja gospodarcza krajów RWPG a niektóre problemy unifikacji prawa* [Economic Integration of CMEA Member Countries and Some Problems of the Unification of Law], "Państwo i Prawo, 1970, No. 5, p. 685.

5. The commercial code which was in force since 1 July, 1934 was abrogated when the civil code came into force. This does not mean, however, that all institutions and legal solutions contained in the commercial code disappeared from the Polish law. For, on the one hand, the civil code adopted certain norms from the commercial code, while some of the latter's provisions remained in force (compare Art. VI, para. 1 and 2 of the provisions introducing the civil code). And so in distinction from the old code of obligations and on the pattern of the commercial code, the civil code regulates agency contracts (Art. 758 and following), consignment contracts (Art. 765 and following), transport contracts if they are not regulated by special provisions (Art. 774 and following), forwarding contracts (Art. 794 and following) and storage contracts (Art. 853 and following). Apart from that, some single provisions of the commercial code are contained in the civil code, though their applicability has been limited in some cases to activity within an enterprise (compare, for example, Art. 97, 543, 554, 563, para. 2, 583 and following, 751 item 1). This concerns mainly various provisions connected with the contract of sale within the framework of the activity of an enterprise.¹⁸ The inclusion of certain provisions of the commercial code was made chiefly for the needs of internal trade turnover. Nevertheless, they are the reason why the Polish civil code in its present form may serve as a basis for the legal regulation of international trade.

Moreover, as I have already pointed out, certain provisions of the commercial code remain in force. In accordance with Article VI, paragraph 1 of the provisions introducing the civil code still in force remain provisions of the commercial code on public companies, limited liability companies and stock companies. Commercial code provisions on the firm, the proxy and commercial register also remain in force with regard to these companies. The relevant provisions were not included in the civil code, since commercial companies do not play any significant role in Poland's economic life. It became indicated, however, to organize certain enterprises and banks in the form of commercial companies precisely because of the needs of international trade.¹⁹ This was also the main reason why the above provisions of the commercial code remained in force.

Also in force remained Articles 518 - 524 and Article 531 of the commercial code. The first of them pertain to the right of seizure. According

¹⁸ Cf. in particular Art. 554 of the c.c. according to which all claims arising from a sale made within the framework of the activity of the seller's enterprise lose their validity after the lapse of two years (the general deadline of statutory limitation on grounds of the civil code is ten years—Art. 118 of the c.c.).

¹⁹ J. JAKUBOWSKI, *Przedsiębiorstwa w handlu międzynarodowym* [*Enterprises in International Trade*], 1970, p. 25 ff.

to them, a merchant is entitled to safeguard a debt due to him from another merchant on the basis of a bilateral commercial operation by seizing movables and securities property of the debtor which he had received for keeping with the knowledge and consent of the latter on the basis of the commercial operation. In certain situations the right of seizure may be exercised to safeguard a debt that has not fallen due as yet, and may pertain to goods the property of the creditor if he is committed to deliver them to the debtor. The above right of seizure, very useful in trade turnover, is treated much more widely than in the civil code where it is vested solely in a person committed to deliver somebody else's goods in order to safeguard claims for the refund of expenditure on the goods and claims for the repair of damage caused by the goods (Art. 461 of the civil code).

On the other hand, Article 531 of the commercial code pertaining to contractual indemnity says that a merchant who had committed himself in the execution of his enterprise to pay a contractual indemnity cannot demand its reduction.²⁰ On this point, too, there is a significant difference in comparison with the civil code which permits in certain cases a merchant to demand a reduction of the contractual penalty (indemnity) (Art. 484, para. 2 of the civil code).

However, the above-mentioned provisions of the commercial code on the right of seizure and prohibition of the reduction of contractual indemnity are applicable exclusively to relations of foreign trade. It becomes necessary, therefore, to define accurately what we are to understand by this term. The successive drafts of the civil code used the term "relations of foreign turnover." The present formulation clearly indicates the intention of narrowing down its sense to turnover within the framework of the commercial activity of the contracting parties, that is within the framework of the activity of their enterprises.²¹ This means that the above-mentioned provisions will not apply to other contracts.²² This is consist-

²⁰ This provision is of a relatively binding character and may be excluded by the will of the parties. So says, correctly in my opinion, J. SZWAJA, *Jeszcze o wykładni art. 531 k.h.* [Further Notes on the Interpretation of Art. 531 of the Commercial Code], "Prawo w Handlu Zagranicznym," 1966, No. 12 - 13, p. 70.

²¹ C. PRZYMUSIŃSKI, *Problematyka handlowa w polskim prawie cywilnym* [Trade Problems in Polish Civil Law], Wydawnictwo Zrzeszenia Prawników Polskich. 1969 - 1970, p. 45 ff.

²² This concerns obligation contracts for whose evaluation Polish law is proper according to Art. 25 - 30 of the Polish international private law. These may be, e.g., contracts concluded by foreigners in a foreign country for meeting their personal needs. The Czechoslovak code of international trade expressly excludes such contracts (Art. 2, item 2), Cf. on this question: Š LUBÝ, *Les obligations dans les relations commerciales internationales. Le droit civil tchécoslovaque*, 1969, p. 187; also:

ent after all with the wording of the provisions of the commercial code that have remained in force, which clearly pertain to the commercial operations of a merchant.

The term foreign trade, on the other hand, indicates that the regulation pertains solely to situations which stop outside a single legal territory.²³ But nowhere will we find a closer definition of this question. It is not said in particular what element of a given relation should step outside the frontiers of a given country. Taking into account, however, the normal meaning of the term it is to be assumed that it pertains to trade relations in which the contracting parties have their headquarters or domicile in different countries.²⁴

This, however, does not concern Polish foreign trade alone. For the above provisions will be applicable in all cases in which Polish law will be competent for the evaluation of a legal relation in the field of international trade; that is regardless of whether a Polish foreign trade enterprise is one of the contracting parties, or whether both contracting parties have their headquarters in two different foreign countries.

Another thing must be also remarked. Except for the above-mentioned provisions of the commercial code, the civil code does not use the terms "merchant" and "commercial operation." At one time these terms had a strictly defined normative meaning in the abrogated provisions of the commercial code. Today, by merchant one should understand a person operating within the framework of his enterprise, and by commercial operation a legal operation performed within the framework of the enterprise. This kind of interpretation permits the use of terms with which the civil code operates.²⁵

6. The scope of matters which are to be directly regulated by the civil code was widely discussed in the course of the codification work. It was recognized in accordance with the general legislative practice that the civil code should regulate the general and fundamental civil law relations traditionally contained in codes. For the principle of the unity of civil law is not synonymous with the principle of completeness of the civil code, which will be probably never and nowhere realized. And what is more, this is quite unnecessary. As a result of this, a large number of very essential

P. KALENSKÝ, L. KOPÁČ, *Quelques considérations sur le nouveau Code tchécoslovaque du commerce international*, "Bulletin de Droit Tchécoslovaque," 1964, No. 3/4, p. 313.

²³ The term "legal operation in foreign trade" has been used also in Art. 126 of the Principles of Civil Legislation in the USSR and Soviet Federative Republics.

²⁴ The term of international sale is contained also in Art. 1 of the uniform law on the international sale of material movables, constituting an annexe to the Hague Convention of April 1964.

²⁵ So says correctly J. SZWAJA, *op. cit.*, p. 74 and C. PRZYMUSIŃSKI, *op. cit.*, p. 23.

problems from fields regulated by civil law provisions remained outside the code. This pertains in particular to questions which require a complex normalization in a single legal act, as it becomes necessary to use simultaneously norms from other branches of law (e.g. administrative law, financial law and sometimes even penal law).

One could mention as examples several legal acts pertaining to fields which might have a bearing on international trade. For example, the sea code of 1 December, 1961, regulates, among other things, contracts on the carriage of cargo, carriage of passengers, time charter, contracts for the services of a marine agent, shipbroker, towing and piloting contracts, as well as marine insurance.²⁶ The air law of 31 May, 1962 regulates air carriage and other air services. The law on cooperatives and their unions of 17 February, 1961 contains provisions regulating the foundation and functioning of cooperatives as legal persons; and it should be remembered that some Polish cooperatives operate in foreign trade.

The negotiable instruments and cheque law has been also left out of the civil code. This domain continues to be regulated by the 1936 laws based on the Geneva conventions of 1930 and 1931. Separate laws contain also provisions dealing with the author's rights (1952) and inventor's rights (1962).

7. The usefulness of a given legal system for purposes of foreign trade depends to a large extent on the range of the autonomy of will which that law grants the parties.²⁷ It is indicated in this connection to tackle the problem of freedom of contracts as seen by the civil code. The problem was widely discussed even before the new civil code came into force. It was also the objective of a number of statements after the civil code came into force. The question was complicated in a certain sense by the fact that the civil code did not adopt the provision of Article 55 of the former code of obligations which proclaimed in a distinct manner the principle of freedom of contracts, saying that the parties to a contract may arrange their relationship at their discretion, provided the content and purpose of the contract are not prejudicial to public order, law or good usage. One should not, however, ascribe too great a significance to the omission of an equivalent of Article 55 in the new civil code.²⁸ For we know codes which, even though they do not formulate the principle of contracts in a positive way, without a doubt recognize this principle (e.g. the German civil code).

²⁶ Insurance contracts are regulated in the civil code (Art. 805 - 834) and cover property and personal insurance.

²⁷ J. JAKUBOWSKI, *Umowa sprzedaży...* [Sales Contract...], p. 59 ff.

²⁸ The sea code, on the other hand, introduces a provision (Art. 2) which says that with the exception of cases provided for by the law the parties may arrange their relationship at their own discretion.

As a result of this, the existence of freedom of contracts is universally assumed on grounds of the Polish law now in force.²⁹ Another thing that in socialized relations it is seriously restricted due to the introduction of general conditions and models of contracts which often contain absolutely binding provisions. The greatest freedom of contracts is noted in relations between private citizens.

It is indicated in this connection to say a few words about the various manifestations of the freedom of contracts in regard to foreign trade. The principle of the freedom of contracts consists in that the conclusion of a contract depends solely on the will of the parties. It is also left to the discretion of each party to choose the partner. It is only on this last point that we can speak of a certain actual limitation, as in the socialist countries only certain enterprises are empowered to conclude international trade contracts. This is connected with the problem of the so-called special legal ability of legal persons (Art. 36 of the civil code). But we have to do here with a problem which in any case according to the provisions of collision law is subject to the law binding at the headquarters of a legal person (compare, e.g., Art. 9 of the Polish international private law).

The freedom of contracts is manifested in a farreaching release of the parties from the observance of any particular form for the conclusion of obligation contracts. There is no doubt that Polish law fully recognizes this principle. Obligation contracts in the field of trade turnover do not require any particular form to be valid. In accordance with Article 75 of the civil code, only obligation contracts whose value exceeds ten thousand zlotys must be concluded in writing for proving purposes (*ad probationem*). The execution of a legal operation not in writing makes its proving difficult (impossibility of proving through the testimony of witnesses and interrogation of the parties). But the provision of Article VI, paragraph 2, second sentence of the provisions introducing the civil code says that as regards foreign trade relations the civil code provisions on the written form for proving purposes do not apply. This means that the parties themselves may decide what form a legal operation should take. While in accordance with Article 60 of the civil code, with exceptions provided for in the law, the will of a person performing a legal operation may be expressed by any act of that person, which is a sufficient manifestation of its will.³⁰

²⁹ Cf. W. CZACHÓRSKI, *Prawo zobowiązań w zarysie* [An Outline of the Law of Obligations], 1968, p. 10 ff.; A. STELMACHOWSKI, *Wstęp do teorii prawa cywilnego* [Introduction to the Theory of Civil Law], 1969, p. 81 ff.

³⁰ J. GWIAZDOMORSKI, *Nowe przepisy o formie czynności prawnych* [New Regulations on the Form of Legal Operations], in: *Księga pamiątkowa ku czci Kamila Stefki* [Memorial Book in Honour of Kamil Stefko], 1967, p. 72, item 20.

Another, probably the most important manifestation of the principle of the freedom of contracts is the freedom of the parties in drafting the contents of the contract. Polish law is very liberal in this respect in the field of contractual obligations, in distinction from, for example, property law or inheritance law. Civil code provisions pertaining to obligations have as a rule relatively binding character.³¹ They operate only in the absence of different contractual provisions. Imperative provisions are a rarity here (e.g. in cases necessitating protection from exploitation or deceit).³² The situation is partly different, as I have pointed out already, in socialized trade turnover. But the relevant provisions will not apply to contracts concluded within the framework of foreign trade (e.g. provisions on rigid prices, maximum or resultant prices which are set for internal trade—Art. 537 to 540 of the civil code).

Last but not least, it should be stressed that the parties may arrange obligation relations by way of a contract, which are not provided for in the detailed part of the law of obligations (*contractus innominatus*), provided such a contract does not violate the law, the principles of social co-existence and is not aimed at by-passing a law. Thanks to this, parties concluding a foreign trade contract may create an obligation relationship consistent with their aims (e.g. a letter-of-credit contract, a control contract, or a bank guarantee contract).

It may be recognized, therefore, that the range of the autonomy of will of the parties guaranteed by the civil code is sufficient for the needs of foreign trade.

One should bear in mind, however, that everything that has been said so far on the subject of the autonomy of will of the parties concerns solely the scope of the Polish private (civil) law. For independently of the provisions of the civil law every country, that is also Poland, has a large set of binding norms of public law, e.g. administrative or financial, which operate in an absolutely binding manner irrespective of the law proper for a given contract. They are outside the realm of obligation statute, and their applicability does not stem from the legal order to which the contract is subject. This concerns in practice currency and customs regulations, and regulations introducing the necessity of obtaining a licence for

³¹ Compare Art. 5 in connection with Art. 722 of the Czechoslovak code of international trade.

³² Cf., e.g., Art. VI of the provisions introducing the civil code according to which: "Seller's liability for the faults of the goods sold may be limited or excluded with the only reservation that this limitation or exclusion is invalid if the seller deceitfully conceals the fault from the buyer." This provision refers to an analogous principle expressed in Art. 558 of the civil code with the exception, however, that a socialized economy unit can never limit or exclude its liability for faults.

the import or export of certain goods.³³ All these regulations have the character of so-called direct action norms.³⁴

8. Commercial usage plays a very great role in foreign trade relations. The extent to which a legal relationship might be affected by custom depends on the law to which this relationship is subject.³⁵ Usage is taken into account in the Polish civil code in the definition of the consequences of a legal operation (Art. 56), interpretation of the declaration of will (Art. 65 para. 1) and the manner in which obligations are fulfilled (Art. 354). Only established usage may be taken into account. The above provisions constitute, therefore, a sufficient basis for the observance of usage if it exists in regard to a certain type of international trade transactions.³⁶

9. Quite often the civil code uses general clauses. The main role is played here by principles of social coexistence, as well as the socio-economic purpose of a law. It must be also remembered that the clause on principles of social coexistence was introduced in the civil code among other things instead of such general clauses as public order, good faith (in the objective sense) and customs of honest trade, used in the code of obligations. The view has been expressed in Polish literature that if Polish law is proper for the evaluation of a foreign trade relationship one should not resort to the general clauses contained in the civil code, as they are not adapted to international trade turnover.³⁷ But such an extreme attitude is not correct. The general clauses mentioned above are sufficiently elastic to be useful also for obligations in the domain of international trade. This applies in particular to cases in which a general clause serves a closer definition of a legal relationship³⁸ (e.g. Art. 354 of the civil code charging the parties with the duty of fulfilling their obligations in a manner consistent with the principles of social coexistence). It is obvious that a general clause used in regard to a legal relationship within the framework of foreign trade will have a different content and different purpose than in the evaluation of a legal relationship of a purely internal character. The point here will be

³³ J. SKĄPSKI, *Autonomia woli...* [Autonomy of Will...], p. 172; J. JAKUBOWSKI, *Umowa sprzedaży...* [Sales Contract...], p. 40 ff; C. PRZYMUSIŃSKI, *Kodeks cywilny...* [Civil Code...], p. 67.

³⁴ Cf. Ph. FRANCESCOAKIS, *Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles de conflits de lois*, "Rev. cr. de dr. int. privé," 1966, No. 1, p. 1 ff.

³⁵ This is expressly provided for in para. 29, item 1 of the Rules of the Panel of Arbiters at the Polish Chamber of Foreign Trade.

³⁶ A. WOLTER, *Prawo cywilne—zarys części ogólnej* [Civil Law—an Outline of the General Part], 1967, p. 62. For more details on this point: J. JAKUBOWSKI, *Umowa sprzedaży...* [Sales Contract...], p. 118 ff.

³⁷ So says, e.g., C. PRZYMUSIŃSKI, *op.cit.*, p. 66.

³⁸ A. WOLTER, *op.cit.*, p. 68.

that foreign trade contracts should be carried out in accordance with the principles of international cooperation and in a manner consistent with the requirements of honest trade.³⁹ On the other hand, principles strictly connected with the fact that Poland is a socialist country will not be applicable. Their operation is confined solely to relations of a purely internal character.

10. One may come to the conclusion on the basis of all the above arguments that the civil code is fully suitable for the legal regulation of relations in the field of foreign trade. It seems that the difficulties put forth in this respect are not justified.⁴⁰ For by way of a suitable interpretation one may eliminate those provisions of the code which are intended for relations of internal trade, and are not adequate for foreign trade transactions. On the other hand, the fundamental principles of the civil code do not stand in any contradiction to the universally recognized principles of the civil law.

³⁹ J. JAKUBOWSKI, *Umowa sprzedaży...* [*Sales Contract...*], p. 263.

⁴⁰ Hence frequent views were expressed in Polish literature that more correct was the standpoint of the Czechoslovak legislation which decided to introduce a separate code of international trade. Cf. J. JAKUBOWSKI, *op.cit.*, p. 270.

Coordination of National Economic Plans of the Member Countries of CMEA

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I

The international and planned regulation of international division of labour within the Council for Mutual Economic Assistance is the substance of socialist economic integration.

According to the comprehensive programme of economic integration adopted by the XXV Session of CMEA (Bucharest, July 27 - 29, 1971): "the cooperation in the domain of planning and the coordination of plans in particular constitute the basic method for the organization of cooperation and for the establishing of international socialist division of labour."

The shaping of a system of planned links among the CMEA countries constitutes a test of the application of the principle of planning—which has been proved in the internal life of those countries—to international economic relations.

This is a genuine contribution of the CMEA countries to the practice and theory of international economic integration.

The system of planned links offers an opportunity to influence rationally the development and the trends of international division of labour. It creates conditions for making the most of economic resources of each of the CMEA countries and contributes to an ever greater intensification of mutual relations among those countries. At the same time this

system secures the stabilization of external economic links by protecting them from characteristic fluctuations of the world market and from disturbances connected with the functioning of the capitalist monetary system. All this is essentially significant to the CMEA countries which have a planned socialist economy.

II

The establishment of a system of international planned links is, undoubtedly, a complicated matter. The material base for national economic planning in each of the CMEA countries is the fact that socialist States are the owners of basic means of production. Consequently, the key branches of national economy (excluding agriculture) are being administered by the states as owners. Economic relations between the CMEA countries have the character of relations existing among various owners and are being fulfilled on the international socialist market. Thus, no objective circumstances exist to create an uniform development plan for the CMEA community as a whole. It creates a definite framework for the system of international planning links.

The CMEA community has the character of an association of sovereign States. Thus the economic relations are at the same time relations between States as owners and between states as sovereign political subjects. This factor considerably influences the character of the system of international planned links within the CMEA. The planned links can neither violate the rights of States as owners of national wealth, nor can they violate the rights of States as sovereign authorities. It refers particularly to the exclusive right of states to determine national economic plans.¹

These factors, above all, decide that the system of planned links between the CMEA countries is based on coordination. The notion of coordination takes into account both: the need to influence the development of economic relations in a planned manner and the economic and political factors which define the character of socialist economic integration. In that sense coordination means an adjustment of the will of States expressed in an international agreement (in the broadest sense of this term including such form of an agreement as resolutions of international organizations adopted unanimously by all interested countries).

Coordination of national plans of economic development corresponds with the principles of cooperation defined in the Statutes of CMEA of

¹ Cf. E. USENKO, *Formy regulirovanija meždunarodnogo socialističeskogo razdelenija truda*, Moskva 1965 p. 72.

1959 (Art. I, item 2) and confirmed in the comprehensive programme of economic integration of 1971. According to this programme (Part I, Chapter I, item 2) integration is being carried out "in accordance with the principles of socialist internationalism, on the base of the respect of state sovereignty, independence and national interests, non-interference in domestic affairs of states, full equality, mutual benefits and friendly mutual assistance." Directly to the process of coordination of plans refers this part of the programme which States that "the socialist economic integration is being carried out fully voluntarily, is not creating any organs above the State level and is not infringing upon the domestic planning."

III

The Council for Mutual Economic Assistance founded in 1949, focused in the first period of its activity on some questions of foreign trade between member countries. Consequently, it played a certain coordinating role in the development of foreign trade. It could have influenced the economic planning only indirectly.

The Fourth Session of CMEA (March 1954) indicated the necessity of extending the cooperation and the coordinative action to the issues of production. Accordingly, the member countries decided to coordinate bilaterally their economic development plans for the years 1956 - 1960. It appeared, that the embarking on the way of coordination of plans was not linked at that time with the creation of a more general notion of integration, it rather originated from a need to create favourable conditions for the international specialization and cooperation in production, in order to define more proper trends of further industrialization of each of the CMEA countries.

The above-mentioned factor was most probably responsible for the fact that primarily the coordination of plans did not refer to the directions of development of individual national economies in their entirety, but was referring to specific fields of economy, mainly to those, which in the given bilateral agreement proved to be tractable for the development of international specialization and cooperation in production.

A new era in the development of the coordination of plans was opened by the XV Session of CMEA (December 1961) and by the meeting of representatives of the Communist and Workers' Parties of the member States of CMEA in June 1962. This meeting approved the document worked out at the XV Session and entitled *Basic Principles of Interna-*

tional Socialist Division of Labour.² In this document which entered into force after having been approved by the member countries, the coordination of plans has been defined as the principal means of developing international socialist division of labour. Its objectives have been determined as follows:

- adequate taking account of the objectively required proportions in the economic development of each country and the socialist system as a whole, so as to attain a balanced economy in each country;

- assurance of high economic efficiency of international socialist division of labour, expressed in a high rate of growth in production and maximum satisfaction of the needs of the people in each country with minimum expenditure of social labour;

- assurance of combination of international specialization in production with all-round comprehensive development of the individual socialist countries with a view to the fullest and most rational utilization in all the member countries of natural and economic resources including manpower;

- gradual elimination of historically shaped differences in the economic development levels of individual member countries, primarily through industrialization of countries with relatively low economic levels, and through maximum utilization of the internal potentialities of each country and of the prevalence of the world socialist system.

It appears from the above-mentioned premises that the interests of individual member countries—economic and others—have become the origin of the coordination of plans. The community development cannot be carried out at the expense of even a temporary upsetting of the economic balance of a member country but through securing this balance. The economic efficiency of the international division of labour is not considered in an absolute way, but is linked with the aim of levelling off the differences in the economic development of member countries.

“Basic principles of international socialist division of labour” have also introduced new elements to the scope and procedure of the coordination of plans. Since then, the coordination has embraced also general questions of development of each national economy in its entirety and this has led to the initiation of coordination of perspective plans (and not only of the current five-year plans). A principle, very important from the practical point of view, has been accepted: that the coordination is to be carried out already at the stage of working out of

² See *Mnogostoronnee ekonomičeskoe sotrudničestvo socialističeskikh gosudarstv (sbornik dokumentov)*, Institut Gosudarstva i Prava Akademii Nauk SSSR, Moskva 1967, pp. 23 - 39.

national plans by individual countries and not after the approval of these plans by proper State authorities. Thus, new possibilities for common exploration and determination of the course of cooperation have been opened.

Finally, an attempt was undertaken to give the coordination of plans a more many-sided character. As a structural expression of this attempt a new body of CMEA has been set up—a Bureau of the Executive Committee of CMEA for all-round problems of economic plans. The Bureau consists of deputy chairmen of the State planning organs of member countries (Art. VII, item 1 of the Statutes of CMEA with the amendment introduced in 1962). The Bureau is entitled to present to the Executive Committee drafts of recommendations for member countries concerning the coordination of plans.

IV

In order to characterize the coordination of economic plans of the CMEA countries from the legal point of view, attention has to be drawn first of all to the fact, that this coordination is a process composed of several unilateral, bilateral and multilateral acts. The following typical elements of this process can be listed:

(a) supplying of informative materials to the appropriate organs of CMEA by each country;

(b) preparation of proper balance-sheets by the organs of CMEA;

(c) exchange of views within the CMEA organs, particularly within the Bureau of the Executive Committee for all-round problems of economic plans;

(d) adoption of appropriate recommendations for member countries by the Executive Committee of CMEA and to some extent also by the Specialized Agencies of CMEA;

(e) bilateral consultations of central planning organs of CMEA countries terminated by the drawing up of joint documents;

(f) conclusion by the CMEA countries of five-year trade agreements covering total mutual turnover, agreements on specialization of production, agreements on cooperation in production, agreements on raw materials, agreements on scientific and technical cooperation, investment agreements, etc.

This survey, far from being complete indicates, however, that the coordination of plans should not be linked with any particular act of law. It should rather be stated that the process of coordination is permanent. The five-year trade agreements, which in practice express the coordi-

nation most fully, are being concluded for a period of time corresponding to the planning period. Other above-mentioned agreements while constituting also elements of coordination are being concluded rather on the basis of defined material factors than on the basis of formalistic ones. This flexibility is still more accentuated in the case of perspective plans, the coordination of which—with the lapse of time—has to be constantly adjusted to changing conditions. Consequently, it requires permanent verification.

V

The coordination of economic plans of the CMEA countries finds its expression in resolutions of international organizations and in international agreements. It can be stated with a certain simplification that the resolutions of international organizations take into account multilateral elements of the process of coordination whereas international economic agreements take into account bilateral elements.

The Council for Mutual Economic Assistance is influencing the process of the coordination of plans through issuing recommendations for member countries. The CMEA recommendations usually concern questions of crucial significance for the development of the whole community and are of interest to all or in any case to the majority of member countries. Such recommendations are mainly based on balance-sheets prepared by the CMEA organs on the basis of data received from individual countries.³ They suggest to the States how to solve problems emerging from these balance-sheets.

As it is well known the CMEA recommendations are not binding, but the member countries are obliged to consider them.⁴ The member countries are obliged to inform the Council within 60 days about the result of the deliberation of the recommendation. The acceptance of a recommendation by member countries creates—on the basis of Article II, item 4a of the CMEA Statutes—the obligation to fulfil such a recommendation. Thus, countries accepting the methods of solving common problems formulated in recommendation on the coordination of plans commit themselves to follow a certain course of action in their mutual relations. The discussed recommendations cannot be implemented directly, they con-

³ Cf. E. USENKO, *op. cit.*, pp. 401 - 403.

⁴ See Art. IV of the Statutes of CMEA. Cf. H. de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawnomiędzynarodowe* [Council for Mutual Economic Assistance. *International Law Study*], Warszawa 1967, pp. 89 - 91.

stitute only in fact the starting point in the process of coordination of plans, and the starting point for further law-making process. Though, the stress is being shifted to bilateral relations.

In the process of coordination of plans in specific sectors of economy, a constantly growing role is being played also by specialized agencies of the CMEA countries, e.g. Organization for the Cooperation in the Industry of Rolling Bearing, Organization for the Cooperation in Metallurgy "Intermetal," Organization for the Cooperation in Chemical Industry "Interchim."⁵ The legal structure of resolutions of these organizations sometimes departs from the pattern of the CMEA recommendations. However, also the resolutions of these organizations, although they are often much more concrete and particular than the CMEA recommendations, are not acts which would crown, the process of coordination but which define starting points for bilateral negotiations.

The coordination of plans assumes the ultimate shape for a given period as a result of negotiations and conclusion of bilateral agreements. These negotiations are of a considerably broader scope than are the resolutions of international organizations, they include also questions which are of interest only to partners in their bilateral relations. In bilateral negotiations the partners are bound, however, by directives on the course of action specified in CMEA recommendations, which they have accepted, and by resolutions of specialized agencies.

Bilateral relations comprise two stages of proceeding. The first stage: consultations of central planning organs, carried out before the acceptance of national economic plans by competent state authorities. Problems are being examined first of all from the point of view of partners' possibilities and needs in production. The aim of these consultations is not yet the shaping up of obligations in the sphere of exchange. The question is rather to search jointly for possibilities of intensification of mutual relations through the specialization and cooperation in production, through the coordination of investment scheme, etc. This joint search influences the shaping up of the drafts of national economic plans being presented by the planning organs to the proper State authorities for their approval. Joint document drawn up as result of these consultations is usually named a protocol. It is not simple to define the legal character of such a protocol. It is difficult in particular to establish whether a protocol constitutes already an international agreement, but still requires to be specified in agreements concluded after the approval of plans by the proper State authorities, or whether this protocol represents only a certain

⁵ Cf. P. TOKAREWA, *Stanovlenie sistemy mezhdunarodnyh organizacii socialističeskikh stran*, "Sovetskoe Gosudarstvo i Pravo," 1967, No. 10.

stage of preparatory works, leading to the conclusion of such agreements. It seems that such a protocol has the value of an international agreement, but only in a restricted sense: it is obliging the parties to take account of the outcome of consultations in the drafts of plans which are being prepared by their central planning organs. This restriction obviously does not apply to those provisions of the protocols which originate from CMEA recommendations previously adopted by member countries, and which because of this acceptance, are already binding.

This cautious interpretation of the legal character of protocols derives from the fact that joint conclusions of planning organs cannot be legally binding for State authorities which are constitutionally authorized to give the final shape to the national economic plans. The crucial significance the protocol has in the process of coordination of plans is not based on legal considerations but on their factual role in this process.

The so far discussed stages of the process of coordination decide in practice about the choice of main courses of the development of the international division of labour. However, the legal obligations acquire their final shape in economic agreements concluded after the competent state authorities have approved the plans.

Economic agreements of the CMEA countries concluded as result of the coordination of plans, have up till now defined mainly the obligations of States in the sphere of exchange. The coordination of production plans acquires its economic meaning only when it becomes the base for the increase of mutual turnovers and when it really serves the intensification of mutual economic bonds. With the development of the process of integration arises a tendency to deal in economic agreements with production and exchange matters in a complex manner. This tendency is reflected in some agreements concerning international specialization and cooperation in production. Such agreements provide—on a scheme base—that State *A* shall develop production *X* having in mind the needs of State *B* and simultaneously shall give up production *Y* or restrict its development. On the other hand State *B* shall develop production *Y* having in mind the needs of State *A* and simultaneously shall give up production *X* or shall restrict its development accordingly.

Agreements on specialization and cooperation in production, on supplying raw materials, on investments and scientific and technical cooperation have the character of a fragmentary regulation and they are related to particular spheres of cooperation or particular undertakings. Strictly speaking, they do not belong to the process of coordination of plans (in the narrow meaning of its concept) but they result from it. Whereas the five-year trade agreements constitute a most general recapitulation of the process of coordination of plans. They comprise the

entirety of the mutual turnover including all elements determined in the above-mentioned detailed agreements. The system of concluding trade agreements for five-year planning periods is for the parties a formal and binding expression of coordination.

VI

The five-year trade agreements establish complete lists of goods for mutual deliveries. These lists have a detailed character, they define the size of deliveries in each group of goods (in tons, number of units, meters—depending on the group of goods). The lists are usually named good quotas but this definition is not quite precise. The good quotas are often understood as the determination of the maximum amount of import in each of the category of goods. Whereas the lists enclosed to the five-year trade plans of the CMEA countries have the character of definite import and export obligations. They do not specify the upper limit of transactions in different branches, but they specify the minimum levels of obligatory deliveries. For instance Article 4 of the trade agreement for the years 1971 - 1975 between the Polish People's Republic and the German Democratic Republic states that enterprises of each of the parties may conclude foreign trade contracts concerning goods which are not listed and also goods which are listed, after the quotas have been exhausted.

It is evident that in the economic agreements of the CMEA countries concluded in the process of coordination of plans, a specific type of international obligations has been shaped which is corresponding to the economic function of socialist States. The evaluation of the character of the lists of goods proves that these obligations do not create only a framework of international law for economic turnover (as it is the case with traditional good quotas), but they constitute material obligations for the parties.

A material obligation in international economic agreement is such an obligation, by which—without any doubt—the parties intend to achieve specific material results in a definite time, creating a precise commitment, which can be a sufficient base for eventual material claims.

From the legal point of view it would seem that the establishing of material obligations in the above-mentioned sense constitutes a specific feature of the process of coordination of economic plans of the CMEA countries. The socialist States as owners of basic means of production introduce new elements into the practice of international economic agreements, elements which are not yet sufficiently explored.

VII

The comprehensive programme of economic integration of 1971, while stressing that "the cooperation in planning and particularly the coordination of plans is the basic method of cooperation" anticipates a whole set of measures opening a new era in the development of coordination of plans. The most important of these measures can be characterized as follows:

1. To include into the cooperation the prognostic activities. This way the States undertake the obligation to carry out a joint study of premises of long-term and five-year planning, the premises which previously were not the subject of organized cooperation within the CMEA. So, we note a constant tendency to extend the time perspective of cooperation in the domain of planning. Primarily this cooperation included only five-year plans, then perspective plans too, and finally also prognostic activities. One can see it as a logical result of the development of integration which—while satisfying certain needs—creates new ones.

2. To determine the notion of planning for a longer perspective. In this respect the CMEA countries decided (Part I, Section IV, item 12 of integration programme) that perspective planning shall determine the main tendencies in the development of more important branches of national economy and the categories of production for 10 to 20 years. It shall also comprise the basic aims of economic policy of each country for a longer period of time in the sphere of socio-economic as well as scientific and technical progress. This way the directions of planning for average periods of time shall be determined, (in the hitherto existing practice the plans for average periods of time have been understood as the five-year plans), as well as for the participation of each country in the international division of labour.

3. To improve the coordination of five-year plans (Part I, Section IV, items 18 - 23 of the integration programme). The changes in this field intend, generally speaking, to transfer more decisively the centre of gravity from the coordination of exchange to the coordination of production and investments. Consequently, the coordination should concentrate on problems which are decisive for the development of economic, scientific and technical relations within the CMEA, and play an important role in the working out of five-year economic plans of the member countries. Simultaneously, in the course of cooperation, the following questions are being considered and agreed upon: a) main course of progress and of cooperation scientific and technical, b) the development of specialization

and cooperation of production in order to organize production in reasonable proportions on the base of modern technology, c) the coordination of building of specific investments which are the subject of common interest, d) nomenclature, the scope and timing of mutual deliveries of goods and of services, with the taking into account economic conditions of deliveries.

4. To introduce joint planning in specific branches of industry and types of production. This new form of cooperation in the sphere of planning requires a wider and separate consideration in the following paragraphs of this Article.

VIII

The coordination of national plans refers to the entirety of economic relations within the CMEA. However, in some fields there is a noticeable necessity of a stronger unification and integration of efforts. Joint planning as a new form of cooperation put forward in the integration programme (Part I, Section IV, items 24 - 30), meets this necessity.

Contrary to the coordination of plans, joint planning in its very assumption relates only to particular branches or particular types of production. An opinion can be met that joint plans should be related first of all to those branches and types of production which are decisive for the all-round scientific, technical and economic progress and require big expenditure. The integration programme anticipates that in the optimal case joint planning should regulate in a complex manner the preparation of production, its initiation and its disposal. The plans should link the development of a given production with the proper development of the scientific and technical base, they should include provisions concerning purchase and sale of licences, etc. Obviously, a narrower scope of joint planning is also possible.

From the formal point of view, joint planning differs from the coordination of plans mainly by its facultative character. The obligation to participate in mutual coordination of economic plans derives from the statutes and resolutions of CMEA. However, the participation in joint planning requires in every case an agreement of countries involved. It is intended to extend the variety of forms of cooperation and not to find a general solution. The choice of this new form, in every case, has to be based on a free decision of the parties.

The introduction of amendments in national economic plans of the CMEA countries, falls in the exclusive jurisdiction of the proper State authorities. The coordination of plans in its traditional form does not

restrict this jurisdiction because of the specific shape of international obligations. From the legal point of view, international obligations undertaken as a result of the coordination of plans can be enforced only in the sphere of mutual deliveries. It is obvious that commitments related to the deliveries have their influence on the shape of plans and on the freedom to introduce changes of plans by the state authorities. But it is only an indirect, factual influence and not a juridical restriction. That may create, it seems, certain difficulties in the cooperation.

It would appear that one of the aims of the joint planning is to eliminate consistently eventual difficulties connected with the changes of national economic plans occurring during their implementation. It refers, of course, to such changes which are undertaken without a common agreement of interested partners. So, a joint plan is not just a sum of coordinated elements of national economic plans, as it is the case with traditional coordination of plans. These elements, without losing their ties with national plans, become at the same time, components of a new separate quality—a joint plan. They are protected by an international agreement.

Contrary to the coordination of plans, joint planning can be defined as a first effort to introduce to the CMEA a new institution—the international planning. One should, however, stress that it is being done very cautiously. The integration programme States that “the member countries of CMEA shall in the first stage carry out joint planning related to a limited number of products and lines of production, and while gaining experience in the sphere of joint planning, they shall gradually extend the scope of joint planning.” The programme of integration States also the principle that “joint planning does not infringe on the independent character of national planning” and that “joint planning is carried out on condition of preserving the national ownership of relevant productive potentials and resources.”

Le problème de l'interprétation uniforme du droit commun des pays du CAEM

par JERZY JAKUBOWSKI

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L'histoire du droit uniforme à l'échelle internationale prouve que certaines dispositions de ce droit sont interprétées de façon différente par les tribunaux des pays engagés par l'acte du droit uniforme, et cela surtout par manque d'une juridiction internationale uniforme. A titre d'exemple on cite le plus fréquemment les interprétations divergentes de la convention de Varsovie sur l'uniformisation de certains principes relatifs aux transports aériens (de 1929)¹ et de la convention de Genève (1930) sur les lettres de change et billets à ordre².

Ces phénomènes se sont également manifestés pendant l'application du droit commun des pays membres du Conseil d'assistance économique

¹ Cf. notamment J. RAJSKI, *Odpowiedzialność cywilna przewoźnika lotniczego w prawie międzynarodowym i krajowym* [Responsabilité civile du transporteur aérien dans le droit international et national], Warszawa 1968, pp. 22 - 25, 29 - 31, 37 - 38, 45 - 46, 59 - 63, 88 - 102.

² Cf. E. CAEMMERER, introduction à la publication (dont il est le rédacteur en chef) *Internationale Rechtsprechung zum Genfer einheitlichen Wechsel- und Schecrecht*, T. II, Berlin - Tübingen 1967, p. XII.

mutuelle³, et tout particulièrement lors de la mise en oeuvre des conditions générales de livraison CAEM 1958. Nous étudierons ici les principaux problèmes soulevés par leur interprétation divergente, notamment l'interprétation donnée à celles des dispositions du préambule qui prévoient la possibilité de renoncer à certaines dispositions des conditions générales⁴, à la possibilité pour l'acheteur, de renoncer au contrat en cas de marchandises défectueuses (*actio redhibitoria*)⁵, à la conception de la force majeure (§ 46)⁶, à l'admissibilité de la modération des pénalités conventionnelles⁷, à l'admissibilité de la revendication d'une indemnité pour des dommages subis réellement⁸, à la compétence du tribunal d'arbitrage dans les cas d'une demande reconventionnelle selon le § 65⁹, à l'interprétation du terme « droit matériel du pays du vendeur » dans le § 74¹⁰.

Très tôt, on s'est intéressé à la nécessité d'une application uniforme du droit commun des pays du CAEM. Les conditions uniformes de livraison sont entrées en vigueur le 1^{er} janvier 1958 dans le CAEM et en 1960 a eu lieu la première conférence des Cours d'arbitrage du commerce extérieur des pays du CAEM. Cette conférence — et celles qui l'ont suivie — avait pour but de concourir à l'application uniforme du droit

³ Sur le développement du droit commun des pays du CAEM, Cf. J. JAKUBOWSKI, *Integracja gospodarcza krajów RWPG, a niektóre problemy unifikacji prawa* [L'intégration économique des pays du CAEM et certains problèmes de l'unification du droit], «Państwo i Prawo», 1970, fasc. 5, p. 677 et s.

⁴ Pour les détails voir: J. JAKUBOWSKI, *Dopuszczalność odstąpienia w kontrakcie od postanowień ogólnych warunków RWPG* [Admissibilité de renonciation, dans le contrat, aux dispositions des conditions générales CAEM], «Prawo w Handlu Zagranicznym», 1967, fasc. 15, pp. 32 - 41.

⁵ Cf. le commentaire publié sous la rédaction de M. KEMPER, *Liefervertrag, Montagevertrag, Kundendienstvertrag im Aussenhandel der RGW-Staaten*, Berlin 1967, pp. 182 - 183.

⁶ *Ibid.*, pp. 199 - 200 et 203 - 204.

⁷ *Ibid.*, p. 237.

⁸ Cf. p.ex. J. JAKUBOWSKI, *System odpowiedzialności w ogólnych warunkach dostaw RWPG 1958* [Le système de la responsabilité dans les conditions générales de livraison CAEM 1958], «Prawo w Handlu Zagranicznym», 1962, fasc. 1, pp. 34 - 35; M. KEMPER, *Spezialregelung durch die AB/RGW der Nicht- und nichtgehörigen Erfüllung der Lieferpflicht und ihre Anwendung in der Spruchpraxis*, «Recht im Aussenhandel», 1964, fasc. 11, p. 1 et s., ainsi que la traduction polonaise de cet article dans «Prawo w Handlu Zagranicznym», 1965, fasc. 10, pp. 18 - 19.

⁹ Cf. notamment Z. L. NANOWSKI, *Sprawa dopuszczalności powództwa wzajemnego na podstawie § 65 o.w.d.RWPG 1958* [Le problème de l'admissibilité d'une demande reconventionnelle sur la base du § 65 des conditions générales de livraison CAEM 1958], «Prawo w Handlu Zagranicznym», 1967 fasc. 15, pp. 42 - 47.

¹⁰ Cf. J. JAKUBOWSKI, *Umowa sprzedaży w handlu międzynarodowym — Metody i formy regulacji* [Le contrat de vente dans le commerce international — Méthodes et formes de la régulation], Warszawa 1966, pp. 222 - 225.

commun de ces pays¹¹. Des hommes de science, notamment M. Kemper et J. Kirsten de la R.D.A.¹², se sont penchés dès 1962 sur ces problèmes qui ont ensuite fait l'objet des publications de M. Kemper¹³ et d'autres auteurs¹⁴.

Tout comme dans le domaine de l'interprétation des actes d'unification universelle, dans celui de l'interprétation du droit commun du CAEM la voie à suivre conduit par la pluralité des moyens destinés à préserver l'uniformité de l'interprétation.

L'information sur la pratique des Cours d'arbitrage constitue un de ces moyens¹⁵. Nombre de décisions sont publiées, mais en majorité elles le sont dans des revues nationales, souvent peu accessibles à l'étranger (en Pologne « Prawo w Handlu Zagranicznym » [Le droit dans le commerce extérieur] — publié par la Chambre polonaise du commerce extérieur ; en U.R.S.S. « Sbornik informacionnyh materjalov » publié par la Chambre fédérale du commerce; en Tchécoslovaquie « Právní Zpravodaj čs. zahraničního obchodu » publié par la Chambre tchécoslovaque du commerce ; en R.D.A. « Recht in der Aussenwirtschaft »). Aussi la proposition, à l'étude actuellement dans le cadre de la Conférence des représentants des pays membres du CAEM pour les questions juridiques,

¹¹ Sur l'histoire et les tâches de ces conférences — lire S. N. BRATOUS, *Cooperation among Arbitration Organizations of European Socialist Countries*, matériaux du III^e Congrès international d'arbitrage (Venise 6 - 8 X 1969) publiés dans *Coopération entre organismes d'arbitrage — Cooperation among Arbitration Organizations*, Turin 1970, pp. 219 - 228.

¹² M. KEMPER, J. KIRSTEN, *Rechtsfragen der neuen Etappe internationaler ökonomischer Beziehungen zwischen den Mitgliedstaaten des Rates für Gegenseitige Wirtschaftshilfe*, «Staat und Recht», 1962, fasc. 12, p. 2187. Cf. de mêmes auteurs, *Fragen des gemeinsamen Leitungsmechanismus der RWG-Mitgliedstaaten*, *ibid.* 1965, fasc. 1.

¹³ Par exemple M. KEMPER, L. RÜSTER, *Probleme der Auslegung international-einheitlicher Spezialnormen der RWG-Länder*, «Recht im Aussenhandel», 1965, fasc. 11 - 12, pp. 1 - 12; *Liefervertrag*, p. 59 et s.

¹⁴ Par exemple L. A. LUNTZ, *Meždunarodnoe častnoe pravo*, t. II, Moskwa 1963, p. 126; H. STROHBACH, *III Konferenz der Schiedsgerichte und Aussenhandelskommissionen in den RWG-Mitgliedsländern*, «Recht im Aussenhandel», 1965, fasc. 4, p. 1 et s.; J. JAKUBOWSKI, *Próby unifikacji prawa w ramach RWPG* [Essais d'unification du droit dans le cadre du CAEM], «Sprawy Międzynarodowe», 1965, fasc. 9, pp. 46 - 47; H. WAGNER, D. KRETZSCHMAR, *Die allgemeinen Lieferbedigungen des RWG 1968 — Textausgabe mit einer Darstellung der Entwicklung der ALB/RGW und mit Erläuterungen*, Berlin (RDA) 1970, p. 78; H. STROHBACH dans la critique de ce dernier livre, «Staat und Recht», 1970, fasc. 8, p. 1337.

¹⁵ Cf. entre autres H. SPILLER, *Die objektive Tendenz zur Internationalisierung des Wirtschaftslebens und die Rechtsentwicklung*, «Staat und Recht», 1963, fasc. 7/8, p. 1188; M. POSCH, V. PETEV, *Probleme der Angleichung und Vereinheitlichung zivilrechtlicher Materien der sozialistischen Länder*, *ibid.*, 1964, fasc. 5, p. 865.

invitant à créer une revue commune consacrée aux aspects juridiques de la coopération économique et scientifico-technique, mérite-t-elle d'être encouragée. La revue publierait les principales sentences arbitrales, renfermant des thèses d'un caractère général. Élaborée en russe ou en deux langues — par exemple le russe et l'allemand — la revue deviendrait un instrument précieux pour une application uniforme du droit commun des pays du CAEM.

La propagation de la littérature sur le droit commun des pays du CAEM a une réelle importance. Cette littérature, plus riche chaque année, devient, par la force des choses, plus exhaustive.

Mais aussi efficace soit-elle, l'information ne peut à elle seule assurer l'uniformité de la jurisprudence; des mécanismes institutionnels sont indispensables. Leur besoin a été ressenti assez vite puisque le premier acte du droit commun des pays du CAEM est entré en vigueur le 1^{er} janvier 1958 (Conditions générales de livraison CAEM 1958) et, dès 1960, a eu lieu à Prague la première conférence des Cours d'arbitrage du commerce extérieur des pays du CAEM, c'est-à-dire d'un organisme chargé d'uniformiser l'application des actes du droit commun. Il suffit d'ailleurs de jeter un coup d'oeil sur les thèmes des conférences (Prague 1960, Moscou 1963, Berlin 1965, Varsovie 1966, Varna 1969); ils sont explicites¹⁶.

Des questions peuvent être posées sur l'efficacité de cette institution du point de vue d'une application uniforme du droit communautaire des pays du CAEM. Pour apprécier sous cet angle l'activité des conférences des Cours d'arbitrage, remarquons d'abord que les décisions de la conférence sont des recommandations qui n'engagent pas les tribunaux d'arbitrage participant à la conférence. Ajoutons encore qu'on n'a pas atteint l'opinion commune dans toutes les questions traitées, comme en témoigne indirectement le fait que certains de ces problèmes ont été discutés au cours des cinq conférences. Un exemple des difficultés éprouvées dans l'uniformisation de la jurisprudence par ce moyen est donné par la notion du « droit du pays du vendeur » prise dans le § 74 des conditions générales de livraison CAEM 1958. Dès la première conférence des Cours d'arbitrage qui eut lieu à Prague en 1960, ses participants décidèrent qu'il s'agissait du droit civil général. Et bien que cette opinion fut corroborée par les conférences suivantes, il arriva à la Com-

¹⁶ Cf. Z. L. NANOWSKI, *IV konferencja przewodniczących sądów arbitrażowych handlu zagranicznego krajów-członków RWPG* [La IV^e conférence des présidents des tribunaux d'arbitrage du commerce extérieur des pays membres du CAEM], «Prawo w Handlu Zagranicznym», 1967, fasc. 15, pp. 108 - 117; J. JAKUBOWSKI, Z. L. NANOWSKI, *V konferencja sądów arbitrażowych krajów-członków RWPG, Varna 1969* [La V^e conférence des tribunaux d'arbitrage des pays membres du CAEM, Varna 1969], *ibid.*, pp. 23 - 24, 187 - 195; S. N. BRATOUS, *Coopération...*, pp. 219 - 228.

mission d'arbitrage du commerce extérieur roumain près la Chambre du commerce roumaine, de prendre, dans le domaine de la prescription, des décisions mettant en oeuvre les dispositions du droit sur les rapports entre organisations socialistes internes¹⁷. Cette divergence ne fut éliminée qu'en 1968 par le nouveau texte des conditions générales de livraison.

Pour ces raisons il faudrait envisager des moyens capables d'augmenter l'efficacité des décisions de la conférence. Le règlement de la conférence devrait imposer un caractère obligatoire aux décisions prises par la conférence. Ce serait un pas de plus vers la garantie institutionnelle de l'uniformité de la jurisprudence.

Les directives d'interprétation adaptées au caractère du droit commun peuvent contribuer à une application uniforme du droit commun des pays du CAEM. Il s'agit de directives spécifiques à l'interprétation du droit commun des pays du CAEM.

En ce qui concerne l'interprétation linguistique, soulignons que le problème des textes en langues multiples ne se pose pas, tous les documents étant établis en russe, choisi pour langue originale. Le principe fondamental de l'interprétation linguistique consiste en ce que les phrases interprétées auront reçu la signification acceptée par l'usage dans la langue du document. Dans le cas des actes du droit commun des pays du CAEM, ce sera la signification usuelle de la langue russe. Seulement au cas où l'interpréteur constaterait une phrase employée dans un sens autre qu'usuel, il doit prendre ce sens différent en considération.

Cela est relativement simple si l'on se trouve devant une expression adoptée par la science qui se sert, c'est notamment le cas des sciences exactes et des sciences naturelles, de notions uniformes internationales ou tout au moins communes dans les pays du CAEM. Un terme juridique présente davantage de difficultés en raison des différences dans la compréhension de nombreux termes juridiques par les systèmes juridiques des pays membres. A titre d'exemple citons le terme « présentation de prétentions » (dans l'original russe : « predjavlenie pretenzii ») employé dans le § 64 des conditions générales de livraison CAEM 1958, qui a embarrassé la Cour d'arbitrage près la Chambre du commerce extérieur de la R.D.A., parce que dans le droit de la R.D.A. ce terme (*Geltendmachung des Anspruchs*) désigne une plainte déposée au tribunal contre un débiteur même et pourtant il ressort clairement du para. 64 des conditions générales de livraison CAEM 1958 qu'il s'agit de prétentions adressées au débiteur. Ce terme provient du droit soviétique où il désigne ce qu'entend par lui

¹⁷ Cf. I. NESTOR, *A Theoretical Survey on Arbitral Practice in Foreign Trade Issues*, «Revue Roumaine des Sciences Sociales», Série des Sciences Juridiques, 1967, fasc. 2, p. 260.

le § 64 des conditions générales de livraison CAEM 1958¹⁸. Ce problème bien connu dans la théorie et la pratique du droit international privé peut être résolu de deux façons dans le cas du droit commun des pays du CAEM : ou bien par l'emploi de l'interprétation admise dans le système juridique du pays donné du CAEM ou par l'adoption d'une interprétation autonome par rapport aux systèmes juridiques intérieurs des pays membres, basée sur des études comparatives du droit des pays du CAEM. A mon avis, la première solution n'est pas bonne, et cela pour de nombreuses raisons.

Il n'est pas toujours possible de déterminer le système juridique qui a servi de base. Parfois, quoique rarement, la construction juridique adoptée pour une question donnée ainsi que le matériel préparatoire sont révélateurs du système dans lequel a été puisée la solution introduite dans l'acte du droit commun ; c'était le cas du terme « présentation de la prétention » du § 64 des conditions générales de livraison CAEM 1958, qui provient du droit soviétique. Et même lorsqu'il est possible d'établir le système juridique national, ce n'est pas une solution juste pour le problème représenté par la compréhension d'un terme juridique utilisé dans le droit uniforme des pays du CAEM, puisque la référence, en matière d'interprétation, à une législation intérieure, conduit nécessairement à une régression du caractère international des normes communes et à une influence de cette législation sur l'acte normatif, uniforme à l'échelle du CAEM. L'impossibilité de résoudre d'une manière satisfaisante le problème : faut-il se baser sur l'état de ce droit pendant le temps de la création de l'acte de droit commun ou sur l'état actuel qui prend en considération les changements survenus dans ce droit intérieur, agit également contre l'emploi du droit intérieur dans les cas de ce genre.

Dans l'exemple du § 64 des conditions générales de livraison CAEM 1958, on a pu se servir du sens juridique du terme « présentation de la prétention » dans le droit soviétique, mais en réalité c'était inutile, car l'analyse de l'alinéa 2 de ce paragraphe ne laisse aucun doute sur son sens : il s'agit non d'une demande déposée au tribunal, mais chez le débiteur.

La méthode connue dans la théorie du droit international privé sous le nom de théorie autonome de la qualification, convient mieux. Difficile à appliquer dans l'interprétation des actes d'unification universelle, parce que les systèmes juridiques des pays qui participent à l'unification universelle appartiennent à des groupes de systèmes, d'économies et de cultures différents, elle peut être efficace dans l'interprétation du droit commun des pays du CAEM, homogènes du point de vue de leur système so-

¹⁸ M. KEMPER, L. RÜSTER, *op.cit.*, p. 7.

cial et politique, et se trouvant à une étape rapprochée du développement économique. L'analyse d'un acte donné du droit commun, qui, en règle, fournit des bases pour la résolution du problème, a de ce point de vue une importance particulière.

M. Kemper et L. Rüster citent en outre des termes qui, tels « la spécificité de la marchandise », ne figurent pas dans le droit national¹⁹. C'est à juste titre qu'ils recommandent de ne les qualifier qu'à la lumière du droit commun. Remarquons en marge que, bien souvent, de tels termes ne tirent pas leur origine de la législation, mais de la vie économique, ce qui force à adopter, en tant que système des références, les termes usités dans la pratique du commerce.

Passons maintenant à l'interprétation systématique du droit commun des pays qui font partie du CAEM. En tête se place la directive ordonnant de déterminer le sens de la norme interprétée de manière à harmoniser le mieux possible avec l'ensemble du système juridique auquel la norme appartient. Comme dans le cas des actes d'unification universelle, dans celui des actes du droit commun du CAEM naît également la question : qu'est-ce qui constitue le système juridique auquel appartient l'acte du droit commun des pays du CAEM?

Deux solutions sont possibles : ou admettre qu'ils sont constitués par les systèmes juridiques des pays membres du CAEM, ou reconnaître l'acte comme une partie intégrale du droit commun des pays du CAEM.

L'inclusion d'un acte du droit commun dans les systèmes juridiques nationaux ne peut avoir, dans le domaine de l'interprétation, que des suites fâcheuses : la déformation de l'acte du droit commun par son intégration dans les lois nationales et l'apparition, dans ces systèmes juridiques, de nombreuses versions de cet acte. Cette conception conduit à la régression du caractère international des actes du droit commun et entrave le développement du système juridique de la Communauté socialiste comme un tout. Seule doit être estimée juste la reconnaissance des actes en tant que parties intégrales d'un système séparé et déjà développé du droit commun des pays du CAEM, qui est un système juridique à indépendance et autonomie avancées.

A l'égard des actes d'unification universelle, la prudence est indiquée dans l'usage, à des fins d'interprétation, des autres actes du droit uniforme. Cette prudence me semble justifiée par la différenciation de l'objet de chacun des actes, par la composition différente des pays participant aux divers actes et par les différences de système, de niveau du développement et des traditions culturelles. Ces facteurs n'exercent aucune influence sur l'uniformisation du droit dans le cadre de la Communauté

¹⁹ *Ibid.*, p. 8.

socialiste. Le développement du droit commun des pays du CAEM s'effectue dans des domaines d'une vie assez proche ; il suffit de dire que les dispositions uniformisées en matière des rapports livraison - vente (conditions générales de livraison CAEM 1958) ont été suivies de l'unification des dispositions étroitement reliées à ces rapports : des dispositions sur le montage des machines et installations livrées (conditions générales de montage CAEM 1962) et des dispositions relatives au service après-vente des articles industriels (conditions générales de service technique CAEM 1962). Elles sont d'ailleurs reliées, comme en témoigne le § 28 des conditions générales des services techniques CAEM 1962 (devenues — conditions générales de livraison CAEM 1968). La composition des pays qui participent aux actes du droit commun est en principe identique. L'homogénéité des systèmes socio-économiques de ces pays et un niveau proche du développement facilitent également l'interprétation des dispositions des actes du droit commun dans le contexte de l'ensemble de ce droit.

M. Kemper et L. Rüster estiment que l'ensemble du droit commun doit être traité comme un contexte interprétatif. Ils se réfèrent aussi bien aux relations entre les divers actes de ce droit qu'à la convergence de nombreuses dispositions. Par exemple, les conditions générales de service technique CAEM 1962, prêtées dans le cadre des garanties, dépendent des conditions générales de livraison CAEM 1958 (actuellement : 1968). De nombreuses dispositions des conditions générales CAEM ont une teneur identique²⁰.

Réfléchissons maintenant sur l'admissibilité, dans le domaine de l'interprétation systématique, de la référence au droit intérieur des pays du CAEM. L'utilisation d'un droit national déterminé lors de l'interprétation des actes d'unification universelle ne peut être justifiée que dans des cas exceptionnels, lorsqu'il est hors de doute que l'expression employée a été puisée dans ce droit. L'homogénéité des systèmes des pays du CAEM, reflétée partiellement dans le droit, fait qu'au cas de l'interprétation du droit commun des pays du CAEM l'usage du droit intérieur est possible dans une mesure plus large que lors de l'interprétation des actes d'unification universelle. Elle doit pourtant se baser sur le principe de n'utiliser que celles des dispositions des droits nationaux qui leur sont communes, et être faite en partant d'une attitude juridique comparative. Soulignons une fois de plus que la référence aux droits nationaux est un moyen auxiliaire, à caractère exceptionnel.

En acceptant l'admissibilité de l'utilisation, dans le domaine de l'interprétation systématique, des éléments communs contenus dans les droits nationaux, nous devons décider s'il s'agit de l'ensemble du droit civil

²⁰ *Ibid.*

ou seulement du droit civil général, comme c'est le cas de la théorie et de la jurisprudence, confirmé dans le § 110 des conditions générales de livraison CAEM 1968. La limitation au droit civil général me semble infondée puisqu'il s'agit non de l'application complémentaire des normes, mais d'activités interprétatives basées seulement — soulignons-le — sur les éléments communs des droits nationaux.

Les directives de l'interprétation systématique du droit commun des pays du CAEM peuvent être classées suivant l'ordre hiérarchique suivant :

1. En interprétant une expression insuffisamment explicite, l'interpréteur se base en premier lieu sur l'ensemble de l'acte du droit commun en tant que système de référence, et également sur la jurisprudence considérée sur le fond de cette disposition dans les autres pays membres du CAEM.

2. S'il n'obtient pas de résultat, l'interpréteur essaie de trouver une réponse dans les autres actes du droit commun des pays membres.

3. L'étude comparative du droit interne des pays membres ne sera entreprise qu'à titre de moyen extrême.

Le caractère particulier du droit commun des pays du CAEM, auquel on peut attribuer un caractère intégrant, doit également s'exprimer dans l'interprétation fonctionnelle. En plus des directives d'interprétation généralement admises, des directives spéciales peuvent être formulées.

La principale serait la directive génétique indiquant l'origine internationale, celle du CAEM, de la norme. Les cours d'arbitrage auprès des chambres du commerce devraient savoir qu'elles se trouvent en présence d'une norme qui n'est pas un produit autonome du législateur de leur pays, mais une oeuvre commune des pays de la Communauté socialiste et que, pour cette raison, elle ne peut être interprétée comme une norme du droit interne, mais en tant que norme commune.

L'importance de cette directive interprétative se confirme dans des situations diverses. Elle peut empêcher la cour d'arbitrage de donner aux normes du droit commun la signification admise dans le droit national de la cour. Elle ne permet pas d'interpréter une telle norme à la lumière des besoins et principes du système socio-économique national, mais engage à une interprétation qui fasse état de l'intérêt de la Communauté en tant que tout. Elle s'oppose, dans la référence aux principes fondamentaux du droit et des rapports humains, à la référence à des principes qui ne sont pas communs aux pays du CAEM.

Je suis opposé à l'application des directives interprétatives basées sur des principes propres à un pays donné, sans exclure toutefois le besoin et l'utilité de la référence aux principes généralement admis dans les pays membres du CAEM. Il n'est pas besoin de prouver l'existence de tels principes communs aux pays du CAEM, ce phénomène étant le résultat de la

communauté des systèmes socio-économiques, du niveau similaire du développement et aussi, dans la plupart des pays, de traditions proches issues de l'héritage juridique romaniste commun.

Arrêtons-nous un instant sur certains principes qui sont communs aux pays de la Communauté socialiste. L'exécution réelle des obligations conventionnelles (principe d'exécution *in natura*)²¹ peut certainement être reconnue comme l'un de ces principes. Un autre principe commun est celui du devoir de coopération entre les parties contractantes dans le but d'une exécution convenable du contrat dont — comme dans le droit polonais — résulte une série de conséquences pratiques²². Ce principe caractérise les rapports entre les unités de l'économie socialiste, mais — comme nous l'avons constaté plus haut — puisqu'il ne s'agit pas d'une application complémentaire des normes, mais d'activités interprétatrices, rien n'empêche de mettre à profit le droit sur les relations entre unités de l'économie socialiste en vigueur dans les pays du CAEM.

On pourrait, certes, trouver d'autres principes communs de ce genre. Que ceux que nous avons cités servent d'exemple.

Dans ce contexte, il serait bon de réfléchir sur l'utilisation, dans la pratique interprétatrice, des coutumes adoptées dans le commerce entre les pays de la Communauté socialiste. Cette utilisation devrait être admise dans le cas des coutumes réellement générales dans ces pays. Bien que les coutumes ne jouent qu'un rôle relativement secondaire dans le commerce entre les entreprises des pays du CAEM, on ne peut les sous-estimer, surtout dans les domaines où, en principe, les règles naissent au cours de la pratique et de l'habitude, comme par exemple la base de livraison dans les rapports achat - livraison.

Quant aux directives de l'interprétation fonctionnelle, nous avons parlé jusqu'à présent de la directive génétique. En second lieu, je place la directive que j'appelle « intégrative ». Elle indique le but essentiel de la création du droit commun — l'approfondissement de l'intégration économique des pays du CAEM. Tout en étant, en principe, le pendant de la directive unificatrice dans le domaine de l'interprétation des actes d'unification universelle, la directive intégrative de l'interprétation du droit commun des pays du CAEM a toutefois des traits spécifiques, dus à une

²¹ Voir détails W. CZACHÓRSKI, *Prawo zobowiązań w zarysie* [Esquisse du droit des obligations], Warszawa 1968, pp. 64 - 67. B. W. REUTR souligne justement que « l'activité commerciale a pour but de livrer une marchandise ou des services et que tous les instruments économiques et juridiques doivent servir ce but » *Integracja a odpowiedzialność przedsiębiorstw* [L'intégration et la responsabilité des entreprises], « Życie Gospodarcze », 1970, fasc. 30, p. 9.

²² Sur ce même principe Cf. J. TROJANEK, *Zasada współpracy i wzajemnej pomocy w stosunkach obrotu uspołecznionego* [Le principe de la coopération et de l'assistance mutuelle dans la circulation socialisée des marchandises], Poznań 1968.

certaine différence entre les fonctions remplies par l'unification universelle du droit dans le domaine du commerce, et par l'unification du droit économique des pays du CAEM. Alors que l'unification universelle du droit sert à faciliter et à développer le commerce mondial, l'unification du droit dans le cadre du CAEM a pour tâche non seulement de faciliter et de développer le commerce entre les pays membres du CAEM, mais d'apporter sa contribution à une intégration très poussée de ces pays et au processus destiné à faire de ces pays un organisme économique uniforme²³. En remplissant la totalité des fonctions incombant à toute unification du droit, dans les limites du CAEM cette unification a donc des tâches plus amples. Mais puisque les tâches d'intégration contiennent *eo ipso* les simples tâches d'unification, on peut — me semble-t-il — définir brièvement le but du droit commun comme un but intégratif. Aussi, en plus de la directive génétique, je distingue la directive intégrative.

Tout acte du droit commun des pays du CAEM a un but intégratif. Il convient de le distinguer du but concret d'un acte donné, du groupe des dispositions ou de la disposition.

La directive intégrative engage les organismes qui appliquent le droit communautaire à ne jamais oublier que le but recherché par les pays — créateurs de l'acte commun contenant les normes — est l'uniformisation du droit et, par cela même, l'approfondissement de l'intégration économique de ces pays, et qu'une interprétation favorisant l'uniformité du droit doit être recherchée par les organismes appliquant le droit commun. Pour cela, l'interprétation admise dans les autres pays doit être prise en considération aussi bien pour harmoniser au maximum les solutions à l'échelle du CAEM que pour arriver à une interprétation uniforme de l'acte du droit commun. Il devient donc indispensable de publier et de propager la jurisprudence en matière de droit commun.

En plus des directives de l'interprétation linguistique, systématique et fonctionnelle, nous distinguons les directives interprétatrices du second degré, apportant une solution aux collisions des résultats obtenus à l'aide des directives du premier degré. En ce qui concerne la hiérarchie des directives interprétatrices, la hiérarchie normale s'impose : interprétation linguistique, systématique, fonctionnelle²⁴, avec la réserve que c'est avec

²³ Au sujet de la notion de l'intégration cf. A. WASILKOWSKI, *Prawne i ekonomiczne pojęcia integracji międzynarodowej* [Notions juridiques et économiques de l'intégration internationale], «*Studia Prawnicze*», 1969, fasc. 23, pp. 51 - 87. Sur la fonction de l'unification du droit dans le processus d'intégration, voir J. JAKUBOWSKI, *Integracja gospodarcza...*, p. 677 et s.

²⁴ Cf. K. OPAŁEK, J. WRÓBLEWSKI, *Zagadnienia teorii prawa* [Problèmes de la théorie du droit], Warszawa 1969, p. 261.

une grande prudence qu'en matière de l'interprétation systématique on dépasse les limites de l'interprétation *intra legem* ; de ce fait, l'interprétation fonctionnelle se place devant l'interprétation systématique qui dépasse l'acte donné du droit commun.

La règle qui limite l'interprétation extensive est considérée comme l'une des directives interprétatrices du second degré.

En matière de droit commun, dans la jurisprudence apparaît jusqu'à présent aussi bien l'interprétation restrictive (*interpretatio restrictiva*) que l'interprétation extensive (*interpretatio extensiva*). Par exemple, la Cour d'arbitrage près la Chambre du commerce de la R.D.A. restreignait les exigences du § 50 des conditions générales de livraison CAEM 1958 au sujet des réclamations relatives à la qualité²⁵, mais interprétait extensivement le § 59 de ces mêmes conditions de livraison, calculant la pénalité conventionnelle due pour les livraisons tardives non sur la base de la valeur de la partie donnée de marchandise livrée avec retard, mais sur la base de la valeur de la livraison entière²⁶.

L'interprétation du § 64 alinéa 1 des conditions générales de livraison CAEM 1958 fournit un matériel intéressant aux observations et à la réflexion. C'est ainsi que, si le collège d'arbitres de la Cour d'arbitrage près la Chambre hongroise du commerce extérieur a reconnu suffisante la seule notification de la prétention²⁷, la Cour d'arbitrage près la Chambre du commerce extérieur de R.D.A. a exigé au surplus que l'acheteur indique le montant de la pénalité conventionnelle²⁸. Nous nous trouvons donc, dans le premier cas, en présence d'une interprétation restrictive et, dans l'autre cas — devant une interprétation extensive de la même disposition. Le § 46 des conditions générales de livraison CAEM 1958, relatif à la notification d'un événement à caractère de force majeure²⁹, a reçu le même l'interprétation divergente : restrictive (de la part de la Commission d'arbitrage du Commerce extérieur près la Chambre fédérale du commerce à Moscou, de la Cour d'arbitrage près la Chambre polonaise du commerce extérieur et de la Commission d'arbitrage du commerce exté-

²⁵ H. STROHBACH, H. RUDOLPH, *Schiedsrichterkonferenz des Schiedsgerichts bei der Kammer für Aussenhandel der DDR*, «Recht im Aussenhandel», 1963, fasc. 8, p. 3.

²⁶ H. FELLHAUER, H. STROHBACH, *Vertragsstrafe bei Teilleistung und unvollständiger Leistung*, «Recht im Aussenhandel», 1962, fasc. 1, p. 3 et s.; M. KEMPER, L. RÜSTER, (*op.cit.*, p. 8) se sont prononcés critiquement envers la motivation, mais non envers le résultat de cette interprétation.

²⁷ A. SPIER, *Zu einigen Rechtsproblemen des Lieferverzuges*, «Recht im Aussenhandel», 1962, fasc. 9, p. 6.

²⁸ J. VÖLTER, *Entscheidungen zu Rechtsproblemen der AB/RGW 1958*, «Recht im Aussenhandel», 1963, fasc. 12, p. 6.

²⁹ Cf. M. KEMPER, L. RÜSTER, *op.cit.*, p. 8.

rieur près la Chambre bulgare du commerce), et extensive (par la Commission d'arbitrage près la Chambre roumaine du commerce et par la Cour d'arbitrage près la Chambre hongroise du commerce).

C'est à juste titre que M. Kemper et L. Rüster attirent l'attention sur la difficulté éprouvée à répondre, d'une manière générale, à la question si une interprétation extensive est admissible. Ils subordonnent cette réponse aux circonstances concrètes du cas donné³⁰. Personnellement, j'estime qu'avec la décentralisation actuelle de la justice dans le cadre du CAEM, il est plus indiqué d'observer la directive limitant l'admissibilité de l'interprétation extensive³¹. A l'avenir, par contre, après la création d'une cour d'arbitrage commune des pays du CAEM, le rejet de l'interprétation extensive ne serait pas juste, me semble-t-il, puisqu'elle servirait le développement du droit commun.

D'autre part, à l'étape actuelle l'interprétation intensive (*interpretatio intensiva*) est encore moins justifiée que l'interprétation extensive³².

Comme dans l'interprétation des actes d'unification universelle, dans le domaine de l'interprétation des actes du droit commun des pays du CAEM un rôle particulier revient à la directive génétique et à la directive intégrative qui, grâce à cela, peuvent également remplir la fonction de directives dites directives interprétatrices du second degré, quand il s'agit du rapport envers le droit commun.

Les « matériaux préparatoires » peuvent rendre de grands services dans l'interprétation du droit commun des pays du CAEM. En effet, l'étude de l'intention du législateur commun détache l'organisme appliquant le droit des solutions et valeurs admises dans le droit de son pays et le rapproche du droit commun. Cet organisme se rend ainsi mieux compte que les solutions de l'acte du droit commun sont le résultat de tendances diverses et de négociations prolongées et détaillées à l'échelon de la Communauté.

Dans les pays du CAEM des hommes de science se prononcent pour l'exploitation, dans le processus de l'interprétation du droit commun, des matériaux préparatoires. M. Kemper et L. Rüster leur attribuent une grande importance³³. Ces auteurs citent en exemple la pratique de la

³⁰ *Ibid.*

³¹ M. Kamieniecki s'est prononcé contre l'admissibilité de l'interprétation extensive des conditions générales CAEM, dans *Luki w ogólnych warunkach dostaw RWPG 1968* [Lacunes dans les conditions générales de livraison CAEM 1968], «Prawo w Handlu Zagranicznym», 1969 fasc. 2, pp. 34 - 35.

³² H. STROHBACH se prononce fermement contre l'interprétation restrictive (*Die allgemeinen Lieferbedigungen der RGW 1968 und die Schiedsgerichtsbarkeit*, «Staat und Recht», 1969, fasc. 10 - 11, pp. 1649 - 1671).

³³ M. KEMPER, L. RÜSTER, *op.cit.*, p. 7.

Cour d'arbitrage près la Chambre du commerce de la R.D.A. qui rejette la demande de l'acheteur souhaitant résilier le contrat à causes de vices de la marchandise livrée, en se référant aux matériaux des délibérations d'un groupe de travail spécial, agissant au sein de la Commission permanente du commerce extérieur du CAEM.³⁴ Parmi les matériaux préparatoires, les auteurs accordent la première place aux comptes rendus des délibérations, en constatant qu'il en résulte quels projets de textes étaient déposés, soutenus ou retirés par les délégations au cours des diverses phases des négociations, et quelles questions sont restées pendantes. Les projets des textes présentés par les délégations ont une importance moindre, tandis que les comptes rendus et les écrits des délégations doivent être mis à la troisième place³⁵. En recommandant la prudence dans l'utilisation des matériaux préparatoires, M. Kemper et L. Rüster excluent le recours aux déclarations verbales³⁶. Un autre juriste de la R.D.A., H. Strohbach, écrivit en 1970 que « la connaissance de ces motifs et des autres circonstances [matériaux du groupe spécial de travail pour la révision des conditions générales de livraison CAEM 1958, qui oeuvrait au sein de la Commission permanente du commerce extérieur CAEM — n.d.l.a.] est d'une grande valeur pour l'interprétation et l'application des normes des conditions générales de livraison CAEM 1968 »³⁷.

Et pourtant, l'utilisation des matériaux préparatoires n'est guère aisée dans l'interprétation du droit commun, notamment parce qu'ils demeurent inédits et que les publications se limitent aux textes des normes. M. Kemper et L. Rüster postulent à juste titre que ces matériaux soient accessibles au moins aux tribunaux d'arbitrage³⁸. Cette proposition est également faite par M. Kamieniecki³⁹.

En plus de ces moyens « juridiques » destinés à assurer l'uniformité de l'interprétation du droit commun des pays du CAEM, une grande importance revient aux moyens « législatifs » qui — parce qu'ils permettent une meilleure formulation des dispositions du droit commun — évitent les divergences dans l'interprétation. Cette prophylaxie joue un rôle extrêmement sérieux.

Le meilleur moyen consiste en révisions périodiques des actes du droit

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ H. Strohbach dans sa critique de l'ouvrage de H. WAGNER et D. KRETZSCHMAR, *Allgemeine Lieferbedingungen des RGW 1968. Textausgabe mit einer Darstellung der Entwicklung der ALB/RGW und mit Erläuterungen*, Berlin (RDA) 1970, « Staat und Recht », 1970, fasc. 8, p. 1337.

³⁸ M. KEMPER, L. RÜSTER, *op.cit.*, p. 7.

³⁹ M. KAMIENIECKI, *Luki...*, p. 35.

commun ; cette méthode permet d'adapter la régulation commune aux besoins changeants, et de l'améliorer — c'est sa fonction principale — mais aussi de l'éliminer par la voie de l'amendement du texte qui est à la source des divergences dans l'interprétation. Il est bon que cette méthode devienne un genre de principe législatif dans le cadre du CAEM.

C'est ainsi, qu'en 1968 ont été changées et perfectionnées les conditions générales de livraison ; les travaux de perfectionnement, orientés en particulier sur l'extension de la responsabilité du vendeur, sont actuellement en cours au sein de la Conférence des représentants des pays membres du CAEM pour les affaires juridiques. La révision des conditions générales de livraison CAEM 1958 a liquidé les sources de certaines différences d'interprétation aussi bien dans la compréhension de certaines décisions (par ex. § 74) que grâce à l'extension des matières réglées (par ex. disposition des conditions générales de 1968 sur la prescription)⁴⁰.

A l'uniformisation de l'interprétation ont contribué le développement quantitatif (élargissement de la régulation) et qualitatif (amélioration de la forme et du sens) des actes du droit commun, notamment du principal d'entre eux — des conditions générales de livraison CAEM 1968. Actuellement, la Conférence des représentants des pays membres du CAEM pour les affaires juridiques procède à des travaux consacrés à la révision partielle de ces conditions. L'élargissement de la régulation, le comble-

⁴⁰ Au sujet des problèmes relatifs à ces conditions générales Cf. B. W. REUTT, *Ogólne warunki dostaw RWPG 1968* [Conditions générales de livraison CAEM 1968], «Rynki Zagraniczne», 1969, No. 69, p. 4; B. W. REUTT, *Ogólne warunki dostaw RWPG 1968* [Conditions générales de livraison CAEM 1968], «Życie Gospodarcze», 30 VI 1968; B. W. REUTT, *Ogólne warunki dostaw RWPG 1968*, «Przegląd Ustawodawstwa Gospodarczego», 1968, fasc. 8/9; M. KEMPER, *Die ALB/RGW 1968 — ein Austruck kontinuierlicher Entwicklung der sozialistischen Staatengemeinschaft*, «Recht in der Aussenwirtschaft», 1969, fasc. 2, p. 6 et s.; M. G. ROZENBERG, *Unifikacja norm odnoszących się do warunków dostaw towarów z państw członkowskich SEW*, «Sovetskoe Gosudarstvo i Pravo», 1969, fasc. 7, p. 51 et s.; H. WAGNER, *Die allgemeinen Lieferbedingungen des RGW 1968 — ein Dokument enger wirtschaftlicher Zusammenarbeit zwischen den Mitgliedsländern des RGW*, «Sozialistische Aussenwirtschaft», 1969, fasc. 2, p. 8 et s.; H. WAGNER, D. KRETZSCHMAR, *op.cit.*; H. STROHBACH, *Die allgemeinen Lieferbedingungen...*, pp 1649 - 1671; *Eksportno-importnye operacii. Pravovoe regulirovanie*, publié sous la rédaction de V. S. POZDNIakov, Moskva 1970, p. 39 et s.; M. M. BOGUSLAVSKI, *Pravovoe regulirovanie meždunarodnykh hozjajstvennykh otnošení*, Moskva 1970, p. 33 et s.; M. KAMIENIECKI, *Luki...*, pp. 29 - 53; *Kary umowne i obniżenie ceny kupna w świetle o.w.d. RWPG 1968* [Les pénalités conventionnelles et la réduction du prix d'achat à la lumière des c.g.l. CAEM 1968], pp. 26 - 27. P. J. KATONA, *The International Sale of Goods among Member States of the CMEA*, «Columbia Journal of Transnational Law», vol. 9, 2.

ment des « lacunes » existantes aboutiront à une situation bien meilleure dans le domaine de l'interprétation, en éliminant, par exemple, les difficultés dues à l'application de l'interprétation extensive. Une importance plus grande encore revient au perfectionnement de la forme de la régulation, qui évite les hésitations dans l'interprétation, causées par des « lacunes » dans la présentation du problème⁴¹ ou par la formulation imparfaite⁴². La forme juridique des actes du droit commun a son importance, elle aussi ; de nombreux auteurs lui attribuent un rang élevé⁴³.

Quelques méthodes faisant partie de la technique juridique appartiennent à la catégorie des moyens législatifs servant à uniformiser l'interprétation. De ce point de vue il est essentiel de formuler les actes du droit commun dans une langue objective et descriptive au maximum, prise moins des systèmes juridiques nationaux que de la pratique du commerce international. Ce postulat est, en principe, réalisé dans le cours des travaux législatifs du CAEM. Cela est visible, par exemple, dans les conditions générales de livraison qui ont attiré l'attention de la science occidentale. Entre autres, le spécialiste anglais du droit commercial international, C. M. Schmitthoff, souligne la langue proche de la terminologie commerciale employée dans les conditions générales de livraison, ainsi que la clarté de ses conceptions (*simple, businesslike terminology and the precision and clarity of its concepts*). C'est — écrit-il — le résultat de leur élaboration par des spécialistes expérimentés⁴⁴. La session

⁴¹ Le règlement de la renonciation de l'acheteur au contrat en cas de marchandise défectueuse peut servir d'exemple (§ 31 alinéa 8 et § 75 alinéa 7 des conditions générales de livraison CAEM 1968),

⁴² Un exemple d'une telle imperfection est donné par la phrase «non par la faute du vendeur» employée dans le § 26 des conditions générales de livraison CAEM 1958 (Cf. J. JAKUBOWSKI, *System...*, p. 31) qui se trouve également dans le § 34 des conditions générales de 1968 (Cf. M. KAMIENIECKI, *Luki...*, p. 49).

⁴³ P. KALENSKÝ, juriste tchécoslovaque connu, est aussi de cette opinion (*Ke koncepci právní úpravy zbožních vztahu mezi podniky pro zahraniční obchod členských států RVHP*, «Studie z Mezinárodního Práva», t. II, 1966, p. 109 et s.); il se réfère à la littérature correspondante. J'ai attiré l'attention sur ce fait dans diverses publications, à partir de 1959 [*Conditions générales de livraison CAEM*, «Handel Zagraniczny», 1959, fasc. 8, pp. 353 - 354]. Ce problème renaît avec la nouvelle version des conditions générales de livraison de 1968; Cf. H. STROHBACH; *Die Allgemeinen Lieferbedingungen...*, p. 1658.

