

POLISH YEARBOOK OF
INTERNATIONAL LAW

X

ACADÉMIE POLONAISE DES SCIENCES
INSTITUT DE L'ÉTAT ET DU DROIT

ANNUAIRE POLONAIS DE DROIT INTERNATIONAL

X

1979—1980

OSSOLINEUM
MAISON D'ÉDITION DE L'ACADÉMIE POLONAISE DES SCIENCES

POLISH ACADEMY OF SCIENCES
INSTITUTE OF STATE AND LAW

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WROCŁAW • WARSZAWA • KRAKÓW • GDAŃSK • ŁÓDŹ
ZAKŁAD NARODOWY IMIENIA OSSOLIŃSKICH
WYDAWNICTWO POLSKIEJ AKADEMII NAUK

1981

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PRINTED IN POLAND

Zakład Narodowy im. Ossolińskich — Wydawnictwo. Wrocław, Oddział w Warszawie 1981. — Nakład 500 egz. Objętość: ark. wyd. 25,50; ark. druk. 21,75; ark. druk. A-1, 28,92. Papier piśm. sat. ki. III, 71 g, 70X100. Oddano do składania 5.VIII.80. Podpisano do druku w sierpniu 1981. Wydrukowano we wrześniu 1981 r. Białostockie Zakłady Graficzne, Białystok. Zam. 1310/80. Cena zł 130,—

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The Polish Initiative on the Preparation of Societies for Life in Peace

by JANUSZ SYMONIDES

It was on October 10, 1974 that the chairman of the Polish delegation made his statement at the General Assembly of the United Nations, in which he stressed the importance of action aimed at shaping the consciousness of nations and societies in the spirit of détente, cooperation and peace and in which he called on everybody concerned to take all possible measures in order to make sure that the last quarter of the 20th century "becomes a period of building for peace and educating for peace."¹ From that date onwards the idea of education for peace has been formulated and developed in several Polish statements and initiatives both at home and on the international arena. It may be recalled, in particular, that the idea was raised by Poland at the Conference on Security and Cooperation in Europe, first in the address delivered to the Conference in Helsinki July 31, 1975² and later in a special document on the education for peace presented by the Polish delegation at the Belgrade session, November 11, 1977.³ The culmination of the Polish action in favour of promoting the idea of educating the society of men for peace was the official presentation by the Minister of Foreign Affairs of the Polish People's Republic at the XXXIII session of the General Assembly of the United Nations of the Polish draft declaration on the preparation of societies for life in peace. The declaration was adopted on December 15, 1978 by 138 votes in favour and 2 abstentions (USA and Israel). This almost unanimous support proves that the Polish initiative was timely and responded to the aspirations and needs of the international community.

¹ "Receuil de documents," (Warszawa — PISM), 1974, No. 10, 1042—1043.

² *Sprawy Międzynarodowe*, 1975, No. 10, pp. 161.

³ *Sprawy Międzynarodowe*, 1978, No. 6, pp. 138—139.

I

The idea of educating societies in the spirit of peace has in Poland a long-standing tradition dating back to the early 15th century. It was at that time that two Polish writers and scholars: Stanisław from Skarbimierz and Paweł Włodkowic from Brudzew inspired by the canonistic doctrines formulated the principle of peaceful coexistence of Christian states with pagan states and praising the virtues of peace accepted only the possibility of waging just wars. Both have been teaching canon law at the Cracow Academy and both were twice its presidents. The importance of their opinions is in no way diminished by the fact that they reflected the Polish reasons of state and have been advanced in connection with the wars and political struggles waged by the Teutonic Order against Poland.

Among the more than 100 sermons left by Stanisław Skarbimierz, of particular importance is the sermon on just wars (*De bellis iustis*) delivered by him probably in 1410.⁴ In spite of its form which followed the usual pattern of those times, the sermon is in fact a scientific treatise containing a clear, concise and complete presentation of the law of war, based on the recognized authorities, principally on the *Decretum Gratiani* and on the writings of Raymond de Penjafort and Guillome de Rennes.

While admitting only just wars, he states that the right of self-defence derives from natural law. Each person has the right to oppose force, has the right to fight back when attacked. It is right to wage war to defend one's country. Adding to the conditions of a just war formulated by Raymond de Penjafort, Stanisław Skarbimierz stresses that war should not be waged in order to satisfy one's hatred, or greed or blood-thirstiness.

Of particular merit are his opinions — very progressive for his time — concerning what we would call at present the right to self-determination and independence of non-Christian peoples. Not only does he claim the right to take advantage of the assistance offered by infidels; he affirms also that “[...] if the infidels are being invaded without just reason by Christians, they wage a just war against the invaders in

⁴ The sermon has been remembered and published with a commentary by L. EHRLICH in *Polski wykład prawa wojny XV wieku* [Polish Doctrine of the Law of War of the 15th Century], Warszawa 1955. As was established by Z. Budkova there are seven copies of the sermon by Stanisław from Skarbimierz, all from the second half of the 15th century; of these four are at the Library of the Jagiellonian University and three at libraries in Wrocław,

order to regain their lands or country" and concludes by stating that "[N]either the Pope nor the Christians have the right to deprive the infidels of their states or power."

In his treatise *Tractatus de potestate pape et imperatoris respectu infidelium* [Treatise on the Power of the Pope and Emperor Towards the Infidels] and in his treatise *De ordine Cruciferorum et de bello Polonorum contra dictos fratres* [On the Teutonic Order and on the War of the Poles Against these Brothers] Paweł Włodkowic refutes the arguments voiced by the Teutonic Order against the Poles for their acceptance of the assistance of the Tartars, Lituansians and Russians in the battle of Grunwald and proves that the wars started by the Teutonic Order and the manner in which these wars have been waged constituted a violation of the law.⁵

Invoking the law of nations he states that the infidels have the same right as the Christians to have their own states. Neither the Pope, nor the more so, the Emperor had the right or authority to grant the Teutonic Order the privilege to wage aggressive wars against the infidels. A war against the infidels could be recognized as just only when waged for just reasons. The recognition of the equality of Christian and non-Christian states, the recognition of the right of non-Christian peoples to independence and statehood is a proof of exceptional far-sightedness.

In the history of the Council of Constance and in the history of the law of nations Paweł Włodkowic went down primarily as an advocate of the principle that the true faith must be spread only by word and not by sword, that pagan states have the right to live in peace as long as they do not attack their Christian neighbours, that an alliance with such states is permissible in a just war. His great contribution was noted and recognized in world literature.⁶

The progressive character of the Polish school of the law of nations is a source of understandable satisfaction not only because similar views

⁵ The theories of Paweł Włodkowic have been extensively studied and commented in Polish literature. See T. BRZESTOWSKI, *Paweł Włodkowic*, Warszawa 1954; L. EHRLICH, *Paweł Włodkowic i Stanisław ze Skarbimierza* (Paweł Włodkowic and Stanisław of Skarbimierz), Warszawa 1954; L. EHRLICH, *Rektor Paweł Włodkowic, rzecznik obrony przeciw Krzyżakom* (Rector Paweł Włodkowic, the Spokesman for the Defence Against the Teutonic Order), Kraków 1963; K. TYMIENIECKI, *Moralność w stosunkach między państwami w poglądach P. Włodkowica* (Ethics in Relations Between States in the Theories of P. Włodkowic), "Przegląd Historyczny," vol. 22, 1919—1920; B. WINIARSKI, *Victoria et Włodkowic*, "Bulletin de l'Académie Polonaise des Sciences et des Lettres," Kraków 1955.

⁶ The merits of Paweł Włodkowic are stressed, among others by von der

were expressed only 100 years later by Francisco de Vittoria, but also for the reason that, while in the "proposals of eternal peace" formulated from the 14th century onwards by European scholars and kings transpired the idea of a "crusade," the idea of a Christian alliance against the infidels, the Polish doctrine and practice called for peaceful coexistence with the infidels.

The ideas advocated by Stanisław Skarbimierz and Paweł Włodkowic represented the first step in a tradition continued in our literature by the great humanists of the Renaissance period, above all by Andrzej Frycz Modrzewski and also by Jakub Przyłuski, Jan Tarnowski and Sebastian Petrycy.

In a remarkable treatise *De Republica emendandā libri quinque* [*On the Reform of the Republic Five Volumes*] published in 1551, Andrzej Frycz Modrzewski devoted the Third Volume to the consideration of the problem of war.⁷ True to the spirit of Renaissance humanism, but also writing as a politician, reformer and philosopher, he condemned wars and called on kings and rulers to desist from waging wars. He pointed out that war is contrary to human nature, that men should not destroy each other but assist each other and live in peace. According to Frycz Modrzewski, war is a crime. One will realise how progressive and far-sighted he was when recalling that only in the 20th century has war been recognized in international law as a crime.

Urging that war be avoided by all legitimate means, Frycz Modrzewski called for the peaceful settlement of disputes. Conflicts ought to be resolved either on the basis of law or in accordance with human common sense. He presented a comprehensive system of peaceful settlement of disputes including: diplomatic negotiations, judicial procedure and conciliation. Neighbouring countries ought to designate beforehand, by way of agreement judges who will be asked to settle disputes. Such judges must be free from allegiance so as to be able to decide on matters of law freely, guided exclusively by their sense of justice.

Just as the Polish school of the law of nations of the 15th century,

Hardt, Lenfant, Nys, Moreau-Reibel. The latest foreign language work is that of S. F. BELCH, *Paulus Vladimiri and his Doctrine Concerning International Law and Politics*, vol. 1 and 2, The Hauge 1965.

⁷ For the discussion of the theories of Frycz Modrzewski see, among others, S. KOT, *Andrzej Frycz Modrzewski*, Kraków 1923; K. LEPSZY, *Andrzej Frycz Modrzewski*, Warszawa 1953; *Andrzej Frycz Modrzewski*, WROCŁAW 1962; W. VOISÉ, *Frycza Modrzewskiego nauka o państwie i prawie* [*Frycz Modrzewski and His Theory on the State and the Law*], Warszawa 1956; W. VOISÉ, *Andrzej Frycz Modrzewski o wojnie i pokoju* [*Andrzej Frycz Modrzewski on War and Peace*], "Państwo i Prawo/" 1951, No. 1.

Frycz Modrzewski accepted only just, defensive wars. A just war cannot be waged in order to satisfy territorial ambitions or the greed for power and glory.

When presenting the opinions of Andrzej Frycz Modrzewski one must emphasize that he was a determined and ardent advocate of the idea of peaceful cooperation of the entire international community. He called for the acceptance within that community of all states, Christians and non-Christian alike. That in itself would be a way of removing a major source of tension and conflicts. The rejection outside the international community of states with different religions was, in his view, contrary to the desire of all men to live in peace.

Just as Stanisław Skarbimierz and Paweł Włodkowic, Andrzej Frycz Modrzewski was far ahead of his time. The impact of his progressive ideas was felt not only in Poland but in Europe as a whole. His treatise *De Republica emendanda* has been translated into German, French, Russian and Spanish. It enjoyed the highest esteem not only among the humanists and partisans of Reformation of the 16th century, but also among the European political and legal scholars of the 17th century. J. Bodin refers to his views and H. Grotius considered to be the "father of the law of nations" has based his exposition on the peaceful means of settlement of disputes to a large extent on Frycz Modrzewski's ideas.

Jakub Przyłuski and Jan Tarnowski, both living in the 16th century, are also prominent for their views on war and peace. Both considered peace to be the highest value and accept war only as a last resort, as a defence against aggression or as a redress of a wrong which can only be sought by the force of arm.

The Polish humanists of the 16th century rejected wars of conquest, but admitted the possibility of waging defensive wars and for patriotic reasons emphasized the imperative necessity of defending one's country. On the other hand, an attitude of extreme pacifism was that of the radical wing of the Arians (Polish Brethren Piotr Giezek from Goniądz, Grzegorz Paweł from Brzeziny, Marcin Czechowicz and others).⁸ Their condemnation of wars was unconditional and so was their rejection of the use of arms even in the defence of the threatened fatherland. Some refused to do military service and to carry arms, carrying instead wooden sticks or wooden sabres. In the way they expressed their protest and rejection of all forms of violence and

⁸ S. ESTREICHER, *Pacyfizm w Polsce XVI stulecia* [Pacifism in Poland of the 15th Century], "Kuch Prawniczy, Ekonomiczny i Socjologiczny," 1931, No. 1; H. OLSZEWSKI, *Historia doktryn politycznych i prawniczych* [History of Political and Legal Doctrines], Warszawa—Poznań 1973, pp. 120—121.

cruelty. The more moderate wing of the Polish Brethren was not against military service. Their most prominent spokesman was Szymon Budny. In the 17th century they made a considerable contribution to the shaping of the modern ideals of tolerance. Whereas their influence in Poland was rather limited, they made their impact felt all over Europe thanks to their publications and writings in Latin, their personal contacts and polemics with West European scholars which left their imprint on the European ideals of pacifism and tolerance. It suffices to mention that their concept of religious tolerance is broadly the same as the concept formulated many years later by John Locke.⁹

The period of Enlightenment with its new, invigorating intellectual currents which followed the period of counter-reformation, was characteristic in Poland of the development of political writings and general public education. In the works published during that period—and this applies not only to those dealing with legal matters—their authors took up the broad problems of war and peace, pointed out the benefits of peaceful cooperation, the need to settle disputes by peaceful means and emphasized the role of the law of nations in the organization of the community of states. They were not Utopians, they had a clear vision of the international situation of their times, nevertheless they profoundly believed in the possibility of limiting wars and reducing their destructive effects by appealing to human intelligence, by education, by the development of an enlightened public opinion.

The political and legal writings of that period are all marked by a determined and unanimous protest against wars of aggression, against wars of conquest and annexation of foreign territory.

Stanisław Staszic, an eminent Polish writer and statesman of that time, not only condemned annexations, but emphasized the right of peoples to self-determination. Wrote he: "A war started by anyone for another purpose than that of protecting the law of nations, of restoring the unalienable right of a people to communicate freely with other peoples or to live under a freely chosen government is unjust. Under no circumstance can wars be waged nowadays in order to conquer foreign territory."¹⁰

There were Poles among those, who in the 18th century exerted

⁹ The problems of tolerance have been the main preoccupation of J. GRELL, S. PRZYPKOWSKI, J. SZLICHTYNG. Cf. *Bracia polscy* [The Polish Brethren], in: *Wielka Encyklopedia Powszechna PWN* [The State Scientific Publishers Great Universal Encyclopaedia], vol. 2, Warszawa 1963, p. 105.

¹⁰ S. STASZIC, *Prestrogi dla Polski z teraźniejszych politycznych Europy związków i z praw natury wypadające* [Admonitions for Poland arising from the present European Relations and the Laws of Nature] 1790, p. 22 ff.

their minds in order to work out a formula of eternal peace. Stanisław Leszczyński, while living in France, wrote a memorandum on the strengthening of universal peace based on a perpetual alliance of England, Genua, the Netherlands, Poland, Switzerland, Sweden, Venetia with France. The proposal providing for a system of peaceful settlement of disputes and collective self-defence, placed at the helm of the alliance the king of the most powerful at that time European state — France — which had to give up all territorial claims. A few years later, K. Skrzetuski in his book on universal history presented a proposal for the establishment of permanent peace in Europe.¹¹

In the context of the idea of educating societies in the spirit of peace, it must be emphasized that following the big educational reform introduced in Poland of the Enlightenment period, the law of nations became part of the regular curriculum of Polish schools.¹² The Commission for National Education, the first state organ dealing with educational matters in Europe, set up on October 15, 1773 by the Polish Sejm on the initiative of the king Stanisław August Poniatowski and other progressive personalities, reformed the schooling system, created secondary schools, introduced a modern programme based on the principles of Enlightenment and promoted the application of new teaching methods.

The Laws of the Commission for National Education of 1783 recommended the introduction in the last two forms, in the fifth and sixth courses, of the law of nature, politic law, the law of nations and internal domestic national law. Four hours in the fifth form and eight hours in the sixth form weekly had to be devoted to these subjects. As a rule the law of nations was taught in the sixth form. The Commission gave the teachers no detailed guidelines concerning the way in which they were supposed to conduct their lessons, but on the basis of the teachers' reports, the essays written by the pupils, the textbooks used (among others by Stroynowski and Wyrwicz) it can be stated that much time and effort was spent in order to educate the pupils in the spirit

¹¹ J. K. SKRZETUSKI, *Historia polityczna dla szlacheckiej młodzieży* {*Political History for Noble Youth*}, Warszawa 1775, vol. 2, p. 290 ff.

¹² A very valuable study of the subject was made by J. KOLASA, in: *Prawo narodów w szkołach polskich wieku Oświecenia* {*The Law of Nations in Polish Schools of the Period of Enlightenment*}, Warszawa 1954. See also: S. HUBERT, *Poglądy na prawo narodów w Polsce czasów Oświecenia* {*The Theories of the Law of Nations in Poland of the Enlightenment Period*}, Wrocław 1969. K. KOCOT has devoted a special study of the science of the law of nations in an earlier period. See K. KOCOT, *Nauka prawa narodów w Ateneum gdańskim* {*The Science of the Law of Nations in the Atheneum of Gdańsk*}, Wrocław 1965.

of peace. The teachers tried to instil in their pupils the idea that instead of waging war the proper way is to prevent conflicts or to solve them by peaceful means, that wars of conquest are acts which deserve the most emphatic condemnation on legal, political and moral ground¹⁸. It can thus be stated that the idea of education for peace was being put into practice by the Polish educational system as far back as the 18th century.

The presentation of the progressive Polish theory and political practice of the period preceding the establishment of the Polish People's Republic would be incomplete without the mention of the Polish initiative on "moral disarmament" put forward at the League of Nations.¹⁴ The idea has been expounded in a special memorandum addressed to the Secretary General of the League of Nations September 23, 1931.¹⁶ Recalling that almost all states adhered to the principle of renunciation of war as an instrument of nation foreign policy, the Polish government called for the subordination of the internal legislation of states to this principle by introducing a prohibition of war propaganda and making it a criminal offence. The Polish proposal provided also for safeguards against the misuse of the press, radio and film for purposes contrary to the maintenance of peace and, among other things, for the establishment of an international disciplinary court for journalists. The memorandum called for the education of the young generation not in a spirit of hatred but in a spirit of international understanding, in accordance with the ideals the League of Nations, and proposed the elaboration of an appropriate international convention.

The Polish initiative gained the support of many states and was greeted with sympathy by the International Commission of Intellectual Cooperation. A special Committee on Moral Disarmament was set up with the mandate of preparing a draft convention on moral disarmament. Among many subjects, the Commission studied the problem of

¹⁸ Attention may be drawn to the fact that the condemnation of aggressive war is ever present in the Polish school of the law of nations at a time when armed conquest is recognized as a legitimate method of territorial expansion by the most eminent Western authorities in international law.

¹⁴ Cf. works by W. MICHOWICZ, *Polskie plany rozbrowienia moralnego w okresie międzywojennym* {*Polish Plans of Moral Disarmament in the Inter-War Period*}, "Kwartalnik Historyczny," 1975, No. 3, p. 698 ff; *Polska to Lidze Narodów* {*Poland in the League of Nations*}, "Sprawy Międzynarodowe," 1978, No. 12, pp. 141—142. Speaking about the proposal concerning "moral disarmament" it may be noted that the idea has been given the wrong label, for as a matter of fact it was not concerned with "disarmament" but with moral "armament" in the struggle for peace.

¹⁶ Doc. C/602.M.240, 1931JX.

educating the young generations and the problems of cooperation of intellectuals. In spite of large support, the chances of the Polish initiative being implemented in practice have been ruined by the increase in international tension caused by the aggressive policies of the fascist states.

II

After World War II, Poland—mindful of its tragic experience—elevated the struggle for peace and for the strengthening of international security to the rank of primary objective of its foreign policy.

Bearing in mind that the halting of the armaments race, the prohibition and elimination of weapons of mass destruction and, generally speaking, disarmament is of fundamental importance for the maintenance and strengthening of international peace, the government of the Polish People's Republic has, during the 35 year period of its existence presented many proposals to that effect.

Of symbolic importance is the fact, that the first initiative taken by our country at the United Nations dealt with nuclear weapons. During the First Session of the General Assembly of the United Nations the Polish deputy foreign minister Zygmunt Modzelewski proposed the conclusion of a treaty banning the use of nuclear energy for other than peaceful purposes.¹⁶

Widely known is the Polish proposal to establish in Central Europe a zone free of nuclear weapons presented by the Polish Minister of Foreign Affairs Adam Rapacki at the XII Session of the General Assembly of the United Nations, October 2, 1957.¹⁷

Maintaining its original plan of a nuclear weapons free zone, the Polish government proposed in 1963 a freeze on the levels of nuclear armaments in Central Europe. The details of the proposal have been set out in a memorandum of the Polish government of February 29, 1964.¹⁸

The Polish proposals reflected a realistic approach and did not affect the balance of military forces in Central Europe. They were only aiming at preventing an increase in the nuclear weapons potential and at eliminating nuclear weapons from the most sensitive zone of

¹⁶ Cf. A. ABRASZEWSKI, *Polska w ONZ [Poland in the United Nations]*, Warszawa 1975, p. 54.

¹⁷ "Receuil de Documents," (Warszawa PISM), 1957, No. 10.

¹⁸ *Rokowania rozbrojeniowe po II wojnie światowej [Disarmament Negotiations After World War II]*, PISM, Warszawa 1964, part. 14.

contact of the armed forces of the two military blocks. The implementation of the Polish plan would have facilitated the execution of other measures aimed at reducing the danger of nuclear war and would have greatly contributed to ensuring the peace.

The proposals made by our country have not been implemented, for in spite of the broad support by world public opinion and various progressive political groups they were opposed by the governments of the Federal Republic of Germany and the United States of America, interested as they were in pursuing the nuclear weapons race. However, the Polish plan on the establishment of a nuclear weapons free zone in Central Europe did play an important role in international relations. It prompted other states to offer similar proposals concerning other regions of the world, such as the Balkans, the Mediterranean Sea and the Baltic Sea. The idea of regional nuclear weapons free zones has also found its practical implementation in the Antarctic and in Latin America.

In 1960 Poland presented a whole series of disarmament proposals. At the XV Session of the General Assembly of the United Nations the head of the Polish delegation the then First Secretary of the Central Committee of the PUWP Władysław Gomułka proposed in the general debate, among other things, that a world wide plebiscite be carried out in which all nations would be given the opportunity to state whether they want their countries to possess nuclear weapons and nuclear weapons delivery vehicles or whether they are in favour of destroying all weapons of mass destruction, of general and complete disarmament.¹⁹

In the late 1960s and early 1970s Poland has been particularly active in promoting the idea of prohibiting chemical and bacteriological weapons. As a result of an initiative taken by our country in the Geneva Disarmament Committee,²⁰ the Secretary General of the United Nations published a report on the effects of a possible use of chemical and bacteriological weapons. Together with other socialist states Poland presented at the General Assembly a draft convention on the prohibition of testing, production and storage of bacteriological and chemical weapons.²¹ Finally, Poland was one of the first states to ratify on December 11, 1972 the Convention on the prohibition to carry out research in and production and storage of bacteriological weapons and toxic materials and on their destruction.

¹⁸ *Rokowania rozbrownieoxoe po II wojnie światowej* {Disarmament Negotiations After World War II}, PISM, Warszawa 1961, part. 4.

¹⁹ Proposal from July 30, 1968, Doc. ENDC/PV 385.

²⁰ Doc. A/7655.

In the 1950s, Poland together with other socialist states took several initiatives aimed at the conclusion of a treaty on collective security in Europe. In a declaration issued on March 9, 1954 the Polish government expressed its readiness to participate in an all-European treaty on collective security,²² and in August of the same year invited France to join in a treaty of alliance and mutual assistance which would present a contribution to an all-European system of collective security, whose principles have been set forth by the USSR in its proposals of February 10, 1954.²³ These initiatives met no positive response.

An important Polish initiative aimed at promoting détente, strengthening international security and laying the foundations of sound international relations, was the proposal to call a conference on security and cooperation in Europe. It was presented on December 14, 1964 by the Polish Minister of Foreign Affairs Adam Rapacki at the XIX Session of the General Assembly of the United Nations.²⁴

The idea was later endorsed by the Consultative Political Committee of the Warsaw Treaty which adopted on July 5, 1966 in Bukarest a declaration on the strengthening of peace and security in Europe. In the Budapest Appeal of March 17, 1969 the socialist countries reiterated again their call for an all-European conference on security and cooperation.²⁵ The Budapest Appeal met with a positive response of many Western states, in particular of neutral states. Finland expressed its readiness to accept the role of host-country. In June 1970 the ministers of foreign affairs of the Warsaw Treaty proposed that the list of participating countries include all European states plus the United States of America and Canada. The persistent efforts of the socialist countries were finally beginning to bear fruit and in the new international climate created by the conclusion of the agreements normalizing the relations of the Federal Republic of Germany with their neighbours it became increasingly difficult for the opponents of the conference to find plausible arguments which could justify its refusal.

The Conference on Security and Cooperation in Europe which started on July 3, 1973 in Helsinki was continued in Geneva from September 18, 1973 till July 21, 1975 and ended with the signing of the Final Act in Helsinki on August 1, 1975.

The Conference laid down the general principles of coexistence and cooperation of the countries of Europe. These principles express

²² "Receuil de Documents," (Warszawa — PISM), 1954, No. 2.

²³ "Receuil de Documents," (Warszawa — PISM), 1954, No. 7/8.

²⁴ "Receuil de Documents," (Warszawa — PISM), 1964, No. 11/12.

²⁵ "Receuil de Documents," (Warszawa — PISM), 1969, No. 3.

unequivocally the ideals of peaceful coexistence, although the term "peaceful coexistence" did not appear in the Conference's documents. The success of the Conference is a great achievement of the peaceful policy of the European community, including Poland, which took the initiative to convene the Conference and acted with determination for several years in favour of that great idea.

The Polish People's Republic made a significant contribution to the liquidation of sources of international tension and conflict. Over the past 25 years our country has been participating in various international bodies whose aim has been the supervision of the implementation of armistice agreements (Korea, Vietnam, Laos, Cambodia, Middle East).

In the efforts of Polish diplomacy in favour of the maintenance of peace and international security a significant role is played by actions aiming at ensuring international protection of human rights. For, in accordance with the fundamental objectives of the United Nations Charter, which reflect the experience of World War II, Poland considers the universal respect of human rights to be, on the one hand, a necessary guaranty of peace and, on the other hand, a bulwark against a possible resurgence of fascism.

During the 33 year period of its participation in the activities of the United Nations Poland made an important contribution to the elaboration of many international acts dealing with the protection of human rights in the world. Our country was among the most active in this field and presented many original proposals.

The persistence in many parts of the world of remnants of Nazism and fascism in the form of various groups and parties spreading overtly their creed prompted our country to take the initiative in this matter. In 1967, the Human Rights Commission and later the General Assembly of the United Nations adopted a Polish draft resolution calling the attention of the international community to the danger of Nazism. In its Resolution 2331/XXII the General Assembly called, among other things, all states to take immediate and effective action against Nazism.²⁸ Thanks to an initiative taken by Poland a Convention on the non-application of prescription in cases of war crimes and crimes against humanity was adopted in 1968. The Convention entered into force in 1971. In 1968 the Human Rights Commission adopted a resolution, pursuant to a Polish initiative, on the prosecution of war criminals and on the indemnification of the victims of Hitlerite atrocities.

²⁸ H. OKULARCZYK, *Działalność Polski w organizacjach systemu ONZ (Poland's Activities in the Organizations of the United Nations System)*, PISM, Warszawa UJ1, pp. 37—38.

A resolution to that effect was also passed in 1969 by the General Assembly of the United Nations.²⁷

The activities of our country in the struggle against massive and grave violations of human rights endangering world peace were not limited to actions aiming at preventing the resurgence of Nazism. The representatives of Poland in the General Assembly of the United Nations, in the Economic and Social Council and in the Human Rights Commission have on many occasions condemned the violations of human rights by the fascist junta in Chile and in the Arab territories occupied by Israel.

At the XXXV session of the Human Rights Commission the Polish delegation presented a draft international convention on the protection of the rights of the child. Among other things, the draft calls for the protection of the child against actions which may lead to discrimination on the grounds of race, religion or any other reason. It proclaims the principle of educating the child in a spirit of understanding of others, tolerance, friendship among nations, peace and universal brotherhood.²⁸

The review of the Polish initiatives, unavoidably fragmentary, not only illustrates the great attachment of our country to the cause of peace, but proves also that we were present whenever and wherever the strengthening of peace and international security was at stake. The Polish draft declaration on the preparation of societies for life in peace represents the crowning of our post war efforts. It reflects, directly and indirectly, all the objectives pursued by our country during the past 35 years, from disarmament to the struggle against all sorts of pathological phenomena in international relations.

III

Let us examine now the salient features of the Polish conception of education for peace, which our country has submitted for international consideration.

In the first place, it must be stressed that education for peace is being treated as an obligation arising from the fundamental right of the individual and of nations to live in peace.

The right to live in peace is the synthesis of many rules and principles of international law. In accordance with the Universal Declaration of Human Rights and the International Covenant on Civil and

²⁷ Resolution 2583/XXIV of December 15, 1969.

²⁸ "Trybuna Ludu" of February 10, 1978.

Political Rights each human being has the unalienable right to life, freedom and security. The fundamental objective of the United Nations is to remove the threat to that right by the maintenance of peace and international security. As stated in the United Nations Charter, the purpose of the UN is to save succeeding generations from the scourge of war. The fundamental and peremptory rule governing international relations is the prohibition of the threat of force²⁹ or the use of force, as stated in Article 2, point 4 of the United Nations Charter. In accordance with the Charter and Verdict of the International Military Tribunal in Nuremberg, confirmed by Resolution 95/1 of the General Assembly of the United Nations are prohibited not only crimes against mankind and war crimes but also crimes against the peace, namely the planning, preparation, initiation or waging of an aggressive war. Aggression is a crime against the peace punishable under international law, pursuant to the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States adopted on October 24, 1970 by the General Assembly of the United Nations.

The obligation of states to educate their societies for peace results also from several international agreements and conventions which fix definite educational and legislative norms. The Convention on Genocide of December 9, 1948 obligates the signatory states to prevent and to punish crimes of genocide both in times of war and peace.³⁰ The Convention on the Liquidation of all Forms of Racial Discrimination adopted in 1965 obligates the signatory states to treat as criminal acts the spreading of ideas of racial discrimination and also to ban organizations supporting racial discrimination and to adopt immediately appropriate measures especially in the field of education, culture, information in order to combat prejudices leading to racial discrimination.⁸¹ Pursuant to Article 20 of the International Covenant on Political and Civil Rights of 1966 the spreading in whatever form of national, racial or religious hatred inciting to discrimination, enmity or violence must be prohibited by law.⁸²

The Convention Against Apartheid of 1973 recognizes apartheid as a crime against mankind and, while stressing that the inhuman acts

²⁹ It states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations."

⁸⁰ Ratified by Poland on September 2, 1950 — *Dziennik Ustaw* (Journal of Laws, further as *Dz. U.*), 1952, No. 2, item 9.

⁸¹ Ratified by Poland *JanXiary* 4, 1969 — *Dz. U.*, 1969, No. 25, item 187.

⁸² Ratified by Poland March 3, 1976 — *Dz. U.*, No. 38, annex.

resulting from the policy and practice of apartheid constitute a serious threat to international peace and security, establishes the principle of international penal responsibility of persons, members of organizations and institutions as well as representatives of states who commit, abet, promote or cooperate in crimes of apartheid.⁸³

The effectiveness of all these prohibitions is, however, reduced by the relatively small number of ratifications of the above mentioned Conventions. It suffices to say that the International Covenant on Political and Civil Rights, which is the most important of all these documents was, at the beginning of 1979, binding only on 55 states, that the Convention Against Apartheid has been ratified only by 49 states. As far as the Convention on Genocide and Racial Discrimination is concerned the number of ratifications is higher, respectively 84 and 302 states.⁸⁴ But in these cases also the number are not overwhelming when compared with the United Nations membership of 152 states.

In the conception of education for peace a very important part is played by the prohibition of war propaganda. The prohibition of war propaganda arises not only from the Covenant on Political and Civil Rights. It is also implied in the Charter of the Nuremberg Tribunal and in its prohibition of the crime against peace. In its Resolution 110/11 of November 3, 1947 the General Assembly condemned all forms of war propaganda aimed at increasing tension, threatening the peace, violating the peace or committing an act of aggression. The Declaration of Principles of International Relations of 1970 proclaims unequivocally that in accordance with the aims and principles of the United Nations states are duty bound to refrain from propagating wars of aggression. In this context it may be recalled that as far back as 1931 the Polish government in its memorandum on "moral disarmament" called for the adoption of internal legislation making war propaganda a punishable criminal offence.

It has to be emphasized that the requirement concerning the adoption by states of internal legislative rules aimed at preventing crimes against the peace, prohibiting war propaganda, racial discrimination, apartheid, colonialism, Nazism, fascism, as well as the requirement of making a punishable criminal offence such acts as the spreading in whatever form or supporting national, racial or religious hatred, inciting to discrimination, enmity or violence was met by the socialist states. As

³⁸ Ratified by Poland February 5, 1976 — Dz. U., 1976, No. 32 item 186.

³⁴ All data according to *Human Rights International Instruments, Signatures, Ratifications, Accessions, etc.*, 1 January 1979, United Nations, New York 1979, p. 13.

far back as 1950—1955 all of them adopted special laws to protect the peace. The Polish law of December 29, 1950 states in its Article 1:

“Who, in oral or written form, through the medium of the press, radio or film or in whatever other form carries out war propaganda, commits a crime against the peace and can be sentenced to serve in prison up to 15 years.”

The Polish Penal Code in its Article 272 provides that:

“Who publicly incites to discord on the ground of national, ethnic, racial or religious differences, or who publicly approves such discords is liable to a punishment of deprivation of liberty from 6 months to 5 years.”

The Penal Code prohibits also the use of print or other mass media for that purpose as well as the compilation, storage, transportation or expedition of written or printed matter or any other object containing such contents.⁸⁵

Internal legislation can and must play an important role in education and in the strengthening of international peace and security. Starting from that premise, Poland and the USSR presented on November 17, 1977 at the Belgrade Meeting a proposal calling on states to express in their internal legislation and in a form most suitable for each state the principles of international relations set forth in the Final Act.³⁸

Apart from the above mentioned Conventions which obligate states to introduce specific prohibitions, to eliminate from the school curricula, from the activities of the mass media and from public life specific and harmful contents, it is possible to find agreements which imply an obligation of positive action in favour of strengthening friendly relations among states and of consolidating the peace. As an example of such an international instrument one may mention the UNESCO Convention against discrimination in education which states in its Article 5:

“1. The States Parties to this Convention agree that:

a. Education shall be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace; {...]

“2. The States Parties of this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.”⁸⁷

⁸⁵ Cf. Art. 273, paras. 1 and 2.

⁸⁶ “Sprawy Międzynarodowe,” 1978, No. 6, p. 135.

⁸⁷ Ratified by Poland September 15, 1963—Dz. U., 1964, No. 40, item 268.

The obligation to educate for peace arises not only from legal norms, but also from political ones contained in many governmental declarations, and especially in the Final Act of the Helsinki Conference. In the section of the Final Act dealing with the implementation of some principles adopted by the Conference, the signatory states declare their determination

"to promote, by all means which each of them considers appropriate a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression or for any threat or use of force inconsistent with the purpose of the United Nations and with the Declaration on Principles Guiding Relations Between Participating States, against another participating State."³⁸

The Polish conception of education for peace is broad and comprehensive. It is addressed to peoples. Its comprehensive character stands out clearly against even such important documents as the Declaration on the Promotion Among the Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, adopted by the General Assembly of the United Nations on December 7, 1965, or the UNESCO resolution on education for international understanding, cooperation and peace adopted by the General Conference on November 19, 1974.

The problem of educating the young generation in the spirit of peace, mutual understanding, respect and friendship among nations was first raised at the XV session of the General Assembly, which adopted a special resolution (1572/XV) to that effect. At the XVII session of the General Assembly the delegation of Romania submitted a draft proposal aiming at developing the principles of Resolution 1572/XV into a special declaration. The discussion which followed led to the introduction of several amendments and finally to the unanimous adoption of the Romanian proposal by the General Assembly of the United Nations at its XX session, December 7, 1965. (Resolution 2037/XX).

What are the purposes of educating for peace? In its broadest sense education for peace must serve to create and to strengthen the conviction that a just and lasting peace must be established and maintained for the benefit of the present and future generations. Thus, to use the terms of the UNESCO Constitution, the objective is to strengthen the belief in the necessity to defend the peace in the minds of men.

Among the various causes of conflicts and tensions which threaten international peace and security one may mention mistrust, suspicion resulting very often from ignorance, intolerance, prejudice. That is

³⁸ Conference on Security and Cooperation in Europe. Final Act, Helsinki 1975.

why education for peace must, on the one hand, eliminate negative stereotypes and attitudes and on the other hand, cultivate friendly feelings and respect for the values and heritage of each nation.

The Polish conception of education for peace starts from the assumption that peace is more than the absence of war, that a just and fruitful peace can be maintained only at an appropriate level of international relations and international cooperation based on democratic principles and devoid of any pathological degeneration. Hence, its broader perception of the aims and purposes of this action. For not only is it designed to transmit information on peace, the dangers which threaten it and the means which strengthen it, but also to generate attitudes of involvement and responsibility for the maintenance of peace on the national, regional and global level. Education for peace is indispensable in order to create a climate of friendship and mutual understanding, in other words—to build the psychological infrastructure of international security and international cooperation.

When approached in that way, peace—while remaining the main objective—becomes at the same time a condition of progress, social development, social justice, respect of human rights and fundamental freedoms, economic, cultural and scientific cooperation as well as a condition which must be met in order to enable mankind to tackle its most pressing problems.

Among the topics which serve to educate for peace and which ought to find their place in the curricula of schools and universities, in the activities of mass media and social organizations one may mention the following: the objectives, principles and activities of the United Nations; the principles of international law which must govern friendly and good-neighbourly relations among nations; the principles and decisions of the Final Act of the Helsinki Conference; the relations between the respect for human rights and the maintenance and strengthening of peace and international security; the initiatives, conferences, movements, individual actions which serve to promote international peace and security.

A special place in the process of education for peace must be given to the problem of disarmament. The armaments race with its ensuing wastage of enormous human and material resources valued at 500 billion dollars per annum, reduces the means available for economic and social development, impedes the restructuring of the international economic order. The halting of the armaments race, the strengthening of political détente by military détente is one of the most pressing and most important tasks confronting mankind today. By poisoning the international climate, by fanning mutual suspicion armaments may lead

to the return of the cold war and even to a direct threat of nuclear conflict. By pointing at the dangers of the armaments race, the process of education for peace must contribute to creating in the public at large a climate conducive to action in favour of halting the escalation of armaments, of reducing the military potential of states and of promoting general and complete disarmament.

The education for peace, while leaving intact the national bonds, must inculcate attitudes of regional and global solidarity, must strengthen in each individual person the feeling of belonging to the community of men. This is no more a simple expression of a wishful thinking, but an obligation arising if only from the UNESCO Convention of the protection of the world's cultural and natural heritage of 1972. Article 6 of the Convention states:

"Whilst fully respecting the sovereignty of the states on whose territory the cultural and natural heritage is situated [...] such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."³⁰

On the initiative of the Polish delegation the General Assembly of the United Nations adopted on November 30, 1976 a resolution dealing with the problem of protection and further development of cultural values.⁴⁰ The same idea was incorporated in the proposal on cultural exchange and cooperation submitted by the Polish delegation at the Belgrade meeting.⁴¹ The proposal was supported by many states-signatories of the Final Act of the Helsinki Conference. The practical implementation of the measures envisaged therein is an integral part of Poland's activities on the international arena and reflects our desire to promote international peace, mutual understanding and respect among nations. It may also be added that the General Assembly of the United Nations has recognized the sea and ocean bed outside the jurisdiction of states to constitute "the common heritage of mankind" at that several international agreements concerning the outer space stipulate that outer space be used only in the interests of all states and that cosmonauts be treated and recognized as emissaries of mankind.⁴²

³⁰ In accordance with the declaration of the Polish Government of September 14, 1976, the Convention entered into force as regards Poland on September 29, 1976 — Dz. U., 1976, No. 32, item 190 and 191.

⁴⁰ "Sprawy Międzynarodowe," 1977, No. 4. Cf. also Resolution 3026(XXVII) of 1972 and Resolution 3148(XXVIII) of 1973.

⁴¹ "Sprawy Międzynarodowe," 1978, No. 6 p. 137 (Doc. CSCE/BM/33).

⁴² The respective articles I and V of the Convention on the Principles Concerning the Activities of States in Research into and Utilization of Outer Space ratified by Poland in 1968 — Dz. U., 1968, No. 14 item 82.

The implementation of the idea of education for peace calls for large international cooperation on a governmental and non-governmental level, of a multilateral and bilateral type, carried out by the UN and UNESCO, by non-governmental organizations and institutions. This cooperation must include an exchange of information and experience in the field of means, methods and organization of the educational process and—in a broader sense—in the field of education of the people at large.

In order to put into practice the ideals of peace and international understanding states must cooperate in the mutual verification of text-books, in particular of those concerning history and geography.

The idea of eliminating and modifying those parts of text-books which may convey false conceptions, inculcate prejudices towards other peoples is not new. Already in the 19th century the international pacifist movement called for a revision of text-books. The objection most often raised against these text-books was that they are reflecting an extreme nationalistic approach, that they are glorifying war, cultivate prejudices and negative stereotypes, that they ignore the role of small states in the history of mankind, etc.

In the late 1960s Poland took the initiative in proposing to many Western states an exchange of text-books and the establishment of bilateral mixed commissions charged with their verification. The study of these text-books revealed that very often the information about Poland and other socialist states is based on stereotypes and anticommunist prejudices. It was not too difficult to work out among experts joint agreed conclusions concerning the necessary modifications to be introduced in the text-books of history and geography used in the schools of some states (for example in Austria and France). Similar contacts have been established with the appropriate institutions in Belgium, Norway and Italy and similar initiatives undertaken Towards Sweden, the United Kingdom, Denmark, the Netherlands and Finland.

The bilateral experience gathered by Poland prompted our country to propose at the European Conference on Security and Cooperation that the Conference recommend the verification of text-books.⁴⁸ The idea

⁴⁸ The Polish appeal in favour of verification of textbooks is based on a previous tradition. As early as in 199 the Polish Commission of International Intellectual Cooperation established a Sub-commission to Study Foreign Textbooks which embarked upon the task of verifying textbooks of history and geography in 25 states members of the League of Nations. Cf. R. GELLES, *Sprawy polskie w niemieckich podręcznikach szkolnych z lat trzydziestych XX wieku w ocenie historyków polskich* [Polish Problems in the German School Textbooks of the Thirties of the 20th Century as Seen by Polish Historians], "Przegląd Zachodni," 1965, No. 5, p. 338 ff.

has been incorporated in a joint Polish-Bulgarian draft proposal submitted April 23, 1975 at the second stage of the Conference in Geneva.⁴⁴ It called for an exchange of text-books and other teaching material among the states participating in the Conference in order to promote such a presentation in these text-books of the history, geography and culture of other countries which will facilitate a better mutual understanding among nations. In view of the objections raised by some Western delegations (Sweden, the United Kingdom) the idea found only partial reflection in the provisions of the Final Act of the Helsinki Conference.

Of some international notoriety are the recommendations worked out by a commission of experts of Poland and the Federal Republic of Germany established under the auspices of the national UNESCO Committees of the two states. The commission started its work in 1972 and in 1976 agreed on its recommendations concerning history. The agreement reached must certainly be considered as a success, in spite of the fact that the implementation of these recommendations is meeting insistence in the FRG.⁴⁵

The problem of text-books was also raised in the Declaration on the Principles and Means of Developing Cultural and Scientific Cooperation, Information and Human Relations Between Poland and France.⁴⁶ The Declaration states:

"Each Party will take all steps in order to ensure that information about the other Party is complete and objective, especially in text-books used in schools, and corresponds to the real image of modern Poland and France, reflects their material and spiritual heritage as well as their achievements".

Factors contributing to the education for peace and rapprochement between Poland and France are the provisions contained in the Declaration on the development of cooperation of the press, radio and

⁴⁴ Doc. CSCE/II/L/131.

⁴⁵ Cf. W. MARKIEWICZ, M. WOJCIECHOWSKI, *Z prac Komisji podręcznikowej Polska—RFN* [The Work of the Polish—FRG Textbook Commission], "Nowe Drogi," 1975, No. 9. W. MARTINEIT, *Bericht über die deutsch-polnischen Schulbuchkonferenzen*, "Das Parlament," 1977, No. 47. S. KIENIEWICZ, *Polska, Niemcy, nauka, szkolna i sprawa pokoju* [Poland, Germany, Education and the Problem of Peace], "Polityka," 1976, No. 34. Cf. also the published materials of the conference organized by the Friedrich-Ebert-Stiftung and the Polish Institute of International Affairs in Bonn (November 28—30 1977). *Die Schulbuch Empfehlungen im Prozess der Normalisierung zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen* "Documentation," Bonn 1978.

⁴⁶ Declaration of June 20, 1975 — "Sprawy Międzynarodowe," 1975, No. 10, pp. 163—165.

television, on contacts between artists, translators, cultural workers, teachers and scientists. The implementation of the terms of the Declaration is made sure by the agreements on cultural cooperation and on scientific and technical cooperation concluded in 1966.

This example may serve as a general pattern. Thus, an important instrument of bilateral cooperation in the field of education for peace are bilateral agreements on cultural cooperation, agreements on scientific and technical cooperation, agreements concluded by the radio and television broadcasting authorities and even agreements between associations of journalists and newspapers.

A broad programme of action and cooperation for the years 1980—1983 in order to implement the resolution on education for international understanding, cooperation and peace has been prepared by UNESCO. It includes regional symposia and seminars devoted to the execution of agreed recommendations. Within the framework of activities arising from the programme of the so-called associated schools UNESCO plans to review their achievements and to examine what kind of assistance it can offer in this field. UNESCO intends to work out a similar programme for institutions of higher learning with a view of promoting international understanding and peace. Among the non-governmental organizations which are—in conjunction with UNESCO—implementing a programme of internal cooperation one may mention the World Association “School as an Instrument of Peace.”

Of importance for educating societies for life in peace is peace research carried out by specialized scientific institutes and associations. In this connection one may mention the International Peace Research Institute in Oslo, the Stockholm Peace Research Institute SIPRI, the Peace Institute in Vienna, the Peace Academy in New York, the Chair of Conflict and Peace Research at the Oslo University and the International Association of Peace Research IPRA.

In spite of the development of this discipline, its purpose was not and is not viewed in the same light by the respective scholars. Some concentrate on the elucidation and understanding of the conditions which would make it possible to prevent international and intercommunal violence, or on research into the structure of violence, or—rejecting the existing international order—on the search for new, better models of international relations, or—while accepting the existing international order—on the search of ways and means of its improvement.⁴⁷

⁴⁷ Cf. J. GALTUNG, *A Critical Definition of Peace Research Our Generation Against Nuclear War, Supplement of Peace Research*, vol. 3, No. 1, p. 5.

Polish peace research concentrates, above all, on the sphere of international relations. It serves a clear and well defined objective of strengthening international peace and security. It is an applied science in the service of political practice, while at the same time performing specific educational functions and promoting the education of our society in the spirit of dedication to peace.⁴⁸

IV

The draft Declaration on Educating Societies in the Spirit of Peace has been submitted by Poland at the XXXIII session of the General Assembly of the United Nations in connection with item 50 of the agenda concerning the implementation of the Declaration on the Strengthening of International Security.⁴⁹

In explaining the basic features of the Polish Declaration the chairman of the Polish delegation, Minister Emil Wojtaszek pointed out that it contained a proposal to invite all states to guide themselves in their activities by the recognition of the supreme importance and necessity of establishing, maintaining and strengthening a just and lasting peace; to urge all states to ensure that the subjects of educational curricula and procedures, instruction and upbringing in the family, at school and in public life, as well as the relevant activities of mass media are compatible with the task of preparation for life in peace of all societies, including in particular the younger generations. The Polish delegation, in submitting the Declaration for consideration by the Gen-

ii. HVEEN, *Peace Research. Historical Development and Future Perspectives* (Paper presented at the IV Conference of the International Association of Peace Research in 1973 in Bled, Yugoslavia). F. BARNABY, in: "Nature," vol. 246, No. 5433, p. 397 ff.

⁴⁸ A. TOWPIK, *Polskie badania nad pokojem i bezpieczeństwem międzynarodowym a "peace research"* [Polish Research into Peace and International Security and "Peace Research"], "Sprawy Międzynarodowe," 1966, No. 2. J. SYMONIDES, *Polskie badania nad pokojem* [Polish Peace Research], "Widnokręgi," 1977 No. 6, p. 6 ff.

⁴⁹ The chairman of the Polish delegation to the XXXIII session of the General Assembly to the United Nations, minister of foreign affairs Emil Wojtaszek, in his letter addressed to the Secretary General of the United Nations asked that the Polish draft Declaration on the education of societies in the spirit of peace be distributed as an official document of the United Nations in connection with the item on the agenda concerning the strengthening of international security. The text of the Polish draft Declaration was introduced as an official document of the XXXIII session under the code number A/C. 1/33/2 and dated September 28, 1978.

eral assembly, was guided by the desire—as emphasized by Minister Wojtaszek—to reinforce the measures already taken by member-states in the political, disarmament, economic and social fields as well as by the desire to strengthen international security by building mutual confidence among nations.

From the very outset the Polish initiative met great interest and elicited a positive response from the part of many delegations. The UN Secretary General, Dr Kurt Waldheim greeted our proposal as a step which could contribute to the realization of mankind's main dream—a future world without wars.

As a result of numerous consultations carried out by the Polish delegation several states expressed their desire to co-sponsor our draft Declaration. Some constructive amendments have also been offered.

In accepting these amendments, the Polish delegation was guided, on the one hand, by its desire to take advantage of every idea which could add to the contents of the draft Declaration and, on the other hand, by its intention to ensure its unanimous adoption. The differences between the first and second draft are relatively minor. Some modifications are of the drafting character. Thus, in the preamble, when recalling several documents adopted by the UN General Assembly the date of adoption has been added.⁵⁰ In part III which deals with concerted action by international organizations, the Specialized Agencies have been singled out and in particular the United Nations Educational, Scientific and Cultural Organization. A concrete date “not later than at its thirty-sixth session” has been set for the Secretary General to submit a report to the General Assembly on the progress made in the implementation of the Declaration.

As far as other additions to the original draft are concerned, the preamble has been enlarged by the mention of other documents adopted previously by the United Nations and related to the subject matter of the Declaration. This applied to the definition of aggression of December 14, 1974, to the Final Document of the Special Session of the General Assembly on Disarmament and to the Universal Declaration of Human Rights of December 10, 1948.

On a suggestion made by the developing countries the Declaration refers to the implementation of the new international economic order

⁵⁰ This applied to the Declaration on the Granting of Independence to Colonial Countries and Peoples, to the Declaration on the Strengthening of International Security, to the Declaration on the Deepening and Consolidation of International Détente, to the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples and to the International Covenant on Civil and Political Rights.

and to the raising of the living standards of all nations. A stronger emphasis was laid on the prohibition of propaganda of aggressive wars and on the right of peoples to self-determination. Finally, on a problem which gave rise to some controversy, namely on the matter of the obligations of states in the field of education for peace, while maintaining intact the principle that states must act perseveringly and consistently in order to make sure that the educational process and teaching methods as well as media information activities incorporate contents compatible with the task of the preparation for life in peace, agreement was reached on the inclusion of the formula "with due regard for the institutional rights and the role of the family, the institutions and organizations concerned" as proposed by the Western powers.

To sum up, it can be stated that as a result of the amendments, which left intact all basic ideas of the Polish draft and its structure, the final Declaration represented a richer and fuller document and reflected entirely the intentions of the Polish delegation.

The amended draft Declaration on the Preparation of Societies for Life in Peace has been officially introduced on behalf of Poland and co-sponsored by 17 other states: Afganistan, Algeria, Argentina, Benin, Czechoslovakia, the Philipines, Ghana, Indonesia, Yugoslavia, Colombia, Madagaskar, Malaysia, the German Democratic Republic, Peru, Venezuela, Hungary, Vietnam and listed as document A/C. 1/33/L.58.

The debate on the implemntation of the Declaration on the Strenghtening of International Security began in the Political Committee of the General Assembly of the United Nations on December 4 with a statement by the deputy Foreign Minister of the Polish People's Republic Eugeniusz Kułaga who, on behalf of Poland and the 17 co-sponsors submitted the proposed Declaration on the Preparation of Societies for Life in Peace for adoption by the Committee.

In his statement deputy Minister pointed out that the Polish proposal aims at strengthening the intellectual and moral solidarity of all nations in order to remodel the outdated slogan *Si vis pacem para bellum* into a principle corresponding to the actual needs of humanity *Si vis pacem para pacem* — If you want peace prepare for peace.

In explaining the reasons which prompted our country to take this initiative Polish delegate recalled our previous initiatives and proposals aiming at establishing international peace and security and promoting détente. He pointed out that the draft Declaration follows a persistent line of support for the aims and purposes of the United Nations Charter, that it has its origins in the best traditions of tolerance, solidarity and in the entire spiritual heritage of the Polish people, that it is

deeply rooted in the authentic desire for peace and in the fundamental principles of the political and social system of socialist Poland.

In the discussion on the draft Declaration it was emphasized in particular that, by contributing to the strengthening of mutual trust, it serves the cause of international security and world peace. Many delegates stressed the fundamental importance of the right to live in peace and the necessity to educate the younger generation in that spirit.⁵¹

Those participating in the discussion included — although in a varying degree of involvement — representatives of all major groups represented in the United Nations, namely representatives of the socialist states, the developing states and the developed capitalist states. While all representatives of the socialist states and many representatives of the developing states took an active part in the debate, the participation of the Western states was relatively restricted.⁵²

In their statements, the representatives of the socialist states, while stressing the importance of the Declaration for the strengthening of international peace and security, called for intensified efforts in order to solve the most important problems facing mankind today and for the elimination of racism, apartheid, propaganda of war and hatred. They emphasized the role and duty of states to act with a view of preparing their peoples to live in an atmosphere of mutual understanding and cooperation among nations.

The delegate of the Federal Republic of Germany, speaking on behalf of the 9 countries of the European Economic Community, emphasized the necessity of shaping the views of the future generations on international relations and their vision of mankind's future in the spirit of the objectives and principles of the United Nations Charter.

In the debate in the Political Committee on the Declaration on the Preparation of Societies for Life in Peace the Holy Sea also registered its voice.

The discussion in the Political Committee lasted for almost a week and was concluded on December 8. In spite of repeated appeals for

⁵¹ The records of the discussion in the Political Committee are to be found in documents A/C.1/33/PV.61 and A/C.1/33/PV.67. Problems concerning the relationship between the Polish draft Declaration and human rights in general have been taken up also in Committee III.

⁵² It may also be noted that not a single developed capitalist state was among the co-sponsors of the draft Declaration. Sweden which voted in favour of the Declaration voiced at the plenary meeting of the General Assembly certain reservations based, in its opinion, on the insufficient acknowledgement of the Universal Declaration of Human Rights and Human Rights Conventions. Doc. A/33/PV. 85, p. 72.

a consensus, in spite of the fact that—as stated by the delegate of Saudi Arabia—it was difficult to imagine that someone could refuse his support for the Declaration, in spite of numerous consultations and the acceptance of several amendments—a fact stressed by the delegate of Malta—a unanimous vote in favour, no one voted against Political Committee 100 delegates voted in favour, no one voted against and only the United abstained.

It may also be added that during the discussions in the Political Committee the group of cosponsoring states increase by another 10 states: Bulgaria, Ethiopia, Cameroun, Congo, Mauritius, Mongolia, Morocco, Panama, Syria, Tunisia.

In its report to the General Assembly the Political Committee recommended the adoption of the draft Declaration on the Preparation of Societies for Life in Peace.⁵³ The vote in the General Assembly took place December 15, with representatives of 140 member-states present, 138 states voted in favour only two—the USA and Israel abstained.

After the vote, the permanent delegate of Poland in the United Nations made a statement on behalf of the Polish delegation. He pointed out that by adopting the Declaration on the Preparation of Societies for Life in Peace the General Assembly of the United Nations has accomplished an act of great significance. In the course of our consultations, said Ambassador Jaroszek, we were sometimes told that our initiative bears the mark of a Polish idealism and romanticism.; This may, to some extent, be true. But it is equally true that our initiative is, above all, the expression of modern Polish realistic political thinking which reflects our conviction on both the necessity and possibility of avoiding a new world and of preventing a nuclear disaster which would threaten the very existence of the human race.

The statement by the Polish delegate was followed by these words uttered by the President of the XXXIII Session of the General Assembly Indalecio Lievano from Colombia. Said he: "As your President I wish to emphasize the importance of the resolution which has just been adopted by the General Assembly because it constitutes a fundamental declaration of principles. The item is far reaching and the sponsors were prompted by noble motives. This text represents a milestone in the history of our Organization."⁵⁴

⁵³ Para. 13 of the Report of the Political Committee on item 50 of the agenda, Doc. A/33/486.

⁵⁴ The voting and statements made in the plenary meeting of the General Assembly are reported in Doc. A/33/PV.85. For the sake of accuracy it may be noted that the delegation of Albania, while present, did not take part in the

Declaration on the Preparation of Societies for Life in Peace

The General Assembly,

Recalling that in the Charter the peoples of the United Nations proclaimed their determination to save succeeding generations from the scourge of war and that one of the fundamental purposes of the United Nations is to maintain international peace and security,

Reaffirming that, in accordance with General Assembly Resolution 95 (I) of 11 December 1946, planning, preparation, initiation or waging of a war of aggression are crimes against peace and that, pursuant to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, of 24 October 1970, and the Definition of Aggression of 14 December 1974, a war of aggression constitutes a crime against the peace;

Reaffirming the right of individuals, States and all mankind to life in peace;

Aware that, since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed;

Recognizing that peace among nations is mankind's paramount value, held in the highest esteem by all principal political, social and religious movements;

Guided by the lofty goal of preparing societies for and creating conditions of their common existence and co-operation in peace, equality, mutual confidence and understanding;

Recognizing the essential role of Governments, as well as governmental and non-governmental organizations, both national and international, the mass media, educational processes and teaching methods, in promoting the ideals of peace and understanding among nations;

Convinced that, in the era of modern scientific and technological progress, mankind's resources, energy and creative talents should be directed to the peaceful economic, social and cultural development of all countries, should promote the implementation of the new international economic order and should serve the raising of the living standards of all nations;

vote. In explaining its attitude the Albanian delegate alleged that the Declaration contains no analysis of the origins of war and of the main threats to the peace. The delegate of Israel explained his abstention by the fact that, allegedly, the Declaration contains "inadequate and unclear" references to the Universal Declaration of Human Rights. Among the delegations not participating in the vote were also the delegations of the Chinese People's Republic and of the Republic of South Africa. The text of the Declaration is annexed to this paper.

Stressing with utmost concern that the arms race, in particular in the nuclear field, and the development of new types and systems of weapons, based on modern scientific principles and achievements, threaten world peace;

Recalling that, in the Final Document of the Tenth Special Session of the General Assembly, the States Members of the United Nations solemnly reaffirmed their determination to make further collective efforts aimed at strengthening peace and international security and eliminating the threat of war, and agreed that, in order to facilitate the process of disarmament, it was necessary to take measures and pursue policies to strengthen international peace and security and to build confidence among States;

Reaffirming the principles contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples, of 14 December 1960, the Declaration on the Strengthening of International Security, of 16 December 1970 and the Declaration on the Deepening and Consolidation of International Détente, of 19 December 1977;

Recalling the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, of 7 December 1965;

Further recalling the Universal Declaration of Human Rights, of 10 December 1948, as well as the International Covenant on Civil and Political Rights, of 16 December 1966, and bearing in mind that the latter states, *inter alia*, that any propaganda for war shall be prohibited by law;

I

Solemnly invites all States to guide themselves in their activities by the recognition of the supreme importance and necessity of establishing, maintaining and strengthening a just and durable peace for present and future generations and, in particular, to observe the following principles:

1. Every nation and every human being, regardless of race; conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields.
2. A war of aggression, its planning, preparation or initiation are crimes against peace and are prohibited by international law.
3. In accordance with the purposes and principles of the United Na-

tions, States have the duty to refrain from propaganda for wars of aggression.

4. Every State, acting in the spirit of friendship and good-neighbourly relations, has the duty to promote all-round, mutually advantageous and equitable political, economic, social and cultural co-operation with other States, notwithstanding their socio-economic systems, with a view to securing their common existence and co-operation in peace, in conditions of mutual understanding of and respect for the identity and diversity of all peoples, and the duty to take up actions conducive to the furtherance of the ideals of peace, humanism and freedom.

5. Every State has the duty to respect the right of all peoples to self-determination, independence, equality, sovereignty, the territorial integrity of States and the inviolability of their frontiers, including the right to determine the road of their development, without interference or intervention in their internal affairs.

6. A basic instrument of the maintenance of peace is the elimination of the threat inherent in the arms race, as well as efforts general and complete disarmament, under effective international control, including partial measures with that end in view, in accordance with the principles agreed upon within the United Nations and relevant international agreements.

7. Every State has the duty to discourage all manifestations and practices of colonialism, as well as racism, racial discrimination and apartheid, as contrary to the right of peoples to self-determination and to other human rights and fundamental freedoms.

8. Every State has the duty to discourage advocacy of hatred and prejudice against other peoples as contrary to the principles of peaceful coexistence and friendly cooperation.

II

Calls upon all States, in order to implement the above principles:

(a) to act perseveringly and consistently, with due regard for the constitutional rights and the role of the family, the institutions and organizations concerned:

(i) to ensure that their policies relevant to the implementation of the present Declaration, including educational processes and teaching methods as well as media information activities, incorporate contents compatible with the task of the preparation for life in peace of entire societies and, in particular, the young generations;

(ii) Therefore, to discourage and eliminate incitement to racial

hatred, national or other discrimination, injustice or advocacy of violence and war;

(b) to develop various forms of bilateral and multilateral co-operation, also in international, governmental and non-governmental organizations, with a view to enhancing preparation of societies to live in peace and, in particular, exchanging experiences on projects pursued with that end in view;

III

1. Recommends that the governmental and non-governmental organizations concerned should initiate appropriate action towards the implementation of the present Declaration;

2. States that a full implementation of the principles enshrined in the present Declaration calls for a concerted action on the part of Governments, the United Nations, the specialized agencies, in particular the United Nations Educational, Scientific and Cultural Organizations, as well as other interested international and national organizations, both governmental and non-governmental;

3. Requests the Secretary-General to follow the progress made in the implementation of the present Declaration and to submit periodic reports thereon to the General Assembly, the first such report to be submitted not later than at its thirty-sixth session.

*85th plenary meeting
15 December 1978*

Military Détente — Contemporary Contents and Meaning

by WOJCIECH MULTAN

The increasing intensification of international relations which marked the last decade and, in particular the development of the East-West dialogue had produced an unprecedented proliferation of new notions and terms with the aid of which some politicians, political scientists and analysts try to depict certain facts or phenomena and processes pertaining to inter-state relations. It is quite understandable that the terminology used is, at first, not very precise and very often subject to various interpretations. On the other hand, it hardly needs stressing that in international intercourse the clarity of basic notions used in a dialogue is of fundamental importance for its progress and success. The present development of the East-West dialogue underscores the urgent need to work out a possibly precise conceptual system reflecting, to the highest possible extent, the existing state of affairs and the processes which occur in the international arena.