⁴⁴ C. M. SCHMITTHOFF, *The Unification of the Law of International Trade*, Göteborg 1964, p. 11. Cf. H. J. BERMAN, *Unification of Contract Clauses in Trade between Member-countries of the Council for Mutual Economic Aid*, «International and Comparative Law Quarterly», 1958, fasc. 4, p. 665 et s.; D. A. LOEBER, *Vereinheitlichung des Warenlieferungsrechts im Aussenhandel der Comecon-Länder*, «Osteuropa-Recht», 1960, fasc. 1, p. 35 et s.

de la Commission du droit commercial international de l'ONU (UNCITRAL) réunie à Genève en mars 1969⁴⁵, a hautement apprécié les conditions générales de livraison CAEM 1968 aussi bien du point de vue du fond que de l'aspect méthodologique, les plaçant sur un niveau supérieur que les lois uniformes sur les ventes internationales de La Haye (1964).

Ces problèmes sont liés avec la méthodologie de la législation internationale. Sans entrer dans les détails qui dépassent le cadre du présent article, je me bornerai à constater qu'ils doivent être traités sous un angle pragmatique et non dogmatique. Le point de départ serait constitué par les besoins socio-économiques et non par les dispositions nationales, par les situations typiques réelles et non par les institutions et les solutions prévues dans les droits nationaux. Les délégués des États devraient savoir surmonter leurs habitudes et routines façonnées par le droit national, et satisfaire au maximum les exigences de la vie sociale et économique, ainsi que les besoins issus du développement de la division socialiste du travail et de l'approfondissement de l'intégration économique socialiste⁴⁶.

La méthode de définition des notions employées dans les actes du droit uniforme contribue également à l'uniformité de l'interprétation. Cette méthode est mise en oeuvre dans la pratique législative du CAEM. Par exemple, dans le § 1 alinéa 4 des conditions générales de livraison CAEM 1968 figure la constatation que dans l'esprit de ces conditions générales « l'offre » signifie également « commande », et « acceptation de l'offre » veut dire aussi « confirmation de la commande ». Selon le § 2 alinéa 1 phrase 1 la forme écrite entend également la déclaration faite télégraphiquement et par télétype. Le § 68 alinéa 2 contient la définition de la notion de force majeure. Le § 110 alinéa 2 définit ce que l'on doit entendre par le terme « droit matériel du pays du vendeur » employé dans l'alinéa 1 de ce paragraphe. Le § 1 des conditions générales de montage CAEM 1962 contient la définition des notions « client », « entrepreneur » et « spécialiste ». Le § 45 alinéa 2 de ces conditions générales contient la définition de la notion de force majeure. Le § 1 des conditions générales des services techniques définit les notions : « produits », « vendeur », « acheteur », « parties » et « contrat ».

Il est indiqué de recourir davantage que jusqu'à présent à la définition des notions. On peut ainsi éviter beaucoup de difficultés d'interprétation.

La proposition a été faite d'utiliser, dans le processus de la législation internationale, des « rapports explicatifs » accompagnant le texte uni-

⁴⁵ Documents de l'ONU A/CN/9/18.

⁴⁶ Cf. J. JAKUBOWSKI, *Integracja...*, p. 685.

forme⁴⁷. Il semble que ce moyen peut être efficace en certaines occasions. Nous pouvons citer, à titre d'exemple d'application de cette méthode, le point 1 des directives pour les conditions générales de livraison CAEM 1968, prévoyant que le principe admettant la renonciation à certaines dispositions des conditions générales, en raison de la spécificité de la marchandise et/ou des particularités de sa livraison, exprimé dans le préambule des conditions générales, s'étend à la base de livraison lors du transport ferroviaire ou automobile. C'est bien plus qu'un « rapport explicatif », puisque nous nous trouvons en présence d'une interprétation authentique.

Le choix de la forme de législation internationale est un moyen important pour prévenir le manque d'uniformité dans l'interprétation du droit uniforme. Réfléchissons un instant sur le fait comment ce problème se présente dans le cas du droit commun des pays du CAEM.

Le caractère juridique des actes du droit commun fait partie des problèmes les plus discutés de l'intégration juridique socialiste. Sans entrer plus avant dans les détails, je renvoie à l'abondante littérature consacrée à ce sujet⁴⁸. Dans le contexte des considérations présentes il faut souligner le fait que l'article IV des Statuts du CAEM impose la mise en oeuvre de ces actes en accord avec la législation intérieure des différents pays membres. Cela signifie-t-il une intégration pleine et entière d'un tel acte à ce droit et sa subordination aux principes supérieurs et à l'herméneutique de ce droit? Je ne le crois pas, et j'estime que la mise en oeuvre n'a qu'un caractère formel qui n'enlève pas aux actes du droit commun leur caractère international. Le fait que les pays membres confirment la recommandation, est déjà décisif.

Il est significatif que la conscience du caractère international des actes du droit commun dominait et domine dans l'attitude à leur égard aussi bien dans la théorie que dans la pratique.

En récapitulant, nous pouvons dire qu'une mise en oeuvre conforme à la législation nationale, telle que l'exige l'article IV des Statuts du CAEM, est une mise en oeuvre dans l'esprit de l'observation et de la mise en pratique, mais n'est pas une introduction dans les systèmes juridiques nationaux dans le sens d'une « transformation » ou d'une « incorporation ».

A la lumière des considérations ci-dessus, nous sommes en mesure de constater que la mise en oeuvre exigée par l'article IV des Statuts du

⁴⁷ A. MALINTOPPI, *Mesures tendant à prévenir des divergences dans l'interprétation des règles de droit uniforme*, « Annuaire UNIDROIT 1959 », Rome 1960, p. 253.

⁴⁸ La bibliographie correspondante est indiquée dans: J. JAKUBOWSKI, *Umowa sprzedaży w handlu międzynarodowym*, p. 209 et s.; P. KALENSKY, *op. cit.*, p. 109 et s.; A. WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej*, Warszawa 1969, p. 128 et s.

CAEM n'influence pas le caractère international des actes du droit commun. Un tel acte ne cesse pas, pour cette raison, d'être un acte de la législation internationale.

La question si un tel acte est, au niveau international, un acte d'organisation internationale ou une convention internationale, est un problème vivement discuté⁴⁹. Dans le contexte de nos considérations il n'a guère d'importance, étant donné que quelle que soit la conception admise, la première ou la deuxième, nous avons ici un acte international.

Ces observations ne sont pourtant pas l'expression d'une attitude approbatrice sans réserves de la forme législative sous laquelle naissaient jusqu'à présent les actes du droit commun du CAEM. Dans mes ouvrages précédents consacrés aux problèmes de ce droit, je soulignais que certains changements sont indispensables dans ce domaine⁵⁰. C'est ainsi que les conditions générales de livraison du CAEM 1968 ont été mises en oeuvre dans les pays membres à divers échelons de la législation. Il serait préférable d'éviter cette différenciation ; l'examen de cette question dépasse pourtant le thème du présent article.

Le principal moyen, le plus important peut-être, de parer au manque d'uniformité dans l'interprétation du droit commun des pays du CAEM, consisterait à créer une cour commune d'arbitrage, postulée — sous des formes différentes — par la littérature de l'objet⁵¹. La création et l'utilité d'une cour commune d'arbitrage est étudiée actuellement par un groupe de travail pour les questions de l'arbitrage au sein de la Conférence des représentants des pays membres du CAEM pour les questions juridiques. Une cour d'arbitrage commune serait en mesure de garantir une interprétation uniforme du droit commun.

⁴⁹ Au sujet de cette discussion, Cf. A. WASILKOWSKI, *Zalecenia...*, p. 128 et s. ainsi que les auteurs auxquels il se réfère.

⁵⁰ A partir de 1959, Cf. *Conditions générales de livraison CAEM*, «Handel Zagraniczny», 1959, fasc. 8, pp. 353 - 354.

⁵¹ Cf. entre autres M. KEMPER, J. KIRSTEN, *Rechtsfragen der neuen Etappe internationaler ökonomischer Beziehungen zwischen den Mitgliedstaaten des Rates für Gegenseitige Wirtschaftshilfe*, «Staat und Recht», 1962, fasc. 12, p. 2187; J. JAKUBOWSKI, *Próby unifikacji prawa w ramach RWPG* [Essais d'unification du droit dans le cadre du CAEM], «Sprawy Międzynarodowe», 1965, fasc. 9, pp. 46 - 47; *Z problematyki rozstrzygania sporów wynikających z handlu między krajami członkowskimi RWPG* [Problèmes de la résolution des litiges dans le commerce entre les pays membres du CAEM], «Palestra», 1967, fasc. 1, pp. 60 - 63; B. W. REUTT, *Integracja...*, p. 9; H. STROHBACH, *Die allgemeinen Lieferbedingungen...*, p. 1669; Z. L. NANOWSKI, *Aktualne problemy międzynarodowego arbitrażu handlowego w ramach RWPG* [Les problèmes actuels de l'arbitrage commercial international dans le CAEM], «Prawo w Handlu Zagranicznym», 1970, fasc. 25, pp. 21 - 23. J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym. Problemy stosowania* [Droit unifié dans le commerce international. Problème de l'application], Warszawa 1972, p. 235 et s.

Les fonctions des Nations Unies et leur efficacité

par WOJCIECH MORAWIECKI

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L'expansion structurale et fonctionnelle des Nations Unies

L'Organisation des Nations Unies a subi un sérieux agrandissement structural et fonctionnel au cours des 25 années de son existence en vertu des décisions de ses organes principaux et notamment de l'Assemblée Générale et du Conseil de Sécurité.

L'agrandissement structural de l'ONU se produisait par la création de nouveaux organes. Bon nombre d'entre eux ont pris la forme d'agences spéciales avec une grande autonomie d'activité, comme par exemple le Fonds des Nations Unies pour l'Enfance (FISE) et le Haut Commissariat pour les Réfugiés — dans le domaine économique et social, ou les forces armées des Nations Unies au Moyen Orient (la FUNU), au Congo (l'ONUC) ou à Chypre — dans le domaine de la sécurité internationale. Certaines institutions, créées en due forme pour être les organes auxiliaires de l'Assemblée Générale, ont pris même la forme d'organisations internationales quasi autonomes, comme par exemple la Conférence des Nations Unies sur le Commerce et le Développement (CNUCED) et l'Organisation des Nations Unies pour le Développement Industriel (ONUDI). On pourrait même prévoir que la création de nouvelles organisations dans le système des

Nations Unies sera simplifiée à l'avenir et qu'elles seront établies plutôt par des résolutions de l'Assemblée Générale de l'ONU que par des conventions multilatérales spéciales. Dans ce nouveau procédé de création des organisations, elles sont sujettes au contrôle direct financier et administratif de l'ONU, puisque leurs budgets doivent constituer une partie séparée du budget de l'ONU et leurs secrétariats — une partie séparée du Secrétariat de l'ONU¹. Elles sont sujettes également au contrôle politique indirect de l'ONU.

Au système des Nations Unies appartiennent, en outre, toutes les organisations internationales indépendantes, mais liées de telle ou autre façon avec l'ONU pour les fins de coopération. C'est ici que se trouvent les soi-disant « institutions spécialisées », liées avec l'ONU par des accords formels et collaborant avec elle par l'intermédiaire du Conseil Économique et Social ; le GATT (Accord Général sur les Tarifs Douaniers et le Commerce), dont les relations similaires avec l'ONU ne sont pas réglées par un contrat formel ; l'AIEA (Agence Internationale de l'Énergie Atomique) liée avec l'ONU par un accord prévoyant les relations directes avec l'Assemblée Générale, le Conseil de Sécurité et le Conseil Économique et Social ; les organisations internationales qui ont été créées à la base des accords concernant le commerce des certains produits conclus actuellement sous l'égide de la CNUCED et dont le fonctionnement est soumis à son contrôle.

Pour coordonner l'activité des organisations comprises dans le système des Nations Unies, on a créé des programmes communs et notamment le Programme des Nations Unies pour le Développement (PNUD), auquel participent, sans compter l'ONU, encore 12 organisations spécialisées, ou encore le Programme Mondial pour l'Alimentation, auquel ne participent que 2 organisations : l'ONU et la OAA (Organisation des Nations Unies

¹ Certains experts occidentaux considèrent que la meilleure solution du problème comment doit fonctionner le système composé de nombreuses organisations — c'est de réunir la responsabilité pour les frais du fonctionnement et pour l'administration habile dans le même centre. De même, les contrats entre l'ONU et les organisations spécialisées concentrent l'attention à la coordination des actions administratives et financières. Nous trouvons aussi cette idée dans les divers rapports concernant l'augmentation de l'efficacité des programmes d'aide des Nations Unies pour les pays en voie de développement. Il s'agit avant tout de rapports ayant été commandés par le Programme des Nations Unies pour le Développement — le PNUD (le soi-disant rapport Jackson : *Étude de la capacité du système des Nations Unies pour le développement*, Nations Unies, Genève 1969) ; par la Banque Internationale pour la Reconstruction et le Développement — la BIRD (le soi-disant rapport Pearson : *Partners in Development*, New York 1969, Praeger) ; ainsi que par l'Institut de Formation et de Recherche des Nations Unies — l'UNITAR (le soi-disant rapport Leonard : *Criteria and Methods of Evolution : Problems and Approaches*, UNITAR Series Nr 1, 1969).

pour l'Alimentation et l'Agriculture). Cette nécessité de coordonner l'activité donne lieu à la création de divers organes spéciaux, tels que le Comité Administratif de Coordination (CAC), qui comprend les chefs d'administration de l'ONU ainsi que de toutes les autres organisations et institutions principales du système des Nations Unies.

Au cours des dernières 25 années on a pu observer aussi un sérieux développement fonctionnel de l'ONU. Elle a développé ses fonctions dans de nombreux domaines en dépassant le cadre qui lui avait été désigné par la Charte de 1945. Il n'en pouvait être autrement. Car l'organisation internationale doit démontrer une vitalité et une capacité d'adaptation aux conditions qui changent en vue d'être capable à satisfaire aux besoins nouveaux de la coopération internationale quand les possibilités réelles s'y prêtent.

Ainsi, par exemple, l'ONU a développé ses fonctions de contrôle sur les territoires non autonomes, aussi bien sous leurs formes de tutelle que coloniales. On doit avouer, sans craindre d'exagérer, que le rôle positif joué par l'ONU dans le processus de la liquidation du colonialisme constitue le succès primordial de cette organisation dans les premières 25 années de son existence.

Particulièrement élargies ont été les fonctions des Nations Unies concernant l'aide pour l'accélération de la croissance économique des pays en voie de développement. Ces fonctions ont pris un essor considérable, et il faut s'attendre à les voir se développer encore à l'avenir. L'ampleur prise par ces fonctions constitue, à côté de la décolonisation, le second symptôme de l'évolution des Nations Unies dans les premières 25 années de son existence.

Le troisième symptôme, c'est le développement des fonctions des Nations Unies dans le domaine de la protection internationale des droits de l'homme. Tout d'abord, la lutte pour les droits et pour la dignité de l'homme a été suscitée par la réaction contre le fascisme et ses crimes commis au cours de la guerre. Plus tard, cette lutte s'est dirigée contre les méfaits actuels de l'impérialisme, tels que l'oppression nationale et la discrimination raciale.

Dans le processus d'expansion des fonctions des Nations Unies dans ces trois domaines des plus importants, les pays socialistes ont joué un rôle décisif. Grâce à la disposition favorable des forces mondiales depuis la fin des années 1950 les conceptions prononcées par ces pays concernant la liquidation du colonialisme, les voies d'accélération de la croissance économique des pays en voie de développement ou concernant les droits de l'homme — ces conceptions rejetées catégoriquement par les puissances occidentales dans la période précédente — ont commencé à l'emporter et sont presque devenues aujourd'hui la doctrine officielle des Nations Unies.

Certaines fonctions prévues par la Charte des Nations Unies de 1945 n'ont cependant pas acquis un degré suffisant de développement. C'est, avant tout, le manque de conditions politiques favorables : de bonne volonté et du *consensus* des États membres qui en est la cause. Cela concernait, hélas, les fonctions principales de l'ONU dans le domaine de sa responsabilité pour la paix et la sécurité mondiale, c'est-à-dire : les fonctions du règlement pacifique des litiges, selon le chapitre VI, et les fonctions de sanctions collectives en cas de menace contre la paix ou de rupture de la paix, selon le chapitre VII de la Charte. S'il s'agit des soi-disant opérations pour le maintien de la paix la pratique de l'ONU n'était pas satisfaisante et laissait beaucoup à désirer. Il faut cependant constater que l'ONU essaie de tirer pour l'avenir de justes conclusions de ses expériences dans ce domaine. On ressent aussi un besoin général d'activiser le Conseil de Sécurité, seul organe compétent pour agir en cas de menace contre la paix, de rupture de la paix ou d'acte d'agression.

Les fonctions de l'ONU dans le domaine de la collaboration directe politique et économique entre les pays socialistes et capitalistes, donc sur le plan principal de la coexistence pacifique — laissent encore plus à désirer. Le symptôme le plus frappant fut la discrimination tenace des pays socialistes quant à leur admission à l'ONU. On tenait à l'écart du système des Nations Unies certains pays socialistes. La discrimination du système socialiste apparaît également toujours lorsqu'il s'agit de l'emploi de citoyens des pays socialistes aux organes administratifs (secrétariats) et surtout de la participation de leurs gouvernements au processus de prise des décisions au sein de nombreux organes, en particulier de ceux qui agissent dans le domaine de la collaboration économique.

Cependant nous observons sur ce plan aussi une évolution favorable. En surmontant une crise profonde qui au moment culminant de la guerre froide (1950-1953) a menacé son existence même, l'ONU a su développer ses fonctions dans le domaine de désarmement, problème crucial de notre temps. L'ONU a adopté une attitude nette depuis 1960, en acceptant à l'unanimité la résolution proposée par l'U.R.S.S. sur la nécessité d'un désarmement complet et universel. Il est vrai que le courant principal du processus politique menant vers l'entente progressive en matière de désarmement se déroule hors de l'ONU, au cours de négociations directes entre l'U.R.S.S. et les États-Unis. Mais la pression des résolutions appropriées de l'Assemblée Générale de l'ONU n'est pas sans effet sur ce processus. Les résultats déjà obtenus dans le domaine des mesures partielles de désarmement, telles par exemple que l'interdiction partielle des explosions nucléaires ou la non-prolifération des armes nucléaires, dégagent la voie du processus de désarmement et facilitent les réalisations successives et plus avancées.

Dans le domaine de la collaboration économique entre les pays socialistes et capitalistes, la Commission Économique de l'ONU pour l'Europe a déjà obtenu certains résultats positifs. Les fonctions de l'ONU dans le domaine des relations entre ces pays peuvent prendre un essor plus considérable dans les années à venir, grâce aux efforts des pays socialistes, et surtout si la Conférence pour la Sécurité Européenne proposée par eux, atteint les résultats attendus.

On doit s'attendre à l'expansion fonctionnelle continue des Nations Unies comme suite du rythme toujours accélérant du progrès technique qui constitue la force motrice du développement économique et des transformations sociales et culturelles. Outre ses effets avantageux — le progrès technique entame des conséquences négatives qui menacent l'humanité de graves dangers. Il va sans dire que la pression du progrès technique — aussi bien dans la réalisation de ses possibilités positives que dans la défense contre les dangers communs qui en résultent, crée une nécessité d'élargissement et d'intensification de la coopération internationale. Donc, l'expansion des fonctions des organisations internationales, et avant tout des Nations Unies, va se produire de plus en plus. La nécessité objective de la coopération sera accompagnée d'un accroissement de ses possibilités. Car l'histoire ne pose généralement devant l'humanité que des problèmes dont la solution devient possible parce que, en même temps, les prémisses objectives, ainsi que, quoique avec un certain retard — les prémisses subjectives y mûrissent.

Le modèle des Nations Unies, tel qu'il fut établi dans ses actes constitutionnels, ne pouvait être qu'une « esquisse de construction », où ne se trouvaient que les lignes principales du bâtiment. Après 25 années de développement structural et fonctionnel, il en surgit un système multidimensionnel, dont la charpente formelle fut remplie de vive substance politique. Cette substance va s'enrichir constamment, car les changements du milieu dans lequel les Nations Unies fonctionnent et sur lequel elles doivent exercer l'influence en accord avec les intérêts des États membres — deviennent si rapides à notre époque qu'ils méritent bien d'être nommés révolutionnaires.

Comme démontre l'expérience, l'adaptation des Nations Unies aux conditions changeantes du milieu n'a exigé aucune révision formelle des principes fondamentaux de la Charte, ni des constitutions des autres organisations appartenant au système des Nations Unies. Les seules modifications formelles qui ont été introduites dans les actes constitutionnels des Nations Unies ne concernaient que l'augmentation du nombre des membres des organes électifs, par exemple du Conseil de Sécurité ou du Conseil Économique et Social de l'ONU. Dans certains cas, on a précisé les con-

ditions de participation pour permettre l'exclusion de l'organisation des membres qui violeraient ses buts et ses principes fondamentaux.

Les principes fondamentaux de la Charte des Nations Unies, ainsi que des constitutions des organisations spécialisées ont survécu à l'épreuve de la vie d'une manière satisfaisante. Ces organisations ont démontré une élasticité suffisante et une capacité à s'adapter aux conditions changeantes, surtout par la voie de l'interprétation fonctionnelle des stipulations de leurs constitutions. On peut affirmer à juste titre que, dans l'avenir aussi, ces organisations vont s'acquitter de leurs tâches et vont s'adapter aux conditions nouvelles sans procéder à une révision formelle et profonde de leurs fondements juridiques.

L'ONU, de même que les autres organisations internationales, influence son milieu à travers la réalisation de ses fonctions. C'est pourquoi, dans les conditions actuelles de l'histoire, une importance particulière acquiert non seulement le problème de l'évolution extensive des fonctions des Nations Unies, mais surtout la question de l'intensité de leur influence, c'est-à-dire de l'efficacité des Nations Unies.

Le caractère des fonctions des Nations Unies

Le caractère des relations internationales actuelles ne permet pas de s'attendre à ce que les États membres acceptent un élargissement considérable du pouvoir de l'organisation internationale et qu'ils consentent à augmenter essentiellement les moyens matériels ou personnels, pour que l'organisation internationale puisse non seulement formuler ses décisions, mais aussi les exécuter. C'est pourquoi l'exécution effective de ses tâches par l'organisation elle-même ne peut donc être que fort limitée. Toutefois, même pendant l'exécution de leurs fonctions opérationnelles le rôle principal des organes respectifs de l'organisation internationale est de prendre des décisions. Donc, sans trop simplifier, on peut constater que le processus décisionnel constitue l'essence même de toute activité de l'organisation internationale².

Le cours et le résultat de ce processus au sein de l'organisation internationale dépendent de divers facteurs.

Ce sont les facteurs structuraux qui délimitent ce processus et le pla-

² « Décisions » sont ici comprises dans un large sens des dispositions ayant aussi bien le caractère des résolutions des organes collectifs que le caractère des actes des organes unipersonnels (pour la plupart administratifs) ; ayant la force obligatoire de droit ou seulement le caractère des recommandations ou des directives générales pour ses destinataires, mais qui toujours expriment la volonté ou l'attitude de l'organisation internationale.

cent dans un cadre bien défini. On peut donc définir ces facteurs comme paramètres du processus décisionnel au sein de l'organisation internationale, car chacun d'eux possède une valeur constante définie par le statut ou par la pratique de l'organisation internationale³.

Le cours et le résultat du processus décisionnel dans les organes des organisations internationales sont, quand même, finalement déterminés par des facteurs politiques variables. L'ensemble de ces facteurs complexes et plus ou moins mesurables forment la notion générale de la balance des forces politiques au sein de l'organisation internationale.

Le processus décisionnel dans les organes de l'organisation internationale a un caractère de processus politique. Les gouvernements des États membres font les démarches et s'efforcent pour donner aux décisions de ces organes le contenu le plus conforme à leurs intérêts. L'organisation internationale constitue donc un certain mécanisme de compétition des États membres. Elle peut même devenir l'instrument des intérêts d'un groupe de membres, lorsqu'ils s'assurent politiquement le contrôle de son activité. Ainsi elle peut devenir leur instrument dirigé contre les intérêts des États membres adversaires. Il en était ainsi à l'ONU lors de la « guerre froide », quand les puissances occidentales qui disposaient de la majorité des voix à l'Assemblée Générale, ont fait de cet organe l'instrument de leur politique.

Mais ce n'est pas la vocation véritable des Nations Unies. Leur destination consiste à réaliser le processus de coopération entre les membres. Ce qui n'exclue pas, mais, au contraire, admet les éléments de compétition dans ce processus. Il a notamment le caractère dialectique, parce que la coopération est d'habitude réalisée en surmontant et en résolvant les controverses. Comme résultat du processus de coopération et pour servir ses buts, les décisions des organes doivent donc répondre aux intérêts communs de tous les membres.

Puisque l'essentiel de la fonction de l'ONU est un processus de prise de décision, il s'en suit qu'elle influence son milieu avant tout en exerçant une pression politique sur les États. Étant donné le caractère actuel de la communauté internationale dont les unités principales sont des États souverains — l'organisation internationale ne peut imposer ses décisions par force ou exercer son autorité directement sur les personnes ou les objets en empiétant ou en passant outre la souveraineté territoriale desdits États. Vu les ressources matérielles et personnelles fort limitées dont disposent les organisations appartenant au système des Nations Unies, même telles

³ Voir plus loin au sujet des paramètres structuraux du processus décisionnel, p. 80 - 81.

fonctions opérationnelles comme l'assistance financière — par exemple par la BIRD, ou l'assistance technique, par exemple par le PNUD — ont plus d'importance comme moyens de pression politique qu'en termes de leur valeur économique absolue.

Comme fonctions de l'organisation il faut donc concevoir les processus politiques de l'activité de ses organes, ayant pour but d'influencer et de former son milieu, c'est-à-dire les États et leurs relations mutuelles. Selon les types de ces processus politiques on peut aussi distinguer trois types principaux des fonctions de l'organisation internationale :

1° fonctions régulatrices, qui consistent dans un processus de statuer les normes morales, politiques, ou juridiques, destinées à former le comportement des États ;

2° fonctions de contrôle, qui consistent dans un processus de connaître les situations de fait pour les confronter avec les normes déterminées en vue d'adapter le comportement des États à ces normes ;

3° fonctions opérationnelles, qui consistent à rendre par l'organisation de différents services à la base de ses propres décisions et à l'aide de ressources matérielles et personnelles dont elle dispose.

Dans le cadre de fonctions principales, on peut distinguer encore de divers genres résultant notamment du degré de perfection technique ou de l'efficacité des processus respectifs de l'activité de l'organisation. Par exemple, dans le cadre des fonctions de contrôle on peut distinguer : les informations reçues des gouvernements ; les enquêtes effectuées sur place par les organes de l'organisation ; les appréciations politiques du comportement des États ou des situations de fait par ces organes ; les jugements prononcés par les organes judiciaires.

Il faut se rendre compte néanmoins que chaque activité de l'organisation internationale contemporaine, donc chaque type et genre de ses fonctions restent déterminés d'une façon ou de l'autre par le caractère des relations internationales contemporaines. L'organisation internationale reçoit des États souverains les stimulants pour agir. Elle est le mécanisme de la coopération des États souverains. Elle est destinée à exercer une influence sur ces États. La création de l'organisation internationale, la direction de son activité, l'efficacité de ses fonctions dépendent donc des États membres.

L'existence et l'activité de l'ONU, comme de toute autre organisation, ne peut être dans ces conditions que le résultat d'un certain minimum de concordance permanente des intérêts de ses membres. En tout cas, l'activité de l'organisation ne peut trop s'éloigner de l'état d'équilibre fixé par le dénominateur commun des intérêts de ses membres. Cela concerne particulièrement les intérêts des puissances principales, ainsi que des groupes principaux des États, dont la participation ou l'appui serait en pratique

indispensable à la réalisation de sa mission ou bien à l'existence même de l'organisation. Le succès de l'activité aussi bien que les limites des possibilités de l'organisation internationale sont fixés « en dernière instance » par l'étendue actuelle de la concordance des intérêts et, par conséquent, le contenu de l'accord possible de la volonté de l'ensemble des ses membres.

Le processus d'aboutir à l'entente entre les États membres doit donc pénétrer tous les types et tous les genres des fonctions de l'organisation internationale contemporaine. C'est pourquoi on doit considérer ce processus comme fonction fondamentale de l'organisation internationale.

Concevant cette fonction fondamentale d'une manière dynamique, on peut la définir comme processus de la coopération qui tend : a) à dégager, identifier et à élargir la sphère de la concordance des intérêts des États membres; b) à formuler et à avancer les tâches communes résultant de cette concordance des intérêts; c) à une entente toujours meilleure quant aux moyens de réaliser ces tâches.

Ce processus est difficile et compliqué, surtout dans les organisations des Nations Unies, composées d'États membres appartenant au divers systèmes sociaux et économiques, ainsi qu'aux divers groupements politiques. Cependant aucune organisation internationale contemporaine, et avant tout l'ONU, n'a en réalité d'autre choix que celui de réaliser un tel processus. Sa mission principale consiste à faciliter le processus de l'entente entre les États membres, à faciliter son progrès, à établir les règles de son cours normal et à supprimer ou à diminuer les obstacles sur son chemin.

C'est une fonction fondamentale, car elle constitue le courant principal de toutes les formes de l'activité de l'ONU, ainsi que de chaque organisation internationale. De son caractère fondamental il résulte aussi que la détermination des paramètres structuraux du processus décisionnel devrait lui être subordonnée.

Les tentatives d'ignorer cette fonction fondamentale causaient toujours des crises aiguës au sein de l'ONU. Un exemple frappant en était la tendance des États-Unis et de leurs alliés à élargir la compétence et le pouvoir de l'Assemblée Générale de l'ONU pour qu'elle puisse à sa majorité décider de l'application des sanctions, entamer des opérations militaires, charger les États membres des frais de ces opérations contre leur volonté.

Cette tendance s'est manifestée pleinement lorsqu'à l'Assemblée la balance des forces était favorable aux puissances occidentales. Le pouvoir accru de cet organe équivalait donc, en réalité, l'accroissement de l'efficacité de son activité comme instrument de la politique des puissances occidentales. Au fur et à mesure que cette balance se penchait en faveur des États socialistes et des États non engagés, les puissances occidentales renonçaient successivement aux tendances qui auraient alors pu se tourner contre leurs propres intérêts. Dans de nouvelles conditions, on commence

à comprendre de mieux en mieux la nécessité d'une entente générale comme base des décisions des organes de l'ONU en matières de plus grande importance. Cela se voit, par exemple, dans la divulgation de la méthode de la prise de décision sans vote, à la base du soi-disant *consensus*, en résultat des négociations directes qui amènent les parties en cause à formuler des projets de résolutions de manière à ce qu'elles puissent être acceptables sans opposition formelle de quelque membre que ce soit. Ce principe a été toujours appliqué entre autres à la Commission Économique de l'ONU pour l'Europe ou au Comité du Désarmement à Genève.

Le principe de l'unanimité des membres permanents du Conseil de Sécurité constitue la sauvegarde formelle de la réalisation de la fonction fondamentale de l'ONU. L'importance essentielle de ce principe ne consiste point à créer un soi-disant « directoriat » des grandes puissances qui s'opposeraient aux autres membres de l'ONU. En réalité, il n'existe aucune opposition d'intérêts des ensembles des États grands et petits. Au contraire, les lignes de démarcation entre les États aux intérêts conformes ou contraires passent tout autrement. En vérité, le principe de l'unanimité des grandes puissances garantit également le respect des intérêts des États plus petits, dont les intérêts dans divers domaines particuliers se rapprochent en principe des intérêts d'une ou de plusieurs grandes puissances. On peut aussi prévoir, sans craindre d'exagérer, que l'accord atteint par toutes les grandes puissances de l'ONU répond à un grand degré aux intérêts de tous les États membres. Et, en pratique, cet accord était généralement approuvé sans trop de difficultés par l'ensemble des membres de l'ONU.

Le problème de l'efficacité générale des fonctions des Nations Unies

La vocation générale de l'organisation internationale est de former ainsi le comportement des États membres et, éventuellement, celui des autres États, à ce que leurs activités contribuent à la réalisation des buts de l'organisation. Dans le sens général par l'efficacité des fonctions de l'organisation internationale, et, en particulier, des Nations Unies, on doit donc comprendre l'effectivité de l'influence que l'activité de leurs organes exerce sur leur milieu.

Le fait de poser le problème de l'influence de l'organisation internationale sur le comportement des États membres — et non seulement des États membres — sous-entend la reconnaissance de sa personnalité distincte internationale. Car cette personnalité distincte résulte de l'autonomie relative de l'organisation vis-à-vis de l'ensemble de ses membres et de chacun d'eux en particulier. On peut démontrer que le rôle autonome

de l'organisation apparaît alors même que ses activités se limitent au processus de caractère purement consultatif : à la confrontation des attitudes des divers États, à leurs persuasions mutuelles, ou même lorsque ses décisions sont prises à l'unanimité par tous les membres de l'organisation. Car la substance d'une décision, même unanime, étant le produit de processus d'interaction politique : d'ajustements, de concessions et de compromis mutuels — s'éloigne des intentions et des positions initiales de certains, et parfois de chacun des membres des organes qui l'ont finalement adoptée. Autrement dit — la volonté de l'organisation qui s'exprime dans les décisions de ses organes, se façonne un peu différemment de la somme des volontés de tous les membres et s'éloigne du dénominateur commun de leurs intérêts et de leurs volontés individuels, s'il était déduit avant le processus de la prise de décision dans le cadre de l'organisation ou bien sans ce processus. Le degré de la personnalité distincte et de l'autonomie de la volonté de l'organisation internationale augmente, bien entendu, lorsque ses fonctions ne se bornent pas au processus de caractère consultatif, mais le surpassent, surtout lorsque, par exemple, les décisions sont prises à la majorité, ou, plus encore, lorsqu'elles sont pourvues de la force obligatoire.

On aurait pu, partant de ces principes généraux, aboutir à une conclusion, en apparence très logique, que le degré d'efficacité des fonctions des Nations Unies dépendrait du degré de sa personnalité distincte et de son autonomie en tant que facteur (acteur, sujet) indépendant vis-à-vis des États. Si l'on définit la notion de l'autorité de l'organisation comme sa capacité à influencer la manière d'agir des États membres, on pourrait exprimer cette idée autrement, et notamment que l'efficacité des fonctions de l'ONU devrait augmenter suivant le degré de son autorité sur les États membres.

Ce raisonnement abstrait, déterminé quand même par des intérêts politiques concrets, a amené jadis maints théoriciens occidentaux à la conclusion que l'efficacité du rôle de l'ONU devrait être élargie par la plus grande augmentation de l'autorité formelle de l'Organisation. Et de là sont nées les conceptions utopiques d'investir l'ONU de l'autorité d'un gouvernement fédéral mondial, conceptions particulièrement à la mode aux États-Unis au lendemain de la Deuxième Guerre mondiale⁴.

⁴ Déjà à l'époque de la Première Guerre mondiale ont apparu de telles conceptions de la future organisation de la paix et de « l'ordre mondial ». Elles ont trouvé entre autres leur expression dans la publication de Herbert E. HYDE sous le titre bien caractéristique : *The Two Roads : International Government or Militarism : Will England Lead the Way ?*, London 1916, P. S. King. Les conceptions de la fédération des puissances occidentales énoncées dans le livre de Clarence K. STRETT, *Union Now* (Geneva 1938) ont provoqué de larges retentissements. Après la Deuxième Guerre

On peut constater généralement que ces conceptions ne prenaient pas en considération les réalités du monde contemporain. Leur rôle idéologique aurait dû consister à frayer le chemin à la domination mondiale de l'impérialisme américain. Cependant ce chemin s'était avéré fermé — vu l'évolution future de la balance des forces dans le monde et au sein des Nations Unies au désavantage des États-Unis.

Il est indiscutable que le degré de l'autorité formelle de l'organisation exerce une influence sur l'efficacité de son activité. L'autorité formelle de l'organisation internationale est déterminée tout d'abord par la manière de fixer les coefficients (paramètres) structuraux du processus décisionnel. Elle va s'augmenter lorsque :

1° s'accroît l'effet juridique des décisions passant des recommandations, des postulats et des conseils aux normes ou aux solutions obligatoires et quand leur formulation devient plus catégorique, plus précise et plus impérative ;

2° la procédure de la prise de décision passe de l'unanimité à une simple majorité ;

3° le poids principal de la responsabilité de l'activité de l'organisation passe des organes pléniers aux organes avec un nombre restreint des membres ;

4° s'accroît la sphère de la compétence des organes administratifs ;

5° s'accroît le degré de l'autodétermination des compétences par les organes, quand, au lieu de la définition détaillée de ces compétences dans le statut de l'organisation internationale, on y applique une définition générale qui laisse libre cours à une interprétation extensive et « fonctionnelle ».

Dans les conditions du système contemporain international et vu le caractère actuel des relations internationales, il n'est possible ni d'investir l'organisation d'une trop grande autorité envers les États, ni de destituer l'organisation de toute autorité de ce genre. Dans le premier cas, si l'on établissait les coefficients (paramètres) du processus décisionnel pour une certaine organisation au niveau supérieur de l'échelle des solutions pos-

mondiale ont apparu de nombreuses oeuvres, petites et grandes, à ce sujet, dont les titres parlent pour elles-mêmes. Et voici quelques exemples : J. LAMEROUX, *Les États-Unies du Monde*, Paris 1946, Sennac ; A. M. LILIENTHAL, *Which Way to World Government*, New York 1950, Free Press Association ; J. E. JOHNSON, *Federal Government*, New York 1948, Wilson ; F. FARNCOMBE, *World Government. Shall Britain Participate*, London 1948 ; F. S. LENT, *Supranationale Politische Integration durch Stärkung der Vereinten Nationen*, Wien 1954. Les propositions du renforcement de l'ONU au moyen de sa transformation en un gouvernement mondial sont traitées, entre autres, par P. E. CORBETT, *World Government Proposals before Congress*, New Haven 1950 ; ainsi que par M. R. DWORKIS, *An Analytical Survey of Concepts and Plans of World Government*, New York 1952.

sibles, on aurait fait d'elle une institution d'un tel degré d'autorité et d'indépendance, qu'elle aurait pris un caractère « supranational ». En particulier dans les conditions actuelles, une telle solution serait complètement irréaliste par rapport aux organisations universelles, parce que le dénominateur commun des intérêts de leurs États membres est relativement bas — ces États appartenant aux divers systèmes socio-économiques et groupements politiques. Dans le second cas — l'application dans toute l'étendue des solutions correspondant au niveau inférieur de l'échelle des solutions possibles aurait pu aboutir à trop réduire et même à paralyser les possibilités de l'activité positive de l'organisation internationale. Par exemple au cours d'un suffrage qui exige l'unanimité absolue de tous les membres, l'obstruction d'un seul membre, même le moins important dans la matière, rendrait l'adoption de toute résolution impossible.

Les solutions accessibles en pratique ne peuvent avoir qu'un caractère intermédiaire. Dans le cas d'organisations à vocation universelle, telles que les Nations Unies, où les intérêts des membres sont relativement divergeants, les solutions raisonnables, concernant les paramètres de processus décisionnel, ne peuvent qu'amener à un degré plutôt peu élevé de l'autorité de l'organisation.

Le maintien du degré de l'autorité formelle de l'organisation internationale à un niveau plutôt peu élevé convient objectivement aux intérêts des États membres et aux besoins réels de la coopération dans toutes les organisations internationales contemporaines, et entre autres, également aux organisations régionales. Preuve en est que presque toutes les organisations régionales ont conservé le principe de l'unanimité et que ce principe ne dresse aucun obstacle insurmontable à l'action efficace de ces organisations dans les conditions d'une concordance très élevée ou même de la solidarité et de communauté des intérêts de l'ensemble des membres.

Dans les conditions actuelles, les organisations internationales ne peuvent pas profiter de la possibilité d'imposer leurs décisions contre la volonté et contre les intérêts des États membres. Et notamment, elles ne peuvent pas avoir leur propre appareil administratif suffisamment effectif pour exécuter leurs décisions. Il n'en est même pas question au sein des organisations aussi puissantes que les Communautés Européennes. Le droit d'appliquer les sanctions militaires internationales octroyé exceptionnellement au Conseil de Sécurité, a été soumis à la condition de l'unanimité des 5 membres permanents — les grandes puissances et, par cela même, l'application de ces sanctions a été limitée en pratique uniquement aux conflits entre les États plus petits, dans lesquels, du reste, les intérêts controversés d'aucune des grandes puissances ne seraient engagés.

Et c'est justement l'expression du réalisme. S'il est clair que dans

l'état actuel du système international on ne peut imposer par la force quoi que ce soit qui serait contraire à leurs intérêts aux grandes puissances, et, de même, aux groupements principaux des États — comment peut-on s'imaginer la possibilité de leur imposer, contre leur gré, les décisions de l'organisation internationale, adoptées par une majorité de voix ou par les organes administratifs ?

Les facteurs politiques peuvent exercer une influence bien plus grande que les facteurs structuraux sur le degré de l'autorité réelle de l'ONU. Comme on l'avait déjà constaté, l'influence que l'organisation internationale exerce sur son milieu se borne en général à exercer une pression politique sur les États. Les facteurs structuraux ne sont importants que s'ils contribuent à augmenter le degré de cette pression. Néanmoins, son efficacité dépendrait avant tout de l'appui accordé aux décisions de l'organisation par les forces politiques réelles. Ainsi, même les simples recommandations qui n'obligent pas juridiquement et même votées par une majorité numériquement faible de l'Assemblée Générale de l'ONU auraient une efficacité considérable comme instrument de pression politique, si des puissances telles que l'U.R.S.S. et les États-Unis, ainsi que d'autres États jouant un rôle important dans les problèmes en question, leur accorderaient leur appui et s'entendraient pour les faire appliquer. Et *vice versa*, même une décision juridiquement obligatoire et unanime du Conseil de Sécurité (p.ex. les sanctions contre la Rhodésie du Sud ou la décision engageant l'Israël à quitter les territoires occupés lors de l'agression de juin 1967) — ne serait efficace, si le vote était fictif et manquait de sincérité de la part des États dont dépendait sa réalisation (p.ex. des puissances occidentales). Évidemment, l'efficacité d'une résolution votée par une faible majorité de l'Assemblée Générale sera presque insignifiante, si les puissances principales et les autres États dont dépend la réalisation de ladite résolution, adoptent envers elle une attitude négative ou indifférente. Dans les circonstances actuelles, seulement les décisions qui répondent aux intérêts de la forte majorité des États membres — y compris les puissances principales, prêtes à agir en accord — ont la chance d'avoir une très grande efficacité politique. Autrement dit, ce seront des décisions conformes à la fonction fondamentale de l'organisation internationale.

Le besoin d'augmenter l'efficacité des fonctions des organisations mondiales appartenant au système des Nations Unies est incontestable. Il n'y a aucun doute que le progrès technologique va augmenter cette nécessité. Les experts et les théoriciens occidentaux, tout en étudiant les possibilités d'augmenter l'efficacité des fonctions des Nations Unies, semblent pourtant ignorer ou falsifier les facteurs politiques dont cette efficacité dépend avant tout. L'attention est plutôt concentrée sur le perfection-

nement technique de la gestion des opérations et d'autres activités des Nations Unies.

Tel a été, hélas, le caractère de quelques rapports concernant l'assistance des Nations Unies pour le développement économique, rapports qui étaient destinés à servir de point de départ à la rationalisation dans ce domaine des programmes de tout le système des Nations Unies au cours de la décennie 1971 - 1980 ⁵.

Souvent on identifie à tort l'organisation internationale en tant que facteur indépendant dans les relations internationales, avec son organe administratif — le secrétariat. En partant de cette mystification que l'efficacité de l'ONU dépendrait du rôle du Secrétaire Général et de son appareil administratif, il aurait fallu, par conséquent, toujours plus renforcer ce rôle. On peut dire de ces conceptions qu'elles sont l'expression des intérêts politiques des États-Unis, ainsi que des autres puissances occidentales. Les programmes d'assistance pour le développement sont réalisés au sein des Nations Unies par les organisations telles que la BIRD et ses filiales, ou par le PNUD, qui agit par l'intermédiaire de plusieurs organisations spécialisées. En fait, ces programmes se trouvent jusqu'à présent sous le contrôle financier et politique des puissances occidentales et remplissent souvent le rôle d'instruments de leur politique. A un degré considérable il en est de même s'il s'agit de nombreux et importants secteurs des secrétariats des organisations du système des Nations Unies. Il s'agirait donc, en effet, de la rationalisation et de l'augmentation de l'efficacité des fonctions de ces institutions internationales en tant qu'instruments de la politique des gouvernements donnés.

Il est douteux qu'une telle rationalisation et une telle augmentation d'efficacité des fonctions des organisations respectives, sans tenir compte des conditions politiques données, causent un accroissement réel de l'efficacité de leurs services, s'ils ne tenaient pas suffisamment compte des intérêts des États auxquels ils sont destinés. Aussi on ne peut s'attendre à ce que les autres groupes d'États membres, et avant tout les États socialistes, augmentent leur apport ou même qu'ils participent aux organisations et aux programmes sur l'activité desquels ils n'auraient pas d'influence suffisante. Car dans les cas extrêmes cela pourrait sembler supporter — du point de vue matériel et politique — les instruments de la politique des États adversaires.

En récapitulant les 25 années passées, on peut constater que les fonctions des Nations Unies ont été et sont toujours avant tout régulatrices.

⁵ Il s'agit ici des travaux ci-haut mentionnés, nommés tout court le rapport Jackson, Leonard et surtout le rapport Pearson, qui feint d'ignorer l'existence et le rôle des États socialistes dans les programmes de l'assistance des Nations Unies pour le développement.

Les Nations Unies influencent surtout leur milieu en adoptant des recommandations qui transmettent aux États les indications comment, selon l'Organisation, doit s'orienter leur activité. Il faut constater que cette méthode élastique d'agir est la plus accessible à l'organisation internationale contemporaine, car elle ne limite pas la souveraineté des États. Ils gardent la liberté juridique quant à l'exécution de ces recommandations. Ils ne sont pas responsables en droit international, s'ils négligent les conseils de l'organisation. Mais, évidemment, ils en restent responsables politiquement et cette responsabilité devient d'autant plus grande que plus grande est la force morale et politique des recommandations des organes des Nations Unies.

On peut démontrer que l'efficacité politique des recommandations des organes des Nations Unies, et surtout de l'Assemblée Générale, va s'agrandir avec les changements de la balance des forces à l'ONU en faveur de la paix, de la démocratie, du progrès et du socialisme, et cela quand ces recommandations jouissent de l'appui énergique des États socialistes et des ceux du tiers monde.

En même temps, on a pu observer l'accroissement de l'efficacité des recommandations des organes des Nations Unies, grâce à leur rédaction plus résolue et plus catégorique. C'est ce qu'on a pu observer avec les résolutions concernant la décolonisation. Plus d'une fois par exemple, on a même fixé les dates exactes de la liquidation des systèmes coloniaux sur les territoires particuliers.

En même temps, il y avait une tendance à renforcer les recommandations des organes des Nations Unies par les procédés adéquats du contrôle. L'Assemblée Générale demande de plus en plus souvent aux États membres d'informer l'Organisation des démarches entreprises pour appliquer ses recommandations et de l'état de leur réalisation. Cela concernait tout particulièrement la Déclaration Universelle des Droits de l'Homme, votée par l'Assemblée en 1948 et les Pactes des Droits de l'Homme, votés en 1966, mais qui ne sont pas encore entrés en vigueur. Ces moyens de contrôle qui ne dépassaient pas les simples formes d'une transmission benévole d'informations par des gouvernements concernant la situation existant sur leurs territoires — constituaient un élément de plus de la pression politique exercée par les Nations Unies.

Dans le domaine des fonctions de contrôle en général, les Nations Unies ne dépassaient d'ailleurs pas trop les souples formes dont l'efficacité ne doit pourtant pas être sous-estimée. Le genre le plus répandu de processus de contrôle constituaient les informations : communiquées de bon gré par les gouvernements des États membres ; ayant parfois la forme de comptes rendus obligatoires selon un questionnaire (p.ex. en ce qui concerne les territoires non autonomes) ; recueillies par les organes

administratifs eux-mêmes (p.ex. sur la situation économique et sociale des pays réclamant une aide économique). Ces informations étaient transmises aux organes intergouvernementaux appropriés ou elles étaient discutées. Les résultats de cette discussion étaient présentés sous forme des résolutions évaluant l'activité des États respectifs par rapport aux modèles juridiques, moraux et politiques affirmés par les Nations Unies. L'importance de telles évaluations comme moyens de pression politique sur les États ne peut pas être sous-estimée. Les États reprouvés ressentent pour la plupart le besoin de s'excuser. Ils sont cloués, pour ainsi dire, au pilori de l'opinion publique mondiale. De plus, les appréciations politiques exprimées par les Nations Unies peuvent servir de base à la justification morale, politique et même juridique par les autres États qui voudraient appliquer des mesures de répression dans les situations données. C'est le phénomène de la soi-disant « légitimation collective » qui consiste à ce que les recommandations des organes des Nations Unies sous forme de directives positives ou d'opinions négatives justifient et appuient par l'autorité de l'organisation la politique des États qui vise leur réalisation.

Les cas de contrôle exécuté sur place par les organes des Nations Unies sous forme d'enquête sont plutôt rares. Cela a toujours été fait avec le consentement de l'État territorial en question. En cas de menace à la paix, les décisions à ce sujet reviennent de droit au Conseil de Sécurité. Quant aux territoires non autonomes les enquêtes prenaient la forme de mission de visite, dont le caractère obligatoire a été accepté dans la Charte de l'ONU par les États qui administrent les territoires sous tutelle. On note la tendance au développement des missions d'étude (*survey missions*), envoyées par le PNUD ou la BIRD dans les pays qui réclament une assistance technique ou financière. Leur tâche est d'examiner la situation économique dudit pays, de définir ses besoins et leurs priorités, ainsi que indiquer la façon la plus appropriée de la réalisation des programmes d'assistance.

On note également un certain développement, quoique dans une sphère plus limitée, des moyens du contrôle international plus arbitraire sous forme d'inspection. La voie d'application de ce contrôle est frayée par l'Accord sur la non-prolifération des armes nucléaires voté par l'Assemblée Générale en 1968 et qui est entré en vigueur le 5 mars 1970. Les États ont consenti à se soumettre à ce moyen rigoureux de contrôle tenant compte de la grande valeur que représente pour l'humanité un désarmement, fut-il partiel, et, par cela même, la consolidation de la paix. Au fur et à mesure que le désarmement progresse, on pourrait prévoir un certain développement de l'inspection internationale, ainsi que d'autres moyens de contrôle efficace de la part des Nations Unies.

En revanche, on n'observe aucune tendance au développement de moy-

ens, techniquement plus raffinés, pour le règlement pacifique des différends internationaux, et cela surtout dans la forme judiciaire. La Cour Internationale de Justice a célébré son XXV^e anniversaire par un manque absolu d'affaires à son rôle. On assiste donc à une crise véritable de cette institution, ce qui porte à conclure que le règlement de différends par des sentences arbitraires d'organes « supranationaux » ne répond plutôt pas au caractère actuel des relations internationales.

Les fonctions opérationnelles des Nations Unies dans le domaine économique et social sont un phénomène tout à fait nouveau.

Jusqu'à la Deuxième Guerre mondiale les organisations internationales exerçaient leurs fonctions opérationnelles, à vrai dire, uniquement dans le domaine du fonctionnement intérieur de l'organisation. C'étaient des services techniques rendus par le secrétariat aux organes intergouvernementaux. Dans ce domaine a eu lieu un vif et sérieux développement des fonctions opérationnelles. Les organes administratifs des Nations Unies se chargent de plus en plus de faire eux-mêmes des recherches analytiques et scientifiques. Dernièrement on procède à créer dans le cadre des organisations internationales des instituts consacrés à la recherche scientifique et à l'instruction du personnel, comme par exemple l'Institut de Formation et de Recherche des Nations Unies (UNITAR), etc.

Cependant, les services rendus à l'extérieur par leur propre personnel et avec leurs propres moyens matériels ou financiers ne sont devenus la fonction des organisations internationales qu'après la Deuxième Guerre mondiale. La valeur de ces services, surtout sous forme d'aide aux pays en voie de développement, a atteint plus de 1,5 milliards de dollars par an, y compris les emprunts accordés par la BIRD et ses filiales. C'était à peine le 10 % de toute assistance économique, dans le sens le plus large de cette notion, fournie aux pays en voie de développement d'une autre façon. L'efficacité des opérations des Nations Unies dans le domaine économique et, avant tout, leur efficacité comme moyen de pression politique sur les États profitant de l'aide, augmente avec l'accroissement de la valeur effective, c'est-à-dire du coût de ces opérations. Il est certain que l'efficacité de ces opérations aussi bien du point de vue économique — d'emploi rationnel des ressources pour accélérer le développement économique — que du point de vue de leur orientation correcte comme moyen de pression politique, dépend de l'assurance d'un caractère véritablement international à la gestion et à la réalisation des fonctions appropriées des Nations Unies. Une des conditions d'assurer ce caractère est de laisser les pays socialistes jouer le rôle des partenaires qui leur est dû dans ce domaine.

Cette condition concerne encore plus les opérations des Nations Unies

pour le maintien de la paix et de la sécurité internationale. Pour la faire observer il y a l'exigence formelle de l'unanimité des grandes puissances au sein du Conseil de Sécurité et l'attribution à cet organe de la compétence exclusive en ces matières. Il faut constater que sous l'influence des États-Unis et des autres puissances occidentales l'ONU était orientée sur une fausse voie : on mettait en oeuvre des opérations en partant des décisions majoritaires de l'Assemblée Générale et on les faisait diriger par le Secrétaire Général de l'ONU. Sans parler du fatal engagement des Nations Unies dans la guerre d'agression américaine en Corée — il suffit de citer des actes tels que la résolution de l'Assemblée Générale de 1950, intitulée l'« Union pour la Paix » ; les opérations des Nations Unies au Moyen Orient (la FUNU) et au Congo (l'ONUC) ; l'essai de charger tous les membres des frais de ces opérations sous forme de cotisations obligatoires. Ces actes ont causé de profondes crises à l'ONU et l'ont parfois menée au bord de l'anéantissement.

Il faut quand même constater qu'au début du nouveau quart de siècle de l'expérience des Nations Unies on est profondément convaincu de la nécessité d'une entente des grandes puissances, l'U.R.S.S. y compris, non seulement pour mettre en marche toute sorte d'opérations des Nations Unies pour le maintien de la paix, mais aussi pour les mener à bonne fin ⁶.

Comme le montrent les tendances observées au cours des premières 25 années de l'existence de l'ONU, on peut prévoir que son développe-

⁶ P.ex. en évaluant les principes de la Charte des Nations Unies un éminent spécialiste et un des plus versés dans la matière des problèmes de l'ONU, caractérise ainsi l'idée maîtresse de cette Organisation : « Insister que la coopération des puissances principales est une condition nécessaire d'une efficacité maximum est basée sur un principe très sensé que dans une organisation internationale pour le maintien de la paix la responsabilité doit s'harmoniser avec la force » (L. M. GOONRICH, *San Francisco in Retrospect*, « International Journal », Vol. 25, 1970, No. 2, p. 259 : « *Insistence that cooperation of the major powers was a necessary condition to maximum effectiveness rested upon the basically sound principle that in an international organization to keep peace responsibility must be harmonized with power* »). Un spécialiste anglais évalue ainsi l'expérience de l'ONUC : « Le Congo semble de confirmer encore une fois cette leçon que l'entente des grandes puissances est une nécessité absolue du succès des opérations de l'ONU, non seulement à leur début, mais aussi pendant toute la période de leur durée, et que toutes les fois que les intérêts nationaux de ces puissances sont opposés dans un domaine donné — il ne peut être question de s'attendre à une action efficace » (Robert R. JAMES, *International Crises, the Great Powers and the United Nations* ; « International Journal », Vol. 25, 1970, No. 2, p. 352 : « *The Congo would seem to have again confirmed the lesson the great-power agreement was a vital requisite for success in a United Nations operation, not merely at the outset but throughout its course, and that whenever these powers had opposed national interests in an area there could be no expectation of effective action* »).

ment futur ne s'orientera pas vers un accroissement de l'autorité formelle des organes. Les gouvernements des États membres ne se décideront sûrement pas à donner aux décisions des organes des Nations Unies la force obligatoire de droit. Ce ne sera pas, non plus, l'orientation vers la prise des décisions par la majorité des voix dans les organes intergouvernementaux des Nations Unies sans égard pour l'attitude d'une minorité politiquement importante.

Il ne faut pas s'attendre non plus à une révolution dans le domaine des fonctions de contrôle, même dans le cours du processus du désarmement qui va se développer. Pour le désarmement partiel on applique plutôt les moyens de contrôle réciproque, plus accessibles aux États ; il en est ainsi avec la démilitarisation de l'Antarctique, l'interdiction partielle des explosions nucléaires, la démilitarisation partielle de l'espace cosmique ou du fond des mers. Les fonctions opérationnelles des Nations Unies qui tendent à se développer dans le domaine économique, après avoir atteint un certain plafond, continueront probablement à rester un réseau limité d'aide aux pays en voie de développement. Semblent limitées aussi les possibilités d'expansion des fonctions opérationnelles dans le domaine de la paix internationale.

En revanche, on peut s'attendre à un accroissement de l'efficacité des fonctions des organes des Nations Unies, grâce aux facteurs politiques : grâce à l'assurance à l'activité de ces organes de l'appui des forces politiques pacifiques et progressistes qui ne cessent pas à croître dans le monde actuel. On peut très bien remarquer qu'après les années d'expérimentations et d'égarement succède la reconnaissance presque générale de la justesse et du réalisme des principes qui inspiraient les auteurs de la Charte des Nations Unies en 1945. Les fonctions des Nations Unies ne vont peut-être pas être très spectaculaires de l'extérieur, mais elles seront plus effectives du point de vue politique en façonnant l'activité des États selon les besoins de la coopération pacifique.

La mesure de l'efficacité des fonctions des Nations Unies

Mesurer l'efficacité des fonctions des Nations Unies est une chose difficile et compliquée. Cela dépend de la possibilité d'évaluer quantitativement le montant des apports et des produits de l'activité de l'Organisation. On pourrait donc tout d'abord considérer les frais de l'activité des Nations Unies qui pèsent sur l'ensemble des États membres pour les comparer aux résultats obtenus. En termes financiers, comptant les dépenses administratives et pour la réalisation des programmes d'assistance (les capitaux des organisations financières exclus) les frais directs,

indiqués dans les budgets et les différents fonds internationaux, atteignaient en 1970 plus de 700 millions de dollars par an pour toute la famille des Nations Unies. On doit y ajouter les frais indirects, notamment ceux de la participation aux travaux des organes, réglés individuellement par les États. En jugeant la résistance que rencontre auprès des gouvernements toute tendance à augmenter leurs dépenses destinées à alimenter les organisations des Nations Unies, on pourrait supposer que le rendement de ces organisations n'est pas considéré satisfaisant par les États membres. Cependant il est clair que l'appréciation de l'efficacité des Nations Unies selon la réaction des gouvernements au montant de leurs cotisations ne serait qu'une simplification inadmissible du problème⁷.

Le rendement des fonctions régulatrices de l'ONU pourrait être mesuré, par exemple, par le nombre des résolutions adoptées par l'Assemblée Générale ou le Conseil de Sécurité ou les autres organes, par le nombre des conventions internationales adoptées dans le cadre de l'ONU. On pourrait établir la moyenne de ce rendement de l'ONU par an ou par un État membre. On pourrait naturellement essayer d'approfondir ces calculs, par exemple en établissant la portée des conventions des Nations Unies par le nombre des États qui les ont ratifiées et par leur importance pour tel ou autre domaine des relations internationales.

Le rendement des fonctions de contrôle pourrait être mesuré, par exemple, par le nombre du personnel des missions d'observation, ou le nombre des inspecteurs et par le temps qu'ils ont passé dans les pays observés en étudiant les situations contrôlées, ou bien encore par le nombre des décisions évaluant le comportement des États ; par le nombre des jugements de la Cour Internationale de Justice, etc.

Le rendement des fonctions opérationnelles pourrait être établi par la valeur de l'aide fournie, en l'évaluant par exemple à la base des frais qu'un État donné aurait subis, s'il avait acheté ce genre de services ailleurs. On pourrait aussi approfondir la mesure de l'efficacité de l'aide pour le développement, fournie par les Nations Unies, en essayant d'établir, combien elle a accéléré la croissance économique des pays qui en ont bénéficié.

Il est facile à remarquer que ces tentatives d'évaluer, du point de vue quantitatif, les dimensions du rendement de l'activité de l'organisation internationale mènent à une simplification, à des appréciations très su-

⁷ On rencontre parfois des évaluations fort cyniques de la valeur de l'ONU. P.ex. un ancien diplomate américain John Paton Davies croit que « Devenir membre de l'ONU, c'est à peine un peu plus que devenir membre de la Société Géographique Nationale ». (« New York Times Magazine », 7 XII 1969, p. 146: « *Becoming a member of the UN is scarcely more significant than becoming a member of the National Geographical Society* »).

perficielles, ou encore s'avèrent inaptes si l'on s'efforce à approfondir les méthodes de calcul. Dans la plupart des cas on ne peut les prendre au sérieux.

On rencontre souvent les évaluations générales de l'efficacité de l'organisation internationale qui partent d'une bien simple, mais comment naïve, comparaison de l'état du milieu de l'organisation au début et à la fin d'une période définie. Du point de vue des objectifs de l'organisation on peut alors constater le progrès, le manque de progrès ou la régression. Ainsi, par exemple, on soutient d'une manière générale que la Société des Nations s'est avérée inefficace, car elle a fait faillite au début de la Deuxième Guerre mondiale qu'elle n'a pas su empêcher. Vingt cinq ans après la création de l'ONU on aurait pu aussi bien affirmer que cette organisation a prouvé son efficacité, car au cours de cette période la paix mondiale a été maintenue. On pourrait aussi raffiner cette appréciation en constatant que l'efficacité de l'ONU sous ce rapport était limitée, car elle n'a pas su empêcher de nombreuses guerres locales et n'a pas résolu de nombreux conflits et situations menaçant la paix. Dans les organisations de caractère économique, on pourrait comparer les indices économiques des pays membres ou de l'économie mondiale au début et à la fin de la période définie — et en attribuer les changements à l'influence des organisations.

Il est facile à remarquer que l'application de cette méthode simplifiée d'évaluer l'efficacité de l'organisation internationale s'appuie sur une prémisses fort éloignée de la réalité que presque tous les changements dans son milieu sont causés par son influence. Cependant les possibilités de l'organisation sont limitées sous ce rapport. Et notamment, elle n'est pas capable d'entamer des processus de développement, mais, tout au plus, elle peut contribuer à les accélérer, à les freiner ou, autrement, à modifier les modalités de leur cours.

Une autre méthode suggérée pour l'étude de l'efficacité générale de l'ONU ou de toute autre organisation internationale est de s'imaginer, d'une manière spéculative, l'état de la situation internationale, partant d'une prémisse fictive que cette organisation n'existe pas ou n'a jamais existé. On peut qualifier cette méthode comme « rétablissement d'une place vide ». Le raisonnement vise dans ce cas-là une évaluation: quelles auraient été les conséquences de la non-existence des Nations Unies⁸. Cette méthode, même en appliquant les techniques les plus raf-

⁸ Cette méthode est suggérée, pour ainsi dire, par Ruth B. RUSSEL dans son article *Power Politics in the United Nations* (« International Journal », Vol. 25, 1970, No. 2, p. 323) lorsqu'elle dit : « Nous ne pouvons p.ex. pas mesurer l'influence de l'existence des Nations Unies pendant la crise de Cuba, puisque nous ne savons pas ce qui se serait advenu sans elles » (« We cannot for example measure the influence of United

finées de la simulation, ne peut s'éloigner que fort peu des appréciations intuitives, telles qu'elles se forment dans la perception subjective des hommes de politique ou des hommes de science.

Il paraît quand même que l'état actuel de la science dans ce domaine ne peut de beaucoup dépasser ces appréciations intuitives. Il ne faut pas donc sous-estimer le rôle de l'intuition dans les sciences sociales en général, et dans la science sur l'organisation internationale, en particulier. Et non seulement parce qu'il n'existe, en effet, d'autres moyens. Il s'agit de ce que l'évaluation intuitive — même que sa justesse ne peut être suffisamment prouvée et qu'elle ne possède qu'un caractère conjectural — si elle est fondée sur une grande expérience des hommes politiques éminents ou si elle découle de l'analyse systématique et rigoureuse de la pratique, effectuée par des théoriciens sérieux — ne s'éloigne pas tellement de la vérité. Une telle évaluation effectuée par les ensembles de praticiens et de théoriciens qualifiés, sans perdre son caractère intuitif, donne plus de garantie de justesse et permet de diminuer la marge de l'incertitude. Dans cette direction pourraient de même s'orienter toutes les techniques modernes de recherches empiriques, d'assemblage et de transformation des données à l'aide de machines à calculer. Cependant, ces techniques ne jouent également qu'un rôle auxiliaire et ne remplacent pas les hypothèses scientifiques intuitives qui, avec l'application de telles techniques, ne peuvent que devenir plus probables plutôt que d'être définitivement niées ou confirmées.

D'une façon générale, on pourrait le mieux juger de l'efficacité des fonctions des Nations Unies d'après l'importance attachée à ces fonctions par les gouvernements des États. Contrairement à ce qui s'est passé pour la Société des Nations, par exemple, aucun État n'a quitté l'ONU⁹. Au contraire, presque tous les États existant (excepté la Suisse et la Répu-

Nations availability during the Cuban crisis, because we do not know what would happen without it »). Pareillement Richard N. GARDNER : Can the United Nations be Revived ? « Foreign Affairs », Vol. 48, 1970, No. 4, p. 660 : « Avant de céder à la tentation de déclarer les Nations Unies comme entièrement inefficaces il faut réfléchir, comment aurait été le monde sans elles pendant les dernières 25 années ». (« Before we yield to the temptation to write the United Nations off as wholly ineffective, we might ask ourselves what the world would have been like during the last 25 years without it »).

⁹ Quoique il y avait eu des cas isolés de la retraite temporaire ou permanente des États membres de l'ONU ainsi que de certaines organisations spécialisées. A ce sujet voir: W. MORAWIECKI, *Prawo państwa-członka do wystąpienia z organizacji międzynarodowej* [Le droit de l'État membre à se retirer de l'organisation internationale] ; « Państwo i Prawo », 1965, No. 7 ; W. MORAWIECKI, *Le problème du « Membre inactif » de la Pologne et des autres États socialistes à l'Organisation Mondiale de la Santé et à l'UNESCO*, « La Pologne et les Affaires Occidentales », Vol. 1, 1966.

blique Fédérale Allemande) et surtout ceux, qui se sont constitués après la Deuxième Guerre mondiale (le Samoa Occidental excepté) — ont demandé à être admis à l'ONU et aux autres organisations de la famille des Nations Unies.

Les efforts des gouvernements pour faire passer dans les organes des décisions conformes à leurs intérêts ou bien la lutte qu'ils mènent aux organes des Nations Unies pour ne pas y permettre l'adoption des solutions contraires à leurs intérêts — tout cela prouve que les Nations Unies constituent un élément important des relations internationales contemporaines — tout cela témoigne de l'importance attachée par les gouvernements aux fonctions des Nations Unies. Il est évident que l'efficacité de l'influence politique des Nations Unies est aujourd'hui telle, que ses réactions doivent être prises en considération par le gouvernement de chaque État lorsqu'il décide de son comportement dans le domaine de la compétence de n'importe quelle organisation de la famille des Nations Unies et, avant tout, de l'ONU.

L'efficacité des fonctions des Nations Unies pour les États membres particuliers et pour leurs groupements

Les Nations Unies, comme toute autre organisation, sont un instrument de la politique de ses États membres. Mais elles ont été appelées à servir *d'instrument commun de la politique des membres*, qui se posent des tâches communes conformes à leurs intérêts concordants. La pratique s'écarte souvent de cet état idéal ; si ces écarts ne dépassent pas certaines limites, on doit les considérer comme symptômes normaux du dynamisme de fonctionnement des Nations Unies. L'activité de l'Organisation peut donc balancer, dans certaines limites, autour d'un état d'équilibre, lorsqu'elle répondrait aux intérêts de tous les membres à un degré égal. Mais parfois les Nations Unies servent de l'instrument de la politique d'un groupe d'États membres plutôt que celui d'un autre groupe et parfois même peuvent devenir exclusivement l'instrument politique de certains de leurs membres, instrument dirigé contre les autres membres.

S'il en est ainsi dans les différentes questions, parfois pour les uns et parfois pour les autres membres — mais de telle manière qu' à la longue pour chaque membre se formerait un bilan positif des frais et des bénéfices de sa participation à l'organisation — son fonctionnement pourra continuer à être traité comme compris dans les limites d'une dynamique normale.

Les fonctions des Nations Unies peuvent donc être examinées, et en fait sont examinées, surtout par les gouvernements, sous l'angle de leur

efficacité pour les États membres. En devenant ainsi plus concrète, la notion de l'efficacité des Nations Unies devient ainsi plus saisissable et celle-ci est plus aisée à évaluer.

Par rapport aux intérêts d'un État donné ou d'un groupe d'États l'efficacité de l'activité des organes des Nations Unies peut être jugée positive ou négative. Le plus souvent ce jugement sera plus nuancé et occupera une place intermédiaire entre ces deux pôles extrêmes : on pourra dégager certains côtés négatifs et certains côtés positifs de l'activité des Nations Unies. Elle ne sera jamais complètement satisfaisante ou insatisfaisante pour aucun État, parce qu'elle sera normalement le produit des compromis.

On peut formuler une conclusion générale que les États membres seront enclins à augmenter l'autorité et l'efficacité de l'organisation internationale, quand ils espéreront que cette augmentation sera favorable à la réalisation de leurs intérêts et que ce sera l'autorité et l'efficacité de l'organisation en tant qu'instrument de leur propre politique. Cela dépendra de la balance des forces au sein de l'organisation. C'est pourquoi, par exemple, les puissances occidentales sont portées actuellement à augmenter l'efficacité des fonctions opérationnelles des Nations Unies dans le domaine économique et social, parce qu'elles ont actuellement, et prévoient pouvoir garder, une influence décisive dans les organes de gestion des programmes respectifs d'assistance. On ne peut en dire de même des fonctions régulatrices des Nations Unies, réalisées surtout par l'Assemblée Générale de l'ONU et les organes pleinières de la plupart des organisations spécialisées (sauf la BIRD et le FMI avec leur procédure de vote pondéré), sur lesquelles les puissances occidentales ont perdu leur contrôle politique avec le changement de la balance des forces après 1955. C'est sans doute pourquoi ces puissances montrent actuellement peu d'intérêt à augmenter l'efficacité des fonctions de ces organes.

L'attitude des États socialistes, comme celle des autres États, envers le problème de l'efficacité des fonctions des organes des Nations Unies est aussi déterminée avant tout par la balance des forces à leur sein, dont découlent la direction et la substance politique de leur activité. De cette balance des forces dépend notamment, si cette activité sera compatible aussi aux intérêts des États socialistes et jusqu'à quel degré doit-on l'espérer.

L'efficacité de l'organisation internationale pour un État déterminé ou pour un groupe d'États dépend du degré de son influence sur l'activité de ses organes. Dans la plupart des cas, et en particulier dans les Nations Unies, les États membres n'agissent pas isolément, mais s'unissent en groupements selon la concordance de leurs intérêts. Ils le font pourtant expressément dans le but d'exercer collectivement une influence plus

effective sur l'activité des organes et, par conséquent, de la rendre plus conforme à ses intérêts. C'est pourquoi les groupements des États membres ont pris un caractère institutionnel dans les Nations Unies.

Le degré de l'influence politique du groupement en question des États membres est déterminé par des facteurs suivants :

a) nombre de voix dont dispose ledit groupement ;

b) capacité à s'acquérir les voix d'autres membres pour renforcer sa position ;

c) rôle réel des États dudit groupement dans le domaine donné des relations internationales ; il s'ensuit une position de surenchère du groupement vis-à-vis des autres États et de leurs groupements ; cette position se traduit par la valeur que représente pour l'organisation et ses autres membres la participation des États dudit groupement dans la réalisation des décisions à prendre ;

d) dépendance de l'activité de l'organisation du rapport des États dudit groupement vis-à-vis de l'organisation ; il s'agit avant tout de la dépendance financière qui s'accroît avec la proportion dans laquelle des États dudit groupement participent aux frais de l'activité de l'organisation ;

e) influence sur le travail des organes administratifs ; cette influence peut s'exprimer approximativement par la quantité et le rang des postes occupés par les citoyens des États du groupement en question.

Il faut constater, que le degré de l'influence du groupement des États socialistes dans les Nations Unies découle de leur rôle réel, avant tout dans le domaine des problèmes liés avec la paix et la sécurité internationale et, éventuellement, de la capacité à s'acquérir les voix des autres membres, surtout des États du Tiers Monde pour renforcer leur position. Le facteur important de l'influence des États socialistes résulte du rayonnement idéologique et politique sur de larges secteurs de la population des autres États — avant tout sur les masses ouvrières — et de leur appui pour les lignes générales de la politique des États socialistes. Par cela même une pression indirecte s'exerce aux Nations Unies sur l'attitude des gouvernements des autres États. En revanche, la situation des États socialistes est toujours faible lorsqu'il s'agit de remplir des postes administratifs, ou, par exemple, de faire dépendre des fonctions opérationnelles dans le domaine économique et social d'un appui financier. Comme on a déjà indiqué, cela reste toujours le domaine d'influence des puissances occidentales. Les États du Tiers Monde influencent les Nations Unies surtout grâce au nombre de leurs voix.

La stratégie de chaque État et du groupement des États envers les Nations Unies consiste sans doute en une concentration des efforts pour mettre en valeur les facteurs de sa force et pour augmenter l'efficience

des fonctions de l'organisation dans les domaines où ces États possèdent la plus grande influence. En même temps, cette stratégie consiste à diminuer sa vulnérabilité à ces fonctions de l'organisation qui probablement pourraient être mises à profit comme instrument politique par le groupement adverse. En déterminant la stratégie de la politique envers les Nations Unies, comme dans toutes les autres matières, il est raisonnable de s'appuyer sur le principe de la concentration sélective des moyens et des efforts.

En étudiant la situation actuelle qui existe dans les types divers des organes des Nations Unies, on peut constater que l'influence des pays socialistes sur l'activité de ces organes ne répond pas toujours au rang et au rôle de ces États dans le monde actuel. Le pourcentage des voix socialistes dans les organes pléniers intergouvernementaux est loin de ce qui pouvait résulter de nombreux indices de la force et de la position des États de ce groupement dans le monde aussi essentiels que : le nombre des habitants, le niveau du revenu national, le niveau de la production industrielle, ou bien — le potentiel militaire. Ce pourcentage fut encore plus réduit par le fait que quatre États socialistes n'ont pas été admis à participer à aucune organisation des Nations Unies.

Cependant la composition et la répartition des forces dans les organes pléniers des Nations Unies a évolué, à partir de 1955, pour refléter d'une manière plus adéquate la composition et la balance réelle des forces dans le monde. Cela a été causé particulièrement par la croissance du nombre des États du soi-disant Tiers Monde et par le fait que leurs intérêts convergent au sujet de certains problèmes contemporains principaux avec les intérêts et l'attitude des États socialistes. C'est pourquoi les États socialistes ont jugé opportun de soutenir le rôle des organes pléniers dans les processus décisionnels des organisations des Nations Unies. Cela se traduit, entre autres, par la mise aux débats de l'Assemblée Générale de l'ONU des matières les plus importantes concernant la paix et la sécurité mondiale et par l'avancement du rang politique des représentants des pays socialistes dans cet organe.

Les possibilités bien plus grandes d'adapter la répartition des forces dans les organes des Nations Unies à la balance réelle des forces dans le monde actuel apparaissent actuellement dans les organes au nombre restreint de membres. En assurant adéquatement leur composition par l'application des critères appropriés de la sélection des membres de ces organes (p. ex. en attribuant les places permanentes aux principales puissances, en répartissant d'une juste manière des places électives aux groupements des États) — et avec la procédure appropriée du vote on peut créer ici les conditions de la prise de décisions qui puissent mieux refléter les influences réelles dans les relations internationales et la ba-

lance des forces dans le monde. On constate par exemple que le Conseil de Sécurité de l'ONU crée de telles conditions pour la prise de décisions dans la sphère de sa compétence. Il paraît que aussi dans les autres organes intergouvernementaux des Nations Unies au nombre restreint des membres existent actuellement pour les États socialistes — et pour les autres États — les possibilités d'obtenir une influence convenable à leur rôle réel sur le processus décisionnel, donc sur la réalisation des fonctions des Nations Unies. C'est vers ces organes d'ailleurs que tend objectivement le poids principal de la responsabilité pour l'activité de Nations¹⁰.

En prenant sous considération une tendance objective — à ce qu'il paraît — à augmenter le rôle des organes administratifs (secrétariats) dans les organisations internationales contemporaines, et particulièrement dans les Nations Unies, on pourrait postuler de profiter de toute possibilité pour augmenter les influences des États socialistes sur ce terrain.

La notion de l'efficacité des fonctions des Nations Unies devient pour nous la plus proche et nous y devenons les plus sensibles lorsque nous nous demandons quelle est cette efficacité pour notre propre pays : est-ce que la participation aux Nations Unies, ou, plus concrètement, audit programme ou à ladite organisation apporte à la Pologne des bénéfices et quels en sont les frais ? Ainsi conçu, apparaît dans toute son étendue le problème de calcul des coûts et des bénéfices résultant de la participation de l'État à l'organisation internationale.

Malgré que plus saisissables intuitivement, les facteurs d'un tel calcul restent toujours difficiles ou impossibles à mesurer, surtout s'il s'agit des facteurs politiques principaux. C'est pourquoi on ne peut pas s'attendre à dresser un bilan plus précis des coûts et des bénéfices de la participation de l'État à l'organisation internationale. Mais il est déjà important de poser ce problème, puisque cela force à repenser l'affaire et à fixer du moins les directives générales de l'attitude de l'État envers l'organisation internationale.

Il serait possible et utile de dresser une carte du problème qui nous intéresse, où seraient marqués les facteurs qui influencent les dimensions des coûts et, respectivement, des bénéfices résultant de la participation de l'État à l'organisation internationale ; il y seraient marqués éventuellement les poids de ces facteurs et leurs interdépendances. Dresser une telle carte, dont la précision pourrait toujours être améliorée dans la suite, permettrait de mieux reconnaître la situation. Cela permettrait aussi de développer une meilleure stratégie d'action tendant à diminuer les coûts et à augmenter les bénéfices de la participation et, par cela

¹⁰ A comparer W. MORAWIECKI, *Some Problems Concerning Organs of International Organizations*, « International Organization », Vol. 19, 1969, No. 4.

même, à augmenter le degré de l'efficacité de l'organisation internationale pour l'État en question.

Du côté des coûts de participation il faut tenir compte des *facteurs financiers* qui sont plus mesurables, comme : les cotisations au budget administratif de l'organisation ; les dotations bénévoles aux fonds qui alimentent les programmes opérationnels ; les frais d'entretien des missions permanentes auprès de l'organisation ; les frais de participation des délégations de l'État aux sessions des organes ; les frais d'entretien de l'administration du pays qui collabore avec l'organisation ; les frais de l'instruction du personnel pour les services ci-haut mentionnés ; la participation aux frais de la réalisation des programmes des Nations Unies sur le territoire du pays en question, etc.

Il faut aussi tenir compte des facteurs difficiles à mesurer — que l'on pourrait qualifier comme des *facteurs de cadres*. Ce sont les coûts qui résultent de la destination du personnel national très qualifié aux travaux des Nations Unies, en résignant de ses services, même d'une nécessité urgente pour les affaires internes du pays. C'est notamment le problème assez grave pour les pays en voie de développement.

Il faut enfin tenir compte des immensurables *facteurs politiques* des coûts de participation, dont l'importance est, sans doute, incontestable et même décisive, comme : l'appui accordé par la participation même de l'État donné au prestige et à l'autorité des Nations Unies et surtout l'augmentation de l'efficacité politique de leurs fonctions qui pourraient servir les intérêts étrangers, voir même ennemis, et nuire aux propres intérêts de l'État membre en question ; les facilitations de ces fonctions grâce à l'accès accordé aux diverses informations ; et autres.

Du côté des bénéfices de la participation à l'organisation il faudrait prendre en considération des facteurs semblables. Ce seraient donc les *facteurs financiers* comme : la valeur directe de services rendus par l'organisation à l'État en question, par exemple sous forme d'assistance technique ; la participation financière de l'organisation aux programmes internationaux ayant lieu sous son égide sur le territoire de l'État en question (p. ex. conférences, séminaires) ; les bénéfices financiers et commerciaux directs et indirects résultant de la location des sièges des organes ou de leurs opérations sur le territoire de l'État donné ; les rentrées des devises des participants de ces programmes et projets ; les appointements des fonctionnaires internationaux qui sont citoyens de l'État en question, transmis sous les formes diverses dans leur pays d'origine, etc.

Il faut citer encore de tels avantages dans le domaine des cadres que le perfectionnement professionnel du personnel national aux services de l'organisation et de ses programmes ; c'est une bonne école de négociation et de jeu politique.

Il faut enfin se rendre compte des *avantages politiques* de la participation à l'organisation internationale. La participation même dans les processus qui se déroulent dans son cadre possède une grande valeur politique. La valeur de la présence de l'État donné à l'organisation ne peut mieux être appréciée qu'en considérant les désavantages que causerait pour lui-même son absence dans ses rangs. Faire partie des Nations Unies renforce considérablement le prestige politique de l'État dans la coopération internationale qui se déroule dans le domaine de la compétence de l'organisation et dans son cadre. La participation à l'organisation permet d'exercer une influence sur ses fonctions et, par son intermédiaire, sur son milieu : les États et leurs relations. Cette participation permet d'entamer et de développer la coopération avec les autres membres de l'organisation et d'exercer sur eux une influence directe ; elle permet de populariser la propre ligne politique de l'État et de promouvoir ses propres modèles sociaux, économiques, politiques et idéologiques. Elle donne l'accès aux nouvelles sources d'information. Enfin, la participation de l'État à l'organisation internationale lui permet de se servir de l'organisation comme d'un instrument de sa propre politique ou, dans une situation défavorable, de défendre ses propres intérêts et de s'opposer à la prise des décisions nuisibles à ses intérêts.

En considérant les facteurs variables des coûts et des bénéfices, il faut aussi tenir compte de leurs effets indirects ou de leurs effets catalytiques éventuels, surtout si les coûts ou les bénéfices donnés concernent les éléments particulièrement vulnérables pour l'État en question.

Les éléments positifs et négatifs dans le bilan général de la participation dans les Nations Unies ont dans leur majeure partie un caractère dialectique et dynamique et sont difficiles à saisir. Cela vient du fait qu'il s'agit ici, à vrai dire, de la participation dans un jeu politique. Il n'est pas à songer qu'un État engagé dans les problèmes du monde actuel puisse s'exclure de ce jeu ou de se tenir à l'écart. La Pologne est engagée au sort du monde actuel plus que beaucoup d'autres États, aussi bien par des raisons objectives — son rang effectif dans le monde et sa situation géographique — que grâce aux causes subjectives, telles que la volonté des Polonais à contribuer à la formation de l'aspect du monde et à y laisser leur empreinte. Les Nations Unies créent des conditions favorables pour que la Pologne puisse réaliser sa mission mondiale qui lui revient.

En dressant le bilan d'un quart de siècle de la participation de la Pologne dans les Nations Unies on peut y remarquer, sans aucun doute, les ombres et les lumières et même parfois des parties perdues dans ce grand jeu politique. En estimant pourtant la grande valeur de l'enjeu principal — c'est-à-dire le maintien de la paix mondiale — il est hors de doute que cette participation a été favorable pour la Pologne, ainsi que

pour les autres nations. Dans le bilan général — les Nations Unies n'ont pas réalisé de nombreuses espérances, mais néanmoins elles ont joué un rôle positif et profitable pour tous leurs membres et leurs groupements. Au fur et à mesure de l'accroissement des forces de la paix et du progrès les Nations Unies pourront servir toujours mieux les intérêts de toutes les nations.

The Warsaw Treaty

by JERZY TYRANOWSKI

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I. Origin

The alliance and cooperation of the Big Powers which headed the coalition of the United Nations fighting the States of the fascist axis bore fruit in the shape of a complete triumph. The cooperation was to have been continued as a guarantee that aggression would not repeat itself. It was to have constituted the corner-stone of the post-war order. In the Declaration of the Three Powers signed in Teheran on 1 December, 1943 a conviction is expressed that the harmony between the Big Powers will make peace lasting. This was the principle on which the United Nations has been built.

The harmony, however, did not last long. Its place was taken by a "cold war." The Brussels Pact signed on 17 March, 1948, and on 4 April, 1949 twelve States of the West, including three Big Powers, signed the North Atlantic Treaty. The signing of the Atlantic Pact was a formal confirmation of the departure of the Western Powers from cooperation with the USSR.

Two German States emerged a few months after the signing of the treaty. This development of the situation in Germany, a development leading to the disruption of unity that had been formally maintained up to then, was a result of the policy of the Western Powers. They needed the Federal Republic of Germany for the aims of their policy, and they liberated in the FRG forces which consented to pursue that policy. As soon as the FRG was formed, efforts began to be made to draw the

Federal Republic into the military systems of the West. The first attempt in that direction misfired—the French National Assembly refused its consent to the ratification of the Treaty on the European Defence Community of 27 May, 1952. In their second attempt the Western Powers achieved their goal—a number of agreements called the Paris Treaty were signed in Paris on 23 October, 1954. The Paris Treaty included a Declaration inviting Italy and the Federal Republic of Germany to join the Brussels Pact, and a Protocol concerning the accession of the FRG to the Atlantic Pact.¹

A conference whose aim was to safeguard peace and security in Europe was held in Moscow from November 29 to December 2, 1954. The conference was attended by eight States: the USSR, Poland, Czechoslovakia, the German Democratic Republic, Hungary, Rumania, Bulgaria and Albania. A representative of the Chinese People's Republic attended the conference in the capacity of observer. The participants in the conference—proclaims the closing communiqué²—examined the situation which arose in Europe in connection with the signing of the Paris Treaty on the remilitarization of West Germany and her accession to military systems directed against the peace-loving States of Europe. In a simultaneously issued Declaration the States participating in the conference warned that if the Paris Treaty is ratified they will take joint steps in the military field in order to safeguard their security.

The warning was disregarded and the Paris Treaty came into force. The FRG became a member of the Western European Union as of 7 May, 1955, and presented a document on her accession to the Atlantic Pact on 6 May, 1955, and participated formally in the North Atlantic Treaty Organization as of 9 May of that year.³ In these circumstances, in accordance with the announcement contained in the Moscow Declaration, its signatories re-assembled at a conference held in Warsaw from May 11 to 14, 1955. The conference resulted in the signing of a Treaty of Friendship, Cooperation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Union of Socialist Soviet Republics and the Republic of Czechoslovakia.⁴ It is called informally the Warsaw Treaty.

¹ Legal analysis of the Paris Agreements: K. SKUBISZEWSKI, *Umowy paryskie z 23 października 1954. Studium z dziedziny prawa międzynarodowego* [The Paris Agreements of 23 October, 1954. A Study in the Field of International Law], "Przegląd Zachodni," 1955, No. 5 - 8, pp. 65 - 131.

² Complete documentation of the conference in "Zbiór Dokumentów" (hereinafter cited as "Collection of Documents"), 1954, No. 11, pp. 3057 - 3147.

³ K. SKUBISZEWSKI, *Umowy paryskie...* [The Paris Agreements...], p. 129.

⁴ "Dziennik Ustaw" [Journal of Laws], No. 30/1955, item 182.

II. The Binding Force of the Warsaw Treaty and Its Parties

In accordance with Article 10 of the Treaty it is subject to ratification by all its signatories, and comes into force on the day of the depositing of the last ratification document. This procedure was exhausted when Albania, as the last State, deposited her ratification document on June 4, 1955. On that day the Warsaw Treaty became valid and came into force at the same time.

In accordance with Article 11, the Warsaw Treaty is an accord concluded for a specified time period. The original period of its validity was twenty years, thanks, however, to a prolongation clause, this period may be extended for another ten years.

The Warsaw Treaty provides for two ways of its expiration: (a) the lapse of time for which it was concluded and (b) fulfillment of the dissolving condition foreseen in it.

(a) As a result of lapse of time the Warsaw Treaty may expire after the passage of twenty or thirty years.

(b) Article 11 of the Warsaw Treaty reads:

"In case of the creation of a system of collective security in Europe and the conclusion of a European treaty on collective security for this purpose [...] the present Treaty shall lose its force on the day of the entry into force of the European treaty."

In this case expiration takes place automatically on the day on which the above-mentioned treaty comes into force. The provision of Article 11 constitutes a typical example of a dissolving condition.⁵

The original parties to the Treaty are States named in the title, which have signed and ratified the Treaty. Other States may accede to the Treaty—Article 9 reads:

"The present Treaty is open to other states which may accede to it irrespective of their social and state system and which will express their readiness to contribute by their participation to the combining of the efforts of peace-loving states in order to safeguard peace and security of nations. Such an accession will take effect with the consent of the state-parties to the Treaty after the document of accession is deposited for keeping with the Government of the Polish People's Republic."

The fact that the accession of a third state to the Warsaw Treaty is made dependent on the fulfillment of the conditions contained in Article 9

⁵ *Zarys prawa międzynarodowego publicznego* [An Outline of International Public Law], vol. 2, Warszawa 1956, p. 115; A. KŁAFKOWSKI, *Prawo międzynarodowe publiczne* [International Public Law], 3rd edition, Warszawa 1969, p. 274; S. NAHLIK, *Wstęp do nauki prawa międzynarodowego* [Introduction to the Science of International Law], Warszawa 1967, pp. 292 - 293; L. GELBERG, *Zarys prawa międzynarodowego* [An Outline of International Law], Warszawa 1967, p. 66.

is not the only limitation in this respect of its "open" character, although other conditions have not been expressly formulated. The Warsaw Treaty is a treaty of European States, it was signed at a "conference of European States on the question of safeguarding peace and security in Europe." Its origin is connected with the development of events in Europe, Article 4 limits *casus foederis* to cases of armed attack in Europe. As a consequence of this, only a European State may accede to the Treaty. This means that the accession of a third State to the Warsaw Treaty requires the fulfillment of the following formal conditions: (a) the acceding State must be a European State expressing readiness to contribute through the participation in the Treaty to the combining of efforts for the purpose of guaranteeing peace and security in Europe, (b) the accession requires for its validity the consent of all participants in the Treaty.

Left to be discussed is the problem of the withdrawal of a party from the Warsaw Treaty. The Treaty provides for just one possibility of withdrawing from it—notice of withdrawal one year before the expiration of the twenty-year period of its validity (Art. 11). As the Treaty itself regulates the manner of giving notice of withdrawal, then in the absence of conditions justifying such notice, a party may withdraw from the Warsaw Treaty only with the consent of the remaining parties.

III. Purposes and Principles of the Warsaw Treaty

The Warsaw Treaty was signed in certain concrete circumstances, its principal purpose is to safeguard the security of the parties to the Treaty by consolidating their defence capacity by way of appropriate organizational measures. The consolidation of the security of the parties is to serve the consolidation of European security. Another principal purpose of the Warsaw Treaty—as results from its very name—is the perpetuation and consolidation of the relations of friendship and cooperation between its parties. Article 8 reads:

"The Contracting Parties declare that they will act for a further development and consolidation of economic and cultural ties [...]."

This purpose has been defined in very broad terms—consolidation of friendship and development of cooperation in all fields. Concrete problems of economic, cultural and other cooperation are regulated by bilateral and multilateral agreements between the States of the Warsaw Treaty.

The basic principle of the Treaty in the mutual relations between its

parties is the ban on the use of force and the duty of regulating international disputes in a peaceful manner. The principle is contained in Article 1 which reads:

"The Contracting Parties commit themselves, in accordance with the United Nations Charter, to refrain in their international relations from any threat of the use of force or of its use, and to settle their international disputes in a manner which would not place international peace and security in jeopardy."

This formulation refers to the principles contained in Article 2, items 3 and 4 of the United Nations Charter.

The principle of respecting the independence and sovereignty of States was expressed in the preamble and in Article 8 of the Treaty. The principles were many times emphasized in acts regulating the mutual relations of the States of the Warsaw Treaty (e.g. in bilateral alliance agreements).

The principle of non-interference in the internal affairs of the States-parties to the Treaty was contained in the preamble and in Article 8. The principle is connected with the principle of respecting sovereignty and independence and equal rights. It has been also expressed in various documents, particularly in the bilateral alliance agreements between the Warsaw Treaty member States. In distinction from the bilateral alliance agreements, the Warsaw Treaty does not mention principles of socialist internationalism.⁶

IV. Obligations Pertaining to Political and Diplomatic Cooperation and Its Forms

The Warsaw Treaty provides for the duty of concerted activity for the preservation of international peace and security. In Article 2 of the Treaty the parties

"declare their readiness to participate in a spirit of loyal cooperation in all international efforts aimed at preserving international peace and security, and will fully devote their forces to the achievement of these goals.

⁶ L. GELBERG explains the absence of a mention of socialist internationalism in the Warsaw Treaty by the fact that it had not been concluded as a treaty intended to embrace only socialist States. "It is difficult to find in its text even a single word like socialist or proletarian internationalism. It was conceived as a nucleus of a future regional organization of collective security for the whole of Europe." — L. GELBERG, *Układ Warszawski, uwagi prawne. Polityka zagraniczna Polski Ludowej* [The Warsaw Treaty—Legal Notes. Foreign Policy of People's Poland], Warszawa 1964, p. 335.

"In this connection the Contracting Parties will strive in consultation with other States which express their willingness to cooperate in this domain for the adoption of effective measures for the purpose of a general reduction of armaments and a ban on atomic and hydrogen weapons, as well as other kinds of mass extermination weapons."

This provision is of a general character, it pertains to cooperation "in all international efforts." Such efforts may include, for example, activity for the restoration of peace in Vietnam or the Middle East, active participation in disarmament negotiations, various initiatives undertaken by individual states (e.g. the Polish proposals pertaining to the creation of an atom-free zone and the freeze of nuclear weapons in Central Europe) or collectively (e.g. the proposal of a non-aggression pact addressed to the NATO member States).

The Warsaw Treaty forbids participation in hostile coalitions. The States-parties to the Treaty have committed themselves "not to participate in any coalitions or alliances and not to conclude any agreements whose purposes stand in contradiction to the purposes of this Treaty." The parties declared at the same time that "their obligations resulting from binding international treaties now in force do not stand in contradiction to the purposes of this Treaty." Articles 3, 4, 6, 7 of the Treaty introduce the duty of consultations. A Consultative Political Committee has been set up for this purpose (Art. 6). The communiqué published in Warsaw on 20 January, 1956 announces that the Committee had been formed and that its first meeting shall be held in Prague on 27 January, 1956. The Committee is composed of all the States-parties to the Treaty. Each State is represented in it by a member of government or other, specially appointed, representative (Art. 6). In practice, meetings of the Committee are attended as a rule—on behalf of every member State—by the I secretary of the communist or workers' party, the prime minister, the minister of foreign affairs and the minister of defence. The meetings are attended also by the Commander-in-Chief of the United Armed Forces. Until 1961 the meetings of the Committee were attended by observers on behalf of the Chinese People's Republic, the Mongolian People's Republic and the Korean People's Democratic Republic (the two last States in the years 1960 - 1961). Beginning with 1962, Albania did not take any part in the conferences of the Committee. The Committee meets in principle once a year (the Resolution of 28 January, 1956 spoke of at least two meetings a year).

The functions of the Committee are carried out in a variety of ways.

(a) Consultations. There are three kinds of consultations provided for in the Treaty:

first—consultations on all important international issues pertaining

to the common interests of the parties. While holding these consultations the parties should be guided by the cause of the consolidation of international peace and security (Art. 3, item 1);

second—immediate consultations for ensuring joint defence and preserving peace and security in every case in which—in the opinion of any of the parties—there arises the threat of an attack on one or several States-parties (Art. 3, item 2);

third—immediate consultations in case of an armed attack on one or several States-parties to the Treaty on the question of steps which should be taken in order to restore and to preserve peace and security (Art. 4). Consultations of this type are held when the attack has actually taken place already. The purpose of these consultations is not to adopt decisions on putting the system of mutual assistance in motion, because that, in accordance with Article 4, is done at once at the moment the attack is made. Their purpose is to concert further indispensable steps.

The situation existing so far did not require consultations provided for in items 2 and 3. On the other hand, consultations “on all important international issues pertaining to the common interests” of the parties were held many times. Their purpose is to reach agreement on a joint stand on major issues of international policy. The results of these consultations are published in the form of declarations, statements and appeals.

The Consultative Political Committee has adopted so far the following documents of this type: 1) The Prague Declaration of 28 January, 1956,⁷ containing the proposal to create a zone of limited and controlled armaments in Europe; 2) The Moscow Declaration of 24 May, 1959,⁸ containing a discussion of the international situation as a whole and presenting the stand of the States-parties on the problems discussed; it contained also a draft of a pact of non-aggression between the Warsaw Treaty member states and the NATO member States; 3) The Moscow Declaration of 4 February, 1960,⁹ containing a discussion of the international situation, particularly the East-West relations, and the problem of disarmament, presenting the stand of the parties on the German problem and the conclusion of a peace treaty with Germany, and confirming earlier proposals; 4) The Moscow Declaration of 7 June, 1962,¹⁰ which presents the stand of the parties on the question of a peaceful settlement of the German problem, and expresses support for the stand of the USSR in the Soviet-American negotiations on this head; 5) The Warsaw Communiqué of

⁷ “Collection of Documents,” 1956, No. 1, pp. 104 - 116.

⁸ “Collection of Documents,” 1958, No. 2, pp. 835 - 872.

⁹ “Collection of Documents,” 1960, No. 2, pp. 175 - 204.

¹⁰ “Collection of Documents,” 1962, No. 6, pp. 642 - 646.

20 January, 1965,¹¹ deals with the most important international problems, particularly the United States policy towards states of Latin America and Asia, condemns the striving of the FRG for obtaining access to atomic weapons and warns against the implementation of the plan of the formation of multilateral nuclear forces within NATO; 6) The Bucharest Declaration on the consolidation of peace and security in Europe of 5 July, 1966,¹² contains a discussion of the situation in Europe, and a proposal concerning the liquidation of the Warsaw Treaty and NATO; 7) The Bucharest Statement in connection with the United States aggression in Vietnam of 6 July, 1966;¹³ 8) The Sofia Declaration concerning the threat to peace arising from the escalation of American aggression in Vietnam of 7 March, 1968;¹⁴ 9) The Budapest Appeal to all European countries of 17 March, 1969,¹⁵ contains in particular a proposal to convene a European conference on safeguarding security in Europe; 10) The Communiqué on the meeting of the Consultative Political Committee of 20 August, 1970,¹⁶ held in Moscow states, among other things, that the main attention had been devoted to the current situation in Europe, and that the participants in the meeting had emphasized that the signing of the Treaty of 12 August, 1970 between the USSR and the FRG constituted an important step on the road towards *détente* and normalization of situation in Europe; 11) Documents approved at the Berlin meeting of the Committee held on 2 December, 1970: Statement on the consolidation of security and development of peaceful cooperation in Europe; Statement in connection with the aggravation of the situation in the region of Indochina; For the establishment of lasting peace and security in the Middle East; To put an end to the imperialist provocations aimed against the independent States of Africa.

The declarations and documents adopted at the meetings of the Consultative Political Committee are an expression of the concerted stand of the member States of the Treaty. They constitute directives by which the parties should be guided in their foreign policy. The declarations are political documents and do not create for the parties any formal obligations in the legal sense. By expressing, however, the achieved degree of concerted will, they do create a basis for the cooperation and concerted activity of the Warsaw Treaty member states.

¹¹ "Collection of Documents," 1965, No. 1, pp. 20 - 28.

¹² "Collection of Documents," 1966, No. 7, pp. 651 - 681.

¹³ "Collection of Documents," 1966, No. 7, pp. 763 - 774.

¹⁴ "Trybuna Ludu," 1968, No. 69.

¹⁵ "Trybuna Ludu," 1969, No. 77.

¹⁶ "Dokumentacja Prasowa," 1970, No. 876, pp. 699 A.

(b) Examination of Problems Connected with the Implementation of the Treaty. This concerns a group of problems with regard to which the Committee is empowered to adopt decisions. The Treaty says that the Committee is empowered to examine problems connected with the implementation of the Treaty. The Resolution on the setting up of a United Command provides that "general problems pertaining to the consolidation of the defence capacity and the organization of the United Armed Forces of the Member States of the Treaty are subject to examination by the Consultative Political Committee which will adopt relevant decisions." This authority of the Committee covers first of all problems connected with the formation of a United Command. The Communiqué of the Meeting of the Consultative Political Committee held in Prague in January 1956 says that on the motion of the Commander-in-Chief "it examined and approved the statute of the United Command and settled problems connected with the activity of the United Armed Forces [. . .]" The same conference approved the motion of the GDR that after the formation of a National People's Army its contingents should be incorporated in the United Armed Forces, and decided that the GDR minister of defence will be, in accordance with the order established, one of the deputies of the Commander-in-Chief of the United Armed Forces. The Moscow Conference of the Consultative Political Committee held on 24 May, 1958, adopted a resolution¹⁷ on a considerable reduction of the armed forces of the member states of the Treaty. The Committee approved also a motion of the USSR government, agreed upon with the government of Rumania, concerning the withdrawal from the latter's territory of Soviet troops stationed there in accordance with the Treaty, and approved the reduction of Soviet troops in Hungary by one division. Considerable changes in the structure of the United Command were adopted at the Budapest conference of the Consultative Political Committee on 17 March, 1969. The Communiqué of that conference says that the States participating in the conference had thoroughly examined and unanimously approved the statute of the Committee of Ministers of Defence, the new statute of the United Armed Forces and the United Command, and other documents aimed at a further perfecting of the structure of the organs directing the defence organization of the Treaty. The practical introduction of these decisions was entrusted to the Commander-in-Chief.

(c) Formation of Ancillary Organs which Shall Prove Indispensable.

This concerns the setting up of ancillary organs of the Committee itself (Art. 6). Two ancillary organs were formed at the Prague meeting of the

¹⁷ "Collection of Documents," 1958, No. 5, pp. 829 - 834.

Committee held in January 1956, namely: a Standing Commission whose task was the preparation of recommendations pertaining to foreign policy, and a United Secretariat composed of representatives of all the member States of the Treaty. The headquarters of both these organs are situated in Moscow.

A number of conferences at the level of party chiefs and heads of government were held in the practice of the relations between the Warsaw Treaty member States. In the context in question, interesting are only those conferences which had been attended by representatives of all parties to the Warsaw Treaty.¹⁸

A conference of first secretaries of central committees of communist and workers parties of the States-parties to the Treaty was held in Moscow from 3 to 5 August, 1961. The Communiqué of the conference¹⁹ informs that it had been devoted to problems connected with preparations for the conclusion of a peace treaty with Germany, and presents the stand of the participants on this question. The Communiqué says also that "The conference instructed appropriate competent organs to prepare indispensable measures in the field of foreign policy and economy which shall ensure the conclusion of a peace treaty with Germany and the observance of its provisions, including provisions pertaining to West Berlin as a free city. Another conference of first secretaries and heads of government of the Warsaw Treaty member States was held in Moscow on 25 July, 1963. The resolution of this conference²⁰ says that its participants approved the results of the tri-partite negotiations on the ban on nuclear weapons tests in the air, outer space and under water. Another meeting of communist leaders of the same level was held in Moscow on 3 - 4 December, 1969. The participants in that meeting issued two statements: on the question of security in Europe and on the question of war in Vietnam.²¹

These conferences are not organs of the Warsaw Treaty, but their participants discussed problems in which the Treaty is directly concerned. These general problems are connected, however, with the security of the

¹⁸ For this reason conferences of this type do not include such conferences as the conference of representatives of communist and workers' parties of 1957; the meeting of party and government leaders of socialist States (Warsaw, 14 - 15 July, 1968); the conference of representatives of communist and workers' parties. (Bratislava, 3 August, 1968); the conference of ministers of foreign affairs—Warsaw, 19 - 21 December, 1967. The body of the participants in those conferences was not identical with the body of the signatories of the Warsaw Treaty and, what is more important, they were not called conferences of representatives of the Warsaw Treaty member States.

¹⁹ "Collection of Documents," 1961, No. 8, pp. 946 - 949.

²⁰ "Collection of Documents," 1963, No. 7, pp. 789 - 790.

²¹ "Trybuna Ludu" of 5 December, 1969.

parties. The resolutions adopted at those conferences may be treated as political recommendations *sensu stricto* addressed to the member States of the Treaty.

The practice of relations between the member States included also conferences of ministers of foreign affairs. A conference of ministers of foreign affairs of the Warsaw Treaty member States was held in Warsaw on 27 - 28 April, 1959. The ministers exchanged views on subjects connected with the approaching Geneva talks between States of the East and the West on issues pertaining to Germany, including a peace treaty and the problem of Berlin.²²

Another conference of ministers of foreign affairs was held in Warsaw on 11 February, 1967.²³ A similar conference, held in Prague on 30 - 31 October, 1969, discussed problems connected with the preparation of a European security conference.²⁴ A conference of foreign ministers, held in Budapest on 21 - 22 June, 1970, adopted a memorandum containing proposals on the question of a European conference on security and cooperation.²⁵ There were also meetings of vice-ministers of foreign affairs (20 - 21 May, 1969 and 26 - 27 January, 1970).

The conferences of ministers of foreign affairs are also not organs of the Warsaw Treaty. Their decisions, similarly as decisions of the conferences of Party leaders and heads of government, may be treated as directives of a political nature by which the governments of the Treaty member States and their organs should be guided.

It became also necessary for the Warsaw Treaty member States to hold conferences of ministers of defence. These conferences discussed concrete problems connected with the strengthening of the defence capacity of the United Armed Forces. They were attended also by chiefs of general staffs. Their debates were presided over as a rule by the Commander-in-Chief of the Armed Forces. The communiqué of a conference held on 8 - 9 September, 1969 in Warsaw²⁶ says that guided by the directives of their respective governments the ministers of defence and chiefs of general staffs had examined concrete problems connected with the strengthening of the combat preparedness of the troops belonging to the United Armed Forces, and that the conference had "instructed the chiefs of general staffs to work out moves resulting from the agreement reached at the conference concerning a further consolidation of the defence capacity of the Warsaw Treaty member states." A conference held in Prague

²² "Collection of Documents," 1959, No. 4 - 6, pp. 524 - 532.

²³ "Collection of Documents," 1967, No. 1/2, pp. 48 - 49.

²⁴ "Trybuna Ludu," 1969, No. 305.

²⁵ "Dokumentacja Prasowa," 1970, No. 868, p. 544 A.

²⁶ "Collection of Documents," 1961, No. 9, pp. 1188 - 1189.

on 30 January and 1 February, 1962²⁷ discussed current problems pertaining to the strengthening of the United Armed Forces. Similar problems were discussed at the Moscow conference of 29 - 30 October, 1969.²⁸ At the Budapest meeting of the Consultative Political Committee of the Treaty the conferences of ministers of defence were transformed into an organ of the Treaty called the Committee of Ministers of Defence.

V. Obligations Pertaining to Mutual Assistance and the Organizational Forms of Its Preparation

Article 4 of the Treaty defines *casus foederis*. The Article reads :

"In case of an attack in Europe on one or on several Warsaw Treaty member States by any State or group of States each Treaty member State, using its right to individual and collective self-defence in accordance with Article 51 of the United Nations Charter, will render immediate assistance to the State or States which had been attacked [...]."

In the light of this Article, *casus foederis* in the Warsaw Treaty takes place in the following cases: first—it is created by an armed attack on any of the member States by any State; second—*casus foederis* takes place in case of an attack in Europe. This means that it does not cover armed attacks launched outside Europe.

Armed attack is the only cause putting in motion the system of mutual assistance provided for in the Warsaw Treaty. The Warsaw Treaty does not overstep the limits set by Article 51 of the UN Charter. Events other than armed attack are not provided for in its provisions, and in such cases action is not undertaken within the framework of the obligations arising from the Warsaw Treaty.

According to Article 4, in case of an armed attack each member State will render the attacked State or States "immediate individual assistance and in consultation with the other parties to the Treaty" "by all means it shall deem indispensable, including the use of armed force." In accordance with this, the duty of assistance arises as soon as the fact of an armed attack occurs. The assistance should be rendered unconditionally and automatically, it need not be preceded by any consultations.

Article 4 speaks of individual assistance and of assistance in consultation with other parties. "Individual" means that each member State has an independent duty of supplying assistance, that it need not consult other

²⁷ "Collection of Documents," 1964, No. 1/2, p. 104.

²⁸ "Dokumentacja Prasowa," 1968, No. 789, p. 930 C.

member States as regards its rendering. It is an independent duty of each member State, and it is committed to carry it out, even should other parties to the Treaty remain inactive in violation of their obligations. The duty is at the same time a joint duty, and this is why when member States begin to render assistance they should act in consultation, because such is the sense of a multilateral alliance.

The assistance should be rendered by all means, including the use of armed force. The formulation of Article 4 "by all means it shall deem indispensable" does not mean that the assisting state has full freedom with regard to the means. A State party to the Warsaw Treaty should render every assistance that will be indispensable for repelling an armed attack made on an ally.

The United Command is the supreme military organ of the Warsaw Treaty organization. The legal basis of the United Command is found in Article 5 of the Treaty and in the Resolution on the formation of this Command adopted by the parties to the Treaty on 14 May, 1955.²⁹ The United Command operates on the basis of a statute approved by the Consultative Political Committee.

The United Command consists of a Commander-in-Chief and his deputies. The Commander-in-Chief is appointed and replaced by way of consultation between the governments of the Treaty member States. In accordance with the Resolution on the formation of the United Command, the deputy commanders-in-chief are ministers of defence or other military chiefs of the Warsaw Treaty member States. In accordance with this provision, up to 1969 the deputy commanders-in-chief were ministers of defence, and since 1969, on the basis of a decision of the Budapest meeting of the Consultative Political Committee, this function was taken over by vice-ministers of defence. The deputy commanders-in-chief are in command of their national armed forces which are a component part of the United Armed Forces. The post of Commander-in-Chief of the United Armed Forces was held so far by marshals of the Soviet Union—I.S. Konev (1955 - 1960), A. Grechko (1960 - 1967) and I. Yakubovsky, the present Commander-in-Chief who holds the post since July 1967.

The Commander-in-Chief has a Staff of the United Armed Forces which consists of representatives of the general staffs of the Warsaw Treaty member States.

The Budapest meeting of the Consultative Political Committee in 1969 examined and approved a statute of the Committee of Ministers of Defence. The Committee studies problems connected with the strengthening

²⁹ *Konferencja państw europejskich...* [Conference of European States...], pp. 134 - 135.

of the defence capacity of the Warsaw Treaty. The first meeting of the Committee of Ministers of Defence was held in Moscow on 22 - 23 December, 1969. These meetings are attended by the Commander-in-Chief of the United Armed Forces.

A Military Council of the United Armed Forces was formed on the basis of a decision of the Consultative Political Committee at its Budapest meeting in 1969. The first meeting of the Council was held on 9 - 10 December, 1969.

The United Armed Forces consist of troops detailed by the individual Treaty member States from their national armed forces and placed at the disposal of the High Command. The Resolution on the formation of the United Command of 14 May, 1955 provides that "The stationing of the United Armed Forces in the territory of the Treaty member states will be done in a manner corresponding to the needs of mutual defence on the strength of consultations between those states."

Soviet troops are stationed in the territory of Poland, the German Democratic Republic, Hungary and Czechoslovakia (up to 1958 they were also stationed in the territory of Rumania). The relations arising from the stationing of Soviet troops in the territory of other States are regulated by bilateral agreements on the legal status of Soviet troops stationed temporarily in the territory of those States. Agreements of this kind were concluded by the USSR with Poland (17 December, 1956),³⁰ the GDR (12 March, 1957),³¹ Rumania (15 April, 1957),³² Hungary (27 May, 1957)³³ and Czechoslovakia (16 October, 1968).³⁴

VI. The Warsaw Treaty and Preservation of International Peace and Security

The Warsaw Treaty and the Preservation of European Security. At the Berlin conference of ministers of foreign affairs of the Big Four in 1954 the USSR submitted a draft of an all-European treaty on collective security in Europe. The western States declined to discuss the draft. The Warsaw conference of 1955 at which the Warsaw Treaty had been signed was an answer to the inclusion of the FRG in the Brussels Pact and NATO and a remedy for the absence of a system of collective security in Europe.

³⁰ "Collection of Documents," 1956, No. 12, pp. 1879 - 1889.

³¹ "Collection of Documents," 1957, No. 3, pp. 333 - 345.

³² "Collection of Documents," 1957, No. 4, pp. 550 - 566.

³³ "Collection of Documents," 1957, No. 5, pp. 1273 - 1283.

³⁴ "Collection of Documents," 1968, No. 10, pp. 1666 - 1680.

However, the Warsaw conference stressed repeatedly that the creation of such a system will continue to remain the most effective safeguard of peace in Europe. The Polish delegate said at that conference: "[...] It is first of all in a system of collective security that we see and that we have always seen the surest guarantee of peaceful cooperation. There is no better safeguard of peace today than a system in which all States, large and small, cooperate together in the struggle against the worst evil—war." This motif ran through the statements of all participants in the Warsaw conference of 1955.⁸⁵

Warsaw Treaty member States came out with a number of disarmament proposals, they supported Polish plans for the formation of an atom-free zone and a zone of armaments freeze (e.g. the Bucharest Declaration of 1966). Warsaw Treaty member States came out firmly against all proposals to form Multilateral Nuclear Forces and Atlantic Nuclear Forces (the Bucharest Declaration of 1966).

On several occasions proposals were put forth concerning the limitation of the strength of armed forces and armaments in Central Europe, particularly the withdrawal or limitation of strength of foreign troops in the territory of the two German States, and limitation of the armed contingents of the FRG and the GDR (the Prague Declaration of the Consultative Political Committee of 1966). The Bucharest Declaration of 1966 extended these proposals and added new ones, such as the cessation of the flights of foreign aircraft carrying atomic and hydrogen bombs over the territory of European States, and the calling of submarines and surface ships with nuclear weapons on board at the ports of those States.

The Moscow Declaration of the Consultative Political Committee of 24 May, 1958 contains a proposal of the conclusion of a non-aggression pact between NATO States and Warsaw Treaty member States. The draft of this pact provided for obligations covering a ban on the use of force between the member States of the two Treaties and introducing a system of consultations. The draft contained a dissolving clause—the non-aggression pact would lose its force in case of the dissolution of NATO and the Warsaw Treaty.

The proposal of a simultaneous dissolution of NATO and the Warsaw Treaty was made in the Bucharest Declaration of 1966 on the question of the consolidation of peace and security in Europe. The Declaration states that if the NATO States are not prepared as yet for a complete dissolution

⁸⁵ Complete documentation of the Warsaw conference is contained in the collection cited above *Konferencja państw europejskich...* [*Conference of European States...*].

of the two groupings, then the States signatories of the Declaration deem it desirable to reach already an agreement on the liquidation of the military organizations of both NATO and the Warsaw Treaty.

Prominence is being gained of late by the idea of convening a European conference on security. The proposal to hold such a conference had been made already in the Bucharest Declaration of 1966.

The Warsaw Treaty member States proposed in the Budapest Appeal to convene as soon as possible a meeting of representatives of all the European States concerned to establish with mutual consent both the procedure of its convening and its agenda. The statement of the Prague conference of ministers of foreign affairs of the Warsaw Treaty member States of 31 October, 1969 repeats the earlier proposals and welcomes the initiative of Finland concerning her cooperation in the preparation and conduct of a European conference. The States participating in the conference proposed the following problems to be included in the agenda of the European conference : 1) the safeguarding of European security and the renunciation of the use of force or the threat of its use in the mutual relations between states in Europe ; 2) expansion on the principles of equal rights of economic, scientific and technical relations aimed at the development of political cooperation between the European states. The proposals were enlarged at the Budapest conference of ministers of foreign affairs of the Warsaw Treaty member States held on 21 and 22 March, 1970. The conference discussed the progress made up to that time in preparations for the convening of a European conference. The participants issued a memorandum on this question,³⁶ in which they proposed as item three on the agenda of the conference the question of setting up an organ for security and cooperation in Europe.

The Warsaw Treaty and the Safeguarding of Universal Peace and Security. Documents of the Consultative Political Committee and conferences of representatives of the Warsaw Treaty member States express their standpoint with regard to the safeguarding of universal peace. Particularly much attention is being paid lately to the Vietnam war (the previously mentioned documents of the CPC and conferences of States parties to the Treaty).

These issues are not connected directly with the functions of the Warsaw Treaty as a defensive treaty of the European socialist States. However, the parties to the Treaty express their interest taken in problems of world importance, according to the principle that peace is indivisible.

³⁶ "Dokumentacja Prasowa," 1970, No. 868, p. 544 A.

VII. Legal and Political Character of the Warsaw Treaty

The provisions of the Warsaw Treaty refer expressly to Article 51 of the United Nations Charter and use its terminology. Article 4 of the Treaty reads:

"In case of an armed attack in Europe made on one or several States parties to the Treaty by any state or group of States, each State-Party to the Treaty, availing itself of the right of individual or collective self-defence in accordance with Article 51 of the United Nations Charter will render immediate assistance to the State or States on which the said attack has been made [...]"

"Steps taken on the basis of this Article will be communicated to the Security Council in accordance with the provisions of the United Nations Charter. The steps will be discontinued when the Security Council adopts measures indispensable for the preservation of international peace and security."

This formulation leaves no doubts as to which provision of the United Nations Charter the Warsaw Treaty refers. The provision is Article 51 of the UN Charter pertaining to individual and collective self-defence. This means that the Warsaw Treaty is a *multilateral alliance agreement on collective self-defence*.

In relations between its parties, the Warsaw Treaty turns the right of collective self-defence into a duty. It is, therefore, correct to say that from the Polish point of view "the Warsaw Treaty constitutes an extension of the provisions of the United Nations Charter, and imparts to them a concrete meaning in the realm of international security."³⁷ This applies, of course, solely to the provisions on collective self-defence. The Warsaw Treaty does not show any connections with any other provisions of the Charter. It must be pointed out in particular that the Treaty is not a treaty on collective security. And since the parties to the Treaty are States situated in a single geographical region, it is called a regional treaty. It must be remembered, however, that it is a regional treaty on collective self-defence, that it is a regional alliance, but it is not a regional treaty on collective security in the form provided for in chapter VIII of the UN Charter.³⁸

³⁷ A. KŁAFKOWSKI, *Podstawowe problemy prawne likwidacji skutków wojny 1939 - 1945 a dwa państwa niemieckie* [Fundamental Legal Problems of the Liquidation of the Effects of the 1939 - 1945 War and the Two German States], Poznań 1966, p. 366.

³⁸ Different views may be found in the doctrine of international law. E.g.: L. GELBERG, *Układ Warszawski...* [The Warsaw Treaty...], says: "The Treaty constitutes a regional pact of collective security provided for in Chapter VIII of the Charter, supplementing the universal system of collective security [...]" (p. 23); the author justifies this view further by the geographical aspect (pp. 148 - 151). A Soviet manual of international law puts a mark of equality between the Warsaw Treaty, the League

The Warsaw Treaty does not renounce collective security in Europe, but it precisely "creates a basis of further struggle for its achievement."³⁹ The Treaty is a defensive alliance formed in certain concrete circumstances, in a situation when the ratification of the Paris agreements aggravated the threat of war in Europe. The treaty served as a basis for undertaking measures for safeguarding the security of its parties, but not only that, because "putting up a barrier in the road of forces of aggression in Europe, they were intended to contribute to peace and security of the other European nations."⁴⁰

An international organization was formed on the basis of the Warsaw Treaty. The organization is equipped with suitable organs operating on the basis of the Treaty itself and their own statutes, and its members are the States parties to the Treaty. It works towards its goals—the goals of the treaty of alliance which is its statute. The organization could be termed to be an allied organization. Because of the reference to Article 51 of the UN Charter, it is a *regional allied organization of collective self-defence*. It has come to be called the Warsaw Treaty Organization.⁴¹

The importance of the Warsaw Treaty Organization goes, however, far beyond the framework of preparation for a joint defence in case of an armed attack. The organization constitutes a forum for adopting a common political line, common attitude of member States towards the most important problems of international politics. It is one of the organizational forms of the community of socialist States. Generally speaking, the organization is concerned with the political and military cooperation of its member States, just as the Council for Mutual Economic Assistance is concerned with economic cooperation. Both organizations serve the same purpose—the strengthening and further development of the cooperation and unity of the socialist States.⁴²

of Arab States and the Organization of African Unity treating them as regional organizations (*Kurs meždunarodnovo prava*, coll. edition, vol. 4, Moskva 1968, p. 401).

³⁹ W. MORAWIECKI, *Organizacje międzynarodowe* [*International Organizations*], 2nd edition, Warszawa 1965, p. 489.

⁴⁰ *Ibid.*

⁴¹ W. MORAWIECKI, *Organizacje międzynarodowe* [*International Organizations*]; *Meždunarodnopravovye formy sotrudničestva socialističeskikh gosudarstv*, coll. edition, Moskva 1962: "Organizacija Varšavskogo Dogovora;" K. GRZYBOWSKI, *The Socialist Commonwealth of Nations, Organizations and Institutions*, London 1964: "Warsaw Treaty Organization."

⁴² "Trybuna Ludu" of 1 April, 1971.

Legal Status of the Baltic Straits

by JANUSZ SYMONIDES

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I. General Remarks

The Baltic Straits, called colloquially the Danish Straits, consist of three natural waterways connecting the Baltic with the North Sea and further on with the Atlantic Ocean.¹ The middle one is called the Great Belt, the western—the Little Belt and the eastern—the Sund.²

The Little Belt runs between the Jutland Peninsula and the island of Fionii. The strait is about 130 km. long; the narrowest place is about 600 m. wide, the widest—27.5 km; the depth varies considerably—from 10 to 81 m.³ A number of islands, in particular Årö and Bogö, divide it into several

¹ The name of Baltic straits is used rather than that of Danish straits for two reasons: first, because of the fact that one of the Sund shores belongs to Sweden, second, the former better describes the role and importance of the straits for states situated in the basin of the Baltic Sea. It is also worth noting that in geographical works, unlike legal works, the term Baltic straits includes also Kattegat.

² The name Belt originates from the mediaeval name of the Baltic—*Beltemere*. At first all straits were called Sund which is a Nordic common name meaning "sea strait." The Little Belt, for example, used to be called *Medelfarsund*—the strait of middle passage. J. STASZEWSKI, *Słownik geograficzny* [Geographical Dictionary], Warszawa 1959, pp. 30, 281.

³ Quoted after *Kratkaja geografičeskaja enciklopedija*, Moskva 1960, vol. 1, p. 220; Z. CZEPE, J. FLIS, R. MOCHNACKI, *Geografia fizyczna świata* [Physical Geog-

channels, of which Årösund and Bogösund are most frequently used by ships. Reefs situated in the channels considerably narrow the fairway which in some places is only 350 m. wide. Navigation in this strait is difficult not only because of a large number of islands and reefs, but also because of a very strong (3 m./sec.) and irregular zigzag current. A bridge opened on 15 May, 1935 between the Eastern Jutland and Fionia constitutes an additional obstacle for navigation. The bridge constitutes a part of an international highway linking Hamburg with Copenhagen and Stockholm. The height of the bridge is 33 m., that is 10 m. less than the height of the bridges thrown across the Kiel Canal, which makes it impossible in practice for ships whose masts and deck installations are taller to pass through the strait.

The Great Belt runs in between two islands: Fionia and Zeeland. The strait is about 120 km. long. Its depth varies from 20 m. in its northern part to 66 m. in the southern part. Its width is between 18.5 km. and 28.2 km.⁴ Two islands—Langeland and Lolland—situated at the entrance from the Baltic divide it into two arms—Siö and Langeland Beld in the western part, and into Guldborg Sund in the eastern part. As in the case of the Little Belt, the navigation channels are seriously narrowed by the presence of reefs. This is why off Knudshoved on Fionia and off Halskov on Zeeland, where the strait is divided by the islet of Sprogö, two channels of Vesterrenden and Österrenden formed by it are navigable in the first case in a width of 3.3 km. and in the second case of 1.7 km.⁵

The shortest Baltic strait, Sund, 100 km. long, passes between Zeeland and the west coast of Sweden, and is from 4 to 47 km. wide. Sund is divided into two arms by the island of Ven: the eastern arm and the western arm. The first of them, off Tarbaek, is divided in a southerly direction into two channels: Kongedybet and Hollaenderdybet, which have a navigable width of 659 and 859 m. respectively. Further on they join each other into a single passage called Drogden which has in its narrowest place a navigable channel a mere 250 m. wide. The eastern arm has in its southern part off the island of Saltholm a passage called Flinterenden

raphy of the World], Warszawa 1966, pp. 110 - 111. Literature differs considerably as regards the various dimensions. E.g. J. ZALESKI, (*Ogólna geografia transportu morskiego w zarysie* [General Geography of Sea Transport in Outline], Warszawa 1967, pp. 125 - 127) gives 660 m. as the narrowest width, and 7 m. as the smallest depth. Still other dimensions are given by P. D. BARABOLA, L. A. IVANAŠČENKO, D. N. KOLESNIK (*Meždunarodnopravovoj režim važnejših prolivov i kanalov*, Moskva 1965, p. 35) the narrowest width 700 m., and the smallest depth 15 m.

⁴ Here, too, considerable differences are noted. The works cited above give the length of the Great Belt as 117 km., its width as 11 or 16 km., and the smallest depth as 12 m.

⁵ E. BRÜEL, *International Straits*, Copenhagen 1947, vol. 2, p. 12.

whose navigable channel is 450 m. wide. The smallest depth of Drogden is 8 m. and off Flinterenden 7.5 m.⁶ The existence of channels and bars in the straits causes currents which prevent silting.⁷

The topographic and climatic data concerning the various straits permit the formulation of some general comparative remarks in regard to their importance for shipping. The comparatively most convenient for navigation purposes is Sund. There are two reasons for this: first, it is the shortest of the Baltic straits and, second, unlike the Belts, it almost does not freeze at all.⁸ But in view of its small depth it cannot be used by ships whose draught is bigger than 7.2 m.⁹ The latter use the Great Belt which sets no limits with regard to the depth of draught or the height of a ship.

The data on the depth of the various straits concern the marked fairways. The measurements were made quite some time ago, but Denmark intends to take new ones which might indicate that for the Great Belt the depth is even greater.

A serious obstacle to free navigation through the Sund and the Great Belt is the transverse traffic of hydrofoil craft, ferry boats and ships, which is very busy along the three routes linking Zeeland with the west coast of Sweden. The volume of the transverse traffic across the Great Belt on two routes for rail and road traffic may be seen in the data for 1960 (5.5 million passengers, 400,000 waggons and 825,000 motor vehicles).¹⁰ It appears, therefore, that in a not too distant future the only solution permitting navigation in the straits will be the construction of bridges over the Sund and perhaps over the Great Belt.

As the only navigation routes connecting the States of the Baltic basin with the Atlantic, the straits have a considerable political, economic and strategic importance. Their role was not diminished by the construction

⁶ According to A. C. O' DELL, *The Scandinavian World*, London 1967, p. 497, the extensive shallows in the Sund which prevented Nelson from attacking Copenhagen in 1801 constitute a serious obstacle to navigation. A proposal to swell the waters and thus to liquidate the shallows by the use of pumps was rejected in 1953 by a Danish-Swedish commission as impracticable.

⁷ Z. CZEPE, J. FLIS, R. MOCHNACKI, *op.cit.*, p. 111.

⁸ V. V. POHLEBKIN, *Daniya*, Moskva 1955, p. 4. This author is wrong, however, when he says that the Sund is deeper than the Belts.

⁹ J. ZALESKI, *op.cit.*, p. 126. In view of the fact that most Swedish exports pass also through the Sund, Sweden is interested in the passage of large ships. It is being considered, therefore, to deepen it to 11 m.

¹⁰ Quoted after A. SOMME, *A Geography of Norden*, Oslo 1960, pp. 133-134. A ferry boat service for rail traffic runs across the Great Belt between Korsør and Nyborg, and for road traffic between Halskov and Knudshoved. Regular transverse connections in the Sund exist between Helsingør and Helsingborg, Hellerup and Landskrona and between Copenhagen and Malmö (cf. *Atlas świata* [*The World Atlas*], Warszawa 1962, p. 116).

of the Kiel Canal which was opened in 1895. In the absence of the latest data on shipping in the straits, it is sufficient to compare data from the inter-war period. In 1935, as many as 38,175 ships passed through the Sund alone, while two years later 23,279 ships passed through the Kiel Canal.¹¹ In 1947, 113 German ships passed through the straits. At the moment, in view of the none too good technical condition of the Canal and its limited depth, with the simultaneous tendency for building ever bigger ships, the straits are becoming very important again.¹² It is worth noting that they are also an entrance into the Atlantic for the navies of the socialist States situated on the Baltic, since their passage through the Kiel Canal is made dependent, in spite of its international character, on obtaining a previous permission through diplomatic channels.¹³

II. The Definition of an International Strait

Before we attempt to answer the question of how the legal status of the Baltic straits is regulated, we must explain some rudimentary problems resulting from a more general reflection on the international status of sea straits.

Both in doctrine and decisions of tribunals we meet various, often differing, definitions explaining when we have to do with straits. As an example may serve here definitions formulated by the Polish doctrine of international law. Berezowski defines it as follows: "Sea straits are natural connections between two open water areas;"¹⁴ like Sarna who says: "A belt of sea water stretching between two mainlands and connecting the areas

¹¹ Assuming that today there is also a certain proportion between the number of ships passing through the straits and the Canal, some picture of the use of the Sund may be obtained from the comparison with figures for the Kiel Canal through which 80,775 ships passed in 1962.

¹² The largest ship to pass through the Great Belt into the Baltic was the tanker "Manhattan" of 106,500 DWT which, when fully loaded, has a draught of 14.95 m. The theoretical depth of the Kiel Canal is 10.97 m. The increasing ship traffic and the increase in the number of large ships requires modernization of the Canal and its installations, such as locks, passing places, system of signals, etc. The operation of the Canal is based on obsolete principles of before 1914. At present the Kiel Canal has reached the maximum traffic intensity it can cope with.

¹³ Cf. on the same subject J. SYMONIDES, *Obowiązki postanowień traktatu wersalskiego dotyczących Kanału Kilońskiego* [*The Binding Force of the Provisions of the Treaty of Versailles Pertaining to the Kiel Canal*], "Technika i Gospodarka Morska," 1967, No. 6.

¹⁴ C. BEREZOWSKI, *Prawo międzynarodowe publiczne* [*International Public Law*], Part I, Warszawa 1966, p. 229.

of two seas, is called a sea strait;”¹⁵ Klafkowski introduces the element of their significance, “Sea straits are natural waterways of international significance, connecting seas and oceans.”¹⁶

The first definition, rather broadly recognized,¹⁷ requires some supplementary explanation. For not every narrows or belt of sea water which is a strait in the geographical sense of the term is subject to a special legal regime. International law is concerned with certain straits only. Makowski pointed out quite rightly that one should draw a distinction between straits indispensable for international shipping and straits which are of local importance only.¹⁸ The first are called international in the doctrine. They possess this character when they connect seas on whose coasts are situated territories of various states. Then these straits constitute international sea communication lines.¹⁹

On what does the special legal status of a strait depend, and what is decisive for its international character? Two factors are worth mentioning: the kind of the seas it connects, and its width. If both shores of a strait belong to a single State, and if it connects a high sea with a closed sea surrounded by the territory of the coastal State, as is the case with the frequently quoted example of the Kerch strait connecting the Azov Sea with the Black Sea, then the waters of such a strait constitute internal waters under the exclusive sovereignty of that State.²⁰

If a strait connects two high seas, there exists the possibility of an alternative status depending on its width. If it is so narrow that a ship cannot pass otherwise than through the territorial sea of the coastal State, we have to do with a territorial strait. Whether the shores of such strait be-

¹⁵ Z. SARNA, *Międzynarodowe publiczne prawo morskie w czasie pokoju* [International Public Law of the Sea in Peacetime], Kraków 1932, p. 172.

¹⁶ A. KŁAFKOWSKI, *Prawo międzynarodowe publiczne* [International Public Law], Warszawa 1966, p. 149.

¹⁷ Cf. for example: R. REDSLOB, *Traité de droit des gens*, Paris 1950, p. 160; G. SCHWARZENBERGER, *A Manual of International Law*, vol. 2, London 1960, p. 694; *International Court of Justice, Reports 1949*, p. 49.

¹⁸ J. MAKOWSKI, *Podręcznik prawa międzynarodowego* [A Manual of International Law], Warszawa 1948, p. 367. It gives as straits of local importance the Solent strait in England and the Fehmarn Belt in Germany. They may be reserved to the exclusive use of the coastal States.

¹⁹ L. GELBERG, *Zarys prawa międzynarodowego* [An Outline of International Law], Warszawa 1967, p. 146.

²⁰ Attention should be drawn here to the fact that the doctrine makes a certain transposition in this respect. In fact it is not the closed sea that determines the legal character of a strait but the other way round. For if such a strait were more than twice wider than the territorial waters, we would not have to do with a closed sea but with a gulf. If, however, this gulf is treated as historical, then the waters of the strait would be also internal waters.

long to one or several States does not affect its status. On the other hand, if a strait is wider than twice the territorial sea, then that part of the waters of the strait over which no coastal State has sovereignty constitutes a high sea. Such a situation does not create any special problems from the point of view of international law, and all doubts are settled by reference to the principle of freedom of the seas, which is binding in that strait.

As a result of this, as Morawiecki justly points out, a special legal status appears solely in the case of territorial straits.²¹ This happens because the legal situation of waters in these straits is not identical with the legal situation of a territorial sea.²² It is worth remarking in this connection that because of a distinct tendency for increasing the width of the territorial sea the number of straits of this kind might increase very considerably.²³

Has international law any general principles and norms defining the legal status of territorial straits? The problem, raised by the International Court of Justice in the case of the strait of Corfu, is the subject of a controversy in the doctrine. A number of authors hold the view that the common law of nations does not contain a special set of uniform norms binding in all cases, since the legal status of various straits is regulated by special bilateral and multilateral conventions.²⁴ We think, however, that these conventions, uniform practice and provisions of the I Geneva Convention of 1958, indicate already the existence of certain general rules pertaining to the passage of merchantmen. The same cannot be said, however, of warships. While analyzing, therefore, the legal status of the Baltic straits, we shall treat separately problems connected with the passage of merchantmen and those connected with the passage of warships.

The minimum width of the straits is the reason why the waters of the Belts are treated as the territorial sea of Denmark, and in the case of the

²¹ W. MORAWIECKI, *Międzynarodowy ustrój cieśnin bałtyckich* [*International Status of the Baltic Straits*], "Sprawy Międzynarodowe," 1958, No. 8, p. 17.

²² As we shall show later on, the differences pertain in particular to the possibility of suspending the right of innocent passage and the passage of warships.

²³ R. R. BAXTER, *The Law of International Waterways*, Cambridge, Mass., 1964, p. 7 note 2, quotes the calculation of the head of the American delegation to the Geneva conference, A. H. Dean, that in case of a general widening of the territorial sea 12 miles, about 116 international straits would become territorial. If the width of territorial waters is increased to 6 miles, the figure will be 52.

²⁴ This standpoint, quite frequent in the literature of the socialist States, was represented in his separate opinion on the question of the strait of Corfu by the Soviet Judge, S.B. KRILOV, *International Court of Justice, Reports 1949*, pp. 74 - 75. See also A. KŁAFKOWSKI, *op.cit.*, p. 149. Comprehensive literature on this subject is cited by W. MORAWIECKI, *op.cit.*, pp. 26 - 27.

Sund—as respective parts of Denmark and Sweden.²⁵ Even though theoretically a part of the waters of the Great Belt whose width does not exceed 6 miles may be regarded as a high sea, but in view of the configuration, islands, currents and shallows passage through this strait is not possible without entering Danish territorial sea. Because of this, all the three straits are territorial. They are also international straits, which results from the fact that they connect two high seas and are of considerable significance for international shipping.

III. Freedom of Passage of Merchantmen

Looking for norms of international law regulating the passage of merchantmen through the Baltic straits, mention should be made of the treaty of 14 March, 1857 which is still in force. In item 1, Article I Denmark undertook not to take any customs duties and tonnage, lighthouse and buoy dues from the hull and cargo of ships passing through the Belts or the Sund bound for the Baltic from the North Sea and vice versa, irrespective of whether they are just passing through the Danish waters or, because of navigation conditions or trade operations, anchor there. Very important was the provision that in future no ship may be stopped or hampered under any pretext.

Item 2 of the same article prevented Denmark from levying taxes on ships and their cargoes, entering or leaving Danish ports, irrespective of whether they conducted any trade operations there or not. The treaty forbade an indirect resumption of the abolished dues or a rise in customs duties and harbour dues.

In Article II Denmark accepted a number of duties:

(a) to keep and maintain in the best condition possible lights, lighthouses, buoys, perches and sea-marks facilitating navigation in the Kattegat, the Sund and the Belts;

(b) to take into the most careful consideration in the interest of navigation the increase, changes in positioning or in the types of the said lights, lighthouses, buoys and leading marks, without any financial charges on foreign ships;

(c) to exercise supervision of pilotage, which is optional for captains and shipowners in the Kattegat, the Sund and the Belts, dues for which,

²⁵ The frontier questions in the Sund were regulated by the Declaration of 1932. In a note annexed to it the waters of the Flinterenden channel were recognized as Swedish. M. SIBERT, *Traité de droit international public*, vol. 1, Paris 1951, p. 748.

as the treaty points out, should be moderate and identical for both Danish and foreign ships;

(d) to permit without any let or hindrance all private, Danish and foreign, entrepreneurs to keep and station in the Sund and the Belts, on equal conditions irrespective of the flag a ship is flying, ships used exclusively for towing vessels which will want to use this service.²⁶

The duty to guarantee safe navigation in the straits, resulting from Article II, made the Danish government submit during the debates of the 1958 Geneva conference and earlier in a commentary presented to the International Law Commission, a proposal that states which on the strength of the norms of international law are responsible for the marking of a waterway by lighthouse vessels, buoys, etc., in passages situated outside their territorial sea should have also the right of administrative jurisdiction over those waters.²⁷

There is no obstacle from the point of view of international law why Denmark should not ensure the observance of these principles by her citizens also outside the territorial sea, but in the absence of a relevant legal norm she could not ensure the respecting of such rules by citizens of third states. This is why the Danish government proposed the introduction of an appropriate provision in the II Geneva Convention. According to Denmark, such rules could contain, for example, the following provisions:

“(a) prohibition of jettison of rubbish, cargo, ballast, ashes or the like in places where it may cause a reduction of the depth of the fairway to such a degree that free navigation is endangered;

(b) rules on the placing of pound net stakes, including prohibition of placing such stakes in fairways where they may endanger navigation;

(c) prohibition of establishing, without permission, sea-marks and the like in the fairways, which may obstruct navigation;

(d) prohibition of destruction or damage of established sea-marks and of using sea-marks for mooring or for securing fishing tackle, etc.;

(e) rules on the removal of wrecks and rendering them harmless, in-

²⁶ Art. II provided also in items 5 - 7: Denmark's obligation to extend the exemption from dues to all waterways or channels connecting the North Sea and the Elbe with the Baltic Sea, and to lower transit dues on the said waterways or channels. Denmark was also committed to conclude with Sweden an agreement on the preservation and maintenance of lighthouses on the eastern shore of the Sund and Kattegat.

²⁷ Cf. “Yearbook of the International Law Commission,” Vol. 2, 1956, pp. 46 - 47, as well as R. BIERZANEK, *Morze otwarte ze stanowiska prawa międzynarodowego* [The High Seas from the Point of View of International Law], Warszawa 1960, pp. 290 - 292; R. MACIEJEWSKA, *Sytuacja prawna statków obcych w kanałach i cieśninach morskich* [The Legal Situation of Foreign Ships in Sea Channels and Straits], Gdańsk 1966, pp. 14 - 15. Prace Instytutu Morskiego.

cluding the right of making the salvage of wrecks abandoned by the owner conditional on special permission by Danish authorities.”²⁸

The Danish proposal did not win the approval of the other delegations and was rejected. The Soviet delegate rightly argued that it is possible to conclude a special treaty, if this kind of regulation is indispensable, there is no need, however, of introducing in international law a clause of a general nature.²⁹

The attempt at extending administrative jurisdiction to certain areas of the high sea inclines one to a more general reflection as regards the powers of Denmark and Sweden with regard to merchantmen passing through their territorial waters. There is no doubt that a coastal State has the right to issue administrative regulations on such questions as: safety of navigation, pilotage, radio-communications, fishing and coast-wise shipping. In the case of Denmark Article II of the Copenhagen Convention establishes even expressly the duty of administrative jurisdiction of the coastal State. But this is not unlimited. For it must not be exercised in a manner hampering innocent passage.³⁰ Certain limitations on its exercise result also from Article II of the treaty of 1857 which, charging Denmark with the duty to undertake certain measures concerning safety of navigation points out *expressis verbis* that they should lead to facilitating navigation in the Kattegat, the Sund and the Belts, and that they should be undertaken in the interests of shipping.

While the question of the exercise of administrative jurisdiction does not give rise to any major doubts, some controversies may arise in connection with the exercise of criminal and civil jurisdiction in the territorial waters of the Baltic straits. For Article I of the Copenhagen Convention contains an express provision saying: that in future no ship passing through the Sund or the Belts may be stopped or hampered under any pre-

²⁸ Denmark pleaded her experience since 1945 justifying the necessity of having certain administrative powers in relation to ship salvage companies working on the removal of wrecks, ensuring not only their lifting but also their removal from the spot where they had been sunk, “Yearbook of the International Law Commission,” Vol. 2, 1956, p. 46.

²⁹ As R. BIERZANEK points out (*Morze otwarte... — The High Seas... p. 292*), the Danish proposal was also opposed by the French delegate, Professor Gidel, who urged the conference not to adopt any decision on a question requiring serious studies, with incalculable consequences.

³⁰ Art. 15, item 1 of the I Geneva Convention expressly states: “The coastal State must not hamper innocent passage through the territorial sea.” The general conditions of an innocent passage are formulated in Art. 14, item 4 which says: “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” The problem of conditions of innocent passage are dealt with in more detail in the presentation of the legal situation of a warship.

text. This formulation may lead to a thesis that it established in fact immunity for ships passing through the straits. But a reference to the work preparatory for the Copenhagen Conference and a functional interpretation do not confirm such a view. The intention of the parties was only to protect ships from being stopped by Denmark on grounds of fiscal or customs questions unsolved with the state whose flag the ship was flying, which may be seen quite clearly from the further part of the Article.³¹

In a situation where the Copenhagen Convention does not contain express provisions regulating the scope of criminal and civil jurisdiction of Denmark with regard to ships passing through the straits, the doubts arising therefrom may be settled first of all on the basis of the provisions of the I Geneva Convention on the territorial sea and the adjacent area. The principles of the exercise of criminal jurisdiction contained in the I Convention are based on French practice limiting the intervention of the coastal State to strictly defined cases.³² Article 19, item 1 says:

"The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- a) if the consequences of the crime extend to the coastal State; or
- b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- c) if the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
- d) if it is necessary for the suppression of illicit traffic in narcotic drugs."

The I Geneva Convention establishes different scopes of criminal jurisdiction dependent on the kind of passage. The rule formulated above applies to two cases: simple passage, when a ship uses the territorial sea sailing to a port of a third state or when it is bound for the coastal State. On the other hand, when it sails from internal waters bound for the high sea, the coastal State has the right to undertake on board a foreign ship passing through the territorial sea all measures provided for in its legislation to arrest a person or to conduct an investigation.³³

³¹ It says: "[...] *mais S.M. le Roi de Danemark se réserve expressément le droit de régler, par accords particuliers, n'impliquant ni visite ni détention, le traitement fiscal et douanier des navires appartenant aux Puissances qui n'ont point pris part au présent traité.*"

³² R. ZAORSKI, *Władztwo na morzu przybrzeżnym* [Sovereignty in the Coastal Sea], Gdańsk-Szczecin 1948, p. 38; by the SAME AUTHOR, *Konwencje genewskie o prawie morza* [The Geneva Conventions on the Law of the Sea], Gdynia 1962, p. 99.

³³ The fact that in relation to this kind of passage the rights of the exercise of criminal jurisdiction are much wider, is connected with the stay of the ship in the internal waters where penal law could have been infringed.

Since in a large number of cases ships passing through the Danish and Swedish territorial waters do not call at their ports, of great importance is Article 19, item 5 which forbids the undertaking of any measures to arrest any person or to conduct an investigation, if this is connected with a crime committed before the ship entered the territorial sea, the said ship being in a simple passage. This item imposes a significant restriction on the exercise of criminal jurisdiction by Denmark and Sweden in regard to ships passing through the straits bound for foreign ports.

In view of the navigating conditions in the straits—narrow channels, underwater reefs and shallows—of considerable importance is also another provision of the I Geneva Convention demanding that when local authorities are about to decide whether to arrest a person and how the arrest is to be made, they should take proper account of the interests of navigation. For in case of the arrest of a person or persons whose presence on board is indispensable if the ship is to continue its voyage, there might arise a situation in which a ship deprived of its qualified personnel could seriously hamper navigation or even block it in narrow channels, and could be also endangered itself. Hence the interest of the navigation not only of the state whose flag the ship flies, but also of the coastal State, demands particular restraint in the exercise of criminal jurisdiction.³⁴

A coastal State exercises also civil jurisdiction, although its scope is narrower than that of the criminal jurisdiction. Article 20, item 1 of the Convention on the territorial sea provides that

“The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.”

In relation to a ship in innocent passage or bound for the internal waters of the coastal State, the latter cannot exercise jurisdiction or perform seizure in connection with any civil proceedings, with the exception of obligations the ship had contracted or obligations which devolved on it during the passage through the waters of the coastal State or in connection with its intention to make such a voyage.³⁵

³⁴ R. ZAORSKI, *Konwencje genewskie...* [*The Geneva Conventions...*], p. 102, cites an explanation of the International Law Commission on the interpretation of the interests of navigation. According to its opinion, obstacles to navigation resulting from the breaks in voyage of a large ship bound for the sea, as the result of the arrest of a person committing on land an offence of a lesser calibre, must not be treated as being of smaller importance than the interest of the state, consisting in the apprehension of the culprit.

³⁵ It is worth noting that the exercise of civil jurisdiction in relation to ships is connected with the controversial problem of the immunity of State-owned ships used

The examination of the extent to which the coastal state may exercise jurisdiction in relation to ships passing through its territorial waters does not answer the more general question whether the said State is in duty bound to maintain the straits in a condition of complete navigability, and whether it may close them either by the erection of dams, draining, etc., or by only suspending the right of innocent passage.

It does not appear from the provisions of the Copenhagen Convention that Denmark is in duty bound to adopt measures aimed at widening or deepening the navigable channels in the straits ; or at removing ice cover in a degree sufficient for purposes of navigation in wintertime. The Convention assumes that the straits are navigable without any Danish efforts.³⁶ Should they cease to be navigable in the effect of the action of natural forces, there would be no legal grounds for demanding that Denmark restore them herself to a State of full navigability. Since, however, the Convention charges Denmark with the adoption of certain measures in the interests of navigation to ensure its safety, one might interpret it as prohibiting the performance of operations that would make free passage through the straits impossible. Such a reasoning leads to the rejection of the view of Ross who argues that the right of passage exists as long as the very possibility of passage itself.³⁷

Today such a view is incorrect in relation to the Baltic straits, both because of the Copenhagen Convention and the I Geneva Convention which expressly says in Article 16, item 4 :

“There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.”

This means that neither Denmark nor Sweden may erect any water constructions that would prevent or hamper passage through the straits. Considering that in view of the depth the only passage giving free access to the Baltic is the Great Belt, the prohibition applies to this strait with particular force.

The Copenhagen Convention contains no express provisions in relation to the passage of merchantmen in case of war. Leaving aside as highly hypothetical a situation in which the coastal States would be parties in an armed conflicts, which could take place only in case of a world-scale

for commercial purposes. Common international law does not permit the summoning of a State by a foreign court without its consent. Hence attempts at the exercise of civil jurisdiction in relation to merchant vessels of the socialist States whose property they constitute might lead to unnecessary conflicts.

³⁶ Cf. E. BRÜEL, *International Straits...*, p. 43.

³⁷ A. ROSS, *A Textbook of International Law*, London 1947, p. 177.

conflict, one may consider solely whether merchant ships of States participating in limited, local wars enjoy the right of passage through the straits. Instructive in this respect is the practice of Denmark which holds firmly to the view that it is bound by the provisions of the Convention when it is neutral. Suffice it to point out that merchantmen of the belligerent States passed through the straits both during the Franco-German and Russian-Japanese wars and during the First World War.³⁸ The question is regulated also by norms of the common international law granting the merchantmen of the belligerents the right of innocent passage through the territorial sea of the third States, provided the latter are neutral.³⁹

IV. The Passage of Warships and the Problem of Neutralization of the Baltic Sea

Whereas the complete freedom of passage of merchantmen in time of both peace and war, during which both Denmark and Sweden are neutral, does not give rise to any doubts, they are aroused by the question whether the right of passage, universally recognized in case of merchant ships, applies equally to warships. For according to the majority opinion, the provisions of the Copenhagen Convention do not regulate this problem.⁴⁰ Although Article I contains the words "no ship," which could suggest that it is applicable also to warships, the principal purpose of the contracting parties was the abolition of dues, and these were collected only for the passage of merchant ships. The Convention speaks also of "cargo," of the performance of "trade operations" which also cannot be applicable to warships.⁴¹

In the absence of conventional provisions directly regulating the pas-

³⁸ The mining of the straits by Denmark during the First World War affected warships only, because Danish pilots led 32,084 merchant vessels through the Great Belts during that time (R. R. BAXTER, *op.cit.*, p. 199).

³⁹ This results, among others, from the provisions of the XIII Hague Convention of 1907 pertaining to the rights and duties of neutral powers in case of naval war (text: L. GELBERG, *Zbiór dokumentów* [Collection of Documents], Warszawa 1956, vol. 1, pp. 287 - 291).

⁴⁰ C. J. COLOMBOS, *The International Law of the Sea*, London 1945, p. 127; R. BIERZANEK, *Strefy ograniczonych zbrojeń a zasada wolności mórz* [The Zones of Limited Armaments and the Principle of Freedom of the Seas], "Sprawy Międzynarodowe," 1959, No. 4/5, p. 45.

⁴¹ Rather isolated is the view of P. FAUCHILLE, *Traité de droit international public*, vol. 1, part II, p. 240, that the treaty pertained to all ships irrespective of the flag they flew—merchant or war. A similar opinion is expressed by J. WESTLAKE, *International Law*, London 1910, vol. 1, pp. 201 - 202.

sage of warships through the Baltic straits, one should consider whether it is possible to find a uniform norm applicable to all other territorial straits, which would thus be also acceptable in this case. Well, there is no such uniformity, because besides conventional and customary solutions permitting the free passage of warships, there is also a convention signed in 1936 in Montreux which limits the passage of navies in the direction of such a closed basin as the Black Sea. Its Article 18 provides that the overall tonnage of warships belonging to States outside the Black Sea basin must not exceed 30,000 tons.⁴²

Can one postulate for the Baltic straits the acceptance of a similar solution limiting free access to the Baltic for warships of States situated outside its basin? This kind of attitude is held at present by the doctrine of the socialist States. Pleading historical precedents and the special geographical situation of the Baltic Sea, the authors, particularly Soviet ones, argue that it has the character of a semi-closed sea with a special legal status.⁴³ For in case of a water area surrounded by the mainland territory of two or several States and connected with the high seas by a natural or man-made waterway giving access to their shores alone, there is no doubt of the existence of certain common interests and aims on the part of the coastal States. These States are interested in the safeguarding of the safety of their shores, in the establishing of such a legal status of the waterways that they could not be used for aggressive purposes by States situated outside that basin. This end may be served first of all by the elimination of foreign warships.⁴⁴ This is connected at the same time with the necessity of recognizing the specific legal status of the straits giving access to the semi-closed sea.⁴⁵

⁴² Text: L. GELBERG, *Zbiór dokumentów [Collection of Documents]*, vol. 2, p. 410. If the tonnage of the strongest Black Sea fleet increased by 10,000 tons in comparison to the level at the moment of the signing of the convention, the upper limit for States situated outside the Black Sea will be 45,000 tons, with the reservation that a single power from outside that basin may have at most two thirds of the total tonnage.

⁴³ "Sovetskoe Gosudarstvo i Pravo," 1950, No. 5, pp. 61 - 62; A. D. KEYLIN, *Sovetskoe morskoe pravo*, Moskva 1954, p. 61; V. I. LISOVSKI, *Meždunarodnoe pravo*, Kiev 1955, p. 145; *Meždunarodnoe pravo*, Moskva 1957, p. 222; V. S. VERŠČENTIN, *Svoboda suhodostva v otkritom more*, Moskva 1958, p. 11 ff. uses the term "closed sea" which meets with certain criticism, as it offers an opportunity for asserting that the old doctrine of *mare clausum* is being revived under contemporary conditions.

⁴⁴ While distinguishing the existence of semi-closed seas or seas with a special legal status, the Soviet doctrine expressly points out that this is connected with the closing of access to warships of States from outside that basin.

⁴⁵ S. B. MOLODCEV, *Meždunarodnopravovoj režim otkritogo morja i kontinental'nogo šel'fa*, Moskva 1960, p. 47.

The legal status of such straits as the Baltic and Black Sea straits must take into consideration the interests and rights of the States situated in those basins. Because for them the use of the natural waterway leading to the seven seas is of prime significance. If they did not have the right of taking their warships into the Atlantic or the Mediterranean, these States would find themselves in a situation in which the fundamental principles of international law—the principle of the freedom of the seas and sovereign equality—would become a fiction in this respect.

One cannot assert, on the other hand, that there is the same kind of necessity justifying States outside the Black Sea and the Baltic basins to bring their warships into these seas. Because there is a difference in the character of the passage through straits into the oceans and the high seas from where it is possible to sail in various directions, and of the passage of the warships of a state or group of States into a sea where the navigation routes lead only to ports situated in that basin, and the very area of the aquen is comparatively small. In the latter case, unless the passage has the character of a courtesy visit, or unless the warships are bound for the port of one of the coastal States at its invitation, the passage has every hallmark of a military demonstration constituting a direct threat to the coastal States. One may surely assert that such a passage is inconsistent with Article 2, item 4 of the UN Charter prohibiting the resorting to the threat of force. The term "threat" has no special definition in international law. "Threat" differs from "use" by its potentiality. Whether certain actual situation constitutes a threat of the use of force depends on its intention. In the situation when naval manoeuvres or demonstrations are taking place in the vicinity of the frontier of a State or States belonging to another grouping, the intention does not leave any doubt. For how can one explain the Baltic manoeuvres of warships of the NATO States which are not Baltic States? It may lead solely to an increase of tension and unnecessary international conflicts. Quite understandable is, therefore the striving of the coastal States for liquidating or at least diminishing threats of this kind.

One could use also other arguments in favour of establishing a special legal Status for the Baltic Sea, permitting its neutralization and elimination of foreign warships. But is it impossible to state the existence of such a status binding already at the present moment, which would bring in its wake the prohibition or limitation of the passage through the Baltic straits of warships of States having no Baltic coasts? At the 1958 Geneva conference, the Rumanian and Ukrainian delegations submitted a proposal, withdrawn before the voting, to include in the Convention a provision permitting the establishment of special navigation regime for some seas because of historical causes or on the basis of inter-

national treaties.⁴⁶ In order to clarify the doubts concerning the existence of a special legal status of the waters of the Baltic it is necessary, therefore, following this proposal, to consider: 1. whether any agreements establishing a special legal status of the Baltic have been concluded; and 2. whether this status is the result of historical causes, in other words—whether protracted practice has produced a relevant customary norm recognized by all the States concerned.

1. Although one cannot point to an international agreement establishing a special navigation status for the whole of the Baltic, certain limitations pertaining to warships result, nevertheless, from several international treaties on the demilitarization and neutralization of the Åland Islands. The beginnings of the demilitarization go back to mid-19th century when Russia concluded in 1856 a convention with France and Britain, in which she undertook not to fortify the Åland Islands, and not to erect and maintain any military installations on them.⁴⁷

The problem of the demilitarization of the Åland Islands reappeared anew after the First World War. This was due on the one hand to their remilitarization during the hostilities, and on the other hand to the fact that they no longer belonged to Russia but came under the sovereignty of Finland which had gained independence as a result of the October Revolution.

In a convention concluded in 1921 in accordance with a resolution of the Council of the League of Nations, the Åland Islands were not only demilitarized again, but their neutralization was also provided for.⁴⁸ Article 2 explained that the name of Åland Islands meant a group of islands, islets and reefs situated in a sea area which contained within its zone established by the Convention not only a territorial sea but also a part of the high seas.

Finland undertook not to fortify the islands, and in accordance with Article 4 no land, naval or air forces of any power had to have in future the right of entry into the established zone. In wartime the zone was to

⁴⁶ R. BIERZANEK, *Strefy ograniczonych zbrojeń...* [*The Zones of Limited Armaments...*], pp. 47 - 48; by the SAME AUTHOR, *Morze otwarte...* [*Open Sea...*], pp. 289 - 290. The Soviet delegate justified this proposal by reasons of security, pointing out that in the past these waters had been used for purposes of aggression. The American delegate came out against this proposal.

⁴⁷ Art. I of the Convention signed in Paris on 30 March, 1856 between France, Great Britain and Russia on the problem of the Åland Islands. Text: L. GELBERG, *Zbiór dokumentów* [*Collection of Documents*], vol. 1, p. 58.

⁴⁸ Convention concluded between Germany, Denmark, Estonia, Finland, France, Great Britain, Italy, Latvia, Poland and Sweden. Text: *Dziennik Ustaw* of 1922 [*Journal of Laws*], No. 68, item 792.

be recognized as neutral and it could not be used in connection with war operations.⁴⁹

The effectiveness of the Convention was seriously weakened by the absence of Soviet Russia among its signatories, all the more so as in a protest note of 13 November, 1921 the government of the Russian Socialist Federative Soviet Republic recognized it expressly as non-existent.⁵⁰ In 1939, after unsuccessful attempts at freeing herself through the League of Nations from the prohibition of fortifying them, Finland remilitarized the islands.

The doubts connected with the legal status of the Åland Islands were liquidated in a bilateral agreement concluded on 11 October, 1940 between Finland and the Soviet Union, which provided for their demilitarization and the prohibition of their use for war purposes. The validity of this agreement, suspended during the war, was restored in accordance with Article 9 of the armistice signed on 19 September, 1944 by the Soviet Union and Great Britain on the one side and Finland on the other. The demilitarization of the Åland Islands was finally confirmed in Article 5 of the peace treaty signed with Finland on 10 February, 1947.⁵¹

Provisions pertaining to the Åland Islands foresee their neutralization. They apply, however, only to a certain zone covering an insignificant part of the open waters of the Baltic. Moreover, the prohibitions apply to all warships irrespective of the flag, and it does not seem, therefore, that they can be taken to mean: the existence of a special navigation status in that sea, justifying the limiting or closing access to the Baltic for warships that do not belong to the States of that basin.

2. Attempts at the neutralization of the Baltic Sea, made for various motives and in various forms, go back in their beginnings to the 17th century. Already during the peace negotiations between Denmark and Sweden in 1658 both States consented to the Sund remaining closed to foreign armadas. Under the influence of diplomatic efforts of England which strove to ensure access to the Baltic for her warships, the original

⁴⁹ Art. 4 and 6 provided for certain exceptions made above all for Finland which could, among other things, in exceptional circumstances introduce and temporarily maintain armed forces indispensable for keeping good order; she had also the right of periodical visits paid to the islands by one or two light surface ships.

⁵⁰ P. D. BARABOLA, *et al.*, *Voennomorskoj mezhdunarodno-pravovoj spravočnik*, Moskva 1966, p. 366. Even before the signing of the convention, the Soviet Union, in notes of 2 October and 28 June, protested against the settlement of the problem of the Åland Island without its participation *Diplomatičeskij slovar*, Moskva 1960, vol. 1, p. 30).

⁵¹ Text of the treaty: *United Nations Treaty Series*, vol. 48, p. 232, Art. 5 declares: "The Åland Islands shall remain demilitarized in accordance with the situation as at present existing."

formulation of the preliminary treaty of Torstrup was supplemented by the pointer that it meant "enemy" fleets, which radically changed the original text, since the Sund became in this way open to all men-of-war: if the States of their flag were not in a state of war with Denmark and Sweden.⁵² For until then, that is until the eastern shore of the Sund was taken by Sweden, the passage of foreign warships was forbidden if they did not have a permission of the king of Denmark, irrespective of whether she was neutral or whether she was engaged in hostilities.⁵³

The gradual increase of the importance and might of other Baltic States, notably Russia and Prussia, produced in the 18th century a *sui generis* sense of community of the Baltic States, and the conviction that the right to prohibit the use of the Baltic by foreign war fleets and to close the straits, which was vested at first in Denmark and since mid-17th century also in Sweden, was the prerogative of all the States of that basin.⁵⁴ This conviction was expressed legally in a number of treaties concluded in the latter part of the 18th century.

The special legal status of the Baltic Sea was established for the first time during the seven-year war. In 1759, Russia signed a convention with Sweden, in which the parties declared that their purpose was to safeguard freedom of trade and navigation and to protect the Baltic Sea from war operations.⁵⁵ This end was to have been served by the dispatch to the Sund of a combined war fleet of the signatories. It was to close access to warships of non-Baltic States engaged in hostilities. One year later the convention was joined also by Denmark for which the closing of the straits did not constitute any serious threat in view of the fact that until the end of the seven-year war (1763) England was not interested in sending her warships to the Baltic.

⁵² The Treaty of Tostrup, signed on 18 February, 1658, said: "*Utraque pars, quantum fieri potest, impediat ne aliqua classis bellica per fretum Oresundicum aut Balticum penetret et irrumpat[...]*," while the final text of the Treaty of Roskilde, concluded on 26 February, 1658, said: "*Inter nos constituimus et mutuo promissimus, nos nunquam concessuros, ut peregrina quaedam classis inimica, cuiusque etiam illa fuerit, per fretum Oresundicum aut Balticum transeat, sed ab utraque parta pro omnibus viribus id impedituros et averturos esse.*" Cited after M. de TAUBE, *Le statut juridique de la mer Baltique jusqu'au début du XIX^e siècle*, RCADI 1935, vol. 53, pp. 509 - 510.