Military détente belongs to the relatively new notions which grew out at a certain stage of the development of East-West relations. It is probably one of the most often used term in the literature on international affairs in the last years. It can be found in the statement of politicians and statesmen. It figures in several official international documents.¹ On the other hand, little attention has been devoted to this problem by politologues and theoreticians in general.⁸

¹ The statements of heads of delegation to the third stage of the Conference on Security and Cooperation in Europe (Helsinki July 30—August 1, 1975) must be viewed as characteristic in this respect. Cf. Conference on Security and Cooperation in Europe, Helsinki July 30—August 1, 1975. Press Documentation Centre of the Polish Press Agency, Documentary Series, part I, 7/108, Warsaw 1975.

² Among the few publications dealing only with some aspects of military détente one may mention: *Détente and Disarmament: Problems and Perspectives*, 1976, edited by A. KOLJADIN, G. KADE and published by the International Institute for Peace in Vienna; A. CHAYES: *Nuclear Arms Control Alter the Cold War*, "Daedalus," Summer 1975, pp. 15—23; *International Détente and Dis-*

The term "military détente" began to appear more and more frequently in international affairs writings of the late 1960s usually in connection with considerations for the prospects of international peace and security and in reflection of the processes of increasing normalization of relations between European states. Although the publications and documents in this period offered no precise definition of the notion military détente, inference can be drawn from such writings. Seemingly, this notion would appear to apply to those unilateral undertaking, as well as actions arising from bilateral or multilateral international agreements, which, generally speaking, result in a substantial reduction of military potential as a foreign policy instrument to exert pressure on other subjects of international law. Equally, it applies to those actions aimed at reducing the role played by military might from being the main pillar of state's security and allowing for non-military security guaranties. The preceeding premisse was a logical consequence of the growing awareness at this period that the main antagonists in the modern world, namely the capitalist and socialist states, had reached a state of overall strategic nuclear parity, and that each side possessed an overkill capacity. Given this situation, a further increase of the military potential of either side could have no rational justification for:

1) It could increase the probability of war; and

2) It would only add more destructive power to the existing overkill capacity.

It must be remembered that the very basis for the East-West dialogue and of the recognition by the principal Western powers of the ideas of peaceful coexistence of states with different social and political systems, were the fundamental changes in the force relationship in the international arena, the most significant of these being, the achievement of nuclear strategic parity between the Soviet Union and the United States of America.

The actual success of the notion of military détente is due to, at least two reasons. First, to the justified analogy to the concept of political détente, on both logical and historical ground and, second, to its rather vague meaning which made it acceptable to both the socialist and capitalist vocabulary. For, as we will demonstrate later on, it covers quite different meanings with a substantial part of its contents

armament, Helsinki- 1977; W. MULTAN, *Détente a rozbrojenie: Kilka refleksji* [*Détente and Disarmament: Some Reflections*], "Polska i Świat," Uniwersytet Adama Mickiewicza, Poznań 1978, pp. 291—302; W. MULTAN, *Czynniki determinujące postęp odprężenia militarnego* [*Factors Affecting Progress of Military Détente*] "Sprawy Międzynarodowe," 1978 No. 2, pp. 7—19; *Międzynarodowe odprężenie militarne* [*International Military Détente*], discussion, "Sprawy Międzynarodowe," 1978, No. 7/8, pp. 175—193.

relating to a sphere of international relations which are as yet not regulated by specific international agreements. Not regulated by specific international agreements, i.e. the behaviour of states and their choice of methods of instruments to use when reacting to the actions of other states.

The origin of the term military détente must be sought in the existence of an analogy to the concept of political détente. It may therefore be recalled that in Europe in the aftermath of World War II, political détente in East-West relations was tantamount to: the renunciation of cold war policies, to the normalization of East-West relations, to the renunciation of mutual territorial claims, to the renunciation of the use of force or of the threat to use force in mutual relations, to the rejection of mutual suspicions, to the intensification of mutually beneficial cooperation; and, finally, as a result of all this, to a substantial increase of mutual trust and sense of security achieved by non-military measures.³ The starting point of all these positive transformations on the European continent was the acceptance by the Western powers of the political and territorial shape of Europe which resulted from the outcome of World War II and the period immediately following. Finally, all these changes on the international arena reflect the recognition by the main Western powers of the idea of peaceful coexistence of states with different social and political systems.⁴

The search for some "military measures" in the field of East-West relations was motivated by the desire to supplement the process of political détente, to enlarge its scope, to increase its credibility and to add to its momentum. When it appeared that there was general agreement between East and West on that score, the problem then became one of agreeing on what measures would be most appropriate in attaining the general goals of: the further improvement of mutual trust; the elimination of the danger of armed conflict; the reduction of its destructive effects should such a conflict take place and to the reduction of the importance of military might as an instrument of foreign policy of states and as

³ A broader analysis of the key problems of military détente in Europe can be found in: J. KOSTKO: *Military Détente in Europe: Concepts and Problems*, in the publication *International Détente and Disarmament*, Helsinki 1977, pp. 212—240; W. MULTAN: *Problemy odprężenia militarnego w Europie* [Problems of Military Détente in Europe], "Sprawy Międzynarodowe," 1976, No. 3, pp. 7—23.

⁴ A complete catalogue of principles which states must respect in their practice of peaceful coexistence was incorporated the Final Act of the Helsinki Conference and, in particular, in the chapter: "Declaration of Principles Governing Mutual Relations of Participating States". Cf. Final Act of the Conference on Security and Cooperation in Europe, Annex to "Sprawy Międzynarodowe," 1975, No. 10.

the principal pillar of the system of international security. We were thus confronted with the problem of the substance of military détente as a series of various measures designed to limit the role of military force as an element determining the substance and nature of relations among states, not only in the context of East-West relations but on a universal scale.

It goes without saying that such broadly defined aims of military détente can be achieved only as a result of the implementation of a very comprehensive programme of measures aiming at the elimination of the causes and sources of political tension, of the symptoms and effects of the expansion in the past and the continuing development of the military potential of states.

As far as Europe is concerned, the main causes of military tension originating from international relations have been eliminated over the past few years. This was the result of the hitherto development of political détente. Thanks to the adoption of all the well-known normalization measures, the main conflict generating factors had been eliminated from the relations between the European states with the resulting reduction of the acuteness of military rivalry and the dangers of military conflict. Also the relations between the main powers: the USSR and the United States were largely freed from the overhanging dark shadow of mutual prejudice and irrational suspicions. The ending of the American intervention in Indochina has also contributed to the improvement of the international atmosphere. However, the world has not yet been freed from hotbeds of political tension and potential dangers of armed conflicts.

Considering the sources of military tension on international arena our attention must not be focused exclusively on the state of East-West relations. It is generally recognized that over the past few years increasing tension can be observed on the North-south axis. Also relations between the capitalist states are not free of tension, generated by effects of unequal development. That is why action in favour of military détente must continuously be organically linked with a determined effort by all states aimed at furthering political détente. The pace of progress and scope of military détente are closely related to progress in the field of political détente on the international arena and to the corresponding internal changes in the main capitalist states. This applies to such changes in the base and superstructure of these states, which would result in the limitation of the role of the military establishments and in the creation of more favourable conditions for the activity of any-militaristic forces. It applies also to such transformations in the way of thinking which would result in a state of affairs which

— to use the language of the resolution of the United Nations General Assembly on the preparation of societies for life in peace sponsored by Poland — “discourage advocacy of hatred and prejudice against other peoples as contrary to the principles of peaceful coexistence and friendly cooperation.”⁵

In the present international situation the broadly conceived functions of military détente are related to a series of groups and kinds of measures which tend, to a greater or lesser degree, to limit the role of the military factor in international relations.

In the broadest sense, in the present international situation the development of military détente is determined by the efficacy of the actions undertaken by the forces of peace in the following three spheres:

- the political sphere (political détente);
- the elimination and limitation of the physical means to wage wars;
- the restrictions of the possibilities to use armed forces.

Taking, in turn, as a point of departure the agreements signed after World War II which restrict the role of military force in international relations as well as the proposals at present under discussion, the ensemble of measures determining the development of military détente can be ranged in the following groups:

1. complete or partial elimination of specific physical means of waging wars;
2. the fixing of quantitative and qualitative restrictions concerning the development of agreed systems of armaments and military equipment;
3. the prohibition to deploy in specific areas and human environments agreed types of armed forces and armaments;
4. the prohibition to carry out tests, to produce, possess, purchase, transfer specific types of armaments and to permit their transit over one's territory;
5. means designed to prevent surprise attack and to reduce the danger of armed conflict;
6. the prohibition to use force in international relations and the acceptance of the obligation to settle conflicts by peaceful means;
7. Measures designed to restrict the development of international organizations which act as instruments of war preparation or waging of war.⁶

⁵ General Assembly, Declaration on the Preparation of Societies for Life in Peace, UN Doc. A/33/486.

⁶ It may be noted that some studies distinguish among the disarmament agreements concluded after World War II the following groups:

1) Agreements which bear the characteristics of a political declaration, an-

Complete or Partial Elimination of Specific Physical Means of Waging Wars

These terms can be treated as synonymous with partial disarmament measures or arms Control. It must, however, be borne in mind that these terms have no unequivocal definitions.

There is no precise definition of disarmament in contemporary literature on international relations. Traditional terminology defines disarmament as all rules, prohibitions and renunciations accepted by states unilaterally, or on the basis of bilateral or multilateral agreements whose aim is to impose specific restrictions on their rights to maintain military potentials both as far as their size, deployment and the possibility of their use is concerned.

A semantic analysis of the term disarmament would suggest that it ought to mean something opposite to the process of arming i.e. of increasing the quantity and quality of physical means of waging war.⁷ The etymology of the word "disarmament" seems to justify the definition proposed by A. Towpik, who understands the term "disarmament" as meaning, "action undertaken by states as opposite to armaments i.e. measures connected with the limitation, reduction and elimination of national armament and armed forces."⁸

According to J. Gilas "disarmament" means "limitation or liquidation of armed forces and armaments of states carried out pursuant to an

nouncing the intention to refrain from military action involving the risks of nuclear conflict;

2) Non-armament agreements aiming at maintaining free from nuclear weapons or from other weapons of mass destruction specific geographical regions, outer space, sea and ocean beds i.e. areas of secondary importance from the point of view of the present arms race;

3) Agreements on partial measures aiming at restricting the spread of nuclear weapons;

4) Agreements designed to impose quantitative restrictions on specific strategic armaments which are "essential from the point of view of nuclear warfare";

5) Agreements on the non-first use of chemical and biological weapons, as contained in the Geneva Protocol of 1925. Cf. *Armaments and Disarmament in the Nuclear Age. A Handbook*, SIPRI, Stockholm 1976, p. 219.

⁷ *Słownik języka polskiego* [Dictionary of the Polish Language] defines disarmament as "the destruction by states of all kinds of stocks of arms in their possession and the termination of their production, carried out on the basis of mutual agreement aimed at consolidating international security." Cf. *Słownik języka polskiego* [Dictionary of the Polish Language], PAN, 1965.

⁸ A. TOWPIK, *Bezpieczeństwo międzynarodowe a rozbrojenie* [Disarmament and International Security], PISM, Warszawa 1970, p. 9.

international treaty.”⁹ This definition distinguishes two forms of disarmament: limitation of armaments and reduction of armaments. By the former, J. Gilas understands “the fixing of ceilings which states undertake not to exceed,”¹⁰ while included in the latter are “measures taken by states whose armaments exceed a defined and agreed level and designed to restore that level.”¹¹

Finally, it may be recalled that the United Nations Charter in Articles 11, 26 and 47 uses two terms: “disarmament” and “regulation of armaments.” According to O. V. Bogdanov, the first embraces practically all measures up to the complete elimination of armed forces and armaments.¹² The latter means, in the opinion of the same scholar, partial disarmament measures leading to general and complete disarmament.

The Final Document of the Special UN Disarmament Session uses the terms “disarmament” and “arms limitation”¹³ irrespective as to whether used in the context of general and complete disarmament or in the context of partial measures. In the latter case it makes use of the concept of “partial measures of disarmament.”¹⁴

A classic case of a disarmament agreement *sensu stricto* concluded after World War II is the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, signed April 10, 1972 following its adoption by the UN General Assembly.¹⁵ The Convention prohibits research into and production, storage and acquisition in what-

⁹ Cf. *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych* [Encyclopedia of International Law and International Relations], edited by A. Kłafkowski, Warszawa 1976, p. 339.

¹⁰ *Ibid.*

¹¹ *Ibid.*; cf. also A. KŁAFKOWSKI, *Zagadnienia rozbrojenia* [Problems of Disarmament], Toruń 1966, pp. 76—62 and A. SKOWROVSKI, “Sprawy Międzynarodowe,” 1967, No. 12, pp. 123—126.

¹² Cf. O. V. BOGDANOV, *Razorużenie — gvarancia mira*, Moskva 1972, pp. 38—60.

¹³ Cf. Final Document of the Tenth Special Session of the General Assembly, A/RES/S-10/2, 13 July 1978, para. 14, 17, 25, 31 ff.

¹⁴ *Ibid.*, para. 38. It may be noted that the publications of the Stockholm International Peace Research Institute use for all these agreements the term “international agreements related to arms control and disarmament.” See “World Armaments and Disarmament” SIPRI Yearbook 1977, Stockholm International Peace Research Institute, Stockholm 1977 p. 386 ff.

¹⁵ For a description of the characteristic features of the main disarmament agreements concluded in the post World War II period see: W. MULTAN, *Aktvsił-ne problemy rozbrojeniove* [Present International Problems of Disarmament], in: *Wybrane problemy międzynarodowe* [Some International Problems of Disarmament], Warszawa 1977, pp. 235—253.

ever form of B weapons of such types and in such quantities which are not warranted by their use for profilactic, protective and other peaceful purposes (Art. 1). The same prohibition applies also to all means and equipment which serve for the use of these weapons of mass destruction. The parties to the Convention undertook to destroy and transfer to peaceful uses all means defined as B weapons within 9 months following the entry into force of the Convention.

Without attempting, at this juncture, to formulate and to support by elaborate arguments a definition of the concept of disarmament it can be stated that the most important feature of the measures connected with it is the complete or partial elimination of the physical means of waging wars. For this reason, such measures are of decisive importance within the framework of actions which the international community can take in order to promote military détente. It is therefore no wonder, that for the same reason measures designed to eliminate specific types of arms and armaments figure so prominently in the proposals of military détente presented by the socialist states. This is clearly reflected in the proposals aimed at reducing military tension submitted by the socialist states over the entire post World War II period. The most recent examples are the proposals contained in the Declaration of the States Parties to the Warsaw Treaty and adopted at the session of the Consultative Political Committee in Moscow, November 23, 1978.

The Establishment of Ceilings to the Development of Military Potentials

Apart from disarmament measures *sensu stricto*, the most radical steps which can be taken with a view of limiting the size of military potentials are those restricting the qualitative and quantitative development of specific components of these potentials. As it is well known, such restrictions can, generally speaking, apply to one of the following levels of the potentials, prevailing at the moment of the acceptance of the obligation. When the obligation calls for a lowering of the existing level we are confronted with a reduction or partial disarmament; when it applies to the existing level we can speak of freezing; when it aims at regulating a situation above the existing level we are dealing with a case of restricted development of armaments to a level provided for in the agreement.

At a time when some Western powers are initiating large scale expansions of their military potential both quantitatively and qualitatively, all agreements designed to prevent their further growth consti-

tute undoubtedly an essential factor of military détente. As a typical agreements of that type one may mention, in the first place, the USA—USSR agreements on the limitation of strategic weapons signed in the 1972—1979 period as a result of the SALT negotiations.¹⁶ They led to the acceptance by both sides of strictly defined quantitative limits of anti-balistic missile launchers, of anti-balastic missiles and of the regions where such weapon systems can be deployed. The agreements fixed also the quantity and permissible quality of the radar systems which constitute an integral part of anti-balistic missile systems. As far as offensive strategic weapons are concerned the agreements provided for a freeze on the number of launching sites of lon-range missiles installed on land and sub-marine vessels and for quantitative limits on specific types of such missiles.¹⁷

At this juncture it is worth noting that a certain convergence exist between the substantive scope of measures envisaged in the third group of steps described above, i.e. between the establishment of ceilings for the development of military potentials above the levels prevailing at the moment of the conclusion of the agreement and the substantive scope of the actions envisaged by the Western proposals of arms control. However, it must be borne in mind that the concept of arms control represents a specific philosophy, a specific approach to such problems as the function of military might in international relations and the possibility and methods of its limitation in the interests of two or more states.

The term arms control had gained acceptance in the literature and political practice of the West in the post World War II period. However, it was not only a concept associated with the idea of disarmament but above all a certain philosophy, an approach to the problems of armaments and disarmament in general.

At the origin of the concept of arms control as a specific philosophy lay two mutually interacting socio-political and scientific phenomena which after World War II could be observed in the West and, in particular, in the United States. On the one hand, the Western powers were unwilling to enter into disarmament agreements with the socialist states, especially as far as the prohibition of atomic weapon was concerned. On the other hand, some very prominent experts in the West, mainly atomic scientists, were aware of the grave dangers for mankind inherent in the uncontrolled development of atomic weapons of mass destruction

¹⁶ For a detailed analysis of the USSR—USA agreements concluded in 1972—1979 see Z. SZCZERBOWSKI, *Strategiczny dialog rozbrojeniowy SALT [The Strategic Disarmament Dialogue SALT]*, Warszawa 1978.

¹⁷ For the texts of these agreements see *ibid.*, pp. 248—287.

and were exercising pressure on the successive American administrations in order to make them change their minds.¹⁸ The development of the concept of arms control is characteristic of the writings of such scholars as: T. C. Schelling, M. H. Halperin, D. G. Brennan, R. R. Bowie, H. Bull, J. E. Daugherty and others.¹⁹ Although the concept itself underwent a profound evolution which reflected to a large extent the changes in emphasis on the disarmament policies of the Western powers in the direction of greater political realism, it kept intact the following elements:

- It was not concerned with the socio-political background of the armaments race, both as regards particular capitalist states and the international scene in general;

- It was sceptical of the possibility to implement radical disarmament measures; such attempts were even considered to be highly undesirable;

- It attached great importance to the role of military might in the foreign policy of states and in the position of states in the international community; furthermore, and this is the most essential matter, military force is considered to be the pillar of national security; on that basis the consecutive versions of the concept of deterrence are being founded;

- It accepted the idea that the armaments race constitutes an inseparable and normal factor in East-West relations;

- It assumed that the implementation of the arms control proposals put forward by the Western powers will enable them to control the development of the military potential of the socialist states; these intentions were characteristic, in particular, of the proposals submitted during the first two decades of the post-war period;

- Later on, the partisans of arms control were in favour of the cooperation of states likely to be involved in an armed conflict, so as to reduce the likelihood of war, its scope and destructiveness, should

¹⁸ The Pugwash Movement provided the organizational framework for the activities of the Western scientists in this field. See J. ROTBLAT, *PUGWASH: The History of the Conference on Science and World Affairs*, Prague 1967.

¹⁹ The following studies merit particular attention: T. C. SCHELLING, *M. H. HALPERIN*, *Strategy and Arms Control*, New York 1962; D. G. BRENNAN, *Arms Control, Disarmament and National Security*, New York 1961; H. BULL, *The Control of the Arms Race*, New York 1965; J. E. DOUGHERTY, *How to Think About Arms Control and Disarmament*, New York 1973; B. BRADIC *On Clarifying the Objectives of Arms Control*, ACIS, Working Paper No. 1, April 1976, University of Carolina, Los Angeles; L. FREEDMAN, *The Concept of Arms Control*, presentation on the annual conference of the British International studies Association, Warwick, 16—18 December 1976.

such a war break out, as well as to limit the political and economic costs of war preparations.

For these reasons the main purpose of arms control measures is the prevention of "excessive" armaments and mutual military "accommodation."²⁰

As stated above, the concept of arms control underwent, under the impact of the changes which took place in the relation of forces on the international arena, and in the first place between socialism and capitalism, an essential evolution in the direction of political realism. This greater realism seems to reflect the present approach of the Western powers to the problems of disarmament and to military détente in general. As a comprehensive model of disarmament the concept of arms control is, of course, unacceptable. None the less, it contains some elements which (apart from disarmament measures *sensu stricto*) can be part of the overall activity in favour of military détente. Of some interest are, in particular, these typical, to some extent groups of arms control measures which come closer to the actions undertaken by the socialist states in order to reduce military tension. These include, in the first place, effective measures designed to reduce the likelihood of large scale armed conflict, the fixing of ceilings to the permissible development of certain armament systems, etc.

It is obvious that both the first and the second group of measures must not be limited to the two super-powers alone but must cover all states which dispose of substantial armed forces. Finally, the value of these measures depends on the weapon system to which they refer. For, it goes without saying that from the point of view of military détente the greatest importance must be attached to measures eliminating or restricting the development of weapons of mass destruction.

The Prohibition to Place in Specific Areas and Environments Agreed Weapon Systems

The establishment of various zones entirely or partially demilitarized had always exerted a beneficial influence by reducing the level of tension in a given area and by reducing the danger of armed conflict. The creation of such zones became of particular importance after World

²⁰ According to some American authors, "arms control" pursues three objectives: 1) to make war less likely; 2) to make war less destructive should war break out and 3) to reduce the cost of armaments. See *International Arms Control: Issues and Agreements*, ed. by J. H. BARTON, L. D. WEILER Stanford University Press, 1976, p. 9.

War II as one of the means of preventing the proliferation of nuclear weapons.²¹

The interest for nuclear-free zones increased particularly when it became clear that no real chance existed to achieve within a short period of time a complete prohibition of atomic weapons.²² The origin of nuclear-free zones is closely connected with the Polish initiatives aiming at the establishment of such a zone in Central Europe.²³

The substantive part of agreements concerning the establishment of nuclear-free zones contains usually the obligations of the states which constitute the zone as well as the obligations of the nuclear powers. The states which constitute the zone give up the right to possess nuclear weapons, to conduct research into nuclear weapons, or to produce or to acquire such weapons in any other way; they undertake also to refuse permission to place on the territory remaining under their sovereignty nuclear weapons belonging to another state. This applies also, as a rule, to the transit of nuclear weapons. On their part, states possessing nuclear weapons undertake to respect the status of the nuclear-free zone and not to use nuclear weapons against such a zone.²⁴ The establishment on the basis of multilateral agreements of nuclear-free zones in Antarctica²⁵ and in Latin America²⁶ had a positive influence on reducing tension among states interested in these regions and among the states of the regions themselves.

A similar, general scope of obligations can be found in the agreements prohibiting the placing in outer space, on the moon and other celestial bodies of weapons of mass destruction.²⁷ Of a similar nature is the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.²⁸

²¹ Cf. J. GILAS, *Regionalne strefy bezatomowe* [Regional Nuclear Weapons Free Zones], Warszawa 1962, publication of the Polish Press Agency.

²² Cf. among others, W. MULTAN, *Idea stref bezatomowych* [The Idea of Nuclear Weapons Free Zones], "Sprawy Międzynarodowe" 1975, No. 5, pp. 43—59.

²³ J. S., *Polski projekt utworzenia strefy bezatomowej w Europie* [The Polish Proposal to Set Up a Nuclear Weapons Free Zone in Europe], "Sprawy Międzynarodowe," 1958, No. 4, pp. 16—45.

²⁴ W. MULTAN, *Idea stref bezatomowych* [The Idea of Nuclear Weapons Free Zones].

²⁵ Cf. Text of the Treaty on the Antarctica, "Recueil de Documents," (Warszawa — PISM), 1960, No. 1.

²⁶ Cf. text of the Treaty on the Prohibition of Atomic Weapons in Latin America, *Disarmament Negotiations After World War II*, vol. 20, pp. 4612—4675.

²⁷ For the text of the treaty see: *Disarmament Negotiations After World War II*, vol. 20, 1967, pp. 4578—4599.

²⁸ For the text of the treaty see: "Recueil de Documents," (Warszawa — PISM), 1971, No. 2.

In spite of the entry into force in 1970 of the Treaty on Non-Proliferation of Nuclear Weapons the concept of nuclear-free zones still remains at the centre of attention of world public opinion and of world disarmament experts; nuclear-free zones are viewed as an essential instrument in the horizontal prevention of nuclear weapons proliferation and hence as a very important factor of military détente.²⁹

The concept of so-called zones of peace can be viewed as an example of a somewhat different formula of arms limitation. And although there is no uniform or precise definition of such limitations, for in each specific case it would reflect the characteristics of the zone, its establishment is connected with the reduction of the military activity on the territory the states or areas which form the zone.

In view of its nature, this group of measures must include all steps leading to the liquidation of military bases on foreign territories. Undoubtedly, the development of modern means of large scale military transportation and, above all, the achievements in the targetting techniques of medium and long-range missiles have to some extent reduced the importance of military bases on foreign territories; none the less, the military units stationed abroad together with the military installations and military equipment stored abroad are continuing to play a considerable role in the foreign policy of the states to which they belong. They are also a factor contributing to heighten tension. This applies, in the first place, to the United States, which although it withdrew from South-East Asia continues to maintain abroad more than 350,000 men fully armed and equipped.³⁰ If one adds to this the equally strong armada of American naval forces cruising the waters far away from the shores of the United States, it becomes clear that the American military forces stationed outside the United States bear a considerable responsibility for the maintenance of military tension.

The so often repeated calls by the socialist states to liquidate all military bases on foreign territory must be treated as forming part of the general objective aimed at further reducing military tension in the world.

²⁹ The interest of the world community for the idea of nuclear weapons free zones, after the entry into force of the Treaty on Non-Proliferation of Nuclear Weapons in 1970, was reflected in the establishment by the United Nations of a Group of Experts who drafted a special report on the subject. One of the conclusions of the report was that the creation of such zones would be of major importance for the reduction of military tension and for the strengthening of mutual trust among states. See: Disarmament Conference Document CCD/476.

³⁰ Cf. *The Military Balance 1978/1979*, London 1978, The International Institute for Strategic Studies, pp. 5—8.

The Prohibition to Conduct Tests, to Produce, Possess, Acquire Transfer and Transit Specific Kinds of Armaments

The scientific and technical revolution has opened up considerable opportunities to use its benefits for the production of increasingly destructive arms systems and, hence, for the enhancement of the role of military force as an instrument of policy. For these reasons all restrictions and prohibitions concerning testing, production and dissemination of existing arms of mass destruction and all steps aiming at preventing the introduction of new such arms, are of considerable importance. For, it must be kept in mind that the main characteristic feature of the arms race which followed World War II was the extremely rapid qualitative increase of the actually produced arms and military equipment.

As a result of negotiations conducted in Geneva by the Conference of the Committee on Disarmament several agreements were reached on these matters. Above all, one must mention the Convention of April 10, 1972 which, apart from the undertaking to destroy all stocks of biological (bacteriological) weapons and toxics matters, introduced the prohibition to produce or to acquire in any other way these arms of mass destruction. Furthermore, the Convention prohibited also all research in this field.⁸¹

Less radical, but quite essential were the restrictions covering the possibilities to perfect further and to disseminate nuclear weapons. The initially unrestricted qualitative development of these weapons has been limited by such agreement as: Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water, signed in Moscow August, 5, 1963,⁸² USSR—USA Treaty on the Limitation of Testing of Nuclear Weapons of July 3, 1974,⁸³ and finally the agreement signed on May 28, 1976⁸⁴ by the two super-powers on the use of underground nuclear tests exclusively for peaceful purposes. On the other hand, as far as non-proliferation of nuclear weapons is concerned, of fundamental im-

⁸¹ Cf. text of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction. "Arms Control and Disarmament Agreements: Texts and History of Negotiations," US Arms Control and Disarmament Agency, Washington DC, 1975, pp. 118—124.

⁸² For the text of the treaty see *op. cit.*, pp. 40—42.

⁸³ For the text of the treaty see "Recueil de Documents," PISM, 1974, No. 7, pp. 795—798.

⁸⁴ Text of the treaty: Z. SZCZERBOWSKI, *Strategiczny dialog rozbrojeniowy SALT* pp. 282—287.

portance is the multilateral treaty of July, 1968,³⁵ the joint USSR—United Kingdom Declaration of February 17, 1975 on the non-proliferation of nuclear weapons³⁶ and the analogous USSR—French Declaration of June 22, 1977.³⁷ It goes without saying that some provisions of the earlier mentioned treaties on the establishment of nuclear weapons free zones contain essentially similar prohibitions. Finally, an element introducing essential qualitative restrictions can be seen in the SALT I and SALT II agreements.

The signing of all these agreements constituted undoubtedly an important element in the action aimed at military détente and at eliminating the military factor from interstate relations. A similar motivation was at the basis of the USSR proposal to conclude a treaty banning completely all tests with nuclear weapons submitted to the UN General Secretary on November 22, 1976³⁸ and the draft convention on the general prohibition of neutron weapons submitted by the socialist states at the Geneva Committee on March 9, 1978.³⁹

Among the treaties providing for a complete prohibition of a specific kind of weapon a special place is due to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques signed on May 10, 1977.⁴⁰ In this Convention, 38 states stated their willingness of saving mankind from the danger of using new means of warfare and pledged themselves "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means or destruction, damage or injury to any other State Party. In this case the prohibition applies to "changing the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."

The history of international relations of the post World War II period seems to corroborate the thesis according to which all steps aiming at: 1) the total or partial liquidation of specific weapons; 2) the fixing of strict limits of their quantitative and qualitative development

³⁵ For the text of the Treaty on the Non-Proliferation of Nuclear Weapons see "Recueil de Documents," (Warszawa — PISM), 1968, No. 7, p. 803 ff.

³⁶ Joint USSR-United Kingdom Declaration on the Non-Proliferation of Nuclear Weapons, Moscow, February 17, 1975. See "Recueil de Documents," (Warszawa — PISM), 1975, No. 2, pp. 160—162.

³⁷ For the text of the USSR-French Declaration see "Prawda" June 23, 1977.

³⁸ For the text of the treaty see "Recueil de Documents," (Warszawa — PISM), 1976, No. 11, pp. 1175—1181.

³⁹ For the text of the proposed draft see "Trybuna Ludu" of March 10, 1978.

⁴⁰ For the text of the Convention see "Recueil de Documents," (Warszawa — PISM), 1976, No. 12, pp. 1365—1375

and, finally 3) the introduction of prohibitions covering research, production, acquisition, stationing on agreed territories of new kinds of weapons, represent an essential element in checking the arms race and, hence, in reducing military tension.

Measures Designed to Prevent Surprise Attacks and to Reduce the Dangers of Military Conflict

Modern military technique disposes of means enabling one state to carry out a sudden surprise attack of the territory of another state with far-reaching and devastating effects. Such an attack requires no lengthy preparations and can be made with lightning speed. Missiles carrying nuclear weapons fired by submarines can reach targets located on the territory of another state within a few minutes. If one adds to this the dangers arising not only from a premeditated act of aggression but also from a human error of those manning the missile sites, from a miscalculation, from a possible failure of the safety systems, etc., it becomes clear that all means safeguarding against the possibility of a surprise attack or against an attack undertaken without the expressed authorisation of the government of the state controlling a given weapon system, are of extreme importance.

The international discussion on means to safeguard against surprise attacks was inaugurated by the USSR proposals which were tabled in 1957 in the Sub-Committee of the UN Disarmament Committee as part of a broader disarmament programme.⁴¹ The discussion continued later in the spring of 1958 in the Security Council and was referred afterwards for study to a team of governmental experts of ten states representing the East and the West. These adjourned without achieving any results and the problem was again taken up in 1962 by the 18-Nation Geneva

⁴¹ See the following USSR documents on the subject: 1) the USSR proposals regarding the reduction of armaments and armed forces and the prohibition of nuclear weapons, presented March 18, 1957 and providing for the establishment of a control organ "to prevent surprise attacks of one state against another". see: "Disarmament Negotiations after World War II," vol. 3, Warszawa 1959, pp. 736—753. 2) The proposals of the USSR Government regarding the easing of international tension presented January 6, 1968. See *ibid.*, pp. 906—914. 3) Letter of the Chairman of the Council of Ministers of the USSR to the President of the USA dated July 2, 1958 proposing discussions on the means of preventing surprise attacks. See *ibid.*, pp. 962—971. 4) Note of the Government of the USSR to the Government of the USA on the negotiations to be undertaken on the means of preventing surprise attacks, dated September 1958. See: *ibid.*, pp. 972—980. 5) Declaration of the Government of the USSR on the means of preventing surprise attacks, dated November 28, 1958. See *ibid.*, pp. 1042—1071.

Committee. The signing on June 20, 1963 of the USSR—USA "hot line" agreement was in part the result of these negotiations.⁴²

The discussion on the prevention of surprise attacks revealed the existence of basic differences. The socialist states were in favour of the adoption of such measures as aerial reconnaissance, on-site control or exchange of information on the military potential of states but only within the framework of the implementation of a comprehensive and far-reaching programme of armed forces and armaments reduction. On the other hand, the Western powers insisted on the establishment of the control system alone, with the adoption of concrete disarmament measures to be left at some unspecified later stage.⁴³

Rapid development of national technical means of control (including, in the first place, satellite observation) had introduced over the past few years several new factors in the discussion on the means to prevent surprise attack, without however reducing its importance. This was reflected in the conclusion of several major agreements in this field between the USSR and the United States, the United Kingdom and France.⁴⁴ The conclusion of such agreements between all nuclear powers and between NATO and the Warsaw Treaty would, no doubt, promote progress towards military détente in general.

In contemporary international relations the reduction of tension depends not only on justified belief that the dangers of armed conflict arising from an accidental, unauthorized use of nuclear weapons had been completely eliminated. Of equal importance for enhancing mutual

⁴² Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link.

⁴³ Cf. W. WIECZOREK, *"Rozbrojenie — teoria i praktyka [Disarmament — Theory and Practice]*, Warszawa 1968, pp. 50—99.

⁴⁴ The USSR and the USA signed two agreements of that type: 1) September 30, 1971, an agreement on the means aimed at reducing the dangers of nuclear war in which they undertook to: a) further perfect the organizational and technical means designed to prevent the accidental use or the unauthorized use of nuclear weapons remaining under their control; b) to inform each other on any case of an accidental, unauthorized or unexplained incident related to a possible explosion of a nuclear weapon which could create a danger of nuclear war; c) to immediately inform each other in each case when a situation arises which might involve a danger of nuclear war; d) to notify earlier about any plans to launch missiles beyond one's own territory in the direction of the other party. 2) June 22, 1973 an agreement on the prevention of nuclear war in which they pledged to: a) act in such a way, so as to prevent the creation of situations which could lead to a dangerous deterioration in their mutual relations avoid military confrontation and eliminate the dangers of nuclear war; b) to enter immediately into urgent consultations should their mutual relations reach a stage involving the danger of nuclear war.

trust is the proper perception by one state of the real intention of another state. What is at stake in this case is the correct interpretation by the other party of such steps as: military exercises or other troop movements carried out on a larger scale in particular in border areas or in areas of increased political tension. Better understanding can be promoted by specific agreements to exchange mutually information regarding the holding of military manoeuvres and large scale troop movements. Such steps belong to the so-called confidence building measures (CMB).

Over the past few years much has been written and said about the CBM's in the context of the implementation of the Final Act of the Conference on Security and Cooperation in Europe and in connection with the consideration of the problem of the reconstruction of the foundations of the security system on the European continent.⁴⁵ It must, however, be recalled that to the group of measures involving specific limitations on the armed forces, apart from those mentioned in the Final Act such as: 1) prior notification of manoeuvres and troop movements and 2) exchange of observers to such manoeuvres, one must add also agreed measures in some other fields referred to generally as military aspects of international security. Typical in this respect are: 1) limitations as to the size and frequency of manoeuvres and troop movements in specific regions; 2) limitations as to the flight of aircraft and the movement of ships with nuclear weapons on board in specific region; 3) limitations as to the construction of military fortification in agreed areas; 4) the establishment of reliable communication systems on matters requiring elucidation and related to the possible use of military force, etc.⁴⁵

None of these measures limit directly the military potential of states; they are, none the less, undoubtedly positive effects as far as the reduction of military tension is concerned, for they contribute to reducing the role of military force as an instrument of foreign policy by:

⁴⁵ Cf. Final Act of the Conference on Security and Cooperation in Europe. Document regarding confidence building measures and some aspects of security and disarmament. Annex to "Sprawy Międzynarodowe," 1975, No. 10, p. 11. On the same subject see: W. GRUSZKA *Realizacja postanowień KBWE dotyczących środków budowy zaufania* [The Implementation of the Decisions of the Helsinki Conference Regarding Confidence Building Measures], "Sprawy Międzynarodowe," 1976, No. 3, pp. 7—23; Z. LUDWICZAK, E. STANISZEWSKI, *Odpężenie militarne a środki budowania zaufania w Europie na Spotkaniu Belgradzkim* (Military Détente and Confidence Building Measures in Europe at the Belgrade meeting), "Sprawy Międzynarodowe," 1978, No. 6, pp. 42—52.

⁴⁹ For a broader discussion of the subject see: World Armaments and Disarmament, "SIPRI Yearbook," 1973, pp. 106—116.

1. limiting to some degree the possibility to use military power in general; and,

2. introducing a more correct perception of the behaviour of the other side by eliminating, at least partly, situations which could be erroneously interpreted as acts directly or indirectly threatening the security of another state.

Taking this into account, and desiring to contribute to enhance the feeling of security on the European continent, the socialist states proposed to limit the number of troops participating in military manoeuvres to 50,000/60,000 men. This proposal was first tabled by the Soviet Union at the Belgrade Conference of 1978. Later, the same idea was incorporated in the Declaration of the States-Parties to the Warsaw Treaty of November 23, 1978.

These measures are, none the less, of a limited nature which is reflected in the fact that: first, they do not detract from the material means to wage war and to commit acts of aggression; and, second, the violation of such undertakings (or at least of some of them) can take place suddenly with effects.⁴⁷ That is why the tendency of some Western powers to overemphasize the role of these measures within the framework of the broader action aiming at military détente at the expense of real disarmament steps, cannot but cast a shadow of doubt as to the sincerity of their motives.

In some publications the group of confidence building measures covers also some so-called "associated measures" or "collateral measures" which may be close to the former in so far as their meaning is concerned, but differ from them from the formal and legal point of view as well as by their very nature. The Final Communiqué of the preparatory consultations of the group of 19 states preceding the Vienna negotiations on the reduction of armed forces and armaments in Central Europe, stated that "during the negotiations mutual reduction of forces and armaments and associated measures in Central Europe would be considered."⁴⁸ In this case it was clearly intended to emphasize the substan-

⁴⁷ The violation by a state of a disarmament agreement can be signalled by various indices and in the case of some disarmament agreements as early as the preparatory stage to such an act; such a violation has usually no immediate effect involving the creation of a dangerous situation for the security of the other party to the agreement. On the other hand, when a state decides to violate a prohibition, for example to hold manoeuvres or to carry out large troop movements, it risks that its action will be seen as tantamount to a decision to start hostile military activities with immediate effects.

⁴⁸ Communiqué on preparatory consultations to negotiations concerning mutual and balanced reduction of armaments, Vienna, June 28, 1973. "Recueil de Documents." (Warszawa — PISM), 1973, Nr. 6, pp. 683—684.

tive link of these associated measures with the actual disarmament steps. This would apply to measures increasing the credibility of the implementation of the disarmament obligations, such as, additional verification procedures, freezing of military expenditure, etc.

The freezing or reduction of military expenditure had continuously attracted the attention of world public opinion since the end of World War II. In the Report of the UN Secretary General on "The Social and Economic Effects of the Arms Race and Military Expenditure" submitted to the Special Session of the General Assembly on Disarmament, the problem of the reduction of military budgets is, together with the quantitative limitation of armaments, viewed as one of the two major means of checking the arms race.⁴⁹ The same stand was adopted by the Special Session itself.⁵⁰

Presently under discussion is a USSR proposal to reduce by 10 per cent the military budgets of the five permanent members of the Security Council. The quite considerable technical difficulties connected with the computation of the real military expenditures of states hardly justify the lack of progress of this field.

The Prohibition to Use Force in International Relations and the Obligation to Settle Conflict by Peaceful Means

The discovery by men of the secrets of nuclear energy and their mastery of the production of other means of mass destruction has put at their disposal an immense destructive potential whose use could endanger the very existence of our civilization. The awareness of the destructive might of nuclear weapons and of the revolutionary implications of missile developments has placed at the forefront the problem of the prohibition to use force in international relations as one of the most important ways of preserving international peace and security. The slightest violation by states of that prohibition had always had (and continues to have) the most adverse impact on the state of international relations, causing military and political tensions which spread, as a rule, beyond the area of direct aggression.

Our country has repeatedly drawn the attention of the world community in the United Nations and elsewhere to the close inter-relationships between the respect by states of the prohibition to use force

⁴⁹ "Economic and Social Consequences of the Arms Race and of Military Expenditures," United Nations, New York 1978, para. 180 and 181 pp. 75—76.

⁵⁰ See: Final Document of the X Special Session of the General Assembly, A/RES/S-10/2, July 13, 1978, para. 89, p. 18.

or threats to use force and progress in the fields of political and military détente, including disarmament. For example, in the reply of the Polish Government of April 22, 1970 to a letter by the UN Secretary General one may read the following statement: "Under conditions of consistently realized disarmament the principle of elimination of wars as a means of settling international disputes will become real because of the lack of material premises for waging aggressive wars."⁵¹

First formulated as a binding norm in the Briand-Kellog Pact of 1928 and later developed in Article 2, paragraph 4 of the United Nations Charter, the idea of prohibiting the use of force had been quite often violated in the practice of international relations also in the post World War II period, its contents being defined with inadequate precision leaving too many loopholes. This explains the reasons why the activities of the socialist states and of the anti-war forces in the West pursued a double objective: first, to make sure that the premises promoting the respect of the idea of the non-use of force in international relations do exist and, second, to work out such a formula of the prohibition which would correspond fully to the modern stage of development of international relations and would be accepted by possibly all members of the international community.

As far as the first aspect of the problem is concerned it may be recalled at this juncture that from the moment of signing of the United Nations Charter the world witnessed more than 150 armed conflicts and aggressions in various parts of our globe with the ensuing loss of more than 10 million human lives. About 90 states participated in these conflicts.⁵² Aggressions and threats of aggression have been committed by imperialist states and by those instigated and supported by them. This policy was reflected in such political and military doctrines as "balancing on the brink of war," "containment," the "roll-back" of communism, etc. Its main ingredient was the threat of use of weapons of mass destruction. The concept of military deterrence and the related concepts of "first use" of nuclear weapons and "forward strategy" which are still at the very foundation of the Western strategic doctrine, reflected in the past and reflects now again the same line of thinking, represents a real threat to peace, increases military tension and activates the arms race both locally and globally.

As mentioned above, the activities of all anti-militarist forces in

⁵¹ For the text of the reply see: "Recueil de Documents," (Warszawa — FISM), 1970, No. 5, pp. 752—759.

⁵² See among others: I. KENDE, *Local Wars in Asia, Africa and Latin America 1945—1969*, Budapest 1972. See also: *The Pugwash Movement at Twenty One*, "Pugwash Conferences on Science and World Affairs/" 1978, London, p. 9.

the world headed by the socialist states aimed at creating the most favourable premises which would ensure the full respect of the prohibition to use force or the threat of force in relations among states. The institution of the prohibition to use force remains the cornerstone of the Leninist idea of peaceful coexistence of states with different economic and social systems. That is why on the initiative of socialist countries, the prohibition of the use of force had been included in the majority of bilateral and multilateral treaties which govern their relations with the Western states.⁸³

A whole series of political and diplomatic measures aiming at a more precise definition of the concept of the prohibition of the use of force or of the threat to use force in international relations and designed to make the concept acceptable as a binding rule to the largest possible number of states represented an integral part of the general activities in favour of the elimination of war as an instrument of settling international disputes. They accompanied the work carried out by the United Nations which culminated in 1974 after many years of negotiations on the definition of aggression.⁶⁴ Aggression was defined as "the use of force in violation of the Charter of the United Nations" (Art. 2).⁵⁵ Because of that, aggression was branded as the gravest and most dan-

⁵³ The obligation prohibiting the use of force in mutual relations is contained in the following agreements signed in the 1970s: Article 2 of the Treaty between the USSR and the Federal Republic of Germany of August 12, 1970; Article of the Treaty of December 7, 1970 on the foundations of normalization of relations between the Polish People's Republic and the Federal Republic of Germany; para. 1 and 2 of the USSR—USA agreement on the foundations of mutual relations of May 29, 1972; principle II of the Declaration of Principles of the Final Act of the Helsinki Conference. Special mention deserve the numerous declarations of the UN General Assembly on the matter, adopted mainly on the initiative of the socialist states, such as Resolution 2625(XXV) together with the declaration on the principles of international law concerning friendly relations and cooperation between states, adopted on October 24, 1970. For the text of the Resolution see: "Recueil de Documents/" (Warszawa — PISM), 1970 No. 10, pp. 1646—1661.

⁵⁴ Resolution 3314(XXIX) of the UN General Assembly on the definition of aggression, with Annex, of December 1, 1974. See: "Recueil de Documents," (Warszawa — PISM), 1974, o. 12, pp. 1397—1403. Art analysis of the earlier negotiations can be found in W. MORAWIECKI *Walka o definicję agresji w prawie międzynarodowym* [The Struggle for a Definition of Aggression in International Law], Warszawa 1956.

⁶⁵ Article 3 of the Definition of Aggression lists: a) "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another

gerous form of unlawful use of force. Finally the United Nations restated "the obligation not to resort to the use of military force."

The acceptance by states of the obligations arising from the prohibition to use force or the threat to use force constitutes a factor of military détente. The positive effect of it increases with the number of states possessing large military establishments pledging to behave accordingly.

The fullest substantive scope of obligations of states parties to a treaty on the non-use of force is contained in the USSR draft submitted to the UN Secretary General on September 23, 1976.⁵⁸ The draft aims not **only** to prevent aggression as such but also to prevent war preparation and, hence, tries to check the increase of military tension.⁶⁷ In this context the following provisions merit particular attention:

- the prohibition to use force or the threat to use force covers all kinds of weapons, including nuclear weapons and other weapons of mass destruction, on land, sea, in the air and outer space (Art. 1);

- the parties pledge themselves to refrain from assisting, encouraging and instigating a state or group of states to use force or the threat to use force, as well as from contributing to the creation of a situation which could endanger the maintenance of peace and international security;

- the parties undertake to deploy all necessary efforts in order to put into action effective measures aiming at reducing military confrontation and promoting disarmament as a step towards the achievement of the ultimate goal of general and complete disarmament under effective international control (Art. 4).

It hardly needs stressing that the acceptance of such a wide range

State; c) The blockade of the ports or coasts of a State by the armed forces of another State; d) An attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State; e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; f) The action of a State in allowing its territory which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of much gravity as to amount to the acts listed above, or its substantial involvement therein."

⁵⁶ For the text of the proposal see "Recueil de Documents" (Warszawa — PISM), 1976, No. 9, pp. 926—930.

⁶⁷ For a broader analysis of the USSR proposal see: V. FIODOROV, *Renunciation of Force in International Relations*, "International Affairs," 1978, No. 7, pp. 32—40.

QI obligations as contained in the draft submitted by the USSR would constitute an important factor of military détente.⁵⁸ One cannot but agree with the conclusion of K. Fiodorov⁵⁹ that "the treaty contains an implicit undertaking by the parties to do the utmost to reduce military rivalry, to reduce armaments and to take the road of disarmament so as to reach the final objective of genral and complete disarmament."

In emphasizing the importance of respecting the prohibition to use force or the threat to use force as a factor of military détente the Special Session of the General Assembly on Disarmament went even further. It attached special weight to the problem of renunciation of the threat to use force as one of the fundamental elements on which all actions in favour of disarmaments ought to be based.⁶⁰

The principle prohibiting the use of force or the threat to use force in relations among states as formulated in the USSR draft is of a comprehensive nature and universal character. On the one, hand, it represents a further extension of the rule contained in Article 2 of the United Nations Charter and on the other hand, of Principle II of the Decalogue of Principles of the Final Act of the Conference on Security and Cooperation in Europe.⁶¹ However, not all states are ready to accept in full the obligations arising from the draft convention submitted by the USSR. The implementation of the principle prohibiting the use of force in international relations would be enhanced by the acceptance of the proposal of the states party to the Warsaw Treaty Organization on the prohibition of the first use of nuclear weapons by the signatories of the Helsinki Final Act.⁶²

⁵⁸ The proposal by the States-Parties of the Warsaw Treaty of November 26, 1976 that the States signatories of the Final Act of the Helsinki Conference conclude an agreement not to use first against each other nuclear arms on land, sea, in the air and in outer space can be considered as a limited form of the implementation of the idea of prohibiting the use of force or of the threat to use force in international relations. For the text of the proposed treaty see: "Recueil de Documents/" (Warszawa — PISM), 1976, No. 11 pp. 1215—1216.

⁵⁹ *Ibid.*, p. 37.

⁶⁰ Cf. Final Document of the Tenth Special Session of the General Assembly, Arts. 25, 26, 57 and 93. A/RES-10/23, July 13, 1978.

⁶¹ See Principles II and V of the "Declaration of Principles Governing Mutual Relations Among Participating States". See also: *Final Act of the Conference on Security and Cooperation in Europe*, "Sprawy Międzynarodowe," 1975, No. 10, annex, pp. 5—6; J. SYMONIDISS, *Deklaracja zasad stosunków międzynarodowych* (Declaration of Principles of International Relations), "Sprawy Międzynarodowe," 1975, No. 10, pp. 24—49.

⁶² Draft Treaty Between the Signatories of the Final Act of the Conference on Security and Cooperation in Europe, Bucarest, November 26, 1976, see: "Recueil de Documents," (Warszawa — PISM), 1976, No. 11, pp. 1215—1216.

Measures Designed to Restrict the Development of International Organizational Structures Acting in the Sphere of War Preparation and Actual Waging of War

The intensification of the cold war and the heightening of military tension after World War II was accompanied by the establishment of international organizations whose principal aim was, to initiate and to coordinate the preparations to military confrontations. Such international organizations as SEATO, CENTO and NATO share in the implementation of the policy from a position of force, in the maintenance of tension and in the acceleration of the arms race.

The history of these pacts proves that their activities cannot be reconciled with the idea of military détente. This applies in particular to their following features. As organizational and structural framework designed to prepare for war and to wage war:

— **They provide a forum where military doctrines and plans as well as long term armament programs were/are discussed and adopted;**

— They provide a ready instrument for action by mostly conservative and cold-war oriented politicians;

— They were/are an instrument of pressure on member-states to force them to increase their military spending.

Taking into consideration the particularly negative influence of military pacts on international life in general and their contribution to maintain tension among states, the socialist states have repeatedly called for their dissolution. A less radical step would be and undertaking not to increase the membership of such pacts followed by a dismantling of their military structures.

A realistic view of the present world situation militates against the expectation that the progressing process of détente on the international arena and the normalization of relations among states will result, almost automatically, in the dissolution of military blocs. The socialist states assume a belief rather that the gradual limitation of the role of military pacts in Europe as the foundation of the present security system on the European continent will be a process accompanying the development of an all-European security system based mainly on non-military factors. The development of these factors and of the new security system in general, is closely tight (connected) with a basic reconstruction of international relations.

1. To sum up, it can be stated that in the present international situation progress in the field of military détente is determined by actions in three main areas:

— in the political sphere (political détente);

— in the sphere of action aiming at eliminating and reducing the material means of waging wars (disarmament);

— in the sphere of action aiming at applying agreed measures restricting the possibility of using armed forces.

It is not easy to determine the actual impact of the actions in the above mentioned three spheres on the progress in the field of military détente. It can, however, be stated with certainty that concrete results achieved in these spheres determine together the progress of military détente.

2. Military détente is a process whose limits are fixed by two points. On the one side, by the mere fact that states possess military forces. On the other side, by actual military conflict itself (as such). Between these two extreme points moves the scale of intensified tension or military détente. Movements on this scale are determined by the will of states which, in turn, reflects their aspirations and possibilities.

3. It is extremely important to define the character of the interdependence between political and military détente. The prevailing view is that progress in military détente is conditioned by the extent of political détente. However, this interdependence is not of a mechanical nature. For it is well known that the causes of the slow development of the process of military détente must be sought not only in the nature of relations among states but also in the nature of certain phenomena of the internal life of bourgeois states for which military might is still one of the most important attributes of the state.

4. From December 1959, i.e. from the date of signing of the first disarmament agreement in the post World War II period to the end of 1979, more than thirty various bilateral or multilateral agreements aimed at reducing military tension have been negotiated. In the majority of cases (16) they deal with weapons of mass destruction. In eight cases they deal with the prevention of nuclear war.

The intensive negotiations aimed at checking the arms race and promoting military détente which have been going on continuously over the past years are expected to lead to further agreements of the same kind. It is hoped that—as some already concluded—they will deal with a great variety of problems, thus enlarging the substantive scope of the concept of military détente.

5. Military détente can be defined as a process of gradual reduction of the role of military might both as a foreign policy instrument of states and as a principal factor of their security through various disarmament steps, measures designed to limit the development of military potentials and to reduce the dangers of their actual use. The concept of military détente covers a wide range of measures which can

promote its achievement. This applies also to measures defined as confidence building or collateral measures.

Speaking about the premises of military détente one should not ignore a very important sphere of various actions in the political, economic, cultural and other spheres which can contribute to the strengthening of mutual trust among states. Such actions can result in the establishment of a complex and permanent network of relationships as a part of the infrastructure of international security founded to a higher degree than hitherto on non-military guarantees. This, in turn is related to a genuine reconstruction of international relations in the basis of the principles of peaceful coexistence of states. One of the essential elements in the practical implementation of this concept, which seems to us as the sole rational formula for coexistence of states in an era in which almost unlimited destructive power has been accumulated in the military arsenals of the main powers, is the principle of respect for the vital security interests of the other party.

Just as the systems of international security based on military might have worked out several institutional framework, the security system based on the reduced role of the military factor must also result in the emergence of institutions aiming at strengthening mutual trust and the sense of mutual security.

There is hardly any need to stress that in this process, apart from its general pace, it is important to achieve as far as possible uniform progress on all its main fronts. What I have in mind is, above all: disarmament, arms limitation, prevention of armed conflicts and the whole group of so-called confidence building measures; in other words, military détente must go hand in hand with political détente. It is equally clear that an unfettered development of the process of military détente must be supported first of all by all states disposing of a substantial military potential and by all states which are located in areas of potential armed conflict.

Aspects juridiques des relations officielles entre le C.A.E.M. et la C.E.E.

par HENRYK DE FIUMEL

Le dialogue qui a lieu depuis un certain temps entre les deux organisations internationales d'intégration économique, le C.A.E.M. (Conseil d'Assistance Économique Mutuelle) et la C.E.E. (Communauté Economique Européenne), a engendré un accroissement de l'intérêt de la doctrine occidentale et des milieux communautaires officiels pour les problèmes juridiques du C.A.E.M. Parmi les raisons de cet état de choses figure notamment le projet d'accord sur les relations mutuelles entre les deux organisations et entre leurs États membres, présenté par le C.A.E.M. aux autorités de la C.E.E.¹.

En ce qui concerne l'attitude envers le C.A.E.M., on relève dans la doctrine occidentale des opinions très diversifiées, à commencer par une attitude généralement et ouvertement hostile envers le C.A.E.M. jusqu'aux jugements objectifs et réalistes admettant l'utilité et la possibilité de conclure l'accord en question. On doit remarquer en même temps que plusieurs commentaires occidentaux témoignent d'une connaissance insuffisamment approfondie des problèmes juridiques du C.A.E.M., surtout en matière de compétences externes de cette organisation. Il est cependant à souligner que personne ne met plus en doute la nécessité même de la normalisation des relations mutuelles entre le C.A.E.M. et la C.E.E. Une exception à cet égard constitue l'intervention de l'un des députés au Parlement européen, M. de la Malène, qui au cours d'un débat relatif à la politique commerciale commune envers les pays socialistes a estimé que le mot COMECON était à proscrire du vocabulaire communautaire et qu'il n'était pas du devoir de la Communauté d'attribuer plus de signification et d'existence réelle à cet organisme commercial*.

¹ Cf. le texte du projet d'accord, en allemand, chez H. J. KIRCHNER, *Aktuelle Fragen der Wirtschaftspolitik gegenüber den Staatshandelsländern*, « Beiträge zum Internationales Wirtschaftsrecht und Atomenergierecht », (Göttingen, Bd 3, 1976, H. 5, pp. 192 - 196.

² Cf. débat au Parlement européen à propos de la question orale N° 19/1972 du député Glinne.

Cependant, M. Christopher Soames, vice-président de la Commission, a mis l'accent, au cours du même débat, sur rengagement de la Communauté dans la politique commerciale commune envers les pays socialistes et sur la nécessité d'une approche pragmatique de ce problème⁸.

Au cours des débats ultérieurs au Parlement européen, plusieurs parlementaires ont tenu à souligner la grande importance que revêtirait l'établissement des relations officielles entre le C.A.E.M. et la C.E.E.; cet événement serait, à leurs yeux, une preuve concrète de la réalisation des dispositions de l'Acte final de la Conférence sur la Sécurité et la Coopération en Europe (cf. surtout les interventions de MM. Schmidt et Kruchov)⁴.

Pour ce qui est des opinions relatives à l'établissement des rapports conventionnels entre la C.E.E. et le C.A.E.M., elles mettent, dans la plupart des cas, en relief les différences dans la nature et les compétences des deux organisations, ce qui devrait conduire à limiter la portée matérielle d'un accord et ne pourrait pas rester sans effet pour le caractère même des deux paries.

Ces réserves sont émises surtout par la Communauté elle-même et trouvent leur reflet dans les déclarations de ses représentants officiels. Il suffit de rappeler à cet égard la déclaration faite, le 8 janvier 1976, à Bucarest, par le vice-président de la Commission, M. Soames, selon lequel il conviendrait » d'établir et de développer des relations avec le COMECON dans les domaines où les deux organisations ont des fonctions plus ou moins comparables »⁵.

Les déclarations de certains députés au Parlement européen vont dans le même sens. Notons, à titre d'exemple, l'opinion du lord Gladwyn pour lequel « le COMECON ne constitue en aucune façon le pendant de la Commission européenne »⁶.

Il est d'autre part à souligner que les députés au Parlement européen ont, plus d'une fois, exprimé leur mécontentement devant le fait que le Parlement n'était pas suffisamment informé du déroulement des conversations entre le C.A.E.M. et la C.E.E. Les réponses fournies à cet égard dans le forum du Parlement européen par la Commission sont

⁸ Ibid., p. 72.

⁴ Cf. *Amtsblatt der Europäischen Gemeinschaften, Anhang, Verhandlungen des Europäischen Parlaments*, N° 202, April 1976, p. 168.

⁵ Speech by Rt. Hon. Sir Christopher Soames, vice-president of the Commission of the European Communities, to the Romanian Association of International Law and International Relations, Bucharest, Thursday, 8 January 1976, p. 5, (mimeographed).

⁶ Cf. *Amtsblatt...*, p. 165.

plus que laconiques et ne satisfont certainement pas tous les députés. Certains auteurs occidentaux ne manquent pas de le souligner⁷.

Très peu d'auteurs occidentaux refusent d'une manière globale au C.A.E.M. — et ceci en dépit des faits évidents — la capacité de conclure des traités interationaux. C'est ainsi que J. B. Carsac estime que « le COMECON, est demeuré jusqu'à présent une association régionale assez peu intégrée et dont les organes sont dépourvus de tout pouvoir de négociation avec l'extérieur »⁸. Ce jugement absurde est d'ailleurs négativement apprécié de la part de plusieurs autres auteurs occidentaux faisant preuve d'une attitude réaliste. A. Lebahn, qui se réfère aux statuts du C.A.E.M., fait remarquer que les réserves occidentales selon lesquelles le C.A.E.M. ne disposerait pas d'une personnalité de droit international ou d'une compétence externe, ne sont plus tenables⁹. Il suffit d'ailleurs de rappeler la teneur des articles III, point 2, XI et XII des statuts ainsi que la pratique du C.A.E.M. pour faire disparaître tous les doutes à ce sujet¹⁰.

Généralement, les auteurs occidentaux ne refusent pas au C.A.E.M. sa compétence générale pour conclure des traités avec d'autres sujets de droit international, mais tentent à démontrer les limites de la portée matérielle des traités conclus par le C.A.E.M., ce qui serait dû à la nature même de cette organisation et à la répartition des compétences entre elle-même et ses États membres.

On fait souvent remarquer que si la C.E.E. possède un caractère supranational, le C.A.E.M. est une organisation classique dont les pouvoirs envers ses États membres sont relativement faibles (p. ex. les recommandations nécessitent une acceptation de la part des États membres)¹¹.

Au cours d'un débat au Parlement européen, le député Fellermaier évoquait « la grande différence qualitative entre le COMECON et la Communauté européenne, celle-ci pouvant agir comme une entité su-

⁷ A. LEBAHN, *RGW und EG — Faktoren des Ost-West-Handels*, « Aussen-Politik », 1978, N° 2, p. 141.

⁸ J. B. CARSAC, *Les rapports entre la C.E.E. et le COMECON, Ambiguïté des propositions soviétiques*, « Défense nationale », mars 1974, p. 73; F. HOUBL, *Das Verhältnis zwischen Europäischen Gemeinschaften und dem Rat für Gegenseitige Wirtschaftshilfe als Testfall für Zusammenarbeit*, in: *Konvergenz- Koexistenz oder Zusammenarbeit in Europa*, 1975, p. 45.

⁹ Cf. A. LEBAHN, *RGW und EG...*, p. 135.

¹⁰ Cf. H. DE FIUMEL, *The Council for Mutual Economic Assistance in International Relations*, « Studies on International Relations », (Warsaw), 1976, N° 7.

¹¹ Cf. Bericht des Sitzungsdokuments des Europäischen Parlaments, 425/74, du 25 janvier 1975, p. 25.

pranationale, alors que c'est le contraire qui semble être le cas pour le COMECON »¹².

Les auteurs français, J. Portier et C. Seranne, représentent le point de vue similaire lorsqu'ils constatent que « le C.A.E.M. ne comporte [...] aucun pouvoir supranational » et précisent en même temps que seulement « les différents pays membres peuvent signer des accords internationaux dans le cadre de la coopération pan-européenne »¹³.

Il n'existe aucun doute que le C.A.E.M. n'est pas une organisation de caractère supranational. Cette constatation assez évidente est mise en relief par le Programme complexe d'intégration économique socialiste qui stipule que « l'intégration économique socialiste s'effectue sur la base du libre consentement et ne comporte la création d'aucun organe supranational » (chapitre I, point 2 *in fine*)¹⁴.

Il est vrai en même temps que — dans le cadre du C.A.E.M. — les pays membres disposent de la plénitude de leurs pouvoirs souverains et que tout acte du C.A.E.M. nécessite le consentement de tous les pays intéressés¹⁵.