⁵³ The necessity of obtaining permission for passage pertained also to ships carrying troops and military equipment. E.g., during the Anglo-Spanish war, Friedrich II closed the Sund to ships carrying artillery and equipment for the Spanish army (E. BRÜEL, *International Straits...*, p. 45 - 46).

⁵⁴ R. BIERZANEK, *Strefy ograniczonych zbrojeń...* [The Zones of Limited Armaments...], pp. 43 - 44.

⁵⁵ Text: G. F. MARTENS, *Supplément au recueil des principaux traités*, vol. 3, pp. 36 - 41.

Of particular significance for the neutralization of the Baltic were the international agreements concluded in the years 1780 - 1781 during the war between Britain and her mutinied colonies and France. In the bilateral conventions signed by Russia with Denmark and Sweden in 1780 the contracting parties expressed in a special article their consent to recognize the Baltic Sea as indisputably closed to foreign warships because of its situation, and undertook to adopt indispensable measures to protect it against war operations.⁵⁶ In the secret articles of the 1781 treaty Russia and Prussia proclaimed the Baltic a closed sea in which the conduct of war operations was prohibited, but in which trade navigation remained free for all vessels.⁵⁷

The principles contained in the treaties of 1780 - 1781 forming a league of armed neutrality, were repeated in the Copenhagen Convention signed by Denmark and Sweden on 27 March, 1794 at the time of the wars waged by the revolutionary France. The contracting parties based the closing of access to foreign warships on the fact that the Baltic should be recognized as a sea with a special status.⁵⁸ Although the separate and secret articles of the convention on armed neutrality of 16 December, 1800, concluded between Russia and Denmark, still proclaimed the Baltic as a sea closed for ever,⁵⁹ in practice the neutralization of the Baltic Sea was ended at the beginning of the 19th century. This resulted, among other causes, from the attitude of Great Britain which "opened" the Sund by the operations of her fleet directed against Denmark in 1801 and 1807.⁶⁰ In 1808, France also recognized the Baltic as an open sea in violation of her earlier declarations, thus legalizing the attack launched by French corsairs on some American ships off Pilawa.

⁵⁶ Text of the treaties: F. F. MARTENS, *Sobranie traktatov i konvencij*, vol. 6, Petersburg 1883, p. 107, 117 ff.

⁵⁷ Cited after R. BIERZANEK, *Strefy ograniczonych zbrojeń...* [The Zones of Limited Armaments...], p. 43.

⁵⁸ Art. X of the treaty of 1794 read: "*La Baltique devant toujours être regardée comme une mer fermée et inaccessible à des vaisseaux armés parties en guerre éloignées, est encore déclarée telle de nouveau par les parties contractantes, décidées à en préserver la tranquillité la plus parfaite*" (cited after E. BRÜEL, *International Straits...*, p. 52, note 4).

⁵⁹ L. OPPENHEIM, H. LAUTERPACHT, *International Law*, London 1952, vol. 2, pp. 630 - 631; C. J. COLOMBOS, *op.cit.*, p. 176; J. MAKOWSKI, *op.cit.*, pp. 680 - 681; F. F. MARTENS, *Sovremennoe meždunarodnoe pravo*, Petersburg 1887, vol. 2, pp. 123 - 124.

⁶⁰ In 1801, admiral Nelson scored a naval victory over the Danish navy on the very doorstep to Copenhagen, while in 1807, after intercepting Danish men-of-war, the English shelled Copenhagen. Stripped of her navy, Denmark could no longer play the part of guardian of access to the Baltic. Neither did she want to play that part.

The Baltic Sea lost its special legal status not only because of the change in the attitude of England and France, but first and foremost because of the fact that the Baltic States themselves ceased to be interested in maintaining its neutrality. Suffice it to point out that during the Crimean war Denmark and Sweden permitted without any protest the passage of a Franco-English fleet, while Russia did not protest against the attack on the Åland Islands. Similarly during the Franco-German war of 1870 Germany considered the French blockade of her Baltic ports as quite legal.⁶¹

Summing up our arguments concerning the legal situation of the Baltic Sea, it must be said that in view of the absence of any binding conventional and customary norms foreseeing its neutralization it has no special legal status which would determine the principles of the passage of non-Baltic warships through the Belts and the Sund. This does not mean in the least, however, that the principles established in the latter part of the 18th century, a certain reflection of which is the legal status of the Åland Islands, have been completely forgotten and stripped of their significance. In the course of the century and a half since they were in force, the Baltic States tried on numerous occasions, in various circumstances and for various political reasons, to re-introduce them in practice. Also as regards the doctrine, many authors, especially in the 19th century, were in favour of the admissibility of closing the Baltic, particularly in wartime, to warships not belonging to the coastal States.⁶²

The return to the special legal status of the Baltic Sea is fully justified from the legal point of view and highly desirable for political reasons. However, the transformation of this *de lege ferenda* postulate into binding norms can take place solely by way of a suitable international agreement concluded by the Baltic States.⁶³

⁶¹ P. FAUCHILLE, *op.cit.*, p. 240.

⁶² R. BIERZANEK, *Strefy ograniczonych zbrojeń...* [*The Zones of Limited Armaments...*], p. 44, and S. B. MOLODCOV, *op.cit.*, *passim*, mention such names as: G. F. MARTENS, ORTOLAN, CUSSY, JACOBSON, HAUTEFEILLE, PERELS. Cf. also L. OPPEHEIM, H. LAUTERPACHT, *op. cit.*, p. 247.

⁶³ The attitude adopted by certain Soviet authors that the refusal on the part of western States to recognize the Baltic straits as closed to warships flying the flag of States from outside the Baltic basin constitutes an illegal departure from and infringement of the principle established in the 18th century, is, in our opinion, rather a *de lege ferenda* than a *lex lata* postulate. Such an attitude is expressed in the collective *Kurs meždunarodnogo prava*, Moskva 1966, p. 247.

V. Principles of the Use of Baltic Straits by Warships in Danish and Swedish Practice

The behaviour of the coastal States must be examined in two situations: during a war when they stay neutral, and in peacetime. In the first case, the practice of Denmark and Sweden was not uniform. At first the straits remained open to the warships of the belligerents. As we have pointed out already, the straits were passed without any let or hindrance by French and English men-of-war in 1854 during the war between the Western States and Russia. In the opinion of the Scandinavian States this attitude was consistent with their neutrality and was kept also in the subsequent armed conflicts. Denmark and Sweden permitted the passage of warships of States participating in the Franco-German war of 1870 - 1871, and consented to the passage of Russian warships: during the wars between Russia and Turkey (1877 - 1878) and Japan (1904 - 1905).⁶⁴

In her principles of neutrality announced in 1912, Denmark excluded some parts of the straits indispensable for navigation from areas which could be closed to foreign warships in case of war. However, under German pressure and in order to protect herself against military operations which could be conducted near her territory, Denmark decided at the beginning of the First World War, on 5 August, 1914, to mine the Belts and the Sund.⁶⁵

A different attitude was adopted by Sweden which left a part of the Sund—the Flinterenden channel—open to the warships of both belligerent sides. In 1915, the Germans mined the open waters in the southern part of the Sund leaving only a passage one kilometre wide, which prevented in practice the use of this waterway. In this situation Sweden opened the Kogrund channel to navigation. This permitted ships to pass through the Sund avoiding the German minefields. In July 1916, afraid that if the Entente takes out through this passage her warships blocked in the Baltic, Germany might violate the neutrality of the channel, Sweden mined the Kogrund.⁶⁶

⁶⁴ H. A. SMITH, *Great Britain and the Law of Nations*, London 1935, pp. 262 - 263; R. GENET, *Précis de droit maritime pour le temps de guerre*, Paris (no date), vol. 2, p. 106; C. ROUSSEAU, *Droit international public*, Paris 1953, p. 447.

⁶⁵ Early in the morning of 5 August, 1914, Germany asked through her ambassador to Denmark: will Denmark close the Great Belt to both belligerent sides immediately and effectively, that is with the use of mines? In the afternoon of the same day, the Council of State decided to mine not only the Great Belt, but also the Little Belt and the Danish part of the Sund.

⁶⁶ M. SIBERT, *Traité de droit international public*, Paris 1950, vol. 1, pp. 747 - 748. In her reply to protests against the closing of the Kogrund, Sweden said that

Shortly before the Second World War, in accordance with a joint declaration of the Scandinavian States, establishing principles of neutrality in case of a naval war,⁶⁷ Denmark and Sweden issued decrees of 31 May and 21 May, 1938 permitting the passage of warships of the belligerent States through the neutral waterways connecting the North Sea with the Baltic Sea.⁶⁸ The declaration could not become effective because when the hostilities began in September 1939, the straits were mined by the Germans and partly also by Denmark and Sweden. Some haphazard mining was also done by Great Britain.⁶⁹ When Denmark was taken in April 1940, the straits came under German occupation.

The Danish and Swedish practice in relation to the passage of warships of States engaged in a war is not uniform and cannot serve, therefore, for establishing an indisputable existence of a relevant customary norm. What is more, the problem is at present of practical importance solely in relation to a hypothetical situation when warships of States which do not conduct operations against the Baltic States would want to pass through the straits. In this case, the closing of the straits by neutral coastal States would be fully justified.⁷⁰

Of greater weight, on the other hand, is to examine the practice of the coastal States in relation to the passage of warships in peacetime. The attitude of Denmark and Sweden was more uniform in this respect, for they permitted their passage, which would support the thesis that a relevant customary norm has been thus produced. But whereas the two States do not raise any serious obstacles to the use of the straits by warships of states not engaged in armed conflicts, the conditions of such passage are rather different.

An analysis of the Danish legislation shows a significant evolution

it had always been a Swedish channel of local significance, which had gained its exceptional significance as a result of illegal activities of other States, which cannot deprive Sweden of the right to mine it.

⁶⁷ The Declaration was signed on 27 May, 1938 by Denmark, Finland, Iceland, Norway and Sweden (text: R. GENET, *op. cit.*, pp. 696 - 704, annexe XXI).

⁶⁸ Text of the Danish royal decree: *League of Nations Treaty Series*, vol. 183, p. 297; text of the Swedish decree: *League of Nations Treaty Series*, vol. 188, p. 323.

⁶⁹ V. I. LISSOWSKI, *op.cit.*, p. 146; *Meždunarodnoe pravo*, Moskva 1957, p. 225. The mining was not done quite so soon, however, as in the case of the First World War, which permitted some warships of the Polish Navy to reach the West through the net of German warships guarding the outlets from the straits. K. SZWARCENBERG-CZERNY, *Statut Bałtyku [The Statute of the Baltic]*, "Roczniki Nauk Społecznych KUL," Lublin 1949, p. 196.

⁷⁰ In the present international situation, the Baltic states could be expected to take part in an armed conflict solely in case of a world conflict which, bringing annihilation to mankind, would be beyond any regulation by international law.

tending to limit the freedom of passage.⁷¹ This is clearly visible when one compares the provisions of earlier decrees of 1913, 1921, 1927 and 1938 with the present binding principles of the access of foreign warships and aircraft of 25 July, 1951.⁷²

In accordance with the regulations of 11 September, 1938, foreign warships had free access and the possibility of passage through the Danish territorial waters with the exception of certain closed areas. Entry into ports depended on notification only if the stay was to be longer than two days, or if the squadron of visiting ships consisted of three vessels. Without special permission, foreign warships could stay in Danish waters for fourteen days.⁷³ It is worth noting that these restrictions did not appear in the earlier decrees.

The present principles of the passage of warships of 1951 introduce some further-going restrictions. As before, Danish waters have been divided into internal and external territorial waters, but the area of internal waters has been enlarged in the zone of the straits which, in accordance with paragraphs 4 and 10, have been closed to foreign warships, and permission for passage may be granted only to vessels in distress.

Passage through internal territorial waters and the channels of Hollaenderdybet and Drogden in the Sund, as well as the Little Belt, is made conditional on a seven-day notice through diplomatic channels. The notice is also compulsory if the time of passage or sojourn of foreign warships in the Danish waters exceeds 48 hours.⁷⁴

Permission is required, on the other hand, for access and passage: to the harbours and harbour areas of Frederiksberg, Helsingør and Copenhagen (para. 8); passage of a higher number than three vessels of the same flag if they are to stay simultaneously in Danish waters in the zone of one and the same military naval region; irrespective of the number of vessels, the stay of each warship if it is to be longer than four days (para. 11).

The decree contains also a number of prohibitions for warships while they stay in Danish territorial waters. They must not carry out measurement work or military exercises, such as artillery, rocket and torpedo practice, trawling, mine-laying, laying a smoke or mist screen, etc. For-

⁷¹ Similarly W. MORAWIECKI, *op.cit.*, p. 35; P. D. BARABOLA, L. A. IVANAŠČENKO, D. N. KOLESNIK, *op. cit.*, p. 47.

⁷² Text: *Voennomorskoj meždunarodnopravovoj spravočnik*, Moskva 1966, pp. 329 - 334.

⁷³ E. BRÜEL, *International Straits...*, pp. 100 - 101.

⁷⁴ Paras 6, 7 and 8 respectively. The terms "internal" and "external" territorial waters accord with the generally accepted terminology.

oreign submarines should pass through Danish waters surfaced and with the flag flying.

Unlike Denmark, Sweden did not introduce any special limitations in peacetime in the use of the Swedish part of the Sund by foreign warships. The royal decrees of 8 June, 1951,⁷⁵ amending the earlier principles of 21 November, 1925, divide the sea territory of Sweden into internal and external territorial waters. The internal territorial waters in the Sund, north of the parallel passing through the Klagshamn lighthouse, include only ports and their entries. In accordance with Article 6 of the 1951 decree and law No. 366 which came into force on 1 July, 1966, foreign warships may, without special notice or permission, sail in innocent passage through the external territorial waters in the Sund strait.

The general conditions of innocent passage are formulated in Article 17 of the decree which prohibits the execution of maps, hydrographic operations or measurements in Swedish territory, except those which might prove indispensable for the safety of the ship. Special permission is required for artillery and torpedo practice, trawling or mine-laying exercises or troop landings. Troops may be landed only in case of funerals and with the permission of the appropriate military authorities. Special provisions regulate the use of telegraph. Boats belonging to foreign warships cannot be armed and cannot carry soldiers.

Without special permission warships may stay for fourteen days in Swedish territory (Art. 15), and their captains should respect instructions issued by appropriate authorities, pertaining to sanitary service, pilotage, customs duties, trade and public order (Art. 16).

In accordance with item 1b, Article 6 warships have no right to stop or anchor in Swedish territorial waters, unless it is indispensable for the safety of the ship.

The differences in the navigating conditions of passage through the straits are, among other things, the result of the different political situation of the two coastal States. Sweden pursues a policy of neutrality, while Denmark belongs to NATO. Not without effect on the Danish decree was the moment at which it had been issued—1951—that is the apogee of international tension between East and West, which is usually called by the name of “cold war.”

Leaving political motives aside, let us consider whether the requirement of advance notice, and in certain cases also the necessity to obtain permission to pass, introduced by Denmark, are consistent with the binding norms of international law of the sea.

⁷⁵ Decrees No. 501 and 502. Text: *Voennomorskoj meždunarodnopravovoj spravočnik...*, pp. 321 - 326.

Denmark and Sweden have the right to regulate the conditions of innocent passage, indicate situations or actions which may lead to the recognition of the stay of a foreign warship in their territorial waters as harmful. Since, however, Article 16, item 4 of the I Geneva Convention does not permit the suspension of the right of innocent passage in the straits, and since there is no doubt that the validity of this Article is extended also to warships, it seems that the requirement of obtaining previous permission for passage stands in contradiction to the spirit of that convention.⁷⁶ Such was at least the spirit of a ruling by the International Court of Justice in the case of the strait of Corfu. Doubts are also aroused by the necessity of notification, eight days in advance at that, of the intended passage. It is characteristic that although the requirement of advance notification, provided for in Article 24 of the draft of the International Law Commission, was accepted by the I Committee, it was rejected at the plenary sessions of the Geneva conference, as a result of which it is not mentioned in the final text of the convention on the territorial sea and the adjacent zone.⁷⁷

These are not the only reservations that may be made in relation to the Danish decree. One of the general principles of international law of the sea is the obligation of equal treatment of all States—the prohibition of discrimination. An analysis of the provisions of the 1951 decree leads to the conclusion that as the result of it the socialist Baltic States might find themselves in a worse situation in comparison with the non-Baltic NATO States. For the principles of access contained in paragraph 1 give Denmark a free hand in regulating the access of warships and aircraft participating in joint military manoeuvres, which means that warships belonging to NATO member States are exempt from the rigour and restrictions laid down by the decree.⁷⁸

⁷⁶ Art. 16 item 3 of the I Geneva Convention permits a coastal state temporarily to suspend the right of innocent passage of foreign ships in certain sea zones, inasmuch as it is necessary for the protection of security. In item 4 the Convention makes an exception from the principle granting a coastal state the right to suspend innocent passage, pointing out in accordance with a verdict of the International Court of Justice in the case of the strait of Corfu that innocent passage cannot be suspended in straits connecting high seas.

⁷⁷ Cf. lengthy arguments on the same subject: US Naval War College, *International Law Studies*, 1959-1960, Washington 1961, pp. 133-138. Even greater reservations than the very requirement of notification are aroused by the necessity of making it eight days in advance. A rapporteur of the International Law Commission, Francois, justly said in his discussion with the Danish delegate in the Legal Committee of the UN General Assembly that no specified deadline for notification must be set.

⁷⁸ P. D. BARABOLA, L. A. IVANAŠČENKO, D. N. KOLESNIK, *op.cit.*, p. 47.

The provisions of the decree in accordance with paragraph 1 apply also to vessels other than warships which are the property of a foreign State and which are used as yachts or training ships. This provision places the socialist States in prejudiced situation, for in view of the system of ownership the rigours resulting from the Danish decree will apply to them in a much higher degree than to States where private ownership is the rule.⁷⁹

The restrictions in the passage of warships through the straits, introduced by the Danish decree, are quite understandably opposed by the socialist Baltic States, because, first, the restrictions do not seem to be justified from the point of view of general international law and, second, instead of applying to non-Baltic States—which would have been justified by the special character of the Baltic Sea—they may lead to the discrimination of the socialist States, which cannot be justified by any manner of means.

VI. Conclusions

An analysis of the legal status of the Baltic straits leads to the conclusion that the freedom of their use by merchantmen does not give rise to any doubts today. Doubts do appear, however, when it comes to the regulation of the passage of warships. A postulate which in our opinion may be addressed to Denmark is to liquidate restrictions in relation to warships and some other vessels of the socialist Baltic States.

The regulation of the passage of warships through the Baltic straits is a problem of direct concern not only for Denmark and Sweden, but for all states situated in the basin of the Baltic Sea. The implementation of frequently made proposals to limit or close access to the Baltic to the warships of States situated outside this region is in the interest of their security. This postulate is justified not only by the specific geographical position of the Baltic but also, as we have shown, by historical precedents and analogy with the Black Sea.

We think that in the new international situation, under conditions of a visible *détente* and peaceful declarations, as well as cooperation between Denmark and Sweden, the implementation of the appeal "Baltic—a sea of peace" and the establishment of a special legal status for that

⁷⁹ In paras 7 and 9 the decree grants certain exemptions to State-owned vessels supervising fishing, if Denmark had concluded appropriate agreements with the state whose flag they fly.

sea is fully feasible, and is in the interests of all the States directly concerned.⁸⁰

The Soviet Union has repeatedly come forward with initiatives aimed at limiting the access of warships of non-Baltic states. Already in a note of 19 October, 1920, in reply to a statement of the British government to the effect that it had ordered its navy to attack all Soviet submarines in the Baltic Sea, the Soviet government pointed out that the best way to avoiding armed clashes would be to remove from these waters the warships of all States which do not possess their own territories on their shores.⁸¹

One of the better known was the Soviet statement made at an arms limitation conference in Rome in 1924, when the Soviet delegation declared readiness to a bigger limitation of naval tonnage than in the submitted draft—280,000 tons instead of 490,000 tons—provided access to the Baltic through the Sund and the Belts will be closed to the warships of non-Baltic States.⁸²

This attitude, as well as proposals of neutralization, are supported at present in the doctrine of the socialist States. Polish doctrine points to the interest of all Baltic States, Poland among them, in a full regulation of the legal status of the straits.⁸³ As Berezowski emphasizes: "Placing navigation in the Danish straits in a proper plane may be done only when this navigation is regulated by an international agreement concluded by the Baltic States, taking into account the Danish interests on the same footing as the interests of the other States of the Baltic Sea."⁸⁴

It is possible to arrive at a reasonable compromise between the different interests of the three groups of States in possession of the Baltic coast? The answer is certainly in the affirmative. The proportionally longest part of the coast is held by States which do not belong to any military blocks—Sweden and Finland, a large part belongs to States belonging to the Warsaw Treaty—the Soviet Union, Poland and the German Democratic Republic, and only one tenth to states belonging to NATO—the Federal Republic of Germany and Denmark. There is no

⁸⁰ The Polish standpoint was presented as follows in an interview granted a correspondent of the Danish press agency "Ritzau:" "[...]the point is to adopt together all measures indispensable for preventing conflicts in the Baltic and the Baltic zone. The point is that the Baltic should be no longer a dividing factor, that it should be no longer the scene of gory clashes. This is how we understand the idea: Baltic that does not divide, a Baltic that unites, a Baltic that is a sea of peace."

⁸¹ Text: *Vnešnjaia politika SSSR*, Moskva 1944, vol. 1, p. 511.

⁸² "Sovetskoe Gosudarstvo i Pravo," 1950, No. 5, p. 62; V. I. Lissovski, *op. cit.*, p. 146.

⁸³ A. KŁAFKOWSKI, *op. cit.*, p. 150.

⁸⁴ C. BEREZOWSKI, *op. cit.*, p. 233.

doubt that the disatomization of the Baltic and the resultant ban on the entry of ships equipped with nuclear weapons would be consistent with the interests of all States.⁸⁵ Similarly, a ban on manœuvres and participation of warships of non-Baltic States, as well as on their stationing in this aquen, would certainly remove one of the potential causes of tension and international conflicts.

The idea of the transformation of the Baltic into a sea of peace and of the establishment of a special legal status for it meets with the opposition of certain non-Baltic States—first of all the United States and Great Britain. We think, however, that in accordance with international law which permits the adoption of regional solutions, the Baltic States may settle all legal problems of the Baltic.

The liquidation of the existing doubts as to the legal status of the Baltic straits may be effected through the conclusion of a multilateral agreement which could pertain either directly to their legal status, or by neutralizing the Baltic, would solve indirectly in a compromise manner the problem of the passage of warships which do not belong to the parties to the agreement.⁸⁶ The arrival at such a compromise, indispensable for the security of the coastal States, would constitute an example of the practical observance of the principle of peaceful coexistence and cooperation of States with different systems, belonging to different military organizations.

⁸⁵ At the Geneva conference Yugoslavia submitted to the I Committee a proposal empowering a coastal state to refuse the right of innocent passage to warships equipped with nuclear weapons (UN Doc. A/Conf. 13/C/1/2, 21). The proposal was rejected. The introduction of a prohibition of this kind would be fully justified in case of neutralization of the Baltic.

⁸⁶ W. MORAWIECKI, *op. cit.*, p. 40.

Legal Problems of the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction

by WOJCIECH GÓRALCZYK

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We witness the technological progress having an ever increasing influence on various spheres of human life. Sometimes we even use the term of technological revolution changing the image of the world in our time.

Technological progress has also an impact on shaping and development of international relations and international law governing these relations. These problems were already subject of many studies. They indicated the great variety of changes and their different trends.¹

One of the consequences of technological progress is the territorial extension of the sphere of human activity. Man goes beyond his traditional environment: land and sea surface, and begins to master and utilize environments less accessible to him so far.

¹ Of many available works I shall restrict myself to the works of Polish authors: W. GÓRALCZYK, *Wpływ rozwoju techniki na prawo międzynarodowe* [*The Impact of Technological Progress upon International Law*], "Polish and Foreign Review," 1958, No. 6, pp. 33 - 40; R. BIERZANEK, *Postęp w nauce i technice a prawo międzynarodowe* [*Progress in Science and Technology and the International Law*], "Zeszyty Naukowe Uniwersytetu Łódzkiego," series I, No. 33, 1963, pp. 13 - 23; J. MACHOWSKI, *Rewolucja naukowo-techniczna jako czynnik rozwoju prawa międzynarodowego* [*Scientific-Technical Revolution as a Factor of Development of International Law*], "Państwo i Prawo," 1970, No. 6, pp. 863 - 874.

In this way, as a result of technological progress, there arose the possibility of exploitation of submarine mineral resources, petroleum in particular, which—after World War Two—prompted the coastal States to take interest in submarine areas beyond the limits of their territorial seas, to raise claims to these areas, to create the theory of continental shelf and induce its international adoption, the best expression of which is the IV Geneva Convention on the continental shelf adopted in 1958.

Thus, the first stage of interest in and claims to the sea-bed came to an end. The provisions of the IV Geneva Convention met the requirements and technological development standard of that time, and their authors believed that they will settle most of the problems connected with exploration and exploitation of the sea-bed and the subsoil thereof for a longer time.

However, it appeared soon that the Geneva Convention on the Continental Shelf failed to solve all problems because conditions will arise in the nearest future for exploitation of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of the continental shelf. It turned out, too, that the Geneva Convention did not settle in a precise and clear manner the extent of jurisdiction of the coastal states over the continental shelf. At the same time, there arose the problem of preventing the militarization of the sea-bed and ocean floor because the contemporary technique enables to make use of the sea-bed for various military goals, among others, the emplacement of weapons of mass destruction—the nuclear weapons and construction of rocket launchers.

In this way there began the second phase of interest in the sea-bed and its subsoil, and this time not only in the continental shelf but whole seas and oceans.

First achievements on the path to solving the new political and legal problems which arose along with the possibility of exploitation of mineral resources of the sea-bed and the ocean floor beyond the limits of the continental shelf, and the possibility of making use of the sea-bed for military purposes, were scored in 1970. These are: Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof Beyond the Limits of National Jurisdiction adopted on 17 December, 1970 at the 1933rd plenary session of UN General Assembly,² and The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof adopted on 7 December, 1970 at the 1919th plenary session of the General Assembly.³

² A/RES/2749 (XXV).

³ A/RES/2660 (XXV). Annex.

The Declaration was the result of work of the Ad Hoc Committee, and later the Standing Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, and the Treaty of the Conference of the Committee on Disarmament.

Both documents constitute only a certain stage of works and not their termination.

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons—after coming into force—will be, of course, legally binding, but will not solve the problem of total ban of any military activity on the sea-bed and ocean floor. Although an important achievement, it is only the first step on the way to a total demilitarization of the sea-bed and ocean floor.

The Declaration, as a resolution of the General Assembly, cannot be enforced on the States, and a final, detailed settlement of the problem of exploration and exploitation of the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction will follow in an international treaty to be worked out and adopted at the conference scheduled for 1973.⁴

In the Declaration a somehow vague definition was used (generally applied in UN terminology) that it refers to areas “beyond the limits of national jurisdiction,” but actually it refers to areas beyond the limits of the continental shelf, because only in exceptional cases (when the shelf is very narrow) the limits of territorial seas, i.e. of full jurisdiction of a coastal State over the sea-bed and its subsoil is farther from the coast than the shelf limit.

The Outer Limits of the Continental Shelf

The IV Geneva Convention of 1958 in Article 1 defined the outer shelf limit as follows:

“For the purpose of these articles, the term ‘continental shelf’ is used as referring: (a) to the sea-bed and the subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”

Point (b) of Article 1 refers to insular shelf.

Thus, Article 1 sets down two basic criteria of determining the continental shelf limit: the depth of 200 metres isobath and the exploitability of the shelf’s natural resources.

⁴ See Resolution of UN General Assembly A/RES/2750 (XXV).

Adopting the depth of 200 metres as the only criterion of the coastal States' jurisdiction limit, it would be comparatively easy to outline the extent of this jurisdiction. Thus defined shelves constitute about 7.5 - 8 per cent of the total surface of seas and oceans.

However, the Geneva Convention defines also deeper submarine areas as shelf if there is a possibility of exploitation of their natural resources. It is the criterion of "exploitability" which raises doubts and presents difficulties.

The origin of its adoption was as follows: the International Law Commission, which worked out the draft of the Geneva Convention, at its III Session in 1951 adopted as the shelf limit the criterion of exploitability of its natural resources. During the V session in 1953 this definition was changed and the criterion of 200-metres depth adopted. At the VIII session in 1956 the majority of the Commission voted for the "joining" of both criteria. I write "joining" in quotation-marks because the criterion of exploitability practically excludes the criterion of depth. In its comments the Commission referred to the decision of the Inter-American Conference on Conservations of Natural Resources of the Continental Shelf and Oceanic Waters, which adopted the resolution that the rights of the coastal State shall reach the limit up to which the depth of the waters enables the exploitation of natural resources of the sea-bed and ocean floor and the subsoil thereof.⁵

At the 1958 Geneva Conference on the Law of the Sea many countries opposed the criterion of exploitability pointing out its lack of precision and the fact that it can lead to the appropriation of large submarine areas.⁶

In favour of the criterion of exploitability were in the first place South American countries and some other developing countries expecting that this definition will enable them to justify the already raised claims concerning coastal fisheries, or that such solution will be more advantageous for them.

Some States (France, Great Britain, Lebanon, Yugoslavia, India, Canada, Holland and Sweden) submitted to the IV Committee of the Geneva

⁵ Comments on work of International Law Commission see: W. GÓRALCZYK, *Szelf kontynentalny* [The Continental Shelf], Warszawa 1957, p. 128 ff; ILA, Buenos Aires Conference (1968) British Branch Committee on Deep-Sea Mining. Report on the Legal Regime of Deep-Sea Mining by E. D. Brown, p. 9 ff., and 91st Congress, 2nd Session: Report by the Special Subcommittee on Outer Continental Shelf to the Committee on Interior and Insular Affairs, United States Senate, Appendix C.

⁶ France, Great Britain, Greece, The Netherlands, Pakistan, Tunisia. (*United Nations Conference on the Law of the Sea. Official Records*, vol. 6, pp. 2, 4, 6, 19 and 21).

Conference amendments to Commission's draft aiming at elimination of the exploitability criterion. India proposed, as a compromise, the adoption of the 550 m. depth (isobath) as the shelf limit. However, all these amendments were rejected.⁷

Eventually, the version proposed by the International Law Commission passed by 51 votes against 9 with 10 abstentions.⁸ This text was later approved at the plenary session and included into the IV Geneva Convention. It resulted from a compromise but it has to be said that in 1958 States were not yet fully aware of the rapid technological progress.

The main deficiency of the "exploitability" criterion is its lack of precision. It does not answer clearly the question where is the limit of rights of the coastal State to the shelf. For what does "exploitability" mean? In the comments of the International Law Commission we read that it followed from this definition that areas in which exploitation was not technically possible by reason of the depth of the water, were excluded from continental shelf.⁹

Nevertheless, the definition of technical exploitability is vague. It is hard to say whether it concerns economically profitable exploitation, because only then one can speak about exploitation, or exploitation technologically possible notwithstanding the costs involved and it must be borne in mind that there is a rapid progress in technology and these possibilities are constantly on the increase. Assuming even that this is a question of economically profitable exploitation only, the criterion of profitability may be hard to define too.¹⁰

Further the question arises whether "exploitability" shall be understood subjectively or objectively, i.e. whether a coastal State can appropriate concrete submarine areas beyond the limit of 200 m. isobath only when it itself, or its citizens dispose of a knowledge and technology enabling the exploitation of these areas, or when such knowledge and technology is at the disposal of highly developed countries of the world. Everything seems to be in favour of the objective interpretation of exploitability as consistent with principle of equality in rights of all States.

⁷ The Indian proposal was rejected by 31 votes to 21, with 16 abstentions (*ibid.*, p. 47).

⁸ *Ibid.*

⁹ "Yearbook of the International Law Commission," Vol. 2, 1956, p. 296.

¹⁰ I pointed out the difficulty of interpretation of the term "exploitability" in the book *Szelf kontynentalny* [*The Continental Shelf*] still before the Geneva Conference (p. 129 ff.). See also L. F. E. GOLDIE: *The Exploitability Test — Interpretation and Potentialities*, "Natural Resources Journal," Vol. 8, 1968, No. 3, p. 434 ff.

A different interpretation would be detrimental for the developing countries and those at the medium stage of technological development.¹¹

Can the provisions of the Geneva Convention, be interpreted in such a way that the technology of exploitation only shall determine the outer limit of the shelf? Should such an interpretation be accepted, it could easily happen in the future that claims be raised to the entire sea-bed and ocean floor as the continental shelf of the coastal States.¹² Such claim has not yet been raised but the government of the United States has already granted concessions at the Pacific coast for submarine areas situated at a depth exceeding 200 m.¹³

There exists, however, a different interpretation of Article 1 of the Geneva Convention. Its supporters maintain that a shelf is only the geophysical extension of the land territory of a coastal State. Even if the legal definition of the shelf does not strictly correspond to its geographical description, the use of the term "continental shelf" means that it refers to the coastal areas only, and not to the whole sea-bed and ocean floors. Attention must be paid also to the definition of adjacency used in Article 1. It defines shelves as sea-bed and subsoil of the submarine areas *adjacent* to the coast, i.e. situated in the proximity of the coast. Speaking at the Geneva conference for the acceptance of exploitability criterion one of the delegates stated:

"The thought underlying that Article was that the continental shelf was a prolongation of the land and, therefore, subject to consideration of continuity or proximity. The decisive criterion was that of proximity. Exploitation beyond the point at which relationship of proximity ended might be based on occupation, but it would not be covered by the provisions of Articles 67 and 68."¹⁴

It is evident from the protocols of the Geneva Convention that adopting the criterion of exploitability, it has never been expected that it

¹¹ Shigeru ODA wrote: "[...]the concept of exploitability must be interpreted each time in terms of the most advanced standards of technology and economy in the world." (S. ODA, *International Control of Sea Resources*, 1963, p. 167).

¹² According to Shigeru ODA "[...]the exploitation of submarine resources beyond even the 200 metres' depth must always be reserved to the coastal State, which is empowered to claim the area where the depth of the superjacent waters admits the exploitation. It is inferred that all the submarine areas of the world have been theoretically divided among the coastal States by this Geneva Convention." (*op.cit.*, p. 167). Of similar opinion was F. MÜNCH, *Die Internationale Seerechtskonferenz in Genf 1958*, "Archiv des Völkerrechts," 1959, pp. 180, 206.

¹³ See L. F. E. GOLDIE, *op.cit.* Reproductions of the maps of these areas are to be found in the annex (p. 466 ff.).

¹⁴ *United Nations Conference on the Law of the Sea. Official Records*, vol. 6, p. 9. The quoted in the speech Art. 67 of the draft worked out by the International Law Commission became the Art. 1 of the Convention.

could result in the division of the sea-bed and ocean floor. The conclusion is that under the terms of the 1958 Convention three elements define submarine areas of which the shelf consists: 200 m. isobath, exploitability and adjacency to the coast, or at least some proximity to the coast.

The interpretation of provisions of an international treaty, however, cannot be done apart from the practice of the States after the treaty has come into force. The most important thing is how the treaty is understood by its parties. The problem of interpretation of Article 1 of the Convention on continental shelf was subject of extensive debates in the First Committee during the XXII session of UN General Assembly. Voices were raised expressing an apprehension should its provision become a basis for too-far going claims of coastal States leading, as a consequence to the division of the sea-bed and ocean floor.

The Ad Hoc Committee set up by the XXII session of the General Assembly, unanimously agreed that deep ocean floor cannot be subject to acquisition. The report of the Working Group of the Ad Hoc Committee reads:

"It was generally agreed that there is an area of the sea-bed and ocean floor which is not subject to national jurisdiction [...]. It was pointed out that none of the members in the Working Group has suggested that either international law or Article 1 of the Continental Shelf Convention authorizes the extension of limits for an indefinite distance into the deep ocean floor [...]."¹⁵

However, claims of some countries exceed what can be determined as a reasonable limit of continental shelf in the light of generally accepted norms of international law, and Article 1 of the Geneva Convention.

What I have in mind here are, in the first place, the claims for a 200-mile zone raised by some Latin American countries, which also include the sea-bed and the subsoil thereof.

Also in the United States there appeared disturbing tendencies (represented chiefly by the oil industry) to include under the jurisdiction of that state the entire continental margin consisting of: continental shelf, continental slope and continental rise. The realization of these tendencies would mean including under the jurisdiction of the coastal States of areas up to a depth of 3,000 - 4,000 m.¹⁶

¹⁵ A/7230, p. 48. That attitude was confirmed in the Ad Hoc Committee Report (*ibid.*, p. 17).

¹⁶ Such attitude was represented among others, by the National Petroleum Council, American Bar Association, the American Branch of the International Law Association. The Special Subcommittee on Outer Continental Shelf adopted the attitude represented by the American Branch of ILA that "rights under the 1958

It is obvious from the above that to counteract these excessive claims the problem of revision of the Geneva Convention on the Continental Shelf and setting down of a precise limit of the shelf became extremely urgent. Unfortunately the Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil thereof beyond the Limits of National Jurisdiction did not set forth the limits of the jurisdiction. However, certain proposals were submitted concerning the determination of these limits.

The attitudes of various countries, were, of course, influenced to a high degree by their attitude towards the width of territorial seas. For instance those Latin American countries which raise claims to a 200-mile wide zone of territorial waters, or exclusive fishing zone were of the opinion that the extent of national jurisdiction over the sea-bed and subsoil thereof can, by no means, be lesser. It is, however, extremely disturbing that some other States (for instance Malta) having a narrower zone of territorial waters, also proposed the 200-mile extent of jurisdiction or expressed their approval for that wide extent.

No State was in favour of the exploitation possibility criterion, and the adoption of depth as the only criterion determining the range of national jurisdiction of the coastal state was also criticized.¹⁷ The draft of the United States suggesting a 200 m. isobath as a limit of full jurisdiction of the coastal State (beyond which—according to the US proposal—there would be so called trusteeship zone over which the coastal State would have limited rights) was almost generally criticized in this respect. The depth criterion was considered unjust because some countries have a very narrow and other a very wide shelf. The United States defending the concept of intermediate zone (trusteeship zone) gave to understand that they would be ready to adopt the criterion of distance instead of that of depth provided it would not be to long a distance. Some States (among them Poland¹⁸ and the USSR¹⁹) came up with the proposal of joining the criteria of both depth and distance. It would mean that every State can extend its jurisdiction over the sea-bed and ocean floor and the subsoil thereof, adjacent to its coast, to a certain distance and beyond it in all places where the waters are shallower than the maximum depth

Geneva Convention on the Continental Shelf extend to the limit of exploitability existing at any given time within an ultimate limit of adjacency which would encompass the entire continental margin.” (above cit. Report, p. 15 and 16).

¹⁷ See e.g., the statement of the delegate of Kenya (A/AC. 138/SC.I/SR.8) and Gabon (*ibid.*, SR. 11).

¹⁸ See A/AC. 138/44, para. 14.

¹⁹ This results from Art. 2 of the Soviet draft (A/AC. 138/43). See also the statement of the delegate of Byelorussia (A/AC. 138/SC. I/SR. 10).

adopted (i.e. to a certain isobath). Poland proposed to adopt the average width of shelf (amounting to approximately 40 - 50 miles) as this distance.²⁰ Supporting the adoption of the criterion of distance Singapore also suggested the average width of the shelf²¹ and Iraq—the distance of 40 miles.²²

The Genesis of the Declaration of Principles and Its Adoption

The matter of peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction was put for the first time on the agenda of XXII session of United Nations' General Assembly pursuant to Malta's motion.²³ The General Assembly by Resolution 2340 (XII) established an Ad Hoc Committee composed of 35 States to examine some aspects of this problem until the next session of the Assembly.

During the XXIII session of the Assembly, by Resolution 2467 A(XXIII), a standing Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction was established, consisting of 42 States. (Poland was a member of the Ad Hoc Committee and is a member of the standing Committee). In paragraph 2(a) of the above mentioned Resolution the Committee was instructed to study the elaboration of legal principles and norms which would promote international cooperation in the exploration and use of the sea-bed and the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction, and to ensure the exploitation of their resources for the benefit of mankind.

Such was the legal basis of work on the Declaration of Principles, while the actual basis of this work was an ever more clearly appearing possibility of exploitation of mineral resources of the sea-bed and subsoil of the areas beyond the limits of national jurisdiction in the first place of petroleum and manganese nodules.

The main wealth of submarine areas is petroleum and natural gas. In 1969 the value of petroleum and gas production was evaluated at 90 per cent of the total value of mineral production derived from the sea and submarine areas. That situation will be most likely sustained through the remainder of this century and probably longer.²⁴

²⁰ *Ibid.*, SR. 12.

²¹ *Ibid.*, SR. 13.

²² *Ibid.*, SR. 7.

²³ A/6695.

²⁴ See Report of UN Secretary General: *Mineral Resources of the Sea* (E/4973, para. 3).

Already at present 18 per cent of world production of petroleum is derived from the sea-bed. It is estimated that in the eighties' the production from submarine areas will probably amount to 30 - 40 per cent and in 2,000—to 40 - 50 per cent of the total world production.²⁵

According to the report of UN Secretary General the value of world sub-sea petroleum production will soon exceed that of all other marine resources including fisheries.²⁶

However, the entire present petroleum production is obtained from the shallow shelf areas under jurisdiction of the coastal States.

Nevertheless, oil wells were already drilled by oil companies at a depth exceeding 400 m. According to the above quoted report of UN Secretary General commercial exploitation of petroleum will be possible in 457 m. (1,500 feet) of water by 1975.²⁷

There exists a possibility therefore that still in this decade (provided the coastal States will not arbitrarily extend their jurisdiction over ever deeper submarine areas) petroleum will be produced in areas not subordinated to the jurisdiction of the coastal states.

There is also a chance that about 1975, production of metals from manganese nodules scattered all over the deep-sea areas will begin. The main metals to be found in these nodules are manganese, nickel, copper and cobalt. Although manganese is their main metallic component, it is expected that the exploitation will rather aim at obtaining nickel and copper, and possibly also cobalt.²⁸

In its works the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction based on the assumption that there exists an area of sea-bed and its subsoil which is not and will not be governed by sovereign rights of the coastal States, and that on this international area valuable marine minerals are available which soon will become subject of exploitation, and that the exploitation thereof will bring substantial revenues.²⁹

²⁵ Such figures were quoted by the delegate of the United States McKelvey in his speech delivered on 4 August, 1971 in the Sea-Bed Committee (see A/AC. 138/SC. I/SR. 13). See also E/4973, paras 8 and 9.

²⁶ E/4973, para. 3.

²⁷ *Ibid.*, para. 41.

²⁸ See the above quoted statement of McKelvey.

²⁹ The belief in these revenues was expressed in the request of the Economic and Technical Sub-Committee addressed to the UN Secretary General to work out for the Committee session scheduled for August 1970 a document concerning the possible methods and criteria for the sharing by the international community of proceeds and other benefits derived from the exploitation of resources of the international area (see A/AC. 138/SC. 2/L. 6, para. 10). Pursuing this request the Secretary General worked out a preliminary note concerning this problem, published

Hence there appeared controversies and disputes in the work of the Committee considerably hampering the elaboration of provisions of the Declaration of Principles acceptable for all groups of States. One of the controversial issues is the problem of the present legal situation of the sea-bed and ocean floor beyond the limits of national jurisdiction, and whether the principle of freedom of the seas, and particularly of freedom of exploitation of marine resources includes the exploitation of the sea-bed and ocean floor.

In the discussion which followed in the Ad Hoc Committee, and later in the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor, as well as during the successive sessions of General Assembly, several developed States and almost all socialist States represented the opinion that the international legal provisions now in force, including the principle of freedom of the seas, apply to the research and exploitation of natural resources of the sea-bed and ocean floor beyond the limits of continental shelf.³⁰ In other words, until the adoption of legislative measures to the contrary, every State can conduct exploration and exploitation of mineral resources on international areas of the sea-bed and ocean floor provided it observes all those restrictions which are stipulated by the existing provisions of international law concerning such an activity. For instance: although free access to these resources and their free exploitation by all States is the consequence of the principle of freedom of the seas, this exploitation must be carried out in such a way as not to impede the use of other freedoms of high seas, particularly of navigation and fishing.

In other words the existing norms of international law constitute a legal framework for the activities of States on sea-bed and ocean floor. There is no legal vacuum in this regard.

Such an attitude is absolutely justified. Moreover, notwithstanding which of the liberties of which the principle of the freedom of the seas consists and to what extent apply to the sea-bed and its subsoil, the basic element of the legal situation of these areas is the fact that they are not

as Doc. AC/138/24 it was later attached to the Report of the Committee (A/8021) as annex IV. After a preliminary discussion on this problem the Committee requested in August 1970 to Secretary General to prepare a more comprehensive study on possible methods and criteria for the sharing of proceeds and other benefits (See A/8021, para. 22). As a result of this request, the report of the Secretary General was published on 15 June 1971 on the possible methods and criteria for the sharing by the international community of proceeds and other benefits derived from the exploitation of the resources of the area beyond the limits of national jurisdiction (A/AC. 138/38).

³⁰ See for instance the extensive statement of the delegate of the USSR (A/AC. 138/SC. 1/SR. 14), and the statement of the delegate of Poland (*ibid.*, SR. 15).

subordinated to the jurisdiction of any coastal State, i.e. they are accessible for exploration and exploitation carried out by all States, or upon their authorization.⁸¹

Some of the developing States represented a different point of view. It was inconvenient for them to recognize the present freedom of exploitation of mineral resources on the international area of the sea-bed and ocean floor. For these States do not have any means at their disposal to avail themselves of this freedom, and they would not benefit from an exploitation taken up by others; on the contrary—the undertaking of such an exploitation could be disadvantageous to them. Firstly, because the developed countries could exhaust the richest and most easily accessible mineral resources of international areas keeping their own interests in mind. Secondly, because an exploitation of sub-sea resources, for instance petroleum, could diminish the dependence of some developed States on exploitation of rich oil resources in the developing States which would entail an unfavourable for those countries impact on international market.

The developing countries expecting future revenues and benefits from exploitation of mineral resources of the sea-bed and ocean floor beyond the limits of national jurisdiction and, on the other hand, not disposing of technical means and capitals indispensable to begin such an exploitation attempted to suggest such a legal settlement which would guarantee their benefiting from the exploitation of those areas. Such attitude must be considered right and justified. For, one can hardly accept a situation in which the resources of the areas would be exploited and utilized by the most developed States only, and particularly by the powerful capitalist monopolies, having largest capitals at their disposal.

However, basing on correct premises, some of the developing States put forward political and legal concepts which were contrary to the basic principles of contemporary international relations and international law and which—in spite of the progressive slogans and canons—would actually bring most benefits of the big capitalist monopolies.

Therefore the developing States came up with the thesis that the principle of freedom of the seas does not extend on the sea-bed and its subsoil, and the existing international rules do not refer to that area at all. There exists therefore a legal vacuum as regards the exploitation of mineral resources of the sea-bed and ocean floor beyond the limits of national jurisdiction.

⁸¹ See F. MÜNCH, *Lex Lata of Deep-Sea Mining (Pacem in Maribus, Legal Foundations of the Ocean Regime. Proceedings of the Preparatory Conference on the Continental Shelf and Legal Framework. January-February 1970, p. 360 ff).*

Until new legal provisions will be worked out taking into consideration the interests of developing countries and filling this "legal vacuum," all States shall refrain from any activities of exploration and exploitation on this area.

To carry their point the developing countries brought about at the XXIV session of UN General Assembly the adoption of a resolution on so-called moratorium³² which provided that until the establishment of an international regime of this area:

"(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction; (b) No claim to any part of that area, or its resources shall be recognized."

Carring the resolution on moratorium in exploitation of mineral resources of the sea-bed and ocean floor beyond the limits of national jurisdiction, the developing countries did not set forth, however, any precise moratorium as regards claims of coastal states which extend their rights on ever wider maritime areas, thus constantly diminishing the international area to which the moratorium refers.³³

In this difficult situation, which revealed various controversial interests, the Committee on Peaceful Uses of the Sea-Bed and Ocean Floor continued its work on the final version of the Declaration of Principles on Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction.

In Resolution 2574 (XXIV) the General Assembly requested the Committee to expedite its work of preparing a comprehensive and balanced statement of these principles and to submit a draft declaration to the General Assembly at its session. Before the end of the Committee's session which was held in Geneva in August 1970, a far-going coordination of opinions was reached. However, no final draft of the Declaration has been worked out.

Already during the XXV session of the General Assembly the Chairman of the Committee, Ambassador H.S. Amerasinghe (permanent representative of Ceylon in the UN) conducted consultations with the members of the Committee to work out a draft of the Declaration which would

³² A/RES/2574 D (XXIV). This Resolution was adopted by 62 votes to 28 with 28 abstentions. All big powers voted against the resolution, as well as Japan and almost all European States. G. W. HAIGHT relates the debates of the XXIV session of the General Assembly on the problems of the Sea-Bed: *Sea-Bed Discussion in the Twenty-Fourth General Assembly*, "The Natural Resources Lawyer," Vol. 3, 1970, p. 405 ff.

³³ The delegate of Mexico stated that the resolution does neither define nor prejudge the limits of national jurisdiction (A/C. 1/PV. 1683, p. 56).

gather general support. The consultations failed to produce a final agreement concerning the draft and its adoption by all members of the Committee.

Nevertheless, the Chairman decided to submit to the Chairman of the First Committee of the General Assembly the draft of the Declaration which, in his opinion, reflected "the highest degree of agreement attainable at the present time."³⁴

The socialist States (except Yugoslavia) had objections and doubts as regards the contents of the draft delivered by Ambassador Amerasinghe and, at the same time, raised objections concerning the procedure of submitting this draft to the First Committee of the Assembly.³⁵ As is well known, the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor observed in its work the principle of elaboration of all resolutions and decisions through negotiations, i.e. the principle of "consensus." In this instance consensus was not achieved, nevertheless the draft had been submitted to the Committee of the Assembly, although not as a document of the Sea-Bed Committee but as an official letter of its Chairman "for the information" of the members of the First Committee.

This draft was later submitted to the First Committee as Document A/C.1/L.544, and 46 States became its co-sponsors.³⁶ It was adopted by 90 votes with 11 abstentions.³⁷

At the plenary session of the General Assembly the Declaration of Principles was adopted by 108 votes with 14 abstentions.³⁸

The Analysis of the Declaration of Principles

The Declaration of Principles was adopted by the resolution of UN General Assembly and as such is not legally binding on member States (the less so, of course, on States which are not UN members), because the General Assembly has no legislative power. The Declaration of Principles therefore, cannot change the existing provisions of international law which apply to the problems it deals with.

That does not mean, however, that the Declaration is of no importance. Already at present it is politically meaningful and will, undoubtedly, bear on the future international regime of the sea-bed and the ocean floor to

³⁴ A/C. 1/L. 542.

³⁵ See, for instance, the statement of the Ukrainian delegate (A/C. 1/PV. 1779).

³⁶ A/8097, para. 13.

³⁷ *Ibid.*, para. 20. The majority of the socialist States abstained from voting.

³⁸ See A/PV. 1933, p. 96. The USSR, Poland and the majority of other socialist States abstained from voting.

be established by an international treaty. That was made obvious in paragraph 9 of the Declaration which reads:

“On the basis of the principles of this Declaration an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon.”

Only this international treaty will be able to establish a new legal regime of the sea-bed and ocean floor beyond the limits of national jurisdiction provided that it will really have a universal character, i.e. will be adopted by all States, for those States which—rejecting its provisions—will not become parties to the treaty, will not be bound by its provisions and will be able to act on the sea-bed and ocean floor according to the presently effective general provisions of international law.

The Declaration of Principles consists of a preamble and fifteen paragraphs of extremely diversified character. Some of them, either expressing the already existing provisions of international law, or only legal postulates, are set forth in such a way that they could be included verbatim, or with slight changes or supplements to the future treaty. Others, instead, are simply general guidelines, which should be taken into account when formulating the provisions of the future treaty.

The basic, and at the same time most controversial principle of the Declaration is the recognition that the sea-bed and ocean floor, as well as their resources, are common heritage of mankind (para. 1). In this way the term of the “common heritage of mankind” was for the first time mentioned in an international document.³⁹

Already in the first Malta's Memorandum of 17 August, 1967, attached to the motion to put the problem of utilization of the sea-bed and ocean floor for peaceful purposes only on the agenda of the General Assembly, included the postulate to declare the sea-bed and the ocean floor a common heritage of mankind.⁴⁰

Further, in the course of debates of the General Assembly, the Ad Hoc Committee, and later of the standing Sea-Bed Committee, the developing States strongly supported the case of declaring the sea-bed and its re-

³⁹ This has been stated, among others, by the Chairman of the Sea-Bed Committee, Mr. H. S. AMERASINGHE: “Special attention must be drawn to the concept of the common heritage of mankind which has for the first time to my knowledge, been enunciated in an international document.” (A/PV. 1933, p. 100). A slightly different term has been used by President Johnson who declared on 13 July, 1966 that sea-bed and ocean floor are and should remain “the legacy of all human beings” (see the statement of the delegate of the United States A/C. 1/PV. 1954, p. 17).

⁴⁰ See A/6695.

sources beyond the limits of national jurisdiction a common heritage of mankind.⁴¹

The developed States, on the other hand, and particularly the socialist States, raised various objections and doubts as regards using in the Declaration of the term "a common heritage of mankind." In the first place they pointed out that this is not a recognized legal principle,⁴² that it can be interpreted in different ways,⁴³ and that its introduction into the Declaration of Principles may cause unnecessary confusion.⁴⁴

Some States which wanted to base the Declaration of Principles on the concept of "common heritage of mankind" did not deny that so far it has no definite legal meaning.⁴⁵ They maintained, however, that its contents should be formulated in the course of works of the Sea-Bed Committee.⁴⁶

Supporting the postulate of introducing the term of "common heritage of mankind" into the Declaration, some countries endeavoured, at the same time, to give its interpretation.⁴⁷ Delegations of Latin America in unofficial consultations proposed that it should be defined in two statements, one constituting a denial of rights and the other constituting an assertion of rights. According to the first statement the term "common heritage of mankind" would imply that the area could not be subject either to sovereign claims in public law or to appropriation in private law; according to the second statement, it would imply that all States should participate in the administration and regulation of the activities in the area, as well as in the benefits obtained from the exploration, use and exploitation of its resources.⁴⁸

According to the delegate of Peru defining the area of the sea-bed and ocean floor as common heritage of mankind means: 1) the ban on ex-

⁴¹ The delegate of India stated, for instance, that this concept constituted the indispensable basis of any declaration of principles (A/AC. 138/CS. 1/SR. 21).

⁴² The USSR (A/AC. 138/SC. 1/SR. 14). The delegate of Canada declared that: "the concept of the common heritage of mankind had no legal content and was unknown in international law. Its inclusion in a declaration of principles could have far-reaching juridical implications, whose precise nature was at yet unknown" (*ibid.*, SR. 13).

⁴³ Japan (*ibid.*, SR. 14), the USSR (*ibid.*), France (*ibid.*), Poland (*ibid.*, SR. 15).

⁴⁴ Japan, (as above).

⁴⁵ See for instance the statement of the delegate of India (*ibid.*, SR. 13).

⁴⁶ See the statement of the delegate of Yugoslavia (*ibid.*, RS. 14) or Cameroon (*ibid.*, SR. 20).

⁴⁷ See, for instance, the statement in the First Committee of the General Assembly: of Malta (A/C. 1/PV. 1589), Brazil (PV. 1591), Ecuador (PV. 1594), Sweden (PV. 1596), and statements in the Sea-Bed Committee of Yugoslavia (A/AC. 138/SC. 1/SR. 14), Chile (*ibid.*, SR. 16), Kenya (*ibid.*, SR. 19).

⁴⁸ See the statement of the delegate of Brazil (*ibid.*, SR. 13).

tending sovereign rights (jurisdiction) over it; 2) the ban on appropriation acquiring of property; 3) joint administration; 4) existence of an administering authority (resulting from point 3); 5) joint participation in the results of exploitation while taking particular account of the interests and needs of the developing countries.⁴⁹

During the work on the Declaration of Principles were voices insisting on including into the Declaration of the term "common heritage of mankind" without defining its legal meaning. For instance the delegate of India stated that "the phrase 'common heritage of mankind' was important and should be included in the declaration, although it was too early to arrive at a precise formulation of the concept."⁵⁰

The concept "common heritage of mankind" is, undoubtedly, the basic concept of the Declaration. The other principles are related to it and constitute its development (some maintain that they result from it), and can never be contrary to it. Therefore, it may be interpreted in the light of all provisions of the Declaration.

According to paragraph 2, the international area of the sea-bed and ocean floor

"shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim, or exercise sovereignty or sovereign rights over any part thereof."

According to paragraph 5

"the area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established."

This paragraph cannot be interpreted as an approval of a free access to the natural resources of the international area, as this area has to be exploited "in accordance with the international regime to be established." The regime should provide for

"the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries [...]" (para. 9).

The same paragraph provides for equipping this regime "with an appropriate international machinery to give effect to its provisions."

Thus the Declaration stipulates not only a prohibition of extending sovereignty or sovereign rights over the international area, or any part

⁴⁹ *Ibid.*, SR. 22.

⁵⁰ *Ibid.*, SR. 14.

thereof, as well as its becoming subject to appropriation, but also "a rational management" of the area, establishing of an appropriate international machinery, and an equitable sharing by States in the benefits derived therefrom.

However, the Declaration did not, because it could not, settle the problem how far "the management" of the resources of the area, will restrict the freedom of activities of the States, what will be the character and competences of the future international machinery and on what principles "the equitable sharing in the benefits" shall take place.

These problems remain controversial and it is hard to guess how they will be solved. The existing tendencies and opinions (especially as regards the future international machinery) will be discussed below.

One point of the Declaration, however, is particularly vague, namely to what kind of activities on the sea-bed and ocean floor the future international regime will apply.

According to paragraph 4:

"All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime [...]".

This wording raises some doubts and objections. It means that exploitation of all resources of the area can be internationally controlled, i.e. not only of mineral but also biological resources. The advisability of this policy can be questioned. Moreover, it is expected that "other related activities" will be governed by international regime, i.e. subject to international control. It is not clear from this formulation which activities can be recognized as "related."

The already quoted above paragraph 9 causes much more confusion. It states that the international regime will apply "to the area and its resources" and stipulates control over "the area and its resources." Similarly, in the preamble an international regime "applying to the area and its resources" is mentioned.

On basis of these formulation, one could arrive at the conclusion that all utilization of the sea-bed and all activities exercised thereon, not only exploration and exploitation of its resources, shall be governed by a future international regime in this area and a future machinery.

Thus, recognizing the indispensability of introduction of an international control over mineral resources of the sea-bed and ocean floor, many States consider that there is no need whatsoever to extend this control over activities which are already conducted there on the basis of freedom of

activities, such as laying submarine cables and pipelines, or scientific research, and which are of no harm to anybody.

The matter of freedom of scientific research is of particular importance and many States (including the USSR⁵¹) put much stress on its maintenance. In the context of the Declaration and the future treaty of crucial importance is the differentiation between exploration serving economic goals and being the first step to exploitation, and the "pure" scientific research which do not serve directly economic purposes, and the results of which are, as a matter of principle, intended for publication.⁵²

And so according to paragraph 4 exploration shall be subject to international control (for instance its licensing is possible), whereas paragraph 10 dealing with scientific research stipulates only international cooperation in this field and provides that it will not form the legal basis for any claims with respect to any part of the area or its resources.

From the differentiation made in the Declaration between exploration and scientific research, and from the formulation of paragraph 10 the conclusion may be drawn that it is not expected to submit scientific research to international control, as it is the case with exploration. However, an explicit approval of this freedom is missing.⁵³

Already this rough analysis makes obvious that the Declaration has many gaps and lacks clarity.⁵⁴

Moreover, one can notice in it certain lack of balance between the interests of the international community expressed in the principle of freedom of the seas, and the interests of the coastal States. Although paragraph 13 (a) confirms that the legal status of the waters superjacent to the area or that of the air space above those waters are not affected by the provisions of the Declaration, but it lacks an explicit confirmation of the principle of freedom of the seas.

On the other hand the interests of the coastal States are particularly stressed in paragraphs 12 and 13 (b). Paragraph 12 provides that exercising their activities on international area States shall pay due regard to the rights and legitimate interests of coastal States "in the region of such activities" and that consultations shall be maintained with the coastal States with a view to avoiding infringement of such rights and interests.

⁵¹ *Ibid.*, SR. 19.

⁵² See the statement of the delegate of Belgium (*ibid.*).

⁵³ See remarks of the delegates of Ukraine and the USSR in the General Assembly criticizing the Declaration from this point of view (A/C. 1/PV. 1779 and A/C. 1/PV 1798 respectively).

⁵⁴ The delegate of Poland stated that its text is enigmatic from the legal point of view (*ibid.*, PV. 1798).

This formulation involves the risk of its misuse by the coastal States in order to extend some rights over the international area and of establishing an "area of consultation."

The Declaration proclaims that international area shall be used exclusively for peaceful purposes (para. 5 and 8), however, this statement is interpreted in such a way that it does not exclude "military activity," if it is conducted for "defensive purposes," according to the purposes of the UN Charter and other legal obligations of international character.

The Declaration lacks, on the other hand, a clear directive to conduct negotiations aimed at a total demilitarization of the sea-bed and ocean floor. Paragraph 8 does not constitute such a directive.⁵⁵

And finally, the Declaration does not contain a precise definition of its basic principle—recognition of the sea-bed and the ocean floor and the resources thereof as a common heritage of mankind. At a session of the Sea-Bed Committee which was held in July and August 1971, some Latin American States went as far that they tried to prove it is evident from the term of a "common heritage of mankind" that only an international machinery (individual States excluded) should be authorized to exercise activities in exploitation of natural resources on the international area.⁵⁶

This principle can be interpreted only as an attempt at establishing a completely new legal status, i.e. the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction may become the common heritage of mankind only by force of a generally adopted international treaty of universal character.

Work in Progress Concerning a Treaty on International Regime of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction

By Resolution 2750C (XXV) of the General Assembly the elaboration of a draft treaty was entrusted to the extended Committee on the Peace-

⁵⁵ The delegates of Poland (as above) and the USSR drew attention to this gap in the Declaration (A/C. 1/PV. 1798).

⁵⁶ The best proof are its versatile interpretations expressed in the Sea-Bed Committee already after the adoption of the Declaration. Various Latin American States, for instance, maintained that this principle implies that the exploitation of resources of the sea-bed and ocean floor can be conducted exclusively by an international organization, or in co-operation with it. The delegate of the USSR was right speaking in the First Committee of the General Assembly about "general and ill-defined concepts relating to the common heritage of mankind." (A/C. 1/PV. 1777).

ful Uses of the Sea-Bed and Ocean Floor,⁵⁷ and within the Committee—to the first Sub-Committee.⁵⁸

Next to the Declaration of Principles the basis of work getting on in the Committee are many drafts and working papers submitted by various States and groups of States.

From the formal point of view, these documents differ widely in character. They include detailed drafts of agreements and more generally elaborated working papers; they deal with all problems of international regime of the sea-bed and ocean floor and an international organization to be established, or with some problems only.⁵⁹ Malta's project entitled "Draft Ocean Space Treaty" occupies a particular position among these documents. Its scope extends beyond the problems of the sea-bed the ocean floor, and it is intended as a general revision of the entire of the sea law, including the four Geneva Conventions of 1958. The provisions of the future treaty on international regime of the sea-bed and ocean floor shall base on the Declaration of Principles and, as a rule, they are so set forth in the submitted drafts. Of course, along with some amendments, more detailed formulations or supplements of the provisions of the Declaration.

As the major provisions of the Declaration have been discussed above, and work on their elaboration into treaty provisions is at a preliminary stage only, it is worthwhile to discuss also concepts relating to the future organization to deal with the problems of the sea-bed and ocean floor, namely those concerning its character and competences, structure and system of adopting resolutions, paying a particular attention to the Polish working paper.

⁵⁷ By Resolution A/RES/2750 C (XXV) the number of members of the Committee was increased from 42 to 86 States, and at the same time its competences were considerably extended. The former name of the Committee which has been maintained, is no more adequate either to the functions of the Committee, or its powers. The Committee is, as a matter of fact, a preparatory Committee for the III conference on maritime law.

⁵⁸ See agreement on the allocation of subjects and functions to the Sub-Committees read by the Chairman of the Committee on 12 March, 1971 (A/AC. 138/SR. 45) and report of the I Sub-Committee (A/AC. 138/60 p. 1).

⁵⁹ These are in the chronological order documents of the United States (A/AC. 138/25, Great Britain (A/AC. 138/26) and submitted in 1971—A/AC. 138/46, France (A/AC. 138/27), Tanzania (A/AC. 138/33), the Soviet Union (A/AC. 138/43), Poland (A/AC. 138/44), 13 Latin American States (Chile, Colombia, Ecuador, El Salvador, Guatemala, Guiana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay and Venezuela) (A/AC. 138/49), Malta (A/AC. 138/53), 7 land-locked and shelf-locked countries (Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands and Singapore) (A/AC. 138/55) and Canada (A/AC. 138/59).

The problem of functions and powers of the future organization and of its character is controversial and settled differently in various drafts.

Assuming that the competence of the organization and its structure should meet the actual requirements, Poland put forward the concept of a "developing organization." This means that, initially when the exploitation of mineral resources of the international area is conducted on a small scale, the organs of the organizations should not be over-developed, its secretariat should be small and the competence be foremost of a coordinating nature. This would be the transitional period, and the transition to the second stage would be connected with the progress in the exploitation of the resources of the sea-bed and ocean floor (and achievement of an appropriately high production), i.e. with the emergence of the need for creating new organs having wider and more diversified competences. A treaty establishing the organization should contain provisions concerning both periods and criteria for the conclusion of the transitional period.

It seems that the concept of a "developing organization" could be a reasonable compromise between the attitude of those States which want this organization to have relatively wide powers, and those which are for an organization of not very broad competence (in the first place of coordinative character) and which fear the establishment, without a real need, of another over-developed, bureaucratic and expensive international organization.

Moreover, the matter of character and competence of the organization, and even the basic problem of the advisability of its establishment, are closely connected with defining the precise territorial scope of national jurisdiction. If the tendency to expand the jurisdiction of coastal States continues, a situation would arise in which all, or almost all mineral resources that could be exploited in the coming decades, would come under the jurisdiction of coastal States. In such a situation the usefulness of establishing an international organization, and particularly an organization of wide powers and over-developed organs, would be questionable.

The drafts and working papers submitted to the Committee offer a wide choice of solutions concerning powers and functions of the organization.

In general, the developing States put stress on the fact that the sea-bed and ocean floor beyond the limits of national jurisdiction were recognized as a common heritage of mankind, therefore all States, and the developing States in particular, should derive actual benefits from the exploitation of their natural resources as they are the co-owners thereof.

The possibility of safeguarding these actual benefits they see, for the most part, only through the establishment of a strong international organ-

ization endowed with very wide competence including at least the management and control of the exploitation and sharing of the benefits.

The most ardent disputes aroused the question whether the organization should be authorized to conduct the exploitation of natural resources of the sea-bed and its subsoil in its own name. The Latin American States go farthest in their draft. They maintain that the organization should exercise exclusive jurisdiction over the international area and have the exclusive right to explore and exploit the resources of this area. According to some Latin American States, the grant of licences for exploitation to various States is contrary to the concept of the common heritage of mankind. However, in view of the fact that initially the organization will not have at its disposal funds and other means indispensable for the beginning of the exploitation, they approve of a transitional joint venture system, on the basis of which States or State-controlled or private enterprise would be admitted to conduct the exploitation jointly with the organization. In this way the possibility of any exploitation otherwise than in association with the international authority would be excluded.⁶⁰

Other developing States (for instance Tanzania) while maintaining that the organization should have the right to conduct exploitation activities in its own name, do not exclude the possibility of granting licences for exploitation of resources of the international area to the States, too.

The developed States (France⁶¹ and Great Britain⁶² most strongly), and socialist States (the USSR⁶³ and Poland⁶⁴) have been against granting the organization a right to exploit in its own name the mineral resources of the sea-bed and ocean floor. Various practical difficulties were indicated (the difficulty of acquiring capitals, risk, possible losses, etc.), as well as political and legal difficulties.

It seems that the promotion by some States of an organization of a supra-national character endowed with a right to conduct exploitation in its own name, not to speak of an exclusive right, does not take into account the political, economic and legal realities, and can only bar further progress in the work of the Committee.

The problem of organs of the future organization, their structure, competences and procedure of adopting resolutions has been also discussed by the Sea-Bed Committee.

The socialist States supported such voting system which would safeguard the interests of all States and groups of States, and which would

⁶⁰ See statement of the delegates of Peru (A/AC. 138/SC. I SR. 7).

⁶¹ *Ibid.*, SR. 9.

⁶² *Ibid.*, SR. 19.

⁶³ *Ibid.*, SR. 8.

⁶⁴ *Ibid.*, SR. 22.

ensure that the organization will not serve a group of States to dominate other States. The USSR came up with the proposal that decisions of the Executive Board of the organization on questions of substance shall be made by agreement. Poland, on the other hand, put forward the proposal of applying by the Council the group voting system, i.e. to adopt a resolution not only a majority of votes (simple or rather qualified) of member States would be required, but also a certain number of votes from individual groups of States.

The draft of the United States provided for a privileged position of 6 most industrialized States. In the Council composed of 24 members no decision could be taken without winning majority within the group of the most industrialized States (i.e. without votes of at least 4 such States).

The developing States opposed any privileges for any States, so called weighted votes, double majority and an overt or covert right of veto. It was suggested usually to take up decisions by simple majority of votes or by a two-thirds majority, observing the one State one vote principle (the proposal of Tanzania and Latin American States).

The developing States, which are more numerous, could in this way outvote other groups of States. Such system of voting, however, involves a risk that some resolutions would never be implemented.

*

The work on the treaty concerning international regime of the sea-bed and ocean floor beyond the limits of national jurisdiction has consisted so far in submitting drafts, proposals and opinions of various States. Now the Sea-Bed Committee and the First Sub-Committee in particular is facing the task to begin negotiations which would produce an agreed upon draft treaty, to be later submitted at a conference on the law of the sea scheduled for 1973.

UN Convention on Non-Applicability of Statutory Limitations to War Crimes—Present State and Prospects for Its Implementation

by SŁAWOMIR DĄBROWA

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I

On 26 November, 1968 at its XXIII session the United Nations General Assembly adopted a convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.¹ The adoption of the convention crowned several years of efforts begun by the Polish government in 1965² according to which the United Nations should take

¹ UN Documents A/2391/XXIII.

² The successive stages of these efforts are described in the following articles: Z. RESICH, S. DĄBROWA, *Sprawa zbrodni hitlerowskich w Komisji Praw Człowieka ONZ* [The Problem of Nazi Crimes in the UN Commission on Human Rights], in: *Przedawnienie zbrodni hitlerowskich w NRF* [Application of Statutory Limitations to Nazi Crimes in the FRG], Warszawa 1965, p. 105 ff; Z. RESICH, XXII sesja Komisji Praw Człowieka ONZ [XXII Session of the UN Commission on Human Rights], "Prawo i Życie," 1966, No. 10; Z. RESICH, *Polska w obronie praw człowieka* [Poland in the Defence of Human Rights], "Sprawy Międzynarodowe," 1967, No. 7/8, p. 84 ff; M. REGENT-LECHOWICZ, *ONZ w sprawach nazizmu, zbrodni wojennych i zbrodni przeciw ludzkości* [United Nations on the Problems of Nazism, War Crimes and Crimes against Humanity], "Prawo i Życie," 1968, No. 5; Z. RESICH, *Konwencja o nieprzedawnieniu zbrodni wojennych i zbrodni przeciwko ludzkości* [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity], "Sprawy Międzynarodowe," 1969, No. 3, p. 5 ff.; A. KŁAFKOWSKI, *Węzłowe problemy ścigania zbrodniarzy wojennych w aspekcie prawa międzynarodowego i konwencji ONZ z 26 listopada 1968* [Key Problems of the Prosecution of War Criminals in the Light of International Law and the UN Convention of 26

a firm stand with regard to the intention of the West German authorities to apply in the Federal Republic of Germany the statutory limitations to crimes committed by the Nazis. The adoption of the convention was a joint success of Polish diplomacy and Polish doctrine of international law whose representatives (Professor Zbigniew Resich and later Professor Alfons Klafkowski) had taken an active part in the United Nations work on this problem.

The convention consists of a preamble and eleven articles. The preamble contains an important formulation emphasizing the convention's legal character. The signatory States declare in it:

"that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."³

This is a demonstration of the declarative character of the convention: it does not create a new principle of international law but reaffirms an already existing principle.

Article 1 gives the definitions of crimes to which the statutory limitations does not apply. They are based on the definitions of the Statute of the International Military Tribunal of 1945,⁴ the Geneva conventions of 1949 on the protection of war victims,⁵ the 1948 convention on the prevention and prosecution of the crimes of genocide;⁶ they are also supplemented by contemporary elements ("deportation in the effect of armed attack or occupation, and inhuman acts resulting from the policy of apartheid" — this latter supplement was added on the motion of the group of Afro-Asian States in the United Nations).

Article 2 extends the applicability of the convention to accomplices in crime, which includes among others persons encouraging their perpetration, plotting for this end or—as regards representatives of authority—tolerating the perpetration of crimes.

In Article 3 the signatory States undertake to adopt internal legislative measures or other measures facilitating the extradition of perpetrators of war crimes and crimes against humanity. In Article 4 they undertake to ensure non-applicability of the statutory limitations to those crimes,

November 1968]—report read at the scientific session of the Polish Institute of International Affairs on the occasion of the XXV anniversary of the United Nations. Warszawa, September 1970 (mimeographed type-script).

³ "Dziennik Ustaw" [Journal of Laws], No. 26, item 208 and annex.

⁴ *Materiały norymberskie* [Nuremberg Materials], Warszawa 1948, p. 53 ff.

⁵ *Konwencje genewskie 1949 r. o ochronie ofiar wojny* [1949 Geneva Conventions on the Protection of War Victims], Warszawa 1951, p. 5 ff.

⁶ *Zbiór Dokumentów* [Collection of Documents], 1949, No. 2, p. 167 ff.

and where these statutes have been introduced they undertake to abrogate them.

Articles 5 - 11 contain closing provisions pertaining to the ratification of the convention, its coming into force and so on.

Poland was the first country to ratify the convention (29 January, 1969) and to deposit the ratification document with the UN Secretary General (14 February, 1969). The exceptionally short period of time which passed between the adoption of the convention and the fulfillment of formalities making Poland a party to it was a proof of the special interest taken by our country in a quick confirmation of the international law principle concerning the non-applicability of statutory limitations to war crimes and crimes against humanity.

In accordance with the requirements of Article 8 the convention came into force 90 days after the depositing of the 10th ratification document, on 11 November, 1970. This means that two years had passed from its adoption, which is a comparatively brief period in the United Nations practice. This was a proof of the weight attached to the convention by a number of States.

II

The convention on the non-applicability of statutory limitations came into force in a year which in many States was celebrated as marking the 25th anniversary of the victory of the United Nations over fascism. And even though this is just a coincidence, it is also a fact that convention constitutes a continuation of the legislative measures adopted after World War II for the purpose of punishing war criminals. It is first of all a continuation of the Statute of the International Military Tribunal in Nuremberg which had also formulated principles of international law existing at the time of its signature and adapted them to the requirements of contemporary world.⁷ The principles were confirmed by the UN General Assembly in the following Resolutions: 3 (I) of 3 February, 1946, 95 (I) of 11 December, 1946 and 170 (II) of 31 October, 1947.

The purpose of the convention was to prevent war criminals and persons guilty of crimes against humanity from escaping justice just because no proceedings had been started against them on time stipulated in the internal codes of various States. This is justified by the fact that, as the UN Commission on Human Rights had recently confirmed, "war

⁷ Cf. A. KLAŃKOWSKI, *The Nuremberg Principles and the Development of International Law*, Warszawa—Poznań 1966, p. 17.

crimes and crimes against humanity belong to the gravest crimes known by international law.”⁸ Strengthening the conviction about the necessity of punishing all war criminals, the adoption of the convention increases at the same time the respect of the laws and usage applicable during armed conflicts.⁹

As has been stressed on numerous occasions by the delegates of Poland and other socialist countries to the United Nations,¹⁰ the problem of responsibility for the war crimes committed during World War II cannot be considered as closed, even though 25 years have passed since the end of the war. Many criminals have completely escaped punishment. According to Robert Kempner, deputy chief prosecutor of the United States at the Nuremberg Trial, a minimum of 25,000 and a maximum of 100,000 Nazi criminals have never appeared in court.¹¹ The gravest crimes in history go unpunished.

Everybody knows that out of the about 6,000 functionaries of the Auschwitz concentration camp about 1,500 have been identified, but only fifty or so punished. Out of the about 7,800 criminals named by Poland for the international “wanted” list only about 1,800 have been extradited to Poland and punished. With regard to the rest of them the extradition demand was rejected in spite of the existence of the recognized principle of international law according to which persons seriously suspected of war crimes, crimes against peace or crimes against humanity cannot claim the right of asylum.¹²

The special interest taken by Poland in the problem of proper punishment of persons guilty of those crimes is justified by the fact that out of the over 6 million Polish citizens who had lost their life in the last war only 11 per cent were killed on the battlefields. The remainder fell victim to the Nazi policy of extermination. Some 2.9 thousand Poles were dying daily under the Nazi occupation. 22 per cent of them died in German concentration camps. 9 out of every 10 camp prisoners died. The average limit of survival for a camp prisoner was half a year. In Poland alone

⁸ Res. 5 B/XXIV of 1970 in UN Doc. E/CN. 4/1039.

⁹ The great importance of the convention for the development of international law is recognized even by authors who criticize its provisions (R. MILLER, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, “American Journal of International Law,” 1971, No. 3, p. 476 ff).

¹⁰ Cf. UN Doc. A/C. 3/SR. 1813.

¹¹ Cf. D. EISENBERG, *The Re-Emergence of Fascism*, New York 1968, p. 12.

¹² Cf. Art. 1, item 2 of the Declaration on Territorial Asylum adopted by the UN General Assembly (Doc. A/2312/XXII) and F. PRZETACZNIK, *Declaration on Territorial Asylum and International Law*, “Indian Yearbook of International Affairs 1966 - 1967,” p. 579 ff.

there are about 20,000 sites of mass extermination where Nazi criminals committed some 50,000 crimes.¹³

Just punishment of the guilty of all those crimes constitutes not only a well-deserved penalty for the criminals, but also a warning for potential perpetrators. According to the formulations of the convention on the non-applicability of statutory limitations, this is an important element of the prevention of those crimes, of the protection of the rights and fundamental freedoms of man, increased trust and cooperation between nations and the protection of international peace and security.

Starting from these assumptions, even after the adoption of the 1968 convention on the non-applicability of statutory limitations, Poland did not cease in her efforts for a just punishment of war criminals. At successive sessions of the UN Commission on Human Rights the Polish delegation tabled draft resolutions which after passing through the Commission and after being approved by the UN Economic and Social Council were adopted by the General Assembly.

III

At the XXIV UN General Assembly session in 1969 the problem of war crimes was debated in discussion on a report of the UN Economic and Social Council. On 15 December, 1969, on the initiative of Poland backed by other socialist States, the General Assembly passed Resolution 2583 (XXIV). With reference to the London declaration of 1942¹⁴ and the Moscow declaration of 1943¹⁵ providing for the extradition and punishment of war criminals and persons guilty of crimes against humanity, the General Assembly called on all states for the earliest possible signature and ratification of the 1948 convention on the prevention and prosecution of the crimes of genocide and the 1968 convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.

Further on in the Resolution the General Assembly called on all States to undertake steps indispensable for the identification, apprehension, extradition and punishment of all persons guilty of war crimes and crimes against humanity, it expressed the hope that States which did not vote for the convention on the non-applicability of statutory limitations would

¹³ Data from *Materiały sesji naukowej w sprawie badania zbrodni hitlerowskich w Polsce* [Materials from the Scientific Session on the Investigation of Nazi Crimes in Poland], Central Commission for the Investigation of Nazi Crimes in Poland, Warszawa 1970 (mimeographed type-script).

¹⁴ British and Foreign State Papers, vol. 144/1952, p. 1072.

¹⁵ U.S. Department of State Bulletin, vol. 9, No. 228, p. 310.

refrain from acts contradictory to the purposes of the convention, and it stressed the importance and need of international cooperation in the prosecution and punishment of war criminals and persons guilty of crimes against humanity.

The closing part of the Resolution concerns further activity of United Nations organs in this domain. The General Assembly asked States to send in information pertaining to the execution of the Resolution, and instructed the Secretary General to prepare for the XXV United Nations session a report on this question, treating it as a high priority task.

Poland has been acting for a long time in accordance with the recommendations contained in the Resolution 2583 (XXIV) and the provisions of the convention on the non-applicability of statutory limitations. Even before the 1968 convention came into force, amendments guaranteeing non-applicability of statutory limitations had been introduced in Polish legislation.¹⁶ Appropriate Polish authorities carry on work whose purpose is the investigation and punishment of all war crimes and crimes against humanity. The Central Commission for the Investigation of Nazi Crimes in Poland, formed as far back as 1945, collects evidence, interrogates witnesses, and thoroughly investigates Nazi crimes. Polish courts have punished 5,352 criminals of German origin (4,661 of them German citizens). Poland also lends legal assistance to other States which conduct proceedings against Nazi criminals. In spite of the absence of appropriate agreements on legal assistance, Polish authorities help courts in the Federal Republic of Germany, Austria and West Berlin. Poland has sent to the Federal Republic about 70,000 pages of documents in the form of microfilms and about 10,000 protocols from the interrogation of witnesses.¹⁷

The same cannot be said about the attitude of all states towards the question of the non-applicability of statutory limitations.

In reply to a note from the UN Secretary General, circulated in accordance with the provisions of the Resolution 2583 (XXIV), 25 States sent in information on the execution of the Resolution. The replies of the governments are contained in a report of the Secretary General,¹⁸ which was discussed at the XXV UN General Assembly session in 1970.

A number of States replied that they attached great weight to the effective execution of the Resolution concerning the punishment of war

¹⁶ Law of 22 April 1964 ("Dziennik Ustaw," 1964, No. 15, item 86).

¹⁷ Data from *Materiały sesji naukowej w sprawie badania zbrodni hitlerowskich w Polsce* [Materials from the Scientific Session on the Investigation of Nazi Crimes in Poland] and from an interview of the director of the Central Commission, C. Pili-chowski, for the Polish Press Agency PAP ("Trybuna Ludu" of 28 January, 1971).

¹⁸ Doc. A/8038 and Add. 1 and 2.

crimes and crimes against humanity, and that their appropriate authorities were studying at present the question of their accession to the convention on the non-applicability of statutory limitations.¹⁹

Some governments, however, particularly of Western European States, answered that they could not join the convention because their internal legislations were incompatible with its provisions. This concerns above all the too broad and—according to those States—not sufficiently accurate definition of crimes against humanity.²⁰ Their argumentation is unconvincing. International law should have precedence over internal law. If internal legislation is incompatible with the principles of international law it should be changed.

A third group of States answered that the problem of the ratification of the convention on the non-applicability of statutory limitations did not concern them, for no war crimes or crimes against humanity had been committed in their territory. This view is incorrect, because the convention does not apply to any concrete conflict (e.g. World War II), but to all the armed conflicts during which war crimes were, are or could be committed. It must be also borne in mind that the convention on genocide is acceded to not only by States in whose territory crimes of genocide had been committed.

IV

Among the replies sent in to the United Nations a particular interest is aroused quite understandably by the reply of the government of the Federal Republic of Germany which bears the chief responsibility for the prosecution and punishment of Nazi criminals, since 75 per cent of them took refuge in the territory of the FRG after the war.

The work carried out in the United Nations since 1965 on the problem of punishment of war criminals could not but affect the attitude of the FRG. The convention on the non-applicability of statutory limitations contributed largely to the extension of the time limit for the prosecution of Nazi criminals in the FRG. For all that, however, the situation is far from satisfactory.²¹

The reply of the FRG contained full official statistical data concerning the prosecution and punishment of Nazi criminals in the FRG. Up to 1 Jan-

¹⁹ Up to 1 July 1971 the convention was ratified by 11 socialist States and Nigeria, India and Guinea.

²⁰ Doc. E/4816, p. 54.

²¹ Cf. A. KŁAFKOWSKI, *L'impréscriptibilité des crimes de guerre et L'Allemagne Fédérale au regard du droit international*, Poznań 1970.

uary, 1969 allied and West German courts tried 75,068 cases, but only 6,227 criminals were sentenced. 1,752 persons were acquitted. In 56,705 cases the proceedings were dropped, as not justifying further investigation. 10,384 are still uncompleted.

The ratio of the number of cases tried to the number of verdicts is alarming. One could expect in this situation intensified efforts aimed at speeding up the prosecution and punishment of criminals. But the reply of the FRG announces in advance that the increasing difficulties, due to the passage of time, in proving the guilt make it impossible to increase the number of cases brought to trial, and will cause an increase in the number of acquittals.

The internal legislation of the FRG does not know the term "war crime" or "crime against humanity." Nazi criminals are tried under the same laws as common criminals, first of all under the penal law one hundred years old (of 1871). This permits an exceptionally lenient treatment of war criminals and persons guilty of crimes against humanity. Even if a culprit is brought to trial, he may count on a lenient sentence. Out of the 6,227 convicts, about 6,000 received sentences of 3 to 4 years' imprisonment. Beginning with 1958, West German courts refuse as a rule to convict criminals as perpetrators, and classify them solely as accomplices, thanks to which the sentences are so light.

Statutory limitations were applied in the FRG as of 8 May, 1960 to all Nazi crimes except murders and complicity in murders. As of 8 May, 1965, statutory limitations were to have been applied even to these crimes (subsequently the FRG government extended the time limit of prosecution). Statistical data show that about 15,000 new cases were opened after 8 May, 1965. This means that the chief argument which was to have justified the application of statutory limitations, namely that all cases involving war crimes had been already opened, proved to have been false.

From 1958 to 1969 only some 240 trials were completed. An average of 6 years passes from the start of proceedings before the accused is interrogated in a court for the first time. It takes even longer for the verdict to be pronounced.

According to the data supplied by the FRG, about 250 prosecutors, including the personnel of the Central Office for the Prosecution of Nazi Crimes in Ludwigsburg, are carrying out investigations at present in cases of over 1,000 so-called "complex crimes" which had been committed by about 18,000 persons. It appears from this that one prosecutor must conduct investigation on over 70 criminals, which does not make his task any easier.

The above figures do not fill one with optimism as to the effectiveness of the further prosecution and punishment of Nazi criminals in the Federal Republic of Germany.

Some other points of the reply of the Federal Republic sent to the United Nations also require comment. Its states that "cooperation with the States of Eastern Europe began in Poland's case only since 1965." It does not give the causes of this state of affairs and is calculated to mislead public opinion. The lack of cooperation was due to the refusal of the then FRG government to accept offers made repeatedly by Polish authorities ever since 1960 in spite of the absence of an agreement on legal relations, and even the absence of diplomatic relations. It was only when the West German authorities decided in 1964 to avail themselves of the assistance offered by the Polish authorities that certain forms of cooperation began to develop in this domain.²²

The final problem is the attitude of the Federal Republic of Germany to the convention on the non-applicability of statutory limitations to war crimes. The reply of the West German government said that the FRG government did not intend to join the convention as it is incompatible with its internal legislation. On the other hand, the reply said that the FRG government fully supported the aims of the 2583 (XXIV) Resolution of the UN General Assembly, and that it will do everything to investigate all cases of war crimes which had not been investigated so far. Accession to the convention would be precisely the best proof of the good will of the FRG. Worth attention in this connection is the appeal of the participants in a scientific conference on the investigation of Nazi crimes, held in Warsaw on April 27 - 28, 1970 under the auspices of the Central Commission for the Investigation of Nazi Crimes in Poland. The appeal is addressed to the West German people, and particularly to scientists in that country, and asks them to convince the FRG government that it has the moral duty of signing the convention and of applying its provisions.²³

The government of the German Democratic Republic also supplied the United Nations with information on the prosecution and punishment of war criminals. The information is in a positive contrast to the information sent in by the Federal Republic. Article 91 of the new Constitution of the GDR of 8 April, 1968 says:

²² J. GUMKOWSKI, *Dokumenty polskie w ściganiu zbrodni hitlerowskich* [Polish Documents in the Prosecution of Nazi Crimes], in: *Przedawnienie zbrodni hitlerowskich w NRF* [Application of Statutory Limitations to Nazi Crimes in the FRG], p. 65 ff.

²³ *Materiały sesji naukowej w sprawie badania zbrodni hitlerowskich w Polsce* [Materials from the Scientific Session on the Investigation of Nazi Crimes in Poland].

"The universally recognized norms of international law applying to the punishment of crimes against peace and humanity and of war crimes constitute a directly binding law. No statutory limitations apply to crimes of this type."²⁴

Over 12,800 persons, that is twice more than in the FRG, were sentenced in the GDR for Nazi crimes in the years 1945 - 1969. In the course of the last decade, the GDR authorities supplied legal assistance in over 200 cases tried by FRG courts, gave access to over nine thousand documents and hundreds of protocols from the interrogation of witnesses. All this was done in spite of the absence of a consent of the Federal Republic to conclude an agreement on legal assistance with the German Democratic Republic.²⁵

The GDR declared its readiness to join the convention on the non-applicability of statutory limitations to war crimes and crimes against humanity as soon as it is possible because of formal reasons.²⁶

V

At the XXV session of the UN General Assembly the problem of war crimes was discussed as a separate item on the agenda in the III Committee of the General Assembly. Apart from the above-mentioned report of Secretary General, containing information sent in by the states, discussion was also held on a draft resolution tabled jointly by Poland and the USSR at the XXVI session of the Commission on Human Rights, accepted by the Commission at the beginning of 1970, approved by the Economic and Social Council on 27 May, 1970,²⁷ and recommended for adoption by the General Assembly.

The delegations taking part in the discussion came out for intensifying international cooperation in the field of finding, apprehending, extraditing, trying and punishing war criminals and persons guilty of crimes against humanity. It was emphasized that crimes of this type do not belong exclusively to the past, but are being committed at present in various regions of the world as a result of the policies of aggression, racialism, apartheid and colonialism. Examples of such acts are contained in nu-

²⁴ Doc. A/C. 3/611.

²⁵ Doc. A/C. 3/618. Cf. also G. GÖRNER, G. SCHUMANN, *UN-Konvention über die unverjährbarkeit von Kriegsverbrechen und Verbrechen gegen die Menschlichkeit—ein Beitrag zur Förderung des Friedens*, "Deutsche Aussenpolitik," 1969, No. 3, p. 279.

²⁶ Doc. A/C. 3/611. The discriminatorily formulated final provisions of the convention prevent the accession of states which do not belong to the United Nations or its specialized agencies. These states include the German Democratic Republic.

²⁷ Res. 1500 (XLVIII) in UN Doc. E/4816.

merous United Nations documents on the policy of apartheid, in a report of the United Nations special committee for the investigation of Israeli practices concerning the rights of the Arab population in occupied territories,²⁸ in press reports on the subject of war crimes committed by American troops in Vietnam, and in other materials.²⁹

Poland and Byelorussia proposed amendments to the Resolution of the Economic and Social Council. The Polish amendments³⁰ consisted in the addition of the new paragraphs expressing satisfaction with the fact of the coming into force of the convention on the non-applicability of statutory limitations, and calling on states to join the convention. The Byelorussian delegation³¹ also postulated the addition of two paragraphs containing an appeal to States to refrain from actions contradictory to the purposes of the convention and to inform the Secretary General on measures adopted in order to join the convention. The amendments were approved.³²

An isolated attempt was made in the course of discussion on the question of the punishment of war criminals to undermine the legal validity of the Nuremberg and Tokyo verdicts convicting German and Japanese war criminals. In the final stage of the work on the convention on the non-applicability of statutory limitations the delegation of Saudi Arabia tabled unexpectedly in 1968 a draft facultative protocol to the convention, concerning the formation of an international penal tribunal for trying war criminals of the victorious states,³³ while in 1970 the same delegation tried to revive the issue by tabling an appropriate draft resolution.³⁴

The initiative meant an essential departure from the trend of the United Nations work on the problem of the punishment of war criminals, and it did not receive any backing from any other delegation. In 1968, the General Assembly decided to add the proposal of Saudi Arabia to the group of problems connected with international penal law.³⁵ In 1970, under a procedural pretext, the proposal of Saudi Arabia was not submitted either to discussion or voting.³⁶

On the other hand, the above-mentioned resolution of the Economic and Social Council, together with the approved amendments of Poland

²⁸ Doc. A/8089.

²⁹ Doc. A/C. 3/SR. 1813.

³⁰ Doc. A/C. 3/L. 1812.

³¹ Doc. A/C. 3/L. 1831.

³² Doc. A/C. 3/SR. 1813.

³³ Doc. A/C. 3/L. 1570/Rev. 2.

³⁴ Doc. A/C. 3/L. 1833.

³⁵ Cf. Z. RESICH, *Konwencja o nieprzedawnieniu...* [Convention on the Non-Applicability...], p. 17.

³⁶ Doc. A/C. 3/SR. 1814.

and Byelorussia, won the support of a large group of States, and was adopted on 15 December, 1970 as a General Assembly Resolution No. 2712 (XXV). Fifty-five States voted for the Resolution, and four (the United States, Great Britain, Portugal and Australia) voted against it. Thirty-three delegations abstained from voting.

In the introductory part of the Resolution the General Assembly welcomes with satisfaction the coming into force of the convention on the non-applicability of statutory limitations, expresses regret that a number of earlier resolutions on the punishment of crimes had not been implemented in full, expresses anxiety that as a result of aggressive wars and the policies of racialism, apartheid, colonialism and similar practices war crimes and crimes against humanity are being committed at present, and expresses the conviction that the prosecution of war criminals and persons guilty of crimes against humanity, their extradition and punishment, as well as the establishment of criteria regarding the compensation due to their victims, constitute an important element of the prevention of similar crimes in future.

In the operative part the General Assembly draws attention to the fact that many criminals remain at large. It calls on all States to adopt measures consistent with the principles of international law in order to find and apprehend those criminals, and to extradite them to the authorities of the States where they had committed their crimes for their just punishment, it condemns the war crimes and crimes against humanity committed today and calls on States to punish their perpetrators and to intensify international cooperation in the field of collection and exchange of evidence against the criminals.

In paragraphs pertaining to the convention on non-applicability of statutory limitations the General Assembly calls on states which are not parties to the convention as yet to join it as soon as possible; it appeals to governments to supply the Secretary General with information on measures adopted in order to join the convention, and to States which are not parties—to obey the provisions of the Resolution No. 2583(XXIV) of 1969 and to refrain from actions contradictory to the basic purposes of the convention.

The final paragraph of the Resolution instructs the Secretary General to continue studies on the punishment of war crimes and crimes against humanity, particularly with regard to the criteria for the assessment of compensation due to the victims of those crimes. The Secretary General should submit a report of this question at the next XXVI session of the General Assembly in 1971. It appears from this that the problem will be continued in the United Nations forum.

The final result of all these efforts is not clear as yet. A Polish representative at the XXV session of the UN General Assembly expressed the opinion that they could lead perhaps to the preparation and adoption of an international instrument pertaining to cooperation in the collection of evidence, extradition of criminals and the exaction of compensation due to the victims of war crimes and crimes against humanity.³⁷ The completion of this work requires time, but a beginning has been made already. On the basis of the Resolution of the Economic and Social Council No. 1158(XLI) and the resolution of the Commission on Human Rights No. 13(XXIV) of 1968, the Secretary General has worked out a report on the apprehension, extradition and punishment of persons responsible for war crimes and crimes against humanity, exchange of documentation and assessment of criteria of compensation for the victims. In Resolution No. 9(XXV) of 1969 the Commission on Human Rights asked governments for commentaries and remarks to this report. Both documents (the report³⁸ and the commentaries of States³⁹) were discussed at the XXVI session of the Commission on Human Rights in 1970.

VI

It appears from the discussion that the biggest progress has been made on the problem of compensation.⁴⁰ United Nations work in this domain is of considerable importance, since in distinction to penal responsibility for war crimes,⁴¹ the question of civil liability is not regulated in international law with sufficient precision. The work should lead to the adoption of generally recognized principles of the assessment of compensation.

This would be fully consistent with the standpoint of Poland.⁴² In a note to the Secretary General of 27 September, 1969⁴³ the government of the Polish People's Republic submitted an extensive elaborate on the problem of compensation. It starts from the correct assumption that responsibility for war crimes and crimes against humanity must not be

³⁷ Doc. A/C. 3/SR. 1813.

³⁸ Doc. E/CN. 4/983 and Add. 1 and 2.

³⁹ E/CN. 4/1010 and Add. 1.

⁴⁰ Doc. E/4816 para. 56.

⁴¹ Cf. J. SUTOR, *Podstawy odpowiedzialności karnej przestępców wojennych w prawie międzynarodowym* [Bases of Penal Responsibility of War Criminals in International Law], "Wojskowy Przegląd Prawniczy," 1965, No. 2.

⁴² Z. RESICH, *Bilans prac ONZ w dziedzinie praw człowieka* [A Balance-Sheet of United Nations Work in the Field of Human Rights], "Sprawy Międzynarodowe," 1970, No. 8, p. 42.

⁴³ Doc. E/CN. 4/1010, p. 35 ff.

limited to the question of the criminal responsibility of the culprits. Civil liability towards the victims for the losses they had suffered should be also regulated by international law.⁴⁴ The absence of precise norms of international law, in combination with the nature of the legislation of the Federal Republic of Germany discriminating Poland in this field, prevents the compensation of losses sustained by Polish citizens as a result of the extermination policy of the Nazi state.

It must be also borne in mind in this connection that the problem of the punishment of Nazi criminals living in the Federal Republic and the resultant consequences (which include precisely, among other things, compensation for the surviving victims of those crimes or their heirs) are an important element of the progressing process of the normalization of relations between the Polish People's Republic and the Federal Republic of Germany. For the sake of a properly conceived normalization, the FRG government should solve to the very end and with all consistence the problem of the prosecution and punishment of Nazi criminals. The treaty on the bases of normalization, signed in Warsaw on 7 December, 1970, provides in Article III that the two states will undertake further steps aimed at a full normalization and all-round development of their mutual relations. Beside the settlement of the problem of compensation, one of such steps could be the establishment of formal contacts between the organs of the administration of justice of the two States as regards the prosecution and punishment of Nazi criminals. This cooperation should be based on the principle of reciprocity, consisting, among other things, in giving the Polish side access to documents to be found in the Federal Republic of Germany, pertaining to Nazi crimes committed in Poland. Where the problem of compensation is concerned, the to-date legislation of the Federal Republic foresees compensation only for persecution for reasons of race or political and religious views, and not for reasons of nationality. Moreover, it contains a number of limitations which prevent in practice even those few Polish citizens who are entitled to compensation under the above-mentioned legislation from receiving it. What is more, the interpretation of these provisions by the West German courts justifies in its essence the persecution of Poles by the German occupation authorities during World War II.

In its note to the United Nations the Polish government proposed the assessment of compensation according to the following accurate criteria:

⁴⁴ Cf. A. KŁAFKOWSKI, *Prawo międzynarodowe a odszkodowania za deportacje na roboty przymusowe* [International Law and Compensation for Deportation as Slave Labour], "Życie i Myśl," 1961, No. 3/4, p. 57 ff.

1. The legal principles which should be observed in this field:

(a) no statutory limitations to be applicable to cases of compensation,

(b) financial liability should be regulated by an act of international law in a way excluding any possibility of discrimination,

(c) the aggressor-State is responsible for the crimes committed by its citizens,

(d) war reparations do not cover liability for crimes,

(e) claims to compensation may be made by the heirs of a victim who died before receiving compensation,

(f) the principle of justness and good faith should be observed when it is decided to grant compensation.

2. Persons entitled to claim compensation:

(a) widows, orphans or next-of-kin heirs of victims whose death was caused by policy of extermination or terror of the occupant,

(b) persons persecuted in camps, prisons or places of detention,

(c) persons deported as forced labour for slave work and performers of this work,

(d) persons forced to perform work inconsistent with their age or capabilities, deprived of social assistance, possibility of rest and medical care, juveniles forced to work, and persons partly incapacitated,

(e) persons who lost their employment or place of work or their dwelling,

(f) persons who as a result of terror became fully or partly handicapped physically, including persons who had been subjected to experiments dangerous for life or health,

(g) persons who suffered psychically as a result of a criminal act of the occupant,

(h) prisoners of war forced to perform slave work in violation of international conventions.

3. Claims for compensation for war crimes or crimes against humanity cannot be regarded as premature or prescribed. They should be honoured irrespective of whether the occupant state concluded a peace treaty with the former occupied state or its successor, and irrespective of the maintenance of diplomatic relations between these States.

4. Claims for compensation should not be examined on the basis of the internal legislation of a given State, but on the basis of appropriate acts of general international law.

The problem of war crimes has been examined in the United Nations in various aspects so far. Predominant in the years 1945-1947 was the

aspect of extradition and punishment. In the years 1965 - 1968, discussions concerned mainly statutory limitations. It is highly probable that in the next few years the work of the United Nations will concentrate on the problem of compensation for the victims of war crimes and crimes against humanity.

Aircraft and Prize Law in Sea Warfare

by ZBIGNIEW ROTOCKI

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I. Introduction

Generally, by prize law we understand the belligerent rights in sea warfare to vessels and goods, both enemy and neutral, exercised in principle by means of two following actions: the seizure of the vessel and her confiscation in virtue of a prize court decision. However, to seize a vessel displaying the flag of a neutral State, her prior visitation is necessary with the aim of ascertaining, firstly, whether she really is neutral and, secondly, if this is the case, whether the trade she carries on does not render assistance to the enemy. Thus visitation may be considered a kind of taking of evidence, which could lead to ascertaining of enemy character or enemy activity of a vessel, and to confiscating of goods and, if need be, of the vessel in conformity with a prize court decision.

In the course of historical development, beginning with the Treaty of the Pyrenees of 1659 and reaching its peak in the 19th century, rules concerning the right of visit and search have been created with the purpose of guaranteeing the safety of the searched ship, as well as of her crew and passengers. Those rules explicitly forbade sinking of an enemy ship, and all the more of a neutral one, before she had been visited, provided that the ship didn't take to flight or offer resistance, restricting at the same time the destruction of a given unit to exceptional cases, even

after the seizure, corroborated by the results of the search that had been effectuated. This state of affairs, favourable to the freedom of shipping during the war, lasted as long as—in the words of the Prize Court in the case of the vessel “Primula”—“actions connected with the use of prize law were, as a matter of fact, basically exercised by men-of-war.”¹ It changed radically during the First and Second World War with the appearance and employment of submarines and aircraft in sea warfare. Both these arms, playing the role of subjects of the right of visitation and search, became a matter of controversion between States and of theoretical disputes among representatives of the doctrine, owing to the manner they had been used in exercising those rights or rather in trespassing rules hitherto practised in this domain.

Whereas the scope of submarine activity with regard to prize law has been definitively settled by the London Submarine Protocol of 1936, stipulating that submarine vessels must conform to maritime law to which surface vessels in exercising prize law are subject, analogical aircraft activity remains legally unsettled to this day. This poses a number of questions arising from aircraft actions connected with inspection and control of the maritime trade. The basic question expecting solution is whether the aircraft may exercise prize law at all; and if so, whether with regard to her specific features² she must abide by hitherto binding rules or whether those rules should be adequately modified? And if they should be modified, the question must be considered whether we should agree to a wide use by aircraft of compulsory change of course (“*déroutement*”), and to sinking of ships without warning (at sight).

Since in this domain binding international regulations are lacking, and national instructions few and diverse at the same time, a reply to those questions wouldn't be an easy one. Also the practice of belligerents, examined as a possible source of international custom, won't be of much help. It was insignificant at the time of the First World War, and between 1939 and 1945 consisted of sinking ships “at sight” based on an non-recog-

¹ P. FAUCHILLE, Ch. de VISSCHER, *Jurisprudence allemande en matière de prises maritimes*, vol. 1, Paris 1922, p. 15.

² *Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare*, General Report in “AJIL,” January 1938, No. 1, Suppl., p. 40—“The aircraft in use today are light and fragile things,” H. A. SMITH, *Le développement moderne des lois de la guerre maritime*, “R.d.C.,” 1938, part I, p. 675: “l'avion est un vaisseau très petit et très vulnérable. Il n'est pas capable de recevoir à bord l'équipage et les passagers d'un navire capturé. De plus il va de soi que l'avion en vol n'est jamais en état de se conformer à la procédure de la visite;” J. COLOMBOS, *International Law of the Sea*, London 1961, p. 724: “Like submarines, aircraft are incapable of making adequate provisions for the safety of the crew and passengers on board merchant ships[...].”

nized by maritime law institution of "war zones" and on the assumption that all the private vessels of the enemy, being subject to direct supervision on the part of their government, are therefore not entitled to a treatment due to merchant vessels. In view of the lack of sources *sensu stricto* in this matter, attention should be drawn to an ancillary source of international law, that is, with judicial settlements lacking, to opinions of the representatives of the doctrine (attempts at codification and pronouncements of individual scientists) and to general principles of maritime law, which may be applied here *per analogiam*.

However, opinions of the representatives of the doctrine vary, since with the exception of two universally repeated theses, namely, that the problem of aircraft actions in sea warfare must be settled by maritime law and not by air law regulations, and that the use of aircraft against merchant vessels must be framed by adequate guarantees, all the remaining problems, that is their majority, do not find an uniform solution. In this matter, as is usual in international maritime law, the opinions of jurists reflect the division between continental and maritime nations. For the view of states ruling over the waves and having at their command aircraft collaborating with warships or taking off directly from aircraft carriers, would utterly differ from that of continental states, whose aircraft taking off from airfields must depend only on themselves and have few only chances to bring a ship into their port.

In this situation general principles of international maritime law, to which with other guidelines lacking we ought to resort in the last instance, must play an important role in establishing binding rules for aircraft actions.

In view of this, we will examine in succession those individual factors in their historical development with the intention of reaching eventually a synthesis and possible conclusions *de lege ferenda*.

II. Aircraft Activity and Prize Law in the First World War

In warfare on sea aircraft were used for the first time during the First World War. But from the very beginning their activity show four characteristic features which to the present day distinguish the part played by aircraft in exercising prize law and are the subject of heated controversies.

Firstly, the aircraft carried on visitations and searches of vessels in the same way as warship did. For instance, the Dutch vessel "Gelderland," sailing from Newcastle to Rotterdam, was detained (3 July, 1917) by three German hydroplanes and boarded by a Flying-Officer. Having exam-

ined the papers, he ordered to bring the vessel into the occupied by the Germans port of Zeebrugge where she was seized by an Admiralty representative. Lawfulness of those actions was recognized by the Prize Court at Hamburg.³ Also Zeppelins carried on visitations frequently. One of them, the "Z.L.23," visited a Norwegian three-master and brought her after a 43-hour journey into a German port; another German airship did the same to the Norwegian vessel "Le Royal" at the height of Hantsholm and, after leaving three members of her crew on vessel's board, brought this unit into the port of Cuxhaven.⁴

The second form of the aircraft activity at sea was her collaboration with the warship. A typical example of such an activity is the case of the German aircraft "Wölfchen" which, having been sent from the deck of her mothership "Wolf" operating in the Pacific Ocean, ordered the ships she met to change their course and sail to the place of mothership's anchorage. On 27 May, 1917, for instance, "Wölfchen" took off from her mothership's deck which, while undergoing repair on the shore of an uninhabited Pacific island, spotted on the sea-line the New Zealand vessel "Wairuna." The aircraft dropped on "Wairuna's" deck an order instructing her under the threat of bombardment to approach the warship "Wolf," and at the same time forbidding her to use the deck-radio. "Wairuna" complied with the order and in effect of this was seized by the German warship.⁵

There were also cases of applying by the aircraft a method called "*déroutement*," widely practised by warships already during the First World War. Thus the Dutch vessel "Agiena" was detained at the open sea (12 July, 1917) by a German aircraft, ordered without visitation to change the course for Zeebrugge, and only there visited and seized. Finally, in virtue of the Prize Court decision at Hamburg "Agiena" was confiscated, but the Court didn't pronounce itself as regards the mode of seizure.⁶

And lastly, glaringly breaking hitherto existing prize law rules, aircraft carried on attacks on enemy vessels, and sometimes on neutral ones, endeavouring to sink them without any attempt at visiting or directing

³ J. H. W. VERZIJL, *Le droit des prises de la grande guerre*, Leyden 1924, p. 308; *Entscheidungen des Oberprisengerichts in Berlin*, vol. 2, 1918, p. 333.

⁴ J. KROELL, *Traité de droit international public aérien*, vol. 2, Paris 1936, p. 398 and J. M. SPAIGHT, *Air Power and War Rights*, London 1933, p. 471.

⁵ "AJIL", Vol. 33, July 1939, p. 587 and J. KROELL, *op. cit.*, vol. 2, p. 398, according to whom "*Cette pratique ne semble point avoir donné lieu à des protestations de la part des belligérants: elle n'a rien de contraire au droit maritime.*"

⁶ J. H. VERZIJL, *op. cit.*, p. 308 and "Annuaire Grotius pour l'année 1919 - 1920", p. 83: "*Der holländische Segler ist in der Nordsee von einem deutschen Flugzeug angehalten, zur näheren Untersuchung nach Zeebrugge eingebracht[...].*"

them into a port. It wasn't yet a current practice, as it was to become during the Second World War, but sufficiently frequent to enable Higgins to state that "aircraft distinguished themselves first of all by their mode of bombardment of merchant vessels in contravention of the rules of international law kept hitherto by warships."⁷ This practice, however, met with protests of the States concerned and with disapproval of the public opinion, which found its expression in the wording of Article 21 of the "War Crimes List" submitted to the Supreme Allied Council (29 March, 1919) by the Commission des Responsabilités. It proclaimed that air force action tending towards "sinking of merchant and passenger vessels without warning and without having assured safety for passengers and vessel's papers" constitutes a war crime.⁸ Although this principle hadn't been put into practice as after the First World War no legal action had been brought against war criminals, the method of attacking vessels at sight became a basic subject of discussions not only of doctrinal, but also of practical nature with regard to activities of States. Consequently, attempts were made at codification of rules on aircraft activity in sea warfare.

III. Aircraft Operations and Prize Law in the Interwar Period

(a) **Codification Attempts.** As has been already said, the practice of sinking vessels without warning had met with universal disapproval, producing trends towards solution of the problem already during the Washington Conference of 1922. Having found the difficulties too heavy to overcome, the Conference limited itself to passing a resolution proposed by Briand. It recommended the appointment of a Commission of Jurists charged with the task of preparing a draft of revised warfare rules in connection with the new operational methods ensuing from the development of new engines of war. This Commission, comprising jurists representing six states, that is France, Japan, Holland, Great Britain, Italy and the United States, met under J. B. Moore's chairmanship in 1923 at The Hague. Its deliberations reflected not only attempts of the authoritative persons trying to formulate legal conclusions resulting from the First World War experiences, but also the position of governments they represented.

At the initial stage of the discussion a stand of fundamental character had to be taken towards the problem of whether aircraft may be permit-

⁷ A. P. HIGGINS, *Le droit de visite et de capture dans la guerre maritime*, "R. d. C.," Part I 1926, p. 97. According to L. OPPENHEIM, *International Law*, vol. 2, London 1944 (6th ed.), p. 419: "During the World War attacks by aircraft upon shipping, although not infrequent, did not constitute a prominent feature of war."

⁸ E. SPETZLER, *Luftkrieg and Menschlichkeit*, Berlin 1956, p. 164.

ted to exercise the right of visitation and search at all. The delegation of Holland moved a resolution against, according to which "the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those rights to an aircraft, which is a new engine of war, entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property."⁹ This resolution, however, gained only Japan's support and was rejected by the remaining delegations which were of the opinion that, as a general rule, aircraft should be permitted to act in exercising prize law in sea warfare.¹⁰ But they couldn't agree as to the principles which were to bind aircraft in that action. In principle all were unanimous that alighting of an aircraft and carrying out visitation by her, apart from extremely rare cases occurring in particularly favourable situations, would be rather an exception to the rule. Hence the discussion concentrated, after sinking at sight of vessels had been deemed inadmissible, on the question whether or not enforcing of the change of course ("*déroutement*") by aircraft should be permitted.

In this questions the States are divided into two groups, that is, adherents and opponents of this institution.

The first group was represented by Great Britain which proposed the following text of the draft: "A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized. A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety. Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from

⁹ *Commission of Jurists, op. cit.* pp. 39 - 40.

¹⁰ J. COLOMBOS, *op. cit.*, p. 672—"There is no doubt much force in this view, but it did not meet with general acceptance" But according to J. B. MOORE, *International Law and Some Current Illusions*, New York 1924, p. 206: "towards the end of the Conference an intimation was occasionally heard to the effect that, if a concerted effort had been made at the outset to secure an absolute prohibition for a limited term, the attempt might have been successful."

seizure and to permit the merchant vessel to proceed unmolested.”¹¹ The British were also of opinion that, *mutatis mutandis*, provisions of Article 1 of the Washington Treaty of 1922 should be applied to aircraft and that they should be permitted to use “*déroutement*,” which had been allegedly stipulated by that Article in relation to submarine operations.

On the other hand, the USA delegation proposed the following wording of the draft convention: “Aircraft are forbidden to visit and search surface or sub-surface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject. In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested.”¹²

However, none of these projects had been universally accepted by the parties, since only Great Britain and Italy voted for the first, and Japan and Holland for the second.

Also the compromising proposition submitted by France to put up with a general statement that “aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject” was rejected by Japan, Holland, the United States and Great Britain which stressed that the very thing needed is explicit denomination of those principles binding surface vessels that could be *per analogiam* applied to aircraft.¹³

Since unanimity as to the content of the article concerning the use of aircraft in exercising prize law couldn't be achieved, it was omitted in the Project, and the Code of Rules proposed by the Commission therefore left “the matter open for future regulation.”¹⁴ Unfortunately, this rec-

¹¹ *Commission of Jurists, op. cit.*, p. 42.

¹² *Ibid.*, p. 41.

¹³ *Ibid.*, p. 41.

¹⁴ *Ibid.*, p. 43: “Although all the delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and non-combatants, the Commission, by reason of a divergence of view as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The Code of Rules proposed by the Commission therefore leaves the matter open for future regulations.”

ommendation remained a dead letter only, and also the remaining and agreed articles concerning air warfare rules were left unratified by the participants of the Hague Conference.

The project of codification prepared in 1939 under the auspices of the Faculty of the Harvard Law School and concerning "Rights and Duties of Neutral States in Naval and Aerial War" was of some importance too. Its Articles 54 and 109 show an attempt at solving the problem of visitation by an aircraft in the following manner:¹⁵ Article 54, paragraph 1:

"In their action with regard to unarmed merchant vessels, belligerent submarines and aircraft must conform to the rules of international law to which surface vessels are subject, except as otherwise provided in this Convention."

Paragraph 2:

"A submarine or aircraft which does not carry a small boat may direct a visited vessel to send its boat to the submarine or aircraft with an officer carrying ship's papers."

Paragraph 3:

"In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a military aircraft may not sink or render incapable of navigation an unarmed merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or by the presence of another vessel which is in a position to take them on board."

This Article repeats in principle provisions of the London Protocol of 1936 concerning submarines, but it exempts from its advantages armed merchant vessels, that is practically all the belligerent's units, and approves the controversial prize law principle of delivering the papers of a detained ship to the visiting unit.

Subsequently, Article 109, paragraph 1 says that:

"A belligerent commissioned military aircraft may signal a merchant vessel to stop as by radio or by firing a machine gun burst across its bows."

Paragraph 2:

"If sea conditions permit the aircraft to alight, the aircraft shall alight and the procedure applicable to surface vessels shall be followed."

Paragraph 3:

"If the belligerent aircraft is unable to alight, it may require the vessel to proceed on its course under instructions as to speed until the sea moderates or

¹⁵ "AJIL," Vol. 33, July 1939, No. 3, Art. 54, p. 548, and Art. 109, p. 778 ff.

until a naval vessel of the belligerent appears; if visit and search are not effected by either means within six hours, or if the aircraft does not remain within sight or hearing of the merchant vessel, the vessel may resume its course at normal speed."

Paragraph 4:

"If the vessel when summoned does not stop, attempts to escape, resists visit and search, or does not proceed according to instructions, it may be compelled by force to stop and the belligerent shall not be responsible for resulting injury to life and property."

We have here, in principle, a description of a not too probable case of visitation exercised by an aircraft in conformity with the procedure practised by surface warships. However, against all appearances, Article 109 paragraph 3 does not permit the use of compulsory change of course, but consents only to a limited to six hours ship's supervision, which can be of practical significance only to aircraft of a sea power. Operations of this kind would be a classical example of the collaboration between aircraft and warships, but they would not solve the old problem of practising "*déroutement*" in aircraft actions.

Thus the Harvard Project was in principle close to the proposal submitted by the USA delegation at The Hague in 1923, except that it deprived armed merchant vessels of all advantages ensuing from the status possessed by merchant vessels. Thus in practice, according to the Harvard Project, all belligerent vessels would be bombarded at sight, whereas the neutral ones would be visited in a manner practised by warships or, if this would be impossible, left in peace.

Of course, all these projects, as none of them has been adopted by States as their externally or internally binding law, have only a research-work value.

(b) Interwar Practice. In the interwar period only the Spanish Civil War provided examples of the use of aircraft for shipping control. During this war aircraft of "unknown" nationality (actually they were Falangist, German and Italian machines) attacked and sunk vessels of third parties not only within the Spanish territorial waters, but also on the high seas. Padelford quotes in his classical work a long list of such cases, and an Italian Undersecretary of State informed that during that War 160 vessels had been sunk.¹⁶ There were also cases of practising "*déroutement*" on

¹⁶ N. J. PADELFORD, *International Law and Diplomacy in Spanish Civil War*, New York 1939, p. 667 ff, Italian Undersecretary of State in the "New York Times," May 6, 1939. In "AJIL," Vol. 33, July 1939, No. 3, p. 781 we read: "The practice in that conflict seems to have justified Judge Moore's observation that "The contemplation of aircraft thus ranging the seas and issuing the unvisited and unsearched vessels orders enforceable by bombing the ship or by firing upon the persons on board, can scarcely be indulged without grave apprehensions."

the part of Franco's aircraft which detained vessels on the high seas and directed them to the Balearic ports in order to be visited and searched.¹⁷

To avoid aircraft attacks, vessels of third parties provided themselves with special deck signs, well visible to pilots and indicating the nationality. For instance, after an aerial attack on the French vessel "Djebel-Antar" (March 10, 1937), the prefecture maritime at Toulon ordered ships to paint the French flag on upper decks, apart from hoisting it day and night.¹⁸

(c) Law-Making Treaties and Internal State Regulations. In connection with bombarding and sinking without visitation of ships in Mediterranean by "unknown" aircraft, States participating in the Nyon Agreement signed the so-called "Supplementary Nyon Agreement" on 17 September, 1937, which in its Part II stipulated that

"The present Agreement applies to any attack by[...] an aircraft upon any merchant vessel in the Mediterranean not belonging to either of the conflicting Spanish parties, when such attack is accompanied by a violation of the humanitarian principles embodied in the rules of international law with regard to warfare at sea, which are referred to in Part IV of the Treaty of London of the 22nd April, 1930, and confirmed in the Protocol signed in London on the 6th November, 1936."¹⁹

As sanction against such an attack, the Part III permits vessels engaged in shipping protection on the high seas to fire at and destroy the attacking aircraft.

These rules, ordering aircraft to implement principles binding submarines in relation to merchant ships, that is, in fact, to exercise the right of visitation in a manner practised by surface vessels, were reasserted by the League of Nations Resolution of 5 October, 1937, according to which "all attacks of this kind (launched by submarines and aircraft) against merchant vessels are incompatible with the conscience of civilized nations."²⁰

The above mentioned decisions, resulting from the specific situation created by the attacks of "unknown" aircraft, do not make easier the solution of the general problem concerning the use of aircraft in exercising prize law, since the number of contracting parties was limited and the problem of "déroutement" left entirely unattended. On the other hand, navy regulations in the interwar period did not, in most cases, take into consideration the participation of aircraft in sea warfare. Only the

¹⁷ "New York Times," June 26, 1939, p. 25 and R. GENET, *Précis de droit maritime pour le temps de guerre*, vol. 2, Paris 1937, p. 230.

¹⁸ R. GENET, *op. cit.*, vol. 1, p. 400.

¹⁹ *League of Nations, Treaty Series*, 1937 - 1938, vol. 181, No. 4185, pp. 149 - 152.

²⁰ *League of Nations Official Journal*, December 1937, p. 944.

Italian "*Legge di Guerra*" of 1938 assumed in its Article 233 the standpoint that

"the stopping, visiting and capturing of merchant vessels cannot be effected by airplanes, as by their construction, or other reasons, they are not able to conform to the established rules prescribed for ships."²¹

A similar attitude was taken during the Second World War (in 1940) by the Dutch *Prijnsreglement* in its Article 39 and 40.²² On the other hand, the German *Prisenordnung* of 1939 stipulated the possibility of using aircraft in exercising rights of visitation and search by stating that they may be exercised not only by warships, but also by "other units belonging to armed forces."²³

(d) **Doctrine.** Among representatives of the interwar doctrine Higgins²⁴ was the only opponent to aircraft participation in controlling the maritime trade. In his opinion aircraft may be used against vessels solely when they refuse to stop or submit to visitation, and on condition that such actions will not expose persons on the deck to a greater danger than that caused by warships acting in similar circumstances. As at that time it was unrealizable, he thought that the Dutch proposal forbidding the use of aircraft for visitation was rightful. Moreover, Higgins was against aerial bombardment aimed at making the order to stop the vessel for visitation more credible. This standpoint was also supported by Spaight, who wanted the aerial bombardment to be eliminated, even if a ship resists to visit and search, or sails under a convoy of warships.²⁵

Most of the authors, however, consented to exercising the right of visit and search by aircraft, restricting it only by various reservations and differing between themselves especially in opinions on the use of aircraft for "*déroutement*." Among them Kroell, albeit he thought that aircraft activity could be subordinated to maritime law and that the very exercise of prize law is "*très discuté*" and should be carried into effect only from a ship's deck, acknowledged that aircraft are subjects of prize law.²⁶ He considered that in principle, and despite difficulties, the aircraft may visit a ship in a mode practised by warships. Moreover, Kroell consented to following of the practice of "*déroutement*" by aircraft, because in his opinion it was commonly accepted, and if warships were permitted

²¹ "Gazzetta Ufficiale," Suppl. September of 15, 1938, No. 211.

²² "Prijnsreglement" of June 3, 1940 in Staatsblad No. A, 2.

²³ *Prisenordnung* of August 28, 1939 in RGB 1939, 1, 1585.

²⁴ P. HIGGINS, *Le droit de visite...*, p. 103.

²⁵ J. M. SPAIGHT, *Air Power...*, pp. 472 - 473.

²⁶ J. KROELL, *op. cit.*, pp. 353 and 395.

to pursue this practice there could be nothing against pursuing it by aircraft placed on warship decks.²⁷ In conclusion he stated that "it does not seem that the binding law of nations would deny legality to the use of aircraft in exercising the right of visit."²⁸

A similar position is taken by Genet. According to him aircraft may visit vessels observing the same principles that apply to warships. Since this would be possible only with regard to huge aircraft equipped with boats of their own, it is devoid of any practical importance. So "*déroutement*" should be permitted to apply (by aircraft)."²⁹ Such a solution, according to Genet, being compatible with the rules of sea warfare, is evidently better than sinking vessels at sight.

Smith and Sandiford assumed a different attitude towards the compulsory change of course. Smith assumed that aircraft are unable to visit vessels legally and disagreed with the thesis that new inventions require an adequate evolution of legal regulations. But he saw a way out in permitting collaboration between the aircraft and warship during visitation. He maintained that the aircraft may operate in exercising prize law "as an envoy or representative of the warship, transmitting her master's orders and supervising their execution."³⁰ Smith disagrees, however, with imposing the change of course by aircraft and is categorically opposed to the sinking of vessels without a preceding call to submit to visitation procedure.³¹

Sandiford, for his part, stresses that aircraft should be submitted to the same principles of action that are valid in relation to surface vessels and explicitly rejects the use of "*déroutement*" by aircraft. Consenting to such a practice would be—in author's opinion—equivalent to indirect agreement to the sinking of vessels by aircraft, since in most cases vessels would be resisting and refusing to carry out the received orders.³² Sandiford also opposes the sinking of vessels without visitation, but suggests that maritime law must be changed if it is to comprise the use of aircraft.³³

Likewise Fauchille, McNair, Volkmann and Spaight pronounced them-

²⁷ *Ibid.*, p. 400

²⁸ *Ibid.*, p. 397. Similarly on p. 398: "*un aéronef naval belligérant peut donc exercer les droits de belligérant, au même titre, que le navire de guerre.*"

²⁹ R. GENET, *op. cit.*, vol. 1 p. 399.

³⁰ H. SMITH, *Le développement...*, p. 676.

³¹ *Ibid.*..., pp. 678 and 679.

³² R. SANDIFORD, *Évolution du droit de la guerre maritime et aérienne*, "R. d. C.," vol. 2, 1939, p. 678.

³³ *Ibid.*, pp. 679 - 680 and R. SANDIFORD, *Diritto Aeronautico di Guerra*, Rome 1937, p. 109 ff.

selves in favour of the use of aircraft as warship's auxiliary weapon in exercising prize law.³⁴

As we see, the representatives of doctrine consented to aircraft participation in exercising prize law (Higgins excepted) on condition that they would abide by regulations binding surface vessels, in particular by those related to sinking of ships. However, there was a lack of unanimity as to the imposing by aircraft the change of course, that is to the key problem in this domain.

(e) Conclusions. On the base of the above-quoted facts it can be stated that before the operations of the Second World War had started, the legal position of the examined question was as follows: In the domain of the rule of law the specific Nyon Agreement was the only existing legal act that could not pretend, however, to have finally solved the problem of the participation of the aircraft in sea warfare. Besides, the attempt to extend *per analogiam* to aircraft the principles binding submarines did not succeed in solving the basic problem posed by the use of "déroutement" by aircraft. Instructions to Navies were few and treated this problem in contrasting manner (comp. *Legge di Guerra* and *Prisenordnung*). On the other hand, a relatively small number of cases of aircraft use in exercising prize law during the First World War and the uselessness of the Spanish Civil War experiences prevented the creation of a custom in this field.³⁵ Then, the prize courts didn't take up between 1914 and 1918 the question whether visitation and capture of vessels by aircraft is permissible; they accepted merely the capture as a starting-point and adjudicated confiscation of a given unit. Also the representatives of the doctrine could not find common language to settle the question. Jurists gathering at The Hague, as well as scientists who later examined the problem of aircraft participation in sea warfare, could not find a practical solution for the use of aircraft in exercising prize law, differing in particular as to the right of aircraft to resort to "déroutement" and to sinking of vessels.

Thus it seems that Spaight was right in saying that "before the outbreak of war there were no definite international rules concerning aircraft actions with regard to vessels."³⁶

³⁴ P. FAUCHILLE—BONFILS, *Traité de droit international public*, vol. 2, Paris 1926, No. 1440 - 35, L. OPPENHEIM, *International Law*, vol. 2, London 1926 - 1928 (4th ed. by McNAIR), p. 445. VOLKMANN, *Internationales Luftrecht*, vol. 2, Berlin 1930, p. 201; J. M. SPAIGHT, *Air Power...*, 34 p. 471 ff.

³⁵ J. KROELL, *op. cit.*, p. 398: "L'utilisation de l'aéronef pour la visite à part les quelques cas signalés, n'a pas encore été généralisé au point qu'on puisse y avoir actuellement un usage admis."

³⁶ J. M. SPAIGHT, *Legitimate Objectives in Air Warfare*, "BYIL," 1944, p. 159.

IV. Aircraft Activity and Prize Law in the Second World War

At the initial stage of the war, that is till the end of 1939, the Germans didn't use the "Luftwaffe" to attack vessels. But the 17th December, 1939 became the turning point in their practice, because from this day on they launched extensive air-raids on vessels anchored in British ports and on those sailing towards British shores, reaching up to Firth of Forth and to Orkneys and Shetland Islands. Finally, the declaration of total blockade of the maritime area around Great Britain proclaimed that "Every vessel sailing in this area exposes herself to danger of being destroyed not only by mines, but also by other means of warfare." In this way the area of aircraft activity had been extended from Loire's estuary up to the Belgian shores and over the British Isles. On 25 March, 1941 this area was extended over the Atlantic up to Greenland and from 26 June, 1942 it encompassed the whole of the Atlantic up to the United States shores.

Thus the area of the North Sea and a considerable part of the Atlantic, situated within the range of the German aircraft, became an area in which the Germans sunk at sight every enemy or neutral vessel, trying to paralyse the maritime shipping entirely. A classical example of such an activity was the air raid against the British vessel "Domala", launched in March 1940, near the Isle of Wight, during which one hundred persons lost their life killed by machine-gun fire and bomb splinters. As a result of this activity the "Luftwaffe" destroyed by the end of 1941 already 526 vessels of 1,553,504 GRT.³⁷ But in water regions where the German Navy dominated, the Third Reich Air Force practised only "déroutement." For instance, the vessel "Road Jarl" was detained by an aircraft in Dutch straits, directed to the port of Bremen, where she was visited, searched, seized and later condemned (19 December, 1941) by the Prize Court at Hamburg.³⁸

Italians on their part, in spite of explicit prohibition stipulated by Article 233 of the "Legge di Guerra" of 1938, used in March 1940 aircraft for sinking the Greek vessel "Kiriti," and the prize court trying this case left out the problem of the legality of such action.³⁹

With the beginning of war operations Great Britain and France com-

³⁷ G. W. FEUCHTER, *Der Luftkrieg*, Bonn 1964, p. 270; E. SPETZLER, *op. cit.*, p. 239 and R. SCHENK, *Seekrieg and Völkerrecht*, Cologne 1958, p. 77; *ibid.*, p. 87: "die totale blockade[...]wurde aufrechterhalten durch die deutsche U-Bootwaffe und zum geringen Teil durch Luftwaffe."

³⁸ S. W. D. ROWSON, *Prize Law During the Second World War*, "BYIL", 1947, p. 209.

³⁹ S. W. D. ROWSON, *op. cit.*, p. 210 and "Bolletino del Tribunale delle Prede", Vol. 2, p. 445.

mitted themselves in their notes of 2 September, 1939 to abide by the rules of the Protocol of 1936. These rules were also to bind aircraft in their actions against merchant vessels.⁴⁰ In connection with this the British Government permitted its aircraft to attack only warships, troopships and vessels directly engaged in warship servicing. To attack other vessels, even though they should open fire first was forbidden.⁴¹ Consequently, according to established practice, the enemy vessels were signalled to change their course and sail into a British port for search. But when in response to such a call two German vessels "Watussi" and "Adolf Leonhart," sunk themselves towards the end of 1939 at the southern shores of Africa, the British declared that this deed had been preceded by instructions issued by the German authorities, which were contrary to the rules of maritime law. That was why the British changed their hitherto existing practice and started bombarding at sight the German vessels. They assumed that in this way they would hinder the crews from abandoning the vessels and from opening the watertight bulkheads, increasing thus the chances of capturing the attacked vessel. According to Smith, this decision was "entirely justifiable, since the evidence of concerted actions made it clear that the ships were under the direct control of the enemy government and therefore not entitled to be treated as merchant vessels."⁴² This practice was introduced by the British gradually. Thus on 12 March, 1940 restrictions on aerial attacks in the Skagerrak area and around the southern shores of Norway had been abolished. In May they had been abolished in Dutch waters and in Helgoland Bay, and with the advance of the Western front also in Dutch, Belgian and French territorial waters. This, according to Lauterpacht, resulted from recognition of those regions by the British as actual theatre of war operations.⁴³ And finally, on the ground of "unquestionable right of retaliation" and in view of permanent violation by the Third Reich of the laws of sea warfare, which had found its expression i.a. in proclaiming a total blockade of the sea area around Great Britain in August, 1940. Allied aircraft were permitted as from 1 June, 1941 to attack without warning the enemy vessels in the North

⁴⁰ Anglo-French Declaration on the Conduct of Warfare (September 2, 1939)—text in: J. R. N. BUTLER, *Grand Strategy*, vol. 2, London 1957, p. 568: "Further, they will only employ their aircraft against merchant shipping at sea in conformity with the recognized rules applicables to the exercise of belligerent rights by warships."

⁴¹ J. LIPSKI, *Druga wojna światowa na morzu* [*The Second World War at Sea*], Gdynia 1962, p. 185.

⁴² H. SMITH, *The Law and Custom of the Sea*, London 1948, p. 159; also cf. J. M. SPAIGHT, *Legitimate Objectives...*, p. 160.

⁴³ L. OPPENHEIM, *International Law*, vol. 2, London 1958 (7th ed.), p. 683/1.

Sea waters and in the Bay of Biscay. As a result, the Coast Command and the Bomber Command operating in these waters, and the Desert Air Force operating in the Mediterranean, sunk a considerable number of the Axis vessels.⁴⁴ The British, however, did not attack neutral vessels from air. In view of their sea power it wasn't necessary. But they practised collaboration of aircraft with warships on a large scale and universally forced the vessels into change of course.

From the French practice also an example of imposing a change of course could be quoted. This took place on the high seas when a patrolling hydroplane ordered, under the threat of opening fire, the fishing boat "Ville de Noirmontier," which had been captured by the Germans, to sail into the port Sables d'Olonne where it was seized.⁴⁵

In the Pacific, however, the Japanese Air Force did not attack the enemy merchant vessels. It resulted, of course, not from the wish to comply with international law, of which the Japanese were very far during the Second World War, but from weakness of their naval aircraft and acceptance of a sea warfare doctrine which, as in the case of submarine actions, saw enemy warships as the main target of aircraft attacks and didn't attach much importance to combating enemy merchant fleet. The Americans on their part started to sink Japanese vessels from the very beginning of the war. As a result approximately 31 per cent of the Japanese merchant fleet fell victim to aerial bombardment.⁴⁶

Thus, actually only the Germans practised indiscriminate sinking of all enemy vessels without warning, as well as of neutral vessels, over huge waters proclaimed by them "war zones."⁴⁷ On the other hand, the naval forces dominating the seas used aircraft to enforce the change of course,

⁴⁴ J. M. SPAIGHT, *Legitimate Objectives...*, p. 160 and J. LIPSKI, *op. cit.*, pp. 185 - 197. This last informs that in the first half of 1940, owing to the lack of aircraft and trained pilots, the RAF sunk only 16 vessels (22478 GRT). However, till the end of that year this number increased by 62 vessels (88970 GRT). But in the Bay of Biscay between June and December 1941 only the pirate ship "Komet" and the ex-Norwegian tanker "Ole Jacob" were sunk.

⁴⁵ P. PARFOND, *Le droit de prise*, Paris 1955, p. 168.

⁴⁶ J. LIPSKI, *op. cit.*, p. 387; G. W. FEUCHTER, *Geschichte des Luftkrieges*, Bonn 1954, p. 325. According to T. ROSCOE, *U. S. Submarine Operations in World War II*, Annapolis 1950, (Russian translation), Moskva 1957, p. 484, Japanese losses amounted to 649 sunk (2, 467, 382 GRT) and 88 heavily damaged vessels (278; 593 GRT).

⁴⁷ J. COLOMBOS, *op. cit.*, pp. 681 - 682: "Germany's conduct of naval and air warfare was so reckless that her cruisers and aircraft did not even spare lifeboats, lighthouses and lightships or their defenceless crews whose object is to protect the shipping of all nations and mitigate for their fellow-sailors the natural dangers of the sea."

more advantageous than ship's destruction, since it created opportunity for her seizure and possible use by the captor. Hence the practice of the 1939 - 1945 period can not be considered a source of custom in this domain, because it based itself on such non-recognized by international law actions as proclaiming "war zones," or on actions arousing doubts like the use of "*déroutement*" or prohibition of self-sinking. Moreover, this practice also violated the basic principles of international maritime law, which required visitation of the ship before taking any further decisions, and comprised strict rules concerning the sinking of ships, especially in cases when life of the crew and passengers, as well as preservation of ship's papers, could not be safeguarded. Thus Smith rightly says that "The experience of the Second World War does not throw much additional light upon the problem."⁴⁸

V. The Problem of Aircraft Participation in Exercising Prize Law Faced after the Second World War

(a) **Doctrine.** Representatives of the doctrine, who have dealt with this problem after 1945, can be divided into three groups. The first attempts to limit air force activity to rules binding submarines and sees the aircraft acting as a unit collaborating with the warship. The second consents to practising "*déroutement*" by aircraft, hence indirectly to sinking of vessels should they resist the order to change the course. And finally the third group accepts attacking vessels at sight in regions of war operations as an ordinary procedure, according to the thesis "*neue Waffen—neues Recht*."

To representatives of the first group belong Lauterpacht, Spetzler, Verdross, Spaight and Colombos. According to Lauterpacht⁴⁹, though it is theoretically possible for aircraft to conduct visitation in a way similar to that of warships, its practical effectiveness would be negligible, especially with all the modern weaponry at ships' disposal. Therefore, in Lauterpacht's opinion, the only part which aircraft may lawfully play in exercising prize law is that of an auxiliary arm of the naval forces proper. Lauterpacht also disagrees with the practice of bombarding even enemy vessels from the air, with the exception of those sailing under convoys.

⁴⁸ H. A. SMITH, *The Law...*, p. 159 and P. GUGGENHEIM, *Traité de droit international public*, vol. 2, Geneve 1954, p. 433 stresses that "*On ne connaît aucune décision de prise rendue pendant la seconde guerre mondiale et se rapportant à la guerre aérienne.*"

⁴⁹ H. LAUTERPACHT in: L. Oppenheim, *International Law*, vol. 2, London 1944 (6th ed. by H. Lauterpacht), pp. 419 - 420.

Spetzler⁵⁰ is of the opinion that, according to Article 1 of the Washington Treaty of 1922 and Article 22 of the London Treaty of 1930, aircraft are bound in relation to vessels *per analogiam* by regulations concerning submarines. Verdross⁵¹ thinks that owing to the absence of detailed maritime law regulations, general principles of the laws of war should be applied to aircraft activity, and in this case the laws of sea warfare. Spaight⁵² for his part considers that when an aircraft is unable to seize a vessel, it must desist from visit and attack and allow the vessel to proceed on its course. Finally Colombos⁵³ maintains that the aircraft may act in conformity with maritime law regulations, and when this is impossible, it must desist from visiting and permit the vessel to continue her journey. Then he states that in view of aircraft's inability to assure the safety of the passengers and crew, she may not effect capture or sinking of ships. Therefore, in Colombo's opinion, attacking enemy vessels with the use of bombs and aerial torpedos is illegal unless those vessels have attacked the vessel first.

The second group is represented by Sandiford who on the one hand, basing himself on Article 233 of the "*Legge di Guerra*," thinks that the aircraft may visit vessels in accordance with the regulations binding surface vessels, and on the other hand consents, contrary to his interwar opinion, to applying "*dirottamento*." He writes that "in view of aircraft's technical features it is the only real solution."⁵⁴

Similarly Guggenheim⁵⁵ claims that visiting "*sur place*" is technically not possible and therefore, the aircraft may apply the compulsory change of course. But as far as sinking of ships is concerned, aircraft are bound, in his opinion, by the same rules that were adopted for submarines in virtue of the Protocol of 1936.

⁵⁰ E. SPETZLER, *op. cit.*, p. 168.

⁵¹ A. VERDROSS, *Völkerrecht*, Vienna 1959, p. 365. Similarly S. W. ROWSON, *op. cit.*, p. 210: "the exercise of belligerent rights against ships by aircraft is not in itself contrary to the principles of international law."

⁵² J. M. SPAIGHT, *Air Power and War Rights*, London 1947, pp. 76 - 107.

⁵³ J. COLOMBOS, *op. cit.*, pp. 692 and 724. Also see Padilla Nervo during the 344 Session of K. M. P.: "that experiences of the last war proved that in certain cases an aircraft could carry out seizure. This applied especially to seaplanes, as they could come alongside a ship and arrest the crew, which amounted to virtual seizure of the vessel"—"Yearbook of the I. L. C.", Vol. 1, 1956, p. 54.

⁵⁴ R. SANDIFORD, *Diritto Marittimo*, Milan 1960, pp. 641 - 642; *ibid.*, p. 642: "*Date le condizioni tecniche dell'aeromobile essa [the problem of visit and search] si risolverebbe in un dirottamento*".

⁵⁵ P. GUGGENHEIM, *op. cit.*, vol. 2, p. 433. *Ibid.*, he considers in conclusion that "*Le droit de prise est peu important dans la guerre aérienne vu les difficultés techniques que son application présente*."

The most extreme opinions in this matter were expressed, under the cover of impartial presentation of facts and on the base of allegedly true state of affairs, by the German scientists von der Heydte and Scheuner.

Von der Heydte assumes that "new weapons require not only a new operational thinking, but also a new law of war."⁵⁶ He advances as an axiom the assumption that aircraft, like submarines, can not abide by the rules of international law and may attack and sink vessels without warning. To render it possible, the belligerents proclaimed during the Second World War the so-called "war zones," to which the enemy reacted by introducing anti-aircraft weapons and convoys. In this way the vessel became a military object, and consequently a legitimate target for the aircraft. Basing himself on this kind of reasoning, von der Heydte consents to sinking of ships without visitation.⁵⁷ Scheuner for his part states that in spite of the wish to bind aircraft by traditional laws of war, attack aimed at sinking of the ship emerged as the actual practice. As a result the aircraft became a part of the dominion exercised from the continent over the sea. Agreeing in principle that aircraft should exercise the right of visit and search in a way similar to that of warships, he maintains that actually aircraft may exercise this right only by applying the compulsory change of course. According to Scheuner, it is a legitimate procedure, and in the event of resistance the aircraft may break it by using force.⁵⁸

In conclusion it may be said that after 1945 the opinions of the authors became very varied.

(b) Instructions to Fleets. After the Second World War the problem of aircraft participation in exercising the right of prize has been dealt with only in the American Law of Naval Warfare of 1955. Namely, in the note No. 14 to the section 502(b)5, it is stressed that

"although there is no question of the right of belligerent military aircraft to visit and search vessels at sea, it is apparent that this right can be exercised only infrequently. In those circumstances in which visit and search is impracticable (and particularly when information concerning a vessel is already held, that, if verified by search, would justify her capture) a belligerent military aircraft may order a vessel to proceed under escort as directed."⁵⁹

⁵⁶ F. A. von HEYDTE, *Völkerrecht*, vol. 2, Berlin 1960, p. 334.

⁵⁷ F. A. von HEYDTE, "Luftkriegsrecht," in: STRUPP—SCHLOCHAUER, *Wörterbuch des Völkerrecht*, vol. 2, Berlin 1961, p. 439.

⁵⁸ U. SCHEUNER, "Seekriegsrecht," in: STRUPP—SCHLOCHAUER, *Wörterbuch des Völkerrechts*, vol. 3, Berlin 1962, p. 233 and U. Scheuner, "Durchsuchung von Schiffen," *ibid.*, vol. 1, Berlin 1960, p. 408.

⁵⁹ J. COLOMBOS, *op. cit.*, p. 691.

The passage mentioning the inability of visitation and search ("impractical circumstances") relates to a situation when the aircraft is unable to do it neither alone, nor with the help of a unit sailing in the vicinity. This regulation explicitly allows the use of "*déroutement*."

Conclusion

Analyzing the material that has been compiled here we can arrive at certain basic statements and conclusions with regard to matters being under examination. Let us order them in four possible variants which show aircraft activity in relation to prize law.

1. Visitation and Search by Aircraft according to Rules Binding Surface Vessels. This type of activity is undoubtedly legitimate and permitted. In practice visitation and search is effected by an aircraft as follows: The aircraft gives the order to stop by radio, by dropping the order on board, or by firing a signal rocket; if need be a bomb is dropped to stress the ultimate character of the order but in such a way as to avoid damaging of the vessel, or a machine-gun burst is fired across the aircraft bows. When the vessel stops, the aircraft alights (this is possible only for hydroplanes) and sends a boat with the visiting crew; lacking the boat, it calls the detained unit to send a boat of her own with an officer and ship's papers aboard. If the vessel fails to comply with the order or attempts to escape, the use of force is permitted. Force may be also used towards a vessel which, after having been seized, resisted the order to sail under escort into the indicated port. The sinking, however, of the seized enemy ship may be applied only when safety of the crew, passengers and ship's papers can be assured in conformity with the principles of the Protocol of 1936, and if neutral ship is being sunk, circumstances stipulated in Article 49 of the London Declaration of 1909 must also occur.

2. Aircraft Collaboration with Warship. As the overwhelming opinion of the representatives of the doctrine and the practice of States shows, such an aircraft action with regard to an enemy vessel is considered to be legitimate when it conforms to following rules: the aircraft orders the detained vessel to surrender to a warship and, to get this accomplished, demands a corresponding change of course. If the order is being complied with, the vessel is not attacked, but if escape and defence is being attempted, the possibility of using force can not be excluded. The seized enemy vessel is directed under the escort of the aircraft or of warship's crew into the belligerent's port to be tried by a prize court. Sinking of the vessel is considered permissible only if conditions stipulated in Article 2 of the Protocol of 1936 can be complied with.

However, this practice meets with opposition on the part of the doctrine when applied to neutral ships. But it seems that such an action could be accepted as permissible in the event of the warship being situated not far from the place where the vessel has been detained by an aircraft. Then the aircraft orders the vessel to stop or to sail in the direction of the warship in order to be visited. The warship, having completed the visitation or, if need be the search, and having found the reason for capture, directs the vessel under the escort of the aircraft or of warship's crew into the belligerent's port to be tried by a prize court. Sinking of the ship is inadmissible; it may be effected only in circumstances stipulated in Article 49 of the London Declaration of 1909 and only after the crew, passengers and ship's papers have been placed in safety, in conformity to the regulations of Article 2 of the Protocol of 1936. However, the practice tends to show that the possibility of aircraft actions aimed at detaining vessels at a considerable distance from warships collaborating with aircraft should be also taken into account. Cessation of this practice, burdensome to neutral vessels, can be effected only through coordination by the States concerned of rules which would clearly define the scope of activity of the aircraft collaborating with the warship in relation to neutral shipping.

3. Compulsory Change of Course ("déroutement"). This procedure by which the aircraft orders a vessel to sail into a port of the belligerent to be visited and searched, does not give rise to reservations from the point of view of international law as far as enemy vessels are concerned. But its application to neutral vessels, in spite of being favoured by States, is a matter of heated doctrinal disputes. It seems that the opinion of most of the jurists is in favour of applying a compulsory change of course to neutral vessels only when the indicated port is not too remote from the ship's course and when the aircraft possesses information which, if confirmed, would justify the seizure of a given unit.

4. Sinking of Vessels Without Visitation (at Sight). This kind of action is incompatible with commonly accepted principles of maritime law concerning not only the right of visit, but also the mode of treatment of non-combatants, and is universally recognized as inadmissible. Unfortunately, this ban was not obeyed in both world wars. It was violated, and in particular it was the Germans who were doing it, firstly, by sinking at sight of armed enemy vessels or those sailing under armed convoys and, secondly, by proclaiming the so-called "war zones" in which all vessels were sunk. Whereas the first practice, being justified by analogous rights vested in warships operating against armed vessels or those sailing under convoys, enjoys the support of various representatives of the doctrine, the other one is condemned almost universally. Here the

only exception are, as a matter of course, some German authors attempting to recognize the "*Sperrgebiet*" as a customary institution of the law of nations and consenting to sinking in those regions at sight of all vessels.⁶⁰ It must be reckoned, however, that in the event of armed conflict there is a possibility of proclaiming once again "war zones" over vast waters and of sinking there of all vessels by aircraft unless this practice, so dangerous and at the same time violating so glaringly the basic principles of maritime law, is abolished by the States through signing an adequate convention.

Thus, in the present moment there are doubts and uncertainties with regard to basic problems concerning the aero-maritime practice. It is the question of whether the collaboration of aircraft with warships and the compulsory change of course are admissible as a general practice towards neutral vessels, as well as the question of "war zones" and their possible size. These problems are of basic significance for aircraft operations at sea; left unresolved they generate a feeling of legal uncertainty and compel us to recognize the present state of affairs as unsatisfactory, all the more so as the attempt to use in such cases by analogy the general rules of the law of war is insufficient and does not close the existing legal gap.

So the postulate *de lege ferenda* comes here out very clearly, as in other sections of the maritime law of war (e.g. "war zones," fictitious blockades, navicerts, etc.). A repeated examination of the traditional rules in this domain of international law, from the point of view of possible changes and additions as well as of a new codification which would settle explicitly obligations of the belligerents, would be very commendable.

⁶⁰ H. TRIEPEL, *Konterbanen, Blockade and Seesperre*, Meereskunde 1918, Heft 3; E. VANSELOW, *Neutralität*, quoted after R. SCHENK, *op. cit.*, p. 98; LABAND, "Zeitschrift für Völkerrecht," 1916, pp. 152, 179, and 204; H. KAWELMACHER, *Die Blockade nach der Londoner Deklaration vom 26 Februar 1909 and die Kriegserfahrungen*, Dissertation, Cologne 1921; FLEISCHMANN, in: LISZT-FLEISCHMANN, *Völkerrecht*, Berlin 1925 (12th ed.) § 64 B, p. 2, E. SCHMITZ, *Speergebiete im Seekrieg*, "Zeitschrift für a. ö. R. u. V.," Vol. 8, 1938, p. 670 and R. SCHENK, *op. cit.*, pp. 114 and 129.

Nationality of Spacecraft and Liability for Space Activities

by ZDZISŁAW GALICKI

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Introduction

The present generation is the eye-witness of an amazing development in technology, which has made possible more and more effective exploration of outer space in recent years. Now, approximately fifteen years after the first satellite was launched, we have a large number of States and even international organizations taking part in space activities. Soon, they will be able to engage in the practical exploitation of outer space.

Having an increasing number of space activities and participants in the same, it is necessary to find some legal rules for these activities as well as to establish certain provisions for the settlement of eventual disputes between States active in the realm of space. Much more numerous experiments in outer space create a potential danger of harm for States and individuals on the earth's surface. As the number of space launchings increases, accidents could unfortunately occur. Although the component parts of missiles, used to launch space satellites and vehicles, usually burn away in the atmosphere, in recent years many cases have been reported of objects plunging from outer space, including segments of carrier rock-

ets and parts of space vehicles which have fallen on sea and on land.¹ It has also to be realized that the risks and dangers will increase because of controlled nuclear reaction which, although at present experimental, will undoubtedly be used in the very near future to evolve more powerful sources of energy for space rockets and vehicles. In these circumstances the necessity of creating certain rules governing the system of liability for damage caused by objects launched into outer space or in the process of being launched, seems to be undoubted.

A correct tendency is the one which aims to establish appropriate rules of law for the protection of terrestrial subjects "before *de facto* situations have crystallised too far."² In the present era, which is witnessing a quickly developing world and society, it is no longer possible, as it was in accordance with tradition, for the rules of law to follow a few steps behind the facts. If the rules of law are to be effective and really useful, they must be created in appropriate time with a very realistic approach to a problem and with recognition of the existing development of legal, scientific and technological progress.

However, the creation of these rules in the field of liability for space activities met a lot of difficult problems. One of the most controversial was the question of who should be held liable if any damage, connected with space activities, occurred.

The purpose of this article is to examine in the light of doctrine, norms of international law and results of work accomplished by the United Nations—the existing legal rules and tendencies in this field. This will be done to prove the great importance of the concept of nationality as applied not only in maritime and air law but also in the emerging law of outer space, and to show that such institutions as nationality and registration could be used as the best possible criteria for identifying parties liable for space activities.

¹ E.g.: in November 1960 some pieces of an American rocket, used for a satellite's launching fell on to Cuban territory. In February 1962 in the neighbourhood of a South African farm, a piece of steel approximately one meter long was found, which, as American experts confirmed, was the part of the "Atlas 109" rocket which put Glenn's spacecraft into orbit. On September 5, 1962, a piece of iron, weighing about 10 kg, was found in a street of a small town in Wisconsin, USA. It was identified as belonging to a section of Sputnik IV, launched by the Soviet Union. For more examples, see: G. P. Žukov, *Kosmičeskoe pravo*, Moskva 1966, p. 121; N. M. MATTE, *Aerospace Law*, London-Toronto 1969, pp. 337 - 340.

² C. W. JENKS, *International Law and Activities in Space*, "International and Comparative Law Quarterly," Vol. 5 January 1956, p. 101.

Development of Legal Regulation of Liability for Space Activities

Significant achievements in evolving a legal regime for space activities have already been reached by the United Nations, and further steps towards this development are being taken at the present time.

By Resolution 1348 (XIII) of 13 December, 1958, the General Assembly of the United Nations established the UN Ad Hoc Committee on the Peaceful Uses of Outer Space. In its report to the General Assembly the Ad Hoc Committee listed the question of liability for injury or damage caused by space vehicles among the "legal problems susceptible of priority treatment."³

In 1959 the UN General Assembly appointed the UN Committee on the Peaceful Uses of Outer Space.⁴ This Committee then established two Sub-Committees: the Technical and Scientific Sub-Committee and the Legal Sub-Committee. The latter soon became the main centre for work on the legal regulation of space activities.

By Resolution 1802 (XVII) of 14 December, 1962, the UN General Assembly requested the Committee to continue urgently its work on: 1) further elaboration of basic legal principles governing the activities of States in the exploration and use of outer space; 2) liability for space vehicle accidents; 3) assistance to and return of astronauts and space vehicles.

These were the three main subjects on the agenda of the Legal Sub-Committee during all its sessions. It is interesting to note that the problem of liability was the subject of consideration for the Sub-Committee during all its sessions, except the fifth one. This seems to indicate the importance and difficulty of that problem. At the second session⁵ an agreement was reached that the relevant instrument for regulation of that question should take the form of an international treaty.

Owing to the elaborations made by the Legal Sub-Committee, the UN General Assembly adopted during its XVIII session one of the most important instruments in the matter of the legal regulation of space activities, namely, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.⁶ In this declaration the principle of international responsibility for space damage was first enunciated. There were also mentioned, among other points, such problems as the responsibility of States for space activities carried on by gov-

³ Report of the United Nations Ad Hoc Committee on the Peaceful Uses of Outer Space, Doc. A/4141, 14 July, 1959.

⁴ UN General Assembly Resolution 1472 (XIV) of 12 December, 1959.

⁵ 16 April - 3 May 1963; see: Doc. A/AC. 105/12.

⁶ UN General Assembly Resolution 1962 (XVIII) of 13 December, 1963.

ernmental agencies or by non-governmental organizations, and the responsibility of international organizations.

Moreover, at the same session, the General Assembly requested the Committee on the Peaceful Uses of Outer Space to arrange for the prompt preparation of a draft international agreement on liability for damage caused by objects launched into outer space.⁷

In its work on elaboration of the draft convention the Legal Sub-Committee considered several proposals submitted by different States. The first one was submitted in very short form as early as 1962 by the United States in response to the previous UN General Assembly and Ad Hoc Committee appeals.⁸ Similarly the USSR Draft Declaration of the Basic Principles Governing the Activities of States in the Exploration and Use of Outer Space provided certain rules in that matter.⁹

But the essential subjects of the Sub-Committee considerations consisted of five draft conventions¹⁰ on liability for damage caused by the launching of objects into outer space, submitted by Belgium, United States, Hungary, India and Italy.¹¹ In close relation to the scope of this study there was the French draft convention concerning the registration of objects launched into space for the exploration or use of outer space.¹²

⁷ UN General Assembly Resolution 1963 (XVIII) of 13 December, 1963.

⁸ US Proposal—*Liability for Space Vehicle Accidents*—UN General Assembly Doc. A/AC. 105/C. 2/L. 4 of June 4, 1962. This proposal contained, among other the following principle commended to a special advisory panel which was to be constituted by the Secretary General, "[...]3(a) States or international organizations responsible for the launching of space vehicles should be liable internationally for personal injury, loss or damage occurred on land, on the sea, or in the air[...], (c) A claim may be presented internationally to the State or States or international organization, responsible for the launching of a space vehicle[...]."

⁹ "[...]11) A State undertaking activities in outer space bears international responsibility for damage done to a foreign State or to its physical or juridical persons as a result of such activities."—Doc. A/AC. 105/C. 2/L. 6 of April 16, 1963.

¹⁰ Three of these draft conventions (Belgium, United States and Hungary) were first submitted in 1964 at the third session of the Sub-Committee, and created the subject of the Sub-Committee's work during the next sessions. The Proposals of India and Italy were submitted at the seventh session in 1968.

¹¹ Belgian Proposal—A/AC. 105/C. 2/L. 7/Rev. 3 (based mainly on a Working Paper on the Unification of Certain Rules of Liability for Damages Caused by Space Vehicles, submitted at the second session on April 30, 1963—Doc. A/AC. 105/C. 2/L. 7/); United States Proposal—A/AC. 105/C. 2/L. 19; Hungarian Proposal—A/AC. 105/C. 2/L. 10/Rev. 1 and A/AC. 105/C. 2/L. 24; Indian Proposal—A/AC. 105/C. 2/L. 32; Italian Proposal—A/AC. 105/C. 2/L. 40. See also: K. HAILBRONNER, *Liability for Damage Caused by Spacecraft. Proposals of Belgium, USA, Hungary, India and Italy*, "30 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," April 1970, No. 1, pp. 125 - 141.

¹² France: Proposal A/AC. 105/C. 2/L. 45.

In 1970, at its ninth session, the Legal Sub-Committee established the Drafting Group¹³ and, as a result of its work, the Sub-Committee approved at the same session texts which comprised the title, the preamble and thirteen articles of the draft convention on liability.¹⁴ In 1971, at the tenth session of the Legal Sub-Committee, the previously mentioned Drafting Group was re-established and continued its work in attempt to prepare the draft convention. This work has been successful in accomplishing its final purpose and on 29 June, 1971, the Legal Sub-Committee adopted the text of the Draft Convention on International Liability for Damage Caused by Space Objects.¹⁵ This Draft Convention has been submitted by the Committee on the Peaceful Uses of Outer Space to the UN General Assembly at its XXVI session and adopted on 29 November, 1971. The Convention has been signed on 29 March, 1972, in Moscow, London and Washington.

It is hoped that this convention will enter into force in the near future, as the rules of conventional law have already been extended into the field of outer space with the conclusion of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,¹⁶ and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.¹⁷ Both were concluded under the auspices of the UN General Assembly as a result of the work performed by the Legal Sub-Committee. These two treaties, both in force,¹⁸ contain some provisions related with the question of liability, which will be considered in the next parts of this study.

Nationality of Spacecraft

1. The Need for Regulation of the Legal Status of Spacecraft. There were some warnings among authors in international law to refrain from

¹³ Composed of Belgium, France, Hungary, India, the USSR, the United Kingdom of Great Britain and Northern Ireland and the United States of America, with Argentina and Mexico serving in rotation.

¹⁴ See: Doc. A/AC. 105/85 para. 27.

¹⁵ Doc. A/AC. 105/C. 2/10. See also: Report of the Legal Sub-Committee on the Work of Its Tenth Session (7 June - 2 July 1971)—Doc. A/AC. 105/94 of 8 July, 1971.

¹⁶ So called: "Space Treaty"—opened for signature on January 27, 1967 in London, Moscow and Washington; see also: UN General Assembly Resolution 2222 (XXI) of 25 January, 1967.

¹⁷ Opened for signature on April 22, 1968 in London, Moscow and Washington; see also: UN General Assembly Doc. A/6804/Add. 1 of 16 December, 1967.

¹⁸ The Space Treaty from October 10, 1967; the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space from 3 December, 1968.

using the "metaphor of nationality" in the field of space law because: "to introduce the concept of nationality into the law concerning the status of spacecraft would inevitably raise difficulties for those cases where the launching authority were either an international organization or some joint venture of a number of states."¹⁹

It seems, however, that a considerable number—if not the majority of authors—prefer to solve the problem of regulation of the legal status of spacecraft by applying the classical concept of nationality to space objects. It must be recalled that this concept involves, at least, the following elements:

(a) national registration;

(b) an appropriate provision of law by which the act of registration creates (or rather gives the evidence of) a specific link between the registered object and the State of registration—called "nationality;"²⁰

(c) similar to Articles 17 - 19 of the Chicago Convention,²¹ explicit international recognition of such a procedure with its consequences.

Customary rules of international law, developed by the practice of States and confirmed by appropriate conventions, recognized the relationship of nationality as existing in ships and aircraft. On the other hand, certain other instrumentalities of transportation, such as trains and automatic vehicles, do not have such a direct relationship to a particular State. It seems that the legal status of spacecraft can be more closely compared with vessels and aircraft. For example, the parallel between ships, their function and place of operation (national ports, territorial waters, high seas), and spacecraft, their function and place of operation (surface flight pads, airspace, outer space), may be seriously considered.²² In addition, the Chicago Convention of 1944, recognizing the characteristics of nationality in aircraft, deals in Article 8 with aircraft "capable of being flown without a pilot." It seems that, in accordance with the general principles of this convention, such pilotless aircraft also have

¹⁹ R. Y. JENNINGS, *The Legal Status of Space Vehicles*—Report to the International Law Association, 51 Conference, Tokyo 1964.

²⁰ Registration of motor cars does not produce such effects.

²¹ International Civil Aviation Convention, Chicago, 7 December, 1944, ICAO Doc. 7300.

²² "By analogy to the law of the sea, it is generally agreed that space craft, if exempted from the territorial jurisdiction of subjacent states, remain subject to the laws, control and direction of the state of their respective nationality"—G. V. LEOPOLD, A. L. SCAFURI, *Orbital and Super-Orbital Space Flight Trajectories—Jurisdictional Touchstones for a United Nations Space Authority*, "Legal Problem of Space Exploration. A Symposium," US Senate, Committee on Aeronautical and Space Sciences, Washington 1961, 87th Session, pp. 533 - 534.

a nationality, a factor which may introduce some implications as to unmanned space vehicles.

The need for regulation and control of spacecraft seems to be clear. Because no international jurisdiction, as yet, directly applies to spacecraft, the idea of connecting each spacecraft with a specific State is desirable to achieve some degree of order in outer space and prevent chaos of lawlessness.

2. Application of the Concept of Nationality to Spacecraft. As already mentioned, for the most part writers in international law agree on the necessity of a connection between a spacecraft and a State responsible for its activities: "All space instrumentalities should bear a specific nationality and be subject to the laws of that nation in respect of their flight."²³

But differences of opinion existed when a more extensive analysis was attempted. C. W. Jenks in one of his early articles on this subject concluded that if international jurisdiction over space activities could not be achieved, a criterion to determine appropriate national jurisdiction must be established with analogies to maritime and international air law.²⁴ But later he took a rather dissenting position towards the concept of nationality of spacecraft stating that: "[...]space law should not start from an assumption comparable to the underlying assumption of the International Civil Aviation Convention that all aircraft are nationally operated"²⁵, and that the concept of nationality does not appear: "[...]necessary for the purpose of a general statement of the law of outer space."²⁶

It seems, however, that Jenks, though preferring not to impress upon space vehicles a characteristic called "nationality," would provide for such a relationship by some other means, as he recognized a necessity of registration of spacecraft, identification marks for space vehicles and responsibility for their conduct. Such an attempt to avoid the classical concept of nationality in the case of spacecraft probably results from his expectation that the space field would become an arena where international law will break with classical institutions, and also from his opinion that spacecraft should bear an earth flag.²⁷

²³ H. LIPSON, N. de B. KATZENBACH, *The Law of Outer Space*—Report to the NASA, October 1960, in: "Symposium 1961," (see *supra* note 22), p. 850.