Ceci dit, il faut insister sur le fait qu'en ce qui concerne la supranationalité, dont parle si souvent la doctrine occidentale, elle n'apparaît pas dans le traité de Rome comme un élément essentiel. Ce principe fut d'ailleurs affaibli dans la pratique par suite des Accords de Luxembourg de janvier 1966¹⁶. Il convient également de souligner que le sens et les interprétations du terme « supranationalité » ne sont pas dans la doctrine occidentale toujours identiques¹⁷.

Dans ce contexte, nous partageons l'opinion de l'économiste hongrois, F. Kozma, lorsqu'il constate « qu'il serait irréaliste de surestimer la supranationalité reconnue aux organes de la C.E.E. ou de sousestimer les possibilités concernant les actions communes du C.A.E.M. »¹⁸.

Abordant le sujet des différentes compétences des deux organisations,

¹² Débats du Parlement européen, N° 165, septembre 1973, p. 49.

¹³ J. PORTIER, C. SERANNE, *Les deux intégrations et les relations économiques Est-Ouest*, « Revue française de science politique », vol. XXIV, n° 6, décembre 1974, p. 1229.

¹⁴ Cf. *Programme complexe d'approfondissement et de perfectionnement de la coopération et du développement de l'intégration économique socialiste des pays membres du C.A.E.M.*, Secrétariat du C.A.E.M., Moscou 1971, p. 10.

¹⁵ Cf. H. DE FIUMEL, *Le caractère juridique des résolutions du C.A.E.M.*, « Cahiers de droit européen », 1967, n° 5.

¹⁶ Cf. L. J. CONSTANTINESCO, *Das Recht der Europäischen Gemeinschaften*, vol. I: *Das institutionelle Recht*, Baden - Baden 1977, p. 373.

¹⁷ Cf. P. PESCATORE, *Le droit de l'intégration*, Leiden 1972, pp. 48 - 54.

¹⁸ F. KOZMA, *Les efforts d'intégration dans la C.E.E. et le C.A.E.M.*, in *L'intégration en Europe: la C.E.E. et le COMECON*, Louvain 1976, p. 265.

plusieurs auteurs occidentaux mettent particulièrement l'accent sur la politique commerciale commune en tant que critère essentiel de la compétence externe de l'organisation et de la capacité générale de conclure des traités.

Selon P. Hermes, dans le domaine particulièrement important de la politique commerciale, il manque au COMECON — contrairement à la Communauté — la compétence de négociier et de conclure des accords de son propre droit (aus *eigenem Recht*)¹⁹.

T. Schweisfurth ne refuse pas au C.A.E.M. une compétence générale pour conclure des traités, mais il estime que celle-ci est l'équivalent de la compétence contenue dans l'article 229, alinéa 2 du traité de Rome. L'auteur souligne cependant que le C.A.E.M. ne dispose pas d'une compétence pour conclure des traités qui correspondrait à l'article 113 du traité de Rome, relatif à la politique commerciale commune²⁰.

Selon F. Franamayer et H. Machowski, les organes du C.A.E.M. ne sont pas compétents pour élaborer ou mener une politique commerciale commune envers les pays tiers^a.

Ces opinions de la doctrine occidentale sont-elles vraiment justifiées ? Est-il vrai que le C.A.E.M., en tant que partie d'un traité international, ne pourrait pas réglementer la politique commerciale de ses pays membres ?

Tout d'abord, il convient de confirmer que les statuts du C.A.E.M., contrairement au traité de Rome, ne contiennent pas de dispositions relatives au transfert de la compétence étatique et matière de conclusion des accords commerciaux au profit de l'organisation même et que, d'une façon générale, il n'y figure aucune disposition évouant une politique commerciale commune du C.A.E.M. Ainsi, les États membres du C.A.E.M. restent toujours compétents pour réglementer leur commerce extérieur avec d'autres pays et, par conséquent, pour conclure des accords commerciaux appropriés. Cette compétence concerne aussi bien la conclusion des accords commerciaux avec les pays membres du C.A.E.M. qu'avec les pays tiers parmi lesquels les pays capitalistes développés, membres de la C.E.E. Dans le premier cas, la réglementation des échanges s'effectue sur la base de la coordination, multilatérale ou bilatérale, des plans économiques nationaux des États membres du C.A.E.M. Dans le

¹⁹ P. HERMES, *Trneds im Handel mit den RWG-Ländern*, « Aussenpolitik », 1975, N° 4, p. 372.

²⁰ T. SCHWEISFURTH, *Sowjetunion, westeuropäische Integration und gesamteuropäische Zusammenarbeit*, « Europa Archiv », 1972, Bd 27, p. 269.

²¹ F. FRANZMAYER, H. MACHOWSKI, *Willensbildung und Entscheidungsprozesse in der Europäischen Gemeinschaft und im Rat für Gegesitige Wirtschaftshilfe. Ein Vergleich*, « Europa Archiv », 1973, Folge 2, p. 59.

second des cas, il s'agira du problème de la politique commerciale commune des États du C.A.E.M. envers les pays tiers, dont les membres de la C.E.E.

Bien qu'aucune disposition des statuts du C.A.E.M. ne traite de la politique commerciale commune, certaines d'entre elles se rapportent néanmoins aux échanges commerciaux avec les pays tiers. Il est prévu, par exemple, à l'article III, point 1d que le C.A.E.M coopère avec ses membres dans l'élaboration et la mise en oeuvre des opérations communes dans le domaine « développement des échanges de marchandises et de services entre les pays membres du Conseil et avec des pays tiers »¹².

Les statuts prévoient donc expressément la participation de l'organisation dans la réalisation des activités communes des États membres en matière de leurs rapports commerciaux avec les pays tiers. Il nous paraît évident que lorsqu'il est question des activités communes intéressant en principe tous les États membres, il ne peut pas s'agir de problèmes concrets et individuels du commerce de chacun des pays membres, mais de la politique commerciale commune de l'ensemble des pays du C.A.E.M. envers les partenaires extérieurs au groupement.

Les statuts du C.A.E.M. mis à part, c'est le Programme complexe d'intégration économique socialiste, adopté à la XXVe session du C.A.E.M. en 1971, qui contient des passages intéressants. En effet, il est question au chapitre I, alinéa 2 des mesures prises par les pays membres en commun ou individuellement « pour assurer la coopération et l'admission sur un pied d'égalité des pays socialistes encore victimes de discrimination dans les organisations internationales économiques, scientifiques et techniques ». Il est d'autre part indiqué à l'alinéa 3 dudit chapitre que: « A ces fins, les pays membres du C.A.E.M. coordonneront leur politique économique extérieure dans l'intérêt de la normalisation des rapports commerciaux et économiques internationaux et avant tout de l'élimination des discriminations dans ce domaine »²⁸.

Les deux alinéas font l'objet d'une analyse critique de Lebahn. Selon lui, l'alinéa 3 du chapitre I du Programme complexe apporte une double limite à la coordination de la politique économique extérieure des pays du C.A.E.M. D'abord, elle doit se limiter à la participation aux organisations internationales et, ensuite, son objectif est d'aboutir au traitement sur un pied d'égalité de tous les pays socialistes par les autres

²² *Protocole portant révision des statuts du C.A.E.M. et de la Convention sur la capacité juridique, les privilèges et les immunités du C.A.E.M.in: L'intégration en Europe...*, pp. 295 - 307.

^W Cf. *Programme complexe...*, p. 11.

pays²⁴. Lebahn doute en même temps si le C.A.E.M. peut devenir le principal coordonnateur d'une politique commerciale commune et estime que les passages respectifs du Programme complexe ne peuvent en aucun cas servir de base juridique pour la compétence du C.A.E.M. dans ce domaine²⁵.

Il nous est difficile de partager pleinement l'avis de Lebahn. En effet, la comparaison des deux alinéas démontre que les limitations en question ne doivent pas être prises trop à la lettre. Si, à l'alinéa 2, il est question de coordonner la politique économique seulement dans le contexte des discriminations commerciales, celles-ci ne sont énumérées qu'à titre d'exemple à l'alinéa 3 (« avant tout ») qui traite de la normalisation des rapports commerciaux et économiques internationaux en général.

Pour ce qui est de la rédaction du passage relatif à la coopération au sein des organisations internationales, il semble — à première vue — qu'il s'agit exclusivement de la coordination dans le cadre des organisations en question. Toutefois, une analyse plus approfondie du texte nous conduit à la conclusion qu'il s'agit en l'occurrence des deux choses distinctes: premièrement, de la coopération (dans le domaine des rapports commerciaux en général) et ensuite (« et ») du traitement sur un pied d'égalité au sein des organisations économiques internationales. Il en résulte en définitive que la conclusion de Lebahn, limitant la réalisation de la politique économique externe par le C.A.E.M. aux seules activités des organisations internationales, n'est pas tout à fait exacte.

Il en est de même pour ce qui est de la conclusion de Lebahn selon laquelle le rôle essentiel du C.A.E.M. en matière d'élaboration d'une politique économique commune ne découle pas des deux dispositions susmentionnées. On doit rappeler à ce propos la signification fondamentale du chapitre XVI, point 2 du Programme complexe, ayant un caractère général et concernant toutes les activités du C.A.E.M. Conformément au point 2, « les États membres du C.A.E.M. organiseront et coordonneront leurs activités en vue de la réalisation du Programme complexe, avant tout dans le cadre du Conseil d'Assistance Économique Mutuelle ». Il est évident que ce passage concerne également la coordination de la politique économique extérieure.

Il faut cependant donner raison à Lebahn lorsqu'il constate qu'il serait difficile de parler en l'occurrence d'une compétence propre du C.A.E.M. en tant que tel, donc d'une compétence qu'il posséderait *ipso iure*. De même, il est impossible de prétendre que le C.A.E.M. dispose

²⁴ A. LEBAHN, *Sozialistische Wirtschaftsintegration und Ost-West-Handel im sowjetischen internationalen Recht*, Berlin (Ouest) 1976, p. 385.

²⁵ *Ibid.*, p. 385.

d'une compétence expresse en matière de politique commerciale commune, bien que certains auteurs occidentaux soient de cet avis^M.

A la lumière des dispositions statutaires et des passages respectifs du Programme complexe, il apparaît néanmoins que le C.A.E.M. peut représenter à l'extérieur ses États membres en tant que coordonnateur de leurs politiques économiques extérieures et que, de ce fait, il est compétent pour conclure des accords internationaux appropriés, y compris ceux avec la C.E.E. L'exécution de cette fonction suppose bien sûr le consentement exprès des États membres du C.A.E.M. qui autoriseraient ainsi l'organisation à les représenter et à réglementer certains problèmes de leurs politiques économiques extérieures.

Ayant été dûment mandaté par ses membres, le C.A.E.M. pourrait donc les représenter dans la conclusion des traités, ceci dans le cadre de sa compétence générale prévue à l'article III, point 2b des statuts du C.A.E.M. Un accord international hypothétique, bien que conclu formellement par le C.A.E.M. en tant que tel, contiendrait des droits et des obligations non seulement pour l'organisation même, mais également — et ceci reste essentiel — pour ses États membres. Cet accord hypothétique pourrait également comporter une clause supplémentaire relative à l'acceptation de l'accord par chacun des membres, mettant ainsi en relief le caractère obligatoire de ses dispositions²⁷.

Au cours des pourparlers officiels, en mai 1978, entre les représentants des deux organisations, on a clairement laissé entendre du côté de la C.E.E. que celle-ci n'était intéressée que par un accord entre le C.A.E.M. et la C.E.E.; d'autre part, cet accord devrait se limiter uniquement à certains domaines (échanges d'informations et de prévisions économiques, échange de données statistiques, protection de l'environnement, standardisations, etc.). Selon la C.E.E., cet accord devrait être complété par plusieurs accords ultérieurs de caractère bilatéral conclus entre la C.E.E. et chacun des États membres du C.A.E.M. et ce n'est que dans ces accords ultérieurs que seraient régis les problèmes de commerce extérieur²⁸.

Comme l'a souligné le vice-président de la Commission, M. W. Ha-

²⁶ Cf. J. M. VISÉE, *L'union douanière élargie et les États tiers*, « Cahiers de droit européen », 1974, n° 5, pp. 573-574; A. USCHAKOV, *Probleme der Wirtschaftsintegration im RGW*, « Aussenpolitik », 1972, K° 3, p. 157.

²⁷ Cf. W. SEIFFERT, *Rechtsfragen der Aussenbeziehungen des Rates für Gegenseitige Wirtschaftshilfe*, « Beiträge... », Bd 3, H. 3, p. 59; F. KOZMA, *op. cit.*, p. 265; cf. également les interventions de A. BYKOV et H. DE FIUMEL au cours de la conférence de Louvain (octobre 1975), dans: *L'intégration en Europe...*, p. 270 et 280.

²⁸ Cf. Europe, du 13 juillet 1978, N° 1014, p. 4.

îerkampf, au cours de ses entretiens, en mai 1978, avec M. Fadeev, secrétaire du C.A.E.M., il serait parfaitement inutile si les dispositions relatives au commerce figuraient dans l'accord C.A.E.M.—C.E.E., car, selon lui, « le COMECON en tant que tel n'est pas en mesure de donner un contenu concret à des dispositions en cette matière » (p. ex. si la clause de la nation la plus favorisée figurait dans l'accord, elle n'aurait, selon cette opinion, aucun effet juridique)²⁹.

Cette attitude de la C.E.E. ne prend pas en considération tous les éléments présentés dans cet article. Même si la Communauté maintient sa thèse selon laquelle les questions relatives à la politique commerciale relèvent toujours de la compétence des États membres³⁰, elle ne peut pas nier que les pays membres du C.A.E.M. sont compétents pour soumettre ce domaine à une réglementation commune par l'intermédiaire de leur organisation. Nier cette éventualité reviendrait à contester le droit souverain de chaque État de réglementer certains aspects de ses relations économiques extérieures, individuellement ou en commun avec d'autres États, conformément à la volonté concordante de chacun de ces États. Ainsi, la persistance de la C.E.E. dans sa formule (accord C.E.E.—C.A.E.M., limité aux formes de coopération assez vagues) ne paraît pas bien fondée.

A la lumière de notre analyse, le C.A.E.M. en tant que tel est compétent pour conclure avec la C.E.E. un accord international régissant certains aspects de la politique commerciale dans les échanges entre la C.E.E. en tant que telle et les États membres du C.A.E.M. Rappelons en même temps que le projet d'accord-cadre, présenté par le C.A.E.M., prévoit non seulement un accord entre les deux organisations, mais également entre leurs États membres respectifs. Il s'agit donc d'un accord « mixte » dont les parties seraient en même temps les deux organisations et leurs États membres³¹. En présentant un tel projet d'accord, le C.A.E.M. a renoncé à la conception d'un accord conclu uniquement entre les deux organisations au nom de leurs membres, bien que cette éventualité — comme nous venons de le démontrer — fût également possible et justifiée.

Le projet d'accord mixte présenté par le C.A.E.M. devrait régir les droits et obligations réciproques des deux organisations en tant que telles et de leurs États membres dans les domaines relevant de la compétence de ces derniers. Il est hors de doute que les dispositions d'un tel accord doivent être suffisamment précises pour pouvoir déter-

²⁹ Cf. Europe, du 1^{er} juin 1978, N° 2459 (Nouvelle série), p. 5.

³⁰ *Ibid.*

³¹ Comme p. ex. l'accord de coopération entre le C.A.E.M. et la Finlande du 16 mai 1975.

miner s'il s'agit d'une obligation à la charge des organisations, des États (si oui, lesquels) ou des organisations et des États membres. Le projet du C.A.E.M. est conçu de cette manière.

En présentant son projet d'accord, le C.A.E.M. était persuadé que ce genre d'accords mixtes (conclus par la C.E.E. et ses États membres) était familier aux autorités de la C.E.E. (p. ex. les conventions d'association). Cette forme a, semble-t-il, été choisie aussi en prévision de doutes, qui pourraient apparaître du côté de la C.E.E., concernant la construction juridique dans laquelle le C.A.E.M., en tant que tel, accepterait des obligations au nom de ses États membres.

Vienna Convention on Succession of States in Respect of Treaties : a General Analysis

by **RENATA SZAFARZ**

It was August 23, 1978 that the consecutive codification conference closed its session in Vienna. A total of 100 states participated in its deliberations. These resulted in the almost unanimous adoption of the Vienna Convention on Succession of States in Respect of Treaties.¹ 78 states voted in favour, none against and only two — France and Switzerland — abstained.

The 39-article long draft prepared by the International Law Commission of the United Nations served as a basis of discussion.² In the course of the conference numerous amendments to the draft were proposed, but only a few of them were accepted. This may be taken as proof of the high standard of work done by the ILC.

The Vienna Convention on Succession of States in respect of Treaties contains 50 Articles (plus an Annex) divided into seven parts:

- Part I — General provisions (Arts 1—14);
- Part II — Succession in respect of part of territory (Article 15);
- Part III — Newly independent States (Arts 16—30);
- Part IV — Uniting and separation of States (Arts 31—38);
- Part V — Miscellaneous provisions (Arts 39—40);
- Part VI — Settlement of disputes (Arts 41—45);
- Part VII — Final provisions (Arts 46—50).

In the preamble to the Convention it is expressly stated that the provisions of this Convention constitute codification and progressive development of international law.

1. The general provisions contain, in the first place, basic definitions of the concepts used and also define the scope of the Convention. The definition of "succession of States" has been maintained in the wording of the ILC. Article 2, paragraph 1(b) states that "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory". Thus, according to the provisions of the Convention the "succession of States" is tantamount to

¹ Text of the Convention, see Doc. A/CONF. 80/31.

² Final Draft Articles on Succession of States in Respect of Treaties, Doc.

the replacement of the one State by another; on the other hand, the succession in respect of treaties is something which may or may not result from the succession of States. Such a concept of succession as an institution of international law has met with the full support of the States participating in the Conference.⁸ In the Convention the "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States" (Art. 2, para. 1/c), whereas the "successor State" means the State which has replaced another State on the occurrence of a succession of States" (Art. 2, para. 1/d).

Following the pattern set by the Vienna Convention on the Law of Treaties of 1969, the Convention on Succession of States applies, in principle, to treaties concluded between States in a written form (Arts 1 and 3). The priority of the appropriate rules of international organizations in the case of constituent instruments of international organizations and treaties adopted within an international organization has also been well established (Art. 4).

The provisions of the Convention apply only to legal cases of succession of States, i.e. to cases "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations" (rt. 6). The amendment submitted by Australia, which would give States indirectly the right to apply the provisions of the Convention also to illegal cases of succession of States⁴ (for example, as a result of the use of force) failed to gain the

GAOR, Twenty-ninth Session, Supplement No 10/A/9610/Rev.1/. For an analysis of the draft see: G. CAGGIANO, *The ILC Draft on Succession of States in Respect of Treaties; a Critical Appraisal*, "Italian Yearbook of International Law," vol. 1, 1975, pp. 69—98; H. G. SCHERMERS, *Succession of States and International Organizations*, "Netherlands Yearbook of International Law", vol. 6, 1975 pp. 103—119; J. B. STEWART, *International Law Commission, 26th Session; Draft Articles on the Succession of States in Respect of Treaties; the Pragmatic Development of International Law*, "Harvard International Law Journal," 1975, No. 3, pp. 638—647; R. SZAFARZ, *Sukcesja państw a traktaty w projekcie kodyfikacyjnym ONZ [Succession of States and Treaties in the United Nations Codification Draft]*, "Państwo i Prawo," 1976, No. 12 pp. 96—108.

¹ The only amendment presented to that provision jointly by France and Switzerland proposed to replace the word "responsibility" by the word "competence"—Doc. A/CONF.80/C.1/L.41. The proposed amendment was however opposed by the Third World States.

* Doc. A/CONF.80/C.1/L.3. It stated that: "Nothing in the present Convention shall be interpreted as obliging a State party to the present Convention to apply its provisions to the effects of events which have occurred contrary to international law including the principles of international law embodied in the Charter of the United Nations".

support of the States participating in the conference and was withdrawn. In such situations the provisions of the responsibility of States will apply. It goes without saying, that there are no legal obstacles which could prevent these provisions from being in some questions identical with those contained in the Convention.

Among the provisions dealing with the scope of application of the Convention the most controversial one was the provision concerning retroactivity. Article 7 of the ILC draft stipulated that the provisions of the convention, as such, will apply to such cases of succession of States which occurred after its entry into force "except as may be otherwise agreed". This meant that in the case when a successor State created after the entry into force of the convention adhered to the convention [I do not refer to the problem of possible succession in respect of this very Convention], its provisions applied automatically to the specific case of succession of States. It would therefore be always a case of retroactive application, because the moment of succession of States will necessarily always precede the moment of accession to the Convention. Consequently, the draft itself provided to a limited extent for the possibility of retroactive application of the provisions.

Attempts were made at the Vienna Conference to extend the retroactive application of the Convention also with respect of cases of succession of States which occurred before its entry into force.

The amendment proposed by Cuba and Somalia to Article 7 aimed at extending the retroactive application of the convention in respect of States created as a result of the decolonization process or national liberation struggle.⁵ Further even in the direction of retroactive application went the amendment by the USA delegation which provided that the convention would apply to all cases of succession of States which occurred before its entry into force in respect of all succession matters which had not been definitely solved.⁸ This amendment was opposed by many delegations, including that of the USSR, which pointed out that the provisions of the convention could not be applied to cases of succession of States which occurred in the remote past, under the rule of entirely different principles of international law; at present the legality of many former cases of succession of States could easily be questioned.⁷

⁶ Doc. A/CONF.80/C.1/L.10/Rev. 2.

⁸ Doc. A/CONF.80/C.1/L.46.

⁷ See statement by Prof. N. A. USHAKOV, *United Nations Conference on Succession of States in Respect of Treaties, First Session, Vienna, 4 April—6 May 1977*, "Official Records," vol. 1, p. 85, para 30; see also statements in the Informal Consultation Group.

The whole problem was referred for consideration to the Informal Consultation Group which worked out a compromise formula along the lines of the British proposal.⁸ Thus, the actual Article 7 of the Convention repeats in paragraph 1 the wording of Article 7 of the ILC draft, whereas paragraph 2 states that:

“A successor State may, at the time of expressing its consent to be bound by the present Convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or State Party to the Convention which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the Convention as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the Convention shall apply to the effects of the succession of States as from the date of that succession of States.”

Paragraph 3 provides for the possibility of temporary retroactive application of the Convention even before its entry into force, on similar principles as those mentioned in paragraph 2.

Thus, the provisions of the Convention can be, to a certain limited extent, applied retroactively. Such a possibility has been created in the interests of the newly independent States which emerged as a result of the decolonization process. These States wanted, whenever possible, to obtain the possibility of applying the provisions of the Convention in respect of their own “succession of States”. And although the solution adopted finally was not without shortcomings (a multilateral convention will always be, in practice, a mosaic a various bilateral agreements), it represented the only generally acceptable one. The strict application of the principle of *lex retro non agit* in the case of the Convention could not enter into account, for it would have made the convention meaningless: no successor would have been able to apply its provisions to its own succession of States.

It must also be added that the practical application of the Convention will depend on whether and how many successor States will consent to be bound by its provisions. One could well imagine an extreme case whereby, in spite of the formal entry into force of the Convention it would not be applied at all as such. Such a situation would occur if and when there would be no single successor State among those States which have deposited their ratification instruments or declared their consent to be bound by the provisions of the Convention.

2. The subsequent general provisions of the Convention define the

⁸ Doc. A/CONF.80/C.1/L.9

legal meaning of devolution agreements, of unilateral declarations by a successor State and of the treaty clauses providing for the participation of a successor State in a treaty (Respectively Arts 8, 9 and 10). While rejecting the proposed amendments the Vienna Conference accepted in full the opinions of the ILC on the matter: these acts have, in principle, the value of a declaration of intention, of a declaration of policy (the direct legal effects of devolution agreements are limited to the relations between the successor and predecessor). Article 8 of the Convention states that:

"1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

"2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question, are governed by the present Convention".

Article 9 establishes a similar rule with regard to unilateral declarations of successor States. In turn, Article 10 stipulates that appropriate treaty clauses are not sufficient to make a successor State a party to a treaty and requires in each case its consent.

In the light of the provisions of the Convention, devolution agreements and unilateral declarations express only a preliminary general willingness on the part of the successor States to accept the treaties concluded by the predecessor States. The failure to conclude a devolution agreement or the absence of a unilateral declaration in no way affects the legal position of the successor. This solution takes into account the fact, that the acts in question are *res inter alios acta* for the other parties of the treaties concerned (devolution agreements) or for the successor States (treaty clauses providing for their participation). Furthermore, when accepting the above mentioned solution one took into account the criticism voiced in doctrine, in the ILC and also in the course of the Vienna Conference, to the effect that devolution agreements have been sometimes forced upon the successor States as part of the price paid for independence. This raised the question of their validity. And it is not excluded that for this reason the former statements of intention have not been followed by practical action. For example, the succession practice of newly independent States which concluded devolution agreements has not differed in substance from

the practice of States which failed to conclude such agreements.⁸ All of them selected the treaties which they wanted to accept (Burma, Indonesia, Jordan, Sri Lanka, Cyprus, Nigeria, Singapore and other States); sometimes they preferred to apply the procedure of accession instead of the procedure of succession (Burma, Indonesia, Syria, Jordan, Sri Lanka, Malaysia, Cambodia, Laos and other States).

As far as unilateral declarations were concerned, as a rule States did not stick to the terms fixed in them for the review of treaties. What more, both the wording of the unilateral declarations and subsequent practice showed that the declarations as such had no decisive effect on the fate of any particular treaty.

Furthermore, by attaching greater significance to devolution agreements and unilateral declarations than is the case in the Convention, one would, as a matter of fact, on the one hand, undermine the principle of *ipso jure* continuity of treaties as applied in the context of uniting and separation of States, and on the other hand, restrict the action of the so-called clean slate principle applicable in case of newly independent States. An attempt to achieve the latter of the above mentioned aims was made at the Vienna Conference by the United Kingdom and Malaysia, i.e. by States which in their quality of predecessor States concluded previously devolution agreements (Malaysia with Singapore). Their desire to see the legal status of devolution agreements enhanced seems therefore to be quite understandable.

The amendment by Malaysia aimed directly at giving the devolution agreements the meaning of an offer directed at the other parties to the treaties in question and proposed to add the following words to the end of paragraph 1 of Article 8:

"...unless the other parties to a particular treaty agree to accept the obligations or rights of the predecessor State as the obligations or rights of the successor State".¹⁰

The same aim, but with the aid of a much more moderate and adroit formula, was pursued by the delegation of the United Kingdom. Its amendment consisted of adding the following words to the end of paragraph 2 of Article 8

⁸ This is also noted by M. G. MARCOFF, *Accession a l'Independence et succession d'Etats aux traites internationaux*, Fribourg 1969, p. 327; the same is pointed out, indirectly, by N. V. ZAHAROVA, *Pravoprejemstvo gosudarstv*, Moskva 1973, p. 91.

¹⁰ Doc. A/CONF.80/C.1/L.15; in its original version the draft amendment read as follows: "unless the other States parties to those treaties agree otherwise".

“...but without prejudice to any relevant rules of international law concerning rights or obligations arising for a third State from a treaty.”¹¹

In the course of the debate¹² the British delegation maintained that its amendment was of a drafting nature only. Some delegations were prepared to support that view, some other however pointed out, and not without justification, that it also affected the substance of the provision contained in Article 8. In fact, the amendment implied the possibility to treat also devolution clauses as treaty clauses concerning rights and obligations of third States. Moreover, it seemed also to imply the priority of the general provisions of the law of treaties concerning treaties and third States, over the provisions of the Convention on the Succession of States. Consequently, when faced with a devolution agreement a third State party to a bilateral treaty concluded with the predecessor States could consider that what is needed is only its written consent and the bilateral treaty will then be considered as succeeded to by the successor State. In other words, the UK amendment seemed to suggest that, under specific circumstances, two elements would suffice to create the legal nexus between the successor State and the other State, namely a devolution agreement plus the consent of that State. However, pursuant to the Convention what is required is in each case a separate expression of consent by both the Successor State and the other State party, and this irrespective of the existence or contents of the devolution agreement (Art. 24).

The UK amendment could have been considered as a drafting amendment only if it would have indicated clearly that the provisions of the law of treaties concerning third States applied to other provisions of devolution agreements, apart from the devolution clauses themselves (as well known, in practice treaties containing devolution clauses were dealing sometimes with other matters also). Such an amendment might have been worded in the following manner: “[...]but in all other respects without prejudice to any relevant rules!...”

Both amendments, the one presented by the delegation of the United Kingdom and the one proposed by the delegation of Malaysia were rejected in a vote in the Committee of the Whole. As a result of such a development the UK delegation withdrew its second amendment of similar contents referring to Article 9 on unilateral declarations.¹⁸

¹¹ Doc. A/CONF.80/C.1/L.11.

¹² *United Nations Conference...*, pp. 88—99.

¹³ Doc. A/CONF.80/C.1/L.12. This amendment was to the following effect: Add the following words at the end of para. 2: “...but without prejudice to any relevant rules of international law concerning rights or obligations arising for a third State from such unilateral declaration.”

Taking into consideration the conclusions which can be drawn from the practice of States as well as the opinions of legal doctrine (which unanimously stresses the insufficient nature of the discussed acts, as such, to assign treaty rights and obligations of the predecessor State to the successor State)¹⁴ it can be asserted that as far as the description of the legal significance of these acts is concerned the Vienna Conference and the resulting Convention played a role "consolidating" and "crystallizing" emergent customary law in the sense given to it in the judgement of the International Court of Justice in North Sea Continental Shelf cases.¹⁵

Although the mentioned rules are not of the nature of *jus cogens*, it seems that reservations which would modify Articles 8 and 9 and provide for the priority of devolution agreements, unilateral declarations and other acts could not be accepted. In fact, such reservations would exclude the application of the Convention and would obviously be incompatible with its object and purpose. Besides, for the States formulating such reservations the participation in the Convention would be devoid of any sense. It can therefore be assumed that the very few States which disagree with the provisions of Articles 8 and 9 will rather remain outside the Convention than adhere to it with the above mentioned reservations.

3. The last group of the general provisions deals with the succession of treaty provisions concerning boundaries and other territorial questions. Article 11 of the ILC draft stipulates that:

"A succession of States does not as such: affect: a) a boundary established by a treaty; or b) obligations and rights established by a treaty and relating to the regime of a boundary."

The comments presented by governments to the ILC draft and, in particular, the debate in the Sixth Committee of the General Assembly of the United Nations revealed that this provision, which represents merely a restatement of a binding customary rule, enjoys the support of many States, including — of course — Poland. Its main opponents — Afghanistan and Somalia — were not formally asking for its removal but were only trying to dilute its meaning. Thus, the delegation

¹⁴ Sometimes attempts were made to present devolution agreements as an offer addressed to the other States parties — see, for example the concept of "tacit novation" in *Statement of the Committee on State Succession*, in: *ILA, Report of Helsinki Conference 1966*, p. 578, para. 4.

¹⁵ ICJ, *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, pp. 38—41.

of Afghanistan proposed to merge this provision with Article 12 which deals with other territorial regimes.¹⁶ In this way, part of the criticism addressed to the latter provisions would naturally extend over the provision concerning the regulation by treaty of boundary questions. The delegation of Afghanistan withdrew however its proposal because of lack of support by other delegations. The overwhelming majority of delegations, including the Polish delegations, was in favour of maintaining Article 11 in the wording of the ILC draft.¹⁷ The debate on this question was very heated and sometimes quite acrimonious. It opposed, in particular, States with unsettled border questions, such as Somalia and Ethiopia. In the Committee of the Whole 55 delegations voted in favour of maintaining the wording of Article 11 as proposed by the ILC, with no delegation voting against and 5 delegations (Afghanistan, Qatar, Swaziland, the Democratic Republic of Yemen and Morocco) abstaining. At the plenary meeting of the Conference only Somalia cast a dissenting vote. Thus, the principle whereby treaty regulations concerning boundaries are binding upon the successor State, and this in all cases of succession of States, has in fact obtained the almost universal support of the international community. This principle protects the territorial integrity of the States neighbouring a successor State, while at the same time protecting the territorial integrity of the successor State itself.

This virtually universal acceptance of Article 11 proves (as does the well known rule contained in Art., 62 para. 2(a) of the Vienna Convention on the Law of Treaties) the recognition of the special status of boundary treaties in international law. This special status reflects their specific nature and the special legal effects which derive from them.¹⁸ As the International Court of Justice put it in the Temple of Preah Vihear case, one of the primary objects of any treaty establishing a frontier between States is to achieve "stability and finality."¹⁹

Much greater difficulties have arisen at the Conference in connection with Article 12 of the ILC draft concerning other territorial

¹⁶ Doc. A/CONF.80/C.1/L.24.

¹⁷ See discussion on the subject — United Nations Conference, pp. 113—129. In the name of Poland a statement was delivered by M. PASZKOWSKI, *ibid.*, p. 117—118.

¹⁸ For a broader discussion of the same subject see statement for the delegate of Poland, *United Nations Conference...* p. 117, para. 39. In Polish literature on the subject of succession in respect of boundary treaties see: J. TYKANOWSKI, *Sukcesja państw w odniesieniu do umów granicznych* (*Succession of States in Respect of Boundary Treaties*), "Sprawy Międzynarodowe," 1974, No. 8—9, pp. 91—105.

¹⁹ ICJ, *Reports*, 1962, p. 34.

regimes. The ILC draft intended to establish a rule whereby a succession of States would not nullify treaty provisions concerning territorial regulations established in the interests of a neighbouring territory or in the interests of the international community as a whole. This may apply to provisions which deal with the use of a territory determined in treaties, for example, the passage through straits, the demilitarization of territories, transit, navigation in international rivers. The developing countries saw in the general formulae of the provision as proposed in the draft a certain danger to their interests. That explained why, at the Conference, the delegations of Cuba, Mexico and Argentina submitted a proposal which aimed at preventing the provision, which covered so-called dispositive and localized treaties from perpetuating the status of military bases or from affecting adversely the sovereignty of every people and every State over its natural wealth and resources.²⁰ It was found necessary to refer the article in question together with the proposed amendments to the Informal Consultation Group which, after lengthy discussions worked out a compromise solution. A new paragraph 3 was added to Article 12 and it reads as follows:

"The provisions of the present Article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates."

Furthermore a new Article 13 was drafted which stated that:

"Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its Natural wealth and resources."

The Western powers abstained when Article 13 was submitted to a vote and only the United States voted against.²¹

In fact, the Conference reaffirmed the special status, in the context of succession of States, of dispositive or localized treaties, traditionally dealt with separately in doctrine as "the hard core of the ensemble of transmissible treaties."²² At the same time, the Conference expressed the opinion that in the case of treaties concerning the establishment of military bases it was their political, "personal"²³ nature which had to be

²⁰ Doc. A/CONF.80/C.1/L.20, Doc. A/CONF.80/C.1/L.19, and Doc. A/CONF.80/C.1/L.27.

²¹ In the opinion of the USA delegation the adopted formula failed to take sufficiently into account the interests of the exploiting States. This delegation favoured a wording which would speak of the sovereignty of each nation and each State over its natural wealth and resources "according to international law".

²² D. P. O'CONNELL, *State Succession in Municipal Law and International Law*, Cambridge 1967, vol. 2 — *International Relations*, p. 232.

considered in the first place. The fact that they were also localized treaties was of secondary importance. I, too, am convinced that Article 12 as drafted by the ILC could not be interpreted as covering military bases.²³ From that point of view, the new paragraph 3 made explicit what was already implicit in this Article.

Taking into consideration the general trend prevailing in the practice of States as well as the predominant opinion of legal doctrine, one is entitled to formulate the thesis, that one of the side effects of the Vienna Conference and of the Convention itself is the consolidation of the customary rule of international law providing for the survival of certain territorial regimes established by treaties, in spite of the occurrence of succession of States.

4. The subsequent provisions of the Convention deal with the succession of treaties in various specific cases of succession of States. In the first place the Convention regulated the "succession in respect of part of territory," i.e. the situation in which both the predecessor State and the successor State maintained their continuity and identity, and in which only part of territory passed from the sovereignty of one State to the sovereignty of the other State. In accordance with the moving treaty frontiers rule generally recognized in international law, Article 15 of the Convention stipulates that whenever such a situation arises treaties of the predecessor State cease to be in force in respect to the territory in question (p. a) while treaties of the successor State enter into force in respect of that territory

"unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation" (p. b).

This would represent such a specific case of succession of States, which could not result in the successor State taking over the treaties previously in force in the transferred territory.

On this matter the Conference shared the view of the ILC and accepted the proposed draft. At the same time, the Conference approved tacitly the statement by the representative of the Holy See that the provisions of Article 15 cannot be applied to concordats, because of their specific nature.²⁴

²³ A different opinion is held by G. CAGGIANO, *op. cit.*, p. 81.

²⁴ In his statement the delegate of the Holy See stated that: "the concordatory regime applicable in part of a territory before the transfer of that territory could not cease to apply to it, just as the concordatory regime existing in the successor State could not be extended to the transferred part of territory". He

5. The next part of the Convention is devoted to newly independent States. Pursuant to Article 2, paragraph 1(f) of the Convention a

"newly independent State" means a successor State the territory of which²⁵ immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible."

This definition covers all types of dependent territories encountered over the centuries, i.e. colonies, trust territories, mandates, protectorates, etc. The Conference rejected a proposal by France and Switzerland airried at extending the definition so as to cover also cases of secession.²⁵ Thus, the Conference maintained the separate regulation of the problem of succession of treaties by States established as a result of the decolonization process.

Article 16 which is crucial for that part of the Convention follows the draft of the ILC and states that:

"A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."

This provision reflects the principle of the so-called clean slate which, in the opinion of the ILC and also of the Vienna Conference, expresses best the essence of the practice of the post-colonial States. It was also thought that the principle of self-determination of nations and the principle of sovereign equality of States called for such a treatment of the problem of succession of treaties in the case of newly independent States.

It must, however, be added that the term "clean slate", although widely used in this context, is lacking in precision. As a matter of fact, the "slate" is not entirely "clean"²⁶ because as Article 16 suggests and

also quoted practical example and referred to Article 3 of the Convention, which excluded *expressis verbis* the automatic application of the provisions of the Convention to treaties concluded between States and other subjects of international law, as representing the legal foundation of his stand. See, *United Nations Conference...*, p. 153, paras. 15 and 16.

²⁵ Doc. A/CONF.80/C.1/L.41.

²⁶ This is also noted by J. B. Stewart. In connection with the provisions which grant the newly independent State the right, if it so wishes, to participate in a treaty on its own behalf as a separate contracting party, he states that: "These provisions are, in a sense, a deviation from a strict clean slate approach since they do presuppose some legal relationships between a new State and its predecessor"; *op. cit.*, p. 639.

other provisions confirm the newly independent States inherit automatically the right to become party (with retroactive effect) of treaties which were in force in respect of the territory in question. This represents a special legal title which opens to the newly independent States such treaties which, under normal procedure, would be closed to them (as to the way in which this right can be exercised, see subsequent paragraphs). Article 16 frees only the newly independent States of the obligation to maintain in force the treaties of the predecessor States.

A corollary of the above mentioned right inherited automatically by the newly independent States is the obligation which lies on the remaining parties to multilateral treaties not to take any action which could impede the resumption of the application of such treaties in their mutual relations with the newly independent States. It goes without saying, that the termination of a treaty is not contrary to this obligation, because the virtual possibility of succession in respect of a treaty does not change the fact that the actual disponents of the treaty are its parties.

In the light of the above consideration it has to be recognized that within the framework of the presented regulation the two essential and necessary elements of the institution of succession, namely the elements of continuity and automatism²⁷ are also present, but to an extent reduced to a minimum as a result of the action of the principle of self-determination of nations and of the principle of sovereign equality of States.

No amendment has been presented to that provision. All those taking part in the debate gave it their support. Among others, the delegate of Italy stated that the provision "constituted the codification, in a masterly text, of a very old principle of international law."²⁸ The provision was accepted without a vote. The Conference was, however, faced with the problem of exceptions to that rule.

It must be recalled that a tendency manifested itself at the Conference to exclude from the action of the clean slate principle treaties of a universal character and those open to universal participation. In respect of such treaties it was proposed to apply the principle of automatic continuity *ipso jure*, with the right of denunciation. A proposal to that effect was presented by the delegations of the Netherlands and the USSR. The delegation of the Netherlands presented it in the form of an amendment to Article 16 of the ILC draft which dealt

²⁷ In general, on the subject of essential elements of the institution of succession see M. G. MARCOFF, *op. cit.*, p. 275.

²⁸ *United Nations Conference...*, p. 161, para 52.

with the right of unilateral notification of succession in respect of multilateral treaties, while the delegation of the USSR proposed to add a new Article 16 bis.

The amendment of the delegation of the Netherlands stated that:

“A itewly independent State shall be presumed to be desirous of being a party to any multilateral treaty open to universal participation which was in force in respect of the territory to which the succession of States relates [...]”

and later provided for the right to denounce such a treaty provided that the newly independent State did not invoke earlier the treaty and did not take advantage of the benefits deriving therefrom.²⁹ The amendment of the Netherlands spoke only of a presumption of continuity and was presented as remaining in accord with the principle of clean slate. This would be the case, if the denunciation of treaties foreseen in this proposal had always had retroactive effects and therefore all treaties concerned would have always been considered as terminated in respect of the newly independent States from the date of succession of States. Actually, the amendment of the delegation of the Netherlands stipulated that such effects can have only such acts of denunciation which have been deposited within 12 months following the date of succession of States. All acts deposited later would be effective *ex nunc*. Considering that in practice even a period of 5 years would have been insufficient to proceed with a review of all treaties, the 12 months period had to be viewed as totally unrealistic, leaving only the second alternative. Consequently, in the majority of cases the treaties would have been considered as automatically succeeded and fully binding in the period between the date of succession of States and the date of denunciation. And this militates in favour of interpreting the amendment of the Netherlands as an exception to the rule of clean slate.

In turn, the proposal submitted by the USSR delegation spoke of automatic provisional continuity of treaties of a universal character till the moment when the newly independent State will either denounce them or notify its succession and become a party to these treaties by its own right.³⁰ According to the USSR amendment a denunciation would always be effective *ex nunc*, which means that in this case also we are dealing with an exception from the principle of clean slate.

Joined to these proposed amendments were definitions of a treaty open to universal participation (amendment of the delegation of the

²⁹ Doc. A/CONF.80/C.1/L.35.

³⁰ Doc. A/CONF.80/C.1/L.22.

Netherlands)⁸¹ and of a treaty of a universal character (USSR amendment).⁸²

The two above mentioned proposals were based, among other things, on the assumption that the automatic application of such treaties from the moment of the establishment of the newly independent States will be profitable for these States and will suit the interests of the international community as a whole. It was also considered that there was no risk involved in the proposed solution, since it concerned treaties signed by States representing all political and social systems. However, because of the fact that in the practice of the post-colonial States the object of succession among the multilateral treaties were exclusively those which were dealt with in the proposed amendments, it was clear that they constituted an important departure from the principle of clean slate. This was pointed out openly by the representative of Norway, who stated that he came to Vienna with the intention to support such proposals, but after studying the whole problem had arrived to the conclusion that an explicit formulation of the principle of clean slate in the original Article 15 "might become only an exercise in empty words".⁸³ Also the delegate of Sweden expressed his reservations in spite of the fact that the Swedish government in their early comments to the draft of the ILC had been the only one to suggest that the principle of clean slate be replaced by the principle of automatic continuity.⁸⁴ In the course of the discussion on this question three positions emerged: the socialist States together with some other States supported the USSR amendment, some Western countries accompanied by some other States expressed their support for the amendment by the Netherlands, while the majority of the delegations of the Third World opposed both amendments. The lack of support prompted the delegation of the Netherlands to withdraw its amendment. This was followed by the withdrawal of the USSR amendment. Thus the Conference decided to maintain the solution proposed in the ILC draft, namely the opting-in formula of the optional succession.⁸⁵

⁸¹ "Multilateral treaty open to universal participation means an international agreement open to participation by at least all States Members of the United Nations".

⁸² "Treaty of a universal character means a multilateral treaty which deals with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole".

⁸³ *United Nations Conference...*, p. 173, para. 28.

⁸⁴ See Doc. A/CN.4/275, pp. 19—22.

⁸⁵ The merits and shortcomings of the two formulae have been discussed by J. MALLAMUD, *Optional Succession to Treaties by Newly Independent States*,

At this juncture, the extensive discussion carried out in legal doctrine on the question of interpretation of the hitherto existing succession practice of the post-colonial States and on the general conclusions to be drawn there from was finally closed. It seems that the opinions presented at the Vienna Conference by these States can be treated as the authentic interpretation of the past actions in this respect.

Pursuant to the provisions of the Convention the succession of treaties in respect of newly independent States is governed by the principle of clean slate (Article 16) with the right of unilateral notification of succession in respect of multilateral treaties (Art. 17, paras 1 and 2, Art. 17, paras 1—3) and the possibility of novation by way of agreement reached by the interested States concerning bilateral treaties (Art. 24) and some multilateral treaties with a limited number of participating States (Art. 17, para. 3 and Art. 18, para. 4). Furthermore, Article 19 of the Convention states that the newly independent State has the right to ratify, to accept or otherwise to approve a treaty which has been signed earlier by the predecessor State.

It goes without saying that rights and obligations deriving from treaties regulating boundaries or other territorial regimes (discussed above) are not subject to the clean slate rule. The newly independent States, the same at other successor States, are bound to carry them automatically, *ipso jure*.

In the light of the hitherto prevailing practice of the newly independent States it can be concluded that the Convention rule, which provides for their participation in multilateral treaties as a result of a unilateral notification of succession, confirms only the existing law on the subject.⁸⁸ The consequences of notification of succession in respect of a multilateral treaty are dealt with in Article 23 of the Convention which states that:

“1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under Article 17 or Article 18, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

“American Journal of International Law,” 1969, No. 4, p. 782 ff. J. Mallamud is in favour of the opting-in formula. The opting out formula was however adopted in the well-known resolution at the ILA Conference in Buenos Aires in 1968 (ILA, *Report of the Fifth-third Conference, Buenos Aires, 1968*, London 1968, pp. xiii-xv).

⁸⁹ Also G. CAGGIANO, *op. cit.*, p. 77. Generally, on treaties as evidence of customary law—see R. R. BAXTER, *Treaties and Custom*, “*Recueil des Cours de l'Académie de Droit International de la Haye*,” vol. 2, 1970, (t. 129), p. 31 ff

"2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except in so far as that treaty may be applied provisionally in accordance with Article 27 or as may be otherwise agreed."

Pursuant to paragraph 1 of that Article the notification of succession in respect of a multilateral treaty has retroactive effects. However, at the same time the Vienna Conference following in the ILC's wake adopted a solution whereby the application of the treaty is suspended in the period between the moment of succession of States and the moment of notification of succession.⁸⁷ It results therefrom (as well as in the light of Article 78 of the Vienna Convention on the Law of Treaties which defines the consequences of treaty suspension) that during that period the other parties to the multilateral treaties are bound only to refrain from acts tending to obstruct the resumption of the operation of the treaty. As mentioned above, this obligation lasts as long as the treaty itself remains in force. The termination of the treaty by its parties or its revision does not violate this obligation. As also indicated earlier, the obligation to take into consideration the possible resumption of the application of the treaties in respect of the territories of the newly independent States is only a corollary of the automatically inherited right of these States to participate in the treaties of the predecessor States.

The application of the institution of suspension of treaties in this context pursues the objective of protecting the interests of third States which remain in the dark as to whether and when the treaty succession will take place. The proposal submitted at the earlier stages of the codification process to the effect that in the interest of the security of legal intercourse a strict term be set for the notification of succession has not been introduced at the Vienna Conference.³⁸

⁸⁷ The adoption of this solution has been inspired by the Polish comments — see Doc. A/CN.4/276, pp. 11—12 and by the comments of F. VALLAT, Doc. A/CN.4/278/add.2, p. 43, para. 239. In the light of Article 73 of the Vienna Convention on the Law of Treaties (which stipulates that its provisions "shall not prejudice any question that may arise in regard of a treaty from a succession of States"), the adoption of the suspension of the application of a treaty in the Convention under discussion does not violate the general rule embodied in Article 42, para. 2 of the Convention on the Law of Treaties. (Pursuant to that general rule the suspension of the application of a treaty can take place only on the basis of the provisions of that treaty or the provisions of that Convention).

⁸⁸ It happens in practice that a newly independent State notifies its succession in respect to treaties after a period of 20 or more years. The record in this field belongs to Pakistan which notified its succession to the General Act

Quite interesting was the discussion on the problem of reservations in the context of succession of the newly independent States in respect of multilateral treaties. Article 19 of the ILC draft dealing with that problem contained the presumption in favour of the automatic inheritance of the reservations of the predecessor State (para 1), provided for the right to formulate new reservations in the notification of succession (para. 2) and stated that as regards new reservations the relevant provisions of the Vienna Convention on the Law of Treaties will be applied (paras 2 and 3). At the Vienna Conference with regard to this provision some amendments aiming at opposite directions were submitted. The delegation of Austria asked for the deletion of paragraphs 2 and 3 thus aiming at excluding the possibility of new reservations being entered by* the newly independent States in their notifications of succession.³⁹ When explaining his position the delegate of Austria stated that the idea of presenting new reservations "seemed to be based on an erroneous concept of succession" and added that a successor "could not formulate new reservations, because its predecessor had not had that capacity."⁴⁰ However, taking into account the fact that new reservations were formulated in notifications of succession,⁴¹ the Conference rejected the Austrian amendment by 39 votes against, 4 in favour and 36 abstentions.

It seems to me that since the notification of succession has, because of the rule of clean slate, a constitutive and not a declarative character, that—in other words—it represents an act expressing the will of a State to be bound by a treaty, new reservations are conceivable. However, they can be effective (in the same way as, for example the act of withdrawal of reservations) only *ex nunc*, i.e. from the moment of notification. The retroactive effects of the notification of succession concern that realm of the treaty which applied to the territory at the moment of the succession of States.

The delegate of Tanzania submitted an amendment aimed at reversing the presumption formulated in paragraph 1 of the said Article. Pursuant to that amendment the absence of a mention of the reservations of the predecessor State in the notification of succession would be interpreted as an *expression* of the intention to refrain from maintain-

of Arbitration of September 26, 1928, 27 years after gaining independence. (See UN doc. ST/LEG./SER.D/9, p. 563).

³⁹ Doc. A/CONF.80/C.1/L.25.

⁴⁰ *United Nations Conference...*, p. 191, para. 60.

⁴¹ See, for example, the statement by the delegate of Poland, who listed all different ways applied in practice by the newly independent States as regards reservations—*United Nations Conference...*, p. 193, para. 74.

ing these reservations in the future.⁴² A notification of succession, as far as its consequences *ex nunc* are concerned, would in this case come close to an act of accession. The Tanzanian amendment was also rejected: the voting was 14 in favour, 26 against and 41 abstentions. The third amendment aimed at recognizing the validity in respect of the newly independent States of various declarations and documents (other than reservations) deposited by the predecessor State when concluding a treaty.⁴³ However, in view of the total lack of support, the delegation of the Federal Republic of Germany which submitted that amendment had to withdraw it. As a result, the Vienna Convention maintained the wording of the ILC draft (Art. 20). Its essence can be summarized in the following formula: in the field of reservations the newly independent State inherits the status of the predecessor State, unless it expresses a contrary intention.

The admissibility of formulating new reservations and also of different choices from the predecessor State's as regards parts of the treaty or the treaty's alternative provisions (Art. 21) explains why the institution of notification of succession is so complex. It includes both elements of the law of succession (inheritance) and elements of the law of treaties.⁴⁴

The elements of succession (inheritance) are:

— The legal basis: the notification of succession takes place in each concrete case on the strength of the right which is automatically inherited by the newly independent State to participate in the multilateral treaties extended to its territory by the predecessor State.⁴⁵ In turn, this right has its origin (as stressed by the ILC) in the legal nexus which has been established between the territory concerned and the treaty by the predecessor State. On the other hand, the application in practice of any of the means of expressing the consent to be bound by the treaty, which are referred to in Article 11 of the Vienna Convention on the Law of Treaties, takes place in each case as a result of

⁴² Doc. A/CONF.80/15, Annex II, p. 37.

⁴³ Doc. A/CONF.80/C.1/L.36.

⁴⁴ A different opinion is held by G. CAGGIANO, *op. cit.*, pp. 78—79 and by V. MIKULKA, *Sukcese sdtu ve smluvni oblasti* [Succession of States in Respect of Treaties], "Pravnik," 1976, No. 2, p. 124; these two authors seem to consider the notification of succession exclusively as an institution of the law of treaties.

⁴⁵ A contrary view is held by G. CAGGIANO, *op. cit.*, p. 78. He considers that the right to become a party to the treaty through the notification of succession "derives from a general rule which is a specific rule on the stipulation of treaties and not one of succession".

a previously reached agreement by the parties concerned, expressed most frequently in the treaty itself.

- The inheritance of the reservations of the predecessor and of its choice as regards the acceptance of part of a treaty and as regards alternative provisions.

- The retroactive effects of the notification of succession.

The elements of the law of treaties are:

- The character of the notification of succession as an act of will, the notification representing an expression of the consent to be bound by the multilateral treaty.

- The possibility to formulate new reservations and to make new choices as regards the acceptance of parts of a treaty or alternative provisions.

- The validity of a multilateral treaty also in relations between the newly independent State and the predecessor State. Among other things, the notification of succession produces the effect whereby the treaty begins to operate in the relations between the newly independent State and all other parties to the treaty, including the predecessor State.

The problem of objections to the formulated reservations, although raised during the debates at the Vienna Conference, was left unresolved, with the sole reference to “general international law” in this matter. This was, no doubt, an attempt to evade the issue, justified perhaps by its minor importance.

In theory three kinds of objections may enter into account: *the* objections of the predecessor expressed against the reservations of other States, the effects of objections raised to the reservations of the predecessor by other parties to the treaty, and eventually new objections expressed by the newly independent State.

The practice of States in this field being extremely meagre,⁴⁸ it is obvious that “general international law” contains no specific rules regulating the problem of objections to reservations in the context of succession. Thus, a judge confronted with such a problem would be left with no choice but to have recourse to analogy. And he would probably arrive at different conclusions depending on whether he had taken as a basis for his reasoning the concept of succession (inheritance), or the solution adopted by the Convention on reservations, or the respective rules of the general law of treaties.

On the question of succession of bilateral treaties the Conference approved fully the draft submitted by the ILC. Thus, the succession

⁴⁸ The practice was presented in the comments of the Polish government to the provisional draft of the ILC—see GAOR, Twenty-ninth Session, Supplement No. 10, A/9610/rev. 1, p. 158.

of a bilateral treaty takes place if the newly independent State and the other State party to that treaty so agree (Art. 24). It results therefrom that in the case of bilateral treaties the newly independent States have the legal authority only to propose to the other party that the treaty be continued. The other State can accept the offer or reject it. This is therefore a fully voluntary or agreed succession. The solution respects the equality of position of both parties. It protects the interests of the newly independent States in the same way as it safeguards the interests of other parties to these treaties. It takes into consideration the fact that bilateral treaties have always a more "personal" character.

Agreements concerning the continuation of such treaties, i.e. their "succession," are of course subject to the general law of treaties, with the proviso that, in principle, they have retroactive effects (Art. 24, para. 2).

Apart from the possibility of succession of a bilateral treaty by way of express agreement (para. 1a), the convention provides also for the possibility of succession in a situation in which "by reason of their conduct they (i.e. the successor State and the other State party) are to be considered as having so agreed (para. 1b). Interpreting this provision in connection with Articles 8 and 9, one must recognize that neither devolution agreements nor unilateral declarations are, in themselves, sufficient in order to accept that the successor State has by its conduct agreed to be bound by the treaty; obviously some additional steps are required on its part.

As a result of the succession in respect of a bilateral treaty two parallel bilateral treaties emerge and not, for example a tripartite treaty. Article 25 stipulates that:

"A treaty which under Article 24 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as being in force also in relation between the predecessor State and the newly independent State."

The entire system regulating the succession of bilateral treaties is in accord with the hitherto prevailing international practice: apart from cases of succession of bilateral treaties by way of agreement reached between the newly independent State and other States parties, there were also cases when succession did not take place because of a lack of agreement (opposition) by the newly independent States or other States parties.⁴⁷

⁴⁷ Some examples of such action are listed in the comments of the ILC to 7 — Polish Yearbook...

Pursuant to Article 26 of the Convention, a later termination, suspension or modification of a treaty in the relations between a predecessor State and another State party, does not result in the automatic termination, suspension or modification of the treaty in the relations between the newly independent State and the other State party.

The ILC intended to enable the newly independent States to actually apply the treaties at the earliest possible date and to that effect provided in its draft for the provisional application of treaties. In that way the ILC took into account the hitherto prevailing practice, since the unilateral declarations of the newly independent States had often the same effect as a result of the acceptance by the other States parties of the offer contained therein. The Vienna Conference accepted the ILC draft. Articles 27 and 28 of the Convention stipulate that treaties can be provisionally applied pursuant to an agreement by the interested States; also a multilateral treaty can be applied on a bilateral basis. The provisional application of a treaty may be terminated following reasonable notice of termination given by any party of following the declaration by the newly independent State of its intention not to become a party to the treaty (Art. 29).

Although in the light of the provisions of the Vienna Convention the newly independent States are not automatically bound by the treaties concluded by the predecessor States, they are none the less bound — since they became independent — by the rules of customary law including those contained in the treaties. Article 5 of the Convention is quite explicit on that matter and states that:

“The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present Convention shall not in any way impair the duty of that State to fulfill any obligation embodied in the treaty to which it is subject under international law independently of the treaty.”

6. It may be noticed that part III of the Convention discussed above contains no provision dealing with the consequences of a succession of States as regards the predecessor State. Nor was there a provision to that effect in the draft submitted by the ILC. At the Vienna Conference the delegation of the United Kingdom, representing a country most in-

Article 23 of the draft. At the Vienna Conference the delegate of India referred to the experience of her country and stated that: “The Indian Government had found that although it wished to be bound by certain pre-1947 treaties other parties to those treaties were not, and that consequently the treaties in question could not be regarded as having devolved on India *ipso jure*. Other pre-1947 treaties had continued in force by express agreement between the parties.” *United Nations Conference...*, p. 89, para. 5.

terested in that problem, proposed to add a new Article 9 bis. And although formally the proposal was concerned with the general provisions of the Convention, it was clear that in fact it dealt with the case of succession of newly independent States. In its original version, the proposed new article read as follows:

"The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States cease automatically on that date to be binding upon itself in respect of that territory."⁴⁸

In the debate⁴⁹ which followed only the delegations of France and Italy supported the UK draft. Other States opposed it on the ground that it was too categorical (Brasil), that in practice there were treaties providing for the continuation of the obligations of the predecessor (Guyana), that it was difficult to reconcile the new article with the provisions of Article 34 (now 35) which dealt with the position "if a State continues after separation of part of its territory" (Sweden).

Taking into account some suggestions made at the Conference the delegation of the United Kingdom presented a revised draft of its proposed amendment which read as follows:

"A treaty which is in force at the date of a succession of States in respect of the territory to which that succession relates shall not give rise, after that date, to rights or obligations for the predecessor State in respect of events and situations occurring thereafter unless that treaty otherwise provides."⁵⁰

Only three speakers asked for the floor to comment on that new proposal. The delegate of Spain supported it, adding that it filled a lacuna in the Convention.⁵¹ The delegate of Guyana maintained his previous objections, stating that "the continuance of the treaty obligations of the predecessor State in respect of the territory of the newly independent State was not necessarily inconsistent with the sovereignty of the new State, as was illustrated by the Agreement to resolve the controversy between British Guyana, and signed at Geneva in 1966. Conceivably the continuance of such obligations might be very pertinent to the viability of the new State, far from being an affront to its sovereignty."⁵² Criticism was also expressed by the delegate of Ma-

⁴⁸ Doc. A/CONF.80/C.1/L.13.

⁴⁹ *United Nations Conference...*, pp. 102—105.

⁵⁰ Doc. A/CONF.80/C.1/L.13/Rev.I.

⁵¹ *United Nations Conference...*, p. 112 para. 1.

⁵² *Ibid.*, p. 113, para. 6. The mentioned Agreement to resolve the controversy over the frontier between Venezuela and British Guyana, concluded between

Madagascar. Referring to the terms "events or situations" occurring thereafter he asked rhetorically: "What would happen in the case of events or situations which occurred after the date of succession of States but whose origin was prior to that date—in the case, for example, of repayment of debts incurred by the predecessor State in respect of the territory before the succession of States?"⁵³

When the matter was put to a vote only 13 delegations supported the UK proposal, while 32 voted against and 32 abstained.

The debate proved that not all treaty obligations of the predecessor State contracted in respect of its dependent territory cease automatically at the date of independence of that territory. However, no attempt was made to formalize that idea in a suitable legal language. The problem was probably considered too delicate and complex to be solved unequivocally. The lack of an explicit solution, one way or another, of the problem of the consequences of a succession of States as regards the predecessor State has created a lacuna in Part III of the Convention.

7. In its subsequent provisions the Convention deals with the succession of treaties in the case of uniting and separation of States. When drafting its proposals, the ILC aimed at preserving the maximum stability of treaties, as having been concluded in accordance with the principle of self-determination of nations and sovereign equality of States (this, of course, applies to valid treaties accepted by States by virtue of a freely expressed will). Whereas in the previously discussed case of succession the overriding interest was that of the newly independent States, in these cases the main concern was with the interests of the international community, i.e. the third States. That is why the ILC draft adopted the principle of *ipso jure* continuity of treaties as the most suitable in the context of uniting and separation of States. Article 30 of the ILC draft stated that:

"1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

"a) The successor State and the other State party or States parties otherwise agree; or

"b) It appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible

the United Kingdom and Venezuela shortly before British Guyana's independence (Geneva, 1966) provided in Article VIII: "Upon the attainment of independence by British Guyana, the Government of Guyana shall thereafter be a party to this Agreement, in addition to the Government of Great Britain and Northern Ireland and the Government of Venezuela" (UNTS, vol. 561, p. 321).

^M *Ibid.* p. 113, para. 4.

with its object and purpose or would radically change the conditions for the operation of the treaty.”

This provision and the principle expressed therein aroused the particular interest of the delegation of the Federal Republic of Germany. This delegation presented at the Vienna Conference a series of amendments dictated by the West-German ideas on German reunification. The first of these amendments provided that should a united State inherit from its predecessors treaties which contradict each other, it will be up to that united State to decide unilaterally by what treaties it intends to be bound.⁵⁴ The second amendment aimed at excluding bilateral treaties from the action of the principle of *ipso jure* continuity of treaties.⁵⁵ The third gave the united State the right to modify the reservations formulated to treaties by the predecessor States as well as the right to formulate new reservations to the inherited treaties.⁵⁶

All three amendments of the FRG delegation met vigorous opposition on the part of the delegations participating in the Vienna Conference and were finally withdrawn.

It must, however, be pointed out that in the first of the three FRG amendments the Conference detected a real problem. In order to meet that problem it adopted, on the initiative of the USA delegation, a special resolution which was annexed to the Final Act of the Conference. The resolution recommended

“that if a uniting of States gives rise to incompatible obligations or rights under treaties, the successor State and the other States parties to the treaties in question make every effort to resolve the matter by mutual agreement,”

It must be stated that the resolution adds nothing to the substance of Article 31. By virtue of paragraph 1(a) of Article 31 are excluded from the action of the principle of continuity treaties in respect of which the successor State and the other State party or States parties agree. Consequently, I consider that the adoption of the above mentioned resolution was superfluous.