²⁴ C. W. JENKS, *International Law and Activities in Space*, pp. 99 - 114.

²⁵ C. W. JENKS, *Space Law*, London 1965, p. 215.

²⁶ C. W. JENKS, *The International Law of Outer Space*—Report to the Institute of International Law, 2nd Comm., 1962, p. 213.

²⁷ *Ibid.*, p. 215. Compare with the remark of J. J. LOPEZ-GUTIERREZ that: "Space activities are performed on behalf of, and for the benefit of, mankind as a whole. Mankind seems to be missing its chance to intervene directly in space activities through appropriate mankind representatives and by means of spacecraft bearing the flag of mankind, as much as the early airlawyers' appeal for denying sovereignty

The views of another distinguished author in the field of space law, J. C. Cooper, were also developed and modernized in a very characteristic way.²⁸ In his case, however, the movement was towards the full recognition of the principle of nationality for space vehicles. He developed fully his views on this subject in 1966 admitting that: "Nationality has become a necessary, not merely an advisable spacecraft characteristic."²⁹

Furthermore, answering the question of how nationality should become a required characteristic applicable to spacecraft, he declared: "The classic evidence of nationality has always been registration[...]. It seems quite necessary for practical purposes that all spacecraft, whether civil or state, should be uniformly registered, and that provision be made by international convention that no object be launched into outer space unless or until the provisions of national and international registration have been carried out."³⁰

Similarly, Bin Cheng was of the view that spacecraft should have the same nationality status as aircraft.³¹ Assuming that, by a regime which includes a national authorisation system prior to entry into a common domain, extraterritorial control on the part of the authorising State may be exercised, A. Haley stated that a system of both national and international "licensing" is essential to the regulation of the legal status of spacecraft.³²

According to M. Seara Vazquez, the attribution of nationality to space vehicles is a duty of States, and this should be regulated by their internal laws. But international regulation should also be established in order to

on the airspace had to yield before decisionmakers who happened to decide otherwise"— *Legal Status of Space Vehicles—Nationality (Unilateral Decisions) v. Internationality (Multilateral Operation)*, in: *Proceedings of the Ninth Colloquium on the Law of Outer Space, Madrid 1966*, ed. by M. D. Schwartz, David, Calif., 1967, p. 136. Similarly, Ph. JESSUP and H. J. TAUBENFELD expressed their opinion that "the need and the incentive" for a multilateral action in the common interest "have never been greater than now" in the space field—*Control for Outer Space and the Antarctic Analogy*, New York 1959, p. 28.

²⁸ See: *Legal Problems of Upper Space* (1956), in: *Explorations in Aerospace Law*, ed. by I. Vlasic, Montreal 1968, p. 277; *The Russian Satellite—Legal and Political Problems*, "Journal of Air Law Commerce," Vol. 24, 1957, p. 384; *Fundamental Questions of Outer Space Law* (1960), in: *Explorations...*, p. 297.

²⁹ Supplementary Note to *Basic Problems of Spacecraft Nationality*, in: *Explorations...*, p. 252.

³⁰ *Ibid.*, pp. 253 - 254.

³¹ *Problems of Space Law*, "The New Scientist," May 19, 1960, pp. 1256 - 1258; also in: "Symposium 1961," pp. 666 - 668.

³² A. HALEY, *Space Law and Government*, New York 1963, p. 139.

avoid conflicts which might result from a diversity of regulations by different States.³³

Polish authors also admitted that: "One of the most important factors of future astronautical law seems to be the definition of the legal status of spacecraft. The first step would be to accept the idea of the nationality of spacecraft in the same manner as aircraft. The nationality of spacecraft would imply for the state a right of control and protection of the craft, responsibility for its proper international conduct, as well as jurisdiction over events occurring aboard."³⁴

The problem of nationality of spacecraft was also considered an essential and important topic by many international and national organizations and conferences.

The Draft Convention on Space Law, submitted to the Second Colloquium on the Law of Outer Space, provided in Articles 6 and 7 for the nationality of spacecraft, and fixed responsibility in the State of nationality.³⁵ The Institute of International Law, in its resolution adopted at the Brussels session in 1963, underlined the need for, and the importance of the registration and creation of an appropriate system of identification marks.³⁶ Similarly, the Draft Code of Rules on the Exploration and Uses of Outer Space, prepared by the David Davies Memorial Institute of International Studies, contained the following provisions:

"5.1. Subject to the provisions of Section 5.2 every spacecraft shall be registered in a State, in accordance with its laws and regulations, and also with the United Nations Committee on the Peaceful Uses of Outer Space.

5.2. Every spacecraft to be launched by an international body shall be registered with the Committee on the Peaceful Uses of Outer Space, which shall issue a registration mark."³⁷

³³ M. SEARA VAZQUEZ, *Cosmic International Law*, Detroit 1965, p. 90.

³⁴ M. ŻYLIĆZ, *Some Problems of Astronautical Law* (1958), in: *Symposium 1961*, pp. 1161-1162.

³⁵ See: M. S. SMIRNOFF, *The Role of IAF in the Elaboration of the Norms of Future Space Law*, in: *Second Colloquium on the Law of Outer Space, London 1959, Proceedings*, ed. by A. G. Haley and Welf Heinrich Prince of Hanover, Wien 1960, p. 151.

³⁶ "Every launching of a space object shall be registered by the State under the authority of which the launching took place with the United Nations or a special body to be created; the registration shall be effected promptly and with particulars to be agreed[...]. Every space object shall bear marks of identification showing its origin and use call signals making it possible to identify the State under authority of which the launching took place"—*Yearbook of Air and Space Law*, Montreal 1965, p. 641.

³⁷ "Journal of Air Law and Commerce," Vol. 29, 1963, p. 141; also in: *Yearbook of Air and Space Law*, Montreal 1965, pp. 653-654.

The UN General Assembly Resolution 1721 (XVI) established already in 1961 that "international law, including the Charter of the United Nations, applies to outer space and celestial bodies." Practically, however, prior to December 1963 it was possible, considering the question of nationality of spacecraft, to rely rather only on the opinions of authors in the fields of law and politics. While not law-making, they constituted, however, a recognized impact on the formulation of law.³⁸ The UN General Assembly Resolution 1962 (XVIII), known as the Declaration of the Legal Principles Governing the Activities of States in the Exploitation and Use of Outer Space, confirmed the views of most writers and identified a direct relationship between a spacecraft and a State though without giving to this relationship the explicit name of "nationality." However, the said declaration identified licensing and registration as the methods of establishing this direct relationship.³⁹

Although the close relationship between a State and a spacecraft is fully confirmed by the Declaration of 1963, the issue of nationality in spacecraft may seem, at first reading, more confusing than clarifying. At least six different possibilities are mentioned, each of them representing a relationship between a State and a space activity which implies international rights and responsibilities:

- 1) State which carries on a national activity in outer space (para. 5);
- 2) State concerned with a non-governmental entity participating in space activity (para. 5);
- 3) State of registry (para. 7, 9);
- 4) State which launches an object into outer space (para. 8);
- 5) State which procures the launching of an object into outer space (para. 8);
- 6) State from whose territory or facility an object is launched (para. 8).

The same principles as contained in the UN Declaration of 1963 were later almost identically proclaimed by the Space Treaty of 1967. The Articles concerned, i.e. Articles V, VI, VII and VIII, are analogous to paragraphs 9, 5, 8 and 7 of the Declaration. So, once more, we face the same problem of different possibilities as to relationship between a State and a spacecraft or space activity, but now they are contained in the undisputably binding norm of conventional law. Moreover, the second international treaty regarding the legal regulation of space activities, i.e. the Agreement on the Rescue of Astronauts, the Return of Astronauts and

³⁸ Compare with Art. 38 of the Statute of the International Court of Justice.

³⁹ It may be recalled that "the classic evidence of nationality has always been registration," (see *supra* note 30).

the Return of Objects Launched into Outer Space, introduces another nebulous concept of "launching authority" which is defined as:

"[...]the State responsible for launching, or, where an international inter-governmental organization is responsible for launching, that organization."⁴⁰

3. Registration and Nationality as the Main Elements Defining the Legal Status of Spacecraft. It seems, that the link between a spacecraft and a State of registry is the strongest and most important of all the several possibilities.

Theoretically, it may be even possible for all the above-mentioned active States to participate, within the framework of a cooperative agreement, in one single launching. But in such a case the State carrying on a national activity in outer space is concerned with the actual experiment or activity, and this State is only indirectly concerned with the spacecraft and the conduct of its crew. The spacecraft does not owe allegiance to this State. Also the State which is concerned with the activity of its non-governmental entity in outer space can act extraterritorially only through this very narrow relationship. Similarly, the States launching an object into outer space, procuring the launching or from whose territory or facility an object is launched, have a limited responsibility for the space vehicle in that it should not cause any damage to others. The authority which these States may exercise is limited to safeguarding their interest which is the issue of damage.

On the other hand, according to Article VIII of the Space Treaty:

"A State Party to the Treaty on whose registry an object launched into outer space is carried, shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body."

Furthermore, as Article V of the same Treaty provides, when astronauts make an emergency landing:

"[...]they shall be safely and promptly returned to the State of registry of their space vehicle."

In consequence, the authority to control the space vehicle, exercise jurisdiction over its manner and operation as well as over the conduct of persons on board, including crew, is vested in the State of registration of the spacecraft. So the most significant authority to act extraterritorially over the spacecraft seems to be vested under the Space Treaty in the State of registry.

The concept of the "State of registry" is known and well-established in maritime and air law. Since the registration is the evidence used to

⁴⁰ Art. 6.

denote "nationality," so it seems that the following main conclusions, resulting from the provisions of the Space Treaty, may be drawn with regard to the legal status of spacecraft:

1) Spacecraft have a legal quasi-personality in public international law, discussed above as "nationality;"

2) Spacecraft have the nationality of the State in which they are registered;

3) Spacecraft are considered to be a part of the territory of the State of registry for the jurisdictional purposes.

However, it is still necessary to establish whether: "The State of the flag has a right and a duty to control its spacecraft and accordingly becomes liable to pay for compensation when the spacecraft have caused any damage."⁴¹

Who is Liable for Space Activities?

As previously stated, an increasing number of experiments in outer space creates a potential danger of harm to States and individuals on the earth's surface or to aircraft in flight. Various types of damage caused by space vehicles may occur in outer space, other regions of common domain, in the State of registry, or in any other State.⁴² In the absence of specific agreements or legislation, damage caused by space activities within the territorial jurisdiction of a State will be governed by its existing national laws, even although they may not give adequate compensation. If the damage occurred on the high seas the usual rules of maritime law, at last, could be applied. But the question remains open if the damage occurs in other States or in outer space. In consequence, allocating liability among

⁴¹ J. J. LOPEZ-GUTIERREZ, *op. cit.*, p. 137.

⁴² The kinds of damage that could be caused by the launching of space vehicles are enumerated in the principle contained in Art. VII of the Space Treaty, as stated by the tripartition: damages produced "[...]on the earth, in air space or in outer space." It has been noticed that "Such tripartition seems to follow the natural development of the schemes of air law international treaties on liability, chiefly by the Rome Convention, October 7, 1952, on damages produced by aircraft to third parties on the ground, and by International Draft Convention on Aerial Collisions prepared by Juridical Committee of International Organization of Civil Aviation (OACI) in 1963. In fact, it would only put, near the traditional cases of air law (damages caused by aircraft on the ground, and collisions of aircraft), a third new hypothesis, that of collision between space vehicles"—G. MELONI, *International Liability for Space Activity*, in: *Proceedings of the Tenth Colloquium on the Law of Outer Space, Belgrade 1967*, ed. by M. D. Schwartz, Davis, Calif., 1968, p. 188.

the several States which may be involved in a launching still remains a very important and crucial problem.

1. The State as a Party Liable. Although nothing is said in the Convention on International Liability whether States are liable for damage caused by space activities carried on by their governmental agencies or by non-governmental institutions, international responsibility for these activities is laid on them by Article VI of the Space Treaty:

"States Parties to the Treaty shall bear international responsibility for national activities in outer space[...]whether such activities are carried on by governmental agencies or by non-governmental entities."

On these points the Space Treaty has added nothing new to what was contained in the UN Declaration of Legal Principles of 1963, where the corresponding clause emerged as a compromise provision resolving the issue of whether space activities should be restricted to governmental agencies or left open to private corporations—a compromise between the Soviet Union and the United States conflicting positions taken up in the Sub-Committee.⁴³ The original USSR position was that all space activities should be carried out solely and exclusively by States. That position was entirely unacceptable to the United States which had plans for telecommunications satellites to be made and operated by private enterprise.⁴⁴

It seems, however, that the next part of Article VI of the Space Treaty has a certain constitutive effect as well inasmuch as it obliges States not to permit non-governmental entities to engage in space activities without authorisation and continuing supervision of their activities.

2. Which State Is Liable? According to the general principles of international responsibility and to the special provisions contained in Article VI of the Space Treaty:

"States Parties to the Treaty shall bear international responsibility for national activities in outer space[...]"⁴⁵

⁴³ Czechoslovak author, V. KOPAL, goes even further and says: "Even if the principle of the responsibility of States activities was not explicitly stated, it could be deduced from general international law. Since international law, according to Resolution No. 1721 and the Space Treaty itself, applies to outer space, the principles of international law concerning the responsibility of States, be it for their own acts or for acts of private persons which are subjects to their jurisdiction, would also apply to situations arising from space activities."—*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including Moon and Other Celestial Bodies*, "Yearbook of Air and Space Law," Montreal 1966, pp. 473 - 474.

⁴⁴ The Communication Satellite Corporation—known as COMSAT.

⁴⁵ Compare with para. 5 of the Declaration of 1963.

The problem, however, begs the question as to which State should be held liable, and against which State could the injured party pursue her claim for damage in those cases where there is not identity between the State launching a space object, the State possessing it, and the State from whose territory or facility the object was launched.

Theoretically there are possible even more complicated situations where, for example: State A was the possessor of a rocket, bearing its registration marks, which was used for the launching of a space vehicle; State B was the owner of the spacecraft; State C had sovereign rights over the territory from which that space object was launched; State D provided equipment for performing the launching; State E delivered trained operating personnel; State F exercised control over the orbit of the spacecraft; and States G, H, I lent their financial support to the experiment and had their observers at the launching site. The situation would be really very complicated and difficult for a hypothetical State J, if the spacecraft, together with fragments of the rocket, fell down and caused damage on its territory.

In its Article VII the Space Treaty proclaims the international liability of "each State Party to the Treaty that launches or procures the launching" and of "each State Party from whose territory or facility an object is launched."⁴⁶ However, the question arises which one is the launching State,⁴⁷ and what kind and what degree of participation is required to bring a State within the definition of the launching State and thus liable for the damage.

Various answers to this question have been given by different authors. C. W. Jenks said that "the launching State[...]remains responsible in all circumstances for whatever it launches."⁴⁸

M. Lachs went further introducing certain new elements and stating that liability rests on the State: "[...]a) which launches or procures the launching of an object into outer space; b) from whose territory or facility an object is launched. In the first case, it is not necessary that the object should have been launched from the territory of the State concerned; in the second, the State is liable even if it is not responsible for the launching."⁴⁹

⁴⁶ Compare with para. 8 of the Declaration of 1963.

⁴⁷ It may be recalled that the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space uses a similar term "the launching authority" which is defined in Art. 6 as referring to "the State responsible for launching."

⁴⁸ C. W. JENKS, *Space Law*, p. 211.

⁴⁹ M. LACHS, *The International Law of Outer Space*, "Recueil des Cours," Vol. 113, 1964-III, p. 76.

The Institute of International Law expressed the opinion that "the State under the authority of which the launching of a space object has taken place shall be liable."⁵⁰ Draft Code, prepared by the David Davies Memorial Institute, contained the provision that "the State or States or international body responsible for the launching of a spacecraft shall be liable."⁵¹

An interesting draft in this field, attempting to solve the problem of liability for damage caused by spacecraft as well as by aircraft, was prepared by Polish late professor C. Berezowski and submitted to two non-governmental bodies.⁵² The author tried to equate the situation with respect to spacecraft with that of aircraft, by broadly categorizing all kinds of damage caused on the earth's surface "by a flight craft in movement or by any person or thing falling or detached therefrom."⁵³ According to that draft, the liability for compensation would attach to the operator of the flight craft; the operator being the person in whose service an aircraft is employed or the contracting State which launches or procures the launching of a spacecraft. Subsidiary liability would also attach to the State from whose territory or facility a spacecraft was launched.

Also trying to find some connection with air law, a similar suggestion was expressed by J. C. Cooper: "[...]the principles in the Rome Convention on damage caused by aircraft to third parties on the surface might well be applied to damage caused by spacecraft[...]."⁵⁴

In an attempt to solve this difficulty long discussions have taken place in the Legal Sub-Committee. At the beginning two opposite views were expressed. The first one was that it would be appropriate to provide that a State which launches or procures the launching or whose territory or facility is used in the launching of object into outer space would be liable. An opposite view proclaimed that the launching State alone should be made liable. Liability should not be attached to States providing territory

⁵⁰ Resolution on the Legal Regime of Outer Space, adopted at Brussels on September 11, 1963, "Yearbook of Air and Space Law," Montreal 1965.

⁵¹ Art. 6.1, *ibid.*

⁵² *Draft Convention on Damage Caused by Foreign Flight Craft to Third Parties on the Surface*—International Law Association, Helsinki Conference 1966, Space Law Committee Report, Annex D, pp. 39 - 42. The same document is annexed to Professor Berezowski's report *Le problème de la responsabilité résultant de l'exploitation des engins volants*, submitted to the Ninth Colloquium on the Law of Outer Space.

⁵³ *Proceedings of the Ninth Colloquium...*, p. 97.

⁵⁴ J. C. COOPER, *Legal Problems of Spacecraft in Airspace*, in: *Explorations...*, p. 313.

for the launching of space objects because it would discourage such States from using their territories for that purpose.⁵⁵

An exchange of views was continued and, for example, according to the Report of the Legal Sub-Committee on the Work of Its Fourth Session, it was reported that the following criteria: "[...]were discussed without prejudging the link between those criteria and the nature of liability:

- (a) providing territory for the launching of a space object;
- (b) providing facilities for the launching of a space object;
- (c) exercising control over the orbit or trajectory of a space object;
- (d) owning or possessing a space object;
- (e) procuring the launching of a space object;
- (f) participating in the launching of a space object;
- (g) registration (international or national) of a space object."⁵⁶

At the sixth session in 1967 an agreement was reached on the point that in defining the term "launching State" the following elements should be included:

"1) the State which launches or attempts to launch the space object or the space device;

2) the State from whose territory the space object or space device was launched;

3) the State from whose facility the space object or space device was launched."⁵⁷

The problem whether the State referred to in the last two categories should be liable primarily, or only secondarily, was not solved and was left for further consideration.

The above-mentioned provisions of paragraph 8 of the UN Declaration of 1963 (repeated later in Article VII of the Space Treaty) have been elaborated in the five proposals in different ways.

In the proposal submitted by the United States at the beginning of the detailed discussion in 1964 "the State of registry" was to be held liable.

⁵⁵ See: Report of the Legal Sub-Committee on the Work of Its Third Session (1964)—Doc. A/AC. 105/21, pp. 8 - 9. The definition of "launching State" posed a difficult problem. The then United States draft included the phrase "procures the launching" within the definition as meaning "defraying the cost of launching." The Canadian delegation suggested adding the following to that concept: "State owning the space vehicle, State that participated in a common undertaking and a State operating the object once launched"—Doc. A/AC. 105/21, Annex II. For more details see also: P. G. DEMBLING, D. M. AARONS, *Space Law and the United Nations—the Work of the United Nations Committee on the Peaceful Uses of Outer Space*, "32 Journal of Air Law and Commerce," 1967, pp. 329 - 351.

⁵⁶ Doc. A/AC. 105/29, p. 4.

⁵⁷ Doc. A/AC. 105/37. Confirmed also later at the seventh session in 1968; see Doc. A/AC. 105/45.

However, such a State would have meant not only the State registering an object but also: "Contracting Party which launches or participates in launching or whose natural or juridical persons launch or participate in launching, or whose facility or territory is used for launching into outer space an object that is not registered with another Contracting Party."⁵⁸

So in fact, a criterion of registration was not exclusive and hence, it could not create sufficient justification for such a term as "the State of registry." A revised US draft has replaced "the State or registry" by "the launching State,"⁵⁹ which should have included a contracting party⁶⁰ which launches or actively and substantially participates in the launching of an object into outer space, or from whose territory or facility an object is launched, or which exercises control over the orbit or trajectory of a space object.

According to the Belgian draft liability should be held by "the launching State" which should be understood to mean the State or States which carried out the launching or, when the injured State is not able to determine the said State or States, the State whose territory was used for such launching.

The Hungarian proposal introduced several criteria and provided that liability should rest with the State which had launched, or attempted to launch, or procured the launching of a space object or vehicle, or with the State from whose territory or facility the launching had been made. The last edition of this draft replaced the previous term "facilities" by a broader expression "territory or facility," and did not introduce the criteria of ownership or possession of a space object which were used in the previous version.

The Indian draft used the term "respondent" for defining a "launching

⁵⁸ Doc. A/AC. 105/C. 2/L. 8.

⁵⁹ It seems, however, that the idea of registration should not be rejected. At the fourth session of the Sub-Committee the Italian delegate suggested that, as an additional criterion, "the launching State" should include "the State which had notified the Secretary General of the UN of a space device and given the data necessary for its identification for the purpose of entry in the registry kept by the Secretariat for that purpose"—Doc. A/AC. 105/C. 2/ER. 51, p. 4. An appropriate system of identification marks and the establishment of legal and technical registration procedures for all space launchings and for all spacecraft could be highly desirable and useful, particularly in cases when a State suffering damage might experience considerable difficulty in identifying the launching State. The registration or entry in a register of objects launched into outer space is mentioned in several provisions of the Space Treaty. The general idea of registration is also advocated by M. McDUGAL, H. LASSWELL and J. VLASIC in: *Law and Public Order in Space*, New Haven 1963, p. 615.

⁶⁰ And also an international organization; but the problem of liability of international organizations will not be considered in this study.

authority" which "shall be absolutely liable to pay compensation." The "launching authority" meant the State responsible for the launching.⁶¹

The proposal sponsored by Italy established the liability of launching State, which should be understood to mean the State launching or procuring the launching of a space object, entered in its own registers or registered with the UN Secretariat.⁶² Finally that was the only draft which mentioned registration in its text.

The foregoing analysis indicates that whatever expression was used or criterion was advanced to determine the party liable, all five text have recognized a responsibility of the State carrying out the launching, and all of them, except the Indian draft, took into account the criterion of territory. The term "launching" was unanimously understood during the discussion in the Sub-Committee to include attempted launching. The same was said in all quoted drafts, except the Italian one.

The Convention on International Liability for Damage Caused by Space Objects confirmed general principles expressed by the said five drafts. General rule established by Article II of this Convention says:

"A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."

According to the definitions contained in Article I:

"(b) The term "launching" includes attempted launching.

(c) The term "launching State" means:

(i) A State which launches or procures the launching of a space object,

(ii) A State from whose territory or facility a space object is launched.

(d) The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof."

⁶¹ The term "launching authority" was used in the proposal submitted by Australia at the seventh session of the Sub-Committee, where it was elaborated more precisely than in the Indian draft: " 'Launching authority' means a Contracting Party that launches or actively participates in the launching of a space object[...]. It includes a Contracting Party from whose territory or facility a space object is launched, a) if that Contracting Party does not disclose the identity of the Contracting Party or international organization responsible for launching a space object from its territory; or b) if none of the States or international organizations responsible for the launching is a party to this Convention"—Doc. A/AC. 105/C. 2/L. 39. It may be recalled that the term "launching authority" has also been used in the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, and has been referred for the purpose of this agreement, *inter alia*, to the State responsible for the launching. But the term "responsible for the launching," left without additional explanations, is not precise and it does not make clear the relationship between the criteria of performing the launching, procuring it, or using a territory for such action.

⁶² In certain cases the Italian draft provided also for the liability of the State whose territory or facility was used for the launching.

It goes without saying that according to the Convention, in the case where a launching was carried out on the high seas or on a territory which belongs to no State, the applicable criterion shall be "the launching State" just the same, i.e. the State which carried out the launching operations.

It seems, however, that besides two meanings of "the launching State," mentioned in Article 1, also the State owning or possessing (or whose nationals own or possess) a space object which caused the damage, may be taken into account. Although the Convention does not expressly recognize this possibility, it seems that the expression "procures the launching" would cover situations in which one State—an owner of a space object—used the territory or facility of another State for its launching or when such an object was launched by another State.

3. The Question of Joint Liability. All preceding considerations lead us to the very important problem, namely, the question of liability in cases of joint undertaking where at least two or more than two States are involved.⁶³ Since a State suffering damage might experience considerable difficulty in identifying the launching State, particularly where the launching was performed as a common undertaking involving more than one State, it would be equitable and practical to create a legal system placing the liability on all the States participating in the joint activity. On the other hand, the question arises as to the apportionment of liability among the participating States.

The Space Treaty, mentioning only the responsibility of States procuring a launching of space object, does not give any solution to this problem. Moreover, the term—a State which "procures the launching"—is not precise and exhaustive.

It has been noticed that: "the question of responsibility (joint or several) for activities carried on by two or more States[...]remains open and calls for further specification in the law making process."⁶⁴

The idea of joint liability has been analysed by several authors; for example, the Soviet writer G. P. Žukov pointed out that if a State suffered damage which resulted from the joint activity of two or more States, those States should be jointly and severally liable with each having the

⁶³ Such common activities are not only hypothetical; e.g. the United States and Italy are engaged in a joint space undertaking known as the "San Marco" project. Some launchings took place in the United States, while the launching team was Italian, and further launchings were to take place from American platforms in the ocean with Italian made space vehicles. See: Doc. A/AC. 105/C. 2/SR. 48 (September 29, 1965), p. 4.

⁶⁴ M. LACHS, *op. cit.*, p. 74.

right of recourse against the other.⁶⁵ Similarly, the Hungarian author G. Gal expressed the opinion that: "[...]it is essential for the protection of the interest of the victims to lay down the principle of joint and several responsibility."⁶⁶

The problem of liability in cases of joint undertaking has been discussed in the Legal Sub-Committee from the beginning of its considerations on the subject of liability for damage caused by space activities. Finally, the Report of the Legal Sub-Committee on the Work of Its Seventh Session contained, as the "text agreed," the following rule: "Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused."⁶⁷

The same kind of liability was provided in the case of damage caused to a third State and resulting from a collision of space objects belonging to different States.

All five draft proposals were based on the concept of joint and several liability of States participating in a joint undertaking though not all of these explicitly used this expression. In any event, it seems safe to conclude that what in fact was in dispute was the terminology to be used and the method of procedure to be followed, and not the principle of joint and several liability itself.

The principle of joint and several liability has been accepted by and included into the Convention on International Liability for Damage Caused by Space Objects. Furthermore, it has been developed in certain particular forms. General rule, established in paragraph 1 of Article V, says that:

"Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused."

Besides this, the principle of joint and several liability shall be applied in the event of damage resulting from the collision of space objects of two launching States and being caused "to a third State or to its natural or juridical persons" (Art. IV, para. 1). There are, however, some differences in the extent of this liability which, being generally absolute (Art. V, para. 1, and IV, para. 1a), may be based sometimes on the fault of liable States or on the fault of persons for whom they are responsible.⁶⁸

⁶⁵ G. P. ŽUKOV, *Problema otvestvennosti za uščerb v kosmičeskom prave*, "Sovetskoe gosudarstvo i pravo," 1966, No. 6, pp. 67 - 73.

⁶⁶ I. GAL, *Space Law*, Budapest 1969, p. 235.

⁶⁷ Doc. A/AC. 105/45, p. 6.

⁶⁸ In the case of collision "if the damage has been caused to a space object of the third State or to persons or property on board that space object elsewhere than on the surface of the earth"—Art. IV, para. 1 b.

There is also a possibility of concluding agreements between States regarding apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable (Art. V, para. 2). Similarly, in the case of damage resulting from the collision of space objects of two States and thereby being caused to a third State, the burden of compensation may be apportioned between the first two States in accordance with the extent of their fault or, when it cannot be established, equally between them.

However, with the aim of preserving interests of the State suffering damage, in no case such agreement or apportionment shall prejudice the right of this State "to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable" (Art. V, para. 2).⁶⁹

Nationality as a Criterion for Identifying Parties Liable for Damage Caused by Space Activities

1. Inadequacy of Other Criteria. In summing up the considerations of previous parts it can be stated that in formulating a regime of liability for damage caused by space activities, one of the greatest difficulties seems to be the great variety of criteria proposed to define parties liable for such activities. It follows, therefore, that responsibility for such damage could be borne by:

1) The State which launches an object into outer space. It may be assumed that this State will usually exercise control over the space object during its flight, as it possesses, in practice, all the necessary installations for this purpose. However, the definition of "launching State" contained in the Convention on International Liability does not seem to be correct, as it mixes together the concept of State which launches or procures the launching of an object with the concept of territorial State.

2) The State from whose territory or facility an object is launched. Although this State may not have the same interest or facilities which are necessary for the control of that object as other participating States, it is considered liable because of its willingness to lend its territory for the purpose of launching. Moreover, according to Article V, paragraph 3 of the Convention on International Liability, for the purposes of joint and several liability:

⁶⁹ The Convention also applies the principle of joint and several liability in the case of liability of international organizations: "[...]organization and those of its members which are States Parties to this Convention shall be jointly and severally liable"—Art. XXII, para 2. Cf., however, *supra* note 60.

"A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching."

The burden of liability in the case of the territorial State should be weighed out in appropriate agreements concluded between this State and other participants.

3) The State owning or possessing (or whose nationals own or possess) a space object which caused the damage. This State is highly interested in the mission of the spacecraft and should therefore bear liability at least to the same extent as the launching State. Furthermore, in most cases it will also be the country where the space object has been constructed and manufactured, and at least some damages may be caused by defects in these processes. Moreover, this State will probably be the State of flag or registry, and whose registration mark is attached to the space object. However, this State is not mentioned expressly in the Convention on International Liability.

Several reasons are usually mentioned for the joint and several liability of all these States. The applicant State shall have the right to decide against which of the participating States—all being jointly and severally liable to it—it will pursue its claims. All participating States, each having the right of recourse against the other, may take up the question of apportioning liability among themselves by entering into appropriate arrangements with each other, taking into account the type and degree of participation in such common undertakings. These arrangements would usually be a matter for the States concerned. From the political point of view such a type of liability would also be of certain advantage to those applicant States and their governments which do not recognize one or more participating States, or have not been recognized themselves by such a State.⁷⁰

It is obvious that the assurance of easy identification of the responsible party, against which the damaged party could seek redress, is one of the most important questions in the system of liability for damage caused by space activities. An incontestable benefit can be derived from fixing liability in a single State, with perhaps others being secondarily responsible. On the other hand, however, it should be equally important to have a real relationship and true link between the damage caused and the State liable.

The existence of such a relationship seems to be doubtful under Article VII of the Space Treaty, which places liability on State which:

⁷⁰ V. KOPAL, *Problems of Legal Responsibility for Space Activities*, in: *Studies in International Law*, vol. 2, Prague 1966, p. 96.

"[...]launches or procures the launching of an object into outer space,[...]and[...] from whose territory or facility an object is launched."

Almost identical text is contained in Article I of the Convention on International Liability.

Furthermore, where there is no specific agreement concerning the apportionment of liability, there is a constant danger that the rule of joint and several liability discussed above may cause serious detrimental results and put an unjustified burden of full compensation on a party playing quite a minor role in the space activity.⁷¹

This attitude, expressed in the Space Treaty and repeated by the Convention on International Liability, appears to be directed primarily towards the hazardous aspect of launching an experimental spacecraft. It does not take into consideration the development and practical use of vehicles, capable of flying both in airspace and outer space, with power systems making possible take off, orbiting, landing, and take off again before returning to the State or place where the flight originally began. In such a case, the State from which a spacecraft was launched may bear no closer relationship to any damage caused by its flight than, for example, the State from which an aircraft departed before its crash.⁷² There is a great probability that in the not too distant future, when space activities progress beyond the experimental stage, the danger of any damage caused by the very process of launching will be less and less serious. In consequence, it seems that as the progress in space activities will be continued, the inadequacy of such terms like "launching State," "launching authority" or "State from whose territory or facility an object is launched," as essential criteria for identifying parties liable, will become more and more visible.

2. Responsibility of the State of Registry. As the Declaration of Legal Principles, the Space Treaty and the Convention on International Liability clearly indicate, there is a tendency towards the concept of individual State responsibility for the spacecraft and space activities which the State licenses or authorizes.

Although most spacecraft at this time are State owned, operated and launched, and any damage resulting from their operation would constitute acts of State, Article VI of the Space Treaty explicitly underlines that

⁷¹ Although according to Art. V, para. 2 of the Convention on International Liability: "A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching."

⁷² In the age of jet transportation such crashes and resulting damage may occur many hours and thousands of miles away from the place of departure.

States shall bear international responsibility for all national activities in outer space:

"[...]whether such activities are carried on by governmental agencies, or by non-governmental entities."

According to general international law, the State is not responsible for the acts of its nationals and any vicarious responsibility of the State for damage caused by its non-governmental entities or private citizens would flow from the failure of the State to take the necessary measures to control their activities. Consequently, the State is responsible for damages flowing from its failure to act and not directly from the act of its individuals.⁷³ However, the Space Treaty, as well as the UN Resolutions, seem to adopt the principle that a State is liable for damages resulting from the acts of private persons. Since, according to the Convention on International Liability, this shall be absolute liability for which a State cannot practically take any mitigating action, it is apparent that privately-owned spacecraft have a relationship with the licensing State not enjoyed by other instruments of transportation.

The national character of spacecraft is strictly connected with appropriate requirements, contained in national laws, such as the licensing, registration and marking of these vehicles. In fact, space vehicles are even more precisely marked than seagoing vessels or aircraft. Unlike aircraft, they are marked not only by combinations of letters and numbers, but also they usually possess their own names. Moreover, they very often have their national flags superimposed on their surface.

Furthermore, the State of registry, i.e. the State of nationality of the spacecraft,⁷⁴ retains, in accordance with Article VIII of the Space Treaty:

"[...]jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body."⁷⁵

In this respect, the position of the State which controls the object seems to be near to the position of the operator of an aircraft, who is principally liable under the Rome Convention of 1952 for damages caused by foreign aircraft to third parties on the surface, and the operator

⁷³ L. F. L. OPPENHEIM, *International Law. A Treatise*, vol. 1, 8th ed. by. H. Lauterpacht, London 1955, pp. 335 - 369.

⁷⁴ As it has been stated before, registration does not create nationality but is merely evidence of nationality.

⁷⁵ Similarly, in accordance with Art. V of the Space Treaty, in the case of an emergency landing, astronauts "shall be safely and promptly returned to the State of registry of their space vehicle."

of nuclear installations or nuclear ships under the Vienna and Brussels Conventions.⁷⁶

Accordingly, confronted with all the above-mentioned reasons, it seems that the link between a spacecraft and the State of registry (i.e. the State of nationality) is stronger, closer and more persistent than any other tie which a State engaged in the same space activity possesses.

Nationality, as it has been emphasized, will be of great importance for the resolution of disputes, the assertion of claims, the protection of spacecraft, and the allocation of responsibility.⁷⁷ It has been suggested that in any allocation of responsibility the inscription in a national register of spacecraft should be:

"[...]a basis for the responsibility for all acts and damages which could be done by a spacecraft during its flight in outer space, in the atmosphere, and on the ground of the earth or on other planets."⁷⁸

Though according to the Convention on International Liability the State of registry may be held liable only when it is a "launching State," it seems that a regulation fixing liability in the State of registry would probably be the most appropriate.⁷⁹ The State of registry could then enter into such other arrangements as it may find necessary. If the State is internationally liable for damages caused by privately-owned spacecraft, it can impose certain conditions for insurance or bond⁸⁰ as a requirement for registration. Finally, the allocation of essential liability in the State of registry has the advantage that the damaged party can, with relative ease, identify the responsible party against which it should seek redress. It seems to be a very important factor especially in the face of the fact

⁷⁶ International Convention on Civil Liability for Nuclear Damage, Vienna 1963; Convention on the Liability of Operators of Nuclear Ships, Brussels 1962. See: P. B. DEMBLING, *International Liability for Damage Caused by the Launching of Objects into Outer Space*, in: *Proceedings of the Eleventh Colloquium on the Law of Outer Space*, New York 1968, ed. by M. D. Schwartz, Davis, Calif., 1969, pp. 236 - 246. See also: J. C. COOPER, *Liability for Space Damage—The United Nations—The Rome Convention*, in: *Explorations...*, pp. 433 - 438.

⁷⁷ M. McDUGAL, H. LASSWELL, J. VLASIC, *op. cit.*, p. 513.

⁷⁸ M. S. SMIRNOFF, *op. cit.*

⁷⁹ It has been noticed that: "In no other way can national responsibility be insured in case of damage caused on the earth's surface or collision in the airspace or in outer space"—J. C. COOPER, *Basic Problems of Spacecraft Nationality* (1966), in: *Explorations...*, p. 254.

⁸⁰ "When enterprises with a high level of hazard potential are undertaken in the future, an international commission or agency could require the posting of an indemnity bond to cover the possible liabilities to be incurred. The issuance of such bonds may develop into an entirely new branch of high finance"—A. G. HALEY, *op. cit.*, p. 152.

that numerous space objects, launched many years ago, still orbit the earth. In the case of any damage caused by such objects, their identification by registration marks (or, at least, their fragments) would be the easiest, if not the only possible, method.

3. National and International Registration of Spacecraft and Space Activities. If it is assumed that a relevant and legally valid link of registration between a space object and a State has to be maintained, one significant question remains to be answered, namely, the form in which this legal link should be made public. Different proposals and practices in this field may be classified generally under the following categories (or their combinations):

(i) *Official Announcement of Launchings.* The Committee on Space Research (COSPAR),⁸¹ according to Resolution 14 adopted at its meeting in Warsaw in June 1963, underlined:

"[...]that prompt announcements[...]of all satellite launchings [...]are needed to enable the international designation scheme[...]to work in orderly fashion; and that the descriptive information on scientific experiments[...]is needed within a few weeks after launching in order to keep the scientific community informed on current space research through the COSPAR Information Bulletin."⁸²

There are also other organizations, such as NASA (National Aeronautics and Space Administration) and SPADATS (North American Air Defence Command's Space Detection and Tracking System), compiling statistics of space launchings.

(ii) *Registration of Launchings.* The registration of launchings is recommended to the States under the UN General Assembly Resolution 1721 (XVI) adopted in 1961. According to this resolution, the General Assembly:

"[...]calls upon States launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary General, for the registration of launchings."

As a result of this, in the special registry maintained by the Secretary General of the United Nations since 1962, several hundred launchings have been recorded. This registration, however, is on voluntary basis as the States "launching objects into orbit or beyond" are only invited to register such launchings.

⁸¹ Established by the International Council of Scientific Unions (ICSU) in October, 1958, to continue the cooperative programs of rocket and satellite research successfully undertaken during the International Geophysical Year of 1957 - 1958.

⁸² "Yearbook of Air and Space Law," Montreal 1965, p. 630.

(iii) *National Registration of Space Objects*. National registration was implied in the Declaration of Legal Principles which used in paragraph 7 the term "State of registry." This implication has been repeated in Articles V and VIII of the Space Treaty. Every State should have its own register for all vehicles bearing its nationality. Each State should, of course, be left free to determine the requirements for national registration as it is with the registration of ships and aircraft. Hence, as it has been noticed: "[...]international action is needed merely to make mandatory the establishment of a national registry of spacecraft."⁸³

In the opinion of some authors, it follows from Article VIII of the Space Treaty that: "the States carrying on space activities are obligated to establish and to keep national registries by municipal legal rules."⁸⁴

It seems, however, that such an interpretation goes too far. Alternatively, analysing the provisions of the Space Treaty, it may be concluded that: "[...]no obligation to keep a national registry follows from Article VIII. From Article VIII it follows that a State Party which does not carry a space object on its registry will not benefit from the provisions of that article. Failure to maintain a registry would be no violation of the Treaty."⁸⁵

This should not, of course, weaken in any degree the broadly correct view that: "The establishment of such a registry in every launching State, if for no other reason than as a modality of control over national spacecraft is certainly desirable."⁸⁶

Furthermore, it has been correctly noticed that such registries should be kept: "[...]not only for enabling identification of ownership, but also for determining the facts necessary for salvage and liability for damage."⁸⁷

(iv) *International Registration of Space Objects*. Although Article VIII of the Space Treaty denotes only a national registry and does not contain any provision about international registration, the question of such registration of space objects, not only as a recommended registration of launchings but as a mandatory registration of spacecraft, has been extensively discussed. The Draft Code, prepared by the David Davies Memorial Institute, contained very characteristic provisions in this matter which has already been quoted above.⁸⁸ Similarly, the "Draft convention concerning

⁸³ I. A. VLASIC, *The Growth of Space Law 1957 - 1965. Achievements and Issues*, "Yearbook of Air and Space Law," Montreal 1965, p. 389.

⁸⁴ I. HERCZEG, *Introductory Report—Problems of Interpretation of the Space Treaty*, in: *Proceedings of the Tenth Colloquium*[...] Belgrade 1967, p. 307.

⁸⁵ *Ibid.*, Mrs Galloway objection, p. 308.

⁸⁶ I. A. VLASIC, *op. cit.*, p. 389.

⁸⁷ I. HERCZEG, *op. cit.*, p. 307.

⁸⁸ See: *supra* note 37.

the registration of objects launched into space for the exploration and use of outer space," submitted by France, provided in its Article 1:

"Any object launched into space for the exploration or use of outer space shall be registered by entry in a register kept by a service under the supervision of one or more Governments Parties to this Convention."⁸⁹

Although there is still no consent as to details for such an international system of registration, there is undoubtedly general agreement that: "What is urgently needed is an international agreement which would make registration with the United Nations or some other international agency mandatory, and which would prescribe the exact nature of information that must be reported."⁹⁰

It should be mentioned that the concept of international registration creates a danger that such registration would be of a purely declaratory nature, different from the constitutive character of registration within the classical concept of nationality. In consequence, it would be a danger for expediency to apply nationality as a criterion for identifying parties liable for space activities. It may create an especially difficult situation in the case of registration of space objects launched by several States together or by international organizations. It seems, however, that some solutions, which were found in analogous situations of air law, may be useful and helpful for possible application to space activities.⁹¹

Conclusion

In launching and employing space vehicles in its activities, every nation active in space must certainly bear the burden of responsibility for injuries and damages sustained by persons or property.

As a logical inference from all the above-mentioned factors; because of the inadequacy of all the various proposed criteria defining parties

⁸⁹ Doc. A/AC. 105/C. 2/L. 45.

⁹⁰ I. A. VLASIC, *op. cit.*, p. 389.

⁹¹ See: Resolution of the Council of ICAO of December 14, 1967, entitled *Nationality and Registration of Aircraft Operated by International Operating Agencies*—ICAO Doc. 8722-C/976. Although the said resolution does not elaborate on specific details concerning responsibility or liability in the case of joint or international registration, it seems that it creates a significant development in the field of reconciliation of the traditional concept of nationality, practical usefulness of the institution of registration, and the need for their application to modern international relations. Like many other useful experiments in air law, it also seems possible to transfer this one, with some essential modifications, into the law regulating liability for space activities.

liable for space activities; since it is of great importance to establish a clear and formal link between a spacecraft and a particular State; and for the obvious benefits which will be derived from fixing responsibility in a single State, with perhaps other States (where it is logically needed or justified) being secondarily responsible—it seems that a rule which:

(a) recognizes, as a superior link, the relationship created by nationality, albeit adapted to the conditions of the modern world; and

(b) fixes primary liability in the State of registry of the space object—would be the most suitable to assure that any regulation on liability for damage caused by space activities will: “[...]extend its protective wings over all those whose rights may be affected or who suffer damage whenever it may occur: on the ground, in the air, in outer space itself.”⁹²

⁹² M. LACHS, *op. cit.*, p. 74.

Sovereign Rights to Cultural Property

by HALINA NIECIÓWNA

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It is commonly agreed that a more intensive development of international relations in the domain of culture began only at the end of the 19th century.¹ It is, however, beyond denial that from the dawn of civilization there have existed contacts in science, art and literature. This is amply proved by the multidirectional influence exerted by different cultural centres revealed and studied by scientists. Such undoubtedly extensive international cultural relations were for long left in the hands of non-governmental agencies. In fact, not before the end of the 19th century is any new trend to be observed: individual governments then started to take a more and more active part in the sphere of international cultural relations. This new trend in international relations was based on the reciprocal granting of rights by States one to another and the assumption of obligations as regards cultural interaction which transcended the boundaries of particular States. Anthony Haig coined for such relations a new term—"cultural diplomacy,"² since "cultural diplomacy" appeared rather late, and its history is short. Even so, we can distinguish in its development several stages, as regards both its substance—from exerting an influence to cooperation, and its forms—from bilateral agreements, through multilateral treaties, to the present highest form of cooperation: inter-

¹ B. I. MELEHIN, *Kulturnoe i naučnoe obščenie narodov. Pravovoe regulirovanie*, Voronež 1968, p. 229; R. BYSTRICKÝ, *Les aspects juridiques des relations culturelles internationales*, "Revue de Droit Contemporain," 1960, No. 2, p. 86; C. DOKA, *Les relations culturelles sur le plan international*, Neuchâtel, 1950, p. 238.

² A. HAIGH, *What is cultural diplomacy?*, in: *UNESCO Handbook of International Exchanges*, Paris 1965, p. 54.

national organizations.³ In this formulation, international cultural relations become indeed one of the instruments of foreign policy.

However, even at the time when cultural activities were not for the most part yet conducted by governments, this did not mean that the entire sphere of cultural relations remained outside the scope of the international law norms which had evolved. Whenever cultural activity stepped beyond the boundaries of one State and to a certain extent engaged the interests of various States, the norms of international law were to some extent automatically involved as a proper legal basis for regulating inter-State relations. This was effected probably because it is always possible to construct legal grounds for a specific branch of international relations by proper interpretation of fundamental principles on which the international law system rests. Moreover, the protection of cultural property, which is the subject of the present paper, was several centuries ago an object of separate norms of international law.

This problem was first mentioned by Grotius and Vattel.⁴ Thus René-Jean Wilhelm's statement, repeated by André Chastel, that "*la protection des oeuvres d'art est une innovation juridique du XX^e siècle*"⁵ is not accurate. In the 17th and 18th centuries, against the background of treaties then concluded, we can find norms of customary law slowly evolving as regards cultural property, namely its restitution, mainly—if not exclusively—in situations which arose from military conflicts and their subsequent peaceful settlement.⁶ The year 1815, which saw the end of the great Napoleonic campaigns,⁷ is of great significance as regards the crystallization of the norms of customary law referred to. It should be borne in mind that Napoleon's declared ambition was to build a France which would be strong politically and great culturally. He strove to create in France, and in Paris in particular, a "world museum," for which he diligently collected priceless treasures of culture from the countries trampled by his army. In view of this assault on works of art, unprecedented in extent, the allies after Napoleon's fall undertook restitution

³ G. A. MOJAEV, *The Role of Cultural Agreements in the Development of International Relations and Exchanges*, in: *UNESCO Handbook...*, p. 75.

⁴ G. CEKLAVER, *La protection des monuments historiques et des oeuvres d'art en temps de guerre*, in: *Premier Congrès d'Études Internationales*, Paris 1938, p. 66.

⁵ R. J. WILHELM, *La Croix-Rouge des monuments*, "Revue Internationale de la Croix-Rouge," 1954, pp. 72 - 81.

⁶ S. E. NAHLIK, *La protection internationale des biens culturels en cas de conflit armé*, RCADI, 1967, pp. 72 - 81.

⁷ For fully documented discussion of this problem, compare S. E. NAHLIK, *Gra-bież dzieł sztuki. Rodowód zbrodni międzynarodowej* [*Looting of Works of Art. Origins of International Crime*], Wrocław 1958, pp. 150 - 155.

on an unparalleled scale. This act of the international community of that time reveals two fundamental features which enable to formulate legal concepts of a broader range. First, restitution was not limited to cultural property seized during the recent war. Second, the general principle adopted was that the restituted property should be returned to its place of origin. A legal consequence of this principle was to regard public ownership of property as the basis for restitutory decisions—for example Belgian pictures were handed over to the King of the Netherlands,⁸ a new ruler of the country. This substantial departure, confirmed by later treaties, from the previous practice in regulating the effects of war, enabled Sfériadès to formulate what seems to be an acceptable statement: “[...]depuis 1815 s'est établie en droit des gens une coutume dont la teneur[...]fut affirmée et sanctionnée par de multiples accords internationaux, coutume d'après laquelle tous objets d'art ou historiques appartenant au domaine public d'un pays et directement ou indirectement extorqués par un autre doivent être restitués au premier.”⁹ This is by no means an uncommon opinion. The same point of view was held by Henri d'Arnoux de Fleury de l'Hermite,¹⁰ Charles de Vischer,¹¹ and Constantin Eustathades.¹² It is of interest that it was in connection with the case of Lord Elgin that both Sfériadès and d'Arnoux de Fleury de l'Hermite applied their thesis concerning a legal obligation to restitute cultural objects as being public property. The Elgin case took place in peace time, as a seemingly legal transaction. Both authors question this “legality” and express the opinion that according to norms of international law Greece might demand from Great Britain to restitute the marbles, interior decorations of the Parthenon, removed by Elgin.

The principle of respecting territorial links, cultural goods, and public property were in particular confirmed in the peace treaties concluded after World War I. Restitutory provisions covered also cultural property removed in peace time and in legal situations other than war. This can be illustrated by the obligation imposed on Germany by the Treaty of Ver-

⁸ *Ibid.*, p. 152.

⁹ S. SÉFÉRIADÈS, *La question du rapatriement des “Marbres d'Elgin” considérée spécialement au point de vue du Droit des Gens*, “Revue de Droit International,” Paris 1932, p. 60.

¹⁰ H. d'ARNOUX de FLEURY de l'HERMITE, *Objets et monuments d'art devant de Droit des Gens*, Paris 1934, p. 119.

¹¹ C. de VISSCHER, *Les monuments et oeuvres d'art en temps de guerre*, “Art et Archéologie, Recueil de Législation Comparée et de Droit International,” Office International des Musées, 1940, No. 2, p. 15.

¹² C. Th. EUSTATHIADES, *Études de droit international*, vol. 3, 1929 - 1959, Athènes 1959, p. 396.

sailles in 1919 to restore to Belgium the wings of the Worship of the Lamb triptych made by the Van Eyck brothers, which the King of Prussia bought in 1812.¹³ An agreement between Austria and Hungary as regards succession cases was based on the principle of restoring works of art to the place either of their origin or of their intellectual links with a given territory.¹⁴ A similar structure of restitutory grounds can be found in the peace treaty between Poland, and Russia and the Ukraine in 1921.¹⁵ These provisions were slightly modified by a concept sometimes advanced to the effect that the integrity of a collection should be respected. This, however, did not eliminate the fundamental principle. The concept of respecting the integrity of a collection was accepted by Italy in the executive agreement concerning the Treaty of Saint-Germain, signed in Vienna in 1920. In that agreement, Italy abandoned a number of claims, accepting the postulate as regards avoidance of dispersing historical, artistic and archaeological collections which constitute an integral aesthetical and historical whole.¹⁶ Also, the treaty between Austria and Hungary was, in the final solution of controversial matters markedly affected by the principle adopted in the negotiations with Italy as concerning the integrity of collections.¹⁷ The Treaty of Riga includes also a thesis relating to respect for a "collection of world significance for culture."

The principle of the territorial links as regards cultural property was generally adopted in restitutory provisions of the treaties concluded after World War II and in regulations issued by the Allies occupying Germany.¹⁸ It should be borne in mind that the restitution of cultural property after World War II was connected with the transfer of cultural objects by the occupying power; in other words, it pertained to the regulation of the situation resulting from the war. Even so, the endorsement of the principle of territorial links so far transcended the situation determined exclusively by the liquidation of the effects of the war itself that a different principle might have been followed—e.g., to restitute the property to its owner wherever he might be found. On the other hand, acceptance of the principle that looted objects of art should be returned to the

¹³ Art. 247 of the Peace Treaty between Allied Powers and Germany, signed at Versailles on 28 June, 1919, "Journal of Laws," 1920, No. 35, item 200.

¹⁴ H. THIETZE, *L'Accord Austro-Hongrois sur le répartition de la maison des Habsbourg*, "Museion," 1932, No. I - II, pp. 92 - 97.

¹⁵ Art. XI of the Peace Treaty between Poland, and Russia and Ukraine, signed in Riga on 18 March, 1921, "Journal of Laws," 1921, No. 49, item 300.

¹⁶ C. de VISCHER, *op. cit.*, p. 34.

¹⁷ H. THIETZE, *op. cit.*, p. 94.

¹⁸ Cf. S. E. NAHLIK, *Grabież dzieł sztuki...* [Looting of Works of Art...], pp. 285 - 302.

territory of origin expresses, above all, international recognition that cultural property should remain where its basic links with a specific territory can be established. Although the United States of America frequently pursued a different policy, it was in the acts of the American authorities that the principle referred to is embodied. Thus the State-War-Navy Coordinating Committee in a document dated 28th January, 1947, and entitled: "Return of Looted Objects of Art to Countries of Origin" stated that it is "[...]the responsibility and desire of this Government to return to their countries of origin cultural objects which have been wrongfully taken and brought to the United States during and after the war."¹⁹ In another document appears the following: "It is the responsibility and desire of the Government of the United States to recover and return to owner nations cultural objects,[...]stolen or improperly dispersed from public and private collections in war areas and brought to the United States during and following World War II[...]"²⁰

The two principles which gradually evolved in international practice—that of the protection of cultural items which are public property and that of the territorial links of cultural property—are of utmost importance as regards the vindication of cultural property in peace conditions. Two circles of States eventually concerned can be distinguished. The first comprises the international community as a whole, the other—States which after a period of colonial dependence either have gained independence or will do so in the future.

For the international community as a whole, the joint functioning of the two principles implies that in the event of the loss of a cultural object which is public property, the State on whose territory such an object is found is under obligation, by virtue of the norms of customary international law, to return the object in question. In somewhat limited international juridical practice in which the object of dispute was cultural property, there is a precedent in a decision of an English court, which recognized the public legal status of cultural objects as being State property. This was the case of the *King of Italy and the Italian Government v. Marquis Cosimo de'Medici Tornaquinci and Christie, Manson and Woods*, decided by the Chancery Division in 1918.²¹ The Court gave judge-

¹⁹ Quoted after A. R. HALL, *The Recovery of Cultural Objects Dispersed during World War II*, "The Department of State Bulletin", Vol. 25, 1951, No. 635, p. 339.

²⁰ *Ibid.*, p. 340.

²¹ B. HOLLANDER, *The International Law of Art*, London 1959, p. 29; S. E. NAHLIK, *Zagadnienie międzynarodowej ochrony dzieł sztuki w czasie pokoju*, w: *Księga pamiątkowa ku czci Juliana Makowskiego* [*The Problem of International Protection of Works of Art in Peace Time*, in: *Studies Presented to Julian Makowski*], Warszawa 1957, p. 232.

ment in favour of the Italian Government and ordered the withdrawal from sale by auction and return to the Italian Government of historical documents constituting part of the Medici collection and taken abroad by their owner, Marquis Cosimo de Medici Tornaquinci. The plaintiff received judgement only as regards that part which referred to documents which were State property; the part of the claim which related to what—in the Court's opinion—was private property of the Medici family was disallowed. Consequently, the judgement illustrates two principles: on the one hand, the recognition that in the case of public property the norms of private international law, which initiate the application of the norms in the domain of *public policy*, are not applicable; on the other hand, it is evidence to the practice of refusing to grant legal protection to States when claim is based on *powers of prerogative*.²²

The general principles as regards protection of cultural property, formulated above, are of special significance to former colonial States. It is typical that succession agreements concluded between colonial States and the former colonies entirely disregard the problem of the succession of cultural property.²³ Theoretically, these should, being public property of the predecessor State, be transferred to the successor by virtue of the sovereignty of the latter. Yet it is known that colonial States removed, prior to granting independence, certain cultural objects from dependent territories. This can be exemplified by certain acts of Great Britain and France, which have come to light. As regards Great Britain, the India Office Library, the most splendid Hindu language collection was transferred to London as early as in 1858.²⁴ The French case refers to Algeria, from which—shortly before granting independence—France removed historical archives relating to pre-colonial history of Algeria²⁵ and about three hundred works of art.²⁶ These are not the only cases. Colonial States made a practice of removing from dependent countries vast quantities of works of art, the creations of natives, and set up separate museum departments to exhibit the looted objects. If you examine catalogues in the museums of West European States, you will see what immense treasures of African or Asiatic culture were taken away during colonial rule. Such

²² F. A. MANN, *Prerogative Rights of Foreign States and the Conflict of Laws. Problems of Public and Private International Law*, "The Grotius Society," vol. 40, London 1955, p. 34.

²³ Cf. *Materials on Succession of States*, "United Nations Legislative Series," New York 1967, p. 243.

²⁴ M. BEDJAOU, *Third Report on Succession of States in Respect of Matters other than Treaties*, International Law Commission, A/CN 4/226, p. 87.

²⁵ "Le Monde," 4, Dec. 1969, p. 9.

²⁶ M. BEDJAOU, *op. cit.*, p. 95.

transfers were particularly numerous after 1920, when Negro art was in vogue in Europe, as is evidenced by the first Paris exhibition devoted exclusively to African and Oceanic art.²⁷

We might say that in theory and in the light of the principles referred to the newly independent States have a claim, based on public international law, to receive back specified objects created on their territory and expressive of indigenous culture, as well as those bought with local funds and constituted public property. If today the States concerned advance such demands uninsistently, this is the result of their difficult situation, in which questions of economy take priority in discussion with the ex-colonial States. There need be no surprise when we find that no mention is made of cultural objects in agreements and other acts connected with succession. Such instruments are the outcome as a rule, of great concessions, and by no means express all the well-substantiated claims of the liberated States.²⁸ As regards cultural objects, such claims follow also from the right to self-determination, the sense of which has been fully defined in identical articles of both the Covenants of Human Rights.²⁹ It seems that the legal consequences in the domain of culture have been formulated in a UNESCO document on cultural rights as human rights. It reads: "[...]for countries which have recently won independence this has not only meant the political right to self-determination. It has also involved a new sense of dignity, a new searching for ideas handed down from the past, pride in art forms perfected both before and during colonial rule and the determination to rebuild the traditional cultures so often disparaged in recent centuries."³⁰

In the present international practice we can, however, record a positive example of favourable settlement of the claims of an ex-colonial State as concerning restitution of cultural property. This is the agreement of July 11, 1968, concluded between France and Algeria, on the basis of which France did restitute to Algeria the cultural property referred to. The Algerian government considered the said works of art as "*faisant partie du patrimoine artistique de l'Algérie*."³¹ J. P. Peroncel-Hugoz, describing a ceremonial opening of the exhibition of the works of art resti-

²⁷ M. LEIVIS, *The Africa Negroes and the Arts of Carving and Sculpture*, in: UNESCO, *Interrelations of Cultures*, Paris 1953, p. 316.

²⁸ Cf. M. FLORY, B. ETIENNE, G. FOUILLOUX, J. C. SANTUCCI, *La succession d'États en Afrique du Nord*, Paris 1968, p. 85.

²⁹ Cf. *The Covenants of Human Rights*, General Assembly Official Records, 21st Session, Supplement No. 16/A/6316.

³⁰ UNESCO, Doc. SHC/XIX/3A, *Cultural Rights as Human Rights*, Paris 1970, p. 9.

³¹ "Le Monde," 4 Dec., 1969, p. 9.

tuted to Algeria, said, after quoting the official Algerian declaration that the revindicated works were part of the artistic heritage of Algeria, that "*Les Français se sont, semble-t-il, rendus aux raisons algériennes en renvoyant ici cent cinquante-sept peintures at cent trente-six dessins.*"³²

In view of the above arguments it might be concluded that in the present stage of the development of international law there exists a system of norms which ensures the vindication of lost cultural property which is also public property. Such a conclusion would be in part true. But only in part, because one essential element of the obligation cannot—for the lack of adequate criteria—be specified on the level of public international law. This element is the notion of *public property*. Mohamed Bedjaoui, special reporter of the International Law Commission, in his third report on succession of States in respect of matters other than treaties, comments on Article 1 of the Report, containing the definition and determination of public property as follows: "An international approach to the notion of public property is hazardous, since there is in international law no autonomous criterion for determining what constitutes public property. Determination of this by treaty or by tribunals or other jurisdictions has its limits and does not resolve all problems. Whatever the circumstances, recourse to municipal law seems inevitable. The question is, however, which legislation[...] should be applied for this purpose."³³ To pose such a question as regards the protection of cultural property admits private international law, thereby impairing the effectiveness of the principles resting on the norms of public international law. This is because the measures offered by the norms of private international law do not guarantee satisfaction of just claims of the State concerned. In practice, owing to the lack of relevant treaties, the concern to preserve cultural heritage and protect it against threats to diminish it, remains today almost exclusively within the sphere of municipal law.

At present, Italy, France, Egypt, Japan and Poland have the most complete sets of legislative measures protecting national cultural property. On the other hand, such States as the United States, Switzerland and the Federal Republic of Germany, are in principle opposed to policies designed to protect cultural heritage.

A full restriction model is generally based on the principle of non-transferrability of cultural objects which constitute State property, or owned by other institutions of public law. It frequently happens that the

³² J. P. PERANCEL-HUGOZ, *Le Musée national des beaux-arts rénové retrouve l'ensemble de ses collections*, "Le Monde," 16 April, 1970, p. 19.

³³ M. BEDJAOU, *op. cit.*, pp. 10 - 11.

principle of unlimited restitution is applicable to such objects, relevant provisions being found either in the act on protection of cultural property, or following from civil law. Cultural objects owned by private persons are usually legally protected by way of their registration by competent bodies. The registration of privately owned cultural objects involves the owner in certain obligations, and—as is the case in Polish law—several privileges to induce the owners to reveal movable works of art.³⁴ The cultural objects registered are not in fact forbidden to be sold on the domestic market, but in order to ensure full control any transfer of ownership or even of possession is required to be registered either by the conservation authorities or by the owner. Another measure is the prohibition on the export of specified objects, including, in the event of infringements, penal sanctions and frequently forfeiture of the object. A further measure is pre-emption enjoyed by the State in domestic transactions or when an export licence is applied for. Export licences, may be granted by competent authorities, which vary from State to State. Those may be as high as parliament—as in the Dominican Republic, where decisions are taken by the Congress, or competent ministers—or a special body, such as Great Britain's Reviewing Committee on the Export of Works of Art, which consists of regular experts and *ad hoc* experts for specific types of objects concerning which an export licence is solicited. A fairly effective measure is a system of highly progressive duties imposed on cultural objects for the export of which a licence has been granted. The extent to which this measure will impede transactions involving cultural property can be illustrated by the export rates introduced by law in Italy in 1939, which in the light of the Treaty of Rome were subsequently held illegal by a decision of the European Court of Justice.

The member States of the European Common Market took advantage of the provisions of the law referred to, to eliminate an inconvenient barrier restricting the access of works of art to the Italian market. The Tribunal rejected Italian arguments aimed at proving that progressive export rates were measures to control draining away of national treasures, not an ordinary export duty.³⁵

The first attempts to introduce international protection based solely on premisses of public law were successive drafts of multilateral

³⁴ Regarding the rights and duties of the owners of cultural property in Poland cf. A. KOPFF, *Własność dóbr kultury* [Ownership of Cultural Objects], "Studia Cywilistyczne," Vol. 12/14, Kraków 1969, pp. 179 - 194.

³⁵ *Cour de Justice des Communautés Européennes*, "Recueil de la Jurisprudence de la Cour," Vol. 14, 1968, Luxembourg, pp. 619 - 627.

conventions prepared by the International Museums Office in the years 1933 - 1939.³⁶ The outbreak of World War II prevented a diplomatic conference which had been planned to discuss the final version of the Draft International Convention for the Protection of National Collections of Art and History.³⁷

The problem of regulating the protection of cultural property was again on the agenda of an international assembly in 1960. This time it was the United Nations Economic, Scientific and Cultural Organization, which—on the initiative of Mexico and Peru—proceeded to discuss illegal imports and exports of cultural objects.³⁸ In the view of the negative attitude of a number of States, among which the United States formulated their objections most categorically,³⁹ the Organization abandoned its original idea of preparing a convention, and confined itself to adopting in 1964 a recommendation on means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property.⁴⁰

Although the UNESCO General Conference Recommendation does not impose any legal obligation on member States, the adoption of the document referred to has played a significant role by its psychological impact which implies the existence and increase of moral obligations connected with the purchase of cultural objects originating in other countries. Any illegal purchase will be considered a reprehensible act even in the absence of any *droit de suite* as regards cultural objects at the present stage of international law.

Another important function of the Recommendation referred to is to clear the ground for the assumption by individual States of obligations by agreement. This was to consist in creating a consistent system of measures which would either eradicate or diminish the number of successful illegal operations, by introducing into the laws of all member States such provisions as would uniformly guarantee effective control of the export and import of cultural objects.

Initial Special Reports by member States by no means bear witness

³⁶ All the texts of the drafts were published in "Art et Archéologie. Recueil de législation comparée et de droit international," 1939, No. 1.

³⁷ For a discussion and legal analysis see S. E. NAFLIK, *Zagrożenie międzynarodowej ochrony...*[*The Problem of International Protection...*], pp. 236 - 239.

³⁸ UNESCO/CUA/123—*Mesures à prendre pour interdire et empêcher l'exportation, l'importation et la vente illicites des biens culturels. Rapport préliminaire.*

³⁹ UNESCO/CUA/123, Add. 1, Annex 1, *Réponses à la lettre circulaire CL/1667 et au document UNESCO/CUA/123, reçues des États membres à la date du 10 février 1964, États-Unis d'Amérique*, p. 8.

⁴⁰ UNESCO, Recommendation on the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property, adopted by the General Conference at its XIII session, Paris, 19 November, 1964.

to any large scale measures for the introduction of all the principles stipulated by the UNESCO Recommendation in 1964.⁴¹ Nevertheless, the Organization proceeded to prepare a convention the draft of which prepared by the Secretariat of UNESCO was discussed by the governmental experts committee, and in the version agreed upon was submitted for discussion at the XVI Session of the General Conference, which adopted the Convention on 14 November, 1970.⁴² The Convention, under the same title as the Recommendation of 1964, contains in its preamble two significant principles in the light of which all the remaining provisions of the act should be interpreted.

The first principle consists in the recognition that cultural objects are basic elements of civilization and national culture, and their real value can be fully appreciated only in close connection with complete information as to their origin, their history, their traditional status. The second principle states the normative duty of every State to protect cultural objects within its own territory. In the present context it is of interest that no legal obligation to assist in the protection of objects which come from other States, parties to the Convention, is explicitly formulated. The authors of the draft merely refer to moral obligations as regards respect for the cultural heritage of other nations.⁴³

Article 1 of the Convention defines the object of protection. The essential part of the definition reads as follows: "For the purposes of this convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science[...]." The remaining elements of an extensive definition constitute a long list of kinds of objects covered by the notion of cultural property. The definition has two remarkable merits. The first is that the extensive descriptive elements do not form a closed system, but merely serve as a list containing examples of basic kinds of objects to be covered. Consequently, each State may specify subjectively the content and scope of such a general definition when deciding which objects are to be protected. There is great diversity of the criteria particularising the objects of protection in various legal systems.

⁴¹ Initial Special Reports by Member States on action taken by them on the recommendation adopted by the General Conference at its thirteenth session, UNESCO 14 C/27, Add. 2.

⁴² UNESCO, Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, adopted by the General Conference at its XVI session, Paris, 14 November, 1970.

⁴³ *Ibid.*, p. 1.

For instance, a fairly frequent time criterion is differentiated and occurs in several variants: 1) granting general protection to any objects created before a specified date; 2) granting protection after a certain minimum period from the time of origin; 3) granting protection to objects created before a certain date which signifies a turning point in the history of the State. The time element rarely occurs *per se*, the legislator combines it either with the artistic value factor or with the particularisation of objects.

Entry in established registers is also a frequent legal condition of classifying a given object as a monument of culture—either as a sole criterion or as an element of a broader definition. In Poland the Protection of Cultural Property and Museums Act, promulgated on 15 February, 1962,⁴⁴ introduces a modern notion of cultural property, the definition of which comprises all the essential elements of the Convention definition. Nevertheless, in further provisions the Polish Act does not disregard a traditional notion of the monument of culture, by which it means “cultural property” 1) entered in the register of monuments of culture; 2) embodied in museums, libraries or public archives; 3) other, if its nature as a monument of culture is evident. The Polish Act extends legal protection only to monuments of culture thus conceived.

The reason for a formal diversity of legal constructions in various States lies in material factors—i.e., a great diversity in cultural circles and differences in the standard of cultural resources. For these reasons, the granting to each State the right subjectively to specify the scope and content of the definition of cultural property constitutes a form of practical realization of the principle that in international relations the cultures of individual nations are equal, and as a result of specific conditions and trends of development each nation contributes its own unique share to the cultural heritage of mankind.⁴⁵

Reverting to the definition of cultural property in the Convention, a considerable advantage is that it protects the works of living artists by removing the time lapse condition present in the draft prepared by the UNESCO Secretariat. For extending protection to living artists there are many good reasons one of which is “the rhythm of social life of a work of art,” noted by Professor Tatarkiewicz, who writes: “Works of art even those which are highly fashionable, end their social existence at a certain point[...]. The crisis of a work of art usually comes in the generation fol-

⁴⁴ “Journal of Laws,” No. 10, item 48.

⁴⁵ Déclaration des principes de la coopération culturelle internationale, adoptée par la Conférence générale le 14 novembre 1966, “Chronique de l’UNESCO”, Vol. 12, 1966, No. 12, pp. 495 - 498.

lowing the one which produced the work. Changes in the evaluation of art usually follow in the next generation after that which produced the work.”⁴⁶ In that period of crisis, it may easily happen that nothing remains of a certain kind of artistic production or of the production of at least one artist, because export has been allowed without due consideration, and the loss becomes evident when the work of art starts “a second life,” frequently more durable.

Article 4 of the Convention is of special interest. It specifies legal conditions for classifying cultural property as the cultural heritage of the States, parties to the Convention.⁴⁷ The formulation adopted in the Convention may be considered highly apt. The establishment of two fundamental links: the principle of territorial link and the citizenship of the artist (or artists) settles a difficult problem of the subject entitled. The State and its citizens are such subjects according to the draft. Any other links are derivative.

The draft of the convention contains extensive provisions specifying the obligations of States as regards internal organization of protection services, their responsibilities and rights. The convention provides that the parties may introduce a number of measures and methods which would protect to the maximum each State against impoverishment of its cultural heritage. The basic measure which the States undertake to introduce in their domestic protection regulations is the export certificate that should accompany any objects exported.⁴⁸ In this respect, the Polish Act of 15 February, 1962, and appropriate executive regulations issued, constitute proper legal grounds in Poland for a restrictive system of export of cultural objects. Article 41 of the Act in general prohibits the export of any cultural objects. Only the Minister of Culture and Art has the right to grant permits for either permanent or temporary export of works of art, for exhibition or official purposes. Moreover, according to the Act, prohibition does not cover specified groups of cultural objects which can be exported provided that a certificate is obtained stating that a given object belongs to any of such groups. These include works of living artists, products of handicraft and artistic industry made after 9 May, 1945, books published after that date. The Order of the Minister of Culture and Art dated 30 June, 1965⁴⁹ specifies the procedure to be followed when granting permission or issuing certificates. According to these regulations, relevant documents must be produced to customs of-

⁴⁶ W. TATARKIEWICZ, *Vita brevis, ars brevis*, “Poezja,” 1969, No. 3, p. 6.

⁴⁷ UNESCO, *Convention...*, pp. 6 - 7.

⁴⁸ *Ibid.*, Art. 8, pp. 12 - 13.

⁴⁹ “Journal of Laws,” No. 31, item 206.

ficers by persons leaving the country. If no permit or certificate is produced and doubts arise as to the type of objects being exported, the customs officers may hold up the object and refer it to experts for an opinion. The bodies entitled to issue permits and certificates should give full particulars of the cultural object to be exported, a provision which increases the effectiveness of control over exports.

The restitution of cultural objects lost has always been a sore point in any suggested or adopted solutions as regards protection. Relevant regulations determine the effectiveness of intricate legal constructions. A preliminary draft prepared by the Secretariat of UNESCO adopted fundamental international provisions in this respect, detached from complicated and varied formulations of municipal law. Generally speaking, the solutions proposed in the preliminary draft were based on the concept of recognizing in international law the right of the State to retain on its territory any object of importance for its cultural heritage.⁵⁰ As a result of this concept, any claims by a given State to the return of cultural objects taken out of the country by the owner in infringement of restrictive regulations issued by the State, should be internationally recognized.⁵¹

The Convention adopted by the General Conference of UNESCO departed notably from the concept presented in the Secretariat document, thereby limiting the range of objects to be internationally protected. According to the provisions—new in this respect—the State who were parties to the Convention undertook to restitute cultural property stolen from “a museum or religious or secular public monument or similar institution in another State Party to this Convention,” provided it has been proved that the object concerned is entered in the register of the relevant institution. In such a case, restitution is made through diplomatic channels.⁵² On the other hand, when a conflict of interests arises—the interest of the State which through its restrictive regulations strives to keep a given object on its territory, versus the interest of an individual owner who sells abroad his cultural property in spite of such regulations—it is the interest of the owner or subsequent buyer which will be protected,

⁵⁰ This concept has been formulated by Ugo Aloisi in a commentary to the first draft of the International Convention with respect to the protection of cultural property against illicit transfer of ownership, prepared by the International Museums Office in 1933, see Report of U. ALOISI, *Art et Archéologie*, “Recueil de législation comparée et droit international”, Paris 1939, No. 1, p. 60.

⁵¹ UNESCO, Doc. SHC/MD/3, Preliminary draft convention concerning the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, Annex, Art. 10 and 7.

⁵² UNESCO, *Convention...* Art. 7.

because the vindication of State rights arising from powers of prerogative will always be refused.

The Convention provides for *droit de suite*, but almost exclusively as regards cultural objects which are public property, since in municipal law only such objects are non-transferable.⁵⁸

In conclusion, we might pose the question as to how in general to evaluate the Convention against the background of today's needs as regards international protection of cultural property. It seems that in spite of the far-reaching compromise of the Convention, whose provisions have departed notably from the original UNESCO assumptions, the most significant aspect of the Convention—when it comes into force—will be the agreed recognition of the sovereign rights of the State to keep intact the fund of its national cultural property. Poland has favourably evaluated the Convention on a realistic basis considering that far-reaching concessions provide a more effective solution since they will enable the Convention to come into force in a relatively short time and more States will be parties to it. On the other hand, were the provisions to be more strict in safeguarding the interests of the States threatened with illegal exports, the States which import cultural property would not support the Convention. If the latter States were not parties to the Convention, this would mean failure in such a valuable international action, and would render the Convention ineffective.

⁵⁸ *Ibid.*, Art. 13/c.

From the History of Teaching the Law of Nations in Poland in the 18th Century

by JAN KOLASA

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I

The splendidly developing Polish science and schools in the period of Renaissance underwent stagnation and scholastic fossilization in the 17th and in the first half of the 18th century. The fall of science and education was one of the most striking symptoms of the general economic, political and cultural disintegration of the country.

The first visible signs of regeneration of various branches of life in Poland are reported only about the middle, in fact, in the second half of the 18th century. To them belongs undoubtedly the reform of the educational system elaborated and introduced by Stanisław Konarski, an educated Piarist, famous propagator of broad social and political reforms, expounded in his work: *O skutecznym rad sposobie* [On Effective Method of Action], Warszawa 1760 - 1763.

The main objective of Konarski's school reform was the education of a new generation of well enlightened citizens, recruited from aristocracy and the gentry, who would be capable of extricating the country out of general backwardness and stagnation. To this end Konarski designed a new curriculum in which to the teaching of law, including the law of nations, a prominent place was secured. Konarski embraced by his reformatory activity only schools administered by the Piarist order. In-

directly, however, his reform contributed also to the modernization of teaching in other schools.

Piarist schools, called "colleges," were scattered all over the country. All of them were embraced by Konarski's reform. Special care was devoted by him to the most important Piarist college, the Collegium Nobilium, founded in Warsaw in 1740.

The curriculum in colleges was divided into five classes, the teaching in the two last classes lasting two years each. Beside the normal curriculum, Konarski introduced for the Collegium Nobilium in Warsaw additional two years including courses of the municipal law and of the law of nations.¹

Teaching the gentry youth legal concepts from the earliest school years had been in fashion in Western Europe since the times of Locke, who, to be sure, put no small requirements to the young people in this respect. For the beginning, he recommended a thorough acquisition of the knowledge of man's duties from Cicero's works and to read several times the Pufendorf's book *On the Duties of Men and Citizens*. Next, he advised the pupil to start studying the work *On the Law of War and Peace* by Grotius or that by Pufendorf *On the Law of Nature and of Nations*.² Thus, it was a rather big portion of legal knowledge to acquire by a juvenile pupil.

These views were well known and shared by Konarski. However, he had never been their blind follower. Whereas Locke seemed to accept the ideal of a typical cosmopolitan gentleman saying that a young gentleman on acquisition of legal education would find a good office in every country,³ Konarski had the specific needs of his own country in mind. He believed that his schools would render service to the Republic if "in the classes, the first and second rhetorics,⁴ sound elements of the public law and politics, and after the class of philosophy—the principles of the civil law and those of the law of nations were taught."⁵

The *Ordinationes*, that is, Konarski's *School Statutes*, say little of the

¹ S. KONARSKI, *Ordinationes visitationis apostolicae una cum collectione capitularum provincialium auctoritate eiusdem visitationis ordinationibus insertorum et approbatorum provincia polona clericorum regularium pauperum Matris Dei scholarum Piarum* (1753 - 1754), published in Polish: *Ustawy szkolne* [School Statutes], Kraków 1925, p. 40 - 135.

² J. LOCKE, *Some Thoughts Concerning Education*, (Polish edition), Warszawa

⁴ The names of the classes were as follows: I *parva*, II *infima*, III *gramatyka*, IV *syntaksa*, V *humanitas*, VI *retoryka*, VII *filozofia*.

⁵ S. KONARSKI, *op.cit.*, p. 324.

1781, p. 326.

³ *Ibid.*

scope and method of teaching the law of nations in Piarist colleges. One may, however, get an idea of it from the recommended textbooks and, more precisely, upon the preserved to our times records of the so-called "school councils" (*sejmiki szkolne*) and pupils displays (*popisy szkolne*).

As basis for lectures of the law of nations Konarski recommended, among other books, the excellent Grotius' work *De jure belli ac pacis libri tres*, Samuel Pufendorf's *De officio hominis et civis* and Abraham Wicquefort's *L'Ambassadeur et ses fonctions* in two volumes. Thus, one may say that these works comprised the principal output of the legal thought at that time.⁶

Konarski did not limit himself to recommending scientific works. In order to link the teaching of the law of nations closer with practical requirements, he ordered to train the pupils of Collegium Nobilium in studying international problems on concrete treaties. To this end he pointed to the well known collection of treaties *Jus publicum Europae in tractatibus stabilitum* and *Codex diplomaticus Regni Poloniae et Magni Ducatus Lithuaniae* prepared at that time by Maciej Dogiel.⁷ In this way pupils prepared themselves to enter positions of statesmen and diplomats in the future, since Konarski rightly foresaw that along the realization of constitutional changes in the Republic, there would arise the necessity of organizing a permanent Polish diplomatic service.⁸

A more direct illustration, not only of the range but also the spirit of the teaching the law of nations, is rendered by the school councils and pupils displays. The councils were organized in individual classes during the school year; whereas displays referring to the subjects taught during the whole year took place at the end of the school year.

Konarski's *Ordinationes* recommended to organize school councils four times a year. They were a kind of discussion held publicly in Polish. The pupils were required to deliver their speeches by heart.⁹ The displays

⁶ *Ibid.*, p. 131-132.

⁷ Learned Piarists such as M. Dogiel, J. Jezierski, C. Kaliszewski, F. Obermajer and F. Siarczyński enriched the Polish literature of the law of nations with valuable collections of international treaties. Thanks to their publications Martens, who initiated the publication of a collection of treaties, could state in 1802 that Poland partitioned in the 18th century was richer in collections of treaties than all the invading Powers together (i.e., Russia, Prussia and Austria)—see L. EHRLICH, *Prawo narodów* [*The Law of Nations*], 3rd ed., Kraków (no date), p. 37. More on collections of treaties, cf. S. HUBERT, *Poglądy na prawo narodów w Polsce czasów Oświecenia* [*Opinions on the Law of Nations in Poland of the Period of Enlightenment*], Wrocław 1960, p. 112-150.

⁸ See on this subject S. HUBERT, *op. cit.*, p. 151-161.

⁹ W. SMOLEŃSKI, *Przewrót umysłowy w Polsce w wieku XVIII*, [*The Intellectual Revolution in Poland in the 18th Century*], Warszawa 1949, p. 30 and S. Kor, *Sejmiki*

were of a different character. They took place sometimes in the middle and, as a rule, at the end of the school year. It was a survey of the achievements of the pupils after the year's work, a kind of public examination before numerous invited guests. Such solemn displays in the capital were attended by most dignified personages of the Republic with the king at their head; and in the province—by most influential notables. Printed reports of such displays inform us not only of their program but also of the effects of teaching casting an interesting light on the relationship of the education in Piarist schools, especially in the Warsaw Collegium Nobilium, with the actual needs of the country. Unfortunately, only few such documents have been preserved up to the present day.

To a precious bequeath of the school councils should be counted the three volumes of *Rozmowy w ciekawych i potrzebnych filozoficznych i politycznych materiach w Collegium Nobilium Warszawskim Scholarum Piarum miane* [*Discourses on Interesting and Useful Philosophical and Political Matters held at the Warsaw Collegium Nobilium*], Warszawa 1760 - 1762.

It follows from them that, indeed, in compliance with Konarski's assumptions, current and most important public affairs of the country were discussed there. In this way pupils became aware of the shortcomings of the regime and of Poland's foreign policy. By means of common discussions and public speeches they prepared themselves for their future political and diplomatic activity.

It follows from the preserved prospects and records of pupils' public displays and school councils that the level and scope of teaching law, that is, also the law of nations, was not in all colleges the same. It was different even in the same college in particular years. For instance, the preserved print of a 1779 display in one provincial Piarist college does not include any chapter on the law of nations. There appear, however, numerous problems concerning law and international relations. The pupils, for example, among other things, proved before the audience the theses that every nation should have in foreign countries a diplomatic service of its own, that it should join other states by means of alliances, that it is forbidden to resort to war without just reasons, and if this happens, it should be waged in a humane and fair manner.¹⁰

szkolne jako środek wychowania obywatelskiego w Polsce XVIII wieku [School Councils as a Means of Civic Education in Poland of the 18th Century], "Sprawozdania z Czynności i Posiedzeń Polskiej Akademii Umiejętności," 1921, No. 1, p. 6.

¹⁰ *Dowody aplikacji ichmościów panów konwiktów edukujących się w Collegium Nobilium Lwowskim Scholarum Piarum* [Evidence of the Application of the Students of Collegium Nobilium Scholarum Piarum at Lemberg] (1773). More on this subject, see J. KOLASA, *Prawo narodów w szkołach polskich wieku Oświecenia* [Law

The programmes and records of the displays organized in the Warsaw Collegium Nobilium, as well as in some other provincial Piarist colleges, and even in Jesuit ones which imitated Konarski's reform, contain information on the law of nations enclosed in a separate, sometimes very long, chapter. For example, in 1769 displays were organized on subjects concerning war (on armistice, capitulations, cartels, passports and safe-conducts) and those of peaceful international relations, among others, on azylum, peace-treaties, ratificatio, treaty safeguards and diplomatic service.¹¹

Particularly noteworthy are the preserved pamphlets of the displays by the pupils in a Jesuit college in 1771 and a Piarist one in 1774. They had been published in French and devoted entirely to the problems of diplomatic missions.¹² Under the general title *Droit des Gens* there are only *Questions sur le traité des Ambassadeurs*. This subject matter was discussed in great detail. In 1771 eighteen pupils debated on as many as eighty two questions, of which every one concerned the legal status and the need of appointing ambassadors in foreign countries. Such a long list of questions relating only to one branch of the law of nations had to be drafted undoubtedly by a good specialist in this subject on a monografic elaboration of these problems. Among others, certainly the recommended by Konorski work of Wicquefort was consulted.

The Konarski's *Ordinationes* expressly prescribed teaching the law of nations only in the curriculum for the Warsaw Collegium Nobilium. Whereas the pupils' displays prove that even in provincial colleges the law of nations was considered and some of its branches even in detail.

True, in face of the reforms introduced at that time in Europe, the new Konarski's programme was, in its essence, not entirely original. West European countries matured earlier for elaboration and introduction of new methods and curricula. Konarski himself admitted that he had been inspired by, among others, Locke and Rolin. Our reformer, however, departed considerably from the ideals and educational principles propa-

of Nations in Polish Schools of the Period of Enlightenment], Warszawa 1954, p. 39 - 40.

¹¹ *Exercitationes litterariae ex physica generali et particulari, iure gentium et civili communi[...] habitae in Collegio Nobilium Varsoviensi[...], 1769.*

¹² *Exercitationes litterariae ex iure naturali, gentium, civili[...] habitae in Collegio Nobilium Varsoviensi Societatis Jesu[...], 1771 and Wyłożenie materii nauk, które ichmość kawalerowie w Collegium Nobilium Warszawskim Scholarum Piarum traktowali i z nich przy końcu roku publicznie dawali dowody w miesiącu czerwcu i lipcu 1774 [The Material Studied by the Pupils of the Warsaw Collegium Nobilium Scholarum Piarum Which Was Subject of Public Display in June and July 1774].* More on this subject, see J. KOLASA, *op. cit.*, p. 40 - 42.

gated by these philosophers. Konarski realized his own idea of civic education in close connection with the concrete needs of his country. In his opinion, the basis of that education was to be sought in the history of one's motherland and the law of nature.¹³ In the teaching of the law of nations particular attention was devoted to the problem which today would be defined as diplomatic law.

II

Konarski's school reform had a limited range of application. It fully embraced only the schools under direct Piarist supervision. Being aware of that Konarski, however, was convinced that his school reform would gather wider acceptance under laic auspices.¹⁴ These expectations materialized soon.

A direct impuls for broader political reforms was given by the tragic partition of Poland in 1773. It opened the eyes of all more educated citizens to the necessity of mobilizing the efforts to carry out the necessary reforms in order to save the very existence of the State endangered by neighbouring Powers. A considerable share in these efforts had the struggle for modern school and education.¹⁵

Since 1773 the cause of national education as one of the principal means of saving the falling Republic had been in the center of concern of publicists and subject of numerous discussions. Precisely in 1773 the Sejm passed a bill for the creation of the Commission of National Education charging it with the reform of the whole educational system in the country. This Commission was the first ministry of education in Europe. From that moment all Polish schools passed under the direct supervision of laic authorities and thus on laic principles the moulding of new citizens was started.¹⁶

The new curriculum became subject of very live discussions. It is characteristic that all debaters introduced the teaching of law, including the law of nations, to their drafts of new curricula.¹⁷ Hugo Kołłątaj, one of the leading representatives of Polish Enlightenment, wrote: "[...]without the knowledge of the law of nature, the constitutional law and the law of nations, without the knowledge of political economy and of the civil and criminal law no educated citizen can dispense with, whether he intends

¹³ See A. JOBERT, *La Commission d'Education Nationale en Pologne (1773 - 1794)*, Paris 1941, p. 86 - 95.

¹⁴ S. KONARSKI, *Ordinationes visitationis...*, p. 224.

¹⁵ J. KOLASA, *op. cit.*, p. 48 - 56.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 56 - 67.

to enter a lower or higher office or leading a peaceful remote life wants to submit to superior authorities with understanding and conviction.”¹⁸

The new school system in the country was framed in the *Statutes of the Commission of National Education* in 1783.¹⁹ These *Statutes* introduced two types of secondary schools: departmental schools (*szkoły wydziałowe*) and subdepartmental schools (*szkoły podwydziałowe*). The departmental schools were conceived as of six classes (with a two years' fifth class) and had usually six teachers. The subdepartmental schools counted three teachers and had three two years' classes. Thus, the teaching in the former lasted eight years and in the latter—six years. In practice, however, the curricula in both types of schools differed only little, sometimes, in fact, not at all.²⁰

As far as legal science was concerned, the *Statutes of the Commission of National Education* recommended for the initial four years the so-called “moral training” (classes I to IV) and in the two further—the teaching of the natural law, constitutional law, municipal law and the law of nations (classes V and VI). The total number of hours of lectures of law foreseen in the *Statutes* was relatively high—in departmental schools it amounted in the second year of class V—four hours, and in class VI—eight hours a week. Thus, a pupil attending the school for eight years obtained during five years one hour a week of moral training and in the two last years—lectures of law respectively five and twelve hours a week.²¹

¹⁸ H. KOŁŁATAJ, *Korespondencja listowna z Tadeuszem Czackim* [Letter Correspondence with Tadeusz Czacki], Kraków 1844, vol. I, p. 311 - 312.

¹⁹ *Ustawy Komisji Edukacji Narodowej dla stanu akademickiego i na szkoły w krajach Rzeczypospolitej przepisane* [Statutes of the Commission of National Education for Academic Schools and Other Schools in the Republic], Warszawa 1783.

²⁰ *Ustawy Komisji Edukacji Narodowej*, p. 36 and 50 and enclosed tables. See also J. LENIEK, *Książka pamiątkowa ku uczczeniu jubileuszu trzechsetnej rocznicy założenia gimnazjum św. Anny w Krakowie* [Book in Memory of the 300th Anniversary of the Foundation of the St. Anna School at Cracow], Kraków 1888, p. CXLII and CXLIII.

²¹ See e.g. *Rozłożenie nauk dzienne na godziny, porządkiem sześciu klas, z odmianną profesorów z roku 1789 na rok 1790, trzynastego roku po wprowadzeniu do szkół krakowskich układu nauk od Prześwieetnej Komisji Edukacji Narodowej na cały naród przepisanych* [The Time Table of Lessons for Six Classes, with the Names of Professors, for the School Year 1789/1790, in the Thirteenth Year of the Introduction to Schools at Cracow of the Curriculum Prescribed by the Commission of National Education], (place and year of publication lacking). See also *Rozkład nauk w szkołach przygłównych krakowskich[...] w roku szkolnym 1793 na 1794 od wprowadzenia do szkół krakowskich przepisów instrukcji publicznej siedemnastym* [The Curriculum in Subdepartmental Schools at Cracow [...] in the School Year 1793/1794, the Seventeenth Year from the Introduction of the Regulation on Public Education to Cracow Schools], (place and year of publication lacking). See also J. LENIEK, *op. cit.*, p. CXLII and CXLIII.

Law occupied then an important place in the curriculum of Polish schools of the Commission of National Education. Neither the *Statutes* of 1783 nor the general curricula set up by that Commission contain any data upon which it would be possible to state more precisely the number of hours devoted to particular legal disciplines. Some information can be obtained, however, from the teachers' reports on the progress in teaching particular subjects, transmitted to the so called Central Schools (The Academies at Cracow and Vilna).²²

It follows from these reports that the teaching of the law of nature started already in class IV²³ and exceptionally already in class III.²⁴ Not infrequently, however, the teaching of that subject started only in class VI and even VII.²⁵

In practice, the number of hours devoted to law was not uniform either. As far as the law of nature is concerned, it ranged in various schools from one to ten hours a week.²⁶ Such striking span may originate in the fact that under the law of nature one often included in teachers' reports also other subjects, that is, the constitutional law or the law of nations.²⁷ Usually, however, about six hours a week were reserved for lectures of the law of nature.²⁸

²² The *Statutes* of the Commission of National Education created two districts of school administration, at the head of which there was in the Crown the Cracow Academy, and in Lithuania—the Vilna Academy. These Academies exercised direct supervision in their districts of departmental schools (of which there were six in the Crown and four in Lithuania) and indirectly through departmental schools supervised the subdepartmental schools (of which there were 39 in the Crown and 29 in Lithuania).

²³ See Reports of the departmental schools of Warsaw and Poznań and the Reports of the subdepartmental schools of Rawa, Płock, Pułtusk, Łęczyca and Węgrów in the publication by T. WIERZBOWSKI, *Komisja Edukacji Narodowej* [Commission of National Education], Warszawa 1901 - 1910, fasc. 1, p. 3, 9, 15, 20, 27, 32; fasc. 7, p. 7, 20, 32, 41, 54, 65, 119, 149; fasc. 5, p. 80, 90; fasc. 3, p. 39, 50; fasc. 4, p. 96, 104, 116, 127, 138; fasc. 2, p. 24; fasc. 6, p. 1, 21.

²⁴ This took place in the school of Rawa in 1778 - 1780, of Toruń in 1783 and at Wschów in 1789. See Reports of these schools in T. WIERZBOWSKI, *op. cit.*, fasc. 5, p. 11, 20, 24; fasc. 9, p. 44, 49, 109.

²⁵ In 1778 at Łęczyca and Płock the law of nature was taught in class VI and in 1781 in class VII at Łęczyca, in 1779 at Płock. See reports of these schools in T. WIERZBOWSKI, *op. cit.*, fasc. 2, p. 8, 17; fasc. 3, p. 23, 30.

²⁶ P. DĄBKOWSKI, *Nauka prawa w szkołach wydziałowych i podwydziałowych Komisji Edukacyjnej (1773 - 1794)* [Teaching Law in Departmental and Subdepartmental Schools of the Commission of Education (1773 - 1794)], Lwów 1915, p. 15, 16.

²⁷ E.g., in the reports of the subdepartmental school of Łęczyca. See T. WIERZBOWSKI, *op. cit.*, fasc. 2, p. 8.

²⁸ Reports of the subdepartmental schools of Płock and Rawa and Reports of the departmental school of Poznań, in: T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 8, 14, 23, 30, 42; fasc. 5, p. 7, 12; fasc. 7, p. 89.

The teachers proceeded to the teaching of the law of nations only after other legal subjects and, as a rule, after having finished the course of the law of nature. The teaching the law of nations usually started in class VI both in subdepartmental and departmental schools.²⁹ There are also teachers' reports informing that they began to teach this subject only in class VII or, on the contrary—already in class V, and sometimes even in class IV.³⁰ As a rule, to the law of nations one hour a week was assigned,³¹ whereas, as it has been already mentioned above, to the law of nature—six, and to the constitutional law—three hours a week.³²

Thus, there existed a considerable disproportion between the time assigned to the teaching of the law of nations and to other legal disciplines. One should, however, remember that the lectures of the law of nature and constitutional law started earlier giving the young brains already a general introduction to the law of nations. Hence the acquainting the pupils with the principles of the law of nations had not to be started with the explanation of rudimentary legal concepts. It was possible to pass at once to the heart of the matter, the more so as the law of nature was treated as introduction to the law of nations. The relation between the law of nature and the law of nations was so close at that time that the latter was considered as the law of nature in respect to mutual rights and obligations of nations.

The above mentioned teachers' reports, especially the more exhaustive ones, enable not only to define the place of the law of nations in the time table of school lessons, but also often inform of the scope of the subject taught. Some teachers limited their reports, e.g., to the information that they had taught the law of nations according to the textbook by Stroynowski or in very broad terms mentioned the discussed problems. For example, a teacher of the subdepartmental school at Rawa wrote:

"I have divided the law of nations into four parts: 1) on diplomatic

²⁹ It was so at Poznań in 1778, 1782, 1784, 1787, 1788, in Warsaw in 1788, 1789, at Rawa in 1783, 1789, at Płock in 1778. The Reports of these schools in T. WIERZBOWSKI, *op. cit.*, fasc. 1, p. 34, 42; fasc. 5, p. 40, 81; fasc. 3, p. 14.

³⁰ In class VII at Płock in 1779, in class V at Pułtusk in 1784, 1786 and 1788, at Kalisz in 1780 and 1791, in Warsaw in 1783, in class IV at Kalisz in 1782 - 1786. See the Reports of these schools in T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 34; fasc. 4, p. 85, 107, 130; fasc. 8, p. 35, 54, 60, 65, 73; fasc. 1, p. 10.

³¹ See e.g., the Reports of the departmental school of Poznań and the reports of the subdepartmental schools of Płock, Kalisz and Toruń—T. WIERZBOWSKI, *op. cit.*, fasc. 7, p. 12, 43; fasc. 3, p. 14; fasc. 8, p. 45; fasc. 9, p. 50.

³² Cf. P. DĄBKOWSKI, *op. cit.*, p. 16.

missions, which I have finished, 2) on wars, which I am just beginning, 3) on titles, the precedence among monarchs and on mutual claims."³³

From the majority of reports it follows that according to the used textbooks the course of the law of nations was divided into a general and detailed part, the latter comprising the problems of diplomatic envoys, treaties, war and diplomatic precedence. One can, however, find also another approach to the subject. For instance, a teacher of the subdepartmental school at Płock divided the courses of the law of nations also into two parts but otherwise. In the first part he discussed with his pupils "the general rules, that is, the rights and obligations of nations," whereas the part devoted to "particular rights and obligations of nations" was put into 37 paragraphs. He taught, among other things, about the need and advantages of trade between different nations, about the equality and independence of nations, justice among nations, at length about treaties and different means of settlement of international disputes and, at the end, about diplomatic law.³⁴ Striking is here that the law of nations was treated in detail even in subdepartmental schools.

The teaching the law of nations in so numerous schools scattered all over the Republic required preparation of special textbooks in Polish, since the adaptation of voluminous and difficult foreign works to the curriculum and to the intellectual capacity of teenage pupils of secondary schools required too much teachers' efforts and time. The Commission of National Education, from the very outset of its existence, strove after the preparation of appropriate Polish textbooks for all school subjects. In spite of great efforts, no textbook of law obtained full and official approbation during the whole period of activity of the Commission. There appeared, however, a lot of interesting publications on legal subjects.³⁵

Undoubtedly, the publication of the first Polish text-book entirely devoted to the law in 1780 constituted an important event in this respect. It was published anonymously at Lemberg under the title *Krótkie zebranie trzech praw początkowych: prawa natury, politycznego i narodów* [A Short Summary of Three Initial Laws: the Law of Nature, Constitutional Law and the Law of Nations]. The title as well as the content indicate clearly that this booklet should fully correspond to the requirements prescribed in this matter by the Commission of National Education. Therefore, in spite of absence of an official approval by the Commission,

³³ Reports of the subdepartmental school at Rawa—T. WIERZBOWSKI, *op. cit.*, fasc. 5, p. 40.

³⁴ Reports of the subdepartmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 106, 107 and 121 - 123.

³⁵ J. KOLASA, *op. cit.*, p. 88 - 97.

this textbook—as it follows from the teachers reports—was broadly used even by schools far-away from the place of its publication.³⁶

Five years on the edition of the *Short Summary* there appeared the generally known and commented in Polish science work by Hieronim Stroynowski *Nauka prawa przyrodzonego, prawa politycznego, ekonomiki politycznej i prawa narodów* [*Courses of the Law of Nature, Constitutional Law, Political Economics and the Law of Nations*], Wilno 1785. Although it also did not obtain Commission's official approval, it was recommended everywhere and the lectures in the vast majority of schools were based on it. It had five editions and a translation into Russian.³⁷ It was used as a textbook even at the Vilna University where Stroynowski was reading the law of nations for many years.³⁸

These two Polish textbooks, most used in departmental and subdepartmental schools, consist of two parts, the general and the detailed one embracing the problems of diplomatic missions, treaties, war and diplomatic precedence. These concise volumes are not original if one evaluates them from the point of view of their contribution to the general doctrine of the law of nations. They cannot be compared with the works by Wolf or Vattel. The authors of these small Polish textbooks rather followed the Western science than kept pace with it. There was nothing exceptional nor wrong in this fact at that time. It seems unimportant here to ask whether the above two school textbooks are original in its content or to look for the prototype of their ideas. One should rather evaluate them from the angle of their destination and the part they had to fulfil in the curricula of the schools of the Commission of National Education.

Thus, for instance, one of the teachers of a subdepartmental school reported that he had taught the law of nature from the works by Hobbes, Spinoza, Grotius, Pufendorf and others.³⁹ What a tremendous effort he had to make to give from such manifold and difficult works a concise and, above all, clear and lucid lesson on this subject in Polish. Precisely the problem of language cannot be neglected here. For many generations they were teaching at that time on materials written in latin. Conse-

³⁶ Reports of the subdepartmental schools of Kalisz and Pułtusk—T. WIERZBOWSKI, *op. cit.*, fasc. 8, p. 73; fasc. 4, p. 43.

³⁷ P. DĄBKOWSKI, *op. cit.*, p. 37; K. OPAŁEK, *Hieronim Stroynowski, przedstawiciel postępowej myśli prawniczej polskiego Oświecenia* [*Hieronim Stroynowski—the Representative of Progressive Legal Thought of Polish Enlightenment*], "Państwo i Prawo," 1952, No. 1, p. 11.

³⁸ I. G. RUDOMINA, *Żywoć Hieronima Stroynowskiego* [*Life of Hieronim Stroynowski*], Wilno 1839, pp. 9 - 10.

³⁹ Reports of the subdepartmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 14, 42, 43.

quently, no Polish scientific terminology existed yet. This was especially acute in the subject of the law of nations. This deficiency had to be made up by those above mentioned modest textbooks on the law of nature, the constitutional law and the law of nations written plainly and intelligibly not only for the teacher but also for the pupils. The modest and, may be, even poor content and form of these publications and their clear and succinct style made it easy for the minds of young pupils of subdepartmental schools to learn the unfolded legal principles. Although the mentioned textbooks do not belong to the universal trend of development of the science of the law of nations, one can safely recognize their priority in Europe as far as the development of the teaching of that subject on such a large scale in secondary schools is concerned.

The usefulness of those textbooks in inculcating, to be sure, difficult ideas and legal principles of the law of nations was confirmed by the pupils' displays. The *Statutes* of the Commission of National Education prescribed the organization of "public pupils' displays" at the end of the school year on the all years' curricula in the given subject. Obviously, to such festive display only the best pupils were admitted, that is, those who proved to be the best in the subject during the school year and at the exams. The displays were announced earlier by means of printed announcements. In the reports of such displays also published in print one can not infrequently find briefer or longer notes and even extensive outlines or summaries of the speeches and of the answers given by the pupils. Thus they constitute precious first-hand information on the scope and level of the acquired knowledge by the pupils and on the spirit in which the law of nations was taught. With the textbooks and the teachers' reports they present the actual state of the teaching the law of nations in the schools of the Commission of National Education.

One should stress that the importance of those pupils' displays reached far beyond the school buildings, since at such festivities the pupils proclaimed before a large audience the principles of natural rights of the man and of whole nations and they proved the rightness of new social and political ideas. Here of necessity it came to the confrontation of new progressive trends with the backwardness and particularism of the gentry. The minds of the older generation were moulded in the spirit of necessary for the State and nation reforms. Thanks to the pupils' displays the knowledge acquired at schools could influence the society and thus contribute to the moulding of public opinion in the spirit favourable to social, political and economic reforms indispensable for the saving the country from anarchy and political fall. The displays were certainly one of the important factors in the intellectual revolution of the Polish Republic of the end of the 18th century.

The confrontation of the textbooks with the preserved teachers' reports and the published records of pupils' displays enables a relatively credible reconstruction of the scope and level and, what is not less important, of the content and the aim of teaching the law of nations in the schools of the Commission of National Education.

The general part usually revolved round two principal problems: 1) the sovereign and the nation and 2) the mutual rights and obligations of nations.

Thus the preliminary lessons aimed at defining the nation as subject of international law based upon the three well-known elements: territory, population and supreme authority. It was emphasized, which was certainly new and progressive in Poland, that the State is based on a *contrat social* (agreement), hence it is of purely human, earthly origin. The people joined into nation to attain by common effort safety and welfare.⁴⁰ These ideas were certainly borrowed from the reasoning on that subject by Vattel, who wrote: "*Les nations ou états sont des corps politiques, des sociétés d'hommes unis ensemble pour procurer leur salut et leur avantage à force réunies.*"⁴¹

The treatment of the State as a being depending on human will broke the traditional, teocratic conception of the State and supreme authority. The State and supreme authority have been submitted to the dictates of the law of nature, which helped in the formation of a new, void of feudal conceptions, epoch of social development. These ideas, propagated since long in the West, were expression of progress there and in Polish secondary schools, certainly, often appeared revolutionary.

According to the contemporary progressive trend of the science of the law of nations they taught in the schools of the Commission of National Education that not the monarch but the nation is subject of the law of nations. For instance, Stroynowski wrote: "By the discipline of the law of nations one should understand a systematic course of *mutual obligations of nations*"⁴² (italics by J.K.)

These mutual rights and obligations were taught in close, often too mechanic, connection with the mutual rights and obligations of individuals. Similarly then as individuals associated themselves in nations, so

⁴⁰ See e.g., Reports of the departmental school of Poznań—T. WIERZBOWSKI, *op. cit.*, fasc. 7, p. 56 and *Popisy roczne szkół wojewódzkich krakowskich...* [Yearly Displays of the Cracow Departmental Schools], 1780, or H. STROYNOWSKI, *Nauka prawa przyrodzonego, prawa politycznego, ekonomiki politycznej i prawa narodów* [Courses of the Law of Nature, Constitutional Law, Political Economics and the Law of Nations], Wilno 1785, p. 210 - 211.

⁴¹ E. VATTEL, *Le droit des gens*, Leyde 1758, p. 1.

⁴² H. STROYNOWSKI, *op. cit.*, p. 207.

all nations constitute one international society. Starting from a rather simplified analogy between an individual and a whole nation, the teachers reduced the mutual rights and obligations of the nations resulting from the nature to few fundamental principles: 1) the inviolability of property and freedom of the nation, 2) the right to defend its freedom and property, 3) the obligation of keeping agreements and 4) the right of demanding assistance in critical situations from other nations.⁴³

In the detailed part the problems of diplomatic missions, war and treaties were successively discussed.

The problems of diplomatic missions were treated in the textbooks rather briefly. As it follows from the teachers' reports, the courses included, however, all principal elements of these problems. The teachers explained to the pupils the "long history, variety and usefulness of diplomatic missions" with the differentiation of envoys of "the first, second and third class." Next, they discussed the "privileges of envoys in respect to law, worship, honours, importation of articles; the exercising of privileges (where and when), their limitations on different occasions, as well as complete cessation in certain cases; the duties of foreign ministers; when do the status and office of the envoy terminate, etc."⁴⁴

On hearing the courses the pupils proclaimed at public displays that "every nation has the right to send and receive envoys" and that "this right as a natural right should be respected by all other nations." A monarch "denying the right of another monarch of sending envoys or persistently rejecting their acceptance commits a wrong and violates the law of nations." It was stressed that the activity of foreign envoys should aim at the strengthening of mutual friendship and at the preservation of peace among all nations.⁴⁵

The argumentation on diplomatic service was closely linked with the progressive aspirations of the camp of reforms in Poland. Stressing the advantages of keeping such a service they strove to break the stubborn reluctance of Polish nobility to the institution of permanent resident diplomatic missions at foreign courts. In this reluctance Poland was isolated.⁴⁶ One also pointed to the rights and obligations of envoys in respect

⁴³ *Ibid.*, p. 214 - 215; cf. also *Krótkie zebranie trzech praw początkowych: prawa natury, politycznego i narodów* [A Short Summary of Three Initial Laws: the Law of Nature, Constitutional Law and the Law of Nations], Lemberg 1780, p. 149 - 156.

⁴⁴ Reports of the departmental school of Poznań; cf. also Reports of the sub-departmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 7, p. 12; fasc. 3, p. 107.

⁴⁵ *Popis roczny z nauk: moralnej, prawa i historii przez cztery klasy w szkołach większych krakowskich dawanych...* [Yearly Display of the Subjects: Moral Training, Law and History, Taught in Four Classes in Larger Cracow Schools...], 1782.

⁴⁶ Wicquefort describes at large the reluctance of Polish gentry to accept per-

to the monarch where they were accredited. It had a special import in face of the numerous and brutal violations of the duties by the diplomatic envoys of the neighbouring Powers to the Polish nations and its monarch at that time.

The problems connected with war occupied most place in the courses of the law of nations in the schools of the Commission of National Education. Here is an example from a detailed conspect of the lesson on war quoted from a teachers' report:

"Having shown that mediation is one of the most used means of settlement of differences, often ineffective, we proceeded to the description and division of war; we considered who had the right to wage a war, to recruit soldiers and terminate the war; we discussed the problem which of the causes of war were important and justified and which only alleged, what was the aim and the time of war; the ways of declaring war has been also described. Since belligerent nations are surrounded by or allied with other nations, which because of the existing treaties should render assistance or remain neutral, or, which because of treaties or other circumstances, do not join any side, we have not neglected to speak in detail also on this matter. We have not omitted the rights serving the nations during the war and, in particular, that what they are permitted or forbidden to do against the enemy in a just war, quoting the rights or rather the causes for which the nation waging a just war acquires the rights on enemy's property and showing which articles of the enemy if they could not be taken away may be destroyed and which should be spared. The information about keeping the word to the enemy, about ambushes, spies and certain kinds of agreements during the war has terminated the matter on war."⁴⁷

The quoted here teachers' report is not at all exceptional in its detailed treatment of the war. Other teachers in other schools discussed this problem similarly.⁴⁸

It is noteworthy that the lesson on war began with the presentation of various means of peaceful settlement of international disputes. In the teachers' reports we read:

in the 18th century trained the pupils in profound understanding and conviction of the advantages flowing from peace among nations and of

manent resident ambassadors in Poland. A. WICQUEFORT, *L'Ambassadeur et ses fonctions*, Amsterdam 1730, vol. 1, p. 8, 12 - 13 ff.

⁴⁷ Reports of the subdepartmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 122 - 123.

⁴⁸ Cf. Reports of subdepartmental schools of Płock (other years), Wschów, Pułtusk and Reports of the departmental school of Poznań—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 107; fasc. 9, p. 110; fasc. 4, p. 85; fasc. 7, p. 22.

"We have spoken of mediation, war and peace. On having shown that mediation is the most used but sometimes ineffective method of solving differences we passed to the description and systematization of war."⁴⁹ Thus, war was treated as an extreme measure. On hearing such a course of lectures the pupil could develop the ideas and mould the society on public displays in the spirit that "war is the ultimate means of seeking redress of a wrong. Nowadays nations should resort to it only when they are convinced that all other means would be ineffective."⁵⁰

Certainly, only a just war in self-defence was considered as admissible. The law of nature gives the nation only the right to defend itself since "the law of war is nothing else than the natural right of self-defence."⁵¹ About just war one may speak only in two cases: "First, when the nation for the sake of its own defence forces back the enemy who invades the country and attempts on its property or the freedom of its citizens; secondly, when in a similar case, as result of salutary assistance or special relations, one or more nations render protection to the innocent against the violator of public safety and peace."⁵² The state of war does not dispense the belligerent parties from observing the principles of the law of nations. The pupils were taught that it was the duty of the nation being at war to "observe during the war the same natural obligations as during peace" and the reasons compelling to declare war ought to be announced in a "public declaration."⁵³

The pupils filled with the idea of humanitarian waging of wars in conformity with the natural law of nations could proclaim at public pupils' displays that "it is an essential duty of the party waging a just war to use all means to save human blood. There is nothing more degrading an intelligent mind than to murder and deprive of life the enemies who surrender and are unable to do harm[...]. A virtuous soldier should regard the inhabitants of the enemy country as his brothers. His braveness should reach only those whose profession is to fight with him openly."⁵⁴

The law of war thus conceived and taught at Polish secondary schools in the 18th century trained the pupils in profound understanding and

⁴⁹ Reports of the subdepartmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 122.

⁵⁰ *Popisy roczne [...] w szkołach większych krakowskich...* [*Yearly Displays... in Larger Schools of Cracow*], 1782.

⁵¹ H. STROYNOWSKI, *op. cit.*, p. 291.

⁵² *Ibid.*, p. 290.

⁵³ *Ibid.*, p. 292 and the Manuscript of the Archive of the Cracow University 450, p. 131.

⁵⁴ *Popisy roczne [...] w szkołach większych krakowskich...* [*Yearly Displays ... in Larger Schools of Cracow...*], 1782. These are certainly repercussions of the J. J. Rousseau's opinions on the waging war and the protection of civil population.

conviction of the advantages flowing from peace among nations and of the calamities which are caused by the war. The teachers did not, however, neglect to inculcate in their pupils the sense of duty resulting from nature of defending one's own country and of giving assistance in need to nations attacked by force of arms.

The lessons on treaties included such fundamental problems as advantages and necessity of concluding agreements between nations, kinds and content of such agreements and the sanctity of the principle *pacta sunt servanda*. In the teachers' reports one can find the following outline of these problems:

"Dealing with this matter we have given a sufficient idea of treaties, we have shown who is authorized, and through whom, to conclude them; we have judged their keeping as indispensable[...]. Next, we have divided them into classes, we have spoken of their termination and renewal at the same time stressing that monarchs' private contracts do not belong to public treaties[...]. Next, we have described the sanctity of treaties[...] we have concluded this matter with remarks on the means of safeguarding treaties and on the rule serving their interpretation."⁵⁵

From the general part of the course pupils learned already that the right to conclude agreements follows from the law of nature; in the lesson on treaties they were taught that nations, similarly to individuals, have special rights and duties which precisely are "confirmed by the law of nations," since "as between people so between nations mutual agreements, hence treaties are necessary."⁵⁶ Such agreements are concluded, among others, for "terminating quarrels, smoothing away all sorts of difficulties, satisfying claims, dispelling doubts[...]" or, finally, for "express and solemn recognition and confirmation of mutual obligations."⁵⁷

The terminology and classification of treaties was coped with variously. As a rule, however, one divided them into those concluded during the war and in peace time.⁵⁸ Particular emphasis was put upon the importance of commercial treaties, professing the theory of entirely unrestricted commercial exchange between all nations. At pupils' displays one could hear following opinions proclaimed by the pupils: "The absolute freedom of the home and foreign trade conforms with the interests of every nation; and nations restricting this freedom cause innumerable losses."⁵⁹

⁵⁵ Reports of the subdepartmental school of Płock—T. WIERZBOWSKI, *op. cit.*, fasc. 3, p. 122.

⁵⁶ *Popis publiczny trzech wyższych klas szkół wojewódzkich lubelskich...* [Public Display of Three Higher Classes of the Departmental Schools of Lublin...], 1780.

⁵⁷ H. STROYNOWSKI, *op. cit.*, p. 295.

⁵⁸ See *Krótkie zebranie...* [A Short Summary...], p. 117, 181.

⁵⁹ *Popis publiczny trzech wyższych klas szkół wojewódzkich lubelskich...* [Public

The principle *pacta sunt servanda* was presented to the pupils as the basis of the international legal order. One of the pupils asserted at the display that "concluded treaties bind to such degree that even those infringing the dignity of one of the parties do not lose their validity provided that they are not forced on by treason, deceit[...]" Solely then "if agreements led to the ruin of the nation, if they violated the law of nature they would become void and, because of their wickedness, would not bind."⁶⁰ Among such treaties they certainly counted in Polish school the agreements of the neighbouring Powers providing for the partitions of Poland, which constitute a brutal violation of fundamental principles of the law of nations and nature.

* * *

This short essay shows clearly the important part of the law of nations played in the curriculum of Polish secondary schools of the 18th century. This teaching contributed to the moulding of a new type of man and citizen. The evolution which took place in the civic and national consciousness thanks to the teaching of law in departmental and subdepartmental schools belong to the best Polish traditions of the period of Enlightenment.

The Commission of National Education created through its reforms an original and interesting system of propagation of legal principles concerning the coexistence of nations, a system of great educational importance. In this system most valuable is the consideration of the whole progressive output of the contemporary science of international law and its adaptation to the political requirements and conditions of the country. The deficiency of Polish works of considerable theoretical ambitions at that time seems justifiable and less important considering the social and political role of the teaching of the law of nature and the law of nations and the inculcation of the essentials of those disciplines already in the youngest generation.

The Commission of National Education made a lasting contribution to which one could refer also today, especially at the realization of the postulated by the UNESCO educational programme by means of schools and the teaching of the law of nations.

Display of Three Higher Class of the Departmental Schools of Lublin..., 1780. Cf. also H. STROYNOWSKI, *op. cit.*, p. 218 - 282.

⁶⁰ *Popisy roczne[...] w szkołach większych krakowskich...* [*Yearly Displays ... in Larger Schools in Cracow...*], 1782.

BOOK REVIEWS ★ COMPTES RENDUS

Adam BASAK, *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice*, Wrocław Scientific Society, Wrocław 1969, 223 pp.

The book under review constitutes an important link in the chain of numerous publications on the topical problem of resolutions of the United Nations organs.

The author has analysed the views of the International Court of Justice on those resolutions and confronted his findings with the opinions represented in the literature. It should be noted that the research has been based not only on the well known opinions of 1955 and 1962 but also on numerous, even fragmentary, remarks in sixteen other judgments and opinions of the Court.

The composition of the study rests in the major part on the three types of authorization of the United Nations organs to make decisions, which correspond to the three degrees of independence granted to them by the Charter. Thus, in Chapters I to III there are examined the views of the Court on decisions based on specific, general and implied authorization.

This division is clear and original though certainly not easy to carry out consistently. For example, one might argue with the author whether whole Article 11 of the Charter refers to decisions taken on general authorization considering the reading of its paragraph 3 (p. 70).

Among the resolutions based on specific authorization Dr Basak deals mainly with those referring to the "internal functioning of the Organization." He

points out that the Court has considered as binding only such of them which do not contain any express request for—or any proposition of a definite way of behaving by member States, and that the Court has called them consistently "decisions."

Among the resolutions on general authorization the Court has acknowledged as binding those decisions which were adopted by the Security Council on Chapter VII of the Charter. Other such resolutions, adopted by the General Assembly and the Security Council, have been considered as binding only if accepted as such by the member States. However, as Dr Basak states, some decisions on general authorization assumed binding force indirectly if the action undertaken upon such decisions involved expenses, because, in the Courts opinion, all member States are required to cover such expenses.

As far as the theory of implied powers of the Organization is concerned, the author has pointed out not only that the Court fully accepts it but also that such implied legal basis of decisions, in the Court's opinion, does not weaken their legal value in any way.

The book ends with a chapter devoted to the study of the question whether the decisions of the United Nations organs constitute a new, separate type of source of international law. The author answers it in the affirmative pointing out that the Court has treated these

decisions as acts which establish law different from a treaty. This conclusion is warranted by the fact that resolutions have served as basis of judgments and opinions of the Court and, in the latter's opinion, such decisions originate in the will of the organ and not of individual States.

The author's general conclusion is that the views of the Court on resolutions of the United Nations organs, even those which have met with heavy criticism, constitute a very valuable material since they contribute to the clarification of the set of problems surrounding such decisions.

These are only the outlines of a few of the author's conclusions from his thorough researches. One should add that the book is well documented. It proves the author's analytic skills and, at the same time, his prudence in generalizations. Even if some of the author's findings only confirm the opinions already prevailing in the literature, the book constitutes a valuable complement among the studies on the vast problem of the legal nature of decisions of international organizations.

Karol Wolfke

Rudolf BUCHAŁA, "*Recht auf die Heimat.*" *Studium z problematyki stosunków między NRF a wschodnimi sąsiadami Niemiec* [*«Recht auf die Heimat». Étude du domaine des rapports entre la République Fédérale d'Allemagne et les voisins de l'est de l'Allemagne*], Katowice-Kraków 1969, PWN, 140 pp.

Dans les publications scientifiques et la presse internationale paraissent de temps en temps les termes dont la signification qui n'est pas tout à fait claire provoque des malentendus, des polémiques et des discussions. Ces controverses, d'apparence terminologique, concernent en réalité les problèmes politiques clés. Il en est ainsi de la doctrine du *Heimatrecht* lancée depuis plusieurs années en R.F.A., qui a été et reste toujours la source de controverses aussi bien au niveau de droit, de sociologie et même de théologie qu'au niveau de langue; ne serait-ce que les difficultés avec la traduction adéquate de l'expression allemande *Recht auf die Heimat* en d'autres langues qui en sont une illustration¹.

¹ C'est ainsi que certains auteurs de langue anglaise parlent de *the right to the native soil*, d'autres de *the right to the homeland*, d'autres encore de *the right of domicile*, comme le proposent les auteurs de *Internationales Recht und Diplomatie*, Köln 1962, p. 80. Cette expression est traduite en français par le « droit au foyer » ou le « droit à la patrie » ou bien — comme le suggère la publication alle-

mande susmentionnée — le « droit au domicile » (*ibid.*, p. 83).

Les différences de vues portent évidemment sur la portée de la notion de *Heimat*. Rudolf Buchała, chercheur à l'Institut Silésien de la Recherche scientifique (Katowice), étudie ce problème au niveau du droit international. Pour constater ce que signifie le mot spécifiquement allemand *Heimat*, l'auteur rappelle les actes juridiques des États de la langue allemande (Autriche, Allemagne, Suisse) où l'on rencontre le terme *Heimatrecht*. L'analyse de ces documents permet de constater que le contenu juridique de la notion de *Heimat* concerne avant tout les relations internationales *in actu*. Notons que, dans le droit traditionnel, la notion de *Heimat* apparaît uniquement dans le cas où il s'agit de l'individu. Dans la République Fédérale Allemande on a admis une autre interprétation de cette question. Conformément à l'interprétation du terme *Recht auf die*

mande susmentionnée — le « droit au domicile » (*ibid.*, p. 83).

*Heimat*² généralement répandue en Allemagne de l'Ouest, cette notion devrait comprendre le « droit au domicile déterminé (géographiquement) » (p. 52), et c'est justement avec cette interprétation de la doctrine du *Heimatrecht* que polémiquait R. Buchala.

La doctrine du soi-disant *Recht auf die Heimat* est née de la contestation de la légalité et de la validité du transfert forcé de la population allemande après la Deuxième Guerre mondiale. Comme on le sait, le déplacement des Allemands fut basé sur les Accords de Potsdam du 2 août 1945. Les conceptions territoriales prouvant l'illégalité des décisions de Potsdam concernant ce déplacement devaient constituer pour ainsi dire le programme idéologique du mouvement de réfugiés, qui se formait après la guerre dans les zones d'occupation occidentales. La doctrine du soi-disant *Recht auf die Heimat* a été formulée dans le document fondamental des organisations des expulsés (*Charta des Heimatvertriebenen*) publié le 5 août 1950 à Stuttgart. La *Charte des expulsés* proclamait³ : « Nous avons perdu notre patrie. Ceux qui sont privés de leur patrie sont des étrangers sur cette terre. Dieu avait placé les hommes dans leur patrie. Contraindre l'homme à se séparer de sa patrie signifie lui donner la mort spirituelle [...] Nous nous sentons donc appelés à réclamer la reconnaissance et la réalisation du droit à la patrie comme l'un des

droits fondamentaux dont Dieu a doté l'homme ». La thèse exposée dans la *Charte* fut développée dans de nombreux ouvrages scientifiques. A la doctrine du *Recht auf die Heimat* sont liés les noms de R. Laun (considéré même comme l'auteur de ce terme provoquant tant de controverses), de M. Bülck, de H. Raschhofer, de K. Rabl et de plusieurs autres représentants de la science ouest-allemande, qui ont fait beaucoup pour que la conception proclamée par eux devienne non seulement partie intégrante de la politique du gouvernement de la R.F.A., mais aussi qu'elle soit reconnue comme règle du droit international contemporain.

Les études menées par Rudolf Buchala permettent de démontrer comment la doctrine du *Recht auf die Heimat*, initialement développée dans des ouvrages scientifiques réservés à un public très restreint, a atteint la presse⁴ (il suffit de rappeler qu'en R.F.A. plus de 60 revues sont consacrées uniquement à la patrie silésienne), quel rôle a joué dans les manifestations politiques organisées par les amicales des réfugiés qui l'ont élevée au rang de grand programme de travail des réfugiés⁵ et comment elle a influé sur la formation de la politique officielle de la R.F.A. « L'observation de l'évolution de cette doctrine et de sa fonction politique, écrit l'auteur, révèle comment une certaine problématique locale — car penser avec la catégorie de *Heimat* concerne initialement l'entourage le plus proche, le plus intime de l'homme — se transforme, de plus en plus

² Faute de place, nous ne présentons pas ici différentes tentatives des partisans de la conception du *Recht auf die Heimat* visant à préciser les divers variantes de cette notion, telles que par exemple : 1° *Recht auf die Heimat*, ce qui signifie le droit de l'homme à s'enraciner dans un endroit ; l'endroit choisi n'est pas important ; 2° *Heimatrecht* — le droit de l'individu au domicile dans un pays déterminé ; 3° *Recht auf die Heimat* — le droit d'un groupe au territoire où il habite depuis plusieurs générations. Conf. E. v. HOFFMANN dans le recueil *Das Recht auf die Heimat, Verträge und Aussprachen*, München 1959, pp. 90 - 92.

³ Le texte dans la « Schlesische Rundschau », 29 juillet — 5 août 1960.

⁴ Il faut noter que selon une information de la presse ouest-allemande (conf. « Volksbote » du 27 juin 1970) on a supprimé plusieurs revues consacrées à la problématique de l'est (« Ostprobleme », « Der aktuelle Osten ») car le gouvernement de la R.F.A. a coupé ses subventions destinées à cette fin.

⁵ Conf. « Grosses Vertriebenenpolitisches Arbeitsprogramm. Neues Präsidium Konstituiert. 2. Völkerrechtliche Tagung ; Recht auf die Heimat klären und durchsetzen » (« Deutscher Ostdienst » du 27 avril 1964).

nettement, d'une pensée à ce qui est le plus proche, le plus intime, en une pensée expansive, dépassant cet entourage le plus proche, allant même au-delà des frontières de l'Allemagne et se dirigeant contre d'autres collectivités et sociétés » (pp. 62 - 63).

Compte tenu qu'un juriste analysant le soi-disant *Recht auf die Heimat* doit se fonder sur le sens même du terme *Heimat* précisé par d'autres disciplines scientifiques, R. Buchala présente à tour de rôle les éléments qui, conformément aux opinions des auteurs ouest-allemands, sont les parties intégrantes de cette notion: la famille, la langue, la région, le travail et la propriété. A l'issue de l'analyse de chacun de ces éléments, on peut constater de manière générale que la patrie se trouve là où l'homme est enraciné dans le sens de l'enracinement en tant que phénomène sociologique (*Verwurzelung*). En même temps, les déplacements des gens, les migrations, sont un phénomène caractéristique du monde contemporain. Les partisans de la doctrine du *Recht auf die Heimat* sont conscients de ce phénomène, toutefois ils estiment qu'une différence essentielle existe entre le déplacement volontaire et le déplacement forcé. Comme l'ont soutenu les participants lors des discussions organisées en R.F.A., il est douteux que l'on puisse parler d'un phénomène de déplacement entièrement volontaire. C'est ainsi que dans la discussion sur le rapport de W. Brepohl, G. Beck, fonctionnaire du ministère des Affaires étrangères ouest-allemand, a remarqué que⁶: « [...]un émigré quitte aussi sa patrie sous contrainte, dans ce sens que ce dernier estime que dans son domicile actuel, il ne peut plus à rien arriver pour des raisons économiques ou personnelles (échecs et malchances) ». La plupart des auteurs ouest-allemands, bien qu'ayant un point de vue analogue sur

les motifs de contrainte inhérents de chaque émigration, postulent que les sciences juridiques (et d'autres sciences sociales) introduisent une différenciation « entre la migration volontaire et l'expulsion, en particulier l'expulsion massive »⁷. Cette différenciation est nécessaire car les conséquences juridiques, dans la construction de la doctrine en question, sont liées au facteur de la contrainte qui, dans les ouvrages des partisans du *Recht auf die Heimat*, est un chaînon indispensable à la reconnaissance de l'illégalité des déplacements.

R. Buchala analyse les diverses opinions des auteurs ouest-allemands attribuant au soi-disant *Recht auf die Heimat* les effets juridiques de deux natures: 1° le droit au retour, c'est-à-dire « l'annulation » de la décision de migration non volontaire (*Naturalrestitution*); 2° le droit à la réparation matérielle des dommages subis à la suite du déplacement non volontaire (c'est une mesure temporaire jusqu'au moment de retour).

Dans son ouvrage, nous trouvons également un esquisse des questions juridiques liées à cette prétention de retour (*Rückkehranspruch*) dans le cadre de l'ordre interne et international.

Dans le titre de sa monographie publiée en R.F.A., D. Fukas se demande, si dans le droit international positif existe une règle selon laquelle un homme a le droit de vivre dans sa patrie et il est interdit de l'en expulser?⁸. La thèse de cet ouvrage se ramène à l'affirmation que le droit international interdit d'arracher l'homme à sa patrie. Il s'agit de la « patrie déterminée » et de la « patrie en général ». Les principaux théoriciens ouest-allemands (par exemple R. Laun,

⁷ *Ibid.*, p. 146.

⁸ D. FUKAS: *Gibt es im positiven Völkerrecht eine Norm des Inhalts, dass des Mensch in der Heimat leben und nicht aus ihr vertrieben werden darf?*, Erlangen 1959. Dissertation présentée à la Faculté de Droit de l'Université d'Erlangen.

⁶ *Das Recht auf die Heimat*, *ibid.*, vol. II, p. 28.

K. Rabi, H. Rogge et autres) ont formulé les conclusions analogues sous forme de programme politique qui se fondait sur le droit en vigueur.

La question se pose donc: le *Recht auf die Heimat* — dans la conception impliquant le droit de la population de rentrer sur le territoire d'où elle a été déplacée — appartient-il, en effet, aux règles du droit international en vigueur? Pour répondre à cette question il faut définir préalablement si les déplacements — volontaires ou forcés — étaient légaux. R. Buchala analyse les accords internationaux qui, selon certains représentants de la doctrine ouest-allemande, ont créé les bases juridiques du caractère généralement obligatoire du *Recht auf die Heimat*. Ils se réfèrent, par exemple, au Statut du Tribunal Militaire International du 8 août 1945, et plus particulièrement à l'interdiction de déportation qui y est exprimée, à la convention sur la prévention et le châtimement du crime de génocide (1948), à la convention de Genève pour la protection des personnes civiles en temps de guerre (1949); ils réfèrent aux droits de l'homme et au droit des nations à l'autodétermination. Chose significative, ils passent sous silence ou critiquent l'acte fondamental de droit international — les Accords de Potsdam — qui précédait chronologiquement les accords susmentionnés et réglait en même temps le statut juridique de l'Allemagne et de sa population après la Seconde Guerre mondiale.

Ces accords sont traités en R.F.A. comme *res inter alios acta*. En ce qui concerne le problème qui nous intéresse, ils stipulaient: « Les trois gouvernements, après avoir examiné la question sous tous ses aspects, reconnaissent qu'il y aura lieu de procéder au transfert en Allemagne des populations allemandes restant en Pologne, en Tchécoslovaquie et en Hongrie ». Il est difficile d'admettre — constate Buchala — qu'au cours des 6 jours qui séparaient la signature du *Statut du Tribunal International* de Nurem-

berg des Accords de Potsdam, la conscience juridique de ces actes ait changé en sa propre opposition, si, en fait, le *Statut du Tribunal* et les accords ultérieurs avaient effectivement contenu la règle absolument obligatoire du « droit à la patrie ». Nous passons ici outre le principe *lex retro non agit*.

Il reste à considérer si les déplacements forcés sont admissibles. J. B. Schechtmann, auteur américain jouissant d'une autorité internationale en ce qui concerne le transfert de la population, constate⁹ que, dans chaque État, existent de nombreuses exigences dans l'intérêt du bien commun qui sont imposées aux individus et aux groupes indépendamment de leurs désirs personnels. Il y a des vaccinations et des quarantaines obligatoires en cas d'épidémie; il y a des évacuations en cas d'incendie, d'inondation ou d'invasion militaire. Il en décide le bien de la communauté qui — à long terme — converge avec celui de l'individu. Il en est de même dans la collectivité internationale. Son bien suprême est la paix. Les peuples peuvent recourir aux mesures de force et de prévention lorsque celles-ci sont le seul moyen efficace pour préserver la paix. C'est toujours une démarche exceptionnelle et extrême. Il ne semble pas qu'il soit nécessaire, à l'heure actuelle, de justifier la thèse que le comportement de la minorité allemande en Pologne et en Tchécoslovaquie à la veille de la Deuxième Guerre mondiale et la politique d'occupation réalisée par l'Allemagne nazie ont créé une situation particulière où le transfert de la population allemande fut la seule solution efficace dictée par l'intérêt de la paix et de la sécurité internationale.

Les considérations juridiques et la référence aux expériences de la période d'entre-deux-guerres où le III^e Reich

⁹ J. B. SCHECHTMANN: *Postwar Population Transfer in Europe 1945 - 1955*, Philadelphia 1962, 381 pp.

éveillait et appuyait le comportement déloyal des minorités allemandes dans chaque pays européen, mènent l'auteur à la conclusion suivante: la doctrine prétendant que la possession par un groupe national d'une région géographiquement déterminée — même si la région en question entre dans le territoire d'un État étranger — porte atteinte aux droits fondamentaux des autres pays. Buchala procède également à une confrontation de la doctrine du *Recht auf die Heimat* avec l'évolution actuelle de la collectivité et du droit internationaux. Il indique que l'exigence centrale introduite par les partisans de cette doctrine au niveau de *lege ferenda* est la théorie du soi-disant *Verfassungsstandart*. L'essentiel de cette théorie se ramène au fait que le droit à la patrie géographiquement déterminée n'expire pas même s'il ne peut pas être réalisé à cause de l'obstacle que présente, pour la volonté de retour chez des personnes déplacées, le régime intérieur de l'État où se trouve leur ancien domicile (p. 112). C'est ainsi que cet État (par exemple la Pologne) devrait adapter son régime intérieur aux principes constitutionnels en vigueur dans le pays qui a hébergé les personnes déplacées (par exemple la R.F.A.). Tout cela a pour but la suppression des obstacles qui résultent des différences de régime et qui empêchent de réaliser le *Recht auf die Heimat*.

Telle se résume la théorie de *Verfassungsstandart*. Elle accorde une position

particulière à certains États qui doivent constituer un modèle de régime spécifique et s'attaque au principe de l'égalité souveraine des membres de la collectivité internationale. Cette doctrine est contraire à la tendance principale d'évolution du monde contemporain: la coexistence pacifique et active des pays de systèmes différents.

Ces opinions ne sont pas restées sans influence sur la politique de la R.F.A. envers ses voisins de l'Est. De sa part, le gouvernement ouest-allemand appuyait activement les centres qui, par leurs « recherches théoriques », servaient à la politique du revisionnisme. On ne s'est pas borné à la conception du *Recht auf die Heimat*: on est revenu à la théorie de *Volksgruppenrecht* et au *Selbst bestimmungsrecht* spécifiquement interprété, on a proclamé la doctrine de *Alleinvertretungsrecht*. La légende sur « le couteau enfoncé dans le dos » après la Première Guerre mondiale fut remplacée après la Deuxième Guerre mondiale par une légende juridique. Mais il s'est avéré que la continuation de la politique fondée sur des mythes mène à l'isolement de la R.F.A. dans la collectivité des nations de l'Europe. Le gouvernement du chancelier Brandt a tenté une certaine revalorisation de la politique de la R.F.A. envers ses voisins de l'Est. Toutefois, les mythes vivent de leur propre vie. On ne peut pas le négliger.

Adam D. Rotfeld

Andrzej CAŁUS, *Prawa i obowiązki państwa w dziedzinie międzynarodowego obrotu osobowego* [Rights and Duties of the State in International Movement of Persons], Warszawa 1970, 270 pp., Szkoła Główna Planowania i Statystyki, Zakład Prawnych i Ekonomicznych Zagadnień Turystyki, "Ruch Turystyczny" — Monografie, No. 7.

An important item has been added to Polish literature on international law. The monograph written by Assistant Professor Całus, seemingly refers to the movement of persons, in fact—thanks to its theoretical nature—it indirectly

presents to the reader the whole domain of international traffic, in particular in economy. Although the movement of persons to and from Poland has been steadily increasing, this country is still far behind a number of European States

which within the short period of the last decade have become powerful in this field—let us mention Spain from among capitalist States, and Bulgaria and Yugoslavia from among socialist States, as examples. It may be claimed that Polish scientists belong to a leading world group in research on the international movement of persons. For instance, the Department of Legal and Economic Problems of Tourism at the Central School of Planning and Statistics has published 12 monographs and over 30 issues of the periodical "*Ruch Turystyczny*" [Tourist Movement], not to mention monographs and articles published by other publishing houses and periodicals.

In the monograph the author discusses the international movement of persons from the point of view of theory, and in the last chapter also in the light of international law practice. The book has been based on extensive (19 pages) bibliography in which you can find works written by specialists in international law, philosophers and other scientists, beginning from the 16th century till the present day.

Over one-third of the book (Chapter I and II) has been devoted to defining relevant terms with great precision. First of all, the very notion "international movement of persons" and its kinds have been specified. International tourism has been treated extensively. The author notes that ever since the 19th century the term "international movement of persons" has referred not only to natural persons changing their location, but also, in some instance, to artificial persons being moved from one State to another. The question arises if the inclusion of the artificial persons movement alters the situation from the point of view of international law. The author seems to answer in the negative (see p. 15).

The author expresses the opinion that today the notion of international movement of persons should be based "on two conditions: a given natural or arti-

ficial person being a foreigner and such a person crossing the frontier of a given State" (p. 18).

The whole international movement of persons has been subdivided according to two basic criteria: that of object and time. As regards the former criterion, the author merely states that as to their object various international travels are classified according to the purposes for which they are undertaken (cf. p. 21). The author continues his discussion of the kinds of international movement of persons by discussing the time criterion i.e. the duration of a person's stay in a foreign country. This leads to the distinction of three basic types: transit, temporary stay, and permanent residence.

Part of the chapter is devoted to tourism as a kind of international movement of persons. It is worth noting that various interpretations of the term "tourist," formulated for specific purposes by economic sciences, international organizations or to be found in international covenants now in force, have been critically evaluated. As a result the author presents his own definition of "tourist"/"tourism." "Consequently international tourism—from the point of view of international law—will be any instance of movement of persons consisting in a foreigner crossing the border of the State he is visiting for purposes other than as a source of income" (p. 45). The author concludes this part of the book by formulating the conditions which imply a broad sense in which he adopts the term international movement of persons. "Foreign nationality of a given natural person and crossing the border of the State to which he is going determine the international nature of the movement of persons in the international law today" (p. 45). Such a broad interpretation of the movement of persons seems better to meet the needs of research on the movement from the point of view of international law.

In Chapter II, against the background of broadly conceived international relations, the author deals with general concepts of international law doctrine relating to the right of the State to maintain traffic connected with international movement of persons. Reference is made to two more general trends in this doctrine: one interprets the movement of persons from the point of view of "the legal status of participants," the other one adopts the "function of the State border" (p. 46) as a criterion. The author shows that if one adopted the first concept, international movement of persons would be reduced to that exercised by subjects of international law. As a result, he is in favour of the other trend, and formulates the following definition of the movement: "The movement is international if it consists in various 'elements' crossing the border, the said elements being characterised by a given nationality (with reference to a person) or origin from a given State (with reference to goods)" (p. 46).

Further on in Chapter II the author analyses in detail general concepts of the right of the State to maintain traffic in international law and relevant arguments in international law doctrine. Systematization of these concepts brings the author to an analysis of the right of the State to make decisions with regard to international movement of persons in Chapter III. The reader is made conscious of high complexity of the problem in various stages of the development of international law studies.

In Chapter III the opinions on the subject under discussion, expressed in international law doctrine have been classified into four groups. The first group comprises most extreme views dating back to the times when the power wielded within a State was identified with the rights of the owner of real property (paragraph 2, "The right of the State not to admit any foreigner"). The author criticizes these views and shows numer-

able inconsistencies in them. The second group comprises the views according to which the State is free to make decisions as regards the movement of persons irrespective of its kind. The third group consists of the views which adopt the alleged duty of the State to admit foreigners (pp. 120 - 140). Finally, in group four we find the views which emphasize the right of the State to establish conditions and manner of admitting foreigners (pp. 140 - 154). The last group is not opposite to the preceding three. It as if places outside the brackets all those elements which the other conceptions have in common.

The studies of international law doctrine on the movement of persons result in the author coming to a sceptical—though the only right—conclusion. Summing up this part of his arguments he says that "to finally determine the scope of the rights of the State with respect to international movement of persons, we should perform a detailed analysis of the very manner in which the States in their historical development exercised their rights which follow from territorial sovereignty" (p. 154). This sort of analysis has been performed in the last chapter (IV) of the monograph (pp. 155 - 231). This is undoubtedly the most interesting part of the book. After a theoretical discussion in the previous chapters, oscillating in the author's words between "generally conceived freedom of the State as regards international movement of persons and the duty to admit foreigners" (p. 10), this part of the book is as if "stepping down on the earth." This is so because the chapter makes an analysis of the legal principles operating in the movement of persons since the origin of absolutist States up to the present day. Within particular epochs the author comes to interesting conclusions which reflect the evolution in law. For instance, in p. 164 he states that "the conception presented make it acceptable to say that before finally introducing perma-

nent inspection on the borders of absolutist States, the free movement of persons was based on a customary principle of peaceful relations recognized not only in practice but also in theory." As a result of his investigations the author shows that later on the States began to strictly regulate the movement of persons. Only after World War II we can observe that the requirements with respect to the movement of persons—tourism in particular—are lessened, but only within certain politically homogenous groups of States. Summing up this part of the book the author states that "the State is in principle free to establish conditions and manner of admitting foreigners." At the same time he emphasizes that "strict formalities applied with respect to tourists do not infringe free movement of persons as such, but they evidence absence of adequately developed friendly relations" (p. 231).

The conclusions which follow from this chapter are in the reviewer's opinion not only of great theoretical significance but they can also serve as material to work out such elements of the States policy as regards the international movement of persons as to contribute to a fuller implementation of the principles expressed in the Charter of the United Nations in the domain of economic and social relations. With reference to this very valuable chapter there is one critical remark of general nature. The title of the chapter: "Free Movement of Persons as a Customary Principle of Peaceful Relations between States" describes "free movement of persons" as "a customary principle of peaceful relations between States." But the thesis worded in the

title should be substantiated (what the author has done) and only subsequently formulated as a conclusion to be drawn from the analysis, not before starting the analysis.

When reading the book one is greatly impressed by laborious presentation and the author's erudition: the book covers international law doctrine in its evolution as an independent discipline from 16th century up to the present. Although—particularly in the last chapter—the author expressed his interest in the law, the monograph clearly shows his preference for theoretical aspects. In fact two chapters of the book, which constitute almost half of it, have been devoted exclusively to a study of doctrinal conceptions. It seems that the proportion of doctrine in the book under review, in particular that which is detached from the law of a given epoch, might be considerably reduced. In spite of this critical remark, one cannot deny that the material analyzed by the author is interesting and contributes to making the study more profound. It is so, among others, because a critical evaluation of this doctrine is not negative by nature, but strives to extract from various conceptions represented in doctrine those statements which to a greater extent reflected international reality in the past and that is why these considerations are still of value today.

The book contains a short summary and contents in English, French and Russian, what may be of interest to foreigners that do not know Polish.

Kazimierz Równy

LUDWIK GELBERG, *Powstanie Polski Ludowej. Problemy prawa międzynarodowego* [Foundation of People's Poland. Problems of International Law], PWN, Warszawa 1970, 172 pp.

The monograph is the first attempt at a more general look at the process and consequences of the foundation of Peo-

ple's Poland in the light of international law. One is not a little surprised by this fact. It involves, after all, problems of

utmost importance for our State. It should be said, however, in the same breath, that the Polish doctrine of international law did take an interest in these problems. But so far it was just the individual aspects of the process of the formation, foundation and development of the Polish People's Republic that had been the object of a number of articles and books or mentions in publications dealing with these questions.

High praise is due, therefore, to the choice of the subject.

It was not the author's intention to make an exhaustive presentation of the problems of international law arising from the foundation of People's Poland. He says that he intended to clarify certain key problems of international law connected with it. These are to be such problems as: "the effect of the war on the legal situation of the Polish State, the question of the Polish government in exile, the formation of the new authorities of People's Poland, the legal foundations of the post-war frontiers of the State, the problem of the continuity and identity of the Polish State and the question of the validity of the previous international agreements" (p. 6). These are in fact key problems not only of a historical but also of tremendous political as well as theoretical importance. The absence of a study treating them as a whole constituted a serious gap, and L. Gelberg undertook to fill it in now.

It must be conceded that his task was made considerably easier by the large number of publications of a documentary, historical, political and legal nature and by various memoirs. And the author does in fact use many of these publications as a basis for his monograph, without spending any time on independent primary source research, and confining himself to the formulation and justification of more general hypotheses.

Another characteristic of the method of this monograph is that it deals with political problems and arguments. This

is a correct method, and L. Gelberg used it also in his earlier publications dealing with politically topical problems, such as the Warsaw Treaty or the conflict in the Caribbean. At times, however, the author wanders too far off the principal trend of problems of international law, delving into details of the history of diplomacy, intrigues inside the government in exile and so on. This adds a specific colour to the book, for example when the author cites poetry or calculates how much longer was Poland at war in comparison with other States.

In many places the arguments of the author assume an "impressionist" character, for example when he expresses the opinion that the Polish people were at one in their minds as regards their support for the émigré government in the early period of the war (pp. 8-9), or when he voices other, more juridical, hypotheses. But of this more anon.

The author is correct when he says that the Polish State did not cease to exist in effect of the complete occupation or even annexation of its territory in 1939-1944. First, however, he puts forth the argument that the annexation of foreign territory by way of aggression is illegal, especially since this was expressly formulated in the Briand-Kellog Pact of 1928, which had the character of an act of general international law. Elsewhere, however, the author offers another argument with regard to this question and lays the main emphasis on the fact that it is only for the duration of the war (*durante bello*), or even only for the duration of war operations, that annexation has no legal effects (p. 16 ff): "As long as the war against Germany was waged by Poland or at least by one of her allies, it was inadmissible for the III Reich under international law to make any changes pertaining to the territory of Poland" (p. 19). The author does not notice that he expresses two contradictory juridical conceptions with regard to a single question, although in the

given situation both of them support the hypothesis of the existence of the Polish State during the war.

When presenting the situation of the Polish government in exile from the point of view of international law, the author devotes most attention to the question of whether this government had been formed and operated in accordance with the 1935 Constitution of Poland. I think that the question, as belonging to the sphere of municipal law, has really no connection with the status of the government in the light of international law. Neither is it an argumentation which could be considered to be correct politically.

Interesting, on the other hand, is the recollection of the attitude adopted towards the émigré government by the Polish Workers' Party. As late as 1943 it recognized this government as the representative of the Polish State in spite of serious reservations with regard to its internal and foreign policy. The interruption of relations with the émigré government by the USSR (25 April, 1943), caused by the former's anti-Soviet policy, compelled the Polish left-wing movement to form another representative body of the Polish State, a body which would be capable of protecting the national interests, the proper place and role of Poland during the war and after its conclusion. The deep conflict of conceptions on these issues caused such an aggravation of class contradictions inside the Polish society that elements of a civil war appeared even at the time of the occupation. In any case, two competing centres of authority, both with their own armed forces, existed since 1943.

At its first meeting held on 1 January, 1944 the National People's Council passed a resolution refusing "the present London government the right to act on behalf of the Polish nation." But it was only after gaining territorial sovereignty by the people's government in the form

of the Polish Committee of National Liberation, that its Manifesto of 22 July, 1944 declared the illegality of the London government and the absence of its right to act in the capacity of representative of the Polish State. I do not know why Professor Gelberg regards the declaration by the Manifesto of the exclusive right of the National People's Council and the Polish Committee of National Liberation to act on behalf of the Polish State solely as a political argument which does not have any legal effects (p. 43). Numerous inconsistencies may be found in his analysis of the legal status of the Polish Committee of National Liberation. Once the author regards the PCNL only as the nucleus of a government (p. 59), and then as a *de facto* government (pp. 59, 60, 61). We find even a sentence saying that the National People's Council and the Polish Committee of National Liberation had diplomatic connections with the USSR (p. 12), and then that the USSR did not regard the PCNL as a government (p. 60). He asserts also that two governments of Poland: the PCNL as a local *de facto* government, and the émigré government as a *de iure* government existed in the latter part of 1944 (p. 61). Finally there appears the hypothesis that it was only after January 1945, after the formation of the Provisional Government, that it became vested with the right of representing Poland in international relations. The hypothesis is not supported by any relevant arguments. The author cites, for example, a declaration of that government, whose contents are identical with the declaration contained in the July Manifesto on the question of the exclusive right to act on behalf of the Polish State. The Provisional Government was recognized *de iure* by the USSR, Czechoslovakia and Yugoslavia, that is by the same States that had recognized the PCNL as a *de facto* government. The difference between a *de iure* and a *de facto* recogni-

tion of a government is not so very significant after all in its effects in the light of international law. And in no case is the recognition a creating or constituting act, but solely a declarative act, and cannot be treated as decisive for the existence of the legal identity of the government which is being recognized as far as international law is concerned.

July 22, 1944 must be accepted as the moment of the foundation of People's Poland and of the taking over by her supreme authorities of the exclusive right to act on behalf of the Polish State. The attitude of the government of People's Poland on this question was officially declared and very firmly maintained. One of the examples is the history of Poland's accession to the Chicago Convention of 1944 on the creation of the ICAO.¹ The government of People's Poland categorically refused to recognize the ratification of this convention by the émigré government, which caused a protracted conflict as the result of which Poland was treated by the ICAO authorities in the years 1947-1958 as a so-called "inactive member." A note of the ambassador of People's Poland to the United States government said at that time that "the Polish government could not recognize the legal validity of either the signature or the ratification document of the convention on international civil aviation (performed by the émigré government—note W. M.) as they had been made and deposited after 22 July, 1944."

The question of the date of the legal succession of the government of People's Poland to the émigré government is of

fundamental significance, and its determination requires, therefore, a more serious and responsible treatment than it appears from the author's statement that "The Government of People's Poland did not question the validity of obligations contracted by the Polish émigré government until the moment of the formation of the Provisional Government (January 1945) recognized as a *de iure* government" (p. 49). The example of conventions on the formation of the International Monetary Fund and the International Bank of Reconstruction and Development as concluded by the émigré government and recognized by the government of People's Poland—that follows this statement—is no argument in support of the author's thesis. For the émigré government signed, on 22 July, 1944 at that, only the final act of the Bretton Woods conference in which it had been taking part before the formation of the Polish Committee of National Liberation. And the conventions themselves were signed on 27 December, 1945 and subsequently ratified by competent organs of People's Poland. Further on the author continues to insist on January 1945 (without, however, giving an exact date) and maintains that it was only international agreements concluded later by the émigré government that were not recognized by the government of People's Poland as binding on the Polish State. He asserts even that there exist exceptions from this principle, but unfortunately does not quote any example of them (p. 51).

Much space is devoted in the book to the new frontiers of Poland. Worth emphasizing is the fact that it analyses for the first time the legal foundations of the eastern frontier. In this connection Professor Gelberg cites a number of legal and diplomatic documents and recalls events of the political process which led to the establishment of the post-war frontier between the USSR and Poland. The author operates here chiefly with political arguments, referring, among

¹ See: W. MORAWIECKI, *Some Particular Aspects of Poland's Membership in International Organizations (UN, ICAO, GATT)*, "Polish Yearbook of International Law", vol. 2, 1968/69, pp. 5-23. Also by the SAME AUTHOR: *Droga Polski Ludowej do organizacji międzynarodowych [People's Poland Road to International Organizations]*, "Państwo i Prawo", 1970, No. 7, pp. 22-26.

other things, to opinions expressed by Lord Curzon, Churchill and even Roman Dmowski, the leader of the Polish nationalist movement. Political arguments showing that occupation of the eastern part of the pre-September 1939 Poland was in the strategic interest of the USSR are correct, and that in effect it facilitated and speeded up the liberation of Poland as a result of the victory over Germany. The author does not confine himself, however, to a mere political justification. He asserts also that the incorporation of those regions in the USSR was consistent with international law, as it was based on the right of self-determination of the Ukrainians and Byelorussians who constituted the majority of the local population, and who had come out in favour of joining the Soviet Ukraine and Byelorussia in a plebiscite held in the autumn of 1939.

We possess numerous valuable publications on the legal foundations of the western frontier of Poland. Professor Gelberg confines himself, therefore, to emphasizing the significance of the act of the unconditional surrender of Germany. Representatives of the German State handed over the power of settling Germany's fate to the victorious powers. This is why their decisions on Poland's western frontier contained in the Potsdam Agreement have the final force in international law. Here the author uses political argumentation, criticizing very strongly, among other things, the at-

tempts at justifying Poland's territorial gains in the West by her territorial losses in the East (the so-called compensation thesis).

The author is quite right on the subject of the continuity of the Polish State in spite of the changes in its territory, population and particularly in its socio-economic system. A general unanimity of views exists in Poland on this question. The final chapter of the book pertaining to the attitude of People's Poland with regard to her previous international treaties is to a large extent a concretization of this hypothesis.

Speaking generally, the small in size but rich in content monograph of Professor L. Gelberg on the foundation of People's Poland, in spite of certain inaccuracies I have indicated, represents a noteworthy effort. It cannot be considered, of course, as having filled the gap due to the absence of a general and comprehensive study on the international law problems connected with the foundation of People's Poland. It is, however, the first ambitious attempt at the presentation of hypotheses and arguments on key problems of international law connected with the genesis of People's Poland. The book also draws attention to the need of a more thorough study of certain problems somewhat neglected so far by the Polish doctrine of international law. The work may constitute a starting point for some useful studies.

Wojciech Morawiecki

Alfons KŁAFKOWSKI, *Umowa Poczdamska a sprawy polskie 1945 - 1970* [*L'Accord de Potsdam et les problèmes polonais 1945 - 1970*], Wydawnictwo Poznańskie, Poznań 1970, 384 pp.

Le plus récent ouvrage du professeur Alfons Klafkowski forme la partie consécutive de ses études sur la liquidation des conséquences de la Deuxième Guerre mondiale ; c'est en même temps une synthèse de ses publications précédentes à ce sujet. Les ouvrages de cet auteur

jouissent depuis longtemps d'une grande estime dans le milieu des juristes—spécialistes du droit international public—aussi bien grâce à leur valeur cognitive que grâce à la méthode très consciencieuse des recherches.

Ladite publication est une monographie

du problème. Quoique l'auteur déclare que son désir ait été de publier l'ouvrage plutôt populaire, la matière même du livre qui est la synthèse des travaux et des publications précédentes de M. Klafkowski démontre le caractère scientifique du livre.

L'ouvrage dont nous nous occupons se compose de six chapitres : les deux premiers concernent l'interprétation historique de l'Accord de Potsdam et son caractère en tant que l'acte du droit international ; les quatre autres parlent des conséquences de cet Accord pour la Pologne ; des deux États allemands ; de l'imprescriptibilité des crimes de guerre ; de l'organisation de la sécurité internationale. Tous ces chapitres se présentent comme un ensemble uni des problèmes analysés sous l'angle de la Pologne.

Le professeur A. Klafkowski en interprétant l'Accord de Potsdam attire l'attention sur le fait particulièrement essentiel, lié avec le problème de la liquidation de l'État de Prusse. Notamment l'analyse de la période d'avant l'Accord de Potsdam permet d'établir que pendant la Deuxième Guerre mondiale il n'y avait pas de divergences parmi les trois Grandes Puissances — auxquelles ensuite adhéra la France — en ce qui concernait l'utilité et la nécessité de la liquidation de l'État de Prusse. Ce sont les décisions de la Conférence à Téhéran qui ont définitivement résolu le problème de la liquidation de la Prusse Orientale, cette conférence a précisé aussi les éléments fondamentaux de la future frontière polono-allemande. La loi n° 46 du 25 février 1947 sur la liquidation de l'État de Prusse constitue un acte formel des décisions des Puissances, décisions établies dans l'Accord de Potsdam sur la liquidation des fondements territoriaux du militarisme prussien. Conformément à l'Accord de Potsdam, les Puissances agissant au nom des Nations Unies ont cédé à la Pologne une partie du territoire prussien. En ce qui concerne la Pologne et l'Union des Ré-

publiques Socialistes Soviétiques, les dispositions de l'Accord de Potsdam ont été réalisées à l'époque où l'État de Prusse formellement n'était pas liquidé, mais *de facto* n'existait plus. La loi n° 46 sur la liquidation de la Prusse est un acte à perpétuité et définitif. Conformément à cette loi les décisions des Grandes Puissances, comprises dans les dispositions territoriales de l'Accord de Potsdam concernant la Pologne, sont définitives.

L'Accord de Potsdam — dont la Pologne n'a pas été la partie contractante, comme le démontre l'auteur — constitue à l'égard de la Pologne « un soi-disant accord en faveur de l'État tiers (*in favorem tertii*) » (p. 151), c'est-à-dire que l'État tiers, en faveur duquel cet accord a été conclu, possède les droits déterminés. Ainsi, au moment même où l'État tiers accepte les décisions de ce contract, les États-Parties contractantes perdent le pouvoir « d'une libre disposition de ces droits » (p. 153), ce qui démontre d'une façon évidente que les décisions de l'Accord de Potsdam concernant son consentement.

Suivant l'Accord de Potsdam et la jurisprudence du Conseil Interallié de Contrôle de l'Allemagne — continue l'auteur — la Pologne réclame auprès des Grandes Puissances l'accomplissement des décisions de cet accord qui la concernent.

Ces réclamations diffèrent selon l'État en question et dépendent de la manière de leur exécution par un État donné. La Pologne n'a point de réclamations envers l'U.R.S.S. qui remplit les dispositions de l'Accord de Potsdam et du Conseil Interallié de Contrôle de l'Allemagne. Il n'y a que l'Union Soviétique qui remplit entièrement et conformément au plan de cet organe les obligations concernant le transfert de la population allemande de la Pologne. La Pologne dirige ses réclamations aux trois Puissances Occidentales — pour qu'elles accomplissent les dispositions de l'Accord

de Potsdam, ainsi que les dispositions du Conseil de Contrôle ; aux États-Unis et la Grande-Bretagne — au sujet de la frontière polono-allemande et du transfert de la population allemande de la Pologne ; à la France — au sujet de l'accomplissement total de ces dispositions. En plus — la Pologne dirige ses réclamations à la République Fédérale Allemande. Elles concernent la normalisation des rapports mutuels, dont le problème crucial est la reconnaissance par la République Fédérale Allemande de la frontière occidentale de la Pologne comme définitive. En outre la Pologne réclame de la République Fédérale Allemande le châtimement de tous les criminels de guerre se trouvant sur son territoire. La Pologne n'a d'aucunes réclamations envers la République Démocratique Allemande, parce que celle-ci a accompli les dispositions de l'Accord de Potsdam concernant la Pologne. Quant aux réclamations de Pologne dirigées à l'Organisation des Nations Unies, elles visent la reconnaissance des droits égaux au sein de l'ONU à la République Démocratique Allemande ainsi qu'à la République Fédérale Allemande.

L'auteur a souligné les réclamations particulières de la Pologne à l'égard du Saint-Siège, réclamations résultant de l'Accord de Potsdam et de la jurisprudence du Conseil Interallié de Contrôle de l'Allemagne. On ne connaît aucun document du Saint-Siège qui définit son attitude envers l'accomplissement de la loi n° 46 traitant de la liquidation de l'État de Prusse, avec lequel il a signé le concordat en 1929. On connaît, en revanche, la nomination systématique par le Saint-Siège de « l'évêque en mission », qui fonctionne sur le territoire de la République Fédérale Allemande où se concentre la population catholique allemande provenant de l'ex-État de Prusse. L'épiscopat allemand de la République Fédérale Allemande souligne que le Saint-Siège maintient « les anciens évêchés à l'émigration » qui sont formelle-

ment les diocèses catholiques situés à l'est de la frontière Odra - Nysa Lusacienne c'est-à-dire sur le territoire de la Pologne. La Pologne réclame du Saint-Siège la reconnaissance du principe qui est la base de tous les concordats, c'est-à-dire que les frontières du diocèse doivent être identiques avec celles de l'État. Ce principe concerne la Pologne et les deux États allemands. Toutes les réclamations de la Pologne ci-dessus mentionnées — comme le démontre l'auteur — sont bien fondées sur l'accomplissement des obligations qui lui ont été imposées par l'Accord de Potsdam.

Il faut attirer une attention particulière sur le caractère de la réclamation de la Pologne concernant la reconnaissance du « rétablissement de la paix » (p. 118)¹, problème formulé pour la première fois par A. Klafkowski. L'auteur, en analysant l'Accord de Potsdam et les moyens de mettre fin à l'état de guerre, exprime l'opinion que cet accord précise deux manières d'atteindre ce but, notamment : traités de paix et « rétablissement de la paix ». Cette dernière expression est particulièrement importante parce qu'elle est appliquée dans le chapitre VIII de l'Accord de Potsdam par rapport à la frontière polono-allemande et dans le contexte de sa délimitation ultime. Dans la traduction polonaise non officielle de l'Accord de Potsdam, continue l'auteur, le terme anglais *peace settlement* est traduit dans le chapitre II comme « conclusion de la paix » et dans le chapitre VIII comme « traité de paix ». En introduisant dans la traduction de l'Accord de Potsdam le terme anglais interprété comme « rétablissement de la paix » et vu que les Grandes Puissances ont mis fin à l'état de guerre avec l'Allemagne à la suite des actes unilatéraux, il faut conclure qu'entre la Pologne et l'Allemagne s'effectua le « rétablissement de la paix ». Il s'ensuit

¹ L'auteur guillemette ce terme et explique à la page 138 qu'il s'agit de la traduction littérale du terme anglais : *peace settlement*.

que la Pologne a le droit de réclamer auprès des Grandes Puissances de reconnaître ce « rétablissement de la paix ». L'auteur souligne expressément que l'efficacité de la réclamation ci-dessus mentionnée dépend du fait si les Grandes Puissances partagent l'opinion que le « rétablissement de la paix » est un fait déjà accompli.