The principle of automatic continuity of treaties embodied previously in the ILC draft has been maintained in Article 31, paragraph 1 of the Convention. It covers all forms of uniting of States, for example,

⁵⁴ Doc. A/CONF.80/C.1/L.45/Rev.1. Certain traces of this proposal can be found in the resolution sponsored by the USA delegation which stated that all problems arising from incompatible obligations must be resolved by agreement between the interested States.

⁵⁵ Doc. A/CONF.80/C.1/L.47.

⁵⁶ Doc. A/CONF.80/C.1/L.53.

the establishment of a union of States, the creation of a new unitary State as well as a voluntary incorporation of one State into another.

The historical precedent of its application include, among others: the formation of the German Federation in 1871, the creation of the Swiss Federation (the adoption of the Swiss Federal Constitution in 1848), the foundation of the Greater Republic of Central America in 1895 (as a result of the union of El Salvador, Nicaragua, Honduras and, in 1897, Costa Rica and Guatemala), the union in 1922 of the Russian, Byelo-Russian, Ukrainian and Transcaucasian Republics. When upon the admission of Texas to the United States a different principle was applied, both France and Great Britain objected. More recent precedents include the formation of the United Arab Republic by the union of Egypt and Syria (1958—1961) and Tanzania in 1964 by the union of Tanganyika and Zanzibar.

The Vienna Conference accepted almost unanimously the principle of automatic continuity *ipso jure* of treaties in the case of uniting of States. The *opinio juris* of the represented States in this matter found its clear expression when the decision was taken: both in the Committee of the Whole and in the Plenary of the Conference the relevant Article was accepted without a vote, by consensus.

In the light of the principles of modern international law and in view of the ever growing interdependence of States, the principle of *ipso jure* continuity is the only conceivable one in the context of uniting of States. This is pointed out also by the eminent expert on State succession D. P. O'Connell, who writes: "It is evident that the tendency will be towards the automatic continuity of treaties, and the instance of the United Arab Republic demonstrates that it would be absurd were this not so."⁵⁷

Indeed, all concepts based on former "annexations," "absorbtions," or other "incorporations" of States, hardly passing any test of lawfulness in the light of contemporary international law, must be considered as wholly irrelevant in the context of uniting of States, as contemplated in the Vienna Convention.

It seems that for the reasons stated above and at least since the Vienna Conference it can be asserted that the principle of automatic continuity of treaties, as applying in the case of uniting of States, is binding also in contemporary customary law.

Although the Convention fails to deal with the matter, it must be admitted that the uniting of States results in the termination of only

⁵⁷ D. P. O'CONNELL, *State Succession and the Effect upon Treaties of Entry into a Composite Relationship*, "British Yearbook of International Law," 1963, p. 132.

those bilateral treaties which were earlier binding in the relations between the two uniting States. On the other hand, as far as the legitimate interests of the newly united States are concerned, it seems that they are adequately protected by paragraphs a and b of Article 31(1) which formulates the exceptions from the principle of continuity.

The territorial scope of the treaty which remains in force in respect of the united State in conformity with paragraph 1 will, in principle, be restricted to the part of the territory in respect of which the treaty was in force at the date of the succession of States (Art. 31, para. 2). Article 32 provides that the united State can, by way of notification, acquire the status of a contracting State⁵⁸ in respect of a treaty which has not yet entered into force, if at the date of the succession of State any of the predecessor States enjoyed such status. Article 33 gives the united State the possibility of ratification, acceptance or approval of the treaty which had been signed by any of the predecessor States.

8. In the context of separation of States, the most controversial was the provision of the ILC draft which provided that if the secession of a State takes place under conditions similar to those which accompany the establishment of a newly independent State, the State which seceded with not be bound by the treaties of the predecessor State (Art. 33, para. 3 of the draft). All provisions concerning newly independent States had to apply to this case. The acceptance of this provision would, at the same time, be tantamount to the acceptance of the idea that within the existing States there are areas actually subjected to quasi-colonial rule. Many delegations representing the Third World claimed that such a provision would encourage secession and were against its inclusion in the Convention. The delegations of the USA and the USSR were also opposed. It was pointed out that the interpretation of this provision may rise many difficulties. The amendment presented by France and Switzerland to delete that provision⁸⁰ was accepted in a roll-call vote by 52 votes in favour, 9 against and 22 abstentions. Thus, the succession of treaties in the case of separation of parts of a State is governed by the principle of automatic continuity *ipso jure*. Article 34 of the Convention adopted as a whole by a majority of 73 in favour, 4 against and 6 abstentions states that:

"1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

⁵⁸ A "contracting State" is, according to Article 2, para. 1 (k) "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force".

⁵⁹ Doc. A/CONF.80/C.1/L.41/Rev.1.

"a) Any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

"b) Any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

"2. Paragraph 1 does not apply if:

"a) The States concerned otherwise agree; or

"b) It appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

This Article covers all cases of separation of parts of a State resulting in the formation of a new State or States, such as: dismemberment of a State, including dissolution of unions, as well as secessions.

G. Caggiano considers that the principle of *ipso jure* continuity as applied to cases of dismemberment and separations (secessions) of States is "a rule which revolutionizes existing law on the subject"⁶⁰ However, the problem arises as to whether in the two above mentioned cases we are in fact dealing with existing, presumably customary law.

In the case of dismemberment of States, it has to be recognized that because of the insufficient practice of States no such legal rule emerged. On the other hand, considering that at least in cases of dissolution of unions the continuity principle has generally been followed (Swedish-Norwegian Union 1905, the practice of Hungary following the dissolution of the Austro-Hungarian Monarchy in 1918, the Danish-Icelandic Union 1944 and the UAR 1961) the solution adopted in the Convention can hardly be viewed as "revolutionary."

It is not the same with the separation or secession of States. As a matter of fact the practice of all States established as a result of a secession followed the rule of clean slate (for example the practice of Belgium, Panama, Cuba, Finland, Poland, Czechoslovakia, Ireland, Singapore and seemingly Bangladesh). It seems that the practice of States in this respect has been sufficiently extensive, consistent and sustained, and that the *opinio juris* of States and the opinions in legal doctrine sufficiently concordant to warrant the conclusion that a customary rule emerged according to which the succession of treaties of the separated State is governed by the clean slate rule. It is therefore difficult to dispute the thesis that the regulation proposed in the draft, together with the decision of the Conference on the extension of the

⁶⁰ G. CAGGIANO, *op. cit.*, p. 76.

principle of continuity *ipso jure* so as to cover all cases of secession "revolutionizes existing law on the subject." The relevant decision of the Conference proves that in the opinion of the majority of States in the case of secession the principle of clean slate has already become obsolete.

Article 36 offers to the State which separated from another State the possibility of acquiring by way of notification the status of contracting party in respect of a treaty which has not yet entered into force. In turn, Article 37 stipulates that a State which separated from another State can ratify or accept a treaty which had been signed by the predecessor State.

Article 35 deals with the situation of a predecessor State which continues to exist in its new territorial shape. It goes without saying that it reaffirms the continuing validity of treaties (with some exceptions) in respect of the remaining territory of the predecessor State, which maintains its continuity and identity. All these provisions have their origin in the ILC draft.

9. Among the "miscellaneous provisions" one can find, the same as in the Vienna Convention on the Law of Treaties, general clauses which exclude from the Convention cases of State responsibility, outbreak of hostilities (Art. 39) and military occupation (Art. 40). The Conference rejected a proposal submitted by the delegation of Mexico⁶¹ aimed at excluding these provisions, as superfluous, from the Convention. However, no vote was taken, since Mexico withdrew its proposal.

10. One of the major problems, which the second session of the Vienna Conference was called upon to resolve, was that of the settlement of disputes. Proposals to that effect have been submitted by the delegations of the USA and the Netherlands. The US proposals provided for arbitration and conciliation,⁶² whereas the Netherlands proposal went much further and provided in certain cases for the compulsory jurisdiction of the International Court of Justice and in other cases compulsory arbitration.⁶³ The debate led to a confrontation between the Western countries and the Third World countries, which were against both compulsory jurisdiction of the International Court of Justice and compulsory arbitration. The socialist States were in favour of leaving to the countries concerned the choice of the method of settlement of disputes and supported the position of the Third World countries. The matter was referred to the Committee *ad hoc* for the

⁶¹ Doc. A/CONF.80/C.1/L.58 and doc. A/CONF.80/C.1/L.55.

⁶² Doc. A/CONF.80/C.1/L.38/Rev.1.

⁶³ Doc. A/CONF.80/C.1/L.56.

Settlement of Disputes which deliberated under the chairmanship of K. Zemanek. The Committee worked out formulae which found their place in Articles 41—45 of the Convention.

The Convention provides that when a dispute arises in connection with the interpretation or application of the Convention, the parties to the dispute acting on the request of anyone of them, will try to settle the dispute by way of consultation and negotiation (Art. 41). Should the parties be unable to settle the dispute within a period of 6 months from the beginning of the negotiation, then each party is entitled to submit the case to conciliation (Art. 42 and Annex). The Convention provides also that each State party to the Convention can make a special declaration stating that if the parties to a dispute fail to settle it by way of negotiation or conciliation any of them can submit the case to the International Court of Justice or to Arbitration Tribunal (Art. 43). It has to be emphasized that in this case the formula of opting-in has been adopted, as against the formula of opting-out as is the case in many other conventions. The Vienna Convention states also that the parties to a dispute can always, by way of mutual agreement, submit their dispute to the jurisdiction of the International Court of Justice, to arbitration or apply any other procedure (Art. 44). Article 45 stipulates also that notwithstanding the provisions of Articles 41—44 all other provisions concerning the settlement of disputes by which the States parties to the Convention may be bound remain in force.

11. The final clauses provide that the Convention is open for signature to all States till February 28, 1979, in the Federal Ministry of Foreign Affairs of Austria, and later, till August 31 at the UN Headquarters in New York (Art. 46). The Convention is subject to ratification (Art. 47). It is open for accession to all States (Art. 48). Apart from the Vienna Convention on Representation of States in Their Relations with International Organizations of a Universal Character of 1975, the Vienna Convention on the Succession of States in Respect of Treaties is the second codification convention open to all States.

The depositary of the Convention is the Secretary General of the United Nations. The Convention will enter into force on the thirtieth day following the date of deposit of the fifteenth document of ratification or accession (Art. 49).⁶⁴

The close link between this Convention and the Vienna Convention

⁶⁴ The Drafting Committee of the Conference which was entrusted with the task of preparing the final clauses proposed the number of 10 documents of ratification or accession. The Western countries proposed the number of 20 and even 25 (United Kingdom). The final number of 15 documents represents a compromise solution.

on the Law of Treaties has been stressed in the preamble in no less than three places:

“Bearing in mind the provisions of the Vienna Convention on the Law of Treaties of 1969,

“Bearing also in mind Article 73 of that Convention;

“Affirming that questions of the law of treaties other than those that may arise from a succession of States are governed by the relevant rules of international law, including those rules of customary international law which are embodied in the Vienna Convention on the Law of Treaties of 1969.”

12. The evaluation of the Vienna Convention on Succession of States in Respect of Treaties will differ, depending on whether one represents the common law approach or recognizes the value and usefulness of codification,⁶⁵ even in these fields where international intercourse is not particularly intense. It seems that in the present international situation when more than half of the international community is composed of new States, when the principles of international law have undergone so substantial a change as compared to the so-called classical law, when there is such a reluctance to submit to international jurisdiction, the codification approach has obvious merits. Codification introduces greater clarity into the rules of a given field of law within the system of international law, for by necessity it has to take into account the validity of other rules. At the same time, it represents the most authoritative statement of *opinio juris* of States in a given field. In any case, the uncertainty as to the law if not removed, is considerably reduced owing to the codification process. As I see it, the uncertainty as to the law is much more detrimental to the international legal order than the uncertainty eventually created by the codified law itself. Another argument in favour of codification is also the fact that the absence of clearly defined rules always puts the stronger party in a more advantageous position.

In this context one must recognize the importance of the Vienna Convention on Succession of States in Respect of Treaties as a document codifying another sphere of international law and supplementing the codification of the law of treaties, in particular the provisions concerning the participation in treaties and the suspension and termination of treaties.

⁶⁵ Against codification of the law concerning succession of States is, for example, D. P. O'CONNELL. In his opinion the solutions are to be sought, “in legal science rather than in codification”, *Recent Problem of State Succession in Relation to New States*, “Recueil des Cours de l'Académie de Droit International de la Haye,” vol. 2, 1970, (t. 130), p. 95 ff.

On the other hand, judging by the practice of States, the opinions expressed in legal doctrine and the debates which took place at the Vienna Conference, it can be asserted that in the Convention itself the element of "progressive development" of international law prevails over the element of codification *sensu stricto*. Obvious examples of provisions of a declarative nature *vis-à-vis* well and long established customary norms are: Article 11 on boundary regimes, Article 15 concerning the transfer of part of territory of a State and Article 35 defining "the position if a State continues after separation of part of its territory." Taking into account the developments which took place before the adoption of the Convention as well as the conclusions which can be drawn from the Vienna Conference one can say that at present the status of customary rule has been acquired by: the principle according to which a newly independent State is not bound to accept the treaties of the predecessor State (Art. 16); the provisions whereby the newly independent States can become parties to multilateral treaties by unilateral notification of succession (Art. 17, para. 1) and to bilateral treaties by agreement (Art. 24, para. 1); the provision defining the effects of unilateral declarations of the successor State (Art. 9) and perhaps the provision on territorial regimes (Art. 12).

The direct practical effects of the provisions of the Convention concerning the newly independent States will be limited. The decolonization process is nearing its end and the Convention will, at best, enter into force not before several years. One can hardly expect that States will use widely the possibility open to them to apply the Convention retroactively, as provided for in Article 7. None the less, the Convention may influence substantially the practice of States and guide their interpretation in many still unresolved succession matters.⁶³ It so happens that newly independent States notify their succession in respect of treaties even after 20 years or more of the date of their independence. In the indirect influence on international life lies, in my view, the biggest practical importance of that part of the Convention. One may, at this juncture, refer to the Vienna Convention on the Law of Treaties of 1969 whose influence and authority even before its entering into force (in January 1980) was great and perceptible in practice.

⁶³ See, for example, the comments by J. JODŁOWSKI on the scope of the binding force of the Polish-British Convention on procedure in civil and commercial matters signed August 26, 1931 and extended later over 50 dependent territories. *W kwestii zakresu mocy obowiązującej niektórych umów międzynarodowych w obrocie prawnym* [On the Question of the Scope of the Binding Force of Some International Conventions Concerning Legal Intercourse], "Nowe Prawo," 1978, No. 7—8, pp. 1066—1069.

It is sometimes maintained that the Convention on Succession of States should have been concluded before the decolonization era.⁶⁷ It is, however, very unlikely that legal solutions adopted beforehand by "old" States could adequately serve the needs and be generally followed in the practice of the newly independent States. On the other hand, it can hardly be asserted that the development of international law will suffer if in some future time the end of the decolonization process will make the provisions concerning newly independent States obsolete. Then, the general principle of succession with regard to all new States (newly united, dissolved, dismembered, separated States) will be exclusively that of continuity, so that the whole philosophy of the Convention will gain in coherence. The problem can be viewed still from another point: these somewhat overdue provisions concerning newly independent States represent a price which it was worthwhile paying in order to have at the disposal for some future use provisions on the transfer of parts of territory and on uniting and separation of States. These provisions can be fully effective.

The solutions actually adopted by the Convention and earlier worked out by the ILC have been criticized on various grounds, sometimes quite contradictory ones. For example, G. Caggiano, to whom I have already referred above, when discussing the problem of the principle of continuity as applied to the dismemberment and secession of States stated that it represented a "rule which revolutionizes existing law on the subject," suggesting indirectly that the principle of clean slate would have been more suitable. On the other hand, H. G. Schermers considers that even in the case of succession of newly independent States the ILC would have been better advised not to apply the principle of clean slate and to stick to the principle of continuity which takes better into account the interests of third States.⁶⁸

In my view, the position adopted by the ILC and the Vienna Conference on these matters was entirely convincing; for it took into account the practice of States and whenever confronted by insufficient precedents or cases susceptible of various interpretations it was based on the conclusions deriving from the fundamental principles of contemporary international law. For example, the ILC and the Conference were right when subjecting the application of the concrete principle of succession (*ipso jure* continuity or clean slate) to the evaluation of the conditions which accompanied the conclusion of the treaties which are the object of succession, i.e. whether or not they have been con-

⁶⁷ See, for example, H. G. SCHERMERS, *op. cit.*, p. 105.

⁶⁸ *Ibid.*, pp. 104—107.

eluded in accordance with the principle of self-determination of nations and sovereign equality of States. It is obvious that because of the continuously growing interdependence of States, the treaties concluded by sovereign States, members of the international community must be automatically honored by the successor State established either by voluntary unification or division of States. Under these circumstances the overriding factor must be that of the interests of third States which are entitled to stable treaties.

The same does not apply to decolonization. Decolonization represents a transition from the state of dependence to a state of independence achieved on the basis of the right of self-determination. This, in turn, involves the right of the newly independent States to determine freely their position in respect of treaties which remain in force in respect of their territories by virtue of the authority of a foreign power. In this case it is the interest of the newly independent States which must be overriding. The special features of this category of succession of States called for a special regulation.⁶⁹

H. G. Schermers goes even further in his criticism. He writes: "ILC draft articles on succession of States have been strongly influenced by State practice, in this case that of the newly independent States. Is this the best approach?"⁷⁰ I must confess that this argument is very strange indeed. Obviously, if one is to codify the law relating to succession of newly independent States in respect of treaties one has fully to take into account the relevant practice of these States. What is more, such a mandate derived from the resolution of the General Assembly of the United Nations on the subject. A wrong approach could have been imputed only if the conclusions deriving from the practice of the newly independent States were to be applied, for example, in the case of unification of States.

Another criticism has been voiced by J. B. Stewart. Wrote he: "The Commission did not even advert to, let alone solve, the difficult problem of attempting to create rules of universal application while meeting the needs of a particular historical circumstance, though admittedly this is a pervasive problem in the development of legal sys-

^M According to the view expressed by the Chairman of the ILC "the Commission's guiding principle for the whole draft had been the desire to maintain the stability of treaty relations. The clean slate doctrine was simply an important exception to that principle, made for the benefit of newly independent States", "Yearbook of the International Law Commission," 1974, vol. 1, p. 180, para. 59.

⁷⁰ H. G. SCHERMERS, *op. cit.*, p. 105.

terns.⁷¹ In this matter one must agree fully with D. P. O'Connell; indeed, the objective of creating rules of universal application in respect of all types of succession of States known in history is beyond human reach.⁷² There are only two ways left: either to evaluate the further applicability of the treaty individually *ad casum* following some *ad hoc* criteria and the presumption of continuity (as advocated by O'Connell), or to formulate a set of criteria which would govern the succession of treaties in a very general way. By entrusting the ILC with the task of codifying this sphere of law one opted implicitly in favour of the latter method. Thus, the ILC and, later, the Vienna Conference adopted the following catalogue of criteria defining the succession of treaties and its procedure:

- the validity of the treaty;
- the territorial or non-territorial character of the treaty;
- type of succession of States;
- type of the treaty (bilateral, restricted multilateral, multilateral);
- object and purpose of the treaty;
- degree of change in the conditions of application of the treaty;
- agreement by interested States.

It was not necessary to take into account separately such criteria advanced in the most recent writings on the succession of newly independent States as the conformity of the treaty with the "fundamental principles of international law," the "principle of self-determination" or the "principle of sovereign equality of States,"⁷³ because the whole mechanism of succession of these States has been so conceived and so taken care of in the Convention that this became superfluous.

As far as the criteria discussed here are concerned, the Vienna Conference introduced only one modification in the draft proposed by the ILC. The Conference decided to reduce the number of categories of succession of States by eliminating secession which bears the mark of the formation of a newly independent State. On the other hand, all attempts aiming at adding to the types of treaties the category of treaties of a universal character ended in failure.

⁷¹ J. B. STEWART, *op. cit.* p. 646.

⁷² D. P. O'CONNELL, *State Succession*, p. 6.

⁷³ See H. BOKOR-SZEGO, *La succession des nouveaux États et les traités internationaux*, "Acta Juridica Academiae Scientiarum Hungaricae," vol. 5, fasc. 3—4, 1963, p. 333; by the SAME AUTHOR, *New States and International Law*, Budapest 1970, p. 77; V. DUCULESCU, *Succesiunea statelor la tratatele internationale* [State Succession to International Treaties], București 1972; M. G. MARCOFF, *op. cit.* pp. 288, 242, 272.

Generally speaking it can be said that the set of criteria applied in the Convention confers to the regulation of succession in respect of treaties the necessary flexibility. It may be added that the criteria worked out by the ILC and incorporated in the Vienna Convention represent nothing new from the point of view of the doctrine; all have been formulated earlier or taken into account in the doctrine of so-called partial succession of treaties. Besides, the Convention itself, respecting the reality of international life, provides only for partial succession. Succession on a minimum level takes place in the case of transfer of part of territory, because only boundary regimes and other territorial regimes established by treaties are inherited by the successor. Succession on a maximum scale occurs in the case of unification or dissolution of States; it can be termed general succession (as against "universal" succession which implies the inheritance of all treaties without exception).

In the light of the provisions of the Convention, the succession of States, depending on the fulfilment of these or other criteria listed above, may produce the following legal effects as regards treaties:

- obligatory or automatic succession;
- optional succession by unilateral act;
- optional succession by agreement (agreed or contractual succession);
- change in the territorial scope of treaties;
- relative or total extinction of a treaty (depending on whether the treaty is bilateral or multilateral).

These effects result from the Convention directly or by implication.

In the light of all these considerations it can be said that from the legal point of view the Vienna Convention merits a favourable evaluation. The lacunae in the Convention which I have signalled in the analytical part of this paper are of course to be regretted. On the other hand, the fact that the adoption of specific solutions was influenced also by political considerations does not detract from its merits; after all this is a normal, quite usual phenomenon in international law. Indeed, very often the solutions which at the time of the adoption of a convention appear as a concession dictated by political motives, are later, viewed from a historical perspective, as the expression of the legal consciousness of States and as the case may be, a contribution to the development of customary law.⁷⁴

The political evaluation of the Vienna Convention from a strictly

⁷⁴ For details on the subject of multilateral treaties as constitutive of new customary law see R. R. BAXTER, *op. cit.*, p. 57 ff.

Polish point of view is also favourable, because of the Convention's emphasis on the stability of treaties. In this context it is most important that the Convention reaffirms the unviolability of boundary regulations. Of importance is also the fact that the application of the principle of clean slate has been restricted only to decolonization. This, of course, has no bearing upon the fact⁷ that by virtue of the hitherto prevailing customary law the principle of clean slate has been applied also in the case of secession of States (including in respect of Poland after World War I).⁷⁵ In connection with the limitation of the scope of application of the principle of clean slate adopted by the Vienna Conference, it seems that in the future, in cases of secession, attempts may be made to extend the scope of the definition of a newly independent State in the interpretation process.

In conclusion, it can be said that the Convention takes into account in a well-balanced way the interests of successor States and the interests of third States, including the interests of the international community as a whole.

It was signed on behalf of Poland in the United Nations Headquarters on August 16, 1979.

⁷⁵ Employing the language of R. R. BAXTER *op. cit.*, p. 31 ff one may assume that travaux préparatoires and the Convention itself serve as evidence that the clean slate principle as applicable in the case of secession is no longer part of customary international law.

State Succession : Boundaries and Boundary Treaties

by JERZY TYRANOWSKI

I

The Convention on Succession of States in Respect of Treaties has been signed in Vienna on August 23, 1978.¹ Article 11 of this Convention, under the title "Boundary regimes," states that

"A succession of States does not as such affect:

- (a) a boundary established by a treaty; or**
- (b) obligations and rights established by a treaty and relating to the regime of a boundary."**

This Article expresses the unquestioned—in any case, not until after the emergence of the newly independent States in Africa—principle that the succession of States does not affect the existing international boundaries. In its positive aspect, the meaning of this principle is that the successor is bound by the existing international boundaries. They continue to exist irrespective of any change of sovereignty. The principle may be thus described as expressing the continuity of boundaries rule. For its justification, it is sufficient to quote such general principles of law as *nemo plus juris in alium transferre potest quam ipse habet*, *nemo dat quod non habet*, and *res transit cum suo onere*. At present, the continuity of boundaries rule is also a natural consequence of the principle of territorial integrity and inviolability of boundaries.

Article 11, however, does not say anything about boundary treaties themselves in spite of the fact it is a part of the Convention which refers to succession *in* respect of treaties. Should it mean that in the light of the Convention only the status established by boundary treaties is the subject of succession, and not the treaties themselves?

Various reasons contributed to such and not other formulation of

¹ Doc. A/CONF.80/31.

Article 11. We shall come to it later. Here it is worth to quote a characteristic statement by the ILC Special Rapporteur, Sir Francis Vallat, who referring to the draft provisions on boundaries and boundary regimes said that these provisions

“in fact constituted saving clauses of a limited character, and no more. Their inclusion in the draft was necessary because, as a result of one or the other of the draft articles, a treaty as such might cease to be in force in the relations between the successor State and another State. Since boundary treaties were usually bilateral, it was necessary to ensure that the rights and obligations arising from a boundary regime were not destroyed by the fact of a treaty ceasing to be in force through the operation of the draft articles”.²

The statement quoted above shows that the provisions of Article 11 have, as “saving clauses,” a general character. They refer only to a certain minimum. After all, they have been included in the General Provisions of the Convention. Thus we arrive at the first basic conclusion that the problem of succession in respect of boundary treaties should be considered in connection with other relevant in this context provisions of the Convention. We have also to take into account that the specific character of boundary treaties is since a long time recognized in international law.

II

There exist two main points of view in the literature of international law in relation to the succession of boundary treaties.

According to the first one, boundary treaties—in view of their character—always devolve upon the successor State. Oppenheim and Lauterpacht state that “According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain valid, and all rights and duties arising from such treaties of the extinct State devolve on the absorbing state.”³ In principle, succession with respect of boundary treaties is usually considered an exception to the rule that the successor does not inherit *ipso jure* the treaties of its predecessor. Undoubtedly, this is why Oppenheim and Lauterpacht describe succession with regard to local rights and duties as “a genuine succession.”⁴

² “ILC Yearbook,” 1974, vol. 1, p. 204, para. 51.

³ L. OPPENHEIM, H. LAUTERPACHT, *International Law. A Treatise*, vol. 1: *Peace*, Eighth Edition, p. 159.

⁴ *Ibid.*, p. 159.

Many other writers also share the opinion that succession takes place *ipso jure* in respect of boundary treaties.⁵ Sometimes succession in respect of a boundary treaty is used alternately with that relating to rights and duties ensuing from such a treaty.⁶

The second point of view is based on the concept that a boundary treaty itself, once having been implemented, cannot be subject to succession, but only the situation it has created, that is, a territory within certain boundaries or simply — a boundary. A. B. Keith wrote that cession and boundary treaties are by no means an exception to the rule that a conqueror or cessionary does not inherit any treaty:

"The successor takes what he has conquered or what is ceded to him. He conquers or accepts a country with fixed boundaries as settled by European history, and he cannot claim to undo cessions which have been already carried out. The real fact is, of course, that a treaty of this sort is no longer a contract; the contract has passed into conveyance, and the transaction cannot, therefore, be affected by the fact that one of the parties to the original conveyance has changed."⁷ The same author stated further that "the boundaries of the territory acquired by the cession or conquest are regulated either by the treaty of cession or by the recognized boundaries before the conquest. Such a succession has nothing to do with succession to treaties. A boundary treaty when completed, is not a contract but conveyance, and the boundaries established are, as in the case of private law, good against the world. The cessionary or the conqueror cannot re-open the question on any legal grounds."⁸

The concept of "conveyance" has been accepted by many other writers. A. P. Lester states that "where a treaty demarcates a frontier between the parties, the frontier agreement is executed upon ratification and operates as a kind of conveyance. A successor State then succeeds not to the treaty but to the frontiers of its territory, as it does to the other facts of its new international life. Once the frontier

⁵ A. S. HERSHEY, *The Essentials of International Public Law and Organization*, New York 1927, p. 218; R.W.G. de MURALT, *The Problem of State Succession with regard to Treaties*, The Hague 1954, p. 92; I. BROWNLIE, in his *Principles of Public International Law*, Oxford 1973, pp. 646—647, states that "the question depends on normal principles governing territorial transfers: certainly the change of sovereignty does not as such affect boundaries."

⁶ H. KELSEN, *Principles of International Law*, New York 1959, pp. 296—297; L. OPPENHEIM, H. LAUTERPACHT, *op. cit.*, pp. 159, 166; A. McNAIR, *The Law of Treaties*, Oxford 1961, p. 657.

⁷ A. B. KEITH, *The Theory of State Succession with Special Reference to English and Colonial Law*, London 1907, p. 22.

⁸ *Ibid.*, p. 27.

provisions are executed, they lose their contractual character and may be severed from any other treaty provisions.”⁹ As a result of the execution of the frontier treaty, an objective juridical situation is created, which continues to exist independently of the treaty.¹⁰

D. P. O’Connell writes that “If a boundary treaty merely defines a frontier, then it is instantly executed, and what is inherited is not the treaty but the territorial extent of sovereignty. Problems arise when the treaty, while defining the boundary in general terms, leaves its actual delimitation to a boundary commission and this delimitation has not been achieved on the date of a change of sovereignty; or when it contains provisions involving continuous and reciprocal rights and duties, or provides for future activity. The problem then raised is one of severance of dispositive from non-dispositive provisions.”¹¹

In 1968, the International Law Association adopted a text of resolution submitted by the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors.¹² Rapporteur of the Committee was D. P. Connell. Section 8 of the Resolution states the following:

“When a treaty which provides for the delimitation of a national boundary between two States has been executed in the sense that the boundary has been delimited and no further action needs to be taken, the treaty has spent its force and what is succeeded to is not the treaty but the extent of national territory so delimited; but where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the question whether the treaty is succeeded to or not is a question to be answered by reference to the principles in Section 1 above where these are applicable, and where they are not applicable it is to be answered by reference to such other legal principles as may prove to be relevant”.

Section 1 of the ILA Resolution envisages the succession of the newly independent States in relation to all treaties, failing a statement to

⁹ A. P. LESTER, *State Succession to Treaties in the Commonwealth*, “ICLQ,” vol. 12, 1963, p. 492; see also F. Ch. OKOYE, *International Law and the New African States*, London 1972, p. 94; A. O. CUKWURAH, *The Settlement of Boundary Disputes in International Law*, Manchester University Press 1967, pp. 105–106.

¹⁰ A. P. LESTER, *op. cit.*, p. 493; A. O. CUKWURAH, *op. cit.*, p. 106; N. NUGERWA writes: “With regard to boundary treaties the justification for their automatic devolution is that the new State is bound not by the treaty as such but by the rule of the inviolability of the sovereignty of other States; the new State must respect the existing frontiers of other States.” *Manual of Public International Law*, edited by Max Sprensen, London—Melbourne—Toronto—New York 1968, p. 298.

¹¹ D. P. O’CONNELL, *State Succession in Municipal Law and International Law*, vol. 2: *International Relations*, Cambridge 1967, p. 273.

¹² International Law Association, *Report of Fifty-Third Conference*, Buenos

the contrary (in case of a bilateral treaty, such a statement may be also made by the other party to the treaty, and not only by the new State).

Commentary to Section 8 explains that

“the Committee has endorsed the view that a boundary treaty which is executed is not susceptible of being succeeded to because its legal effect is exhausted. It is the boundary that is succeeded to, not the treaty. At the same time the Committee is aware that many boundary treaties contain provisions for future actions. It proposes that the question of succession to these provisions should be resolved on the same basis as succession to any other treaty or to such other legal principles as may prove to be relevant, such as estoppel. It is recognized that this solution presupposes that the reciprocal rights and obligations in the treaty can be severed from the boundary provisions, and that there are disputed boundaries where the two are alleged to be inseparably or conditionally connected”.¹⁸

The viewpoint that a boundary treaty which is executed becomes extinct, and that it is only the boundary established by such a treaty that is succeeded to, may be criticized from several points of view. First of all, it is based on the concept of “conveyance” which is rather unfounded in international law. This concept automatically removes the question of boundary treaties from the scope of succession in respect of treaties. As a result, the proposed solution, being based on the concept of the extinct boundary treaty, reduces the whole question to the principle of the continuity of boundaries established by treaties. As this principle does not embody rights and duties concerning a boundary regime, it does not offer a comprehensive solution of the question. Anyway, the same conclusion has been reached in the above-quoted ILA resolution and the commentary upon it. Thus the lack of succession in respect of boundary treaties may create many inconveniences.

Followers of this concept maintain that it guarantees more solid protection boundaries. A. P. Lester states that “unless frontier provisions were indeed regarded as executed, and thus severable from the rest of the treaty, they may remain dependent upon other provisions in the treaty as a whole, and the perpetual possibility of breach of these other provisions would create “continuously available process by which the frontier might be questioned.”¹⁴ But it is difficult to grasp why the acceptance of the assumption that the boundary treaty or its severable provisions containing boundary regulations are still binding and subject to succession should produce a different result. On the con-

Aires, 1968, pp. 596—599.

¹⁸ *Ibid.*, p. 603.

¹⁴ A. P. PATER. *op. cit.*, p. 493.

irary, it would produce the same result, and besides it would permit to avoid inconveniences ensuing from the lack of such succession.

The specific position of boundary treaties is based on the fact that they create a permanent situation, and not on the fact that they are executed. Having been implemented, boundary treaties constitute a permanent basis of the situation established by them, and at the same time they establish the foundation of reciprocal rights and duties concerning the boundary regime.

If a definite boundary regime has been conceived as an integral part of a boundary regulation, that is, if it has conditioned a particular course of the boundary line, the lack of succession in respect of the boundary treaty may endanger the whole boundary regulation.¹⁵ It is obvious that provisions of a purely "personal" character, concerning the States being parties to the boundary treaty, would be excluded from the scope of succession in respect of boundary treaties.

III

In a commentary to the draft articles on succession of States in respect of treaties, the ILC stated in 1974 that in considering questions concerning succession in respect of treaties, the implications of the general law of treaties should constantly be borne in mind. As at present the Vienna Convention on the Law of Treaties contains the most authoritative statement of the general law of treaties, the ILC "felt bound to take the provisions of that Convention as an essential framework of the law relating to succession of States in respect of treaties."¹⁶

Special Rapporteur of the ILC, H. Waldock, referring to Article 62 paragraph 2(a) of the Vienna Convention on the Law of Treaties, stated in his Fifth Report on Succession in Respect of Treaties that "the considerations which led the Commission and the Vienna Conference to make this exception to the fundamental change in circumstances appear to apply with the same force to a succession of States, even though the question of the continuance of the treaty may then present itself in a different context."¹⁷ He stressed that the relevant provision of the Vienna Convention "is so framed as to relate to the treaty rather than to the boundary resulting from the treaty." But he immediately stated that "in the present draft the question is not the continuance in force

¹⁵ This point has been also underlined by D. P. O'CONNELL in his commentary to Section 8 of the ILA Resolution. — *International Law Association*, op. cit., pp. 605—606.

¹⁶ *ILC Report*, 1974, GAOR: Twenty-Ninth Session, Suppl. No. 10, p. 9, para. 21.

¹⁷ Doc. A/CN.4/256/Add. 4, p. 21, para. 21.

or otherwise of a treaty between the parties; it is what obligations and rights, if any, devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty.¹⁸

The dilemma whether a boundary treaty or merely the continuance of the situation established by such a treaty is succeeded to, permeate the whole course of the codification work of the ILC concerning succession to boundary regimes. In analyzing the course of the ILC discussions, and subsequently their outcome, one has to bear constantly in mind that they were heavily burdened with specific succession problems of the newly independent States, that is, by problems that would rather not reappear in the future.

In his first report on succession in relation to treaties, Sir H. Waldock proposed the following formula:¹⁹

"Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession."

According to H. Waldock's explanation, this draft provision was intended as a general reservation. The two following versions of the draft provision were submitted by Sir H. Waldock in the above-mentioned Fifth Report on Succession in Respect of Treaties. Both versions were presented as alternative solutions:

Succession of States in Respect of Boundary Settlements

Alternative A

1. The continuance in force of a treaty which established a boundary is not affected, by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating to the predecessor State.

Alternative B

1. A succession of States shall not, by reason only of its occurrence, affect the continuance in force of a boundary settlement which has been established by a treaty.

¹⁸ *Ibid.*, p. 26, para. 28.

¹⁹ "ILC Yearbook," 1968, vol. 2, p. 93.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary.

Alternative A has been described by Sir H. Waldock as representing succession in respect of a boundary treaty, and Alternative B as embodying succession in respect of a boundary situation.²⁰ It seems, however, that this differentiation is not a too clear-cut one. The first explicitly envisages succession in respect of the boundary treaty, applying at the same time the principle of separability of treaty provisions. According to the second, if a boundary regulation is to be understood as comprising all treaty provisions related to a boundary, then, as a matter of fact, this regulation may also imply succession in relation to a boundary treaty on the basis of the same principle of separability of treaty provisions. Nevertheless, the commentary implies that the second alternative was meant by the Special Rapporteur to signify succession in respect of the boundary. Sir H. Waldock, in submitting his proposals, did not pronounce himself firmly in favour of any of the two alternatives, but stated, referring to the ILA resolution of 1968, that the juridical opinion favours the second solution.

The ensuing discussion revealed differences in the opinions between the ILA members. The controversy concentrated upon the question which of the proposed solutions is the best with respect to the continuance of a frontier in case a succession of States occurs. R. Ago stated that a treaty of cession is a source of rights and duties, but the territorial sovereignty is established only when the treaty has been executed. Having been executed, it becomes extinct and is nothing else but an evidence of the legitimacy of the transfer. What takes place in such a case is not a succession in relation to the treaty, but a succession of a real right.²¹ E. Hambro considered dangerous to put the equation sign between boundaries and boundary treaties.²² J. S. Camara thought, however, that the distinction between succession in relation to a boundary treaty and succession in respect of a boundary may turn out to be highly dangerous in practice. If the clean slate principle is adopted in respect of a treaty, it will undoubtedly introduce an element of doubt as to the validity of the boundary regulation contained in the treaty.²³ M. K. Yassen said that "the boundary could not be questioned so long as the treaty was deemed to be in force. The treaty had produced its effects, but it retained all its importance as a title and as evidence of the establishment of the boundary. The sue-

²⁰ Doc. A/CN.4/256/Add. 4, p. 27, para. 30.

²¹ "ILC Yearbook," 1972, vol. 1, p. 251, para. 13.

²² *Ibid.*, p. 251, para. 11.

²³ *Ibid.*, p. 250, para. 8.

cessor State must know to what extent it could rely on the title represented by the treaty to defend its frontiers if they were disputed by other States. For a number of reasons based on the interests of the international community of which stability in international relations was not the least, it was essential that the treaty establishing a boundary should continue in the event of a succession of States.”²⁴

Finally, the draft articles on succession of States in respect of treaties, adopted by the ILC in 1972,²⁵ contained the following provision (Article 29):

Boundary Regimes

“A succession of States shall not as such affect:

- (a) a boundary established by a treaty; or
- (b) obligations and rights established by a treaty and relating to the regime of a boundary.”

This provision, with a slight change of wording (“does not” instead of “shall not”), was included as Article 11 in the general part of the draft convention on succession of States in respect of treaties, adopted by the ILC in 1974.²⁶ In the same form and in the same place it appears in the Vienna Convention of August 1978.

IV

The practice of States explicitly shows that with regard to traditional cases of succession of States (annexation, cession, uniting and dissolution of States) a customary rule of international law has been developed, according to which the successor inherits *ipso jure* boundary treaties of the predecessor. A few examples may be here mentioned.

At the end of the past century a dispute arose between Great Britain and the United States as to the course of the boundary between Canada and Alaska. On 24 January, 1903, both States signed the Convention for the Adjustment of the Boundary between the Dominion of Canada and the Territory of Alaska.²⁷ Article III of the Convention states, *inter alia*:

“[...]the Tribunal shall consider in the settlement of the questions submitted to its decisions the Treaties respectively concluded between His Britannic Maj-

²⁴ *Ibid.*, p. 251, para. 15 and 16.

²⁵ *ILC Report*, 1972, GAOR: Twenty-Seventh Session, Suppl., No. 10, p. 9.

²⁶ *ILC Report*, 1974, p. 16.

²⁷ *British and Foreign State Papers*, vol. 96, 1902—1903, pp. 84—89.

esty and the Emperor of All the Russians under date of 28th (16th) February A.D. 1825, and between the United States of America and the Emperor of All the Russias, concluded under date 18th (16th) March, A.D. 1867, and particularly the Articles III, IV and V of the first mentioned Treaty..”

In 1891, the German Supreme Court stated:

“The Boundary Treaty concluded between the Grand Duchy of Baden and the former French Kingdom on April 5, 1840, remained in undisputed force after the German Reich took over the rights of France by the incorporation of the border land of Alsace-Lorraine.”⁸⁸

On April 25, 1838, the United States and the Republic of Texas, which had been created two years earlier as a result of secession from Mexico, signed the Convention for Marking Boundary.²⁹ The preamble of the Convention states, *inter alia*:

“Whereas the Treaty of Limits made and concluded on the twelfth day of January, in the year of our Lord one thousand eight hundred and twenty-eight, between the United States of America and the United Mexican States on the other, is biriding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the said United Mexican States...”

Many examples of succession in relation to boundary treaties are supplied particularly by the German practice. We shall here confine ourselves to the practice of the Federal Republic of Germany, since the contention that the boundary treaties concluded by different German States before 1871 were or are still binding upon the FRG would mean that they have survived not only the unification of Germany in 1871, but also later structural changes of this State; as well as the division of Germany into two States in 1949.

The Treaty between the FRG and Netherlands of 8 April, 1960⁸⁰ states in its Article 1:

“The course of the frontier between the Kingdom of the Netherlands and the Federal Republic of Germany shall be as specified in the Boundary Treaties between the Kirigdom of Prussia and the Kingdom of the Netherlands signed at Aachen on 26 June, 1816 and at Cleves on 7 October, 1816, in the Frontier Treaty between the Kingdom of Hanover and the Kingdom of Netherlands sign-

⁸⁸ *Fontes Iuris Gentium*, Decisions of the German Supreme Court relating to International Law, 1878—1929, Series A, Section II, Tomus 1, Berlin 1931, p. 116.

²⁹ *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. 2, Compiled by William M. Malloy, Washington, 1910, pp. 1779—1780.

⁸⁰ “UNTS,” vol. 508, No. 7404.

ed at Meppen on 2 July, 1824, and in the Agreements concluded for the purposes of implementing, revising and supplementing those Treaties, to the extent that such Treaties and Agreements were in force between the Kingdom of the Netherlands and the Reich on 31 December, 1937, and in provisions derogating therefrom which are set out in Annex A to this Treaty."

According to the information provided by the Netherlands agreements, concluded for the purposes of implementing, revising and supplementing the above-mentioned treaties, there are six treaties concluded between Prussia and the Netherlands before 1871, and two treaties concluded between Prussia and Hanover.

The Treaty of 1960 does not explicitly stipulate whether all the mentioned treaties remain still in force or terminate with its entering into force. In any case, the importance of the statement that they remained in force on December 31, 1937 should not be overlooked. Several of those treaties, as the 1816 Treaty between Prussia and the Netherlands, also regulated boundary regimes.

On February 29, 1972, the Federal Republic of Germany and Austria signed the Treaty on the Common State Boundary.⁸¹ Article 34 of this Treaty states that with its entering into force the provisions of the former Treaties, which are inconsistent with it, shall be terminated. In particular, the Treaty mentions boundary treaties between Austria and Bavaria of 1818, 1820, 1844, 1851 and 1858.

Many valuable indications are provided by the lists of treaties in force. For instance, the French list of such treaties reveals that France, as the successor of Sardinia (the cession of Savoie and Nice to France was effected in 1860), considers itself to be bound by the Treaty of 1564 between duke Emanuel Philibert de Savoie and the Town of Bern, and by the Treaty on Frontiers of 1754 between the King of Sardinia and the Republic of Geneva.⁸²

In the light of the above practice, it may be stated that Article 11 of the Vienna Convention expressed, in relation to traditional cases of succession of States, only the basic concept that succession of States did not in any way affect the existing boundaries. But it did not preclude boundary treaties from being succeeded to. Also doctrinal concepts, which had influenced the actual wording of Article 11, did not settle the question.

From among traditional cases of succession of States, the Vienna Convention singled out only three: succession in respect of part of

⁸¹ *Bundesgesetzblatt*, 1975, Teil II, Nr. 34.

⁸² P. DUPARC, *Traités et accords en vigueur. Liste des engagements bilatéraux souscrits par la France en vigueur en 1^{er} janvier 1958*, Paris, 1962.

territory, uniting of States and separation of parts of a State. The omission of annexation is understandable. However, the omission of secession, which is handled on a par with the dissolution of a State is rather questionable.

The question of succession in relation to boundary treaties considered in the light of the Vienna Convention provisions concerning traditional cases of succession of States may lead to several conclusions.

As to cession, Article 15 of that Convention expresses the moving treaty-frontiers rule, generally recognized in international customary law. This rule is not applicable to boundary treaties because they are localized treaties. Even if we ascertain that, according to international customary law, boundary treaties pass over *ipso jure* from the transferor to the cessionary, we are still left with the question of the scope of such a succession.

Succession in respect of boundary treaties (and possibly other "territorial treaties") was treated as an exception to the rule that the cessionary does not inherit any treaties. Therefore, the scope of succession in such a case is limited. We must assume that cession involves succession in respect of a boundary treaty with the application of the principle of separability of treaty provisions. The successor (cessionary) takes over *ipso jure* the boundary treaty within the scope of those provisions that refer to the establishment of the boundary, and also of the boundary regime constituting an integral part of the boundary regulation. The Vienna Convention, following the ILC drafts, does not distinguish between the regime constituting an integral part of the boundary regulation and other boundary regime. Thus we can say that in so far as Article 11 envisages the continuance of the boundary regime in general, it exceeds — as to cession — the scope of the existing rule of customary international law.

As to the uniting of States, Article 31 (1) of the Convention envisages that the successor State takes over *ipso iure* all the treaties concluded by the predecessors. There is not doubt that this provision reflects an already existing customary rule of international law. The uniting of States is a peculiar phenomenon. As M. Bedjaoui, the Special Rapporteur on succession in matters other than treaties, stated, that a State brought into existence by the uniting of two States is "almost the arithmetical sum of the other two so far as rights and obligations are concerned."⁸⁸

With respect to boundary treaties, it may be said that when the uniting of States occurs, the successor State takes over *ipso jure* all

⁸⁸ Doc. A/CN.4/216/Rev. 1, p. 48, para. 89.

the boundary treaties, that is, those establishing a boundary as well as those concerning all the boundary regimes. In this instance, the principle of the separability of treaty provisions is not applicable, as boundary treaties with all their provisions constitute here the subject of succession.

As to the succession of States in cases of separation of parts of a State, Article 34 (1) of the Convention envisages that all the treaties pass over *ipso jure* to successors. The Vienna Convention put on equal footing, with regard to succession in respect to treaties, the dissolution of a composite State, the division of a unitary State and secession (Article 35 determines only the position of the predecessor State in the event of secession).

Thus, in the light of Article 34, all boundary treaties pass over to successors as in the event of the uniting of States. It is doubtful, however, whether this Article reflects the customary rule of international law. Most certainly it expresses such a rule in respect of the dissolution of a composite State. And also most certainly it does not so in respect of secession. In the literature of international law the position of a secessionist State, as a successor State, is traditionally defined by reference to the clean slate rule.

In the event of secession, succession in respect to boundary treaties is treated as an exception to the clean slate rule. Consequently, it must be assumed that, according to the customary rule of international law, secession is followed by succession *ipso iure* in respect of a boundary treaty with the application of the principle of separability of treaty provisions. The successor takes over the boundary treaty within the scope of those provisions that refer to the establishment of the boundary as well as of the boundary regime constituting an integral part of the boundary regulation.

V

The principle of continuity of State boundaries, expressed in Article 11 of the Vienna Convention, constitutes, in respect of the above-mentioned traditional cases of succession of States, only a basis for succession *ipso jure*—to a smaller or large extent—in respect to boundary treaties.

The whole question looks different with respect to the newly independent States. There are few doubts left that the newly independent States, especially those in Africa, have rejected succession *ipso jure* in respect of the boundary treaties of the colonial powers.

However, the newly independent African States have committed themselves to respect the existing boundaries. In 1964, the Assembly of Heads of State and Government of the Organization of African Unity adopted a resolution which declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence."³⁴

The statement of the African States that they have undertaken to respect the existing boundaries is to be understood literally. The point is that on achieving their independence these States did not feel to be bound by any customary rule of international law which could demand their respect for the existing boundaries. According to the viewpoint taken by the newly independent African States, European powers did not exercise sovereignty over African territories and, consequently had no authority to establish boundaries in Africa. Moreover, it is also claimed that the boundaries in Africa were established by colonial powers arbitrarily, without paying attention to the needs of the local population.

It may be said that the African States regarded the existing boundaries as factual situations which must be preserved in the interest of stability, peace and international security in Africa. They considered that the obligation to respect the existing boundaries constituted their own obligation ensuing from the act of their own will.

The solution accepted in Africa is linked with the *uti possidetis juris* principle which, according to the opinion of one of the African jurists, "is akin to, if not a prolongation of the concept of State succession."³⁵

Uti possidetis, ita possidetis — as you possess, so you may possess.³⁶ This principle has been formulated as a basis of territorial demarcation in relations between the Latin American States which emerged on the territory of former Spanish America. It has been described as the principle of colonial *uti possidetis*.³⁷

The essence of this principle has been expounded in the decision of the Federal Council of Switzerland of 1922 concerning the boundary dispute between Colombia and Venezuela in the following manner:

³⁴ ILC Report, 1974, p. 40, para. 11.

³⁵ A. O. CUKWURAH, *op. cit.*, p. 112.

³⁶ DON VINCENTE SANTAMARIA de PAREDES, *A Study of the Question of Boundaries between the Republic of Peru and Ecuador*, Washington 1910, p. 269; Case concerning sovereignty over certain frontier lands (Diss. Op. Judge Moreno Quintana), ICJ Reports, 1959, p. 255.

³⁷ DON VINCENTE SANTAMARIA de PAREDES, *op. cit.*, p. 17.

"When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name *uti possidetis juris* of 1810. The principle laid down the rule that the boundaries of the newly established republics would be the frontiers of the Spanish provinces which they were succeeding. This general principle offered the advantage of establishing the absolute rule that in law no territory of old Spanish America was without an owner."⁸⁸

In fact, however, the whole matter was not so simple as that. First of all, the States of Latin America did not interpret this principle so unequivocally as it had been expounded in the above quoted decision. Although the year 1810 was the initial date when colonial *uti possidetis* was formulated, another date—the year 1821—was also recognized in relation to the States of Central America.³⁹ Generally speaking, three interpretations of the colonial *uti possidetis* principle have been shaped among the States of Latin America: a) *uti possidetis* of 1810, b) *uti possidetis* upon achieving independence, and c) *uti possidetis* before achieving independence.⁴⁰

Another complication was created by the fact that the boundaries of particular administrative units had not been fixed with a sufficient precision. According to S. W. Boggs, "As the Spanish crown created new viceroalties, audiencias, and other jurisdictions, large and small, and at times abolished or combined two or more, the map of Latin America became a sort of palimpsest from which the earlier inscriptions of colonial domain were supposedly erased in order that new writings might supersede them."⁴¹ Moreover, as no effective possession had been entered upon many sparsely populated territories, claims could be laid to them only on the basis of old royal documents. And these could often be used to support claims of both parties.⁴²

To the difficulties presented above, we may also add the advancement of the *uti possidetis de facto* principle by several States of Latin America. This resulted from the fact that in some instances the administrative authorities of several colonial units had exercised jurisdiction, often in good faith, outside their administrative boundaries. States emerging from such units expanded at the cost of the adjacent ones,

⁸⁸ J. B. SCOTT, *The Swiss Decision in the Boundary Dispute between Colombia and Venezuela*, "AJIL," vol. 16, 1922, p. 428.

⁸⁹ I. BROWNLIE, *op. cit.*, pp. 137–138.

⁴⁰ DON VINCENTE SANTAMARIA de PAREDES, *op. cit.*, p. 277.

⁴¹ S. W. BOGGS, *International Boundaries. A Study of Boundary Functions and Problems*, New York, 1940, p. 80.

⁴² *ibid.*, p. 80; N. HILL, *Claims to Territory in International Law and Relations*, London—New York—Toronto, 1945, p. 155.

were inclined to maintain that *uti possidetis* meant administrative possession which had actually existed at the time of achieving independence. Contrariwise, the other parties concerned maintained that *uti possidetis* principle required that the territorial sovereignty of Latin American States be confined to territories rightfully occupied by the administration of the former units.⁴³ Eventually, according to F. C. Fisher, "The protagonists of the first theory contended that the principle required the establishment of a juridical line, which they called the line of *uti possidetis juris*, while those who upheld the opposing view affirmed that the true theory was expressed by the term *uti possidetis de facto*."⁴⁴

The acceptance of the *uti possidetis* principle in Latin America must have resulted from the conviction that the boundaries in existence at the time of achieving independence had no legal foundations. In view of this, situation, the acceptance of the *uti possidetis* principle was tantamount to transforming the existing factual situation into the legal one. In the principle failed in achieving its purpose, mainly because its two competing versions had been set forth.

The *uti possidetis de facto* principle permitted to base the title to a territory on actual possession. However, the title to the territory, based on the *uti possidetis de facto* principle, does not result from prescription because such a title ensues from agreement.

The *uti possidetis juris* principle permitted to base the title to a territory on possession being in accordance with the former colonial administrative division and, in fact, performed substitutional role in view of the lack of succession in respect of legislative and administrative acts of the colonial power. This institution should not be regarded as succession *ipso jure* in respect of those acts, since the title based on *uti possidetis juris* is also a result of agreement.

The acceptance of the *uti possidetis* principle by the African States cannot be called in question. This opinion is shared by many authors.⁴⁵ As succession *ipso jure* in respect of boundary treaties has been rejected, it is the *uti possidetis* principle that constitutes the legal basis for the territorial demarcation in Africa. I. Brownlie includes the *uti*

⁴³ F. C. FISHER, *The Arbitration of the Guatemalan—Honduras Boundary Disputet* "AJIL," vol. 27, 1933, p. 416.

⁴⁴ *Ibid.*, p. 416.

⁴⁵ ALLOT, *Boundaries and Law in Africa*, in: *African Boundary Problems*, edited by C. G. Widstrand, Uppsala, 1969, p. 17; I. BROWNLIE, *op. cit.*, p. 138; J. SYMONIDES, *Terytorium państwowe w świetle zasady efektywności* [State Territory in View of the Principle of Effectiveness], Toruń 1971, p. 149.

possidetis principle among the roots of title to territory and regards it as an indirect form of disposition of territory.⁴⁶

But, as the events in Latin America have shown, a clarification is required whether *uti possidetis juris* or *uti possidetis de facto* is at stake. If the *uti possidetis de facto* principle is adopted, the existing extent of possession must serve as a basis of territorial demarcation, and previous boundary treaties have, as a rule, no evidential value. Contrariwise, the *uti possidetis juris* principle accords them such a value. According to the last one, the respective boundary treaties constitute a basis for the demarcation of the boundaries in question. In the case of former administrative boundaries the basis for such a demarcation is provided by the internal acts (legislative or administrative) of the colonial power.

Commitment to respect the existing boundaries of achieving independence, proclaimed by the above-mentioned OAU Resolution, may be understood as concerning both principles—the *uti possidetis juris* and the *uti possidetis de facto*. If the second principle is adopted, it may prove to be little effective as a basis for the territorial demarcation in Africa. There were no actual boundaries in many regions of Africa, especially in the desert ones, and that means that there had not been any actual and effective possession, so the criterion of actual possession would be illusive. This is why the *uti possidetis juris* constitutes the only rational solution. What distinguishes essentially the situation in Africa from that in Latin America is the fact that the majority of the boundaries of the new African States are those that had once international character and were established by treaties concluded by the colonial powers (In Latin America only the boundaries with Brazil had formerly international character). About one-fourth of the present boundaries in Africa had formerly administrative character.

The question of former administrative boundaries was mentioned by the ILC Special Rapporteur, M. Bedjaoui, in his first report on succession of States in respect of matters other than treaties. He declared that “colonial administrative boundaries were made international boundaries in an effort to avoid throwing the political map of Africa into dangerous confusion.”⁴⁷ He further stated that “the boundaries of the African States, like these of the Latin America States, were established on the basis of *uti possidetis juris* at the date of independence.”⁴⁸ It is significant that M. Bedjaoui regarded that the *uti possi-*

⁴⁶ I. BROWNLIE, *op. cit.*, p. 137.

⁴⁷ Doc. A/CN, 4/204, p. 53, para. 121.

⁴⁸ *Ibid.*, p. 54, para. 126.

detis juris principle had been accepted by the African States and that it should be applied as a means of establishing boundaries.

Summing up, a few conclusions may be drawn from the above considerations.

The main function of the *uti possidetis juris* principle is that it creates the legal basis for the actually existing boundaries. According to this principle, the course of a boundary is such as it has been established by the boundary treaties of the colonial powers or by unilateral regulations of those powers (administrative boundaries).

The *uti possidetis juris* principle fulfils the function of a substitute for the lack of succession *ipso jure* in respect of boundary treaties. But it differs from succession *ipso jure* as the latter acts automatically and maintains uninterrupted continuity of the existing legal situations. The *uti possidetis* creates the legal basis for the existing situations regarded as factual situations, but not until after it is accepted by way of agreement.

Then, it differs from succession *ipso jure* in that its application reduces boundary treaties to a basis for establishing only the course of a boundary line. In case, however, of succession *ipso jure*, nothing but those treaties constitute the legal basis of the boundary itself and succession also encompasses mutual rights and duties concerning the boundary regime.

As to its effects, the *uti possidetis juris* fulfils the same function as the continuity of boundaries rule as far as boundaries established by treaties are concerned. Although the continuity of a specific legal situation is basically denied by the *uti possidetis* doctrine, it is in fact ensured. In this sense, that is, as far as the effects are concerned, the *uti possidetis juris* is contained in the continuity of State boundaries principle expressed in Article 11 of the Vienna Convention.

VI

Inasmuch as the principle of the continuity of frontiers, contained in Article 11 of the Vienna Convention, constitutes, as we have established above, in relation to traditional cases of the succession of States only a foundation for succession *ipso jure* with respect to boundary treaties, it acts independently in cases of the newly independent States. The newly independent States show a tendency to regard the clean slate principle as having unrestricted character (maintaining at the same time flexibility in practice), and therefore not allowing exceptions also with respect to boundary treaties. Thus only the principle of

continuity of State boundaries established by treaties is applicable in relation to the newly independent States.

This principle, however, does not offer a suitable solution as far as the continuance of the boundary regime is concerned. The problem it created was raised during the codification work. As an illustration we may quote here the statement of the Egyptian delegate to the VI Committee of the UN General Assembly, who said: "it could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations."⁴⁹ Referring to this statement, the ILC Special Rapporteur, F. Vallat, stated that "rights and obligations could clearly exist only in the context of the treaty from which they derived. If the treaty disappeared, the rights and obligations would also disappear."⁵⁰

The Vienna Convention is not yet a binding act of international law, and it is difficult to foresee when and in relation to which States it will assume such character. In the present state of international law, the refusal by the newly independent States to recognize succession *ipso jure* with respect to boundary treaties creates serious difficulties in maintaining the continuity of rights relating to boundary regimes.

These difficulties may be overcome by recognizing such succession in respect of boundary treaties that would be based on agreement concluded by the immediately concerned newly independent States. Succession of this kind is not an unusual phenomenon. The newly independent States, while stressing the unrestricted character of the clean slate principle, are in practice not unwilling to succeed — on a rather large scale — to treaties concluded by the colonial powers.

VII

Initially, some newly independent States objected to the draft on boundaries and boundary regimes since they were convinced that it was inconsistent with the right to self-determination.

The ILC commentary to Article 11 of the 1974 draft states that

Such a provision would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground

⁴⁹ Sixth Committee, 1972, GAOR: Twenty-Seventh Session, p. 67, para. 3.

⁵⁰ "ILC Yearbook," 1974, vol. 1, p. 205, para. 63.

of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty.”⁵¹

The commentary does not, however, contain any further explication as to the meaning of the self-determination principle in the context of its possible use as the ground for “the revision or setting aside of the boundary settlement.”

A similar question was raised earlier in connection with Article 62 paragraph 2(a) of the Vienna Convention of the Law of Treaties, according to which “a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary.”

On a wider plane, the question touches upon the relation between the right to self-determination and the principle of territorial integrity and inviolability of boundaries.

Thus our considerations must start from the following fundamental statement: the practice of States seems to indicate that the right of self-determination does not embrace the “right to secession.” The international community has recognized the right of the peoples in dependent territories to independence. But it did not so in relation to peoples inhabiting integral parts of State territories.

There is a viewpoint in the literature of international law that “secession forms no part of the concept of self-determination and its revolutionary character derives legality only in success.”⁵² Without embarking upon a discussion on this question, it should be nevertheless stated that the existence of the “right to secession” is at least controversial. On the other hand, if we even assume that such a right has an existence, we should stress at the same time that it is a right of a particular people. Thus the right to self-determination as the “right to secession” would be a right to which a people and not a State is entitled.

Secession does not constitute a violation of the principle of territorial integrity and inviolability of boundaries. This principle is binding in relations between States, and it embodies a ban on certain activities in relations between States. But it does not affect relations between the State and any of the population groups inhabiting its territory. Thus the right to self-determination and the principle of territorial integrity and inviolability of boundaries, as they refer to different areas of relations, are not contradictory. In consequence, the principle of territorial integrity and inviolability of boundaries has nothing in common

⁵¹ *ILC Report*, 1974, p. 42, para. 17.

⁵² S. KAUR, *Self-Determination in International Law*, “*Indian Journal of International Law*,” vol. 10, 1970, p. 493.

with the question of existence or non-existence of the "right to secession/

In fact, in the present-day territorial disputes the whole problem boils down to the question whether one State may put forward territorial claims against another State, invoking the right of self-determination of a group of population inhabiting the territory of the latter one. But the right to self-determination, if conceived in this way, is incompatible with the principle of territorial integrity and inviolability of boundaries. It is so because such an expression to the right of self-determination distorts its basic meaning of being a right of the people and not of the State. The correct expression of the right to self-determination, even if the existence of the "right to secession" is acknowledged, is devoid of any inconsistency.

The right to self-determination understood as the right of a people cannot serve as a legal basis for territorial claims of one State against another. Territorial claims invoking the right to self-determination cannot be recognized as based on international law.

As to the inadmissibility of invoking the *rebus sic stantibus* rule with respect to boundary treaties, the ILC stated that "self-determination, as envisaged in the Charter, was an independent principle [...]. By excepting treaties establishing a boundary from its scope, the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed."⁵³ A correct viewpoint in this question has been taken by G. Haraszti, according to whom "in the event of the enforcement of the right to self-determination, the question is not one of abrogating a valid treaty in view of a change of circumstances, but of enforcing a right which has never and can never become the subject-matter of a boundary treaty."⁵⁴

Thus, the incompatibility of the ban on invoking the *rebus sic stantibus* rule in relation to boundary treaties with the right to self-determination is out of question. Equally, the incompatibility of the principle of continuity of boundaries in case of the succession of States with the right to self-determination is also out of question.