On a soulevé aussi dans l'ouvrage le problème des réclamations de la Pologne à l'égard de la République Fédérale Allemande à titre d'indemnité pour les déportations aux travaux forcés et le travail d'esclave au III^e Reich. C'est ce domaine des réclamations concernant les indemnités qui n'est pas compris dans l'Accord de Potsdam et qui, par conséquent, ne peut pas être inclu dans l'Accord polono-soviétique du 16 août 1945. Comme sujet de ces réclamations peut paraître un individu, une organisation internationale ou bien un État qui est en mesure de formuler ses réclamations à titre de travail d'esclave et de déportations aux travaux forcés indépendamment du traité de paix.

L'auteur examine l'Accord de Potsdam sous l'aspect de la sécurité internationale et constate qu'aucune Puissance ne conteste pas sa responsabilité pour ce genre de sécurité dont elle est chargée en vertu des traités internationaux réglant la Deuxième Guerre mondiale. La Pologne a précisé d'une manière homogène son attitude envers le problème de la sécurité internationale, notamment dans la déclaration de Władysław Gomułka, qui a constaté que

pour la Pologne il n'y a pas de problème des frontières, mais il existe uniquement le problème de la paix. Ce dernier est le problème de la sécurité internationale, et la Pologne cherche sa solution dans les cadres de l'ONU et sur la base de la Charte des Nations Unies. La sécurité de la Pologne et l'inviolabilité de ses frontières s'appuient sur l'Accord de l'Amitié, Coopération et Assistance Mutuelle, conclu par la Pologne avec l'U.R.S.S. en 1945, renouvelé et complété en 1965.

Le livre du professeur A. Klafkowski met en revue beaucoup d'autres problèmes multiples et essentiels liés avec la liquidation des effets de la Deuxième Guerre mondiale, en exposant, entre autres, le rôle de la République Fédérale Allemande au N.A.T.O., l'attitude des Puissances Occidentales envers la réalisation des traités internationaux concernant l'Allemagne comme unité, et y oppose l'accomplissement de ces traités par les États socialistes ainsi que leur participation constructive au règlement des conséquences de la Deuxième Guerre mondiale. Cet ouvrage, comme d'ailleurs tous les précédents du même auteur, est écrit d'une manière précise et communicative. C'est non seulement une excellente et intéressante monographie de la liquidation des conséquences de la Deuxième Guerre mondiale en ce qui concerne la Pologne, mais en même temps, elle nous incite à réfléchir sur le problème de la paix — l'unique voix acceptable pour toutes les nations.

Remigiusz Rybicki

Wojciech MORAWIECKI, *Narody Zjednoczone. Zamierzenia i rzeczywistość* [Les Nations Unies. *Espérances et réalité*], II^e édition corrigée et élargie, « Wiedza Powszechna », Warszawa 1970, 483 pp.

L'expert en relations internationales contemporaines se trouve souvent devant une question difficile: comment le règlement des comptes des Nations Unies avec l'histoire se présente-t-il? Quelle

est actuellement la participation réelle de cette organisation dans la résolution des grands problèmes de notre époque? Le manque d'une perspective adéquate de recherche rend la réponse à cette

question bien souvent difficile ou même impossible. Car, à côté des principes et des buts, de la structure, du statut juridique et de la sphère des compétences des institutions internationales, il faut, en premier lieu, tenir compte dans nos considérations de la spécificité de leur fonctionnement, des tendances historiques de développement dans le cadre de l'évolution de la situation internationale, de l'efficacité d'application des méthodes d'action définies, de l'efficacité des opérations entreprises, et enfin, — *last but not least* — des possibilités politiques réelles. Le livre de Wojciech Morawiecki *Les Nations Unies. Espérances et réalité* constitue un exemple de l'application conséquente de ces principes.

Et que dire des recherches envisagées par l'Auteur ? Il y a plus d'un quart de siècle, une organisation universelle d'un monde de paix avait été fondée, dont l'activité est basée sur des principes nouveaux, qui n'ont pas encore été appliqués. Naturellement, tous les buts de l'ONU n'ont pas pu être, dans cet espace de temps relativement court, pratiquement réalisés et dans les conditions d'un monde diversifié et divisé, l'activité de ce mécanisme de coopération internationale se heurte, presque à chaque pas, à des obstacles considérables. D'où les désenchantements, les anxiétés, les défaites amères, et pourtant, l'Organisation a à son compte beaucoup de réalisations à la mesure de l'époque. L'acquis actuel nous autorise donc à « faire un bilan prudent des acquisitions et des défauts » (p. 19), à présenter — à partir de ce bilan — « une image multidimensionnelle et plastique de l'ONU et des autres organisations faisant partie du système des Nations Unies » (pp. 24 - 25), à démontrer leurs tendances et régularités de développement.

L'Auteur présente, en même temps, son métier méthodologique : « L'image de l'ONU et des autres organisations dans le système des Nations Unies doit être une image dynamique, montrant ces

organisations en plein mouvement et expansion au moment où elles réalisent des tâches concrètes. C'est parce que je suis d'avis — écrit le professeur W. Morawiecki — qu'il faut traiter les organisations internationales non pas comme modèle établi selon les règlements formels de leurs statuts, ou bien postulé dans nos désirs, mais plutôt comme un processus continu de la coopération réelle des États membres pour lesquels les organisations internationales créent un cadre institutionnel adéquat » (p. 25).

Cette remarque est d'autant plus précieuse, que les études publiées jusqu'à présent en polonais sur les organisations internationales accusaient trop souvent l'étroitesse dans la conception du problème. Cette déformation était due au recours prédominant dans des recherches à des canons du dogme juridique. Il est évident, que les institutions internationales font partie de la science du droit international public, mais nombre de questions relatives à leur activité dépassent assez largement le cadre de cette discipline. L'ouvrage sous revue est justement le reflet de ce phénomène. En rompant avec la tradition formaliste de l'exégèse des normes qui règlent la structure, les procédures et le champ des compétences des différentes organisations, cet ouvrage accentue bien plus l'analyse fondée sur les principes de la dialectique du fonctionnement de ces organisations.

Cela ne veut nullement dire qu'on ait omis dans ce livre ces importantes questions de nature juridique, qui prêtent à controverse, ayant un rapport réel avec cet ensemble des problèmes. L'Auteur a entrepris une tentative réussie d'expliquer et d'analyser ces questions, en conservant les proportions appropriées entre l'aspect juridique — et ceci parfaitement élaboré — et les autres éléments des réflexions. Ainsi, en maintenant les liens existant, et incontestablement utiles, entre l'ensemble des problèmes relatifs aux organisations internationales et le

système des sciences juridiques, l'Auteur a dépassé des problèmes de celui-ci à tout le moins du point de vue méthodologique. En conséquence, cela a permis d'éviter d'isoler le sujet analysé hors des autres domaines de la science sociale, et surtout des disciplines des recherches dans le domaine des relations internationales.

Les expériences de W. Morawiecki donnent lieu à constater que l'ensemble des problèmes concernant les organisations internationales peut être traité comme un domaine autonome des recherches scientifiques faisant partie du groupe de sciences politiques fort ramifiées, s'intégrant mutuellement. Cette conception du sujet est dictée, d'une part, par l'accroissement du nombre, le développement des fonctions et de la qualité du processus politique des organisations internationales, et de l'autre, par les tendances au développement des sciences sociales contemporaines visant à traiter tous les domaines et tous les phénomènes de la vie sociale, et, en particulier, bien sûr, les relations internationales de la manière la plus ample et dans toute leur complexité.

De ce point de vue, la valeur de la monographie analysée est certainement importante. Le livre de Wojciech Morawiecki constitue une illustration de l'intégration adroite de différents plans de recherches scientifiques. Les considérations analytiques mènent à la synthèse du problème, obtenue grâce à l'application des méthodes du raisonnement logique stricte. A la suite de quoi nous avons reçu une image complète et universelle du système organisationnel des Nations Unies, présenté sur le fond de la réalité internationale complexe de notre époque.

Dans la communauté internationale contemporaine — dans le cadre de laquelle agit l'ONU — prédominent les contradictions d'intérêts des États appartenant à de différents groupements, et ce n'est que dans un degré fort limité qu'il a été

possible d'élaborer le même dénominateur des aspirations politiques. « Néanmoins, écrit W. Morawiecki, c'est la convergence des intérêts des membres des organisations internationales qui constitue la base de l'existence et de l'activité de ces organisations; la possibilité de jouer par celles-ci un rôle positif est conditionnée et limitée par la capacité des États membres d'aboutir à une entente. *La fonction principale* de ces organisations consiste donc à faire dégager et élargir la sphère des intérêts convergents des États membres; à chercher les résolutions servant ces intérêts et acceptables pour les groupements principaux d'États; à faire éliminer les formes de rivalité non pacifique » (p. 20).

La nature d'une organisation internationale ne peut se réduire uniquement à une forme spécifique des rapports entre les États. « Avant tout, elle doit être conçue comme un processus d'action, visant à réaliser les tâches communes de ses membres, processus qui se manifeste par l'accomplissement des différentes fonctions par les organes de cette organisation et en son nom » (p. 25). L'Auteur définit donc l'organisation internationale comme un processus de coopération des États, qui s'effectue dans une forme particulière, dont le trait caractéristique constitue l'existence des organes permanents destinés à réaliser les objectifs communs à la base des intérêts convergents des membres » (p. 37). Vu dans cette optique, le bilan des acquisitions de l'ONU et de ses institutions spécialisées, embrassant par leurs activités tous les échelons de la vie internationale, s'avère incontestablement favorable. Cela concerne, en premier lieu le maintien de la paix mondiale et les mesures partielles du désarmement, la liquidation du colonialisme, les progrès réalisés dans l'élimination de toutes les formes de discrimination raciale, les luttes pour la mise en application des droits de l'homme, l'activité culturelle et humanitaire, l'assistance technique et le développe-

ment des relations économiques, la communication, l'utilisation pacifique de l'énergie atomique et la codification du droit international. Si l'on omet de souligner les mérites des Nations Unies dans ces domaines, l'image du monde contemporain est mutilée et incomplète.

Mais — en même temps — malgré les espoirs de ses créateurs, exprimés dans l'introduction solennelle à la Charte des Nations Unies, le fait seul d'existence de l'Organisation s'est avéré insuffisant pour éliminer efficacement les causes qui mettent en danger ou portent préjudice à la paix et à la sécurité internationales. Des conflits armés les plus divers éclatent presque constamment dans tel ou autre point du globe terrestre, et, cependant, l'Organisation était souvent incapable de prendre position envers des actes d'agression évidents, envers des crimes contre la paix ou envers des attentats contre les libertés démocratiques fondamentales. Et même dans le cas où, finalement, une action dans l'intérêt de la paix et de la sécurité internationales a pu être entreprise (Proche Orient 1956, Congo 1960) — le problème de la légitimité, de la direction politique, de l'efficacité et du mode de financement de ces entreprises a suscité de fortes controverses, ce qui avait eu pour conséquence des crises sérieuses au sein de l'Organisation.

Est-ce à dire que la « réalité » des Nations Unies s'avère contraire aux grands « desseins de ses fondateurs » ? En analysant ce problème — combien ardu et complexe — le livre de W. Morawiecki va au-delà de tout ce qui a été écrit dans la littérature scientifique polonaise. Les remarques de l'Auteur sur la fonction, les possibilités et les perspectives de l'activité du système organisationnel des Nations Unies, et en premier lieu de l'ONU elle-même, sont marquées par un profond réalisme. Il convient de présenter les conclusions fondamentales : « En évaluant, d'une manière générale, l'activité de l'ONU dans

le domaine de la paix et de la sécurité internationales, il faut souligner qu'elle n'a pu être réellement efficace que dans les cas où les puissances principales, et en premier lieu l'Union Soviétique et les États-Unis, pouvaient agir en commun et trouvaient une plate-forme d'entente adéquate. Les appels, formulés avec fermeté, du Conseil de Sécurité à mettre fin aux opérations militaires étaient toujours respectés, de même les recommandations de l'Assemblée Générale, auxquelles ces puissances prêtaient leur appui, s'avéraient d'une grande efficacité » (p. 219). En conséquence : « le système de sécurité de l'ONU ne peut pas fonctionner efficacement lorsqu'une des grandes puissances est partie dans un conflit » (p. 197). « En face [...] des conflits dans lesquels les grandes puissances seraient engagées, l'ONU est presque impuissante, et le Conseil de Sécurité, en dehors de la médiation et de la mitigation, est incapable d'entreprendre une action quelconque » (p. 102). « On ne peut pas, alors, s'attendre à ce que l'ONU joue un rôle déterminant et indépendant quelconque par-dessus ou en dehors des États. Si l'organisation n'est pas en mesure de résoudre les problèmes qu'elle affronte et de réaliser ses tâches avec succès, ce n'est pas tellement la faute de cette organisation, mais bien plutôt de la politique poursuivie par tel ou tel de ses membres, laquelle entrave la réalisation des buts ou met l'organisation dans l'impossibilité d'arriver à une entente indispensable. Une organisation internationale, dont évidemment l'ONU, constitue incontestablement un instrument de politique de ses membres. Sans le principe de l'égalité souveraine et les garanties appropriées qui la préservent, une organisation internationale pourrait devenir l'instrument d'un groupe de ses membres, dirigé contre un autre groupe. Dans ce cas, elle perdrait son caractère véritablement international et, par conséquent, elle risquerait d'être disloquée » (p. 75). La conclusion en est

que « l'unique méthode de travail de ces organisations, qui paraît juste, est celle qui consiste à rechercher, au moyen d'accords ou de compromis, des solutions des problèmes relatifs à la coopération internationale qui pourraient être adoptées par presque tous les membres de l'organisation » (p. 374).

La juxtaposition formulée dans le titre ne peut, en regard de ces remarques, être comprise comme une tentative de disqualifier la réalité politique contemporaine de l'Organisation des Nations Unies. L'Auteur souligne (p.ex. p. 371), à juste titre, qu'une organisation internationale, du moment de sa fondation, commence à vivre sa propre vie qui, en pratique, s'écarte parfois des modèles types statutaires. En face des transformations profondes survenues dans le milieu où il fonctionne — « le système organisationnel des Nations Unies avait dû être adapté, d'une certaine manière, au système, toujours en mutations, des rapports internationaux » (p. 21). Dans son livre, Wojciech Morawiecki a réussi à présenter, d'une façon étonnement concrète, les substances contemporaines, et nouvelles dans leur fond, des idéaux des Nations Unies.

En comparaison avec l'édition précédente de 1967, les modifications et les compléments ont une portée considérable. Les éléments méthodologiques ont été approfondis. L'Auteur a actualisé les informations contenues dans le texte et dans les nombreux tableaux, il a proposé une disposition plus claire du sujet. La partie finale a été consacrée à l'importance et au rôle de la Pologne dans le système des Nations Unies. On a pré-

senté le voie peu facile, entravée par l'hostilité des gouvernements des puissances anglo-saxonnes, de la Pologne populaire menant aux organisations internationales du système de l'ONU (p.ex. l'exclusion de la Pologne — seule parmi les Alliés à prendre une part active dans la lutte contre les hitlériens, non interrompue depuis le déclenchement de la Deuxième Guerre mondiale jusqu'à sa fin en Europe — de la participation à la conférence à San Francisco, où avait été fondée l'Organisation des Nations Unies, ou bien, l'inadmission de la Pologne, pendant plusieurs années, à l'OACI) et la revue succincte et systématique de ses initiatives. Un intéressant avant-propos du livre fut écrit par le Président du Comité pour la Célébration du vingt-cinquième anniversaire de l'ONU en Pologne — le prof. Zbigniew Resich, éminent connaisseur et participant aux travaux de l'ONU dans le domaine de la protection internationale des droits de l'homme. Il a constaté notamment, et à propos, que « l'ONU, après vingt-cinq ans d'existence s'est si fortement intégrée dans le système contemporain des rapports internationaux, qu'il serait aujourd'hui difficile d'imaginer le monde sans cet instrument utile, bien qu'imparfait ».

Dans la littérature juridique contemporaine de notre pays, le livre de Wojciech Morawiecki constitue un grand pas en avant dans le domaine de l'identification et de la clarification du sens historique de l'idéal des Nations Unies et de sa forme contemporaine réelle.

Andrzej S. Nartowski

Halina OKULARCZYK, *Członkostwo organizacji wyspecjalizowanych ONZ* [Membership in UN Specialized Agencies], PISM, Warszawa 1970, 217 pp.

The book under review deals with one of the most salient problems of international organization.

The membership in an international

organization plays a very important role because political orientation of the activities of a given organization is determined by its composition. The content of

the decisions taken by international bodies is ultimately determined—with re-unanimous vote procedure—by the range and degree of convergent interests and by concordant will of all the members, and, with regard to the organizations applying the majority-of-votes procedure—by the range and degree of convergent interests and by the concordant will of a prescribed majority of members.

All the specialized agencies of the United Nations belong to the latter category. As political orientation and content of their activities depend upon the actual balance of power within the agency, and a change in membership affects this balance, it is by no means surprising that great importance is attached to membership problems in these agencies. For these reasons, among others, the decisions on admission or expulsion of members are as a rule considered to be important matters which require a qualified majority of votes, and in practice sharp controversies or even dramatic conflicts among members have been noted in these matters.

In particular, such conflicts have arisen in regard to the participation of socialist States in the UN and its specialized agencies. Many of these States, including Poland, encountered impediments, created by Western powers, on their roads to world organizations.

In the monograph, which is an improved version of her doctoral dissertation, Halina Okularczyk focusses her attention on legal aspects of membership in specialized agencies of UN. Within the limits of this perspective the dissertation is a comparative analysis of structural and procedural solutions adopted by particular specialized agencies of the United Nations to deal with such problems as: original membership, admission of new members, associate members, suspension of the rights of membership, expulsion of members, withdrawal from the organization. Successive chapters of the book deal with these problems.

A comparative analysis constitutes a higher level of studies on international institutions in comparison with a description and analysis of particular institutions. It is worth noting that no comparative study has so far been made either in Poland or—if I am not mistaken—elsewhere, as regards the membership in international organizations. In these circumstances we should appreciate not only the right choice of subject made by the author—the subject being of high significance politically and theoretically—but also the pioneering and ambitious character of the task she has undertaken.

Worth noting is skillful use of the entire Polish and almost the whole world bibliography on the subject in principal languages.

Another advantage of the book is its extraordinary clarity, logical construction and high precision of wording.

Finally, the confrontation of statutory regulations with practice of international agencies, and, first and foremost, focusing attention on problems affecting Poland and other socialist States, merit special attention.

Due to these outstanding qualities the book should be highly appreciated. The book by Miss Okularczyk can be considered an achievement closely approaching the cognitive limits set by and inherent to formal legal comparative analysis of membership in international agencies.

The author intentionally limited the scope of the research both as to the object, i.e. specialized agencies of the United Nations, and as to the methodology, i.e. to legal aspects of membership in these agencies. Since she performed her task within these limitations very well critical observations can rather concern the limitations themselves.

A number of questions and reservations arises as to limiting the object of the study. The point is what set of organizations has been selected for a com-

parative analysis. Why should GATT be left out without any justification? By way of an extra-statutory development GATT has become a fully shaped international organization practically cooperating with UNO along similar lines as formally conceived specialized agencies.

And, by the way, the author has not rigorously confined her study to formally conceived specialized agencies of the United Nations, as she has included the International Nuclear Energy Agency into the comparative analysis. The solutions adopted by GATT for various membership questions are particularly interesting, and this applies in particular to Poland's membership in this organization.

Why should such organizations as UNCTAD and UNIDO, only formally founded as subsidiary organs of the General Assembly of the United Nations, be excluded from a study on the membership in specialized agencies? The author has not even raised the problem of the nature of these organizations, neither has she considered it expedient to justify their omission. Yet a hypothesis could be advanced that the formation of new specialized agencies in the UN system tends to be simplified by founding them in virtue of resolutions adopted by "mother organizations." This was, to some extent, the case already with IFC and IDA, affiliated with IBRD and formally included into specialized agencies of UNO.

There seem not to exist any substantiated grounds to adopt as a basis of including relevant international organizations of wide responsibilities to the class of UN specialized agencies by solely formal criteria following from Articles 57 and 63 of the Chapter of the United Nations, namely: (1) a formal agreement on cooperation with UNO having been concluded, (2) maintaining relations with UNO through the Economic and Social Council. Such strict criteria, if applied, would clash more and more with the sit-

uation which has evolved as a result of the development of the United Nations system which meets new requirements of international cooperation.

Keeping the study within exclusively legal research methods has naturally resulted in a certain impoverishment of its content.

Remaining within a narrow range of such methods, the author compares statutory solutions relating to particular membership problems, adopted by the organizations she has selected. On the basis of such comparisons she attempts some categorizations. Going beyond the confrontation of basic instruments, she shows and examines how these solutions have been implemented in practice by particular organizations. This greatly contributes to bringing the study under review closer to legal and political reality. Yet the author abstains even from posing the question—and, of course, she does not attempt to give an answer—why certain organizations have adopted this very solution—and not the other—of the same institutional problems of membership.

The said methodological limitations of Miss Okularczyk's study on the membership in specialized agencies of the United Nations impoverish also the content of conclusions presented at the end of each chapter: they do not contain (except for the chapter on associate membership) any evaluation or proposals, but are in fact reduced to a general summary of the chapter and a classification of variant solutions of particular problems of membership.

As it follows from the above characteristics of the book it possesses considerable cognitive value. This value, however, remains limited to getting to know rather the outer cover of the phenomenon, but not the essence of political processes which determine the real role of an international organization and the actual dimensions of problems involved, such as membership in particular.

The cognitive value of the study of membership in international organizations could be further increased only if

it penetrated beyond the borders of traditional juridical research methods. Miss Okularczyk did not yet dare to do so.

Wojciech Morawiecki

Jerzy RAJSKI, *Odpowiedzialność cywilna przewoźnika lotniczego w prawie międzynarodowym i krajowym* [Civil Liability of an Air Carrier in International and Municipal Law], PWN, Warszawa 1968, 213 pp., Rozprawy Uniwersytetu Warszawskiego, series No. 31.

The work under review is worth especial note among all the scientific works in Polish literature dealing in recent years with problems of air law. This is due to several reasons. First—the problem of the liability of an air carrier has been presented against the background of numerous legal comparisons, the author showing an excellent knowledge of foreign legislations, jurisdictions and literatures in this field. Second—apart from the legal situation in the particular States, the author deals extensively with problems connected with the liability of an air carrier in the light of international agreements and international practice. And last but not least—emphasis has been laid first and foremost on civilist questions involved in air law. As is known, the doctrine of civil law has shown little interest in those problems so far. Neither did works written by air law specialists contain a deeper civilist analysis. This gap is filled now no doubt by the present work which is written from the positions of a civilist.

The first and largest part of the work presents the civil liability of an air carrier in the light of uniform international provisions, first of all the Warsaw Convention of 1929 (with subsequent amendments). The author discusses here, among other things, the scope of the applicability of the provisions of that convention, the definition of an air carrier, premises and principle of his liability, the rule of limited compensation and exceptions from this rule. Particularly valuable are arguments pertaining to the following

problem: what is to be understood by the formulation of Article 20 of this Convention, exempting a carrier from liability, provided he proves that he had adopted all necessary measures to avoid a loss (*"toutes les mesures nécessaires"*)?

We note a serious divergence of views on this head in literature specializing on this subject. According to the author (p. 59), Article 20 does not assume presumption of guilt but presumption of liability of an air carrier. This liability should be based on the principle making exoneration admissible solely in cases in which blame for the loss falls exclusively on the sufferer.

Food for thought is offered also by the formulation of Article 25 of the same Convention, which excludes the possibility of pleading regulations limiting liability, if the loss arose from the bad intention of the carrier or "from a fault which according to the law of the adjudicating court is regarded as equivalent to a bad intention." The author tries to assess what degree of fault is meant here, and how should the stand of the adjudicating court be evaluated in this case.

Part One of the work ends with a general evaluation of the Warsaw Convention. The evaluation is not very positive. The Convention is limited to the unification of only some questions pertaining to the liability of an air carrier. In formulating the principle of liability, the Convention uses an enigmatic formulation permitting ambiguous interpreta-

tion. And although this facilitated the acceptance of the Convention by a large group of States, it led subsequently to dissension, and the principle of liability began to be treated differently by the individual States.

And it is these systems of civil liability of an air carrier in the internal law of foreign States that are discussed in the Part Two of the book. The author distinguishes among those internal systems a group modelling itself on the provisions of the Warsaw Convention and a group departing from the principles of that Convention. According to the author, a certain differentiation may be made among the systems of the former group as regards their attitude towards the Convention. Only the Belgian legislation fully accepts the provisions of the Convention, extending their binding force (without any modifications whatever) to all air shipments which are subject to it. Outside Belgium, a similar stand has been adopted in Europe by Greece and Luxemburg. A sizable group of States, on the other hand, accepted the provisions of the Warsaw Convention with the simultaneous introduction of various amendments. These States include Britain and France. Again, other States, followed the system of the Convention so far that they carried out the postulate for the uniformization of the fundamental principles of the international and national system of liability of the type involved. These States include, among others, Hungary, Holland, Italy, the Federal Republic of Germany and Poland.

Among the legal systems departing from the principles of the Warsaw Convention the author describes the Soviet system. The latter increases the civil liability of an air carrier even in comparison with the liability connected—as the Soviet theory calls it—with the exploitation of “a source of increased danger.” The author emphasizes this broad protection of the passenger by the Soviet air law. A trend to increase liability is

noted also in Czechoslovakia. The same group of systems includes also (among the socialist countries) Rumania and the German Democratic Republic.

Marked differences are noted, on the other hand, in the author's opinion, in the systems regulating the liability of an air carrier in the United States. This view is backed strongly by a review of literature and jurisdiction.

Part Three of the book deals with the liability of an air carrier according to the provisions of the Polish law.¹ In the light of the Polish air law of 1928, the accepted liability was based as a rule on the principle of risk. Nevertheless, on the eve of the appearance of a new law there appeared in Polish literature voices in favour of accepting liability based on blame. The author does not agree with them. He criticizes also the formulations of the Polish air law of 31 May, 1962 which does not formulate separate principles of the liability of an air carrier for damage to persons and damage to goods. This is replaced by a uniform principle of liability of an air carrier to cover all cases, formulated with the use of that fragment of the Warsaw Convention which had given rise to the highest number of reservations in world doctrine. This is the principle of Article 78 of the 1962 Law exonerating a carrier from liability, “provided he proves that he had adopted all possible measures to avoid damage.” This gave rise to a number of differences in interpretation. According to some opinions, Polish air law has no room for the concept of liability based on the principle of blame (except Article 76 of this law). According to others, our law accepts the principle of blame whose existence it presumes. This latter view is accepted by some repre-

¹ The author has published already an article on this subject in “The Yearbook of Air and Space Law,” 1966, p. 94 ff entitled “Basic Principles of Polish Air Law.”

sentatives of Polish doctrine² and by practical commentaries.³

Proof of lack of guilt on the part of an air carrier is no reason, in the author's opinion (p. 191), for releasing him from liability. For Article 78 cited above does not require from the carrier a normal or even the greatest carefulness, but the adoption of all possible measures to avoid damage. And the infliction of damage in air transport means precisely default in the adoption of measures of this kind. According to the author, an air carrier must be held responsible, therefore, for accidents happening, for example, due to constructional and technical faults in the functioning of an aircraft, for all acts of persons executing the obligations of the carrier if such acts, even without the fault of any such person, led to damage. A different interpretation would constitute, in the author's opinion, a departure from the developmental line of Polish law, and would be at the same time proof of a step backward in the protection of the sufferers' rights in comparison with the legal situation in force before. There are no reasons at all, according to the author, for the acceptance of such an interpretation of Article 78 cited above

which would limit the liability of an air carrier for any damage incurred by the passengers. It should be accepted, therefore, that in accordance with Polish law an air carrier is responsible on the principle of blame solely in cases indicated in Article 76 of the Polish air law.

Further on in his work, particularly in its conclusions pointing to the need of a thorough reform of the system of the civil liability of an air carrier, the author broadly justifies the above criticism of the formulations of this law and its interpretations.

It may be said in summing up that the work under review is an example of a sound use of the comparative method. The abundant materials drawn from foreign legal systems are properly systematized and are a good illustration of the theses contained in the work. Also worth noting is the keen critical sense of the author, independence of his polemical remarks and practical postulates.⁴ The work of this young Polish civilist is a proof of the marked viability and high scientific rank of the Polish doctrine of air law.

Mieczysław Sośniak

Andrzej WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej* [*Recommendations of the Council for Mutual Economic Assistance*], Warszawa 1969, 329 pp. and annexes.

The systematically expanding economic cooperation of the socialist States—member countries of the Council for Mutual Economic Assistance, particularly in

connection with the recently begun process of their economic integration, gives birth to a large number of important legal problems pertaining to this cooperation. The problems arise both from strictly bilateral economic relations of these States, and in particular from the

² E.g. in J. FABIAN's work entitled *Umowa o przewóz lotniczy w prawie polskim* [*Contract on Air Shipment in Polish Law*], Warszawa 1969, p. 64 ff.

³ In a commentary to the Polish air law of 1962 by T. Uszyński (Wydawnictwo Komunikacji i Łączności, Warszawa 1966, p. 115) which expresses a view according to which a guilt constitutes the principle of liability in air law, while Art. 78 of the Polish air law—only one of the methods of exculpation.

⁴ As one of many examples may serve here criticism of the views of R. Rodière who divides the term of "return journey" into two separate shipments, carried out by the author on page 23 and following, correct definition of the span of "period of shipment" on page 43 and following, and many others.

activity of the Council itself, as it is the basic platform of multilateral cooperation.

In spite of the immense importance of the above problems the legal literature of the socialist countries in this field, especially as regards larger monographs, is not too abundant. This is why the present work of A. Wasilkowski, a well-known specialist in this domain, cannot but arouse quite understandable interest. The book consists of 8 chapters in which the author deals in turn with the following problems: the place of the Council for Mutual Economic Assistance among all the international economic organizations; general legal problems of the recommendations of international organizations; the role of the CMEA recommendations in the international division of labour; the place of the recommendations as decisions of the CMEA; the adoption of a recommendation; the recognition of a recommendation by States; problems arising when no interest is taken in an adopted recommendation; execution of recognized recommendations.

The author tackles a wide range of problems highly interesting from the legal point of view. The painstaking reader who will make a careful study of the work will have a high degree of satisfaction. Although in some places the work is difficult of reception, it is marked by thoroughness and conscientiousness of the legal analysis of the problems in question. The value of the author's arguments is enhanced by the fact that he analyzes the recommendations of the CMEA against a broad backdrop of other international organizations, both universal and grouping socialist States alone.

By recommendations the author means decisions adopted by collective organs of international organizations, whose purpose is to formulate certain rights and duties, which are not binding legally on the subjects they are addressed to (p. 43). As is known, recommendations in

this meaning of the term are the most popular form of any decisions made by active international organizations. The special interest taken by the author in the legal problems connected with the recommendations of the organs of the Council for Mutual Economic Assistance is explained by the fact that they are the fundamental and practically the only legal form in which this organization expresses its will with regard to relevant questions, that is economic, scientific and technical cooperation, a form addressed to its member countries.

The author treats CMEA recommendations as qualified, because in distinction from normal recommendations they do produce certain legal effects when they are adopted. In particular, they impose on the addressee the obligation to examine them and to advise the organization of the result of that examination (p. 62). An analysis of the legal character of recommendations in general and CMEA recommendations in particular leads the author to the conclusion that a recommendation is not an expression of the will of States whose representatives participated in its adoption, but of the will of the organization as such, and that in this sense it is a unilateral act (pp. 46, 87, 204, 209). Analyzing recommendations from the point of view of the process of law-making, the author denies them the character of a source of law, he sees their role as ancillary. He stresses at the same time, however, that in many cases it is in fact decisive for the appearance of a legal norm (p. 96).

Pointing out that the CMEA recommendations constitute a means for the achievement of its aims and tasks, the author analyzes the question whether the Council in its present form is an organization of an integrating type, and gives a negative answer to this question (p. 123). It must be pointed out, however, at this juncture that the fact that at its XXV session held in July 1971 the CMEA adopted a complex programme of fur-

ther expansion and improvement of cooperation and development of the socialist economic integration of the member countries permits one to look somewhat differently at the long-range goals of the organization.

The author carries out a detailed legal analysis of various basic kinds of recommendations adopted by the CMEA organs, especially ones pertaining to the principles and conditions of the economic, scientific and technical cooperation of the member countries, coordination of economic plans, specialization and co-production, as well as joint undertakings of the member countries. With regard to the first group the author distinguishes recommendations on the question of principles concerning states as such, which require as a rule further more concrete determination (e.g. fundamental principles of the socialist division of labour), and recommendations on the question of conditions of cooperation suitable for direct application by enterprises operating in international economic turnover (p. 137).

A particularly interesting form used in the CMEA Statute (Art. IV, item 3) says that all decisions are adopted only with the consent of the member countries concerned, and do not extend to countries which declared their disinterest in a given problem. Furthermore, the Statute does not formulate any objective criteria of this interest.

The whole point is that the difficulty of a proper interpretation of this provision lies in the fact that an equal measure must be applied to two aspects of the problem, namely the protection of the interests of the less interested countries so that other CMEA members could not impose any solutions if those countries are not ready for them on the one hand, and the protection of the interests of the more interested countries, so that other member of the organization could not hold them back

from such forms of cooperation for which these countries are prepared (p. 239).

The author suggests here an interesting, though obviously disputable, interpretation of the above provision, according to which any objection against the adoption of a decision of a CMEA organ (and a recommendation in particular) by a country regarding itself as concerned could be effective if the decision would have because of its objective to extend to that country, if the participation of the said country were indispensable for the execution of the undertaking involved in the decision (pp. 246, 248). It must be conceded that the interpretation suggested by the author reveals a realistic approach to the problem in question. He is also right when he says that the principle of the adoption of decisions on the basis of interest is suited best to the needs of cooperation within the framework of the Council for Mutual Economic Assistance at its present stage of development (p. 250).

Analyzing the problem of the legal essence of a recommendation after its recognition by the addressee member States of the CMEA, the author rejects the thesis that the recommendation is then transformed into an international agreement. He points out that it is not a recommendation as such but the individual statements of will of the individual States, or the acts recognition, that create then the mutual rights and duties of the States concerned (p. 272). This is not tantamount, however, to an automatic appearance of an international agreement, but most often the appearance of the duty to conclude such an agreement based on the directive contained in the recommendation (p. 286).

In the closing part of the work the author tackles the interesting problem of the responsibility of the CMEA member States for obligations arising from the recommendations of the organization, which they have recognized. Pointing out that although the very principle of ma-

terial liability for the non-execution of obligations of a material nature cannot be questioned, the author stresses the difficulty of its practical implementation, as long as the obligations are in the realm of public international law (p. 308). The author weighs also the possibility of the creation of various mechanisms for the settlement of disputes which might arise between the CMEA member countries in the field of their material liability (particularly the creation of an

international arbitration organ and a CMEA tribunal).

It should be added in conclusion that since the appearance of his book A. Wasilkowski has written a large number of articles in which he has made a more thorough analysis of some of the problems. And the book itself won in 1970 the 2nd prize of the monthly "Państwo i Prawo" ["State and Law."]

Henryk de Fiumel

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BOOKS

ALBINOWSKI Stanisław: Wokół EWG [Europejskiej Wspólnoty Gospodarczej]. Procesy integracji gospodarczej w Europie Zachodniej [Dans l'orbite de la CEE. Le processus d'intégration économique en Europe occidentale. Around the European Economic Community. Processes of Economic Integration in Western Europe]. Warszawa 1969 Państwowe Zakłady Wydawnictw Szkolnych 263 pp.

Reviewed by: Ciamaga Lucjan. *Sprawy Międzynarodowe* No. 6 pp. 128 - 132.

BARTKOWSKI Tadeusz et al.: Problemy jedności Afryki [Problèmes concernant l'unité de l'Afrique. Problems Concerning Affrica's Unity]. Warszawa 1969 Polski Instytut Spraw Międzynarodowych 335 pp., bibliography.

Reviewed by: Bartnicki Andrzej. *Sprawy Międzynarodowe* No. 4 pp. 112 - 117.

BARTKOWSKI Tadeusz, DOBOSIEWICZ Zbigniew: Afryka a Europejska Wspólnota Gospodarcza [L'Afrique et la CEE. Africa and the EEC]. Warszawa Polski Instytut Spraw Międzynarodowych 157 pp., bibliography, summaries in English and Russian.

Reviewed by: Klepacki Zbigniew. *Sprawy Międzynarodowe* No. 5 pp. 129 - 133.

BASAK Adam: Decisions of the United Nations Organs in the Judgements and Opinions of the International Court of Justice. Wrocław 1969 Ossolineum Wrocławskie Towarzystwo Naukowe 223 pp., bibliography.

BUCHAŁA Rudolf: „Recht auf die Heimat” Studium z problematyki stosunków między NRF a wschodnimi sąsiadami Niemiec [Étude du domaine des rapports entre la République Fédérale Allemande et les voisins de l'est de l'Allemagne. Study on the Relations between the FRG and the Eastern Neighbours of Germany]. Kraków 1969 Państwowe Wydawnictwo Naukowe 140 pp., bibliography, summaries in English and Russian.

Reviewed by: Rotfeld Adam D. *Polish Perspectives* No. 4 pp. 73 - 75. idem. *Perspectives Polonaises*;

Kokot Józef. *Zaranie Śląskie* No. 4 pp. 200 - 203;

Rotfeld Adam. *Państwo i Prawo* No. 8/9 pp. 378 - 381.

CAŁUS Andrzej: Prawa i obowiązki państwa w dziedzinie międzynarodowego obrotu osobowego [Les droits et les devoirs de l'État dans le domaine de la circulation internationale des personnes. Rights and Duties of the State in International Move-

* This bibliography includes also publications of earlier date which were not enlisted in the bibliography annexed to the previous volume and publications reviewed in 1970.

ment of Persons]. Warszawa Szkoła Główna Planowania i Statystyki 270 pp., bibliography, summaries in French, English and Russian.

DAVIS John Herbert: Złudny pokój. Rzecz o konflikcie syjonistyczno-arabskim [Une paix illusoire. A propos du conflit Israélo-Arabe. Illusive Peace. On the Sionist-Arab Conflict]. Warszawa Książka i Wiedza 181 pp., bibliography.

Reviewed by: Bartkowski Tadeusz. *Sprawy Międzynarodowe* No. 10/11 pp. 184 - 188.

DEMBIŃSKI Ludwik: Samostanowienie w prawie i praktyce ONZ [L'autodétermination d'après le droit et la pratique de l'ONU. Self-determination in Law and Practice of the UN]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 274 pp., bibliography, summary in English.

Reviewed by: Antonowicz Lech. *Państwo i Prawo* No. 10 pp. 600 - 601;
Nartowski Andrzej. *Sprawy Międzynarodowe* No. 10/11 pp. 177 - 180.

DOBROŚIELSKI Marian: Z problemów współczesności [Les problèmes contemporains. On Contemporary Problems]. Warszawa 1969 Książka i Wiedza 162 pp.

Reviewed by: Lewicki Stanisław. *Prawo i Życie* No. 17 pp. 7;
Jankowski Henryk. *Studia Filozoficzne* No. 6 pp. 125 - 128.

FILIPOWICZ Bernard: Ogólne zasady protokołu dyplomatycznego [Principes généraux du protocole diplomatique. General Principles of Diplomatic Protocol]. Second revised edition. Warszawa 1969 Szkoła Główna Planowania i Statystyki 209 pp., bibliography.

GAŚNOROWSKI Janusz: Polskie orzecznictwo arbitrażowe w sprawach morskich z lat 1965 - 1967 [La jurisprudence arbitrale en matière maritime dans les années 1965 - 1967. Polish Arbitration Judgements in Maritime Cases in the Years 1965 - 1967]. Gdańsk 1969 Wydawnictwo Instytutu Morskiego 40 pp.

GAŚNOROWSKI Janusz, MARUCZYŃSKI Włodzimierz, PIETRASZEWSKI Józef: Polskie orzecznictwo sądowe w sprawach morskich. Wybrane orzeczenia sądów województwa gdańskiego w latach 1963 - 1968 [La jurisprudence polonaise dans les affaires maritimes. Sentences choisies des Tribunaux de la voïvodie de Gdańsk dans les années 1963 - 1968. Judgements of Polish Courts in Maritime Cases. Selected Decisions of the Courts in the District of Gdańsk in the Years 1963 - 1968]. Gdańsk Wydawnictwo Instytutu Morskiego 127 pp.

GELBERG Ludwik: Powstanie Polski Ludowej. Problemy prawa międzynarodowego [La naissance de la Pologne Populaire. Problèmes de droit international. The Foundation of People's Poland. Problems of International Law]. Warszawa Państwowe Wydawnictwo Naukowe, Instytut Nauk Prawnych PAN 159 pp.

GIŁAS Janusz: Tranzyt przez porty morskie w świetle prawa międzynarodowego [Le transit par les ports maritimes à la lumière du droit international. Transit Through Sea Ports in the Light of International Law]. Gdańsk 1969 Wydawnictwo Morskie 180 pp., bibliography, summary in English.

GORALCZYK Wojciech: Materiały do ćwiczeń z prawa międzynarodowego publicznego [Matériaux pour les études de droit international public. Materials for Studies in Public International Law] Selected ... Warszawa Uniwersytet Warszawski 351 pp.

GÓRBIEL Andrzej: Konieczność wojskowa w prawie międzynarodowym [La nécessité militaire en droit international. Military Necessity in International Law]. Kraków Państwowe Wydawnictwo Naukowe 86 pp., summary in English.

GRZELAK Edward: Wolność sumienia w dokumentach ONZ. Wybór dokumentów [La liberté de conscience dans les documents de l'ONU. Choix de documents. Freedom of Conscience in UN Documents. Selected Documents]. Warszawa Centralny Ośrodek Doskonalenia Kadr Laickich 87 pp.

IWANEJKO Marian: Międzynarodowy Trybunał Sprawiedliwości [La Cour internationale de Justice. International Court of Justice]. Kraków 1969 Państwowe Wydawnictwo Naukowe, Uniwersytet Jagielloński 121 pp., bibliography, summary in English.

Reviewed by: Skubiszewski Krzysztof. *Sprawy Międzynarodowe* No. 8 pp. 198 - 200.

KŁAFKOWSKI Alfons: Les conséquences juridiques de la Seconde Guerre mondiale et le problème allemand. Varsovie 1968 Interpress 336 pp., bibliography.

Reviewed by: Gifas Janusz. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 1 pp. 297 - 302.

KŁAFKOWSKI Alfons: Obozy koncentracyjne hitlerowskie jako zagadnienie prawa międzynarodowego [Les camps de concentration nazis en tant que problème de droit international. The Nazis Concentration Camps as a Question on International Law]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 103 pp.

Reviewed by: Szpak Leon. *Państwo i Prawo* No. 6 pp. 1031 - 1034.

KŁAFKOWSKI Alfons: Die deutsch-polnische Grenze nach dem II Weltkrieg. Übers. von Janusz Sikorski. Poznań Wydawnictwo Prawnicze 134 pp.

KŁAFKOWSKI Alfons: Granica polsko-niemiecka po II wojnie światowej [La frontière polono-allemande après la Seconde Guerre mondiale. The Polish-German Frontier After the Second World War]. Poznań Wydawnictwo Poznańskie 113 pp.

Reviewed by: Ziemiak Witold. *Prawo i Życie* No. 9 pp. 6;

Roszkowski Janusz. *Nowe Książki* No. 9 pp. 541 - 543;

Hagemajer Marek. *Życie i Myśl* No. 7/8 pp. 232 - 234;

G.T. *Tygodnik Powszechny* No. 22 pp. 2.

KŁAFKOWSKI Alfons: L'imprescriptibilité des crimes de guerre et l'Allemagne Fédérale au regard du droit international. Trad. par Maciej Szepietowski. Poznań Wydawnictwo Poznańskie 250 pp.

KŁAFKOWSKI Alfons: Umowa poczdamska a sprawy polskie 1945 - 1970 [L'accord de Potsdam et les problèmes polonais dans les années 1945 - 1970. Potsdam Agreement and Polish Problems in the Years 1945 - 1970]. Poznań Wydawnictwo Poznańskie 383 pp.

Reviewed by: Kowalski Włodzimierz. *Trybuna Ludu* No. 262 pp. 3, 4;

Skowroński Andrzej. *Prawo i Życie* No. 18 pp. 3;

Rybicki Remigiusz. *Sprawy Międzynarodowe* No. 11/12 pp. 181 - 184.

KOCOT Kazimierz, WOLFKE Karol: Wybór dokumentów do nauki prawa międzynarodowego [Choix de documents pour l'étude du droit international. Selection of Documents for International Law Study]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 469 pp.

Reviewed by: Skubiszewski Krzysztof. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 321 - 323.

KOCOT Kazimierz: Delimitacja. Na marginesie orzeczenia Międzynarodowego Trybunału Sprawiedliwości z dnia 20 lutego 1969 r. [Délimitation. En marge de la décision rendue le 20 février 1969 par la Cour internationale de Justice. Delimitation.

Side Note to the Judgement of the International Court of Justice of February 20, 1969]. Opole Instytut Śląski 27 pp., bibliography.

KOWALSKI Włodzimierz T.: Jalta i Poczdam [Yalta et Potsdam. Yalta and Potsdam]. Warszawa Państwowe Zakłady Wydawnictw Szkolnych 98 pp.

KOWALSKI Włodzimierz T.: Rola ZSRR w ustalaniu granicy na Odrze i Nysie Łużyckiej [Le rôle de l'U.R.S.S. dans l'établissement de la frontière sur l'Odra et la Nysa Lusacienne. The Role of the USSR in the Settling of the Odra—Nysa Border]. Warszawa Robotnicza Spółdzielnia Wydawnicza „Prasa” 37 pp.

LIBERA Kazimierz: Międzynarodowy ruch osobowy [La circulation internationale des personnes. International Movement of Persons]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 337 pp., bibliography.

Reviewed by: Machowski Jacek. *Sprawy Międzynarodowe* No. 2 pp. 110 - 114;
Równy Kazimierz. *Państwo i Prawo* No. 2 pp. 342 - 345.

MEISSNER Wojciech: Francuska ustawa z 1967 roku o zderzeniach statków, ratownictwie i awarii wspólnej [La loi française de 1967 sur la collision de navires, le sauvetage et l'avarie commune. French Act of 1967 on the Collision of Ships, Life-saving and Common Damage]. Gdańsk 1969 Wydawnictwo Instytutu Morskiego 40 pp.

MORAWIECKI Wojciech: Narody Zjednoczone. Zamierzenia i rzeczywistość [Les Nations Unies. Espérances et réalité. United Nations. Intentions and Reality]. 2nd edition revised and enlarged Warszawa Wiedza Powszechna 482 pp.

NOWICKI Józef: Teoria rozwoju krajów ekonomicznie mniej zaawansowanych [Théorie concernant le développement des pays moins avancés du point de vue économique. Theory of the Development of Economically Less Advanced Countries]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 293 pp., bibliography, summaries in English and Russian.

Reviewed by: Dobosiewicz Zbigniew. *Sprawy Międzynarodowe* No. 6 pp. 132 - 134.

OKRĘGLICKI Mieczysław: Przewóz pasażerów i ich rzeczy morzem w świetle nowego ustawodawstwa francuskiego [Le transport des passagers et de leurs bagages par mer au regard de la nouvelle législation française. Sea Transport of Passengers and Their Effects in the Light of the New French Legislation]. Gdańsk 1969 Wydawnictwo Instytutu Morskiego 18 pp.

OKULARCZYK Halina: Członkostwo organizacji wyspecjalizowanych ONZ [La participation aux organisations spécialisées de l'ONU. Membership in the UN Specialized Agencies]. Warszawa Polski Instytut Spraw Międzynarodowych 217 pp., bibliography, summaries in English and Russian.

Reviewed by: Kolasa Jan. *Sprawy Międzynarodowe* No. 12 pp. 122 - 125.

PAZDZIÓR Bolesław: Office européen des Nations Unies à Genève. Wrocław 1969 Państwowe Wydawnictwo Naukowe 126 pp., bibliography.

Reviewed by: Równy Kazimierz. *Sprawy Międzynarodowe* No. 4 pp. 120 - 124.

PIOTROWSKI Stanisław: Sprawy polskie przed Międzynarodowym Trybunałem Wojennym w Norymberdze. Vol. 2: Proces Hansa Franka i dowody polskie przeciw SS [Les problèmes polonais devant le Tribunal militaire international de Nuremberg. Vol. 2: Le procès de Hans Frank et les preuves polonaises contre la SS. Polish Prob-

lems before the International Military Tribunal at Nuremberg. vol. 2: The Case of Hans Frank and the Polish Evidence Against SS]. Warszawa Wydawnictwo Prawnicze XI, 350 pp.

Reviewed by: Kąkol Kazimierz. *Prawo i Życie* No. 14 pp. 7;
Garlicki Andrzej. *Kultura* No. 31 pp. 3.

RAJSKI Jerzy: Odpowiedzialność cywilna przewoźnika lotniczego w prawie międzynarodowym i krajowym [La responsabilité civile du transporteur aérien dans le droit international et interne. Liability of an Air Carrier in International and Municipal Law]. Warszawa 1968 Państwowe Wydawnictwo Naukowe 213 pp.

Reviewed by: Szpunar Adam. *Państwo i Prawo* No. 6 pp. 1015 - 1018.

SIEDLECKI Jacek: Komentarz do działu i kodeksu morskiego (Tytuł IV: Umowy) [Commentaire au Code maritime. Titre IV: Contrats. Commentary to Section 1 of the Maritime Code. Title IV: Agreements]. Gdańsk Instytut Morski 80 pp., bibliography.

SKUBISZEWSKI Krzysztof: Zachodnia granica Polski [La frontière occidentale de la Pologne. Poland's Western Border]. Gdańsk 1969 Wydawnictwo Morskie 630 pp., manuscript.

Reviewed by: Wojciechowski Marian. *Kultura* No. 4 pp. 11;
Łuczyński Zdzisław. *Więź* No. 5 pp. 108 - 118;
W.R. *Polish Perspectives* No. 6 pp. 83 - 85;
idem. *Perspectives Polonaises*.

SONNENFELD Renata: Realizacja zasad współistnienia w ONZ. Aspekty prawne [Réalisation des principes de coexistence au sein de l'ONU. Aspects juridiques. The Fulfillment of Coexistence Principles in the UN]. Warszawa 1968 Polski Instytut Spraw Międzynarodowych 94 pp., bibliography.

Reviewed by: Jasudowicz Tadeusz. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1969 No. 4 pp. 292 - 294;
Polemic: Sonnenfeld-Temporek Renata. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 359 - 360.

SULEK Jerzy: Stanowisko Rządu NRF wobec granicy na Odrze i Nysie Łużyckiej 1949 - 1966 [Position de la R.F.A. envers la frontière sur l'Odra et Nysa Lusacienne. 1949 - 1966. The Proposition of the Government of the FRG with regard to the Odra—Lusatian Nysa border in the years 1949 - 1966]. Poznań 1969 Instytut Zachodni 422 pp., bibliography, summary in English.

Reviewed by: Mazur Zbigniew. *Polish Western Affairs* No. 1 pp. 168 - 174;
idem. *La Pologne et les Affaires occidentales*;
Malinowski Ludwik. *Pokolenia* No. 4 pp. 119 - 124;
Rybicki Regimiusz. *Sprawy Międzynarodowe* No. 5 pp. 123 - 125;
Roszkowski Janusz. *Nowe Książki* No. 10 pp. 626 - 627.

SZURSKI Tadeusz: Zasada największego uprzywilejowania w Układzie Ogólnym w Sprawie Taryf Celnych i Handlu (GATT) [La clause de la nation la plus favorisée dans le Traité général sur les tarifs et le commerce. The Most Favourite Nation Clause in the General Agreement on Tariffs and Trade (GATT)]. Warszawa Polska Izba Handlu Zagranicznego 261 pp., bibliography.

TEHERAN—Jalta—Poczdarn. Dokumenty konferencji szefów rządów trzech wielkich mocarstw [Téhéran—Yalta—Potsdam. Documents des conférences tenues par les chefs de gouvernement des trois grandes puissances. Teheran—Yalta—Potsdam. Documents from the Conferences of the Chiefs of the Governments of the Three Big

Powers]. Translated from Russian by Walenty Daszkiewicz and Adam D. Rotfeld. Warszawa Książka i Wiedza 550 pp.

UKŁAD ZSRR—NRF. Podstawowe dokumenty i wypowiedzi [L'accord entre l'U.R.S.S. et la R.F.A. Documents et déclarations fondamentales. USSR—FRG Agreement. Basic Documents and Statements]. Warszawa Polska Agencja Prasowa 75 pp.

WALICHNOWSKI Tadeusz: Status quo w Europie. [*Status quo en Europe. Status quo in Europe*]. Warszawa Ministerstwo Obrony Narodowej 229 pp., bibliography.

Reviewed by: Sułek Jerzy. *Prawo i Życie* No. 21 pp. 6.

WASILKOWSKI Andrzej: Zalecenia Rady Wzajemnej Pomocy Gospodarczej [Les recommandations du Conseil d'Assistance économique mutuelle. Recommendations of the Council for Mutual Economic Assistance]. Warszawa 1969 Państwowe Wydawnictwo Naukowe 351 pp., bibliography, summaries in Russian and French.

WIECZOREK Włodzimierz: Nierozpowszechnianie broni jądrowej [La non-prolifération de l'arme nucléaire. Non-proliferation of Nuclear Weapon]. Warszawa 1969 Wiedza Powszechna 153 pp.

WOJTYNA Mieczysław: Forma czynności prawnych w polskim prawie morskim. Zagadnienia kolizyjne [La forme de l'action juridique en droit maritime polonais. Problèmes du conflit de lois. Form of Legal Actions in Polish Maritime Law. Problems of Legal Conflicts]. Kraków 1969 Politechnika Krakowska, Katedra Ekonomii Politycznej 29 pp., bibliography.

ZAGADNIENIA prawne Bałtyku. Pod redakcją Ludwika Gelberga [Les problèmes juridiques de la mer Baltique. Legal Matters of the Baltic Sea]. Wrocław 1969 Ossolineum 183 pp.

Reviewed by: Gilas Janusz. *Państwo i Prawo* No. 8/9 pp. 375 - 377;

Polemic: Gelberg Ludwik. *Państwo i Prawo* No. 12 pp. 995 - 996.

ARTICLES

BEREZOWSKI Cezary: La responsabilité pour des dommages résultant des vols supersoniques. In: *Rapports polonais au VIII^{ème} Congrès international de Droit comparé*. Varsovie Ossolineum pp. 14 - 26.

BIERZANEK Remigiusz: Prawo państw do uczestnictwa w ogólnych umowach wielostronnych [Le droit des pays à prendre part aux conventions multilatérales de caractère général. The Right of States to Participate in General Multilateral Agreements]. *Sprawy Międzynarodowe* No. 1 pp. 36 - 57.

BIERZANEK Remigiusz: Nowe koncepcje w dziedzinie poszanowania praw człowieka w czasie konfliktów zbrojnych [Les nouvelles conceptions dans le domaine du respect des droits de l'homme en cas de conflits armés. New Ideas Concerning the Observance of Human Rights During Armed Conflicts]. *Wojskowy Przegląd Prawniczy* No. 3 pp. 355 - 372.

BIERZANEK Remigiusz: Definicja agresji w świetle prac Komitetu Specjalnego ONZ [La définition de l'agression à la lumière des travaux du Comité spécial de l'ONU. Definition of Agression in the Light of Works of the UN Special Committee]. *Sprawy Międzynarodowe* No. 8 pp. 77 - 91.

BIERZANEK Remigiusz: ONZ a kodyfikacja zasad prawnych pokojowego współistnienia [L'organisation des Nations Unies et la codification des principes juridiques de la coexistence pacifique. UN and Codifications of Legal Principles of Peaceful Coexistence]. *Państwo i Prawo* No. 10 pp. 456 - 469.

BORKOWSKI Janusz: Postępowanie przed polskimi przedstawicielstwami dyplomatycznymi i konsularnymi za granicą [Procédure devant les représentants polonais diplomatiques et consulaires à l'étranger. Proceeding before Polish Diplomatic and Consular Missions Abroad]. *Zeszyty naukowe Uniwersytetu Łódzkiego* No. 6 pp. 15 - 28, summary in French.

BRAS Władysław: Wspólne kontrole graniczne a wykonywanie suwerennych praw państwa i ochrona praw obywatelskich [Les contrôles communs de frontière, l'exercice des droits souverains de l'État et la protection des droits civiques. Common Border Controls and the Carrying out State Sovereign Rights and the Protection of Citizen's Rights]. *Państwo i Prawo* No. 1 pp. 96 - 103.

CHODOROWSKI Jerzy: Działalność interpretacyjna sądu wspólnot europejskich [L'activité interprétative de la Cour de Justice des Communautés européennes. The Interpretative Activity of the Court of European Communities]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 141 - 162, summary in French.

CZAPSKI Waldemar: O przyjmowaniu na terytorium państwa osób mających podwójne obywatelstwo [De l'admission des bipatrides sur le territoire de l'État. On the Receiving on the Territory of a State of Persons having Dual Citizenship]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 1 pp. 25 - 49, summary in French.

DOBROCYŃSKI Michał: Organizacja Narodów Zjednoczonych a pomoc techniczna [L'organisation des Nations Unies et l'assistance technique. The United Nations and the Technical Assistance]. *Sprawy Międzynarodowe* No. 8 pp. 122 - 134.

DYRDA Iwona: Kilka refleksji na temat tzw. międzynarodowego prawa islamu [Quelques réflexions au sujet du "droit international islamique". Some Remarks on the so-called International Law of Islam]. *Państwo i Prawo* No. 1 pp. 104 - 108.

FIUMEL Henryk de : Quels sont pour chaque mouvement d'unification, les organes compétents et leur mission ? (Le cas du Conseil d'Assistance économique mutuelle). In : *Rapports polonais au VIII^{ème} Congrès international de Droit comparé*. Varsovie Ossolineum pp. 61 - 68.

GAJDA Eugeniusz: Polska w Organizacji Narodów Zjednoczonych [La Pologne dans l'Organisation des Nations Unies. Chronique des plus importants événements des années 1945 - 1960. Poland in the United Nations. Chronicle of Important Events 1945 - 1960]. *Sprawy Międzynarodowe* No. 8 pp. 172 - 183.

GALICKI Zdzisław: Bezprawne zawładnięcie statkiem powietrznym [La capture illicite d'aéronef. Unlawful Seizure of Aircraft]. *Sprawy Międzynarodowe* No. 7 pp. 109 - 119.

GILAS Janusz: Problem zwierzchnictwa państwowego w sferze emisji radiowej [La souveraineté de l'État dans le domaine des émissions radiophoniques. The Problem of State Jurisdiction in the Sphere of Radio Emission]. *Państwo i Prawo* No. 5 pp. 689 - 700.

GILAS Janusz: Granica celna w świetle prawa międzynarodowego [La douane à la lumière du droit international. Customs Border in the Light of International Law]. *Sprawy Międzynarodowe* No. 12 pp. 46 - 61.

GÓRBIEL Andrzej: Konieczność wojskowa w prawie międzynarodowym [La nécessité militaire en droit international. Military Necessity in International Law]. *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* No. 44 pp. 83, summary in English.

IWANEJKO Marian: Międzynarodowy Trybunał Sprawiedliwości [La Cour Internationale de Justice. The International Court of Justice]. *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 1969 No. 45 pp. 118, bibliography, summary in English.

JAKUBOWSKI Jerzy : Le champ d'application dans l'espace des règles uniformes de droit privé matériel. In : *Rapports polonais au VIIIème Congrès international de Droit comparé*. Varsovie Ossolineum pp. 82 - 91.

JÓZEFOWICZ Paweł: Kraje skandynawskie a europejska konferencja w sprawie bezpieczeństwa i współpracy [Les pays scandinaves et la conférence européenne consacrée à la sécurité et la collaboration. Scandinavian Countries and the European Conference on Security and Cooperation]. *Sprawy Międzynarodowe* No. 6 pp. 41 - 57.

KŁAFKOWSKI Alfons: Aktualne znaczenie umowy poczdamskiej [L'importance actuelle de l'accord de Potsdam. Actual Significance of the Potsdam Agreement]. *Sprawy Międzynarodowe* No. 6 pp. 5 - 23.

KŁEPAČKI Zbigniew M.: Europejska Komisja Gospodarcza ONZ. Dorobek i perspektywy [La commission économique pour l'Europe. Acquis et perspectives. The UN Economic Commission for Europe. Achievements and Perspectives]. *Sprawy Międzynarodowe* No. 8 pp. 135 - 148.

LEŚKO Teofil: Prawne aspekty zakazu użycia broni chemicznej i biologicznej [Les aspects juridiques de l'interdiction de l'arme chimique et biologique. Legal Aspects of the Ban on the Use of Chemical and Biological Weapon]. *Wojskowy Przegląd Prawniczy* No. 1 pp. 92 - 109.

LEŚKO Teofil: Upowszechnianie zasad międzynarodowego prawa wojennego [La propagation des principes du droit international de la guerre. Dissemination of Principles of the International Law of War]. *Sprawy Międzynarodowe* No. 10/11 pp. 164 - 176.

LEWANDOWSKI Bohdan: Rola ONZ w utrzymaniu międzynarodowego pokoju i bezpieczeństwa [L'ONU et le maintien de la paix et de la sécurité internationales. Role of the UN in Maintaining International Peace and Security]. *Sprawy Międzynarodowe* No. 8 pp. 23 - 35.

MACHOWSKI Jacek: Rewolucja naukowo-techniczna jako czynnik rozwoju prawa międzynarodowego [La révolution scientifique et technique en tant que facteur du développement du droit international. Revolution in Science and Technology as Factor in the Development of International Law]. *Państwo i Prawo* No. 6 pp. 863 - 874.

MACHOWSKI Jacek: Przestępstwo uprowadzenia statku powietrznego w świetle prawa międzynarodowego publicznego [La capture illicite d'aéronef civil au regard du droit international public. Hi-jacking of Aircraft in the Light of Public International Law]. *Państwo i Prawo* No. 11 pp. 684 - 699.

MAKARCZYK Jerzy: Problematyka prawna Konferencji Narodów Zjednoczonych do Spraw Handlu i Rozwoju (UNCTAD) [Les problèmes juridiques de la Conférence des Nations Unies pour le Commerce et le Développement. Legal Problems of UN Conference for Trade and Development (UNCTAD)]. *Studia Prawnicze* No. 24 pp. 26 - 59.

MARKIEWICZ Ryszard: Polska — NRF — bezpieczeństwo europejskie [Pologne — République Fédérale Allemande — sécurité européenne. Poland — Federal Republic of Germany — European Security]. *Sprawy Międzynarodowe* No. 12 pp. 8 - 19.

MASZNICZ Leszek: Mechanizm działania Sekretariatu ONZ [Le mécanisme du fonctionnement du Secrétariat de l'ONU. The Mechanism of the UN Secretariat]. *Sprawy międzynarodowe* No. 8 pp. 149 - 155.

MATYSIK Stanisław: La distinction du contrat d'affrètement et du contrat de transport de marchandises. In: *Rapports polonais au VIIIème Congrès international de Droit comparé*. Varsovie Ossolineum pp. 110 - 116.

MICHALSKI Henryk: Układ Warszawski — niezawodny instrument pokoju i bezpieczeństwa [Le pacte de Varsovie — un instrument important pour le maintien de la paix et de la sécurité. Warsaw Treaty — an Unfailing Instrument of Peace and Security]. *Sprawy Międzynarodowe* No. 5 pp. 24 - 37.

MORAWIECKI Wojciech: Instytucjonalne współczynniki procesu podejmowania decyzji w organizacji międzynarodowej [Les coefficients institutionnels du processus décisionnel au sein de l'organisation internationale. Institutional Factors in the Decision-Making Process in International Organization]. *Państwo i Prawo* No. 2 pp. 213 - 228.

MORAWIECKI Wojciech: Rola ONZ w tworzeniu norm prawa międzynarodowego [Le rôle de l'ONU dans la création des normes de droit international. The UN Role in Establishing Norms of International Law]. *Państwo i Prawo* No. 10 pp. 470 - 484.

MORAWIECKI Wojciech: Funkcjonalne podejście do organizacji międzynarodowej [Approche fonctionnel à l'organisation internationale. Functional Approach to an International Organization]. *Sprawy Międzynarodowe* No. 10/11 pp. 106 - 124.

NAHLIK Stanisław E.: Plon wiedeńskiej konferencji w sprawie traktatów [Les résultats de la Conférence de Vienne consacrée aux traités. Results of the Vienna Conference on the Law of Treaties]. *Sprawy Międzynarodowe* No. 6 pp. 58 - 80.

NAHLIK Stanisław E.: Wkład ONZ w kodyfikację i postępowy rozwój prawa międzynarodowego [L'apport de l'ONU à la codification et au développement du droit international. The UN Contribution in Codification and Progressive Development of International Law]. *Sprawy Międzynarodowe* No. 8 pp. 104 - 121.

NAHLIK Stanisław E.: Przyczyny nieważności i wygaśnięcia traktatów w świetle kodyfikacji prawa traktatów przez ONZ [Les causes de la nullité et de l'extinction des traités au regard de la codification par l'ONU du droit des traités. Reasons for Invalidity and Termination of Treaties in the Light of the UN Codification of the Law of Treaties]. *Państwo i Prawo* No. 10 pp. 485 - 497.

OKULARCZYK Halina: Organizacja Narodów Zjednoczonych. Członkostwo i główne organy [L'Organisation des Nations Unies. Membres et organes principaux. The

United Nations. Membership and Main Organs]. *Sprawy Międzynarodowe* No. 8 pp. 156 - 171.

PASTUSIAK Longin: Stany Zjednoczone a bezpieczeństwo europejskie [Les États-Unis et la sécurité européenne. The United States and the European Security]. *Sprawy Międzynarodowe* No. 6 pp. 24 - 40.

PASZKOWSKI Mieczysław: Uprawnienia ICAO (International Civil Aviation Organization) w dziedzinie unifikacji międzynarodowych norm i metod postępowania [Les attributions de l'ICAO dans le domaine de l'unification des normes internationales et pratiques recommandées. The International Civil Aviation Organization's Authority in the Field of Unification of International Standards and Recommended Practices]. *Sprawy Międzynarodowe* No. 12 pp. 62 - 72.

PERCZYŃSKI Maciej: ONZ a problemy współpracy gospodarczej Wschód — Zachód [L'ONU et les problèmes de la collaboration économique entre l'Est et l'Occident. The United Nations and Questions of Economic Cooperation between East and West]. *Sprawy Międzynarodowe* No. 8 pp. 60 - 76.

PIONTEK Eugeniusz: Niektóre aspekty prawne pokojowego rozstrzygnięcia sporów za pośrednictwem ONZ. Sprawa Irianu Zachodniego [Certains aspects juridiques du règlement pacifique des différends par l'intermédiaire de l'ONU. Le problème de l'Irian occidental. Certain Legal Aspects of Peaceful Settlement of Disputes through the United Nations. The Case of Western Irian]. *Sprawy Międzynarodowe* No. 12 pp. 88 - 99.

PROKOPCZUK Jerzy: ONZ a dekolonizacja [L'ONU et la décolonisation. United Nations and the Decolonization]. *Sprawy Międzynarodowe* No. 8 pp. 47 - 59.

RESICH Zbigniew: Społeczno-prawna problematyka XXIV Sesji Zgromadzenia Ogólnego ONZ [Les problèmes socio-juridiques de la XXIV^e Session de l'Assemblée Générale de l'ONU. Socio-legal Problems of the XXIVth Session of the General Assembly of the United Nations]. *Nowe Prawo* No. 3 pp. 315 - 318.

RESICH Zbigniew: Bilans prac ONZ w dziedzinie praw człowieka [Le bilan des travaux de l'ONU dans le domaine des droits de l'homme. Balance-Sheet of the UN Activities in the Field of Human Rights]. *Sprawy Międzynarodowe* No. 8 pp. 36 - 46.

SAWICKI Jerzy: „Operacje pokojowe” ONZ w pięć lat po „kryzysie finansowym” [Les “opérations pacifiques” de l'ONU cinq années après la “crise financière”. UN “Peace-keeping Operations” After Five Years of “Financial Crisis”]. *Sprawy Międzynarodowe* No. 5 pp. 74 - 94.

SEROCZYŃSKI Leonard: Niektóre aspekty procesu integracji w ramach wspólnot europejskich [Certains aspects de l'intégration dans le cadre des communautés européennes. Certain Aspects of the Process of Integration within the Frames of European Communities]. *Prawo w Handlu Zagranicznym* No. 25 pp. 89 - 119.

SKOWROŃSKI Andrzej: Kształtowanie się zasad transferu ludności niemieckiej z Polski [La formation des principes concernant le transfert de la population allemande de la Pologne. Formation of Principles of the Transfer of German Population from Poland]. *Sprawy Międzynarodowe* No. 7 pp. 42 - 63.

SKUBISZEWSKI Krzysztof: Legal Nature and Domestic Effects of Acts of International Organizations. In: *Rapports polonais au VIII^{ème} Congrès international de Droit comparé*. Varsovie Ossolineum pp. 194 - 200.

SPEEDWELL F. P.: Funkcjonowanie misji specjalnych [Le fonctionnement des missions spéciales. *Functioning of Special Missions*]. *Sprawy Międzynarodowe* No. 3 pp. 117 - 123.

STAREWICZ Artur: Perspektywy Unii Międzyparlamentarnej [Perspectives de l'Union interparlementaire. The Prospects of the Inter-Parliamentary Union]. *Sprawy Międzynarodowe* No. 3 pp. 57 - 67.

SUJKA Bogumił: Wybrane aspekty prawne działalności propagandowej poprzez środki masowego przekazu [Les aspects juridiques de la propagande faite à l'aide de la radio, la télévision et la presse. Selected Legal Aspects of the Propaganda through Mass Media]. *Sprawy Międzynarodowe* No. 12 pp. 20 - 32.

SUTOR Julian: Państwa stale neutralne a system bezpieczeństwa zbiorowego ONZ [Les pays gardant constamment leur neutralité et le système de sécurité collective de l'ONU. Perpetually Neutral States and the System of Collective Security of the UN]. *Wojskowy Przegląd Prawniczy* No. 3 pp. 373 - 385.

SUTOR Julian: Prawnomiędzynarodowe aspekty neutralności Szwajcarii [Les aspects juridiques de la neutralité de la Suisse. The International Law Aspects of Switzerland's Neutrality]. *Sprawy Międzynarodowe* No. 10/11 pp. 71 - 87.

SYMONIDES Janusz: Znaczenie i istota prawna terytorium państwowego [Importance et nature juridique du territoire d'État. The Importance and Legal Character of a State's Territory]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 1 pp. 1 - 23, summary in French.

SYMONIDES Janusz: Międzynarodowa kontrola wykonania umów dotyczących praw człowieka [Le contrôle international portant sur l'exécution des accords relatifs aux droits de l'homme. International Control in Carrying into Effect Agreements Concerning Human Rights]. *Nowe Prawo* No. 2 pp. 224 - 238.

SZAFARZ Renata: Zastrzeżenia do umów międzynarodowych [Les réserves aux conventions internationales. Reservations to International Agreements]. *Państwo i Prawo* No. 7 pp. 115 - 126.

SZURSKI Tadeusz: Instytucjonalny charakter GATT [Le caractère institutionnel du GATT. Institutional Character of GATT]. *Prawo w Handlu Zagranicznym* No. 25 pp. 55 - 76.

TREPCZYŃSKI Stanisław: Ruch pokoju i bezpieczeństwo europejskie [La sécurité européenne et le mouvement en faveur de la paix. Peace Movement and the European Security]. *Sprawy Międzynarodowe* No. 4 pp. 5 - 16.

WASILKOWSKI Andrzej: Koordynacja planów a modele wspólnego planowania krajów RWPG [La coordination des plans et les modèles d'une planification commune des pays du CAEM. The Coordination of Plans and Patterns of Common Planning of the CMEA Countries]. *Państwo i Prawo* No. 7 pp. 5 - 16.

WASZKIEWICZ Zofia: Przyczyny zerwania konkordatu między Polską a Watykanem 1945 r. (w świetle współczesnej literatury) [Les raisons de la rupture du con-

cordat entre la Pologne et le Vatican en 1945. A la lumière de la littérature polonaise d'aujourd'hui. Causes for the repudiation of the Polish — Vatican Concordat in 1945 in the light of contemporary Polish writings]. *Zeszyty Naukowe Uniwersytetu im. Mikołaja Kopernika w Toruniu* 1969 No. 36 pp. 103 - 121.

WIECZOREK Włodzimierz: ONZ a rozbrojenie [L'ONU et le désarmement. UN and Disarmement]. *Sprawy Międzynarodowe* No. 8 pp. 92 - 103.

WINIECKI Jan: Zdolność prawna ONZ do zawierania umów o pomocy technicznej [La capacité juridique de l'ONU à conclure des conventions d'assistance technique. UN Legal Capacity to Conclude Agreements on Technical Assistance]. *Sprawy Międzynarodowe* No. 1 pp. 84 - 92.

WINIEWICZ Józef: Dwudziestopięciolecie ONZ a Polska [Vingt-cinq années de l'ONU et la Pologne. Twenty Five Years of the UN and Poland]. *Sprawy Międzynarodowe* No. 8 pp. 5 - 22.

ZAORSKI Remigiusz: Polski pas wyłącznego rybołówstwa w świetle praktyki międzynarodowej [La zone polonaise de pêche exclusive à la lumière de la pratique internationale. Polish Zone of Exclusive Fishery Rights in the Light of International Practice]. *Sprawy Międzynarodowe* No. 4 pp. 61 - 72.

Reviews of Foreign Publications

ABRASZEWSKI Andrzej — [Concerning: Sharp Walter Rice — The United Nations Economic and Social Council. New York 1969] *Sprawy Międzynarodowe* No. 8 pp. 194 - 198.

ANTONOWICZ Lech — [Concerning: Identity and Continuity of States in Public International Law, 2d edition. Genève 1968] *Państwo i Prawo* No. 5 pp. 805 - 807.

ANTONOWICZ Lech — [Concerning: Arcybasov I.N. — GDR — subekt meždunarodnogo prava. Moskva 1969] *Sprawy Międzynarodowe* No. 6 pp. 125 - 128.

CIESŁAK Marian, GABERLE Andrzej — [Concerning: Aleksiejew N.S. — Otvetstvennost' nacisticheskich prestupnikov. Moskva 1968] *Palestra* No. 4 pp. 79 - 83.

IZDEBSKI Zygmunt — [Concerning: Jean J. Servan-Schreiber — Le reveil de la France. Paris 1968] *Państwo i Prawo* No. 7 pp. 166 - 168.

MAJCHRZAK Jerzy — [Concerning: Resursy i meždunarodnoe Sotrudničestvo. Moskva 1968] *Ekonomika i Organizacja Pracy* No. 4 pp. 188 - 189.

MORAWIECKI Wojciech — [Concerning: Morozov G. I. — Meždunarodnye organizacii. Moskva 1969] *Sprawy Międzynarodowe* No. 8 pp. 188 - 191.

PASTUSIAK Longin — [Concerning: Farrel B. Barry — The Making of Canadian Foreign Policy, Scarborough 1969] *Sprawy Międzynarodowe* No. 7 pp. 153 - 156.

PASTUSIAK Longin — [Concerning: Hans j. Morgenthau — A New Foreign Policy for the United States. New York 1969] *Sprawy Międzynarodowe* No. 9 pp. 182 - 185.

PASTUSIAK Longin — [Concerning: Diplomacja sovremennogo imperializma. Moskva 1969]. *Sprawy Międzynarodowe* No. 12 pp. 132 - 135.

POTOCKI Jacek — [Concerning: Jefimow G.K. — Generalnaja Asambleja OON. Moskva 1969]. *Sprawy Międzynarodowe* No. 8 pp. 191 - 194.

PROKOPCZUK Jerzy — [Concerning: Solodovnikov V. G. — Afrika wybiraet put'. Moskva 1970] *Sprawy Międzynarodowe* No. 12 pp. 114 - 117.

ROTFELD Adam D. — [Concerning: Das 198. Jahrzehut. Eine Team Prognose für 1970 bis 1980. Hamburg 1969] *Sprawy Międzynarodowe* No. 9 pp. 178 - 182.

RUTKOWSKI Józef — [Concerning: L'économie de la Communauté européenne. Paris 1968] *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 2 pp. 149 - 151.

SYMONIDES Janusz — [Concerning: Čeprov I.J. — Novye problemy meždunarodnogo prava. Moskva 1969] *Sprawy Międzynarodowe* No. 1 pp. 123 - 126.

SYMONIDES Janusz — [Concerning: Schwarzenberger Georg — Foreign Investments and International Law. London 1969]. *Sprawy Międzynarodowe* No. 7 pp. 156 - 159.

TOWPIK Andrzej — [Concerning: Buchan Alstair — Europe's Futures. Europe's Choices. London 1969] *Sprawy Międzynarodowe* No. 9 pp. 175 - 178.

ZYSMAN Ewa — [Concerning: Kapica M.S. — KRN: dva desjatiletija — dve politiki. Moskva 1969] *Sprawy Międzynarodowe* No. 12 pp. 125 - 132.

Private International Law

BOOKS

JAKUBOWSKI Jerzy: Przedsiębiorstwo w handlu międzynarodowym. Problematyka prawna [Les entreprises dans le commerce international. Problèmes juridiques. Enterprises in International Trade. Legal Questions]. Warszawa Polska Izba Handlu Zagranicznego 311 pp., bibliography.

Reviewed by: Przymusiński Czesław. *Przegląd Ustawodawstwa Gospodarczego*. No. 7 pp. 243.

KONWENCJE Międzynarodowej Organizacji Pracy ratyfikowane przez Polskę [Les conventions de l'Organisation internationale du Travail ratifiées par la Pologne. Conventions of International Labour Organization Ratified by Poland]. Part 1 - 2. Warszawa 1969 Instytut Pracy 195 pp. + 177 pp.

KONWENCJE Międzynarodowej Organizacji Pracy nie ratyfikowane przez Polskę [Les conventions de l'Organisation internationale du Travail non ratifiées par la Pologne. Conventions of International Labour Organization not Ratified by Poland]. Part 1 - 2. Warszawa Instytut Pracy 210 pp. + 243 pp.

WALASZEK Bronisław, SOŚNIAK Mieczysław: Zarys prawa międzynarodowego prywatnego [Précis de droit international privé. The Outline of Private International Law]. Warszawa 1968 Państwowe Wydawnictwo Naukowe 290 pp., bibliography.

Reviewed by: Ludwiczak Witalis. *Państwo i Prawo*. No. 7 pp. 148 - 150.

WALASZEK Bronisław, SKĄPSKI Józef: Materiały do nauki prawa międzynarodowego prywatnego [Matériaux pour l'étude du droit international privé. Selected Materials for Study of Private International Law]. Kraków Uniwersytet Jagielloński 281 pp., bibliography.

WOJTYNA Mieczysław: Kształtowanie się zasad rządzących formą czynności prawnej w prawie międzynarodowym prywatnym [La formation des principes relatifs

à la forme de l'action juridique en droit international privé. Shaping of Principles Governing the Form of Legal Action in Private International Law]. Kraków 1969 Wyższa Szkoła Ekonomiczna 81 pp., bibliography.

WOJTYNA Mieczysław: Zagadnienie kolizyjne w odniesieniu do czynności prawnej między nieobecnymi [Le problème du conflit de lois par rapport aux actions juridiques entre absents. Problems of Conflicts of Law with Reference to Legal Action between Absentees]. Kraków 1969 Wyższa Szkoła Ekonomiczna 22 pp., bibliography.

ARTICLES

JAKUBOWSKI Jerzy: Integracja gospodarcza krajów RWPG a niektóre problemy unifikacji prawa [L'intégration économique des pays du CAEM et certains problèmes de l'unification du droit. Economic Integration of the CMEA Countries and Some Problems of the Unification of Law]. *Państwo i Prawo* No. 5 pp. 677 - 688.

JODŁOWSKI Jerzy: Konwencja polsko-francuska o prawie właściwym, jurysdykcji i wykonywaniu orzeczeń w zakresie prawa osobowego i rodzinnego [La convention polono-française relative à la loi applicable, la compétence et l'*exequatur* dans le droit des personnes et de la famille. Polish-French Convention on the Proper Law, Jurisdiction and Carrying out Judgement in Personal and Family Law]. *Państwo i Prawo* No. 12 pp. 872 - 888.

NANOWSKI Zbigniew E.: Aktualne problemy międzynarodowego arbitrażu handlowego w ramach RWPG [Problèmes actuels de l'arbitrage international de commerce dans le cadre du CAEM. Actual Problems of the International Trade Arbitration within the CMEA]. *Prawo w Handlu Zagranicznym* No. 25 pp. 13 - 25.

SKĄPSKI Józef: Les problèmes de droit international privé nés de la cession de territoires ou de l'accession de territoires à l'indépendance. L'expérience polonaise. *Archivum Iuridicum Cracoviense* Vol. 3 pp. 247 - 260, summary in Russian.

TOMASZEWSKI Maciej: Umowa polsko-francuska o prawie właściwym, jurysdykcji i wykonywaniu orzeczeń w zakresie prawa osobowego i rodzinnego [La convention polono-française relative à la loi applicable, la compétence et l'*exequatur* dans le droit des personnes et de la famille. Polish-French Convention on the Proper Law, Jurisdiction and Carrying out Judgements in Personal and Family Law]. *Nowe Prawo* No. 9 pp. 1301 - 1310.

TRAMMER Henryk: Z rozważań nad strukturą normy kolizyjnej prawa prywatnego międzynarodowego [La réflexion sur la structure de la norme de collision du droit international privé. Considerations on the Structure of Conflict of Law Rules in Private International Law]. *Studia Cywilistyczne* Vol. 13/14: 1969 pp. 397 - 404, summaries in French and Russian.

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