⁵³ ILC Report, 1966, Doc. A/CN.4/191, pp. 196—197, para. 11.

⁵⁴ G. HARASZTI, *Some Fundamental Problems of the Law of Treaties*, Budapest, 1973, p. 398.

The New Law of the Sea

by **WOJCIECH GÓRALCZYK**

I

The title of this paper implies that there exists already a more or less coherent body of rules of international law which can be called the new law of the sea.

This implication is, however, not that clear and calls for explanation, for there are no new conventions in this field and the Third United Nations Conference on the Law of the Sea which had been deliberating since 1973 has, so far, failed to adopt a new convention; furthermore it cannot be foreseen with certainty when such a convention (if finally adopted) will enter into force and which states will become parties to it.

However if, in spite of all this, the author of this paper implies in the title that the new law of the sea exists then such an opinion rises several questions which call for a thorough elaboration and discussion.

Here are some of them:

— How does the new law of the sea differ from the classical law of the sea which was shaped during the past centuries and which was codified in the Geneva Conventions of 1958.¹ In what does its novelty consist? what are its main features?

— How did it emerge? — obviously not in a treaty form, for — as I mentioned before — no new convention has been adopted and the Geneva Conventions of 1958 are still, formally in force;

— Whose interests does it serve? how can it be evaluated? is it just and equitable?

¹ I refer to the Convention on the Territorial Sea and the Contiguous Zone and to the Convention on the High Seas, for only they represent the codified classical law of the sea.

I

The fundamental feature of the new law of the sea lies in its sanctioning of the extension of the jurisdiction of states over vast sea areas thus leading to the creation of 200 miles' coastal zones.

These zones have been carrying and are being given various names. They have been called continental shelf (with a complete disregard of the geographical contents of this concept),² epicontinental sea, patrimonial sea, maritime zone (*la zona marítima*)? exclusive fishing zone, or finally economic zone. Of course, no particular importance is to be attached to the terminology, for what matters is the legal contents which lie behind these names.⁴ All these zones have one thing in common: the rights of the coastal states are defined in a functional way.⁵ They seem to serve economic purposes, in the first place, the purpose of making sure that the coastal state enjoys the exclusive right to exploit the resources of the sea; thus it can be said that the whole concept is "resources oriented."

The establishment of 200-mile zones has resulted in a change in the legal status of large sea areas.

According to the classical law of the sea states exercised their jurisdiction in a narrow coastal zone, three, four, six miles wide. A 12-mile zone of territorial sea was unacceptable to many states and at the Second Conference on the Law of the Sea in 1960 the majority of participants rejected the concept of a 12-mile zone of territorial sea.⁶ For a long time there was a general consensus that coastal states have no jurisdiction over the natural resources which lie beyond the territorial sea. However, after the II Conference on the Law of the

² So acted: Chile in the Presidential Declaration concerning the continental shelf of June 23, 1947 (see *Laws and Regulations on the Regime of the High Seas*, vol. 1, New York 1951, p. 6) and Peru in the Presidential Decree concerning continental shelf of August 1, 1947 (*ibid.*, p. 16).

³ The term was used, among others, in the Declaration signed August 18, 1952 by Chile, Ecuador and Peru (*La Declaración sobre Zona Marítima*). For the text see "Revista Peruana de Derecho Internacional," 1954, p. 104.

⁴ For an analysis of this problem see W. GÓRALCZYK, *Szerokość morza terytorialnego i jego delimitacja* [The Extent of the Territorial Sea and Its Delimitation], Warszawa 1964, p. 67 ff.

⁵ The problem is discussed also by A. STRABURZYŃSKI: *Funkcjonalny podział uprawnień państw nadbrzeżnych na obszarach morskich* [The Functional Division of Jurisdiction of Coastal States on Maritime Areas], in: *Polska i Świat. Studia nad prawem międzynarodowym i współczesnymi stosunkami międzynarodowymi* [Poland and the World. Studies Into International Law and Modern International Relations], ed. H. Olszewski, Poznań 1978, p. 529 ff.

⁶ Cf. A/CONF.19/L.4, para. 19; Second United Nations Conference on the Law

Sea the states began to modify their position on this issue, but the prevailing view was still that the so-called exclusive fishing zone cannot exceed 12 miles.

Thus, the overwhelming part of the world's sea areas enjoyed the status of the high seas, subject to the principle of the freedom of the seas which included above all freedom of navigation and freedom of fishing (or in a broader sense — freedom of exploitation of the resources of the seas).

The Geneva Convention on the High Seas of 1958, places those two fundamental freedoms before other freedoms of the seas (Art. 2).⁷

The situation changed with the establishment by the majority of states of 200-mile zones. This found its reflection, among other things, in the Draft Convention on the Law Of the Sea (Informal text)⁸ worked by the Third United Nations Conference on the Law of the Sea representing the preliminary draft of a new convention on the law of the sea. In the listing of the freedoms of the high sea the freedom of fishing was shifted to fifth place and explicitly restricted by provisions concerning, among other things, the protection of living resources and the management of their exploitation (Art. 87).

However, these changes in drafting are not the most important ones. Even in the past the principle of the freedom of fishing was not interpreted in an absolute way, being subject to restrictions arising from the necessity to protect the living resources. The essential thing is that the Draft Convention on the Law of the Sea sanctions simultaneously the establishment of 200-mile economic zones (called "exclusive economic zones") over which the coastal state has

"sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the sea-bed and subsoil and the superjacent waters [...]" (Art. 56, p. 1, a).

Thus the principle of freedom of fishing ceases to apply in the 200-mile zones.

It has been estimated that the 200-mile zones established not only at continental coasts but also around islands and islets scattered on the seas and oceans cover about 40 per cent of the entire maritime area. It is in these zones (formed mainly by shallow shelf areas) that

cf the Sea, Official Records, vol. 1, 1970.

⁷ Text in "Dziennik Ustaw" [Journal of Laws further as Dz.U.] 1963, No. 33 item 187, annex.

⁸ A/CONF.62/WP. 10/Rev.3.

the richest fishing ground are to be found and it is from these areas that about 90 per cent of all catches originate.

Thus, the principle of freedom of fishing will have no bearing on the exploitation of the major part of the biological resources of the seas. It does not apply to the areas where the most fertile fishing grounds are to be found, while covering areas of minor importance for the fishing industry. In this way the principle of freedom of fishing has been deprived of its practical meaning.

And this constitutes a fundamental feature of the new law of the sea. Pursuant to the classical law of the sea the marine resources were open to all states, to their vessels and nationals. At present, these resources have been divided among the more favourably located coastal states. The appropriation covered not only the living resources but also the mineral resources, for states extended even earlier their jurisdiction over coastal submarine areas (or shelf areas) where all the oil and natural gas deposits are to be found. The exploitation of these deposits exceed the economic importance of the fishing industry.

Thus, the second pillar of the principle of freedom of the seas, namely the freedom to exploit the resources of the seas has ceased to exist.

The extension of the state jurisdiction over the 200 miles zone is so essential that it represents a qualitative change in the law of the sea; consequently, one can speak of the emergence of a new law of the sea. It goes without saying that, however important, this change was not the only one as far as the system of norms concerning the status and the right to use the maritime areas is concerned.

It must be emphasized that the tendency to extend the jurisdiction of the coastal states took also other forms, namely through the extension of the territorial sea, the shifting of the baselines from which the breadth of the territorial sea is measured further away from the coast, the creation of various coastal zones in which states reserved for themselves various rights and privileges as well as the introduction of the concept of so-called archipelagic waters.⁹

On top of that emerged a necessity to regulate shipping activities and to protect the marine environment against pollution.

Furthermore, the extension of the jurisdiction of states on vast coastal areas and, in particular on the 200-mile zone led to further changes in the system of rules of the law of the sea.

⁹ Cf. W. GÓRALCZYK, *Rozszerzenie terytorium państw nadbrzeżnych na obszary morskie* [The extension of the Jurisdiction of States Over Sea Areas], in: *Aktualne problemy prawa morza* [Current Problem of the Law of the Sea], Gdansk 1976, p. 48.

Since the access to coastal fishing grounds was from now on depending on the will of the coastal states, it became necessary to conclude bilateral agreements between the coastal states concerned and the states whose fishermen traditionally fished in these waters. The right to fish in these waters based hitherto on a customary rule of international law had to be based on bilateral agreements very often arrived at following arduous negotiations.

Such agreements, generally of a short term nature, can be divided into three basic types: 1. Agreements providing for a gradual phasing cut of foreign fishing vessels from the newly established coastal zones. Their aim is to mitigate the negative economic effects for the states engaged in distant-waters fishing by spreading over several years the process of elimination of their fleets from the coastal fishing grounds. 2. Agreements providing for mutual fishing rights for the vessels of both contracting parties in areas subject to their jurisdiction (exchange of surpluses of the allowable catch). 3. Agreements fixing the principles and conditions in accordance to which the fishing vessels of one party can carry out their activities on the waters remaining under the jurisdiction of the other party.¹⁰

The majority of agreements concluded over the past few years belong to the latter category. Not all coastal states (in particular not all developing states) which established a 200 miles fishing zone have the capacity to harvest the entire allowable catch. Under these circumstances such bilateral agreements make it possible for states engaged in distant-water fishing to gain access to the surplus of the allowable catch.

A right of access to such surplus implies, as a rule, the obligation to make a payment in favour of the coastal state and sometimes also an obligation to supply and to sell a portion or the entire catch in the ports of that state. Furthermore, agreements of that type (especially agreements signed with developing states) may also provide for an obligation to cooperate with that state in the field of fishing, an obligation to provide technical assistance, to train personnel, to carry out scientific research into the resources of the coastal zone, to engage in joint ventures with the coastal state or its nationals.

Thus, bilateral agreements have become to a large extent the principal basis for the practice of distant-water fishing.¹¹ Poland has also

¹⁰ Cf. J. E. CARROZ, M. J. SAVINI, *The New International Law of Fisheries Emerging From Bilateral Agreements*, "Marine Policy," 1979, No. 3 pp. 79—98.

¹¹ Intergovernmental agreements are not the sole basis of distant-waters fishing. There are many agreements concluded between states and private persons as well as agreements concluded between private persons. For example, many

concluded a series of such agreements.¹² Their main shortcoming lies in their short term nature. They fail therefore to provide the necessary long-term stability for the development of distant-water fishing. Many coastal states aim at developing their own national fishing industry so as to gain the capacity to harvest the entire allowable catch in their own zone and to eliminate gradually from their zone all foreign fishing vessels.

Another important consequence of the extension of the jurisdiction of the coastal states is the increasing importance of the delimitation of sea areas. Under the classical law of the sea with its three or six miles zone of territorial sea, the problem of the delimitation of the sea areas between states with opposite or adjacent coasts was treated as a technical matter.¹⁸ In fact, the application of one or another method of delimitation had only very limited importance since it affected very small areas without major economic or political value.

The present situation is however, radically different. Hundreds of thousands of square kilometres of sea and submarine areas containing huge natural resources are being divided up. The application of the median line in the division of the North Sea between the United Kingdom and Norway, without taking into consideration the so-called Norske Renne, resulted in the allocation to the Norwegian sector of areas rich in oil deposits.

Entire semi-enclosed seas, such as the Baltic Sea are being cut up with the result that following the establishment of fishing zones by the coastal states no place is left where fishing is free.

The delimitation of sea areas has, thus, acquired great importance and has also provoked many disputes and conflicts. The principles of delimitation lost their technical character and had to be replaced by substantive rules; in particular, it was necessary to base the delimitation

Japanese fishing vessels operate on the basis of agreements signed between states and private Japanese firms and consortia. These agreements are not binding under international law.

¹² The texts of these agreements and their analysis can be found in: E. WIŚNIEWSKI, P. ANDERS, *Umowy międzynarodowe PRL dotyczące rybołówstwa morskiego* [International Agreements of the Polish People's Republic Concerning Maritime Fishing], Gdynia 1978.

¹⁸ This is the way I treated them in my work *Szerokość morza terytorialnego i jego delimitacja* [The Extent of the Territorial Sea and Its Delimitation] whose Part IV bears the title: *Metody techniczne wyznaczania granicy zewnętrznej morza terytorialnego* [The Technical Methods of Fixing the Outer Limit of the Territorial Sea]. Similarly, delimitation is treated as a technical problem by S. W. BOGGS (*Delimitation of the Territorial Sea*, "American Journal of International Law" 1930 and *Delimitation of Seawards Areas under National Jurisdiction*, "AJIL" 1951) and by F. MUNCH, *Die technische Fragen des Küstenmeers*, Kiel 1934/

of sea areas on the principle of equity and not on geometrical constructions. One cannot but agree with the words of one of the authors, who wrote "that the delimitation of maritime boundaries must be determined according to equitable principles is now, it seems, an established principle of both customary and conventional international law. It is indeed the fundamental norm."¹⁴

The necessity to apply the principle of equity in the process of delimitation of submarine areas was recognized, among others, by the International Court of Justice in the North Sea Continental Shelf judgement,¹⁵ as well as by the Arbitration Tribunal which ruled in the disputes over the delimitation of the continental shelf between France and the United Kingdom in 1977.¹⁶

The principles of delimitation of sea areas became one of the most important and at the same time most controversial problems negotiated at the III Conference on the Law of the Sea.¹⁷ It must, however, be emphasized that according to the Draft Convention on the Law of the Sea the delimitation of economic zones and of the continental shelf shall be effected in accordance with equitable principles (Arts 74 and 83). It can therefore be expected that the future convention on the law of the sea will recognize the principle of equity as constituting the foundation of the delimitation of sea areas.

It may be asked why, while speaking about the new law of the sea and its characteristic features I do not mention the recognition (in the Resolution of the UN General Assembly of December 17, 1970)¹⁸ of the sea-bed and ocean floor beyond the limits of national jurisdiction, as well as the resources of the area as being the "common heritage of

¹⁴ Cf. L. D. M. NELSON, *Equity and the Delimitation of Maritime Boundaries*, "Iranian Review of International Relations," 1978, No 11/12, p. 217.

¹⁵ Cf. North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands). North Sea Continental Shelf, Judgement, I.C.J. Reports 1969; in particular see pp. 46—47.

¹⁶ Cf. Tribunal Arbitral, République Française (Royaume Uni de Grande Bretagne et d'Irlande du Nord. Delimitation du plateau continental, Decision du 30 juin 1977); *La Documentation Française*, p. 80.

¹⁷ Cf. W. GÓRALCZYK, J. SYMONIDES, *Dalszy krok na drodze do konwencji prawa morza* (A Further Step Towards a Convention on the Law of the Sea), "Technika i Gospodarka Morska," 1978, No. 9, p. 533 ff. Also by the same authors: *Zakończenie prac VII sesji III Konferencji Prawa Morza* [The Conclusion of the Work of the VII Session of the III Conference on the Law of the Sea], "Technika i Gospodarka Morska," 1979, No. 1, p. 16.

¹⁸ A/RES/2749/XXV. In the resolution we read, among other things: "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction [...] as well as the resources of the area, are the common heritage of mankind."

mankind." The concept of "common heritage of mankind" is something entirely new, not only in the law of the sea, but in international law in general. It implies, among other things, that the resources of the international area should be exploited in the interests of mankind as a whole.¹⁹

This omission is due to the fact that the sea bed and ocean floor has not yet become the common heritage of mankind, thus the problem can be treated only *de conventione ferenda*. The above mentioned Resolution of the General Assembly was not binding upon the UN member-states, since the General Assembly has no legislative powers. It could not alter the actual legal situation of that area and introduce an international regime of exploration and exploitation of the resources of the area.²⁰

Furthermore, the concept of common heritage of mankind and its practical implementation involve certain organizational measures. Indeed, there are plans to create a special international organization, the Sea-Bed Authority which would organize the exploitation of the resources of the sea bed and exercise control over these activities. The plans provide also that the Sea-Bed Authority will carry out on its own the exploitation of these resources through international enterprise and will authorize States, State Entities or persons natural or juridical which sponsored by States to engage in such exploitation. Such authorizations will have the form of contracts. The parties will make payments to the Sea-Bed Authority which will, in turn, ensure, that the benefits of the exploitation of the sea-bed are equitably shared by all States, taking into particular consideration the interests and needs of developing countries.²¹

¹⁹ On the subject of the concept of the common heritage of mankind see, among others, W. GÓRALCZYK, *Legal Problems of the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, "Polish Yearbook of International Law," vol. 4, 1971. Also by the same author: *Zagadnienia prawne wykorzystania dna mórz i oceanów poza granicami jurysdykcji państwowej* [Legal Problems of the Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction], in: *Aktualne problemy prawa morza* [Current Problems of the Law of the Sea], p. 202 ff. L. GELBERG, *Legal Problems of the Exploitation of Deep-Sea Mineral Resources*, in: *Scientific and Technological Revolution and the Law of the Sea*, edited by M. Frankowska, Warsaw 1974, p. 123 ff.

²⁰ Cf. W. GÓRALCZYK and L. GELBERG, *op. cit.* and K. SKUBISZEWSKI, *La nature juridique de la "Declaration des Principes" sur les fonds marins*, "Annales d'Etudes Internationales," 1973, p. 237 ff.

* Cf. Part XI of the Draft Convention on the Law of the Sea together with the appropriate annexes (A/CONF.62/WP. 10/Rev.3).

It goes without saying that the implementation of such a system of international exploitation of the sea-bed beyond the limits of national jurisdiction calls for an international treaty which would provide the appropriate legal basis. Therefore, as long as the III Conference on the Law of the Sea continues, and as long as there is no binding convention on the law of the sea, the concept of common heritage of mankind will have no practical bearing. And that is why it cannot, as yet, be considered as forming a chapter of the new law of the sea.²²

The use of the term "new law of the sea" call for yet another comment. I have indicated the most important changes in the system of norms affecting the legal situation of the sea areas and the way they are being used and I have explained why these changes justify the assertion that there is in fact a new law of the sea.

This, of course, does not mean that all rules of the law of the sea have been altered. It suffices to compare the Draft Convention on the Law of the Sea with the Geneva Conventions of 1958 to see that many provisions of the Geneva Conventions have been taken over by that document textually or with only minor amendments.

It must also be emphasized that whereas the freedom of exploitation of the resources of the seas (and above all the freedom of fishing) has lost its former importance as a result of the extension of the jurisdiction of the coastal states over a 200 miles zone and over the continental shelf, no serious attempt was made to restrict the freedom of navigation. The freedom of navigation applies still in the economic zone, although the coastal states have obtained the right to regulate certain matters connected with the exercise of that freedom, among other things, from the point of view of the protection of the marine environment against pollution. On the other hand, as far as the passage through straits is concerned, the concept of transit passage through straits has been introduced (Arts 37—44 of the Draft Convention on the Law of the Sea, to take care of the new situation arising from the fact that many straits used for international navigation which were formerly part of the high seas came now under the jurisdiction of the coastal states as territorial sea. Transit passage allows for greater freedom of navigation than the traditional right of innocent passage.

²² This problem is not entirely non-controversial. The majority of the developing states represents the view that the sea-bed and ocean floor beyond the limits of national jurisdiction had already become the common heritage of mankind. Cf. the discussion on the subject at the plenary session of the III Conference on the Law of the Sea and the document worked out by the legal experts of the Group of 77 (A/CONF.62/77).

II

A variety of reasons led to the emergence of the new law of the sea. They can be divided into three groups: those which reflected progress in science and technology, those reflecting economic change and those induced by political evolution.

First comes scientific and technological progress which revolutionized the methods of exploitation of the resources of the seas, thus causing far reaching economic consequences.

This was felt, first, in the field of high sea fishing. For some time already it became clear that with the introduction of industrial techniques of fishing and processing the biological resources of the seas and oceans could not be considered any more as inexhaustible, so that the preservation of the absolute freedom of their exploitation in accordance with the principle of free access for all involved the danger of their complete destruction.²³

Technical progress affected also decisively other ways of the exploitation of the seas. These became much more intensive, interdependent, and some lost their "innocent" nature. New possibilities of using the sea areas and submarine areas hitherto unknown and undreamed of emerged.

Huge oil deposits and natural gas deposits were discovered under the sea-bed and their exploitation mastered even in very great depths. The exploitation of oil under the sea-bed is already of immense economic importance.²⁴ This however, can adversely affect the freedom of navigation, the exploitation of the biological resources of the sea and can lead to the pollution of the sea waters.²⁵

The most developed countries are preparing for the exploitation of manganese nodules at depths ranging from 4,000 to 5,000 metres

* In Polish literature this problem is extensively discussed by R. ZAORSKI, *Eksploracja biologicznych zasobów morza w świetle prawa międzynarodowego* [The Exploitation of the Biological Resources of the Sea in the Light of International Law], Gdynia 1967.

²⁴ Cf. The Sea. Mineral Resources of the Sea. Report of the Secretary General (E/4973) in particular para. 3 and 12. It is estimated that in the 1980s the production of oil from offshore deposits may account for 30—40 per cent of world production and by the year 2000—about 40—50 per cent of world production. Comp. statement by the delegate of the USA in the Sea-Bed Committee /A/AC.138/SC.I/SR.13 and E/4973, paras 8 and 9.

²⁵ For example, a very serious leak of oil causing great damage resulted from an explosion of a well situated at about 5.5 miles from Santa Barbara in California (cf. Marine Science Affairs—Annual Report of the President to the Congress on Marine Resources and Engineering Development, April 1970, p. 41 ff). Similar accidents occurred in the North Sea.

under the sea. It is expected that by the end of the century the sea-bed will become an important source of such metals as nickel, manganese, copper and cobalt.

As far as navigation is concerned, traffic is so intense and some routes so congested that it became necessary to introduce even on the high seas obligatory traffic separation schemes. Such was the case in the English Channel and in the vicinity of many great ports.

Sea transport and, in particular, the transport of oil led to the increasing danger of pollution of the seas by oil with the resulting threat to the biological equilibrium of the marine environment and to many valuable species. Particularly dangerous, especially for the coastal states, may be the wreckage of a big tanker carrying oil. This was illustrated by the catastrophes of "Torrey Canyon" and "Amoco Cadiz."²⁰

An important problem is that of the pollution of seas (and in particular of semi-enclosed seas such as the Baltic Sea or the Mediterranean Sea) by various chemicals. Such seas lose their ability of biological self-purification with the resulting threat to the natural environment and most adverse economic consequences.

The diversification and intensification of the use of the sea areas arising from technical progress, the loss of their former innocent nature, accompanied by the growing importance of the exploitation of the resources of the seas and the fear of foreign competition in the coastal areas provide added incentives for a growing number of coastal states to extend their jurisdiction over ever greater sea areas. They wish to annex for themselves the resources of the seas and to increase their revenue, not necessarily by exploiting these resources themselves, which for the same objective can be achieved by taxing foreign fishermen or entrepreneurs who operate under licence.

Together with the modifications which took place in the methods of exploitation of the sea and underwater areas and which have resulted and are still calling for the creation of new legal rules or for the alteration and adaptation of the existing ones, there were important changes in the world's political scene. As a result, the further evolution of the law of the sea ceased to be the exclusive realm of a restricted group of big capitalist maritime powers, who traditionally favoured a narrow three — mile territorial seas.

The USSR, the other socialist states and the developing countries

²⁰ Cf. R. PIETRASZEK, *Zwalczanie zanieczyszczenia morza i ochrona środowiska morskiego* [The Struggle Against the Pollution of the Sea and the Protection of the Marine Environment], in: *Aktualne problemy prawa morza* [Current Problems of the Law of the Sea], p. 157 ff.

were increasingly influencing the development of international law and of the law of the sea.

However, recently some tendencies have been gaining ground among the developing countries which were bound to arouse certain objections. These countries were trying to extend their jurisdiction over ever larger coastal zones and to question the validity of the whole existing system of the law of the sea as a system created without their participation and representing only the interests of the big maritime powers. The countries of Latin America which have been first to establish 200-mile zones succeeded to some extent to impose their point of view on the other developing countries.

The developing countries are advocating now the idea of a new distribution of the riches of the seas. They claim that the group of beneficiaries must not be restricted to those who dispose of the means to exploit these riches — to the highly developed countries, but — in confirmity with the principle of equity — they must benefit also those who need them most i.e. the developing countries. It is being argued that the new law of the sea must contribute to the implementation of the so-called new economic order.

The developing countries, or the Group of 77 (which in fact includes at present more than 110 states) dispose of the majority of votes in all international conferences and in all major organs of the United Nations; they are also beginning to use that numerical advantage to push through their position.

III

Let us now examine briefly how the new law of the sea came into being. As already indicated, this was not the result of the adoption of a new international convention. It was rather the outcome of practice of states, accepted as law. This practice included, mainly, a series of unilateral acts taken by the coastal states. A definite role in this process was also played by the work of the UN Sea-Bed Committee and, later, by the III Conference of the Law of the Sea.

The first 200 miles* zones have been established in the late 1940s and 1950s by the South American States (mainly by the states of the Pacific coast). At that time these states were justifying their action by adducing the doctrine of the continental shelf formulated by the United States, although this hardly justified their claims, and were arguing that their action was dictated by particular oceanographic and biological conditions of the region. They represented the view that their

actions must not necessarily be imitated by other states (for instance by coastal states of enclosed and semi-enclosed seas), since it was motivated by regional peculiarities.²⁷

The claim to a 200-mile zone was at that time in conflict with international law and aroused protests of many states.²⁸ These states which included the United States of America and the United Kingdom failed, however, to persuade the states of Latin America to give up their claim.²⁹

Events took an opposite course — the practice of establishing 200-mile zones began to spread. It was followed by an increasing number of Latin American states (for example Mexico) and later by many states of Africa and Asia. Chile, Ecuador and Peru, supported by several Latin American states persuaded the developing states i.e. the Group of 77 that the establishment of 200-mile zones was in the interests of the Group as a whole, although this was not the case. And when some developing countries, landlocked and otherwise geographically disadvantaged, realized that the establishment of such zones and the extension of the jurisdiction of states over the sea-bed beyond the 200-mile zone infringes upon their interests, it was already too late. So many states were claiming the right to establish a 200-mile zone that the process could not be stopped, let alone reversed.

Among the developed states of Europe it was first Iceland which began enlarging its fishing zone, which was quite understandable in view of its specific economic interests.³⁰ As well known, this led, at first, to protests by other states (including the Federal Republic of Germany and the United Kingdom) and, later to a serious conflict between Iceland and the United Kingdom, to the so-called cod-war. Also in this case the United Kingdom failed to dissuade Iceland from maintaining its claim.³¹ Soon thereafter other states like Norway,

²⁷ For example, in the Preamble of the Declaration of Montevideo of May 8, 1970 there is a statement that the States signatories of the Declaration have extended their sovereignty or their exclusive rights over a 200 miles zone "by reason of conditions peculiar to them." Thus, these states are not asserting the right of each state to establish a 200 miles zone of territorial sea or a 200 miles exclusive fishing zone. They are adducing the "peculiar conditions" of the 9 signatory states of the Declaration. For the text of the Declaration see International Legal Materials, 1970, p. 1081.

²⁸ See M. WHITEMAN, *Digest of International Law*, vol. 4, *passim*.

²⁹ Cf. G. WEISSBERG, *Fisheries, Foreign Assistance, Custom and Conventions*, "The International and Comparative Law Quarterly," 1967, p. 718.

³⁰ Cf. *The Evolving Limit of Coastal Jurisdiction*! Published by the Government of Iceland. Reykjavik, June 1974.

³¹ Iceland refused to accept the verdict of the International Court of Justice of July 25, 1974 (I.C.J. Reports 1974, p. 3).

Canada and, later the United States of America followed by the United Kingdom, the countries of the Common Market and, finally the USSR and Japan extended their jurisdiction over 200-mile fishing zones.

The appropriate legislative acts can be found in the subsequent volumes of the United Nations Legislative Series devoted to the law of the sea.⁸²

It may be added that Poland, although the establishment of 200-mile zones by other states affected adversely its interests, created an exclusive fishing zone on the Baltic Sea. An act of the Polish Sejm to that effect was passed December 17, 1977 and entered into force January 1, 1978.⁸³

It has to be emphasized that Poland found itself in particularly unfavourable situation. Our fishing industry has been, for years, specializing in fishing on the high seas outside the Baltic area. Our traditional rights have been however increasingly restricted by the coastal states. At the same time, in view of the establishment of fishing zones on the areas neighbouring the Baltic Sea and in view of the decision by Sweden to create from January 1, 1978 an extended fishing zone on the Baltic, the waters adjacent to the Polish coast were increasingly threatened by intensifying fishing activities not only by the Baltic states but also by the fishing fleets of other states relegated from the fishing grounds of the North Sea and the Norwegian coast.

The rapporteur who presented in the Polish Sejm the relevant act stated, among other things, that "the initiative to submit to the consideration of the Sejm an act prior to the conclusion of the III Conference on the Law of the Sea has been caused by the unilateral actions taken by the Western powers which, while evicting the Polish vessels from their traditional fishing grounds, have been intensifying their own fishing activities on the Baltic Sea." He added that "in the course of the discussion on the proposed act in the commissions of the Sejm it was pointed out that the decision on the establishment by Poland of a fishing zone was forced upon us by the

⁸² Cf. National Legislation and Treaties Relating to the Territorial Sea, the Continuous Zone, The Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea /ST/LEG/SER.B/15; Sales No. E/F.70.V.9/; National Legislation and Treaties Relating to the Law of the Sea /ST/LEG/SER.B/16, Sales No. E/F.74.V.2/; National Legislation and Treaties Relating to the Law of the Sea /ST/LEG/SER.B/18, Sales No. E/F.76.V.2/; and National Legislation and Treaties Relating to the Law of the Sea (ST/LEG/SER.B/19, Preliminary Issue).

⁸³ Dz. U. 1977, No. 37, item 163. Cf. also P. ANDÉRS *Polska strefa rybołówstwa morskiego 1978* [The Polish Fishing Zone 1978], "Technika i Gospodarka Morska," 1978, No. 4 p. 211 ff.

establishment of similar zones by more than 60 states, including the member-states of the European Economic Community and Sweden.³⁴

Thus, Poland unable to preserve its rights to the traditional fishing grounds of the high seas had no other way left but to protect what could still be protected on the Baltic Sea.³⁵

At present, all states which could establish 200-mile economic or fishing zones did so. It can therefore be said that this has become a general practice, not as a result of the implementation of common interests but as a result *pf* the imposition of the will of the coastal states upon the international community. Thus, the interests of the states which could profit most from the establishment of 200-mile zones prevailed over the interests of all other nations. At first, many states protested against this practice, but failing to get across their views and to force the states concerned to desist from the establishment of 200-mile zones, they themselves extended their exclusive fishing rights over the coastal zones. They included such states as the United States of America, the United Kingdom, the USSR, Japan and Poland.

At the same time, many proposals providing for the right of coastal states to establish 200-mile economic zones were submitted to the III Conference on the Law of the Sea.³⁶ These proposals were treated, at first, as proposals *de conventione ferenda*, but all participating states realized that there is no chance to reach a compromise agreement in respect to the problem of the extent of coastal states' jurisdiction over maritime areas without recognition of the 200-mile economic zone. All so-called negotiating texts, beginning with the Informal Single Negotiating Text of May 7, 1975 to end with the Informal Composite Negotiating Text (Revision 2) of April 10, 1980³⁷ provided for the right of coastal states to establish 200-mile economic zones.

J. Symonides summed up the process of establishment and recognition of economic zones in the following terms: "As a result of a chain reaction, which accurately depicts the way in which the 200-mile economic and fishing zones have been established, we arrived at a situation whereby a practice constituting at first a flagrant violation of

³⁴ "Trybuna Ludu," December 19, 1977.

³⁵ The establishment of a 200 miles zone in the Baltic Sea is not possible in view of its limited area. Furthermore, the fishing grounds of the Baltic Sea are relatively poor and they cannot compensate for the loss of the fishing grounds of the high seas.

³⁶ Cf. Third United Nations Conference on the Law of the Sea. Official Records, vol. 3.

³⁷ Cf. A/CONF.62/WP.8, loc. cit., vol. 4, p. 137; A/CONF.62/WP.8/Rev.1, loc. cit., vol. 5, p. 125; A/CONF.62/WP.80 and Add. 1, loc. cit., vol. 8, and A/CONF.62/WP.10/Rev. 1 and Rev. 2.

the principle of freedom of the seas became so widespread as to lead to the emergence of a new customary rule granting to the coastal states the right to create fishing zones beyond the limits of the 12 miles' territorial sea.³⁸

Thus, a customary rule emerged which provided for the right of each state with the appropriate geographical location to establish a 200-mile economic zone or an exclusive fishing zone, as all the necessary conditions for the establishment of such a rule have been fulfilled. The general practice of states has been recognized as law. This recognition as law (*opinio iuris*) was reflected in the very practice of establishing of economic and fishing zones, as the states establishing such zones were explicitly or tacitly taking the view that they were authorized to do so. It would be unreasonable to argue that the overwhelming majority of states is violating international law. For international law is a body of rules which states recognize and apply in practice. The absence of protests is also an argument militating in favour of the admissibility of the establishment of such zones. As I have already pointed out, the states which voiced at first such protests established in the end themselves 200-mile zones. Finally, the III Conference on the Law of the Sea, the statements made by the participating states and the results of the negotiations achieved so far have also contributed to the shaping of the *opinio iuris*.

When did this customary rule emerge? In the process in which a custom takes shape it is very hard to pinpoint the moment when the practice of states becomes law. None the less this can be done with some approximation.

In a study published in 1978, but no doubt written earlier K. Zaorski stated that: "The exclusive economic zone is not, as yet, an institution of the international law of the sea. It has not been recognized by states or by international tribunals. All changes of the principle of the freedom of the seas which has the character of a general rule of international law of the sea, and the more so a change as profound as the introduction of exclusive economic zones, would have to be accepted by the entire international community, i.e. by the socialist states, the capitalist states and the states of the Third World."³⁹

³⁸ J. SYMONIDES, *Ustawy o prawie morza [The Legislative Acts on the Law of the Sea]*, "Trybuna Ludu," January 6, 1978.

³⁹ R. ZAORSKI, *Podział wód morskich a III Konferencja prawo morza [The Division of the Sea Waters and the III Conference on the Law of the Sea]*, in: *Polska i świat. Studia nad prawem międzynarodowym i współczesnymi stosunkami międzynarodowymi [Poland and the World. Studies in International Law and Contemporary International Relations]*, Poznań 1978, p. 641.

It seems that the recognition and acceptance of the 200-mile economic zone took place in 1976—1977 when, among others, the United States of America, the member states of the EEC, the USSR and Japan established 200-mile fishing zones. It was at that time that the practice of creating such zones became general, was accepted by the entire international community and was not questioned any more by any state.

The fact that some states establish extended exclusive fishing zones and not economic zones calls for some additional comment. It has to be pointed out that such states exercise their authority also on the sea-bed and its natural resources on the basis of international law and internal legislative act concerning the continental shelf. Thus, the sum total of their rights on the coastal zones is, in principle, the same as the rights of the coastal states in the economic zone. For example, Poland has not established an economic zone on the Baltic Sea, but on December 17, 1977 the Polish Sejm passed two separate acts: on the Polish maritime fishing zone and on the continental shelf of the Polish People's Republic.⁴⁰ Furthermore, no state which has established a wider fishing zone questions at present the right of states to extend their jurisdiction over the sea-bed and its resources in an area extending 200 miles from the baseline,⁴¹ which is tantamount to the right to establish a 200-mile economic zone.

Thus, under international law each state with an appropriate geographical location has the right to establish a 200-mile economic zone or a 200-mile fishing zone as well as to extend its jurisdiction over the continental shelf area and its natural resources.

It seems that the role of custom as a source of modern international law is often underestimated. The changes in the law of the sea prove that custom continue to be an essential source of international law, that customary rules can abrogate treaty rules. International treaties which cease to serve the interests and the practice of states are being modified or repealed. And this happened to the Geneva Conventions of 1958. Some of their provisions have been abrogated or modified by newly emerging customary rules.

The recognition of the important role played by customary rules should, however, not be construed to mean that we underestimate the role of treaties, since treaty provisions are, generally much more explicit and precise than customary rules.

⁴⁰ Dz.U., 1977, No. 37, items 163, 164.

⁴¹ The problem of the outer limit of the continental shelf beyond the 200 miles is still controversial.

Reverting in this context to problem of the 200-mile economic zone, we would like to point out that the customary rule which emerged as a result of the practice of states enables states to establish economic zones (or exclusive fishing zones), but grants them no right to extend their territorial seas to 200 miles. None the less, it must be stated that it is still not sufficiently clear what the coastal states can and cannot do. That is why the III Conference on the Law of the Sea is so important. It is to be expected that the Conference will result in a precise definition in the form of a treaty of the status of the economic zone, of the rights of the coastal state and of the rights of other states in that zone.

IV

One last question remains to be answered, namely whose interests does the new law of the sea serve and how is the new law of the sea to be evaluated? I think that the answer is implicit in what has been stated above.

We are generally committed to the idea that everything new represents progress and improvement. In this case however such optimism would hardly be justified.⁴²

I may also add that my views are shared by other Polish scholars. A few years ago A. Klafkowski wrote: "The direction in which the codification of the law of the sea is moving is not likely to benefit the international community. It bears the mark of the selfishness of a few groups of states able to muster a sufficient majority of votes in the international organizations and in diplomatic conferences."⁴⁸ A. Straburzyński expressed a similar view when he wrote: "The essential point is that both the multifunctional 200-mile economic zone as well as the extended functional submarine zone up to the outer edge of the continental margin do not serve the interests of the majority of the coastal states, nor — certain opinions notwithstanding — do they serve the interests of the developing countries."⁴⁴

⁴² I expressed this opinion in *Aktualne problemy prawa morza* [Topical Problems of the Law of the Sea], p. 296 and 297.

⁴⁸ A. KLAFKOWSKI, *Próba kodyfikacji prawa morza w całokształcie prac kodyfikacyjnego prawa morza* [The Attempts at Codifying the Law of the Sea Within the Framework of the Codification Activities of the United Nations], in: *Symposium naukowe. Aktualne problemy międzynarodowego prawa morza* [Scientific Symposium. Topical Problems of the International Law of the Sea], Gdańsk, January 23—24, 1975, p. 13.

⁴⁴ A. STRABURZYŃSKI, *op. cit.*, p. 536.

Undoubtedly, the old law of the sea needed correcting, but the manner in which these changes have been introduced and their general direction were not perfect.

The new law of the sea should be the outcome of negotiations in the course of which the interests of all groups of states could be taken into consideration. The proper forum for such negotiations was and remains the III Conference on the Law of the Sea. It has to be regretted that the new rules emerged as the result of unilateral acts by coastal states which, forestalling the outcome of the Conference, extended their jurisdiction over large sea areas.

The new law of the sea should contribute to promote international cooperation in the rational exploitation and protection of the marine environment and of its resources. It should reflect the interests of the entire international community, which means that it should reconcile and harmonize the interests of the coastal states and the interests of those geographically disadvantaged, the interests of both developing and developed states.

Instead it was a victory of "maritime nationalism." The beneficiaries were the coastal states, including many highly developed ones and the losers, the geographically disadvantaged states, including many developing ones.

Some developing states which were first to advocate the lofty idea of making the sea-bed and ocean floor with their resources the common heritage of mankind, have by establishing 200-mile economic zones and by extending their jurisdiction over the sea-bed beyond the 200 miles to the outer edge of the continental margin clipped the area to such a degree that the greatest riches, namely the deposits of oil and natural gas have fallen into the hands of the coastal states.

Thus, the new law of the sea failed to live up to expectations. It cannot be said that it is just and equitable. The III Conference on the Law of the Sea will change nothing, for as far as the jurisdiction of the coastal states is concerned. It can reject the claim of those states to a 200-mile territorial sea but can only sanction their right to establish a 200-mile economic zone. To some extent this happened already in the Draft Convention on the Law of the Sea of August 27, 1980.

States* Responsibility for Pollution Damage Resulting from the Exploration for and Exploitation of Seabed Mineral Resources

by **BARBARA KWIATKOWSKA-CZECHOWSKA**

1. The Importance of the Problem in the Light of Scientific and Technical Developments

The problem of States' responsibility for pollution damage resulting from the exploration for and exploitation of seabed mineral resources has acquired nowadays particular importance in view of the rapidly progressing development of exploration and exploitation techniques which make it possible to use these resources to an ever greater extent. Of increasing economic importance are the seas and oceans as potential sources of valuable and rare mineral resources and, in particular, of fuels such as oil and natural gas. It is estimated that in the 1980s the exploitation of offshore wells will account for about 30—40 per cent of the world's oil production, increasing to about 40—50 per cent by the year 2000. It is expected that by 1985 18 per cent of the world nickel demand and over 50 per cent of the world cobalt demand will be met by seabed resources.¹ No wonder that the seas and oceans have become already and will be in the future to an ever greater degree areas of multifarious activities described as "unusually dangerous" or "abnormally dangerous"² not only for men but also for the marine environment itself.

The main threat arises from pollution damage resulting from the exploration for and exploitation of seabed mineral resources. Almost all operations carried out at the various stages of exploitation of seabed mineral resources involve great risks for the marine environment. The

¹ See: *Mineral Resources of the Sea* UN Doc. E/4973.

² See, for example, L. F. E. GOLDIE, *International Principles of Responsibility for Pollution*, "Columbia Journal of International Law," 1970, No. 2, pp. 283—289; J. M. KELSON, *State Responsibility and the Abnormally Dangerous Activity*, "Harvard International Law Journal," 1972, No. 2, p. 224.

greatest are those accompanying the exploitation of offshore deposits of oil and natural gas.⁸ Well known are the consequences of the disaster which occurred in 1969 at the oil platform of the Union Oil Company off the Californian coast near Santa Barbara or of the disaster which occurred in 1977 at the Phillips Petroleum "Bravo" platform in the Norwegian sector of the North Sea.⁴ However, it must be emphasized that: "The most pervasive pollution comes not from headlined oil spills but from the many activities that take place every day underwater."⁵ But at the same time "as exploration and exploitation activities extend further into the deep ocean, so must the risk of blow-outs increase with the consequent difficulty of getting them under control if rigorous conditions and regulations are not imposed."⁶

The responsibility of states for damages caused as a result of the exploration for and exploitation of seabed mineral resources is subject, in the absence of appropriate treaty rules in the traditional law of the sea and, in particular, in the Geneva Conventions of April 29, 1958,⁷ to customary rules of international law concerning the liability of states to compensate for caused damages. The lack of detailed treaty rules in this field is due, to a great extent, to the tendency prevailing till the turn of the 1960s to hold responsible for pollution damages caused by exploration and exploitation of the seabed only persons directly engaged in such activities.⁸ The first treaty norms in this field have been worked out in the 1970s, namely in the multilateral Offshore Pollution Liability Agreement of September 4, 1974 and in the Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration for and Exploitation of Seabed Mineral Resources of May 1, 1977.⁹ No doubt, the above mentioned tendency reflected the very

* See: *Effects of the Exploitation of Mineral Resources on the Superjacent Waters and Another Uses of the Marine Environment*, UN Doc. A/AC.135/15.

⁴ For a broader discussion of the same subject see, among others, D. J. WALMSEY, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, "San Diego Law Review," 1971, pp. 514—568.

⁵ Commission on Marine Science, *Engineering and Resources, Panel Reports*, vol. 1, *Science and Environment*, 1969, p. 52—53.

⁶ L. F. E. GOLDIE, *op. cit.*, p. 286.

⁷ Convention on the Territorial Sea and Contiguous Zone, Convention on the High Seas and Convention on the Continental Shelf (later on referred to as the I, II, and IV Geneva Convention), in: *United Nations Conference on the Law of the Sea, Official Records*, vol. 2, Geneva, 24 February—27 April 1958, pp. 132—143.

⁸ For more details on the subject see, M. DESPAX, *La pollution des eaux et ses problèmes juridiques*, Paris 1968, pp. 194—196.

⁹ *New Directions in the Lazo of the Sea*, New York 1977, vol. 6, pp. 507—549. Cf. L. GÜNDLING, *Ölunfälle bei der Ausbeutung des Festlandssockels. Zur*

nature of these activities and the reluctance of states to accept responsibility for the activities of enterprises engaged in the exploration and exploitation of the mineral resources of the seabed. All the more so, that many states not disposing of the necessary capital and know-how for the exploitation of the seabed have been issuing licences to foreign enterprises to carry out such operations.

So far, no state has ever been held responsible for such damages. However, in view of the growing activities in the field of exploration for and exploitation of seabed mineral resources and the increasing threat of harmful effects of such activities, the problem has attracted the attention of many legal scholars. Some have been emphasizing the need to work out special treaty rules to that effect.¹⁰ And although no steps have been taken, so far, in order to conclude an international convention dealing with the responsibility of states for such damages, the problem has been on the agenda of the Third United Nations Conference on the Law of the Sea and taken care of in the subsequent versions of the draft convention on the law of the sea.¹¹ It must be said, however, that these versions contain no detailed rules but only some general principles which are included in the parts of the draft dealing with the international area of the seabed and ocean floor and with protection of the marine environment and marine scientific research. The last two sections concern activities undertaken in the whole area of the sea-bed and ocean floor i.e. in the territorial sea, continental shelf and economic zone as well as beyond its boundaries, i.e. in the area recognized as the common heritage of mankind.

Generally speaking, neither the customary law in force concerning the responsibility of states, nor the new draft convention on the law of the sea, provide unequivocal solutions of many detailed problems connected with the responsibility of states for pollution damage which may result from the exploration for and exploitation of seabed mineral resource. This is recognized by Article 236, paragraph 3 of ICNT drafted along the lines of paragraph 22 of the Stockholm Declaration of 1972.¹² The said Article states that:

Verschmutzung des Meeres und ihrer völkerrechtlichen Kontrolle, "Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht," 1977, No. 3—4, pp. 563—564.

¹⁰ Cf. note 2 above, and also S. H. LAY, *Pollution from Offshore Oil Wells*, in: *New Directions...*, vol. 8, pp. 103—105.

¹¹ These are: Informal Single Negotiating Text (ISNT), UN Doc. A/CONF.62/WP.8/Part I, Part II and Part III; Revised Single Negotiating text (RSNT), UN Doc. A/CONF.62/WP.8/Rev.1/Part I, Part II and Part III; Informal Composite Negotiating Text (ICNT), UN Doc. A/CONF.62/WP.10.

¹² Stockholm Declaration on the Human Environment, June 5—16, 1972, UN Doc. A/CONF.48/14.

"States shall cooperate in the development of international law relating to criteria and procedures for the determination of liability, the assessment of damage, the payment of compensation and the settlement of related disputes."

Of major importance is the adoption of principles relating to the liability of states for damage inflicted within the sovereign boundaries and sovereign rights of states. In view of the extension of these boundaries to 200 miles and even beyond, it is certain that the exploration and exploitation activities will mostly be carried out within the areas of the continental shelf and economic zone. On the other hand, the activities carried out on the seabed and ocean floor of the international area stated only recently by a few firms representing the highly industrialized capitalist countries will, for some years, be of a much lesser scale. None the less, one would be well advised to search already now for appropriate solutions in this field in order to avoid future conflicts.

2. Sources and Scope of Responsibility

Of fundamental importance for the determination of liability of states for pollution damage resulting from the exploration for and exploitation of seabed mineral resources within the sovereign boundaries and sovereign rights of states is, in view of the absence of binding treaty rules, the principle of territorial sovereignty. In the area of the territorial sea the coastal state exercises sovereignty, which implies a presumption of its comprehensive authority, provided that it does not impair the rights of other states, as laid down in the maxim *sic utere tuo ut alienum non laedas*. Consequently, the exploitation by such a state of its own territory or territorial sea, or the granting to somebody else the permission to use one's own territory in a way which causes damages to another state, involves the responsibility of that state, as it clearly results from the verdicts in the *Trail Smelter* and *Corfu Channel* cases.¹⁸

This applies to an equal degree to the area of the continental shelf and economic zone. For, if the coastal states do enjoy in these areas the same rights to explore and exploit the mineral resources as in the territorial sea, it follows logically that they must use these rights in

¹⁸ See: *Reports of International Arbitral Awards*, United Nations, vol. 3, pp. 1907—1982 and *ICJ Reports*, *The Corfu Channel Case*, 1949, p. 22. Cf. also, J. E. READ, *The Trail Smelter Dispute*, "Canadian Yearbook of International Law," 1963, pp. 213—292.

a way which does not impair the rights of other states and bear the responsibility for any violation of these rights.¹⁴

A good example of the application of the maxim *sic utere tuo* is the principle of good neighbourhood which as pointed out by Symonides — “implicitly requires curtailing action which might cause damage outside national territory.”¹⁵ As emphasized by the author, this principle “can serve as a proper frame of reference for the settlement of the problem that sometimes arise [...] between countries lying [...] around a single sea.”¹⁶

Of essential importance in the case of exploration for and exploitation of seabed mineral resources in the continental shelf and economic zone is also the principle of freedom of the high seas. In accordance with Article 2 of the II Geneva Convention

“all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas”

enjoy such freedom. Consequently, as pointed out by Slouka, there is “a standing expectation among all users of the high seas that each of them would observe and enforce certain safety standards so as not to injure the interests of the others.”¹⁷ Thus, “states controlling the adjacent outer continental shelf also automatically assumed responsibility for the maintenance of order and safety of the high seas above the shelf.”¹⁸

The principle of the freedom of the high seas has, at the same time and for the reasons stated above, fundamental importance for the determination under international law of the responsibility of states for pollution damage resulting from the exploration for and exploitation of mineral resources in the international area of the seabed and ocean floor. In case of adoption of a new convention on the law of the sea this role will be played by the concept of common heritage of mankind which — as one of its elements includes — in accordance with Article 147, paragraph 1 of ICNT — the following principle:

¹⁴ Cf. E. D. BROWN, *The Legal Regime of Hydrospace*, London 1971, pp. 181—182; W. M. MOUTON, *The Continental Shelf*, The Hague 1952, p. 173; S. H. LAY, *op. cit.*, p. 104.

¹⁵ J. SYMONIDES, *Internal Legal Aspects of Human Environmental Protection*, “Peace and the Sciences,” Vienna, 1972, No. 4, p. 8 International Institute for Peace.

¹⁶ *Ibid.*

¹⁷ Z. J. SLOUKA, *International Custom and the Continental Shelf. A Study in the Dynamics of Customary Rules of International Law*, The Hague 1968, p. 149.

¹⁸ *Ibid.*

"Activities in the area shall be carried out with reasonable regard for other activities in the marine environment."

However, pending the adoption of a new convention, the principle of the freedom of the high seas which applies to these areas will form the basis for the determination of responsibility of states.

In view of the absence of treaty rules regulating the problem of responsibility of states under international law for pollution damage resulting from the exploration for and exploitation of seabed mineral resources the question of the regime of responsibility in this field remains open.

As regards transboundary environmental damage the responsibility of states was set forth in paragraph 21 of the 1972 Stockholm Declaration which states that:

"States have, in accordance with the Charter of the United Nations and the principles of international law [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to environment of other states or of areas beyond the limits of national jurisdiction,"

However, neither the wording of this paragraph nor the discussion which preceded its adoption indicate clearly the acceptance of a specific regime of responsibility.¹⁹ It seems that in order to establish the principles and tendencies in this field it is necessary to distinguish between situations arising from damage caused to the environment of other states and situations which may arise from damages caused to the environment of international areas. In the first case a state may be liable under international customary law for a damage resulting from an action violating international law or—as in the *Trail Smelter* case—for a damage resulting from an action which is not prohibited under the law.²⁰ On the other hand, the liability of a state for a damage to the

¹⁹ For a broader discussion of the subject see, G. HANDL, *Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited*, "Canadian Yearbook of International Law," 1975, pp. 160—161; *Sea Island Project Feasibility Study on the Development of Industrial Islands in the North Sea*, in: *Report Phase A*, vol. 4, March 1974, pp. 136—138.

²⁰ In this connection one may note the differences of opinion among the representatives of legal doctrine on the interpretation of the principles invoked in the *Trail Smelter* and *Corfu Channel* cases. According to some authors, including I. F. E. GOLDIE, *op. cit.*, pp. 306—307 and J. M. KELSON, *op. cit.*, p. 227, these cases "clearly point to the emergence of strict liability as a principle of public international law." In turn, G. HANDL, *op. cit.*, pp. 165—170 states that the analysis of the awards in these cases "do not indicate a trend towards

environment of international areas is still a matter of conjecture and its practical implementation may prove very difficult indeed. It may, however, be pointed out that in the existing treaty law there is a clear tendency to recognize the responsibility of a state for such damage, provided that the state violated binding treaty provisions. It can be said that, generally, in international environmental law — to quote Kiss — “recent developments show the growing importance attributed to the liability of states for omissions of specific international obligations;” consequently “the very ground for liability would be the duty of due diligence rather than ultra-hazardous activities.”²¹

The tendency to make states internationally liable for a damage only when such damage results from action contravening international law prevailed also at the III Conference on the Law of the Sea. As regards the international area of the seabed and ocean floor, Article 139, paragraph 1 ICNT provides that:

“States parties shall have the responsibility to ensure that activities in the Area [...] shall be carried out in conformity with the provisions of this part of the present Convention.”

Furthermore, paragraph 16 of Annex states that:

“Any responsibility or liability for wrongful damage arising out of the conduct of operations by the Contractor shall lie with the Contractor.”

At the same time, the last sentence of Article 139, paragraph 1 ICNT provides for an exception from that rule, so that:

responsibility for risk as a general category of international liability” but rather “tends to support the opposite conclusion.” It seems to me that the opinion of these authors is only partly warranted. In general, it can be recognized that these awards reflect the acceptance of objective responsibility. As far as the *Corfu Channel* case is concerned, it has to be pointed out that many representatives of the legal doctrine take the opposite view and consider that in this case the blame rests with Albania (comp. for example, M. J. HOSTIE, *The Corfu Channel Case and International Liability of States “Liber Amicorum” of Congratulations to Algot Bagge*, Stockholm 1956, pp. 89—100). On the other hand, D. LÉVY, in: *La responsabilité pour omission et la responsabilité pour risque en droit international public*, “Revue Generale de Droit International Public,” 1961, No. 4, pp. 747—748 is quite right when stating that guilt was not the premiss of Albania's responsibility and when emphasizing that this was not tantamount to the acceptance of the theory of risk. Albania was found guilty of non-fulfilment of its international obligation. On the other hand, in the *Trail Smelter* case, Canada is responsible for a permissible action (comp. A. Ch. KISS, *Survey of Current Developments in International Environmental Law*, Morges 1976, p. 46). Thus, only in the latter case we were dealing with the international responsibility of a state based on risk.

"A State Party shall not [...] be liable for damage caused by any failure to comply by a person whom it has sponsored [...] if the State Party has taken all necessary and appropriate measures to secure effective compliance. [...]"

In the section dealing with the protection of the marine environment Article 236, paragraph 1 ICNT states that:

"States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law for damage attributable to them resulting from violations of these obligations."

Article 264, in the section dealing with marine scientific research provides that:

"§ 1. States [...] shall be responsible for ensuring that marine scientific research [...] is conducted in accordance with the present Convention. § 2. States [...] shall be responsible and liable for the measures they undertake in contravention of the present Convention in respect of marine scientific research activities conducted by other States, their natural or juridical persons or by competent international organizations and shall provide compensation for damage resulting from such measures."

It is not my intention to deny the importance of the solutions envisaged in the ICNT, however it seems that making states liable (even if such liability is absolute) only for acts undertaken in contravention of the law cannot be considered as satisfactory.²² The mere fact that research in and exploitation of marine mineral resources belong to spheres of human activity involving great risks of environmental pollution damage militates in favour of the adoption in this case of a regime of responsibility based on risk.²³ To that effect it would be advisable to sign a special convention dealing with the responsibility of states in this field, along the lines of the treaty law concerning outer space or nuclear power. Such a solution would be justified on similar grounds as those which militate in favour of the adoption in this case of the principle of objective responsibility (which will be discussed later in this paper). It must, however, be pointed out, at the outset, that an important argument in favour of the concept of responsibility for based on risk is the generally unsatisfactory state of the legal rules regulating this sphere of marine exploitation.

²¹ A. Ch. KISS, *op. cit.*, p. 54.

²² Among others, the authors of *Sea Island Project...*, p. 143 recognize in this case as sufficient the responsibility of a state for illicit acts.

²³ Cf. L. F. E. GOLDIJA *op. cit.*, p. 286; J. M. KELSON, *op. cit.*, p. 230; S. H. LAY, *op. cit.*, p. 104.

The law of the sea in force at present fails to provide clear indications as to the scope of the obligations of states in the field of research in and exploitation of the mineral resources of the sea. Of fundamental importance are the rules contained in the Geneva Conventions of 1958, in the Convention on the Protection of the Marine Environment of the Baltic Sea Area of March 22, 1974, in the Convention for the Protection of the Mediterranean Sea Against Pollution of February 16, 1976 and in the Agreement Relating to the Exploitation of the Frigg Field Reservoir of May 10, 1976. They all provide for certain general obligations of states as regards the protection of the marine environment against pollution resulting from research in and exploitation of marine mineral resources. Actions by a state which contravene these obligations and result in a damage involve, from a theoretical point of view, the responsibility of that state. However, in view of the absence of precise indications as to the scope of obligations arising from these conventions difficulties may arise in their practical application; it may not be easy to establish whether in a specific case a state acted in fact in contravention of its obligations under international law. For example, a controversy may arise as to the interpretation of the term "all appropriate measures" which a state must take in order to prevent pollution.²⁴

In the case of adoption of a new convention on the law of the sea the above mentioned problems will not disappear, for it can be expected that the new convention will take over many provisions of the Geneva Conventions. Furthermore, as far as the economic zone is concerned, new conflicts may arise because of the different status of the economic zone compared to the status of the continental shelf. Attention must also be drawn to the possible application in practice of the exception foreseen in the above mentioned Article 139, paragraph 1 ICNT and concerning the international area of the seabed; in fact this exonerates the state from liability for damage caused by any failure to comply with the future convention by a natural or juridical person, provided that the state concerned has taken "all necessary and appropriate measures to secure effective compliance." The determination of what has to be considered as "necessary and appropriate," especially as regards control and supervisory measures, may in many cases prove to be a controversial question.

The adoption of a new convention on the law of the sea would no doubt be of certain importance for a more precise definition of the obligations under international law of states carrying out research in

²⁴ The need to respect "good oil industry practice and the standard of good seamanship" is particularly stressed. See E. D. BROWN, *op. cit.*, p. 183.

and exploitation of the seabed both within the limit and beyond the limit of national jurisdiction in the field of marine environment protection.²⁵ The present draft fails, however, to indicate in detail the measures which states must undertake. It can therefore serve only as a general pattern for the regulation of the rights and obligations of states as regards research in and exploitation of the mineral resources of the seabed, provided that detailed international standards are worked out to take care of specific cases.

3. The Premises of Responsibility

The premiss which gives rise to the responsibility of states involving compensation can, in the matters under discussion, be only a material damage. In the case of illicit activity the damage will engage the responsibility of a State apart from the violation of international law attributed to the state concerned and its alleged guilt, and in the case of lawful activity damage would be the only premiss of emerging responsibility.

It seems to me that in the matters under discussion it would be appropriate to renounce the legal construction of guilt and to rest the responsibility of states on objective premisses, i.e. on the resulting effect.

The principle of objective responsibility of states is justified by many reasons quoted in legal doctrine concerning the protection of the environment and particularly dangerous activities. This include, among other things, the difficulties in the determination of guilt both because of the possibility of joint action by several persons as well as because of the fact that "the plaintiff state would have to look for evidence in an area largely subject to the national jurisdiction of another,"²⁶ and that "in the case of enterprises employing technological advances [...] it may be impossible to arrive at a consensus as to the proper standard of care for the activity's operation."²⁷ Of essential importance is also the increasingly widespread application of the principle of objective responsibility in the civil law of states as well as in the international conventions dealing with civil responsibility for damages caused by pollution and by nuclear activities.²⁸

²⁵ See Articles 193, 195, 196, 199 and 205—210 ICNT.

²⁶ J. SYMONIDES, *op. cit.* p. 7. See also, G. HANDL, *op. cit.*, p. 159.

²⁷ J. M. KELSON, *op. cit.*, p. 200.

²⁸ Cf. S. CIGOJ, *La protection de Venvironnement et le droit comparé*, "Revue Yugoslave de Droit International," No. 1/2, pp. 91—92 and 102; V. E. FITZ-MAURICE, *Liability for North Sea Oil Pollution*, "Marine Policy," 1978, No. 2.

The adoption in this case of the principle of objective responsibility of states is accepted in doctrine, though opinions are sometimes expressed in favour of the maintenance of guilt as the premise of such responsibility. For example, M. A. Gicu argues that: "The introduction of such a severe responsibility of states (on the grounds of effect) and the extension of" the so-called absolute responsibility (responsibility without guilt) for all kinds of activity on the world ocean cannot solve the problem of protection, rational exploitation of the living resources of the sea; neither can it promote the protection of the marine environment. [...] By reducing the basis of responsibility only to the damage caused to a state one excludes the responsibility of a state under international law for the violation of the established legal order when there is no actual damage incurred by a concrete subject."²⁹ It seems to me that the difficulties indicated by M. A. Gicu can more easily be avoided through the elaboration of an appropriate procedure for claiming compensation for damages caused to the environment of international areas (a matter which will be discussed later in this paper) than by the use of the construction of guilt.

In the light of the above considerations it is essential to define the concept of material damage as well as to determine the causal relationship between the damage and the event which caused it.

From the point of view of international law the problem of damage calls for certain clarifications. In the first place, it has to be noted that material damage resulting from the exploration for and exploitation of the mineral resources of the sea can cover both *damnum emergens* and *lucrum cessans* in the classical meaning of the terms.³⁰ Furthermore it would be advisable to distinguish between material damage caused to states, including their environment³¹ and damage caused to the environment of international areas, since this is of essential importance from the point of view of the subject who is entitled to claim compensation. It must also be emphasized that the legal concept of damage caused to the marine environment (including the environment of inter-

²⁹ M. A. GICU, *Voprosy mezhdunarodno-pravovoj otvetstvennosti v oblasti racional'nogo ispolzovaniya morskoy sredy i ee resursov*, in: *Mezhdunarodno-pravovye problemy mirovogo okeana na sovremennom etape*, Moskva 1976, p. 105.

³⁰ Cf. R. MUNTEANU, *Aspects de la responsabilité pour les activités menées sur le fond des mers et des océans au delà des limites de la juridiction nationale*, "Revue Roumaine des Sciences Sociales, Sciences Juridiques," 1976, No. 2, p. 240.

³¹ As pointed out by A. L. SPRINGER, *Towards a Meaningful Concept of Pollution in International Law*, "International and Comparative Law Quarterly," 1977, No. 3, p. 537, the environment can be treated as "the property of the injured state."

national areas) is identified with the concept of pollution in the broadest meaning of the term.³² In the law of the sea pollution is defined as:

"The introduction by men, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairing of quality for use of sea water and reduction of amenities."³³

Certain doubts arise in connection with the question of the possibility of subjecting the responsibility of a state for pollution to the extent of the damage and to the proof thereof. Among the solutions proposed in doctrine it is possible to distinguish those which are based on the concept of "substantial injury," which can be defined (per *analogiam* to the Helsinki Rules of 1966) as a damage which "materially impedes reasonable exploitation of natural resources"³⁴ and those which involve the acceptance of the claims by states only when—as stated in the *Trail Smelter* case—"the case is of serious consequence and the injury established by clear and convincing evidence."³⁵ The first solution fails to take into consideration the biological features of the ecological systems, while the second ignores the evolution of the environment caused by pollution. That is why the best solution would consist in the application (as is the case in many conventions dealing with sea pollution) of the above quoted definition of pollution supplemented by detailed standards concerning research in and exploitation of mineral resources of the sea.

The determination of damage caused by pollution and of its extent will most probably remain in many cases and for a long time a difficult question because of the absence of appropriate scientific evidence as to the impact, especially in the longer run, of pollution agents on many marine species and on the ecological equilibrium of the marine environment.

Also, it may not be easy to determine the causal relation between

³² For a broader discussion of the subject see *ibid.*, pp. 537—557.

³³ Long-Term and Expanded Programme of Oceanographic Research UN Doc. A/7750, p. 25.

³⁴ The idea has been adopted in ILA, Draft Articles on Marine Pollution of Continental Origin, in: *Report of the Fifty-Eight Conference*, New York 1972. CL also J. SYMONIDES, *op. cit.*, p. 7.

³⁵ "Serious physical and economic damage" was invoked in 1961 by Mexico in the *Peyton Packing Company and Casuco Company* case. See. M. M. WHITE-MAN, *Digest of International Law*, vol. 6, pp. 258—259. Cf. also R. MUNTEANU, *op. cit.*, p. 240.

it can be expected that these activities will mostly be of a multinational of the mineral resources of the sea and the damage. It may not be so difficult to do that when the effects of pollution are immediately apparent, provided of course that there are no other sources of pollution. However when there is cumulation of pollution from various sources (such as in the case of the disaster in the Santa Barbara Channel), or long term effects of pollution the determination of causal relations may give rise to controversy or prove to be impossible.

4. The Active Subject of Responsibility

The proposals submitted by states to the III Conference on the Law of the Sea aim at formulating *expressis verbis* in the new convention the principle of international responsibility of states for national activity which violates the law, national activity covering actions of state organs and actions of natural and juridical persons.⁸⁶ In the section dealing with the protection of the environment this principle was clearly enounced in Article 41 ISNT, Part III which defined national activity as "activities under their jurisdiction and control." And although the same concept was not used in the articles concerning responsibility in KSNT, Part III and in ICNT, it was reflected in almost all proposals submitted by states and also found its way into Article 195, paragraph 1 ICNT. In its section concerning scientific research the already mentioned Article 264 ICNT provides for the responsibility of states for "marine scientific research [...] undertaken by them or on their behalf."

In the case of exploration for and exploitation of mineral resources in the continental shelf and in the economic zone the definitions quoted above can be interpreted as covering activities within the limits of the sovereign rights of states. The place where natural or juridical persons exercise their activity cannot *ipso facto* constitute an essential element in the case of exploration for and exploitation of these resources in the international area of the seabed and pcean floor. As regards this area the concept "jurisdiction or control" has been defined with precision in the section of ICNT concerning its legal regime, but in a way which differs from that in ISNT. Article 17, paragraph 1 ISNT, Part I provides in its first sentence for the responsibility of a state for ensuring that the activities undertaken by

³⁸ See for example, the informal proposal by Bulgaria, Poland, Romania and the USSR of 1974, UN Doc. A/CONF.62/C.3/L.17, III.

“governmental agencies or non-governmental entities or persons under its jurisdiction, or acting on its behalf”

comply with the provisions of the convention. However in the third sentence it enounces the principle that:

“Damage caused by such activities shall entail liability on the part of the State [...] in respect of activities which it undertakes itself or authorizes” (emphasis added).

On the other hand, Article 139, paragraph 1 INCT provides for the responsibility of states for ensuring that the activities carried out by

“States Parties, or state enterprises, or persons natural or juridical which possess the nationality of States Parties or are effectively controlled by them or their nationals” (emphasis added)

are in conformity with the convention. At the same time, Article 151, paragraph 2 (ii) ICNT stipulates that persons are entitled to undertake activities in the international area in association with the Authority *“when sponsored by States”* (emphasis added).

Thus ICNT introduces in lieu of the criterion of authorization by the state provided for in ISNT the concept of “effective control” and “sponsorship” by the state. They may all entail different things and different forms. Considering this, and also considering the fact that it can be expected that these activities will mostly be of a multinational character, it would be more appropriate, from the practical point of view, to stick to the criterion of authorization by the state.³⁷ Then, only the state which authorized the natural or juridical person to explore for and exploit the mineral resources of the seabed in the international area would be responsible for the damage.

Should, however, the damage result from the activities carried out by several states in the international area, these states would — in accordance with Article 139, paragraph 2 ICNT — be “jointly and severally responsible.” The ICNT does not define in detail the meaning of this joint responsibility. It seems that in order to protect effectively the rights of those who suffered damage it would be advisable to enable them to claim compensation jointly from the responsible states or from each state separately. At the same time, the settlement of the compensation claim by any of the jointly responsible states releases all other states from that obligation. This, of course, does not affect the right

³⁷ In literature, the adoption of this criterion is advocated among other by J. M. KELSON, *op. cit.*, p. 234; J. M. KOLOSOV, *Otvetsvennost' v meždunarodnom prave*, Moskwa 1975, p. 162.

of the state which met the compensation claim to claim reimbursement from the other states responsible for the damage.

Of essential importance is also the problem of responsibility in the case of the establishment by a state of a "consortium to engage in an exploitation activity which enhances the risk of pollution injuries to others."⁸⁸ Its solution is rather difficult because of the controversies surrounding the legal status of international enterprises. Goldie belongs to those few authors who have tried to deal with that problem; he advocates either a "system for registering consortia as international legal entities" and a primary responsibility of the consortia and secondary responsibility of the constituent states, or another, perhaps more realistic solution which he sets forth in the following terms: "Alternatively, where either no system for registering consortia of this type is provided or, if provided, is not availed of, then the agency and the constituent states should be held to be jointly and severally liable for the full amount of loss caused by any pollution damage an enterprise governed by the agency may have caused or permitted."⁸⁹

The next question is that of the exhaustion of local remedies. It seems to me that in the matter under consideration one could use the suggestion put forward by Lay that "international claims should not require exhaustion of local remedies, although a period of time for direct negotiations between claimant and respondent should be provided."⁴⁰ The omission of local remedies took place in practice, among other cases, in the *Trail Smelter* and *Cherry Point Oil Spill* case.⁴¹ This is justified because of the fact that in the majority of cases of pollution resulting from exploration for and exploitation of mineral resources of the sea only the state will dispose of the necessary funds to meet the compensation claim, and also because of the fact that the state representing the interests of the claimants has greater means to prove the existence of the damage, to evaluate its extent and to demonstrate the causal link between the damage and the event which brought it about. On the other hand, in actual practice there is a trend favouring the resolution of claims in cases of transfrontier pollution problems, including the cases under consideration in this paper, by administrative or judicial procedure of states, and this can contribute to the development of means of local remedies.⁴²

³⁸ L. F. E. GOLDIE, *op. cit.* p. 328.

³⁹ *Ibid.* p. 329.

⁴⁰ S. H. LAY, *op. cit.*, p. 105. See also, A. Ch. KISS, *op. cit.*, p. 39.

⁴¹ See "Canadian Yearbook of International Law," 1973, pp. 332-338.

⁴² Cf. H. SMETS, *The OECD Approach to the Solution of Transfrontier Pollution Problems*, in: *Environmental Law, International and Comparative Aspects*, New York 1976, pp. 3 ff.

5. The Passive Subject of Responsibility

Particular attention must be paid to the problem of the passive subject of responsibility in the case of damages resulting from the exploration for and exploitation of the mineral resources of the sea for the marine environment which is not subject to state jurisdiction.

The fact that in the case of damages inflicted to the environment of the international areas, including the marine areas, one can speak of an injury inflicted to the international community, implies the recognition in this case of the international community as the passive subject of responsibility. In this connection the problem arises as to who is entitled to claim compensation on behalf of that community. Many scholars are in favour of the application of the institution of the so-called *actio popularis* i.e. of giving the right to do that to each state or international organization.⁴³ The need to draft specific provisions granting such rights to states in the new convention on the law of the sea is stressed, in particular, in the draft of the Working Group on Ocean Environment of the American Society of International Law of 1974.⁴⁴ It must, however, be pointed out that in actual practice various political and economic factors may restrain states from suing other states which did not inflict them direct damage. That is why a solution consisting of the granting of the right to sue for compensation, to a specific organ or international organization such as IMCO, IOC, UNEP, WMO or to the future organization on the international areas of the seabed and ocean floor seems more realistic.⁴⁵

The new draft convention on the law of the sea does not recognize the institution of *actio popularis*. There are also no provisions to that effect in the international treaties concerning the protection of the marine environment. Under these conditions the application of *actio popularis* in this sphere becomes doubtful, because—as a matter of principle—international law admits *actio popularis* only on the basis of an appropriate treaty norm. As pointed out by Kiss: "It is still more doubtful that such an action would be recognized as acceptable if undertaken by one or more Governments, outside any treaty provision and any specific interest, exclusively on behalf of the common concern

⁴³ See for example, L. A. TECLAFF, *International Law and the Protection of the Ocean from Pollution*, in: *International Environmental Law*, New York 1974, p. 117.

⁴⁴ A. D'AMATO, J. L. HARGROVE, *Environment and the Law of the Sea. A Report of the Working Group on Ocean Environment of the American Society of International Law*, Washington 1974, p. 53.

⁴⁵ Cf. *ibid.*, and also S. H. LAY, *op. cit.*, p. 105; R. MUNTEANU, *op. cit.*, p. 240.

of mankind to safeguard the biosphere.⁴⁶ Kiss belongs to those representatives of the legal doctrine, who in spite of this are inclined to favour the application of the institution of *actio popularis* in the case of damages inflicted to the environment of the international areas and his stand seems perfectly justified. The most effective solution would be that consisting of the amalgamation of the two previously mentioned procedures i.e. granting the right to sue for compensation to both organizations acting within the framework of the United Nations system and to states. It would also be recommendable to appoint such an organization which would dispose of the necessary means (eventually in cooperation with other organizations) to prove the existence of the damage to the environment and to demonstrate the causal relation. Finally, it seems to me that in case that works would be undertaken on a separate convention concerning international responsibility for damages resulting from explorations for and exploitation of mineral resources of the sea, due attention would have to be paid to the problem of the institution of *actio popularis*.

6. The Effects of Responsibility

Pursuant to international law in force, the fundamental form of reparation is *restitutio in integrum*. However, in the case of damage inflicted to the marine environment it is not restitution which is being sought but appropriate monetary compensation.⁴⁷ It has to be pointed out that the evaluation of the amount of compensation depends, to a large extent on the evaluation of the actual value of the marine resources which represents an economic problem which still remains to be solved.⁴⁸ Under the existing circumstances one may consider the suitability of adopting a solution consisting of the adoption of a penalty payment for each ton of oil spilled into the sea as a result of the exploitation of offshore wells.⁴⁹ In any case the compensation must cover at least the costs of removing the polluting agents.

As far as the amount of compensation is concerned it would be advisable to fix a high maximum limit, since the achievement of full compensation may — because of the extent of the damage — prove unrealistic. The maximum limit would have to exceed the amounts adopted with regard to civil responsibility in this field. It should also be

⁴⁶ A. Ch. KISS, *op. cit.*, p. 48.

⁴⁷ J. SYMONIDES, *op. cit.*, p. 7.

⁴⁸ M. A. GICU, *op. cit.*, pp. 106—107.

⁴⁹ S. H. LAY, *op. cit.*, p. 105.

emphasized that in case of death or bodily injury the adjudged compensation would have to be paid in full.

Of essential importance is also the question of compulsory insurance or other equivalent financial security designed to make sure that the state fulfils properly its obligations. Compulsory insurance could also apply to all persons directly involved in the exploitation of the mineral resources of the sea; the state meeting the compensation claim could then sue such persons for reimbursement.

It has to be noted that in international law concerning environmental protection compensation is linked to the obligation to prevent the occurrence of the same damage in the future. This obligation, established in the *Trail Smelter* case, was explicitly provided for in the ILA draft of 1972, which contains the principle according to which a state must suspend its activities until such time that it can guarantee the strict application of the mining regulations.⁵⁰

Of some importance is also the question of the possible establishment within the framework of the United Nations of a fund into which sums paid by those responsible for the pollution of international areas resulting from the exploration for and exploitation of the mineral resources of the sea, will be deposited. The resources accumulated in such a fund could serve to finance measures taken in order to protect the environment and to cover compensation claims. Till now, detailed proposals to that effect have been presented in the above mentioned ILA draft of 1972 concerning the international area of the seabed. The draft provides for payments to be made by "all operators and States involved in the exploration and exploitation of the natural resources of the international area" and for the utilization of the fund's resources:

"i) where it appears to be impossible to indentify the cause of pollution; ii) where damage results from a natural phenomenon of an exceptional, inevitable and irresistible character; iii) where the damage exceeds the fixed limit imposed on the operator and/or the State concerned; and iv) where has been caused general damage to the marine environment [...]" (Art. 9, para. 9).

Without prejudging the issue of the detailed solutions which may eventually be adopted, it seems to me that it would be recommendable to place the main emphasis on the utilization of the resources of such a fund in meeting compensation claims for damages which cannot be

⁶⁰ Article 9, paragraph 3 Draft Declaration of Principles which should Govern the Activities of States in the Exploration and Exploitation of the Mineral Resources of the Sea-Bed and Subsoil beyond the Limits of National Jurisdiction, ILA, 1972, in: S. ODA, *The International Law of the Ocean Development*, Leiden 1972, vol. 2, p. 224.

exactly evaluated in terms of money as well as in order to prevent pollution and only exceptionally in order to compensate for specific damages. In that way it would be possible to prevent the shifting of the entire burden of compensatory payments on the fund by the contributed states.

7. Conclusions

Because of the absence of appropriate treaty rules dealing with the determination of the responsibility of states for damages resulting from the exploration for and exploitation of the mineral resources of the sea, the principle of territorial sovereignty and the principle of the freedom of the seas are of fundamental importance. However, in view of the increasing importance of the problem resulting from the constant development of science and technology, there is an urgent need to regulate in a treaty form the responsibility of states in this field, for neither the customary law pertaining to the international responsibility of states nor the draft convention worked out at the III United Nations Conference on the Law of the Sea provide unequivocal answers to many detailed questions.

Because of the unsatisfactory state of the legal rules dealing with the rights and obligations concerning the exploration for and exploitation of the mineral resources of the sea, it is necessary to work out precise international standards in this field. At the same time, the unusually dangerous character of the exploration and exploitation of the mineral resources of the sea justified in this case the imposition of responsibility upon states not only for illicit acts, but also — following the example of the law on outer space — the adoption of the principle of responsibility of states by virtue of risk. It would be recommendable to omit in this case the legal construction of guilt and to apply the principle of objective responsibility based on effect. The problem of determination of that effect i.e. of the damage is not rising any theoretical objections. In order to determine the responsibility of the state one could make use of the universally applied definition of pollution of the marine environment together with the detailed standards in this field. However, given the actual stage of scientific development, the determination of the damage caused by pollution and the determination of the causal relation between the specific event and the damage may, in practice give rise to many difficulties.

The criterion on the basis of which a state ought to be held responsible for the exploration for and exploitation of the seabed and

ocean floor in the international area calls for careful consideration. It seems that the most appropriate would be the criterion of authorization given by the state to carry out such activities. The omission of the principle of exhaustion of local remedy seems justified.

Particular attention must be paid to the problem of application in the case of damages caused as a result of exploration for and exploitation of the mineral resources of the sea to the entire international community of the institution of *actio popularis* and to the problem of the right to sue for compensation granted to the appropriate international organization and to states.

Several questions relating to the effects of state responsibility, in particular, the question of compensation limits, compulsory insurance and compensation fund call for effective solutions.

The adoption of adequate solutions in all these matters is, no doubt, a very difficult task, because of the vital economic interests of states which are involved. On the other hand, it is indispensable because of the needs to protect the marine environment and to ensure the rational exploitation of the seas and oceans which represent two-thirds of our planet.

Liability for Damage in Maritime Shipping under the Aspect of Risk Allocation

by JAN LOPUSKI

I. Some Basic Assumptions

1. The topic in question is closely connected with the broad problem of civil liability. Civil law rests on two pillars: law of property and civil liability.¹ In civil maritime law the latter problem seems to have even a greater importance judging by the way it attracts attention of marine jurists. And it certainly is a crucial problem of all international conferences dealing with civil maritime law.

To present such a broad and controversial problem in an article may prove to be an ungrateful task. To facilitate its performance it may be necessary to commence with the presentation of some basic assumptions taken as departing points for my further reasoning, although these assumptions may concern questions which in the theory of maritime law are still controversial.

The first basic assumption is that the autonomous maritime law has now so many links and common features with general civil law that any analysis of its principles and socio-economic functions cannot disregard trends which dominate in the theory of civil law.

The second assumption concerns the broadening of problem of liability for damage which cannot any longer be restricted to civil liability in its classical meaning, having the element of civil sanction, and subject to the traditional Roman division into contractual and delictual (tort) liability. Such meaning of liability for damage would not cover other civil law instruments aimed at compensating the damage such as insurance or compensation funds, which combine the elements of guarantee and division of the financial burden of compensation among a large number of interests participating in the creation of the fund. It

¹ A. STELMACHOWSKI, *Wstęp do teorii prawa ogólnego* [Introduction to the Theory of Civil Law], Warszawa 1969, p. 243.

is assumed therefore, that when considering the topic in question one must take into account, besides the contractual and tort liability, also this third type of liability for which in the Polish doctrine the term "guarantee-repartitive liability" has been suggested.² There is a strong interaction between these different types of liability for damage which have, as the case may be, competitive or complementary functions.

The third assumption concerns the very concept of maritime law of to-day. It seems that the stability of maritime law, so often indicated in the literature as one of its characteristic features, belongs to the past. We live in a changing world and the sphere of relationships governed by maritime law is by no means immune from the process of social changes, which require an adequate legal regulation. Let us consider only the impact exercised by the changing international legislation, which is by no means restricted to technical rules. In the last 50 years we have had not only four Solas conventions steadily increasing the standards of safety but also three subsequent conventions on the limitation of shipowner's liability, introducing new concepts of this basic institution of civil maritime law. One cannot praise a conservative attitude which still dominates the meetings of the International Maritime Committee.⁸

2. The latter assumption determines the general approach to the problem in question. It seems that any attempt of a dogmatic analysis of the existing rules of national or international legislation concerning the liability for damage, in an article, would turn out to be sterile; in any case it could be only very superficial. The approach must necessarily be a functional one. Law after all is an instrument of social organization. Liability for damage is a central problem of civil law and performs complex socio-economic functions. Its principles should be adapted to the needs of a community passing to the higher forms of social organization. And particularly in the legislation process — whether it is national or international — we should develop in us "the consciousness of future" in order to be fully aware whether we move in a right direction. The historical approach may prove here to be advisable. The main institutions of maritime law of damages have a long history of evolution and are still not deprived of certain archaic features originating from legal concepts born in quite different socio-economic conditions. The historical approach helps us in finding the roots of these concepts, and in tracing various stages of development they have already under-

¹ W. WARKALLO, *Odpowiedzialność odszkodowawcza [Liability for Damage]*, Warszawa 1972, p. 94 ff.

⁸ See a critical note of C. LEGENDRE on the IMC seminar on risk allocation in maritime law, "Le Droit Maritime Français" 1976, No. 336.

gone, thus indicating the trajectory of evolution of the main institutions of maritime law of damages which we intend to examine.

II. Risk Allocation and the Determination of Rules of Civil Liability: the Insurance Factor

3. As it follows from the title of this article the problem of liability for damage should be presented under the aspect of risk allocation. Legal concepts aimed at the division of risks among the participants of maritime adventures have a long history. G. Ripert distinguished even between the division of risks and the contractual displacement of risks against remuneration.⁴ I propose, however, not to uphold this distinction since various legal devices falling under both these categories serve the same economic aim—spreading of risks incident to maritime activity by progressing from some primitive concepts such as *foenus nauticum* or *lex Rhodia de iactu* to more sublimated ones such as marine insurance and reinsurance.

4. Before reviewing the main institutions of the actual shipping law aimed at the division of risks, it should be stressed that the appraisal of liability for damage solely under the aspect of risk allocation, being as such an economic problem, seems to be a one-sided approach. There is a striking difference in the approach to liability for damage problem between legal writings on maritime law and documentation concerning the international shipping legislation, and general theoretical studies in liability for damage. While in the former the allocation of risks is considered as a crucial economic problem, being decisive for the acceptance of appropriate legal rules on liability for damage, modern theoreticians of civil law, who reject the purely dogmatic approach to legal problems, examine liability under the aspect of its complex socio-economic functions: compensatory, preventive and repressive.

This fundamental difference in approach to the problem in question seems to be understandable when we consider the different spheres of relationships taken as the background against which the liability problem is discussed. Maritime law has a strong international character and liability for damage in maritime shipping is generally considered against the background of conflicting international interests, where economic arguments prevail over the social ones. Consequently marine legislators are not open to some general social ideas which influence legal thinking

⁴ G. RIPERT, *Droit maritime*, Paris 1950, vol. 1, p. 61.

with regard to liability for damage considered as a national problem, such as humanitarianism, consumer's protection, risk of progress or implications of a gradual process of "socialization" of risks.⁵ They are also reluctant to admit the importance of any other socio-economic function of civil liability but the compensatory one, which is more or less characteristic of a considerable part of representatives of the Western legal science. Instead of it, the delegates for international conferences concentrate on finding the cheapest way for spreading the risk incident to shipping, using doubtful arguments which barely cover their real intentions. In this way the discussion boils down to purely economic considerations and the final result, quite often achieved by way of "package deals," bears the stamp of purely technocratic thinking — shortsighted and often illogical.

On the other hand, studies in liability for damage under general civil law refer in most cases to a given national legal system, whether it is French or Soviet, British or Polish. Consequently problems are discussed against the background of the sphere of relationships existing in a country where that legal system is in force. In this situation, consideration is given to the interest of a national community having in general a much higher degree of social organization than it is in case of the world shipping community. And although even in case of a national community the legislator has to reconcile the conflicting interests of various economic groups (or departments), he will generally be more susceptible to arguments based on social reasons, taking into account the interests of the community as a whole.

5. It would follow therefrom that certain arguments as put forward in the discussions on liability for damage under international maritime law may not sound understandable to jurists dealing with civil liability problems. One may refer e.g. to an argument widely used in the discussions concerning Uncitral's work on the reform of the Hague Rules and Unctad's work on the multimodal transport,⁶ which seems to originate from national maritime law and marine insurance associations of certain capitalistic countries. They have opposed the increase of carrier's liability on the ground that it would restrict demand for cargo insurance thus preventing the developing countries from establish-

⁵ For the socialization of risks theory see W. FRIEDMANN, *Law in a Changing Society*, London 1964, pp. 122—123. Also R. SAVATIER, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui*, Paris 1964, and G. VINEY, *Le déclin de la responsabilité individuelle*, Paris 1965.

⁶ See the report by the UNCTAD Secretariat (TD/B/AC.15/14 of 14 Jan., 1976) on liability and cargo insurance cover under international multimodal transport operations.

ing their own marine insurance markets. Apart from the question of feasibility of such an argument, one may doubt whether such kind of purely economic argumentation would be found acceptable in any serious discussion on carrier's liability under national civil law.

Let us take another example—insurability of liability for fines imposed under administrative or penal law. It seems to be an unwritten rule of insurance law that pecuniary consequences of penal liability are not insurable.⁷ For instance in Poland enterprises cannot insure their liability for penalties imposed under anti-pollution regulations since such an insurance, depriving the penalties of their preventive effect would be clearly against public policy. The same would apply to liability for fines under customs, fiscal or sanitary laws. But in the international relationships it is common practice to insure shipowners against fines or penalties which may be imposed on their vessels for the violations of customs, sanitary, anti-pollution or fishing regulations. Such fines or penalties imposed under foreign regulations are treated as insurable risk and nobody would bother that such an insurance is against public policy of the country which has introduced these regulations in order to protect its legitimate interests. This may lead us to a pessimistic conclusion that one may speak seriously only about national public policy. The sphere of world shipping relationships is a scene of hard competition among various national and international groups of interests and one may doubt whether the international shipping community has anything like a common public policy, particularly in absence of a supranational authority which could implement it. In consequence thereof the attitude of states participating in the work on international shipping legislation concerning liability for damage problems is to a much higher degree determined by purely economic considerations, taking into account national interest, than by arguments drawn from the analysis of the socio-economic functions of the proposed juridical solutions.

This seems to be a very unsatisfactory situation since international legislation exercises a strong influence on national legislations. Especially in respect of law on transport, otherwise than in respect of law of international trade, the aim of international legislation should not be the creation of a special regime for international relations only, but the unification or at least assimilation of national transport regulations. Moreover, any international solution which expresses solely a compromise achieved between the conflicting groups of economic interests at

⁷ M. PICARD, A. BESSON, *Les assurances terrestres en droit français*, Paris 1970, vol. 1, p. 510.

a given period, disregarding the main trends in the evolution of liability, which conform with the needs of a highly organised community entering the era of scientific and technological revolution, is doomed to fail from the very beginning; when confronted with social needs it will probably very soon be found unsatisfactory. The growing number of dead or halfdead conventions is a proof thereof. *

6. Let us turn now again to the problem of risk allocation. This problem seems to be as old as maritime law itself. The idea of spreading the risk of maritime adventure lies at the roots of ancient Greek and Roman concepts of maritime law such as *foenus nauticum* or *lex Rhodia de iactu* and various forms of “community of interests” in medieval shipping. It lies at the roots of limitation of shipowner’s liability deriving from the latter period. But all these more or less primitive concepts provided for spreading the risk within the micro-economic sphere represented by the community of interests involved in a common maritime adventure. It was only the advance of marine insurance and reinsurance, opening the way for spreading the risks on a macro-economic scale, with millions of insurance-takers participating in the creation of insurance funds, which has proved to be the cheapest way of spreading the risks even of a considerable magnitude. Actually, if compared with insurance, the older concepts of risk allocation based on the idea of community of maritime adventure seem to be obsolete and largely ineffective.

7. The introduction of marine insurance must therefore be considered as a milestone in the process of “socialization of risks” incident to maritime shipping. But it is common knowledge that for quite a long period marine insurance did not cover civil liability risks, except of liability under general average, and much later — shipowner’s collision liability. Under general insurance law civil liability was not insurable risk up to the 19th century, liability insurance having been considered as contrary to public policy. It was argued that liability insurance deprived civil liability of its preventive and repressive functions and as such was counterproductive and contrary to the moral principles. In some countries it was explicitly condemned by legal regulations or decisions of courts (e.g. France).

Nevertheless since the 2nd half of the 19th century we have witnessed a rapid development of liability insurance in the field of both marine and land insurance. The introduction of liability insurance may be rightly considered as a further milestone in the process of distribution or — as some say — socialization of risks. It is sometimes overlooked that the turning-point in the evolution of insurance was the overcoming of the rule of insurance law prohibiting the insurance against losses

caused through the fault of the assured. Once this rule, which could still be found in some early 19th century insurance legislation,⁸ was abolished, the way was paved for a new kind of insurance i.e. liability insurance, which having developed rapidly begins to influence and even overshadow the insurance of persons and property, creating a so far undissolved dilemma of a general direction for the future development of insurance. The discussions in Unctad and Uncitral concerning the best way for covering cargo losses represented only a fragment of a more general discussion on the question whether to expand liability insurance, passing from the principle of fault to a strict or absolute liability, or to seek the main instrument of compensation in life and property insurance (or in special compensation funds).

8. When considering this problem we must be aware of a radical change which occurred in the structure of risks covered by insurance. In the oldest and most traditional branch of insurance, i.e. marine insurance, the risks covered were mostly external in relation to the assured — perils of the sea, wars, pirates, robbers, restraints of princes, etc. While the technological progress has considerably reduced the dangers coming from elements, and piracy sounds to us as something exotic, we are faced with a variety of new risks which are no more external but internal in relation to the assured — technological defects, organizational or psychological failures, which have caused the worst marine disasters of our times. At the same time the magnitude of risks has been enormously increased; it does not concern only the steadily increasing values of ship and cargo exposed to perils of sea voyage but also the damaging potential of big, modern vessels loaded with oil, liquid gas or chemicals which present a real threat to the environment of various regions through which they pass. A latent defect or a human error may trigger a chain reaction leading to a real calamity, causing damage by far exceeding the financial capacity of the tortfeasor.

Having in mind this change in the nature and structure of risks incident to maritime shipping it would be difficult to question the insurability of liability risks on public policy grounds. Liability insurance seems to be the best available means guaranteeing the compensation for the victims of marine casualties who may happen to be complete “strangers” to shipping activity (e.g. victims of pollution or ship’s explosion disasters), having no other protection save the civil liability of the tortfeasor. On the other hand, it protects enterprises and other persons engaged in an activity exposing them to liability risks, against

⁸ W. Warkallo, *Ubezpieczenia majątkowe [Property Insurances]*, Warszawa 1971, p. 45, referring to the Austrian Civil Code of 1811.

encumbrance with liabilities hampering the conduct of their activities.

9. In the theory of insurance law it is now more or less generally accepted that liability insurance exercises a strong influence on the development of civil liability. The "depersonalisation" or "socialization" of civil liability by way of liability insurance deprives, at least partially, civil liability of its preventive function, since the financial consequences of the assured's faulty behaviour are borne by the insurer; this may lead to a multiplication of faults and damages.⁹ On the other hand, it is the liability insurance which has rendered possible a steady increase of civil liability (by the objectivization of fault or extension of the scope of strict liability) without detrimental consequences for the development of risk-creating activities which may serve the interests of humanity; so far as the liability risk is insurable, to premium due therefor constitutes one of the items in the total costs of the risk-creating activity. It has opened the way for the introduction of new kinds of liability, such as product liability, and incites the courts to award high compensations in the death and personal injury cases. These changes in civil liability influence in turn the insurance practice by increasing the demand for insurance cover. Some have called it a "vicious circle," which results in a steady augmentation of premiums for liability insurance.¹⁰ It may necessitate either the introduction of legal limitations of liability on a wider scale or passing to some higher forms of compensation in the process of "socialization" of risks and liabilities, which on a minor scale are already experimented in the field of motor traffic accidents, i.e. the creation of special compensation funds; this may lead to the decline of individual liability.

Although it not suggested that in international shipping relationships we can successfully carry into effect the concept of compensation funds (one may be rather sceptical about the future of the International Compensation Fund for Oil Pollution Damage) it seems that liability insurance presents a key problem in the allocation of risks in maritime shipping, where the above described interaction between civil liability and liability insurance is more or less similar. It seems, however, that when considering this problem against the background of international shipping relationships we must pay more attention to the preventive effect of civil liability, since administrative or penal measures, applied mostly in respect of nationals, are largely ineffective in the international sphere.

⁹ For the presentation of this problem see La. R. SAVATIER, *op. cit.*, p. 351 and M. PICARD, A. BESSON, *op. cit.*, pp. 513—514.

¹⁰ A. PICARD, A. BESSON, *op. cit.*, p. 515.

III. Liability for Damage in Maritime Law: Policy Goals and Realities

10. Considering the problem of legal rules concerning the liability for damage and the practice of marine insurance as a matter of policy aimed at achieving the optimum results which are in the common interest of the international shipping community, the following priority for common goals to be achieved by an appropriate framing of legal rules and insurance practice is suggested:

- to provide proper incentives for taking steps and applying means to prevent losses or damages (to life and property) in maritime shipping;

- to obtain as optimum spread of insurable risks at the lowest possible cost;

- to reduce the cost of handling maritime claims.¹¹

11. The first of these goals may be obtained by strengthening the preventive function of civil liability i.e. by increasing liability of those who by exercising proper care, improvement of organization and application of high safety standards may reduce the risk of damage. The trend towards increasing civil liability for damage is general, practically in all legal systems of the developed countries, although the increase is effected by a variety of ways and means. This would mean, as far as liability for damage in shipping is concerned, the increase of shipowner's and sea carrier's liability. This proposition is very unpopular with marine jurists who are attached to certain traditional concepts of maritime law and privileges conferred on the shipowner. These privileges may be reasonably defended on economic grounds by those who represent the shipowning interests. They seem, however, undefendable if we take into consideration the socio-economic functions of civil liability, provided that the liability is insurable.

With regard to the basis of carrier's contractual liability I think that it should be assimilated to carrier's liability in other branches of transport law and that the Uncitral 1978 Convention¹² was a step in a right direction. Being a compromise solution it has a number of deficiencies (scope of application, low amounts for unit limitation of carrier's liability etc.), but the abolished exception of nautical error was certainly a relict which has always amazed civil jurists not acquainted with the traditionalism of maritime law. On the other hand, the protection accorded to passengers under the IMCO 1974 Convention

¹¹ See report on the IMC seminar on risk allocation in maritime law (note 3 supra).

¹² UN Convention on the carriage of goods by sea, 1978 (Hamburg Rules).

(Athens Convention) which sticks to carrier's liability based on fault and provides for relatively low limits seems to be inadequate, if compared with latest reforms of international air law.

12. The limitation of carrier's contractual liability to passengers or cargo-owners concerns the allocation of risks among the parties to "maritime adventure" and as such deserves a different treatment than the global limitation of shipowner's liability which affects the interests of persons who may be complete "strangers" not only to a given maritime adventure but to shipping in general. This former concept born in the practice of sea carriage, but later imitated by law and practice of other branches of transport, has certain advantages since it simplifies the settlement of claims (especially in death or personal injury cases) and facilitates the assessment of liability risks. It may be acceptable in respect of death or personal injury claims provided that sufficiently high limits are fixed. In respect of cargo claims it may be substantiated on the ground that in case of more valuable cargoes it is usual to contract cargo insurance. In view of the progressing integration of transport we should aim, however, at uniform limits for all branches of transport law, which would mean a considerable increase of present liability limits in the law of carriage by sea. Arguments against it, which refer mostly to the insurability of such liability risks, are not very convincing.

13. Concerning the basis of shipowner's tort liability, strict liability should be substituted as the general rule to liability based on fault, having regard both to the process of mechanisation and automatization decreasing the importance of human factor as cause of accidents, and to the magnitude of risks to the environment (fire, explosion, pollution, etc.) created by the operation of big vessels and nature of their cargoes. Looking at this problem in a time perspective a clear shift of opinion in marine circles may be noted. While in the discussions on the "TORREY CANYON" liability convention which took place in the IMCO Legal Committee in 1967-69, the opposition against introduction of strict liability for oil pollution damage was quite strong, in the present discussions on the extension of 1969 Convention on hazardous substances other than oil, strict liability seems to be a more or less accepted principle. Since under a number of national legislations shipowner's liability for damage done to ports and fixed objects is strict, it may be suggested as a general rule for shipowner's tort liability incident to the operation or movement of his vessel, save the collision liability covered by 1910 Brussels Convention.

14. One of the key problems of maritime law of damages is the limitation of shipowner's liability. G. Ripert called it even the cornerstone

of maritime law seen by him as an architectural construction.¹⁸ This institution originating from a medieval concept, but unknown to Roman maritime law, has for years attracted attention of marine jurists, resulting in a variety of national limitation systems and so far three international conventions, none of which has satisfied everybody. One may have an impression as if we have been moving around within the magic circle created by this traditional concept of maritime law, whose necessity for the interest of community has never been convincingly proved. A variety of risk-creating activities such as: mining, oil-drilling, chemical industries, land and air transport (Rome 1952 Convention found little support) are successfully exercised without being protected by a similar privilege. And when we examine its history we find that it was introduced into the British maritime law only in the 18th century in order to put British shipowners on an equal footing with their continental competitors. Once the shipowner's liability has become an insurable risk the limitation of liability appears to us as a primitive risk-sharing device, maintained in the interest of shipping industry.

It is, however, often argued that it is the limitation of liability which makes possible for the shipowner to cover his liability by insurance. Having in mind the capacities of modern insurance markets, with wide possibilities of international reinsurance which renders possible the cover of risks of considerable magnitude, such an argument might be accepted only in respect of certain catastrophic risks incident to major shipping disasters ("Grandcamp," 1947, "Amoco Cadiz," 1978), the consequences of which may exceed the limits of insurability. But in order to allocate the "catastrophic risks" it is by no means necessary to introduce the elaborated system of per ton limits with all the complications connected with the conversion of "units of account" or "monetary units" as contained in the IMCO 1976 Convention on Limitation of Liability for Maritime Claims. It does not seem logical to attach the limits of liability to the tonnage of vessel, since vessels of the same tonnage may have quite different values and may present different liability risks. It would seem that the system of per ton limitation should be replaced by a high ceiling limitation which could be invoked only exceptionally in case of major disasters involving the shipowner's liability. The limit may either be determined by a fixed appropriate amount applicable in respect of all liabilities arising from one major accident, in which case conversion difficulties could not be avoided, or by an amount equivalent to ship's value before the accident multi-

¹⁸ G. RIPERT, *op. cit.*, vol. 2, p. 140.

plied by an appropriate coefficient. In view of the artificiality of the "amount per ton" limitation of shipowner's liability, the return to ship's value is suggested by R. Rodiere,¹⁴ although his disregard shown in respect of relationship between liability and insurance may be open to criticism.

Although it would be difficult to trace in the 1976 IMCO Convention some really fresh ideas on the limitation problem it still presents a step forward insofar as it raises the limits particularly in respect of small vessels. Under the 1957 Convention such vessels can invoke, even in case of bigger cargo claims, the global limitation, which thus supplements the protective function of unit limitation of carrier's liability.

IV. Liability Insurance: the Key Problem

15. Assuming the interaction between civil liability and liability insurance we must consider the usefulness of liability insurance under the aspect of its socio-economic functions. It is now largely admitted that liability insurance is necessary not only to protect the assured against liabilities, but also to assure protection for the victims. Mandatory liability insurance and direct action of the victim against the tort-feasor's liability insurer (as provided for by nuclear and oil pollution conventions) indicate to the latter function of liability insurance, which has become a social necessity. The problem arises how to reconcile the socio-economic need for liability insurance with its anti-preventive effect. The dilemma is best illustrated by the American anti-pollution legislation. The insurance legislation of the state of New York has prohibited the insurance liability for pollution damage¹⁵ for the seemingly obvious reason i.e. its anti-preventive effect. At the same time the federal legislation (Water Quality Improvement Act, 1970), applicable to foreign vessels visiting the USA waters, has imposed compulsory insurance of pollution liability on obviously economic grounds. This may serve as another illustration how different the legislative solutions of seemingly the same problem may be, dependent on the sphere of relationships to which the legislation is applicable.

Since the shifting of the financial burden of liability from the person liable on the liability insurer deprives civil liability of its preventive effect, the assured's behaviour should be influenced by appro-

¹⁴ R. RODIÈRE, *La limitation de responsabilité du propriétaire de navire*, "Le Droit Maritime Français," 1973, No. 293, p. 267.

¹⁵ S. SIMITIS, *Haftungsprobleme beim Umweltschutz*, "Versicherungsrecht," vol. 45, 1972, p. 1093.

prate conditions and practice of liability insurance. Premiums should be diversified dependent on results obtained by the assured and application of loss prevention measures, which should be subjected to the control of the insurer. Sanctions ranking from high deductibles to the refusal of insurance indemnity (or recourse claim of the insurer against the assured in case of direct action being granted to the victim) should be provided for in case of the assured's qualified negligence and particularly in case of his privity. In one word the insurer should be allowed and should actually exercise a more active control over the assured as far as the loss prevention is concerned.

16. One of the strong arguments commonly used by those who oppose the increase of individual liability for damage (both shipowner's tort liability and carrier's contractual liability) is that it will cause a considerable rise of liability insurance premiums and consequently increase the cost of services provided by the shipowners, which would be contrary to the community interests. This argument seems a bit fallacious and in any case conjectural. In any case it shows the disregard to the preventive function of individual liability.

Although it is obvious that the increase of liability may cause the increase of liability insurance premiums, it is by no means certain that the entire increase may be shifted on consumers of shipping services through the augmentation of freight rates, having regard to the competition on the international shipping market. If insurance premiums charged on shipping enterprises are differentiated, dependent on loss ratio, those who care for loss prevention may have considerable preferences. The increased liability for damage channelled on those who undertake a risk-creating activity, if covered by insurance, may become an important controlling factor in the conduct of enterprises which undertake such an activity. This has more or less generally been recognised in respect of environmental damage and some Western international organizations (Council of Europe, OECD) have accepted the principle "he who pollutes must pay" as a guiding one for their environmental policies, even if it may not always be consequently followed.¹⁸

17. In the "ship-cargo" relationship we meet now quite often arguments that since pollution damage is caused by cargo, it is the cargo-owner who should be made at least partially liable therefor. It seems obvious that cargo liability in case of oil (or even chemicals) would have little preventive effect, since one cannot see in which way the shipper or consignee of cargo may influence its safe ocean carriage. It

¹⁸ W. P. GORMLEY, *Human Rights and Environment: The Need for International Co-operation*, Leyden 1976, pp. 135, 217.

may even be illogical to consider such activities as pumping of oil from Arabian sands, or importing it for a Polish refinery, as creating risk of oil pollution for French coasts. It is the transport of oil along these coasts which creates that risk. The sharing of pollution risk between ship and cargo in such a case may be motivated solely by economic considerations and not by socio-economic functions of civil liability. It should be settled, therefore, in the internal relationship between the carrier and the shipper (e.g. guarantee by the shipper to cover part of damage done by the cargo). Liability in relation to third parties should be channelled on the shipowner, who may; however, be partially relieved by identifying the shipper and proving that adequate security has been provided. This would compel the shipowner to request from the shipper such a security before shipment of a hazardous cargo.

18. In the discussions concerning allocation of risks in "ship-cargo" relationship the following arguments are commonly used:

- that cargo damage may be covered at a lower cost by way of cargo insurance than by way of carrier's liability insurance,

- that the capacity of insurance market in respect of shipowner's liability risks is restricted.

While the former contention has been used as an argument against the increase of carrier's liability for cargo damage, the latter one has been used against the increase of shipowner's liability for damage done by cargo. This argument, based on an expertise emanating from the British insurance circles, was for the first time used in the discussions on "Torrey Canyon" Civil Liability Convention, and since that time has often been repeated.

When considering these contentions we must focus our attention on the role played in the insurance of marine risks by the protection and indemnity clubs which cover shipowner's liability risks, since international shipping, including the shipping of socialist and developing countries, depends to a considerable degree on the services provided by these clubs.

It is a well-known fact that the "spread of cover" of *P* and *I* clubs is incomparable with the "spread of cover" of the cargo insurance market, and the very structure of these insurance markets is completely different.¹⁷ In case of *P* and *I* clubs, the undertaken liability risks are spread within the relatively narrow community of club members. Clubs take advantage of reinsurance only to the extent it is absolutely necessary since reinsurance is costly, and clubs are operated on the basis of

¹⁷ See the report by the UNCTAD Secretariat (TD/B/AC.15/25 of 22 July 1977) on the feasibility of establishing Protection and Indemnity Clubs in developing countries.

mutuality. Their aim is to provide protection and defend the interests of their members, and not to provide protection for third parties suffering damage. While being indulgent in respect of negligence of their members (even personal), clubs use every skill to avoid payments to third parties, who have claims against their members. On the other hand, the cargo insurance market with the extensive practice of reinsurance treaties provides a very wide spread of cover and may absorb big risks at relatively low rates. The problem is whether the present system of shipowner's liability insurance is really functional in view of the magnitude of risks incident to operation of modern vessels. It has already been questioned on various occasions. Recently in connection with the "Amoco Cadiz" disaster the French Government has proposed in the IMCO Legal Committee (Leg XXXV/4 of 7 June, 1978) to study i.e. the adequacy of the present system of marine insurance and in particular the structure and functioning of the P and I clubs, contending that their character (mutuality) and the system of contributions seem to diminish the incentives towards the application of safety rules. Although the international organization of P and I clubs provides valuable services for shipping, it would seem that by extending the insurance of vessel on shipowner's liability risks (which is generally practised in air insurance and only marginally in marine insurance), a better spread of liability risks could be obtained, making such cover more effective and less expensive.

V. Conclusions

19. Concluding these remarks on liability for damage and allocation of risks in maritime shipping one must be aware of difficulties which may stand in way of a reform of maritime law of damages. In view of the acceleration of change, to which we are generally ill-adapted, we face the crisis of consciousness, which is a very serious crisis of far-reaching consequences. It is manifested by a seemingly irrational resistance to change.

In international shipping relationships the resistance to change has traditionally been strong; in this sphere of intertwined conflicting interests considerable efforts are needed to disturb the established "balance of interests." From the point of view of particular economic or professional groups the resistance may not even be irrational. Shipowners may be reluctant to increase their liabilities, and marine lawyers — who earn their living on maritime disputes — may not favour the simplification of liability rules. And nobody would expect average

adjusters to be enthusiastic about the abolishment of general average. Having this in mind one may even be astonished that so much has been achieved in the way of reform of maritime law in the last 20 years.

But more foresight and vision is required from Governments. They participate in the building of the new international order of the oceans and should be properly advised on modern trends in law by representatives of legal science; they cannot expect much help from the econo-centric technocrats, who seldom display insight and imagination.

L'influence du développement du commerce international sur la théorie des obligations

par JERZY RAJSKI

1. Le développement dynamique de la coopération économique internationale, sur l'échelle sans précédent dans l'histoire de l'humanité, fit naître une tendance à former des liens contractuels complexes et de plus en plus compliqués. Les entreprises économiques d'une grande envergure exigent parfois des efforts réunis de plusieurs unités économiques dans le processus de coopération diverse, durable et souvent bien compliquée du point de vue économique, technique et juridique. Les exemples de telles entreprises peuvent nous fournir les grandes entreprises dans le domaine de la production, de l'exploitation et de la transformation des richesses naturelles, de la satisfaction à long terme aux besoins d'approvisionnement en matières premières, combustibles et énergie ou bien de la construction « à clef » de grands ensembles industriels, d'urbanisme, de communication, d'irrigation, etc. Leur réalisation s'effectue souvent avec la participation des partenaires étrangers. Elles sont alors accompagnées d'un nombre de contrats de droit civil, variés et interdépendants, qui embrassent d'une manière complexe des stipulations aussi bien « techniques » que purement juridiques. Les cadres juridiques de cette sorte d'opérations sont souvent très développés (on rencontre des contrats comptant quelques cents des paragraphes) et compliqués (différents liens entre « le contrat principal » et « les contrats rattachés », « macro-contrats », faisant une sorte de cadre pour un nombre d'autres contrats, ensuite suppléés et développés par des contrats détaillés, etc.).

Les rapports économiques internationaux qui connaissent un développement sans cesse croissant font naître de nouveaux problèmes exigeant une solution juridique déterminée. Ils enrichissent la matière de droit des obligations et invitent à certaines réflexions de nature théorique.

2. La formation des contrats du type discuté est en général une issue d'un processus de négociations long et compliqué: de la fixation préliminaire de certains principes de négociations jusqu'à l'établissement

final et détaillé d'un bilan des dispositions du contrat. Elle englobe, entre autres, de différentes recherches initiales (travaux préparatoires), le choix des tierces personnes dont la participation est indispensable (p. ex., dans le domaine financier et d'assurances), l'obtention de l'autorisation ou de l'accord nécessaires des autorités compétentes d'État, etc. Les étapes les plus importantes de ce processus déterminent notamment les éléments successivement établis du contrat: les spécifications, les détails des livraisons et des services, les prix, les garanties de qualité ou de fonctionnement convenables, les clauses de modification du contenu du contrat, les effets de l'inexécution des obligations par la suite des circonstances indépendantes de la volonté des parties, la voie de solution des litiges (les clauses d'arbitrage), etc.

La nature complexe des négociations, leur longue durée, les frais qu'elles engendrent, la nécessité d'une coordination des pourparlers parallèles (qui se complètent dans plusieurs cas), ne restent pas sans influence sur leur caractère particulier. C'est pourquoi les négociateurs introduisent parfois dans le processus de négociations certains éléments visés à la protection de leurs intérêts. Ils revêtent la forme de différents arrangements concernant aussi bien le mode de négociations que l'établissement progressif du contenu du futur contrat. La richesse de différentes formes des relations juridiques entre les partenaires, dans les cas de cette sorte, n'est pas toujours réductible aux catégories déterminées des institutions traditionnelles de droit civil. Les fonctions mêmes de la négociation sont transformées. Conformément à une opinion adoptée dans la doctrine polonaise, « les parties tout au cours de la négociation ne font pas de déclarations de volonté qui les obligent, mais seulement établissent progressivement les dispositions particulières du futur contrat »¹. La déclaration de volonté n'est faite qu'au moment où les parties tombent d'accord sur toutes les dispositions du contrat qui ont fait l'objet des négociations². Les cas des négociations discutés se distinguent essentiellement des négociations ainsi comprises. Au cours de leur durée, les partenaires font les déclarations de volonté concernant

¹ Cf. S. GRZYBOWSKI, *System prawa cywilnego — część ogólna* [Système du droit civil — partie générale], Wrocław 1977, p. 551; semblablement A. WOLTER, *Prawo cywilne — zarys części ogólnej* [Droit civil — précis de partie générale], Warszawa 1967, p. 242.

² S. GRZYBOWSKI, *op. cit.*, pp. 549 et 551; A. OHANOWICZ, J. GÓRSKI, *Zarys prawa zobowiązań* [Précis de droit des obligations], Warszawa 1970, p. 97. La possibilité « de faire les déclarations de volonté » et « d'accomplir les actes juridiques » au cours des négociations (du processus de formation du contrat) est affirmée par Z. RADWAŃSKI, *Teoria umów* [Théorie des contrats], Warszawa 1977, p. 65.

aussi bien les problèmes déterminés liés au développement des négociations que le contenu du futur contrat.

A la première catégorie appartiennent, entre autres, les arrangements qui touchent le mode de négociations et déterminent les détails de réalisation de leurs étapes successives. Quant à cette dernière question, les parties peuvent s'obliger à la due diligence pour terminer, dans un délai convenu, les étapes particulières des négociations. Elles peuvent également se charger des obligations plus larges dans ce domaine (le défaut de parvenir à la fin d'une étape déterminée des négociations, dans le délai prévu, engendre alors le résultat analogue à celui de la réalisation d'une condition résolutoire de l'acte juridique; les parties sont dispensées de leur obligation de poursuivre les négociations).

A cette catégorie appartiennent aussi certaines obligations liées au futur contrat:

- à ne pas s'engager dans les négociations parallèles (concurrentielles) avec d'autres personnes, et d'autant plus à ne pas conclure avec elles les contrats concernant l'objet du contrat négocié (c'est une clause dite d'exclusivité dont peut résulter une obligation unilatérale ou bilatérale);

- concernant le secret relatif aux informations acquises au cours des négociations qui ne peuvent pas être révélées (il est essentiel dans ce cas d'établir l'étendue et le caractère de ces informations);

- concernant les recherches et d'autres travaux préparatoires visés à rendre possible aux parties l'appréciation plus complète de la possibilité de réalisation et des frais de l'entreprise proposée (c'est qu'on appelle la clause de possibilité de réalisation du futur contrat); l'élément essentiel de cette sorte d'obligation est la répartition des frais de ces travaux, notamment en cas de non-conclusion du contrat négocié;

- qui établissent la répartition des frais des négociations en cas de non-conclusion du futur contrat.

Les arrangements de la seconde catégorie sont de la nature et signification différentes. Ils sont liés au processus de formation progressive du futur contrat, qui est caractéristique pour bien des cas des négociations des contrats internationaux commerciaux. L'intention des parties consiste, dans les cas de cette sorte, à s'obliger à ne pas mettre en question, dans la suite des négociations, des éléments du futur contrat qui ont été déjà convenus. Elles s'engagent, en même temps, à continuer les négociations en bonne foi, loyalement et de façon conforme aux usages du commerce international afin de parvenir aux déclarations de volonté concordantes relatives aux autres éléments (non convenus) du futur contrat, ayant un rang de l'obligation, contractuelle. Les arrangements de cette sorte écartent certaines difficultés qui peuvent surgir dans

l'appréciation des effets de la non-conclusion du contrat promis⁸. Ils permettent également d'attribuer à l'obligation des parties dans ce domaine le contenu plus large dépassant le cadre de l'obligation traditionnelle de s'abstenir du comportement illicite au cours des négociations. Ces questions sont assez compliquées. L'analyse de la pratique contractuelle en la matière permet de conclure sur l'élargissement de l'étendue de l'obligation de « négocier en bonne foi » au fur et à mesure que se développent les nouvelles étapes des négociations. La problématique de ce qu'on appelle *culpa in contrahendo* est ici beaucoup plus riche que dans la conception de la doctrine de droit civil de plusieurs pays.

3. Conformément à l'opinion de la doctrine de droit civil des plusieurs États contemporains, tout ce qui précède le moment de la conclusion du contrat, lorsqu'il n'est pas une offre ou un avant-contrat, est situé dans le cadre des négociations qui n'engendrent aucun effet juridique pour les parties. L'approche de cette sorte s'avère insuffisante, car elle n'est pas en mesure de faire ressortir la richesse et la complexité des relations juridiques créées par les partenaires au cours des négociations dont nous venons de parler plus haut. Comme le prouve l'expérience du commerce international, au cours des négociations plus compliquées, les partenaires forment entre eux les différents arrangements contractuels qui préparent la formation du contrat négocié (ou des contrats négociés). Ces arrangements résultent souvent de l'échange entre les parties de différentes sortes de documents parmi lesquels particulièrement importants sont les lettres dites d'intention (*letters of intent*). Le caractère juridique de ces derniers documents n'a pas jusqu'à présent été soumis à la discussion plus large dans la doctrine⁴. Ils se sont formés et ensuite répandus dans la pratique contractuelle du commerce international et attendent toujours leur règlement juridique. Il convient donc de constater que les dispositions de droit civil des États contem-

⁸ Les systèmes juridiques des États particuliers démontrent de grandes différences en la matière en ce qui concerne aussi bien le fondement que l'étendue de la responsabilité qui peut en résulter. Quant au droit et à la doctrine en Pologne, cf.: W. CZACHÓRSKI, *Prawo zobowiązań w zarysie* [Précis de droit des obligations], Warszawa 1968, pp. 205 et s.; S. GRZYBOWSKI, *System prawa cywilnego...*, pp. 550—551; A. OHANOWICZ, J. GÓRSKI, *Zarys prawa zobowiązań...*, pp. 186—187.

⁴ Dans ce domaine, il convient d'attirer l'attention sur les travaux de groupe de travail « contrats internationaux », fonctionnant près la revue « Droit et pratique du commerce international » et dirigé par le professeur M. Fontaine. Un bilan de ces travaux a été publié dans le n° 2 de 1977 de la revue mentionnée sous le titre *Les lettres d'intention dans la négociation des contrats internationaux* (pp. 73 et s.).

porains, relatives à la formation du contrat, ont été créées sur la base d'une expérience généralisée et du point de vue des besoins des modèles relativement simples de formation des contrats répandus dans le commerce de l'époque. Elles ne prennent pas en considération de plusieurs situations particulières qui naissent au cours des négociations plus compliquées visant à créer les contrats complexes de droit civil dans le commerce international.

4. On recontre, dans la pratique du commerce international, des situations dans lesquelles les parties (ou l'une d'entre elles) procèdent à l'exécution des obligations avant tomber d'accord sur toutes les dispositions et avant conclure le contrat respectif⁵. Cela arrive en particulier dans les cas de la formation des contrats commerciaux internationaux concernant la réalisation de grandes entreprises économiques. Le rôle particulièrement important jouent alors de différents documents échangés entre les négociateurs, et notamment les lettres d'intention ci-dessus mentionnées qui confirment la volonté des parties visée à la formation du contrat et autorisent le commencement de son exécution sans délai (ou dans un délai déterminé). Une telle conclusion doit indubitablement résulter de la teneur du document déterminé, accepté par les deux parties. Fréquemment, l'autorisation en question est prévue *expressis verbis* dans le document respectif (la clause de « l'autorisation à commences » — *authority to proceed*)⁶. Du point de vue juridique, il est permis d'affirmer qu'il y a lieu, dans ce cas, la formation d'une convention spéciale entre les parties qui est ensuite consommée par le contrat principal conclu ultérieurement. Autrement, il faudrait venir à la conclusion suggérant un renversement de la relation entre le moment de la conclusion du contrat et le moment de procéder à son exécution. La convention particulière dont nous parlons, en affirmant la volonté résolue des parties à conclure le contrat principal, distingue une étape des travaux au commencement desquels elle autorise, de l'ensemble de l'entreprise faisant l'objet du contrat principal. Elle constitue ainsi une sorte de « partie » (antérieurement formée) du contrat principal. Voilà encore un nouveau phénomène né dans la pratique contractuelle du commerce international qui complique la distinction, paraît-il évidente, entre l'étape de la formation et le l'exécution du contrat.

5. Dans la formation des contrats à long terme dans le commerce

⁵ Cf. *Les lettres d'intention...*, pp. 98 et 104; cf. aussi P. KHAN, in: *Le contrat économique international. Travaux des Viles Journées d'études juridiques Jean Dabin de VUniversité de Louvain, Bruxelles—Paris 1975*, pp. 186—187.

⁶ Cf. les exemples de ce type de clause dans *Les lettres d'intention...*, pp. 98—99.

international, il est important de régler la question de l'influence inattendue (imprévue) du changement des circonstances (notamment de nature économique) qui met en danger de la manière essentielle l'équilibre originaire des intérêts (des obligations) des parties⁷. Ce problème, connu dans la littérature polonaise sous le nom de la clause *rebus sic stantibus*⁸, est — comme on le sait — résolu différemment dans les systèmes juridiques des États particuliers. Les uns admettent dans ce cas la possibilité de la modification de la teneur du contrat (selon l'étendue et le mode différents), les autres l'écartent.

Dans le premier groupe, on peut distinguer les systèmes qui prévoient cette possibilité *expressis verbis* dans les dispositions déterminées des codes⁹ et ceux où elle a été admise par la jurisprudence¹⁰. Au deuxième groupe appartient à côté, entre autres, du droit français¹¹ et du droit belge¹² — le droit polonais¹³.

Dans la pratique internationale commerciale, ces problèmes ont gagné, ces dernières années, de l'importance en liaison avec les crises profondes qui tourmentent l'économie du monde capitaliste et le

⁷ « L'économie du contrat » selon la terminologie française.

⁸ Cf. W. CZACHŒSKI, *Prawo zobowiązań w zarysie...*, p. 383; K. PRZYBYŁOWSKI, *Klauzula « rebus sic stantibus » w rozwoju historycznym* [La clause « rebus sic stantibus » dans le développement historique], « Pamiętnik Historyczno-prawny, vol. III, (Lwów) 1926, n° 1.

⁹ Ainsi, p. ex., les droits: hongrois (art. 241 du code civil), tchécoslovaque ((art. 276 du code du commerce international), de la R.D.A. (art. 78 du code civil et art. 295 de la loi sur les contrats économiques internationaux), italien (art. 1467 du code civil), grec (art. 388 du code civil) et un nombre des législations hors d'Europe (entre autres, art. 3183 du code civil éthiopien).

¹⁰ Cf., p. ex., la jurisprudence des tribunaux anglais, espagnols, ouest-allemands, suisses et ceux des États Scandinaves. Cf. à ce propos, p. ex., C. M. SCHMITHOFF, *The Export Trade. The Law and Practise of International Trade*, London 1975, p. 97; F. BONET RAMON, *Codipo civil comentado*, Madrid 1964, pp. 958-963; J. ESSER, *Schuldrecht — Allgemeine Teil*, Bd I, Karlsruhe 1970, pp. 226-228; J. ENGEL, *Traité des obligations en droit suisse*, Genève 1973, pp. 528-534; K. RODHE, *Adjustments of Contracts on Account of Changed Conditions*, « Scandinavian Studies in Law », 1959, pp. 151-197.

¹¹ Cf., p. ex., G. MARTY, P. RAYNAUD, *Droit civil*, t. II, 1^{er} vol.: *Les obligations*, Paris 1962, pp. 208 et s.; A. WEIL, *Les obligations*, Paris 1971, nos 337-350. J. GHESTIN, *Traité de droit civil. Les obligations. Le contrat*, Paris 1980, pp. 105-106.

¹² Cf., p. ex., H. DE PAGE, *Traité élémentaire de droit civil belge*, Bruxelles 1964, nos 573-582 bis.

¹³ Un adoucissement du rigorisme du principe *pacta sunt servanda* a été prévu par l'art. 269 du code des obligations. Bien que l'opportunité de cette disposition, ayant le caractère d'une souple règle générale, n'eût pas été mise en question — comme l'a justement remarqué W. CZACHŒSKI (*Prawo zobowiązań w zarysie...*, p. 384) — il n'y a pas de son équivalent dans le code civil.

fléchissement du système monétaire de ces pays. C'est pourquoi on introduit de plus en plus souvent aux contrats ce qu'on appelle *hardship clauses*¹⁴ qui correspondent aux clauses bien connues *rebus sic stantibus*. Elles ont apparu en particulier dans les contrats internationaux de livraison à long terme des matières premières, et ensuite aussi dans les contrats concernant de tels domaines économiques que la métallurgie, les métaux non ferreux, les machines, l'industrie chimique et pétrochimique, l'informatique et les transactions bancaires.¹⁵

Ces clauses prévoient la possibilité déterminée de la révision des dispositions contractuelles en vue de les adapter aux circonstances nouvelles radicalement changées. Parfois elles sont exprimées dans de larges formules élaborées en détails. Les parties y déterminent les circonstances ayant la signification discutée (les critères de leur appréciation), les conséquences qu'elles engendrent, le mode de leur constatation, les délais, la situation juridique des parties (la renégociation du contrat, le droit de désistement du contrat, la « suspension » de son exécution ou éventuellement l'arbitrage), le sort du contrat au cours de la renégociation, etc. Cette brève énumération même indique la richesse des problèmes qui naissent dans cette sorte des situations. Certains d'entre eux exigeraient un règlement juridique.

Les conséquences théoriques de ces phénomènes appellent aussi un intérêt. Elles conduisent à l'application restrictive du principe *pacta sunt servanda*. La nature même du contrat subit des transformations: la convention inviolable (convention-loi dans la conception de la doctrine française) cède la place à une convention évolutive, en voie de développement. La relation entre la formation et l'exécution du contrat devient compliquée: après la conclusion du contrat et au cours de son exécution peuvent avoir lieu les renégociations successives qui conduisent à donner au contrat liant les parties une nouvelle teneur. La notion traditionnelle de contrat subit dans ces cas des modifications.

Il faudrait aussi attirer l'attention sur certains dangers liés à cette sorte des clauses contractuelles qui peuvent susciter des incertitudes, menacer la sécurité et la stabilité de la situation juridique des parties. Elles exigent assurément la haute confiance des parties, leur coopération loyale en vue de soutenir de bonnes relations commerciales. Tous ces

¹⁴ On emploie universellement en cette matière la terminologie anglaise, car il n'y a pas en français d'un équivalent suffisamment précis. Cf. *Les clauses de « hardship » — aménagement conventionnel de l'imprévision dans les contrats internationaux à long terme*, « Droit et pratique du commerce international », n° 1, pp. 9 - 10; J. GHESTIN, *Traité de droit civil...*, p. 106.

¹⁵ Cf., p. ex., *Les clauses de « hardship »*, p. 15; Cf. aussi B. OPETIT, *L'adaptation des contrats internationaux aux changements des circonstances: la clause de « hardship »*, « Journal du droit international », 1974, n° 4, pp. 794 et s.

facteurs parlent, à mon avis, en faveur de l'opportunité du règlement législatif déterminé de cette problématique.

6. Pour finir avec ces réflexions nécessairement bien superficielles, je voudrais souligner que la pratique contractuelle a formé un nombre de solutions nouvelles conformes aux besoins des rapports de droit civil dans le commerce international qui se développent et se compliquent sans cesse. Certaines institutions de droit civil ont gagné une valeur nouvelle, remplissant un nombre des fonctions nouvelles et variées dans le domaine des rapports économiques internationaux.

L'approche empirique permet de développer de nouvelles conceptions théoriques facilitant la réalisation des buts déterminés d'une manière adéquate aux besoins actuels du commerce international, en prenant en considération les intérêts des parties engagées dans les rapports contractuels dans ce domaine.

Il est permis de conclure ce résumé extrêmement synthétique avec un postulat *de lege ferenda* indiquant le besoin d'élaborer une loi spéciale (pas nécessairement en forme d'un code) qui contiendrait un manche des dispositions concernant les contrats les plus répandus dans le commerce international¹⁵. Il semble que certaines réflexions générales contenues dans ces remarques pourraient fournir une inspiration utile pour le législateur et servir aux besoins de la pratique du commerce extérieur et au processus d'application du droit en vigueur dans ce domaine. Quant au règlement juridique proposé des contrats dans le commerce international, il serait opportun de postuler que ces dispositions déterminent clairement leur relation aux institutions respectives du code civil, particulièrement à celles qui sont réglées dans le troisième livre sur les obligations¹⁷.

¹⁸ Les travaux préparatoires en ce sens qui ont été entrepris sous les auspices du Ministère du Commerce extérieur et de l'Économie maritime, ont abouti à l'élaboration du projet de la loi sur les relations de droit civil dans le commerce international.

¹⁷ Cf. Z. RADWAŃSKI, *Teoria umów...*, p. 259.

**The Principle of Equality of Sexes as Regards the
Contraction, Invalidation and Dissolution of a Marriage
in the Socialist Systems of International Private Law
with Particular Regard to Polish Law**

by MIECZYŚŁAW BOŚNIAK

Introduction

The principle of equivalence (or equality) of the sexes manifests itself, as well known, with differing intensity in various fields of family law. With regard to the contraction and dissolution of marriage this problem is much more simple as compared to other fields. For, here we deal with cases when the quality of the right of the man influences the legal sphere of the woman. From the very outset it can be stated that there are no such cases in the legislation of the socialist countries. As far as personal connections are concerned these countries operate with the right of each party. And when personal law cannot be applied one has recourse to *lex loci celebrationis matrimonii* or to *lex fori*. Thus, in this case also the woman enjoys adequate legal protection.

As well known, the importance of the principle of equivalence of the sexes as regards the problem of choice of law has been judged quite differently by various scholars.¹ Among other things, the point has been raised that in view of the special nature of conflict norms the indication in the conflict norm of the right of the man should in no way be construed to mean that the substantive norm applied on this basis leads inevitably to the discrimination of the woman. And conversely: in view of the female, the substantive law can result in the worsening of her legal position.² While opposing such a stand attention was drawn to the fact that by conferring the decisive voice to the per-

¹ I am referring to the bibliography on the subject compiled by F. GAMILSCHEG, *Internationales Privatrecht*, vol. 2, Berlin 1973, p. 38.

² For a critical appraisal of this argument see, among others, P. H. NEUHAUS, *Die Grundbegriffe des IPR*, Berlin 1962, p. 109.

sonal status of the husband one enables him to modify that status (by a change of nationality or residence), whereas such a change of connection by the wife does not modify, in this situation, her legal position. Furthermore, with the change in the personal status of the husband, the wife is subjected to a law which is foreign, very often insufficiently known to her, etc.³ There is a wealth of other arguments advanced against the "neutrality" of conflict norms in the matter under consideration.⁴ We shall however, refrain from quoting them here.

Our task will thus be limited to the presentation of choice of law solutions concerning the contraction, invalidation and dissolution of marriage in the conflict law of Poland and other socialist countries and in the treaties signed by these countries. Doubts may, arise only in connection with the possible influence of the clause of public order, a matter which will be discussed at the end of this paper.

The Principle of Equality of Sexes in Polish Conflict Law

The Contraction of a Marriage in Polish International Private Law

As far as the evaluation of the material requirements of the validity of a marriage is concerned, Polish law (together with most other modern systems) adopts the principle of the competence of the national law of the spouses.⁵ This leads to specific difficulties when the spouses are of different nationality. In such a case, there are two possibilities: to submit the solution to only one of the personal statuses or to examine the position of each spouse in order to ascertain whether he or she meets the legal requirements set by the national law. We assume that the evaluation takes place separately for each spouse in accordance to his or her personal law, for the conditions are set by the national law of the parties concerned.

Both parties enjoy therefore full equality. The same applies also to the form of marriage contraction. Polish legislation in force gives preference in this respect to *lex loci celebrationis matrimonii*, with the provision that "it suffices to respect the form required by the national law of both spouses" when the marriage is being contracted abroad.

The principles concerning the form of marriage can therefore be

³ Cf. MAKAROV, *Die Gleichberechtigung der Frau und das IPR*, Rabels Z. 1952, p. 385 ff.

⁴ Cf. also F. STURM, *Zur Gleichberechtigung im deutschen Internationalen Privatrecht*, "Rechtsvergleichung und Rechtsvereinheitlichung," Heidelberg 1967, p. 155 ff.

⁵ Article 14 of the Polish Law of 1965 of International Private Law.

divided in Polish law into two groups: (i) the principle of the mandatory local form for marriages contracted in Poland and (ii) the principle of the admissible national form for marriages contracted abroad. The premisses justifying the exception from *lex loci celebrationis* in favour of *lex patriae* is the respect of the form foreseen by the national law of both spouses. Thus, our legislation admits the validity of a mixed marriage as to its form, i.e. of a marriage contracted by a Polish national with a foreign national abroad in a form which differs from the local form.

Since the local form is basic, the suitability of the national form should not be considered as tantamount to a right of choice *sensu stricto* or even as a full alternative. In principle, the spouses should apply the local form. The marriage will however, be valid also provided that they meet the requirements of their state of origin. Otherwise, the consequences of the failure to comply with the form will be determined by local law which will decide whether the marriage is valid and, if not, what are the consequences of invalidity. Here we can see the distance which separates us from the principle of choice of the law.

The form of marriage of stateless persons is, in principle, subject to the *lex loci celebrationis matrimonii*. If the marriage is being contracted abroad it suffices to respect the formal requirement imposed by the law of the place of residence of the spouses.

As far as engagement is concerned, we judge—in accordance with the traditional stand—the material conditions of its validity in conformity with the personal law of each fiancé and its form in conformity with the place of the engagement. In accordance with the principle of separate treatment of the personal status of each fiancé, the consequences of the breach of promise must be judged for each fiancé in conformity with his or her personal law. Thus, if the law of the state of a party concerned considers a breach of promise as a delict, then we shall apply the *lex loci delicti*. On the other hand, if the national law links the breach of promise to contractual consequences we shall apply the contractual status.⁶

It has to be emphasized that Polish law is silent on that subject. When settling the matter of the consequences of a breach of promise and of its negative results it would be advisable to consider whether—in spite of the principle of equality of the sexes, but in conformity

⁶ As a result, as pointed out by LAUTERBACH, in: *Das internationale Familienrecht Deutschlands und Frankreichs*, Tübingen 1955, p. 24, a woman of FRG nationality cannot claim any indemnity for a breach of promise from a person of Polish nationality, for such indemnity is not foreseen under Polish law. On the other hand, indemnity can be claimed from a French national.

with the spirit of that principle—one would not be well advised in giving preference to the law applying to the fiancée whose interest ought, in this case, to be viewed as paramount.⁷

The Invalidation of a Marriage and the Divorce

From the point of view of the problem under consideration the invalidation of a marriage presents no major difficulties. In accordance with Article 16 of the Polish Law on international private law, in cases of marriage invalidation we apply the law set by the provisions concerning the forms of its contraction and the material premisses of its validity, i.e. the above mentioned Articles 14 and 15 of the Law in question.⁸

The same applies to the question of divorce dealt with in the Polish international private law by Article 18. Article 18 provides for a three-stage procedure: for the common national law of the spouses at the moment they are asking for a divorce, failing that—for the law of the state of their residence and, failing that, for Polish law. The emphasis placed on this community of law excludes the possibility of granting a divorce on the basis of the personal status of only one of the parties.⁹ In this case too the principle of equality of the sexes is fully respected, although the above mentioned “passage” from one status to the other aimed at saving the community of judgement (even in case of different nationality of the parties) was sometimes criticized.¹⁰

The Implementation of the Principle of Equality of the Sexes in International Treaties and in the Collision Norms of the Socialist States

International Treaties of Socialist States (with particular regard to treaties signed by Poland)

In the treaties on legal assistance signed by Poland with other socialist states the fundamental principle guiding the evaluation of the

⁷ Cf. NEUHAUS, *op. cit.*, p. 126.

⁸ The problem of invalidation of marriage in Polish international private law is dealt with in detail in a collective work entitled *Międzynarodowe prawo rodzinne [International Family Law]* by M. SOSNIAK, B. WALASZEK, E. WIERZBOWSKI, Wrocław 1969, pp. 134–141.

⁹ This problem has been discussed on many occasions in literature; see, in this connection, the various opinions quoted by NEUHAUS, *op. cit.*, p. 101.

¹⁰ Cf. STURM, *op. cit.*, p. 165: “Der Übergang von Staatsangehörigkeit zum Domizilprinzip bei Ehegatten mit verschiedener Staatsangehörigkeit überrascht, entbehrt innerer Logik und Konsequenz und wirkt wie ein *deus ex machina* zur

material requirements of the validity of a marriage is the national law of the parties contracting a marriage.¹¹ Some interpretation difficulties arise only in connection with the practical implementation of the provisions of the treaties signed with the USSR and the German Democratic Republic.¹²

The treaty with the USSR provides a clear directive only with regard to the form of marriage subject to the *lex loci actus*. The question arose as to whether this law ought to be applied also in the evaluation of the material premisses which determine the validity of a marriage. However, such an interpretation would be in conflict with the legal doctrine of the USSR which subject always the evaluation of the material requirements of the validity of a marriage contracted by USSR nationals to Soviet law. Some Polish theoreticians conclude that, as far as Polish-USSR relations are concerned, it is necessary to separate the requirements concerning the capacity to contract a marriage (age, legal capacity, single status) from other material requirements. The first group would then be subject to the national law of each party, whereas the remaining material requirements would be dealt with by the *lex loci celebrationis*. Such a solution is corroborated by actual practice.

The treaty signed by Poland with the German Democratic Republic contains also exclusively provisions concerning forms of contracting a marriage (Art. 21). Some theoreticians concluded therefore that all requirements determining the validity of a marriage ought to be subject to the *lex loci celebrationis* or that the evaluation of the premisses of

Rettung der Gleichberechtigung Ibid., a characteristic example of a marriage of a FRG national with an Austrian national in a developing country; their relationship will be ruled by the law of that country (in view of the different nationality of the spouses).

¹¹ Such is the case, for example, in Art. 12, item 1 of the treaty with Czechoslovakia of July 4, 1961 (Dziennik Ustaw—"Journal of Laws," further as Dz.U., 1962, No. 23, point 103), in Art. 31, item 2 of the treaty with Hungary of March 22, item 1 Dz.U., 1995, No. 8, point 54) in Art. 22, item 1 of the treaty with Bulgaria of December 4, 1961 (Dz.U., 1963, No. 11, point 88), in Art. 22, item 3 of the treaty with Rumania of January 21, 1962 (Dz.U., 1962, No. 63, point 301). Some restrictions with regard to the application of foreign law in view of the provisions of internal legislation are foreseen in Art. 25, item 2, sentence 1 of the treaty with Yugoslavia of February 2, 1969 (Dz.U. No. 27/1963, point 162) and in Art. 24, item 1 of the treaty with Mongolia of September 14, 1971 (Dz.U. No. 36/1972, point 244). For a similar solution in other treaties see, for example, the treaty between the GDR and Rumania of September 24, 1958, Art. 22 item 3.

¹² Cf. Article 28 of the treaty between Poland and the USSR of December 28, 1957 (Dz.U., 1958, No. 32, point 147). Cf. also the treaty between Poland and the GDR of February 1, 1957 (Dz.U. 1958, No. 27, point 114).

validity with regard to the nationals of the two states concerned, irrespective of their nationality, must be made in accordance with the two systems, i.e. with the law of Poland and the GDR. I considered such an interpretation as erroneous and advocated the application in such cases of the traditional principle of competence resulting from Article 13, p. 1, EG zum BGB.

Also some other treaties signed between socialist states (with the exclusion of those signed by Poland) do not contain a separate provision dealing with the material requirements of the validity of a marriage.¹⁸

As far as the form of marriage contraction is concerned, the treaties in question respect fully the principle of equality of the sexes. There is full accord as to the principle of *lex loci celebrationis*, with the possibility provided for in some treaties of applying the *lex partiae* of those contracting a marriage. The adoption of the fundamental principle of competence is connected with the possibility of guarantying the competence of the organs of the state concerned as regards the contraction of marriages on its territory. Some treaties recognize the possibility of referring to the *lex partiae* of those contracting a marriage, others — such as the treaty signed by Poland with the German Democratic Republic and Rumania — recognize the principle of *locus regit actum* excluding the possibility of applying the *lex partiae*.

Of a somewhat more complex nature is in these treaties the problem of marriage invalidation. As a rule, where a violation of formal requirements occur they indicate the law of the state where the marriage was contracted,¹⁴ however, in cases of violation of material requirements of validity they refer to the national law.¹⁵ On the other hand, some treaties contain a provision which admits the invalidation of a marriage only provided that the premisses of validity are foreseen by both the *lex loci* and *lex partiae*.¹⁶

¹³ For example Article 22 of the treaty between the GDR and Bulgaria of September 24, 1958 mentions only the form of marriage.

¹⁴ Or, if the status of the form provides also for the competence of the national law of the spouses, also this law; this is set out clearly in Art. 25, item 1 of the treaty between Poland and Rumania; the same is implied in Art. 25, item 2 of the treaty between Poland and Bulgaria.

¹⁵ For example Art. 15, items 1 and 2 of the treaty between Poland and Czechoslovakia, Art. 24, item 2 of the treaty with Mongolia, Art. 25, items 1 and 2 of the treaty with Bulgaria, Art. 25, item 2 of the treaty with Rumania; cf. also the treaty signed by Czechoslovakia with Hungary (Art. 22).

¹⁶ For example, Art. 30, item 2 of the treaty between Poland and the USSR, Art. 27, item 2 of the treaty with Yugoslavia, Art. 24, item 1 of the treaty with the GDR, Art. 33, item 2 of the treaty with Hungary. A characteristic feature of the latter is the competence of the law of the place of residence of both spouses, as provided for in Art. 33, item 3.

The provisions of treaties requiring that the evaluation of the invalidity be subject to both *lex patriae* and *lex loci celebrationis matrimonii* were often criticized in Polish literature¹⁷ which attempted by way of interpretation to introduce a modified solution.¹⁸ The discussion of this problem would however exceed the framework of this paper.

It is characteristic of these treaties that, as far as divorce is concerned, they refer to the competence of the *lex patriae* of the spouses. Differences occur only with regard to the settlement of the issue of competence when there is no such common law. Some treaties accept, in cases of differing nationality and various residence of the spouses, the competence of the two legal system represented in the treaty.¹⁹ Some opt for a three-stage system: common *lex patriae*, common *lex domicilii* and only in the last resort the competence of both systems.²⁰ Finally, there are treaties which after the common *lex patriae* of the spouses favour—in case of the absence of such common *lex patriae*—the competence of the law of the state where the spouses “have or had their last place of residence.”²¹

It is significant that some treaties signed by Poland²² and in particular the treaties signed by the German Democratic Republic (with Hungary, the USSR, Bulgaria and Rumania) provide for the possibility of choice of the law by the parties in a divorce case who are of different nationality and have different places of residence. They can file for a

¹⁷ For example E. WIERZBOWSKI, *Normy kolizyjne prawa rodzinnego i spadkowego w umowach zawartych pomiędzy PRL a krajami socjalistycznymi* [Conflict Norms in the Family Law and in the Law of Succession in the Treaties signed by the Polish People's Republic with the Socialist States], in: *Prawo rodzinne i spadkowe europejskich państw socjalistycznych* [Family Law and Law of Succession of the European Socialist States], Warszawa 1965, p. 16.

¹⁸ Cf. for example M. PAZDAN, *Materiałne wymogi ważności małżeństwa w bilateralnych konwencjach zawartych przez Polskę w latach 1949—1962* [Material Requirements of the Validity of a Marriage in the Bilateral Conventions Concluded by Poland in the Period 1949—1962], in: *Księga pamiątkowa K. Przybyłowskiego* [In Honor of K. Przybyłowski], Kraków 1964, p. 259.

¹⁹ For example Article 30 of the treaty between Poland and the USSR, Article 23 of the treaty with the GDR, Article 24 of the treaty with Rumania; the latter however does not require the acceptance of the double competence of different residence. Different nationality suffices.

²⁰ This is the way the matter is dealt with in the treaty between Poland and Hungary (Art. 33). The same applies to the treaty with Yugoslavia (Art. 27), however the treaty provides that in the case of the law being declared as competent because of the common place of residence of the spouses, the causes of a divorce must be recognized by the law of both parties.

²¹ Art. 14 of the treaty between Poland and Czechoslovakia, Art. 24 of the treaty with Bulgaria, Article 27 of the treaty with Mongolia.

²² Cf. Article 23 of the treaty between Poland and the GDR of 1957.

divorce in each of the states covered by the treaty and in this way engage the competence of the law of that state.²⁸ And as this is open to both parties, we have still another confirmation of the principle of equality of the sexes.

Collision Norms of the Socialist States

In most cases, the material requirements of the validity of marriage in the socialist states are subject to the national law of each party. Such is the case in Yugoslavia,²⁴ Czechoslovakia,²⁵ Hungary²⁸ and Albania.²⁷ A similar system was adopted in the *Rechtsanwendungsgesetz* of the GDR of December 5, 1975 (para. 18, item 1).²⁸

A more complex system is provided for in Articles 31 and 32 of the *Osnovy Zakonodatel'stva Sojuza SSR i Sojuznyh Respublik o brake i sem'e* of 1968. [Principles of Legislation of the USSR and of the Republics of the Union Concerning Marriage and Family]. As a matter of principle, the premisses under consideration are subject to the *lex loci celebrationis matrimonii* (Art. 31, item 1 of the cited *Osnovy*...) as regards all marriages contracted in the USSR (with the exception of consular marriages); this applies (and is worth stressing) to both material and

²³ Cf. Article 24 of the convention between the GDR and Rumania of July 15, 1958. Art. 24, item 1 provides that in a divorce case the law of the state whose nationals both spouses are and within whose boundaries they reside is competent. On the other hand, item 2 states: "Gehört z. Z. der Erhebung der Scheidungsklage ein Ehegatte dem einen, der andere dem anderen Vertragspartner an, und wohnen die beiden Ehegatten entweder auf dem Gebiet des einen oder auf dem Gebiet des anderen Vertragspartners, so sind für die Ehescheidung die Gerichte beider Vertragspartner zuständig. Die Gerichte wenden bei der Entscheidung das Recht ihres Staates an." The same is contained, but in a more succinct form, in Art. 24, item 2 of the convention signed by the GDR with Bulgaria, February 27, 1958. A similar solution was adopted in the convention signed by the GDR with the USSR, November 22, 1957 and in the convention signed by the GDR with Hungary October 30, 1957 (Art. 29, item 2).

** Article 82 of the Yugoslav Basic Law on Marriage.

²⁵ Article 19 of the Czechoslovak international private law of 1963.

²⁸ Cf. L. RECZEI, *Internationales Privatrecht*, Budapest 1960, p. 186.

²⁷ Article 5 of the Albanian Law of the Civil Law of Foreigners and of the Application of Foreign Law of 1964.

²⁸ The conflict rules of the family law now in force in the GDR have been transferred with minor modifications from the law introducing the family code of the GDR (the modifications concern paras 23, 24, items 2 and 3 of the *Rechtsanwendungsgesetz*). They have been discussed, among others, in the articles by H. WEIMANN, *Das internationale Familienrecht der EG zum FGB*, "Staat und Recht," 1966, p. 389 ff and by G. A. LUBCHEN, *Neuregelung des Internationalen Familienrechts* "Neue Justiz," 1966, No. 1, p. 14 ff.

formal premisses of validity of such a marriage. On the other hand, marriages of foreigners contracted abroad are subject to foreign law.

Let us consider now the problems of form of marriage. As we may recall from the remarks concerning the Polish collision system, when considering the forms of marriages of Polish nationals abroad the fundamental role is played by the link with the national law to the extent established by the given collision system. As the extent of action of that link increases, or even — as is the case for example in the Albanian system — supercedes entirely the local link, the evaluation of the form of contracting a marriage comes close or is even tantamount to the competence foreseen for the evaluation of the material requirements of validity. Such is the case, for example, with the USSR system. USSR citizens contracting a marriage in a foreign country must respect all formal and material requirements of USSR law. This explains why it is being recommended that instead of making use of local forms they use the consular form.²⁹

In other socialist states the problem is solved in a variety of ways. Hungarian, Czechoslovak and Bulgarian law accept marriages contracted by their nationals abroad in both local and consular form. There are differences when apart from civil marriages there is a possibility of a religious form. The Czechoslovak legislator went so far as to exclude the competence of a religious form for marriages of Czechoslovak nationals. This makes it impossible for Czechoslovak nationals to contract a marriage in a country where there is no Czechoslovak consular or diplomatic representative and where the law requires only the application of a religious form. In this respect other socialist states, such as Hungary or Bulgaria, adopt a much more pragmatic possibility, the validity of marriages of their nationals contracted in a religious form in a country which has no other form.

It is significant that the theory and practice of the USSR comes close to that stand. For, while accepting the competence of *lex loci celebrationis matrimonii* with regard to marriages contracted abroad by Soviet citizens with foreign nationals (see Art. 32 of the above mentioned *Osnovy...*) it respects their marriages celebrated there in a religious form.³⁰ Considering the matter from the point of view of our study, one may see this as a reflection of the principle of equality of both parties, since one of them (the foreign national) can make use of the form provided for in the national legislation.

²⁹ Cf. also M. M. BOGUSŁAWSKIJ, *Meždunarodnoe častnoe pravo*, Moskva 1974, p. 205.

³⁰ Cf. BOGUSŁAWSKIJ, *op. cit.*, pp. 208—209.

The invalidation of a marriage is not subject in all socialist states to the law which is competent to deal with these promises of its validity whose violation is the cause of invalidation. This principle is embodied, among others, in para. 20, item 3 of the *Rechtsanwendungsgesetz* of the GDR. Other choice of law systems of the socialist states contain various reservations to this principle,⁸¹ or generally make the invalidation of a marriage subject to the principles of competence applying in divorce cases.⁸²

The problem of divorce is dealt with by the legislation of the socialist states in different ways. Consideration is being given to either the personal law of the spouses or to the *lex fori*. In any case there is no ground for according a privileged position to either side.

In the USSR the granting of a divorce, is in principle, subject to Soviet law.³⁸ Czechoslovak law provides, above all, for the competence of the common *lex patriae* of the spouses (see Art. 22, item 1) and, failing that, for the *lex fori*. *Lex fori* applies also in the case of special difficulties raised by the competent foreign law (see Art. 22, item 1). A similar system has been adopted by Albanian law (see Art. 7). Yugoslav law provides (see Art. 86) that a divorce can be granted to foreign nationals only for reasons which are valid in the countries of origin of the spouses and which are also valid under Yugoslav law. The interference of the *lex fori* is therefore an omnipresent fact. The law of the GDR (see Art. 20, item 3) provides for the competence of the common *lex patriae* of the spouses and, failing that, the competence of the *lex fori*; it admits also the possibility of granting a divorce in accordance with the *lex fori* under special circumstances.⁸⁴

Thus, as far as the conflict norms of the socialist states are concerned, the interference of the *lex fori* in matters of divorce is very strong. This does in no way contradict the fundamental principle of the equality of sexes; quite often it is possible — in view of the provisions of the family law of the socialist states — to strengthen significantly the position of the wife, whether she is filing for a divorce or she opposes its granting.

⁸¹ For example, the Yugoslav Basic Law on Marriage provides in Article 85 that if only one of the spouses is of Yugoslav nationality the invalidation of a marriage can take place only for reasons foreseen in Yugoslav legislation.

⁸² For example, Art. 22, item 3 of the Czechoslovak Law on international private law of 1963, or Art. 7, item 4 of the Albanian Law of 1964.

⁸⁸ Cf. BOGUSŁAWSKI, *op. cit.*, p. 211 ff.

⁸⁴ "Wird [...] auf das Recht eines Staates verwiesen, das eine Beendigung der Ehe durch Scheidung nicht oder nur als Ausnahme lässt, ist das Recht der DDR anzuwenden" (para 20, Abs. 2).

The Principle of the Equality of Sexes and the Clause of Public Order

Introduction

The Polish law in force on international private law has renounced to adduce the link of *lex loci celebrationis matrimonii* for the evaluation of the material premisses of its validity. This was not the case with the former Polish law of 1926.⁸⁵ None the less, the peculiar control exercised by the *lex loci celebrationis matrimonii* over the premisses of validity of the marriage is still as topical in Poland as it is in many modern choice of law systems. Among them one may mention in the first place the system of the USSR, in accordance to which a marriage contracted in the USSR is subject to the exclusive evaluation of Soviet law.⁸⁶

As it is well known, the problem has been considered also by the Hague Conventions.⁸⁷ Their system based on the erroneous assumption that the only way of avoiding the preponderance of the *lex loci celebrationis matrimonii* over the requirements set by the *lex patriae* of the spouses is to list all the obstacles that influenced the provisions concerning the limitations to contract a marriage in the Polish law of 1926 on the international private law. As stated above, these provisions were omitted in the law which is now in force.⁸⁸ In accordance with

⁸⁵ Cf. Art. 12, item 2 of the Polish Law of 1926. This problem has been dealt with extensively in the light of that law by K. PRZYBYŁOWSKI, in: *Znaczenie prawa obowiązującego w miejscu zawarcia małżeństwa przy ocenie materialnych wymogów jego ważności* [The Importance of the Law in Force in the Place of Contractation of a Marriage when Evaluating the Material Requirements of Its Validity], Lwów 1932.

⁸⁶ Cf. Article 31 of *Osnovy zakonodatel'stva Sojuza SSR i sojuznykh respublik o браке i semye* of 1968. It is on this legislation that the conflict rules of the family codes of the various republics have been based, for example Article 161 of the *Kodeks o браке i semye RSFSR* of 1969. Cf. in this connection, among others, L. A. LUNC, *Mezhdunarodnoe častnoe pravo. Osobennaja čast'*, second edition, Moskva 1975, p. 445 ff.

⁸⁷ Cf. in particular Article 2 of the Hague Convention of June 12, 1902.

⁸⁸ Though the first draft of that law provided for the application of limitations with regard to foreign law (Art. 20 of the draft published in "Nowe Prawo," 1961, No. 11; Cf. also my article entitled *Uwagi do projektu polskiego prawa prywatnego międzynarodowego* [Remarks to the Draft Proposal of the Polish International Private Law], "Nowe Prawo," 1967, No. 7/8, p. 1013. These limitations are absent in the draft adopted in the third reading in 1963; Cf. K. PRZYBYŁOWSKI, *Kodyfikacyjne zagadnienia polskiego prawa prywatnego międzynarodowego* [The Problem of Codification of the Polish International Private Law], "Studia Cywilistyczne," vol. 5, Kraków 1964.

that law the whole attention with regard to the evaluation of the material requirements determining the validity of a marriage must be focused on the general principles of the invoked clause.³⁹

It has to be recalled that the problem of marriage contraction represents an area particularly suitable for the intervention of the clause of public order. As it is well known, attempts have even been made to include the entire problem into the area of public order. Each epoch and almost each country produces a concept of marriage which corresponds most closely to the moral ideas and to the social role imparted to the institution of marriage.

Also in the area of socialist law it is possible to point at certain characteristic features which derive from the principles of family law, general constitutional principles and principles of socialist morality and which could constitute the foundation for the application of the clause of public order. Each individual, irrespective of sex, race, class origin and religion has the "legal possibility" to contract a marriage provided that he or she are single. A further basis for the intervention of the clause is the violation of the principle of monogamy. The principle of equivalence (equality) of the sexes can also be adduced.

As regards the theory of the socialist countries, in some of them one views the intervention of the clause in the case of violation of the principle of equality of the sexes as self-evident (for example the doctrine of the GDR⁴⁰). In other socialist countries the position is less categorical. However, for example the statements by USSR experts on the matter justify the contention that the principle in question is considered to be "a fundamental principle of the legal order."⁴¹ Recently such a stand would be supported by the USSR Constitution of 1977. The principle of the equality of sexes is embodied in Article 35. Furthermore, Article 35, sentence 2 of the Constitution emphasizes the importance of the "free consent of the woman and the man" contracting a marriage and states that "the spouses enjoy full equality of rights in their family relations."

³⁹ That the problem is similarly contained within the confines of the general principles of international private law is implied in the wording and interpretation of the provisions of the family code of the other socialist states. See, for example, the Czechoslovak international private law; cf. Z. KUČERA, *Mezinárodní právo soukromé*, Praha 1975, p. 89.

⁴⁰ Cf. for example T. WIEMANN, *Die Bedeutung des IPR in der DDR*, "Staat und Recht," 1954 No. 3, p. 752. On the opinions of H. WIEMANN see NEUHAUS, *op. cit.*, p. 26.

⁴¹ Discussing the conflict rules of the USSR N. Orlova refers on many occasions to this rule as "fundamental." See, N. V. ORLOVA, *Brak i sem'ja v meždunarodnom častnom prave*, Moskva 1966, pp. 21, 23.

Till now Polish literature on international family law paid little attention to this problem.⁴² None the less, many reasons, including the wording of Article 78 of the Constitution of the Polish People's Republic justify the recognition of the principle of equality of the sexes as "fundamental." It must also be recalled that the obligation of equal treatment of the spouses results from such important international instruments as the Universal Declaration of Human Rights of 1948, the Human Rights Covenants of 1966 and the Final Act of the Conference on European Security and Cooperation held in Helsinki in 1975.

The problem of equal treatment of the spouses as the basis of the application of the clause has also been dealt with in Polish jurisprudence.⁴³

It may be recalled at this juncture that, unlike the first two above mentioned principles, the problem of recognition of the principle of equality as a fundamental principle justifying the intervention of the clause was controversial in European theory. In the West-European states the West-German theory for example opposed the application of the clause on the basis of the principle in question putting forward three fundamental arguments. First, that the principle cannot be considered as "fundamental;" second, that only recently did it acquire the quality of a general principle in European legislation; that in the 19th century quite the opposite principle was in force;⁴⁴ third, that one should not refer to the provisions of the Constitution, for one is confronted only with a postulate and not with a statement of actual fact. Also Western jurisprudence adopted quite different stands on the

⁴² Cf. for example, M. SOŚNIAK, B. WALASZEK, E. WIERZBOWSKI, *Międzynarodowe prawo rodzinne [International Family Law]*, Wrocław 1969, p. 32 ff. The principle of equivalence is also not mentioned by J. BALICKI, *Problemy kolizyjne prawa małżeńskiego [Conflict of Law Problems in the Law of Marriage]* Warszawa 1959 p. 30 ff.

⁴³ Cf. for example, the decision of the Voivodship court in Zielona Góra of February 21, 1975, II CR 109/75 published in "OSPİKA" 1/1976 item 9 with the opinion by J. JODŁOWSKI which contains the following sentence: "The application of a foreign law which deprives the woman of the right to ask for a divorce is excluded on the basis of Article 6 of the international private law, as the implied discrimination of the woman contradicts the fundamental principles of the Constitution of the Polish Peoples Republic."

⁴⁴ It is well known that in the basic treatises of the 19th century dealing with international private law the place of residence of the husband has been the sole link for family questions. Cf. for example, F. K. von SAVIGNY, *System des heutigen römischen Rechts*, Berlin 1849, para. 379, p. 325.

subject and in some cases rejected the application of the clause in such cases.⁴⁵

It would not be in order to engage in a more detailed presentation of these controversies, the more so that we deal here mainly with the theory and practice of the socialist states. Let me only conclude by reminding the reader that the arguments directed against the recognition of the principle of equality of the sexes have been thoroughly criticized also in the West. This led finally to the adoption of the view that the clause must intervene in all cases when the foreign family law fails to respect the principle of equality.⁴⁶

The Action of the Clause in Case of Reference

As known, the clause of public order can result in the exclusion of the competent law indicated by national provisions as well as of the law indicated by foreign provisions. The latter much less frequent case occurs in connection with the reference.⁴⁷

Polish law and Polish doctrine have not adopted the concept of total reference. Polish legislation preserves always the control over the law indicated by foreign conflict norms which act on the basis of the concept of further and reverse reference adopted in Article 4 of the Polish Law of 1965 on international private law.

Such a control can be exercised in the sphere under review as regards further reference:

1) By the refusal, in principle, to accept a reference in which a foreign conflict norm which refers to a further law makes use of a law designated in defiance of the principle of equality (for example, makes use of the law of the husband).

2) By the refusal to accept the consequences of further reference, if the substantive law of a third state which is deemed as competent involves the discrimination of the woman in whatever form. In the latter case the judge must examine what are the substantive results which may arise from the application of further reference.

Some doubts may however, arise in connection with reverse reference. It is obvious that the clause can never be directed against the competence of the national law. On the other hand, as far as the problem

⁴⁵ For example, the verdict of the BGH of April 29, 1964 Rejecting the application of the clause when judging the relations between the spouses (thus, in a different field than that dealt with in this paper).

⁴⁶ Comp. for example, F. STURM, op. cit., pp. 176 and 177.

⁴⁷ For a discussion of the problem in connection with that principle see, among ether, F. STURM, op. cit., p. 173 ff,

under consideration is concerned, a situation may occur whereby an indicated foreign law refers the case back to our national law, but on the ground that it recognizes the superiority of the law of the husband, who is of Polish nationality, this link designates in this case the competence of the law. By excluding in such a case the action of the conflict norm which discriminates against the woman the clause would be opposing the application of our own substantive norms based on the full equality of the spouses. This, in turn, could lead to a situation in which the law of the referring state (whose reference we do not respect) and which as far as substance and conflict are concerned is discriminating against the woman would become competent.

The problem must be solved by examining from the outset the foreign substantive law which is designated by our choice of law provisions as competent. If it respects the principle of equality of the spouses, we will refuse to admit reverse reference to our law, reference based on a conflict norm not respecting equality. It may be added that such cases when in the legislation of the same state the substantive norms concerning family law are based on the principle of equality while from the point of view of choice of law they favour the husband are very rare indeed. On the other hand, if the foreign substantive law designated by our conflict norms as competent admits discrimination, and in particular if the foreign law itself, concedes its own incompetence and refers to our law, there is nothing to prevent us from accepting that reference and to apply our own law on this basis and without making use of the clause.

The Incompatibility of Foreign Substantive Norms with the Principle of Equivalence

The above considerations lead us to establish the relationship between the clause of public order and the effects of the application of foreign substantive provisions in cases when these effects are in conflict with the principle of equivalence. Pursuant to the opinions of some West-German scholars, the intervention of the clause is based in such cases on the so-called *grosse Banachteiligung der Frau* by foreign provisions and by *eine intensive Inlandsbeziehung*.⁴⁸

The question arises as to whether any departure from the principle of equivalence discovered in the effects of the application in our country of a foreign legal provision would justify the use of the clause, or as to whether the problem arises only in the case of a flagrant violation of that principle. There is no unequivocal answer, the more so that in

⁴⁸ Several German authors referred to by F. STURM, *op. cit.*, p. 175.

this paper we are dealing only with the problem of contraction and dissolution of marriage. In other fields of family law it could have more differentiated aspects. It seems, however, that even with regard to the specific problems under review the imposition of a special requirement in the form of a "flagrant," "acute," "glaring" violation of the principle of equivalence as a result of the application of a foreign legal provision would be justified.

Another problem arising from the application of the clause is the already mentioned problem of *Inlandsbeziehung*, i.e. the examination of the link between the given relation and the area of application of the clause. The link can be modulated in various ways. We shall limit ourselves (*exempli gratia*) to four situations: first, the problem may arise in connection with a marriage contracted in our country by two foreign nationals or by a person of Polish nationality and a person of foreign nationality; second, the problem may arise in connection with a marriage contracted abroad by two persons of Polish nationality or by a person of Polish nationality and a person of foreign nationality; third, the problem may arise in connection with a marriage contracted abroad by two persons of foreign nationality living in Poland; fourth, the problem may arise in connection with a marriage contracted abroad by two persons of foreign nationality living abroad.

As can be seen, even in the above mentioned four situations (and there are many more) the strength of the link may depend both on the connection arising from the nationality of the spouses and on the connection resulting from their place of residence. It goes without saying that in our system the former is of fundamental importance. That is why in the first two situations the application of the clause seems beyond any doubt, while in the third situation it is justified and in the fourth (if the case comes before a Polish court) it is justified on general grounds.

The effects of the application of the clause with respect to the problem under review can be seen, mainly, in the form of a simple withdrawal of the limitations envisaged by the foreign law and, if needed, by the substitution of one's own norms *in lieu* of the excluded provision.⁴⁰ These effects will, of course, be limited territorially.

⁴⁰ Though in the literature of the socialist countries it is stated beyond any doubt that the exclusion of a foreign provision does not lead, as a rule, to the substitution of the national law. It is being recommended to look, as far as possible, in the foreign system for provisions which are close in their contents to the excluded ones but are not in conflict with our public order. In Polish literature see: M. SOSNIAK, *Skutki zastosowania klauzuli porządku publicznego w prawie prywatnym międzynarodowym* [The Consequences of the Application

In accordance with the opinion represented generally at present (also in Polish literature) the clause acts also under treaty relations, regardless of the fact as to whether a reservation was introduced in the international treaty about the exceptions foreseen in favour of the action of public order in the states parties to the treaty.⁵⁰

of the Clause of Public Order in International Private Law], "Studia Cywilistyczne," vol. 1, 1961 p. 194 ff. In the USSR the problem has been discussed by (among others) A. LEWITIN, *Voprosy publichnogo porjadka w mezdunarodnom častnom prave*, in: *Problemy mezdunarodnogo častnogo prava*, Moskva 1960, p. 228; L. A. LUNC, *Meždunarodnoe častnoe pravo*, Moskva 1970, p. 300. The rule of Article 6 of our law on international private law does not prejudge the issue of the consequences of the application of the clause. It leaves the question open, unlike other legal systems, for example, para 4 of *Rechtsanwendungsgesetz* of 1975 (GDR) which is in favour of the exclusive application of the *lex fori*.

⁵⁰ Cf. among others, M. SOSNIAK, *Klauzula porządku publicznego to międzynarodowym prawie prywatnym* [The Clause of Public Order in International Private Law], Warszawa 1961, p. 149 ff. *Międzynarodowe prawo rodzinne* [International Law of Marriage], p. 39 ff.; J. JODŁOWSKI, *Konwencja polsko-francuska o prawie właściwym, jurysdykcji i wykonywaniu orzeczeń w zakresie prawa osobowego i rodzinnego* [The Convention between France and Poland on Legal Competence, Jurisdiction and Execution of Verdicts in the Field of Personal and Family Law], "Państwo i Prawo," 1970, No. 12, p. 885.

**The Principle of Equality of Sexes with Respect
to Relations Between Parents and Children (Including
Adoption) in the Socialist Systems of International
Private Law with Particular Regard to Polish Law**

by JÖZEF SKĄPSKI

1. The problem of equality of the sexes arose in Poland with particular acuteness after World War II with regard to international family law, among other fields, with regard to relations between parents and children. This resulted from the fact that the unified family law for the entire territory of Poland provided for the equality of the sexes, whereas the solutions contained in the Law of August 2, 1926 on the competence of the law in the field of international private relations admitted under certain circumstances a different treatment of the man and the woman which found its expression in connecting factors which were applied in the conflict rules dealing with the relations between parents and children. In particular, in Article 18 dealing with children born in wedlock and in Article 22 dealing with the rights of children born out of wedlock the competence of the national law of the husband of the mother or of the father of the child whose situation has to be legalized has been accepted. These conflict rules clearly favoured the man whose national law was being taken into consideration while disregarding the position of the mother. Polish scholars discussing Article 18 often expressed the view that such an approach leads to the discrimination of the mother of the child if she is on different nationality than her husband and if the provisions of the national law of the husband are less favourable to her and to the child. Now, let's see what was the *ratio legis* of that provision when it was drafted. It was considered at that time that the personal law of the child must determine whether it is born in wedlock. If it was born by a married woman, then the personal law of the child must be the personal law of her husband, since the child born by the wife is, as a rule, of the same nationality as the mother's husband and also shares his place of residence. It must also be remembered that at that

time the majority of the laws on nationality provided that a woman acquired automatically the nationality of her husband. After World War II the situation in this respect changed fundamentally and at present the contraction of a marriage does not, in principle, result in a change of nationality by the wife. This explains why the solutions adopted in the Law of 1926 became increasingly obsolete as contrary to the principle of equality of the sexes. This has no bearing on the fact that the application of one or another connecting factor in the provision on the choice of law may be in a concrete situation without major importance from the point of view of the interests of the child. It may even so happen that a solution based on the national law of the man serves better the interests of the child than its own national law.

2. The problem was additionally complicated by the fact that when the Law of 1926 was enacted children born in wedlock and out of wedlock were treated in a different way. This found its reflection also in the rules of international private law. The discrimination of children born out of wedlock was finally eliminated from the Polish family law on October 1, 1950 when the family code entered into force.¹

3. This led to substantial difficulties in the application of the norms of international private law of 1926 as regards relations between parents and children. It could not be otherwise, since these norms were in conflict with the social conditions prevailing in Poland after World War II.

II

1. In order to remedy the existing situation work started in Poland on a new law on international private law. As one of the main reasons of the need to introduce new legislation these in favour of a new code stressed the privileged status of the national law of the husband and father² in the law of 1926. The solutions regarding the choice of law based on the competence of the national law of the man were considered incompatible with the prevailing social relations in Poland and

¹ Articles II and VII of the provisions introducing the family code of June 27, 1950 ("Dziennik Ustaw"—"Journal of Laws," further as Dz.U., No. 34, item 309) which entered into force on October 1, 1950. It was at that time that the provisions concerning the unifies family law introduced in 1945—1946 were abrogated. The family code was later replaced by the family code of 1964 which entered into force January 1, 1965 (Dz.U., 1964, No. 9, item 59 and 1965 No. 45, item 234).

² K. PRZYBYŁOWSKI, *Kodyfikacyjne zagadnienia prawa prywatnego międzynarodowego* [Problems of Codification of International Private Law], "Studia Cywilistyczne," vol. 5, Kraków 1964, p. 3.

other countries. It goes without saying that in close connection with the principle of equal treatment of both sexes was another problem, namely that of the equalization of the legal situation of children, irrespective as to whether they were born in wedlock or out of wedlock. What was at stake was the adoption of a system whereby the choice of law rules would not be in contradiction with the principles accepted in the substantive provisions of the family laws of the socialist countries, which were all respecting the principle of the legal equality of the sexes. This, of course, does not mean that the conflict rules must always depend on the norm of substantive law. It goes without saying that the aim of the internal norms of substantive law differs from the aim of conflict rules. Polish scholars drew on several occasions attention to that fact when interpreting the conflict rules contained in the law of 1926. It was pointed out that conflict rules must indicate the competent law irrespective of the law which has to be applied in each specific case. The correction (if needed) of the effects resulting from the application of a foreign law could always take place thanks to the use of the public order clause. That is why, with a few exceptions, nobody shared the view that a conflict rule can lose its legal force because of changed social conditions.⁸ On the other hand, this does not mean that there were no voices raised in favour of modifying the existing legal order.

2. From the very beginning those engaged in the codification work shared the view that as regards relations between parents and children the modifications of the laws in force must be far-reaching. In particular one was looking for a simplified conflict solution and for such a connecting factor which would be most adequate for this kind of relations. The possible preservation in whatever form or extent of a different treatment of the father and mother was rejected out of hand as an obvious anachronism. In principle there was no doubt that the competence of the national law of the child must be accepted as a general principle. And although at a certain stage of the codification work a proposal was discussed to subject the affiliation of a child to a putative father or mother to the national law of the mother, it never gained the necessary acceptance⁴ of the Committee of International Private Law of the Codification Commission set up in 1956. It was

⁸ B. WALASZEK, *Uznanie dziecka w polskim prawie międzynarodowym prywatnym* [The Recognition of a Child in Polish International Private Law], Kraków 1959, p. 18 and 19; *Sądowe ustalenie nieślubnego ojcostwa w polskim prawie międzynarodowym prywatnym* [The Ascertainment by Courts of the Fatherhood of a Child Born of an Extramarital Relation in Polish International Private Law], Kraków 1958, p. 155. See also the bibliography listed there.

⁴ K. PRZYBYŁOWSKI, *op. cit.*, p. 48.

considered that such a solution would lead to an unjustified preponderance of the national law of the mother and also result in many cases in the necessity to apply two laws if the mother and the child had different nationalities, with all matters relating to relations between parents and children (with the exception of the affiliation of a child to a putative father or mother) being subject to national law of the child.

The authors of the new draft rejected also the concept of the "more favourable law" which was embodied in Article 21 of the Law of 1926 and which can also be found in some international treaties in connection with the place of residence.⁵ The Committee on International Private Law of the Codification Commission concluded that subjecting the competence of the law to the evaluation of the benefit would be tantamount to relying on a *critérium* which is unclear unstable, unreliable and undermining the stability of legal relationships. It has been recognized that in order to protect the interests of the child it suffices when necessary to make use of the general clause of public order. It was also decided to renounce the separate regulation of the competence of the law in matters pertaining to the child's property.⁶

3. In the course of the codification work several solutions as to the choice of law have been considered as far as adoption is concerned. In any case there was general agreement that to some extent it is necessary to require that the personal law of the adopted be taken into consideration. It was pointed out that such a need resulted even from the law of 1926 in which the competence of the national law of the adopted person was based on the conflict rules concerning capacity. It was however, proposed in principle to rely on the national law of the adopting person as was the case in the Law of 1926. During the discussion on the draft proposal it was suggested, among other things, that a provision be introduced according to which adoption would be admitted only if it remained in conformity with the national law of the adopted.⁷ Another proposal was aiming at subjecting the premisses of adoption and its annulment to the national law of the child and the consequences of adoption to the national law of the adopting person.⁹

⁵ Cf. for example, Article 34 of the Polish-Hungarian Convention of 1959 and Articles 26 and 27 of the Polish-Romanian Convention of 1962.

⁶ K. PRZYBYŁOWSKI, *op. cit.*, pp. 49 and 50.

⁷ J. RAJSKI, *O projektowanych przepisach nowego prawa rodzinnego międzynarodowego* [On the Proposed Provisions of the New International Family Law], "Nowe Prawo," 1962, No. 6, p. 831.

⁸ B. WALASZEK, *W sprawie niektórych postanowień polskiego prawa pry-*

However, in the final draft proposal the Codification Commission adopted the principle of the competence of the national law of the adopting person, while requesting at the same time that the law of the adopted be taken into consideration when necessary.

III

1. The new Polish international private law in force since July 1, 1966 (Ad of November 12, 1965) does not provide, in principle, for the different treatment of the sexes when indicating the law which is competent to settle matters concerning relations between parents and children. Generally, one connecting factor was used, namely the nationality of the child. Thus, in accordance with the general rule contained in Article 19, paragraph 1, legal relations between parents and children are subject to the national law of the child. Such a solution excludes the privileged treatment of the law of the father. The scope of this rule, regardless of the fact whether it applies to children born in wedlock or out of wedlock, covers the entire sphere of mutual rights and obligations, personal and property, between parents and children. It concerns such questions as parental authority, the legal definition of the place of residence of the child, the family name of the child, the assistance of the child in a common household if the child lives with its parents and is maintained by them, the obligation of the parents to maintain their child, the obligation which rests on the child to maintain its parents etc.⁰

Article 19, paragraph 1 does not fix the moment which is determinant of the definition of the national law of the child. That is why the change of nationality implies, as a rule, a change in the competent

watnego międzynarodowego [On some Provisions of Polish International Private Law], "Nowe Prawo" 1962, No. 9, p. 1186 ff.

⁰ Pursuant to the Law of 1965 it is agreed that Article 20 which states: "alimony claims between relatives and kinsmen are subject to the national law of the person entitled to receive alimony" does not apply to alimony claims of parents with respect to children. It is considered that Article 19, paragraph 1 covers the entire sphere of relations between parents and children and hence also the alimony claims of parents against grown up children. Cf. for example, M. SOSNIAK, *Précis de droit international privé polonais*, Warszawa 1976, p. 195. Also B. WALASZEK in: M. SOSNIAK, B. WALASZEK, E. WIERZBOWSKI, *Międzynarodowe prawo rodzinne* [International Family Law], Wrocław 1969, p. 281. Different views are expressed by M. TOMASZEWSKI, in: *La filiation*, Wrocław 1977, p. 239 ff.

law. However, the science of law emphasizes that this must not always be the actual national law of the child. For, nothing prevents the court from taking into account in a specific case the law which presided over the establishment of a specific legal relationship, even though at present this law is not the national law of the child. It is argued that when solving this kind of problems the overriding consideration must be the interest of the child.¹⁰

2. The rule embodied in Article 19, paragraph 1 of the Law of 1965 does not cover the entire field of the relations between parents and children. Some modification have been introduced as regards the affiliation of a child to a putative father or mother, the contestation of fatherhood or motherhood and the recognition of a child (Art. 19, para. 2). Thus, affiliation or contestation is subject to the law of the child at the moment of its birth. In this case the moment determining the national law of the child has been clearly defined. Such a solution rules out the possibility of a change of status and this, in turn, enhances the certainty as to the legal status and prevents interpretation difficulties which arose, for example, in connection with some conventional solutions which do not foresee the fixing of the moment determining the competent national law of the child.¹¹ The scope of this rule covers all premisses of affiliation or contestation of fatherhood or motherhood, irrespective of the fact as to whether the child was born in wedlock or out of wedlock, in conformity with the principle of equal treatment also under international private law of children born in wedlock and out of wedlock. However, if the determination of the origin of the child is based on a presumption of it being born in wedlock, the problem of the existence and validity of the marriage is of a preliminary nature and, in accordance with the principle accepted in Polish legal science, must be considered by the law indicated by the Polish conflict norms which deal with the contraction, annulment and dissolution of a marriage (Articles 14—16 and Article 18 of the law of 1965).

3. The recognition of a child is subject to the law of the state of the nationality of the child at the moment of recognition. The difference in the way of settling the problem of the moment which determines the national law of the child has been dictated by the specific character of the act of recognition as a voluntary method of affiliation by a father

¹⁰ B. WALASZEK, *op. cit.*, p. 216; M. SOSNIAK, *op. cit.*, p. 194.

¹¹ Cf. for example, Article 32 in connection with Article 52 alinea a of the Polish—USSR Convention of 1957. On this matter see the Judgement of the Supreme Court of February 3, 1962 “Orzecznictwo Sądu Najwyższego, Izba Cywilna” (Jurisprudence of the Supreme Court, Civil Chamber), 1963, item 220.

or even by a mother. It has been recognized that this must be done in accordance with the actual national law of the child. However, the law fails to explain what has to be understood by "the moment of recognition." It may be surmised that this will be the moment when the declaration of intent is made in the manner foreseen by the competent law. Pursuant to the opinion expressed in Polish legal science the rule provided for in the procedure of recognition must be applied in a similar way as in other similar events influencing the relation of the child towards its parents.¹² (for example, in the legitimization of a child as a result of the act of marriage taking place after its birth, provided that the substantive law foresees such a way of legitimization). On the other hand, the legitimization of a yet unborn child is subject to the national law of the mother (Art. 19, para. 2, sentence 3). However, this provision does not imply a privileged legal situation of the woman. The solution adopted by the Polish law results simply from the fact that with regard to an unborn child it is, naturally, impossible to apply the connecting factor of nationality. The competence of the national law of the mother replaces, in a way, the competence of national law of the child, who will no doubt acquire after birth the same nationality as the mother's.

4. The Law of 1965 has introduced a specific provision (Art. 21) which deals with the competence of the law in matters pertaining to the claims raised by the mother against the father of a child born out of wedlock and connected with the conception and birth of the child. The evaluation of this question is subject to the national law of the mother. This provision however, only seemingly implies a privileged treatment of the legal situation of the woman. In fact we are facing here a kind of alimony claim, and in accordance with the Law of 1965 alimony claims are subject to the national law of the person entitled to be granted alimony. However, the application to the claims of a mother of a child born in wedlock of the law indicated in Article 20 would rise difficulties and could be done only by way of analogy. For, on the one hand, the provision of Article 20 concerns only alimony obligations between kinsfolk, whereas between the parents of a child born out of wedlock there is generally no kinship which would imply such obligation; furthermore, the claims of a mother of a child born out of wedlock arising from her pregnancy and delivery are not of the nature of alimony claims in the generally accepted meaning of the term. Difficulties could therefore arise in connection with the qualification of such claims as alimony claims. The introduction of a specific

¹² K. PRZYBYŁOWSKI, *op. cit.*, p. 49, note 114.

conflict rule for claims of such nature can be explained by the desire to eliminate these doubts.

5. Whereas the Polish international private law makes use, in principle, of the national law when dealing with the relations between parents and children, this does not imply that the national law will always be competent. It will be remembered that in certain cases the law (Art. 3) provides for the accessory application, instead of the national law, of the law of the domicile. This is so when the nationality of a given person cannot be ascertained or when the person involved is stateless. This however, does not change the fact that the solution as to the choice of law is based on the connecting factor connected with the child, which excludes in Polish conflict law any inequality in the treatment of the sexes.

6. Important problems affecting also the principle of equal treatment of the sexes may arise under Polish international private law in connection with the institution of reference (*renvoi*). Article 4 of the Law of 1965 provides for the two kinds of reference: for reference back (remission) and reference to a third law (transmission). Reference back is not subject to any limitations. Thus, if the foreign law indicated by the Polish conflict rule asks for the application with regard to a specific legal relationship of the Polish law (for example, as the law of the place of domicile, then the Polish law is being applied (Art. 4, para. 1). In the case of remission there is therefore no danger of violation of the principle of equality of the sexes, for the substantive Polish family law is based on the legal equality of men and women. Complications may arise in the case of transmission. In accordance with Article 4, paragraph 2, of the Law of 1965, if the national law indicated by our conflict rule calls for the application to a given legal relationship of another foreign law, then this law must be applied. Thus, the use by the conflict rule of the national law, which is normal when dealing with relations between parents and children, is a necessary premise for transmission. What is however, to be done if the conflict rule of the national law of the child when dealing a problem falling within the realm of relations between parents and children does not recognize the equality of the sexes in the field of international family law and indicates the substantive law resulting from the personal connecting factor of the man (the husband of the mother or the presumed father? Can such a transmission be recognized? The answer will be yes pursuant to the Polish international private law. Even under such circumstances will transmission be accepted as valid, since it results from the application of a rule of the Polish international private law. We shall apply a foreign conflict rule only because our

national law so decides. There is no rational justification for a correction, at this stage, of the Polish conflict rule which admits transmission. The fact that the conflict rule of the national law when indicating the competent law grants preferential treatment to the man is, in itself, of no consequence. For, it may so happen that the substantive law indicated in the process of transmission, even though the referring conflict rule subjects the competence of the law to the sex of one of the parents, is more favourable to the child than its own substantive national law. Hence, under Polish law we always allow transmission within the limits set by Article 4, paragraph 2. It is therefore of no importance whether the conflict rule of the indicated law makes use of a connecting factor connected with the man or bases its solution on a connecting factor which respects the equal treatment of men and women.

7. In order to arrive at a proper solution of the problem it is essential to examine the effects of the application of the foreign competent substantive law, irrespective of the fact as to whether the law in question is directly indicated in the Polish conflict rule (which is, as a rule, the national law of the child) or is indicated under consideration of transmission. At this point we enter into the very complex problem of the clause of public order. The detailed discussion of this question would of course exceed the framework of this paper in view of its very general nature. It must however, be borne in mind that as far as relations between parents and children are concerned the clause of public order may interfere quite often. That is why it is necessary to draw the attention to certain related problems. Under Polish law and pursuant to Article 6 of the Law of 1965 it is admitted that the clause of public order never excludes beforehand the possibility of applying the competent foreign law. Its application will be ruled out only if this would result in effects contrary to the fundamental principles of the legal order of the Polish People's Republic.¹⁸ And this explains why we cannot automatically rule out transmission even though the conflict rule of the referring national law violates the principle of equality of the sexes. For, in each concrete case we must examine the effects of the application of the foreign substantive law and determine whether they are not in conflict with the fundamental principles of the Polish legal order.

Polish literature represents generally the view that the clause of

¹⁸ M. SOŚNIAK, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym* [The Clause of Public Order in International Private Law], Warszawa 1961, p. 105 ff. *Précis...*, p. 79 ff.; B. WALASZEK, *Międzynarodowe prawo rodzinne* [International Family Law], p. 228.

public order must be applied with great care and only in exceptional situations. In no case can it rule out the function of international private law which reflects, among other things, the idea of coexistence of states with differing social systems.¹⁴ In the sphere of relations between parents and children one admits, for example, the possibility of interference of the clause of public order in situations when the foreign law forbids the ascertainment of fatherhood by courts of law, rules out the admissibility of recognition of a child born as a result of an adulterous relations, limits or excludes the alimony obligation of one of the parents. However, it is doubtful whether the clause of public order could be applied if the law which is competent with regard to unmarried parents failed to respect the principle of the equality of rights of the parents in the sphere of parental authority, although such equality of rights is to some extent known in Polish family law.

8. The law competent in the case of adoption is under the new law the same as under the Law of 1926, namely the national law of the adopting person. However, it was stated unequivocally and in conformity with the views expressed on the basis of the old law, that the adoption cannot be carried out without simultaneously respecting the provisions of the national law of the adopted person if these provisions concern the consent of the adopted person, the consent of its legal representative and the permission of the competent state organ (Article 22).¹⁵ The problem of the equality of the sexes may arise in the case of adoption only under conditions of transmission. Doubts, if any, must be settled in the same way as when dealing with relations between parents and children.

IV

1. The problem of choice of law in the sphere of relations between parents and children is also settled in the conventions concluded by the socialist states.¹⁶ As regards Poland, many conventions and, in particular those with other socialist states, have been concluded prior to the entry into force of the Law of 1965. They are all based on the principle of equality of the sexes. However, the mode of settlement of conflict problems differs. The majority of convention rules accept as competent

¹⁴ B. WALASZEK, *ibid.*

¹⁵ K. PRZYBYŁOWSKI, *op. cit.*, p. 50 ff.

¹⁶ On the question of convention rules see, in particular, M. SOSNIAK, *Les conventions conclues entre les pays socialistes sur le droit civil international et le droit international de la famille*, "Recueil des Cours," vol. 1, 1975, p. 45 ff.

the national law of the child. There are none the less exceptions. Thus, for example, the treaty of 1957 signed by Poland with the USSR provides in the first place for the competence of the law of the state in which parents and child reside. Only in case of the lack of a common domicile the competent law is that of the child (Art. 31). The same system applies in the Polish-French Convention of 1967, with the difference that in the sphere of legal relations between a child born out of wedlock and its mother and father it is always the national law of the child which is competent (Art. 10). The Convention of 1958 signed by Poland with the German Democratic Republic provides above all for the competence of the law of the state of common nationality of both parents and children. Only when such a common national law is lacking the national law of the child applies. In the Convention of 1959 concluded by Poland with Hungary and in the Convention of 1962 concluded by Poland with Romania one provides for the competence of the law of the state where the child resides if such law is more favourable to the child than its national law. A very elaborate system in the sphere of relations between parents and child is contained in the Polish-Austrian Convention of 1963 (Art. 10). The origin of a child born in wedlock is determined in accordance with the common national law of the parents at the moment of birth of the child. Eventually, one may apply their latest common national law. In principle, also the legal relations between parents and child born in wedlock are subject to the common national law of the parents. As a characteristic feature one may mention the fact that for the ascertainment of the origin of a child born out of wedlock one applies the law of the state of nationality of the mother at the moment of the child's birth. This solution based on the preferential Treatment of the national law of the mother differs fundamentally from the provisions of all other conventions.

2. In almost all conventions the adoption is subject to the law of the state of the adopting person. The convention concluded by Poland with Yugoslavia in 1960 provides for a conjoint competence of the national laws of the parties, i.e. of the adopting and adopted person (Art. 30). Only the Polish-French convention is based on the competence of the law of the state on whose territory the adopting and adopted person have their common domicile. In the absence of such a common domicile the convention provides for the competence of the national law of the adopted person (Art. 12).

V

1. Just as in Poland, also in all other socialist states the law provides for the equality of the sexes. This is reflected also in the conflict rules concerning relations between parents and children. As a rule, these relations are subject to the national law of the child. In Czechoslovakia the Law of 1963 on international private law and on procedure accords decisive importance to the national law of the child. However, if the child resides in Czechoslovakia, the ascertainment or denial of fatherhood can be accomplished in accordance with Czechoslovak law, provided that this is in the interest of the child (Art. 23). The same goes for all legal relations between parents and children, if the child resides in Czechoslovakia and if the application of Czechoslovak law is in its interest (Art. 24). Just as under Polish law, the claims of a mother of a child born out of wedlock against its father are subject to the national law of the mother at the moment of the child's birth. However, if the mother who is a foreign national lives in Czechoslovakia and the child's father and the child itself are of Czechoslovak nationality it is the law of Czechoslovakia which is competent (Art. 25).¹⁷ The GDR Law of 1975 (*Gesetz über die Anwendung des Rechts auf internationale zivil-familien- und arbeitsrechtliche Beziehungen sowie auf internationale Wirtschaftsverträge — Rechtsanwendungsgesetz*) provides for all legal relations between parents and children for the competence of the national law of the state whose nationality the child had acquired at the moment of its birth. The same solution has been adopted under Bulgarian law.¹⁸ On the other hand, under Hungarian law the legal situation is different, since it reflects the preponderance of the national law of the father. The ascertainment of the origin of a child born in wedlock is subject to the national law of the father, if the father is a foreign national. However, if the child resides in Hungary and the Hungarian law is more favourable to the child, the ascertainment of fatherhood is subject to Hungarian law. Also for the evaluation of the origin it is the Hungarian law which is competent, if the child has Hungarian nationality, even

¹⁷ R. BISTRYCKY, *La nouvelle loi tchécoslovaque sur le droit international privé* "Bulletin de Droit Tchécoslovaque," 1963, No. 4, p. 248; Z., KUCERA, *Mezinárodní právo soukromé*, Praha 1975, p. 210 ff. The Czechoslovak law on international private law of 1948 contained, as far as relations between parents and children, are concerned, similar solutions to the Polish international private law of 1926. This was, in part, due to the fact that the two laws were, to some extent, patterned on the Austrian draft of international private law of 1913.

¹⁸ V. KUTIKOV, *Meždunarodno častno pravo na NR B'ulgaria*, Sofia 1976, p. 488 ff.

though its father may be a foreign national. The ascertainment of the fatherhood of a child born of an extramarital relation is subject to the national law of the presumed father at the moment of the child's birth. The relations between parents and children are, in principle, subject to the evaluation by each national law of the child. However, if the child resides in Hungary and if the Hungarian law is more advantageous to it, then it is subject to Hungarian law.¹⁹ Also in Romania the law applies a differentiated solution subject to the sex of the parents. As a rule, it is the national law of the father which is competent. However, when the motherhood of a child is to be ascertained, then the national law of the mother prevails.²⁰

It must be stated that in spite of certain differences in the settlement of legal relations between parents and children in the conflict rules of some socialist states, as reflected in the preferential treatment of the man, whose national law is considered as competent, the evolution of the conflict rules in this field goes in the direction of recognition of the competence of the national law of the child. This can be seen, among other things, in the provisions included in the conventions signed by these states.

In the USSR the relations between parents and children are, in principle, subject to USSR law irrespective of the nationality of both parents and children. The same applies to alimony claims, even though the two parties are of foreign nationality. The relations between parents and children of USSR nationals living abroad are also subject to the law of the USSR.²¹

2. As far as adoption is concerned, we are not confronted in the socialist states with conflict rules which would indicate a lack of equality of the sexes in matters pertaining to the ascertainment of the competence of the law. There are various methods of linkage on the basis of the national law of the adopting and adopted person. Moreover, some legal systems provide for the unconditional application of rules of a territorial nature (for example, in the form of a permit issued by the appropriate authority to proceed with the adoption on the territory of that state or with respect to a national of the state).

¹⁹ I. SZASZY, *Private International Law in the European People's Democracies*, Budapest 1964, p. 359.

²⁰ I. SZASZY, *ibid.*, p. 360.

²¹ L. A. LUNC, *Meždunarodnoe častnoe pravo, osobennaja čast'*, Moskva 1975, p. 463 ff.

Observers of States in International Organizations of a Universal Character

by GENOWEFA GRABOWSKA

International organizations are a prevalent form of cooperation of sovereign states. The fundamental link of the state with an organization is, of course, that of membership. However, as the activities of the organizations developed, the traditional concept of membership understood as regular membership ceased to satisfy the requirements of both the states and the organizations. Some organizations¹ introduced also another kind of membership designed, above all, to cover those states which failed to meet the statutory conditions. The traditional scope of the concept of "membership" was therefore considerably broadened.

International organizations did not restrict their cooperation to states enjoying full membership status. Some organizations invited also non-members states, even non-governmental institutions² and other international organizations, to participate in their activities. The achievement of that goal was up till now best served by a less formalized relationship than membership, i.e. by the institution of so-called observers. The observer being defined, generally as a "plenipotentiary of a state delegated to participate in the proceedings with the reservation that he cannot use his plenipotentiary powers in an active manner."³ This paper deals with the legal situation of observers, and with their importance for

¹ For example, the General Agreement on Tariffs and Trade provides for as much as four kinds of membership: regular, temporary, *de facto* and associated. For a broader discussion of the subject see W. MORAWIECKI, *Narody Zjednoczone, Zamierzenia i rzeczywistość* [The United Nations, Intentions and Reality], Warszawa 1970, pp. 330—332.

² See for example United Nations General Assembly Resolution 3210 of October 14, 1974, which invited the Palestine Liberation Organization to take part in the debate on the Palestinian question and also Resolution 3237/XXIX which granted the PLO observer status in the UN and in the conferences held under their auspices.

³ See *Dictionnaire Encyclopédique*, Petit Larousse, Paris 1959, p. 713.

the sending states and for the international organizations of a universal character.

I. Origins

It is not easy to pinpoint the moment in history when observers were first nominated. It is, however, certain that they took part already in some international conferences held in the 19th century.⁴ As far as some earlier international organizations are concerned, observers of non-member states had been well known in the League of Nations.⁵ However, neither the League of Nations Covenant nor the Rules of Procedure of its organs contained legal provisions for the establishment of observers. These problems had been settled by the practice of states and of the organization itself. Following that practice it is possible to determine the procedure applied in connection with the establishment of observer missions of states non-members of the League of Nations.⁶

The decision on the establishment and dispatching to Geneva of an observer mission belonged exclusively to the interested state. On the other hand, the establishment of the mission itself followed a pattern set somewhat earlier in connection with the establishment of permanent mission of member-states. The basic functions of the observers included the tasks of following closely the activities of the organization and of maintaining informal contacts on behalf of the sending state with the organization. The growing importance of observers was reflected in the fact that in 1935 the Swiss Federal Council decided to grant them certain quasi-diplomatic privileges.⁷

⁴ For example the representatives of Holland and of the interim government of Belgium were admitted without full rights to participate in the London Conference of 1830—1832; see TC. WOLFKE, *Great and Small Power in International Law from 1814 to 1920*, Wrocław 1961, p. 24; or Montenegro, Greece, Persia and Rumania whose position was described in the records of the Berlin Congress of 1878 as "interested States having no part in the Congress," see G. F. MARTENS, *Nouveau recueil général de traités*, 2 série, vol. 3, p. 445; finally, the participation of Rumania and Serbia in the London Conference on the navigation on the Danube in 1883, see K. WOLFKE, *op. cit.*, pp. 71—73.

⁵ See G. GRABOWSKA, *Obserwatorzy państw w Lidze Narodów [The Observers of States in the League of Nations]*, "Przegląd Prawa i Administracji," vol. 6, 1975; P. B. POTTER, *Permanent Delegations to the League of Nations*, Geneva 1930, p. 7.

⁶ See V. Y. GHEBALI, *Les délégations permanentes auprès de la Société des Nations*, in: *Les missions permanentes sises à Genève, Paris, Strasbourg et Bruxelles*, Brussels 1971, pp. 62—84.

⁷ See G. PERRENOUD, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse*, Lausanne 1949, p. 82.

Missions of observers at the League of Nations served to maintain permanent contacts with the organization when a state was unwilling or unable to assume full membership. Thus, for example, The United States of America maintained unofficial contacts with the League of Nations through a special mission acting within the US Consulate in Geneva. Sometimes the establishment of an observer mission preceded only the accession of a state to the League of Nations as a regular member. Thus, the observer mission of Hungary and Mexico functioned one year and the mission of Ireland only a few months before these states became regular members of the organization.⁸ Sometimes states withdrawing from the organization were leaving behind, just to play safe, a permanent observer mission (for example Germany after 1933 and Japan after 1936).⁹ It may also be recalled that it was the League of Nations which introduced first the term of "observer" (in 1932) to designate representatives of non-member states. The form of participation of non-member states in the activities of international organizations did, however, develop on a large scale only after 1945, i.e. after the establishment of the United Nations and its Specialized Agencies.

II. The Legal Basis for the Establishment of Observers

Not so long ago there were no uniform legal provisions dealing with the problem of participation of non-member states in the activities of international organizations of a universal character. Organizations interested in developing cooperation with non-member states were adopting various solutions attaching greater importance to ensuring that the non-member states had actually the possibility to take part in the proceedings than to resolving formally the question of their legal status. It may also be noted that in their more than 30 years old practice the international organizations of a universal character did apply towards the observers two basic methods which can broadly be described as statutory and extra-statutory.

The first statutory method consisted in making sure that the observers of non-member states are allowed to take part in activities of the organization on the basis of a specific legal provision. The provisions defining the character and scope of that participation were incorporated in the Charters of the organizations or, more frequently,

⁸ Hungary (Feb. 1921—18 Sept. 1922); Mexico (I 1930—IX 1931); Ireland (June 1923—19 Sept. 1923) — see V. Y. GHEBALI, *op. cit.*, p. 43.

⁹ See Archives Société des Nations, 1933—1946, Dossier 50/155/120 quoted after V. Y. GHEBALI, *op. cit.*, p. 60.

in their rules of, procedure and sometimes even in the agreements concerning the headquarters of the organizations. The method of dealing with the problem of observers by specific legal provisions had been adopted by the majority of the UN Specialized Agencies.

The extra-statutory method, chronologically earlier, had the characteristic features of an institution based not on proclaimed law but on the adopted, often applied over a long period, practice of states and organizations. Such a way of linking organizations with non-member states had emerged, in the first place, in the United Nations.

The above situation had changed following the adoption on March 14, 1975 of the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,¹⁰ referred to later as the "1975 Convention."

The Vienna Convention of 1975 is the last of the series of treaties resulting from the work of the International Law Commission and concerning the codification and development of the principles governing diplomatic relations conceived in their broadest sense.¹¹ It regulates all known forms of representation of states in international organizations, the major part of the provisions of the Convention dealing with representatives of member-states. For the first time in international law the Convention sets out clearly also the legal basis for the institution of a link between the international organization of a universal character and the non-member states.¹²

¹⁰ For the original text see, Vienna Convention on the Representations, of States in their Relations with International Organizations of a Universal Character, Doc. A/CONF.67/16; Polish text see *Wybór dokumentów do nauki prawa międzynarodowego* [Selected Documents for the Study of International Law], edited by K. KOCOT, K. WOLFKE, Warszawa 1976, pp. 589—613. On the course and results of the Vienna Conference see, among others, M. PASZKOWSKI, *Dyplomacja wielostronna na forum organizacji międzynarodowych* [Multilateral Diplomacy in International Organizations] Warszawa 1976; J. G. FENNESSY, *The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, "American Journal of International Law," 1976, No. 1; K. KOCOT, *Konwencja w sprawie reprezentacji państw w stosunkach z powszechnymi organizacjami międzynarodowymi* [Convention on the Representation of States in their Relations with International Organizations of a Universal Character], "Sprawy Międzynarodowe," 1976, No. 9.

¹¹ Earlier Conventions included in the same group are: Convention of 1961 on Diplomatic Relations; Convention of 1963 on Consular Relations; Convention of 1969 on Special Missions. See *Wybór dokumentów...*, p. 177, 192, 554. Comp. also Chapter X "Reprezentacja państw w ich stosunkach z organizacjami międzynarodowymi" (Representation of States in their Relations with International Organizations) in the book by J. SUTOR, *Prawo dyplomatyczne i konsularne* [Diplomatic and Consular Law], Warszawa 1977, pp. 226—234.

¹² For a broader treatment of the subject see G. GRABOWSKA, *Obserwa-*

A non-member state of an organization can enter into a permanent relationship with such an organization or participate in its activities over a longer, but beforehand unspecified period. It is then entitled to maintain at the organization a mission of observers, composed of the chief of mission or permanent observer and the mission members or observers. The legal provisions dealing with the institution of permanent observer missions and their members are to be found, together with the provisions on permanent missions of member-states in Part II of the Convention entitled "Missions to International Organizations" (Arts. 5—41).

It may so happen that a non-member state is interested only in the activity of one selected organ of the organization or with a conference called by it. In that case such a state is entitled to send an observer to a meeting of such an organ or to such a conference. The legal provisions dealing with the institution of delegations of observers and their members are to be found in Part IV of the Convention entitled "Observer Delegations to Organs and to Conferences" (Arts 71—72), with references to the provisions of Part III of the Convention dealing with delegations to organs and conferences.

The decision of the sending state as regards the nature and duration of the observer function allows for the distinction of two groups of observers: a) of a group of permanent observers who form part of permanent observer missions and b) of *ad hoc* observers who perform their functions only during the period expressly specified in their delegation. These two different groups of observers functioning on the basis of different legal provisions will be dealt with separately in the subsequent parts of this paper. Thus, the permanent observers who are part of permanent missions will be discussed in part III of this paper using as an example the United Nations; the analysis of the *ad hoc* observers included in the delegations of observers will be carried out in part IV using as an example the UN Specialized Agencies.

III. Permanent Missions of Observers

"Non-member States may, if the rules of the Organization so permit, establish permanent observer missions..."

this is the language used in Article 5, point 2 of the Convention to define the general legal basis enabling non-member states to establish

torzy państw w powszechnych organizacjach międzynarodowych [Observers of States in International Organizations of a Universal Character], Warszawa 1978, pp. 58—65.

links with an international organization through the intermediary of a permanent observer mission.

Thus the establishment of a permanent mission of observers can take place "if the rules of the Organization so permit." It is obvious that under such circumstances our main interest must be focused on the term "rules of the Organization"; on their interpretation depends the actual possibility of making practical use of that provision. An attempt at defining the term "rules of the Organization" is made by the Convention itself in Article 1, point 1 (34). Thus, the "rules of the Organization" include not only the States and Rules of Procedure but also the relevant decisions and resolutions, and established practice of the organization. The establishment of observer missions can therefore be made dependent on various factors arising not only from rules of written law (Statutes) or adopted law (rules of procedure, decisions, resolutions) but also from the practice of particular organizations. It must also be born in mind that the admissibility of establishment of observer missions will be determined not only by legal factors but also by elements of a political nature.

In order to evaluate properly the problem of participation of non-member states in the activities of international organizations it is therefore necessary to proceed, in the light of Article 5, point 2 in connection with Article 1, point 1 (34) with the analysis of the following sources:

1. The Statutes of the organizations and the Rules of Procedure of their main organs,
2. The decisions of the organizations and their resolutions,
3. The practice of the organizations.

This list may be completed with the following two points (although they are not mentioned in the Convention):

4. The Headquarters Agreements concluded by states with organizations,
5. The internal regulations of particular states which deal with the legal situation of observers.

As mentioned above, the legal basis for the establishment of observer missions as formulated in Article 5, point 2 of the Convention is of a general nature and applies to all international organizations of a universal character. On the other hand, the sources listed above (p. 1—5) are of a particular and complementary nature; they differ in various international organizations, which may differ as regards their statutes, rules of procedure, resolutions and practice. They can therefore be referred to as provisions of a particular nature.

1. The Evolution of the Institution of Observers in the UN

The origin of the institution of observers in the UN can be traced back to 1945. As early as 1945 the governments of Finland and Italy requested to be allowed to send observers to the San Francisco Conference. The inviting powers refused to agree to this request.¹³

It has to be pointed out that neither the UN Charter nor the Rules of Procedure of its main organs contain provisions dealing with the establishment of permanent missions of non-member states. There are also no decisions or resolutions of the UN on the matter. In the final resort, it was the established practice of the UN which decided on the possibility to set up permanent observer mission at the UN.¹⁴ It seems that the practice of the UN in this field had been influenced by the following factors: a) the principle of universality of the UN embodied in the Charter, b) the Swiss precedent, c) the permanent missions of member states and, finally d) the deadlock in the admission of new members to the UN.

Ad a). The principle of universality imposes on the UN the duty to expand continuously its activities so as to embrace all states; on the other hand, it acknowledges the right of each state to join the UN, provided that it meets the requirements set forth in Article 4, point 1 of the UN Charter.¹⁵ Depending on the interpretation of these conditions it is possible to either open the UN to all states able and willing to respect the principles of the Charter or to close the door to the UN to some states for other, most frequently, political reasons. Food the time being outside the UN remain states unwilling to join (e.g. Switzerland), small states which, as sometimes qualified, are restricted in the exercise of their sovereign rights (e.g. Andorra, Monaco, San Marino), divided states (e.g. the Korean People's Democratic Republic and the Republic of Korea), the Holy See. Thus, since not all states are willing or able to become members of the UN, the UN as a universal organization must offer them the opportunity to participate in its activities through permanent observer missions. At present there are

¹³ See J. MACHOWSKI, *Aspekty polityczno-prawne statusu stałych obserwatorów przy ONZ [Political and Legal Aspects of the Status of Permanent Observers in the United Nations]*, "Sprawy Międzynarodowe," 1967, No. 1, p. 93; A. GLEEN MOVER, *Observer Countries: Quasi Members of the United Nations*, "International Organizations," 1966, No. 2, p. 271.

¹⁴ See *Yearbook of the International Law Commission* (further as YILC), 1967, vol. 2, pp. 190—191.

¹⁵ See R. BIERZANEK, *Zasada uniwersalności w ONZ [The Principle of Universality in the United Nations]*, "Sprawy Międzynarodowe," 1968, No. 10, pp. 41—59.

four permanent observer missions at the UN headquarters in New York representing the Republic of Korea, Monaco, the Holy See and Switzerland. The Republic of Korea, San Marino, the Holy See and Switzerland maintain also permanent observer mission at the United Nations Office in Geneva.¹⁰

Ad b) Switzerland was the first state to appoint a permanent observer at the UN. Its policy of neutrality pursued since the Congress of Vienna precluded Switzerland's full membership. However, as stated in 1946 by the Head of the Swiss Political Department Mr. Petitpierre, "Switzerland was ready to take part in every international activity initiated by the UN with the exception of activities in the political and military fields."¹⁷ The achievement of this objective was to be served by the Swiss observer mission sent already to the I Session of the UN General Assembly in London.

However, it became clear soon that sporadic contacts limited to the participation of Switzerland in the plenary session of the General Assembly did not satisfy either side. That is why in summer of 1946 the Federal Council set up at the Swiss General Consulate in New York a liaison office with the UN manned by two officers. November 5, 1948 the Federal Council decided to transform the liaison office into an autonomous mission headed by a permanent observer accredited to the UN Secretary General. The first permanent observer was M. Wagnière.¹⁸ The precedent set by the Swiss Government as regards the establishment of a permanent observer mission had been accepted without objections by other UN members and in the absence of any written rules repeated on many occasions by other states.¹⁹

Ad c). The practice by member states of appointing permanent representatives at the UN Headquarters in New York served as a pattern for the establishment of observer missions.²⁰ The principles dealing with the setting up of permanent mission of member states had been formulated in Resolution 257 adopted unanimously at the III session of the UN General Assembly, December 3, 1948.²¹ On the other hand, the right to send observers by states not belonging to the UN while not questioned in practice as a principle had never been explicitly stated.

¹⁰ See YILC, 1967, vol. 2, p. 190; also A. GLEEN MOVER, *op. cit.*, p. 276.

¹⁷ See Report of the Federal Council to the Federal Assembly concerning Switzerland's Relations with the United Nations, June 16, 1969, pp. 51—52.

¹⁸ *Ibid.*

¹⁹ For example, Austria, Finland, Japan, Italy before admission as full members in the UN — see YILC, vol. 2, p. 190.

²⁰ See V. ZORIN, *Osnovy diplomaticheskoy sluzby*, Moskva 1964, p. 291.

²¹ See YILC, 1967, vol. 2, p. 146.

That is why the established rules accepted by the UN General Assembly concerning the setting up of permanent missions by member states had been subsequently applied *per analogiam* by non-member states when setting up observer missions.

Ad d). The deadlock in the admission of new members to the UN lasted till 1959. Many applications for membership had been left pending, above all, for political reasons. Some states had only one way left, namely to establish a link with the UN through an observer mission. However, not all non-member states had been given an equal chance to be represented in New York although it would seem that such equality is but a mere consequence of the principle of universality. At that time the first attempts at formulating the legal principles of the appointment of observers within a firm legalistic framework had been made. In the course of the V Session of the General Assembly a draft resolution²² calling upon the Secretary General to invite state that had submitted membership applications²³ to send observers to the sessions of the General Assembly, was discussed but rejected, with all great powers voting against. Because of the absence of binding formal provisions the decision on the admission of permanent observers to the UN was taken by the Secretary General alone, although very often under pressure of the imperialist powers.

The policy pursued at that time by the Secretary General of the UN as regards the establishment of observers is reflected in the list of states which acquired observer status. Thus, in 1955 there were eight permanent observer missions in New York representing the following states: Austria, Finland, Spain, Japan, the Republic of Korea, the Federal Republic of Germany, Switzerland and Italy.²⁴ It may be noted that not a single socialist state whose membership application was pending had an observer. Even at a time when the need of genuine contacts with an organization aspiring to achieve universality was so great, only political reasons, hardly compatible with the interests of the organization as a whole, were affecting the decisions regarding the granting to a state the right to establish an observer mission.

In the light of the established practice of the UN the legal status

²² Draft resolution submitted by El Salvador, V Session of the General Assembly of the United Nations, Doc. A/1585, p 4; see also A. GLEEN MOVER, *op. cit.*, p. 272.

²³ These were the following states: Austria, Ceylon, Finland, Jordan, Ireland, South Korea, Portugal, Italy — see Official Records of the Security Council, Fourth Year, No 26.

²⁴ Permanent Mission to the United Nations, New York, August 1955, Doc. St/SG/ Ser A/64, pp. 134—136.

of observers can be defined as follows: non-member states send requests to be granted the right to establish permanent observer mission to the Secretary General. When deciding on the matter the Secretary General must take into consideration the following two criteria set forth in the memorandum dated August 22, 1962, sent by the Legal Counsel to the then Acting Secretary General:²⁵

1) Does the state applying for member status belong to at least one Specialized Agency of the UN?

2) Is such a state generally recognized by members of the United Nations?

The first criterium is, in principle of a formal nature, and in spite of its allegedly objective features is not easily applicable in practice. Frankly speaking, it is hard to understand what can be the relation between the decision on the admission of a state to a Specialized Agency of the UN taken by the appropriate organ of that Agency and the decision of the Secretary General concerning the granting to that state the observer status at the UN. The right of the particular organizations and of their organs to adopt decisions derives from individual and mutually independent legal foundations. That is why there is no justification for a procedure whereby the possibility to establish an observer mission by a given state at some organization depends on the decision on the membership of that state in another organization, even if the two organizations are as associated as the United Nations and the Specialized Agencies.

The second condition which makes the granting of observer status subject to the "general recognition" gives rise to even stronger objections. The question arises as to how many member states of the UN must recognize a state seeking observer status to meet the condition of "general recognition." In practice, the Secretary General when applying that criterium referred to the principle of the so-called presumed majority of votes of the member states.²⁶ In view of the fact that the problem of "general recognition" was never put to a formal vote in any of the UN organs, the Secretary General when deciding over the presumed majority had no other choice but to rely on purely political speculation and on a simple count of the number of states recognizing the government which is seeking observer status.

²⁵ See "United Nations Juridical Yearbook," 1962, provisional ed. St/LEG/8, pp. 236—237 and S. D. BAILEY, "Observer Status" at the United Nations, "The World Today," 1966, No. 12, p. 507.

²⁶ Dag Hammarskjöld conceded this openly and without any embarrassment — see his press conference of April 21, 1960 p. 14 — UN Secretariat Office of Public Information, "Press Release," 1960, vol. 18 p. 14.

In the light of the above considerations concerning the actual practice of the United Nations as regards the admittance of observers it can be assumed that the influence of the 1975 Convention on the legal situation of observers in the UN will not be apuricularly great. The establishment of observer missions in the UN had taken place even after the entry into force of the Convention and will continue to take place above all in accordance with the principles laid down in the actual practice of the Organization. One should not overrate the innovatory role of Article 5, point 2 of the Convention as the general legal principle governing the establishment of observer missions by non-member states in the UN. Only when supplementing the general basis with the detailed provisions covered in the Convention by the term "rules of the organization" is it possible to evaluate properly the institution of observers. The practical possibility to establish permanent observer missions at international organizations by non-member states depends exclusively on those "rules of the organization" or on those detailed provisions.

IV. Delegations of Observers

In accordance with the Convention of 1975 (Art. 1, point 1/12—14) delegations of observers are sent to particular organs of international organizations or to international conferences by states which desire to be represented and to participate in the activities of these organs or conferences. The sending of observer delegations is possible only when allowed by the appropriate provisions of the organizations (Art. 71). The mechanism of the establishment of an observer delegation is, from the formal and legal point of view, the same as that of establishing permanent observer missions. Article 71 of the Convention provides the legal foundation with the "rules of the organization" providing the detailed provisions. In actual practice however, the "rules of the organization" i.e. the constituent instruments, relevant decisions and resolutions, and established practice of the organization, determine the possibility to send a delegation of observers to the organs or conferences called under the auspices of these organizations.

The rules and provisions of the majority of the UN Specialized Agencies grant to states the right to send observer delegations to the sessions of the organs of these Agencies. They define in detail the conditions which must be fulfilled by a state wishing to send such a delegation. However, even in this relatively small group of organizations

some aspects regarding cooperation with non-member states are settled in a different manner.²⁷

The analysis of the constituent instruments and, above all, of the rules of procedure of the Specialized Agencies offers the possibility to establish a list of conditions which must be met by a state seeking observer status. The list of criteria and conditions which determine whether a state can or cannot be invited to take part in a session would be as follows:

a) UN membership; for example, paragraph 6, point 3 of the Rules of Procedure of the General Conference of UNESCO provides that

“The Director General informs states members of the United Nations [...] and invites them to send observers”²⁸

b) membership in another Specialized Agency entitles, in accordance with paragraph 30 of the Rules of Procedure of the General Conference of the International Atomic Energy Agency a non-member state of the IAEA to send an observer;²⁹

c) the submission of an application for regular membership. For example paragraph 4 of the Rules of Procedure of the Assembly of the International Maritime Consultative Organization provides that the granting of observer status by a state depends on the fulfillment of this condition:

“The Secretary General may invite a state which applied for membership to send observers;”³⁰

d) the submission of an application for associated membership of an organization by a non-selfgoverning territory:

“The Director General may invite to send observers [...] territories in the name of which an application for associated membership has been made.”³¹

²⁷ G. GRABOWSKA, *Obserwatorzy państw w organizacjach wyspecjalizowanych ONZ [Observers of States in the Specialized Agencies of the UN]*, “Acta Universitatis Wratislaviensis,” 1970, p. 119.

²⁸ *Zbiór statutów i regulaminów organizacji międzynarodowych [Collection of Charters and Rules of Procedure of International Organizations]*, edited by S. Hubert, Warszawa 1966, vol. 2, p. 319.

²⁹ *Ibid.*, vol. 2, p. 1117.

³⁰ *Ibid.*, vol. 2, pp. 1099–1100.

³¹ Para. 3 of the Rules of Procedure of the World Health Organization, see *Collection of Charters*, vol. 2, p. 418.

e) the signing of the Charter of an organization while ratification is still pending sometimes enables also a state to send observers. For example paragraph 8 of the Rules of Procedure of the Contracting Parties of GATT states that "representatives of states signatories of the Final Act [...] which have not yet become Contracting Parties can be present at the meeting in the capacity of observers."⁸²

f) the participation in the founding conference of the organization is a condition which the World Health Organization considers as sufficient to entitle a state to send its observers. According to paragraph 3 of the Rules of Procedure of the World Health Organization, are entitled to send observers

"states which participated in whatever form in the International Health Conference of 1946 in New York [...]"⁸⁸

Thus, the rules of procedure of many Specialized Agencies provide for various situations in which non-member states can be represented at the sessions of these Agencies by delegations of observers. We are dealing here with organizations wishing to cooperate through observers with the largest possible number of states and to fulfill their universal mission ensuring to all states, irrespective of their relationship with the organizations, the possibility to participate in their current activities.

However, not all Specialized Agencies accept the participation of observer delegations in the activities of their organs. Some, like for example the International Telecommunication Union, the Universal Postal Union, the World Health Organization are, by the very nature of their action, universal. Therefore, the problem of cooperation with non-member states does not arise at all.

The statutes and rules of procedure of financial organizations, such as for example the International Bank for Reconstruction and Development, the International Monetary Fund or the International Development Association do not provide for the possibility for observers of non-member states to participate in their work. It seems that the close mutual financial interdependence of the member states and the obligation to share in the capital of these organizations precludes the participation in their activities of both permanent observers and delegations of observers.

The observers forming part of observer delegations sent to Specialized Agencies enjoy a legal status deriving from the provisions of the organizations, in the first place, from their constituent documents and

⁸² **Collection of Charters, vol. 2, pp. 1327—1328.**

⁸⁸ ***Ibid.*, vol. 2, p. 418.**

rules of procedure. The statutory provisions determine whether observers can participate in the activities of their plenary organs. On the other hand, the rules of procedure of the plenary organs list in detail the conditions which must be met in order to make it possible for a non-member state to cooperate with the organizations in question. The possibility to establish observers at the Specialized Agencies arising from statutory law or procedural provisions is defined here as "statutory way," as distinct from the "extra-statutory way" adopted in the practice of the United Nations. .

V. Types of Observers

Depending on the duration of the mission or the delegation of observers, they are divided into permanent observers and *ad hoc*, or temporary observers.

Permanent observers forming part of permanent missions are sent by non-member states for an unspecified and unlimited time. It is their duty to participate systematically and on a continuing basis in all organs of the organizations (provided that the provisions of the organization allow it) not only during their sessions but also during the intersession periods. Here we are dealing with a permanent mission with a well defined internal set-up, well defined duties, fixed rights and obligations towards the organization and towards the government of the delegating state. Permanent observers of states are to be found at the United Nations.

Observers *ad hoc* are deprived of this element of permanence. In this case a state cooperates with an organization by sending a delegation of observers (not a mission) to selected sessions of some organs of the organization. For example, it results from the rules of procedure of the Specialized Agencies that observers are entitled in each case to take part in only one session of an organ of the organization; after the closing of the session their mandate lapses. A state wishing to participate as an observer in a subsequent session must again repeat the whole accreditation procedure.

Depending on the organ of the organization to which observers *ad hoc* are accredited, one distinguishes two groups of observers: one, sitting at the plenary organ and, another sitting at an organ with restricted membership performing executive functions in the organization. Non-member states are sending observers to plenary organs (assemblies, conferences). This category of observers is to be found, most often, in the plenary organs of the Specialized Agencies.

The states enjoying the right to send observers to an executive organ of an organization (council, committee) belong to a different group. The restricted membership of such an organ makes it impossible for all member states to participate in its work. However, apart from the group of states members of the executive organ, there are other states interested in its activities (or wishing to keep these activities under control). And it is for the states not serving on the executive organ that the internal rules of some organizations⁸⁴ provide under specific conditions for the possibility to send an observer delegation. Observers send to a session of an executive organ by a member state of the organization not serving on that organ are being referred to as "internal observers."

Apart from internal observers, observers of non-member states of an organization are allowed to participate in the sessions of an executive organ in situations expressly specified in the rules of the organization. Such cases are, however, very rare. The contacts of an executive organ with the states which are not its members are, as a rule, of a sporadic nature, and limited to situations when such contacts are required in the interests of the organization.³⁵

VI. Rights and Functions of Observers

The statutes and rules of procedure of international organizations contain no provisions defining the functions of observers in a detailed manner. Even organizations which are regulating themselves the way in which observer missions are established fail to provide indications as to the functions of observers. These functions emerged gradually in the course of their activities. At first, both states and organizations were borrowing from the still uncodified rules of diplomatic law, in particular, as regards the functions of diplomatic missions. After the entry into force of the Convention on Diplomatic Relations of 1961 this Convention served on many occasions as a pattern for the definition of the aims and functions of missions accredited to international organizations, including also missions and delegations of observers.⁸⁶

³⁴ For example, para. XXV p. 9 of the General Rules of Procedure of the Food and Agricultural Organization, see Collection of Charters, vol. 2, p. 247; para. 32 of the Rules of Procedure of the Council of the International Civil Aviation Organisation, Collection of Charters, vol. 2, p. 756; para. 6 of the Rules of Procedure of the Council of the International Maritime Consultative Organization, Collection of Charters, vol. 2, p. 1210.

³⁵ For a broader discussion of the subject see G. GRABOWSKA, *Obserwatorzy państw...*, pp. 95—98.

⁸⁶ See P. GERBET, *Conclusion*, in: *Les missions...*, p. 849.

Together with the work on the codification of the Convention of 1975 the UN Secretariat carried out studies concerning the legal status of representatives of states (including observers) at the UN and the Specialized Agencies. These studies resulted in the publication of the very valuable report entitled "The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities" (Doc. A/CN.4/1. 118 and Add 1 and 2)⁸⁷ and submitted in May 1967 to the International Law Commission.

The first attempt at a comprehensive treatment of the activity of observer missions was made in Article 7 of the 1975 Convention. According to the provisions contained therein the function of a permanent observer mission include, among other things: a) the representation of the delegating state and the defence of its interests in the organization; b) the maintenance of open lines of communication with the organization; c) the continuous observation of the activities of the organization and the reporting on these activities to the government of the delegating state; d) the promotion of cooperation with the organization and the conduct of negotiation with its authorities.

The application of a subjective critérium (i.e. who are the subjects towards whom the observers are obligated to perform specific functions) makes it possible to treat the obligations of observers on three levels: a) towards the sending state; b) towards the organization to which they are accredited and c) towards the host country of the organization.

Ad a) Representation and reporting are among the fundamental obligations of observers towards the sending state. Through the intermediary of observers the sending state manifests its presence in the organization in various ways; in matters of particular interest it communicates to the organization its opinion, conducts informal consultations and also, circumstances allowing, and intervenes informally. A mission and delegation of observers has, thus, for the delegating state always a representative character.³⁸

One of the most fundamental duties of the observer is to report on the activities of the organization to his government. In order to do

⁸⁷ See YILC, 1967, vol. 2, p. 154. The practice concerning the functioning of observers of states in the United Nations is described on pp. 190—191; the practice concerning observers in the Specialized Agencies is dealt with on pp. 203—104.

³⁸ The above position is based not only on Art. 7, letter a of the Convention of 1975 but also on the Rules of Procedure of some Specialized Agencies — see for example para. 5 of the Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization, in: *Collection of Charters*, vol. 2, p. 726.

this he must have access to the necessary information. As revealed by a study carried out among observers accredited in Geneva,⁸⁹ the observer accomplishes his task primarily through the collection and analysis of documents of the organization, through the participation in meetings open to observers and through direct contacts with the Secretariat of the organization as well as with the missions of other states accredited to the organization. Information is a two way street. The delegating state supplies the observer with the necessary information, apart from the instructions he is getting from his government on matters concerning his action. It may also so happen that the observer's duty consists in the transmission to the organization of the statements of his government.⁴⁰

Ad b) The mere presence of the observer at the headquarters of the organizations his ability to participate in the activities of the organization involves also some duties. These duties are, however, not clearly defined by the organizations; nor are they mentioned in the Convention of 1975. It appears that the fundamental obligation of the observer towards the organization is to behave in such a way which would exclude the possibility of its normal, daily activity being perturbed. Such a minimalistic view of the fundamental duty of the observer is by no means in conflict with another view which requires active cooperation of the observer with the organization when the latter considers problems interesting his government. The relations of observers with international organizations are, on the one hand, dependent on the traditions of the organizations as regards their cooperation with non-member countries and, on the other hand, on the nature and initiative of the observer missions and delegations. The relations of a permanent observer mission with an organization will always be stronger as compared to the relations of an observer delegation.

⁸⁹ M. VIRALLY, *Les missions permanentes auprès de l'Office des Nations Unies à Genève, des Institutions Spécialisées et de l'AELE*, in: *Les missions...*, pp. 232—233.

⁴⁰ Such a situation had arisen in the UN in 1966 in connection with the Rhodesian crisis. The Security Council deciding to apply obligatory economic sanctions against Rhodesia appealed to non-member states to join in threatening the violators with the application of Art. 2, para. 6 of the UN Charter. Among these states was Switzerland which had been informed by the Secretary General about the measures taken by the Security Council. Switzerland, anxious to emphasize that it is not bound legally by the decisions of the Security Council did not reply officially to the the not of the Secretary General but instructed its permanent observed mission in New York to transmit an official statement on the subject, accepting the decisions of the Security Council. See Report of the Federal Council, *op. cit.*, p. 78.

Ad c) The duties of an observer towards the host country of an organization have been set out in Article 77 of the Convention of 1975. Thus, the observer is duty bound to respect the law and regulations of the host state and not to interfere in the internal affairs of that state; the premises of the mission or the delegation must be used in accordance with their purpose.⁴¹ The observers, together with the representatives of the member states form a large group of diplomats permanently stationed in the host country. They may also include persons who, apart from their regular professional activity may exercise other functions, for example engage in intelligence activities. That explains why, in spite of the fact that the observers are not accredited to the host state, it was necessary to deal in the Convention of 1975 with the duties of observers towards the host state so as to protect its interests and security.

As anyone can see, the functions of observers vary and their exercise requires in each case appropriate authority. The freedom to exercise these functions will depend on the nature of the link of the observer with the organization, on the actual practice of the organization, on the instructions of the delegating state and even on the internal regulations of the host state.

Each international organization regulates differently the scope of the authority of the observers accredited to it. However, all organizations grant to the observers such rights as are necessary to enable them to carry out their tasks.

As set forth in the rules of many organizations, the participation in the deliberations without voting rights is the fundamental right of the observer.⁴² The rules of some organizations, and above all their practice, makes it possible to define in a more detailed manner the conditions of such participation, for example by setting forth the specific rights enjoyed by the observer. Thus, the FAO Conference which is the plenary organ of the organization has adopted certain rules which must be followed by the organization when accepting the credentials and when granting rights to observers of non-member states. Annex C of

⁴¹ The contents of this Article is obviously influenced by Article 41 of the Convention on Diplomatic Relations of 1961, Article 55 of the Convention on Consular Relations of 1963, Article 47 of the Convention on Special Missions of 1969. See *Wybór dokumentów...*, pp. 189, 203, 504.

⁴² "To participate without right of vote"—see for example Article 18 (h) of the Constitution of the WHO, A. J. PEASLEE, *International Government Organizations*, the Hague 1961, vol. 2, p. 1884; also for example para 4 of the Rules of Procedure of the Assembly of IMCO. *Collection of Charters*, vol. 2, p. 1099.

the Report of the IX FAO Conference states that observers of states admitted to participate in the sessions of the organization have the rights to:

- 1) address the conference exclusively on matters listed on the agenda of the plenary session of the Conference or the Council or during the meetings of plenary commissions provided that the Presidium of the Conference or Council accords its permission;

- 2) participate without the right to vote in the meetings of the Commissions and Committees of the session of the Conference or the Council, provided that the chairmen of the meetings agree;

- 3) receive documents and reports of the sessions with the exception of those which are for member states only;

- 4) submit written materials on matters concerning specific items on the agenda.⁴³

The list of rights enumerated above, while made for the purposes of one organization only, is of considerable importance for the entire problem under consideration. We are dealing here with the only official and, largely, complete list of rights granted to observers by international organizations. As a rule, observers enjoy the same or similar rights in other organizations with the sole difference that these rights had not always received the form of a statutory or procedural rule.

The list of rights enjoyed by observers will be complete with the addition of their right to conduct negotiations with the organization and to sign the text of a treaty as well as of their right of access to the headquarters of the organization. The first right is granted to the observers by Article 12, point 2 of the Convention of 1975; the right of access to the headquarters of the organization is of the nature of a privilege enabling directly a state to enjoy observer status and is granted by the government of the host state.⁴⁴

Thus, the rights granted to observers are rather modest and provide little scope for their action in the organizations, in particular in the decision making process. On the other hand, they are sufficient to enable observers to represent the position of their governments and to maintain international contacts thanks to their official status.

⁴³ See FAO Rapport de la neuvième session de la Conférence, Rome 1957, pp. 221—222.

⁴⁴ For example, (Article XI, Title 27, Letter a, p. VIII of the Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Headquarters of the IAEA. See Collection of Charters, vol. 2, p. 1236; also Article 79 of the Convention of 1975.

VII The Privileges of Observers

Observers, being representatives of sovereign states must, when exercising their functions, enjoy specific privileges and immunities.⁴⁵ The Convention of 1975 provides a uniform legal basis for the privileges of observers in all international organizations of a universal nature. According to Article 20, point 1 of the Convention the duty to ensure that the observers enjoy appropriate privileges rests, above all, with the host state of the organization. It seems that this duty results from previous provisions contained in the headquarters agreement concluded by the organization with the host state. The agreement to have the headquarters of an organization on one's territory involves also an agreement to facilitate the statutory activities of the organization, including the functioning of observer missions and delegations; hence, the appropriate authorities of the host state have the obligation to make the proper arrangements in order to ensure that those concerned, including the observers, enjoy all due privileges.

However, all facilities cannot be granted by the host state. The Convention of 1975 provides that the organization shall assist the observers in obtaining these facilities while granting to them the facilities which lie within its own competence (Art. 20, p. 2 and Art. 51, p. 2). The organization has also the general duty to assist (when necessary) the delegating state, the members of observer missions and delegations so as to make sure that they obtain and actually enjoy the privileges to which they are entitled (Art. 22, p. 1 and Art. 53, p. 1). However, since the entry into force of the Convention of 1975 the observers are granted privileges, principally, on the basis of agreements concluded by organizations with host states, of individual decisions of host states taken in the sphere of their internal law as well as on the basis of unwritten principles of courtesy respected in inter-state relations.⁴⁶ Among the privileges enjoyed by observers one may distin-

⁴⁵ On the scope and nature of the privileges enjoyed by representatives of member states see, among others: B. V. GANJUŠKIN, *Diplomaticeskoe pravo mezhdunarodnyh organizacij*, Moskva 1972, p. 80; M. PASZKOWSKI, *Dyplomacja...*, p. 108 ff.; J. SUTOR, *Przywileje i immunitety międzynarodowe [International Privileges and Immunities]*, Warszawa 1973, pp. 170—175.

⁴⁶ See for example, Article XII Title 25 of the Agreement between the Government of the Italian Republic and the Food and Agricultural Organization of the United Nations Regarding the Headquarters of FAO, Collection of Charters, vol. 2, p. 287; Article 9 of the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization Regarding the Headquarters of UNESCO, Collection of Charters, vol. 2, p. 376.

guish facilities granted to observer missions and delegations and individual privileges granted to observers, the personnel of missions and delegations and to their families.

The first group includes, for example, the privilege of inviolability of premisses, archives and documents as well as the inviolability of the official correspondence of missions and delegations. Furthermore, these premisses are exempt from taxation and the objects of official use are, when imported, exempt from customs duties and control. Observer missions and delegations enjoy also the right to communicate freely with their governments, diplomatic and consular missions, special missions and missions in other international organizations.

The group of personal privileges includes personal inviolability and the inviolability of private premisses. Observers enjoy also immunity from jurisdiction and are exempt from social security legislation; they pay no taxes, dues or other charges and are exempt from customs duties and control.

The privileges are of a temporary nature and their duration depends on the category of the observers. Thus permanent observers enjoy their privileges as long as they act as such. Observers *ad hoc* enjoy their privileges only for the limited period of their delegation as observers to a specific session of the organization. The closing of the session marks also the termination of the delegation and the expiration of the privileges.

The Convention of 1975 played an important role in the unification of the legal foundations and scope of the privileges of state representatives in international organizations. The privileges of state representatives, including the privileges of permanent observers granted under the Convention, reflect the provisions of the Convention concerning diplomatic relations.⁴⁷ On the other hand, the privileges of state delegations and observer delegations are closer to consular privileges or to the privileges resulting from the Convention on special missions.⁴⁸

The Convention of 1975 grants to permanent observers the same privileges as those enjoyed in the host state by representatives of member states, while granting to delegates-observers privileges identical to those enjoyed by delegates of member states of the organization. Such an approach to the problem is justified by the representative character of

⁴⁷ Cf. Articles 19—39 of the Convention of 1975 with Articles 20—41 of the Convention on Diplomatic Relations of 1961. See *Wybór dokumentów* pp. 597—600 and 182—189.

⁴⁸ Cf. Articles 51—68 of the Convention of 1975 with Articles 28—53 of the Convention on Consular Relations of 1963. *Wybór dokumentów...*, pp. 603—604 and 199—203.

the observer missions and delegations. The principle of equal rights of states in international relations involves also a similarity of rights and obligations of the representatives of states in international organizations.

VIII. Closing Remarks

It results from the above considerations that in the present international practice the institution of observers has no uniform character. Various organizations apply various legal rules as regards the establishment, composition of missions and delegations of observers, their rights and privileges. Under these circumstances we are confronted with a differing interpretation of norms of customary law or written law, or adopted law which govern the institution of observers. This has its consequences not only in the sphere of the science of international law, but above all affects considerably the state of international politics. It may be hoped that both the legal situation and the general atmosphere surrounding the observers will improve following the entry into force of the Convention of 1975.

Taking into consideration the characteristic features of the observers of states which we discussed above, their place and role in the system of universal international organizations, it is possible to put forward a definition of this institution. It seems that generally speaking one may define as observers all persons representing a state in an organization (or in its organs) which is not a member of this organization (or its organs). The scope of representation as reflected in the participation of the observers (without the right to vote) in the work of the organizations varies depending on the internal rules or practice of these organizations.

The contacts maintained through the observers between the organizations and the non-member states is beneficial to both parties. The organization and, in particular, the organizations of a universal character, can and should use the institution of observers in order to expand their activities so as to cover non-member states. This will promote the full implementation of the statutory principle of universality of international organizations.

The benefits which a non-member state derives from such a relationship are even greater. Very often the participation of observers enables the non-member state to gain access to very valuable sources of information, such as for example, documents, archives, libraries. In the organizations themselves the observers have the possibility to pre-

sent the position of their governments and to influence various actions undertaken in numerous fields of international cooperation.

The problem of observers is therefore still on the agenda. History teaches us that there may always be states unwilling or unable to join international organizations as full members. In such a case the institution of observers can and must provide the link between such states and the international organizations.

Polish Court Judgements in International Civil Law Cases

by MACIEJ TOMASZEWSKI

Succession

Jurisdiction of Polish court to ascertain the acquisition of movables left by a deceased foreign national. Necessary jurisdiction. Foreign heir.

Supreme Court, Civil Chamber. Decision of October 19, 1977 (III CZP 76/77) in the case involving the request by Karen D. to ascertain the acquisition of an inheritance left by Frank C. (Decisions of the Supreme Court, civil series, 1978, No. 8, item 129).

The testator, a national of the USA domiciled in Poland, died in Poland on May 12, 1974. Two years before his death the testator made a will before the notary of the State Notary Office in which he instituted as his sole heir his granddaughter, a national of the USA. The testator left in Poland only money deposited on bank accounts. An application to ascertain the acquisition of the inheritance was presented by the heiress who asserted that the courts of the State of New York where the testator had his domicile prior to his moving to Poland refuse to deal with inheritance cases involving its citizens whose last domicile was abroad. In view of that factual situation the Voivodship Court of the City of Łódź addressed the Supreme Court, pursuant to Article 391 of the Code of Civil Procedure, the following legal question:

"Does a Polish court have jurisdiction in a case involving the ascertainment of the acquisition of an inheritance in a situation whereby the inheritance left by a foreign national who died in Poland include movables situated in Poland and whereby the heir who is also a foreign national cannot the ascertainment of his rights to the inheritance by a Rational court of the testator?"

The Supreme Court gave the following reply:

"If the inheritance includes movables situated in Poland and the heir is unable to the ascertainment of his rights to the inheritance by a national court of the testator, the case involving the ascertainment of the acquisition of the

inheritance is subject to the jurisdiction of Polish court, irrespective of the fact as to whether the heir is a Polish national or a foreign national."

Stating the reasons of its decision the Supreme Court added (among others):

"The circumstance that also a heir who is a foreign national can be deprived of legal protection both abroad and in the Polish People's Republic cannot be irrelevant in the light of the principle, characteristic (among others) of the Polish legal order, in accordance to which a heir who is a foreign national must not be treated in a less favourable way compared to a heir who is a Polish National."

Note: The above decision is a complement to the already published in the *Polish Yearbook of International Law*, vol. 10, p. ... decision of the Supreme Court of May 31, 1975 (III CZP 78/75), in which the Supreme Court adopted the concept of the so-called necessary jurisdiction of Polish courts in cases involving the ascertainment of the acquisition of a movable inheritance left in Poland by a foreign national whose last domicile was in Poland when the heirs cannot achieve the ascertainment of their rights to the inheritance because of the lack of judicial jurisdiction in the national country of the deceased. In such exceptional cases the Polish courts shall, according to the opinion of the Supreme Court, deal with the issue in order to avoid the reproach for having refused to administer justice.

The doubts of the Voivodship Court in this case were caused by the fact that the principle stated in the decision of May 31, 1975 the Supreme Court justified by stressing, among others, that the rigorous application of Article 1108, paragraph 1 of the Code of Civil Procedure providing for jurisdiction of Polish courts in inheritance cases only when the deceased was Polish national on the day of his death or, when having no nationality at all, was domiciled in Poland, would be tantamount to a refusal to grant the Polish heir legal protection.

In the latest decision the Supreme Court explained therefore that the so-called necessary jurisdiction of Polish courts in cases of such nature can apply also in order to extend the necessary legal protection to a heir who is a foreign national.

Air Transport

The importance of a record of damages. Interpretation of Article 26 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12, 1929 (with subsequent amendments).

Supreme Court, Civil Chamber. Judgment of November 9, 1976 (I CR 360/76) in the action brought by "Warta" Insurance and Reinsurance Company Ltd against the USSR Airline "Aeroflot" in Moscow for payment of damages. (Decisions of Polish Courts and Arbitration Commissions, 1978, fasc. 1, item 3, with the approving comment of J. Rajski).

The USSR Airline "Aeroflot" accepted an order to carry from Vladyvostok boxes containing printers of Japanese production for calculators destined for the Foreign Trade Bureau "Mera-Elwro" in Wrocław. The consignment was handed over by the handling agent i.e. by Polish Airlines "Lot" to C. Hartwig International Forwarders acting of behalf of the Polish importer.

At the receipt of the consignment it was discovered that some boxes were damaged and some were missing. A commission with the participation of the forwarder, handling agent and customs official made a formal records of the damages. A copy of the record was received by the representative of Polish Airlines "Lot" acting as the handling agent of the forwarder.

The Insurance and Reinsurance Company "Warta" Ltd paid to the Polish importer i.e. to "Mera-Elwro" the sum of 4,077,499.50 zlotys in damages and claimed the said sum from the USSR Airlines "Aeroflot" before the Voivodship Court in Warsaw.

The Voivodship Court in a preliminary judgement recognized the claim as justified in principle.

The defendant "Aeroflot" submitted the judgement for revision to the Supreme Court. The Supreme Court dismissed the appeal for among others the following reasons:

"[...] The provisions of Article 26, paragraph 2 and 3 of the Warsaw Convention as drafted in the Hague Protocol fail to state with precision what is to be the content of an 'objection' made to the forwarder when it has been discovered that the consignment was missing or damaged. The 'objection' can be voiced in two forms: in the form of a 'reservation' entered into the bill-of-lading, or in the form of a 'letter sent within the prescribed period (of 14 days) for such an 'objection'. It is beyond controversy, that the recipient of the consignment (the forwarder) has made no entry into the bill-of-lading in the form of a 'reservation'. {...]"

"What remains, however, to be considered is whether the formal record of the damages is not of the nature of an 'objection' voiced in the form of a 'letter'.

"Whereas, as far as an objection in the form of a 'reservation' is concerned the Convention requires formally that the 'reservation' must be entered into the bill-of-lading, in the case of an 'objection' voiced in the form of a 'letter' no other additional requirements are foreseen.

"Hence, it must be recognized that the formal record of damages made by the recipient (forwarder) directly at the receipt of the consignment forwarded on the basis of an international bill-of-lading and delivered within 14 days following the receipt of the consignment to the handling agent of the forwarder is an 'objection' voiced in the form of a 'letter' as provided for in Article 26, paragraph 2 and 3 of the Warsaw Convention.

"For, since the above mentioned provision of the Convention does not foresee any other requirement for an objection in the form of a 'letter', such 'letter' can take various forms, including the form of a formal record. All the more so, that such a record contains all necessary elements which make it possible to identify the consignment and to evaluate the extent of the damages. One must refute the presumption of law arising from Article 26 paragraph 1 of the Convention that the goods were received by the consignee in a good state and in accordance with the bill-of-lading.

"It is obvious that an 'objection' in the form of a 'letter' (formal record) must arrive to the forwarder (his handling agent) within the period prescribed in Article 26, para. 2 of the Convention, i.e. within 14 days following the day of the receipt of the consignment.

"In this case there are no doubts that the prescribed time-limit has been respected for the 'objection' in the form of a 'letter' (formal record) was voiced directly at the receipt of the consignment and one copy of that 'letter' was received by the representative of the handling agent of the forwarder who was present at and took part in the receipt, as stated in the document."

Recognition of a Foreign Judgement 1

Divorce pronounced in the USA. Conditions of recognition. The possibilities of defence before a foreign court. The law applicable to divorce. Public policy clause.

Voivodship Court in Warsaw. Decision of October 30, 1975 (II Co 727/75 in the case concerning the application of Barbara K. for the recognition of the judgment of a foreign court (Decision of Polish Courts and Arbitration Commissions, 1978, fasc. 7—8, item 146, with a comment of Jan Ciszewski).

Barbara K. Polish citizen domiciled in the USA, applied for the recognition of the judgment of a court in the State of Nevada (USA) dissolving by divorce her marriage with Izydor Ł. of Polish nationality and domiciled in Poland.

Izydor Ł. and the Voivodship Attorney who participated in the proceedings did not voice any opposition against the recognition of the efficacy of that judgement on the territory of the Polish People's Republic.

As it was established by the Voivodship Court Barbara K. and Izydor Ł. were married in Poland in 1962. They have no children. In November 1970 Barbara K. went to the USA to visit her relatives

residing there. She was to be absent for 6 months but failed to return to Poland. On May 3, 1973 she prayed for divorce with Izydor Ł. at the District Court of Clark, State of Nevada (USA) on the ground of childlessness, lack of common property and long separation. A copy of the summons and a notification on the date of the court proceedings have been sent to Izydor Ł. by mail without intervention of a Polish court; furthermore, the documents were in English, a language unknown to Izydor Ł. Finally, in accordance with the legislation of the State of Nevada the defendand was informed about the date of the court proceedings by an announcement printed in the "Nevada Legal News" published in Las Vegas.

The District Court in Clark ruled July 12, 1973 that it had jurisdiction in the case, having established that the petitioner had resident in the County of Clark of the State of Nevada for more than six weeks prior to the beginning of the court proceedings, and applying the law of the State granted a divorce. As a basis for the divorce the Court accepted the unassailed statements contained in the petition.

The Voivodship Court in Warsaw dismissed the application concerning the recognition of the above mentioned decree of the District Court of Clark (Nevada) for (among others) the following reasons:

"A judgement by a foreign court can be recognized as effective on the territory of the Polish People's Republic, provided that it meets all conditions listed in Articles 1145 and 1146 of the Code of Civil Procedure. The decree of the District Court in Clark whose recognition is requested by Barbara K. fails to comply with the conditions resulting from the provision of Polish law. In particular, in contravention of Article 18 of Private International Law the District Court in Clark when granting the divorce applied the substantive law of the State of Nevada, whereas it ought to have applied the Polish law, since both husband and wife were of Polish nationality and were not domiciled in the same state. Izydor Ł. was deprived of the possibility of defence in the divorce lawsuit because the copy of the summons and the information about the date of the proceedings were in English, a language he does not know, and handed over to the respondent in a manner not practiced in Poland i.e. directly by mail without the participation of a Polish court (Article 1146, paragraph 1 p. 3 of the Code of Civil Procedure).

"The law of the State of Nevada which was applied in this case differs essentially from Polish law, as can be seen from the information provided by the Ministry of Justice... (comp. Article 1146, paragraph 1, p. 6 of the Code of Civil Procedure). The divorce was granted without it being established that there was a complete and permanent breakdown of the marriage which is an indispensable condition under Polish law for the granting of a divorce. Furthermore, since it appears from the circumstances of the case that the responsibility for the breakdown of the marriage lies exclusively with the petitioner, the granting of a divorce without the consent of the innocent spouse contradicts the fundamental principles of the legal order of the Polish People's Republic.

Note: The refusal to recognize the divorce decree of the court of the State of Nevada for the reasons invoked in the decision of the Voivodship Court in Warsaw does seem rather debatable. In the first place, it is not clear on what ground the Voivodship Court accepted the view that the responsibility for the breakdown of the marriage lies exclusively with the applicant. For, in a legal proceeding concerning the recognition of foreign judgements there is no room for the presentation of evidence as to the circumstances and causes of the matrimonial life. It cannot be excluded that the breakdown could have taken place prior to the applicant departure to the USA without guilt on either party or because of the exclusive guilt of the husband. Furthermore, even if we were to assume that the exclusive responsibility for the breakdown of the marriage lies with the applicant, then the question arises as to whether the fact that Izydor Ł., the participant in the proceedings concerning the recognition of the decree of divorce granted by the American court, did not object to such recognition should not be treated as his assent to such a divorce. The same fact should, in my opinion, militate also against the assertion that Izydor Ł. was deprived of the possibility of defence before an American court and ought at any rate, to be considered as signifying that he renounces to adduce this negative premise of the recognition of the foreign judgment. There can be no doubt that in view of the long separation of the spouses and their mutual lack of intention to continue their marriage (as witnessed also by the absence of any objection by Izydor Ł. to recognize the decree of divorce granted by the American court) it can be assumed that there was a permanent and complete breakdown of the marriage justifying the granting of divorce also in the light of Polish law, all the more so that there were no minor children born from that marriage (Article 56 of the Family and Guardianship Code).

Under these circumstances the effects of the application in this case of the law of the State of Nevada do not differ essentially from those of the possible application of Polish law. Thus, there ought to be no obstacles to the recognition of the said decree of divorce in the light of Article 1146, paragraph 1, p. 6 of the Code of Civil Procedure which takes into consideration the equivalence of the appropriate Polish law and the foreign law actually applied in a case.

Recognition of a Foreign Judgement 2

Decree of divorce pronounced by a court of the Federal Republic of Germany. Legal interest in an application for recognition,

Supreme Court, Civil Chamber. Decision of September 23, 1977 (I CK 309/77) in the case concerning the application of Kamila N. for the recognition of a foreign judgment (Decisions of the Supreme Court, Civil Series, 1978, No. 8, item 139).

Kamila N. of Polish nationality requested the Voivodship Court in Warsaw to recognize the decree of a divorce pronounced by a court in the Federal Republic of Germany to Wolfgang and Brunhilda R., both of FRG nationality. The applicant who intended to marry in Poland Wolfgang R. furthermore filed with the Court a written statement by Wolfgang R. in which he "associated himself" with the application concerning the recognition of the decree of divorce. The Voivodship Court dismissed the application in its decision of May 19, 1977 stating that Kamila N. had no legal interest in the recognition of the decree of the FRG court which granted a divorce to Wolfgang and Brunhilda R. Kamila N. appealed to the Supreme Court asking for the settling aside of the decision by the Voivodship Court and for the recognition of the decree of divorce granted by of the FRG court. The Supreme Court dismissed the appeal, remanding at the same time the case to the Voivodship Court in Warsaw in order to engage the procedure involving the application of Wolfgang R. for the recognition of the divorce decree granted by a court in the Federal Republic of Germany.

Stating the reasons of its decision the Supreme Court pointed out the following:

"There is nothing to justify the view that only a person of Polish nationality is entitled to apply in a Polish court for the recognition of a foreign decree of divorce. On the contrary, one of the fundamental principles of the Polish international law of procedure is the equality of rights of foreign nationals in the field of judicial protection. Consequently, there is no ground whatsoever in the assertion by the applicant that in view of the fact that Wolfgang R. is not subject to the 'jurisdiction' of the Polish courts she, and she alone is entitled to submit an application concerning the recognition of the decree of divorce granted by a court in the Federal Republic of Germany in the case of the former spouses Wolfgang and Brunhilda R.

"In the light of Article 1147, paragraph 1 of the Code of Civil Procedure an application concerning the recognition of a foreign judgment can be submitted by each person that is not only by persons who were parties in a divorce proceeding completed by a legally valid final decree in a foreign country or by persons of Polish nationality. However, pursuant to the said Article 1147, paragraph 1 of the Code of Civil Procedure those endowed with such rights include exclusively persons who have a legal interest in obtaining the decision of a Polish court recognizing the efficacy in Poland of a divorce decree granted by a foreign court. The question as to whether a person has such an interest i.e. such a legal need, can be resolved by determining whether the said decision by a Polish court will affect the sphere of his or her subjective rights or whether such a decision is indispensable for the protection

or the exercise by that person of his or her obligations arising from legal provisions. [...]

"According to her own statements the applicant meets all conditions which are required under the Family and Guardianship Code for the contracting of her marriage. In other words, she has no need to apply for a judicial decision recognizing her right in this respect, i.e. she has no legal interest in this matter. On the other hand, the legal situation of Wolfgang R. who was married before is quite different. Wanting to acquire in Poland the right to contract a marriage (not necessarily with the applicant) he and he alone must submit the proof that his former marriage has been terminated. It is not Kamila N. Polish nationality, but Wolfgang R. of FRG nationality who wants to contract a marriage in Poland and who is thus legally interested, in the light of Article 1147, paragraph 1 of the Code of Civil Procedure, in obtaining for himself a decision by a Polish court recognizing that the decree of the court in the Federal Republic of Germany dissolving the marriage of Wolfgang and Brunhilda R. is effective in Poland. (...)

"On the other hand, the objection concerning the refusal by the Voivodship Court to consider the application of Wolfgang R. of March 1977 which is to be found in the file of the case is justified. The erroneous qualification of that letter did not present an obstacle to give it proper consideration in due course, following its correction and removal of its shortcomings by the applicant, Wolfgang R."

Recognition of a Foreign Judgement 3

Divorce granted in Denmark by an administrative organ. Judgements subject to recognition. Public policy clause. Exclusion of recognition in Poland of a foreign administrative decree.

Supreme Court, Civil Chamber. Decision of January 10, 1978 (I CR 308/77) in the case submitted by Alicja J. together with Rono Oskar J. concerning the recognition of a foreign judgement (Office of the Attorney General, Decisions of the Supreme Court, annex to "Problemy Praworządności," 1978, No. 7 pp. 16—18).

By its judgement of October 13, 1975 the Supreme Presidium of the City of Copenhagen dissolved by divorce the marriage contracted in Warsaw between a Danish national (husband) and a Polish national (wife). At the moment of the divorce both spouses were domiciled in Denmark.

In her application dated December 15, 1976 the wife divorced in accordance with Danish law asked for the recognition of the said divorce in Poland. The Voivodship Court in Warsaw dismissed the application stating that in the light of Article 1145, paragraph 1 of the Code of Civil Procedure decisions of administrative organs are not subject to recognition. Furthermore, the Voivodship Court in Warsaw asserted that

the decision (decree) the recognition of which was requested by the applicant contradicted the fundamental principles of the legal order of the Polish People's Republic.

The applicant appealed to the Supreme Court asking for a revision of that sentence and for the acceptance of her application. She objected that by erroneous interpretation Articles 1145, paragraphs 1 and 1146, paragraph 1, p. 5 were violated.

The Supreme Court dismissed the appeal stating in the reasons of its decision (among others) the following:

"Pursuant to Article 1145, paragraph 1 of the Code of Civil Procedure the efficacy on the territory of Poland of judgements of foreign courts in civil cases which in Poland are settled in courts and which are not susceptible to fulfillment by way of execution depends on their recognition by a Polish court.

"It results from the said provision that the Code of Civil Procedure, when recognizing foreign judgements, adopted a system which takes into account simultaneously the competence of both Polish and foreign courts. This means, that, first, a judgement by foreign courts in a case which in Poland does not belong to the competence of a court cannot be recognized, and that second, a Polish court cannot recognize the decision of another organ than a court, although the decision was rendered in a case which in Poland is settled in court.

"The provision whereby subject to recognition are only judgements by courts is so clear and unambiguous that it rules out the application of a functional interpretation. In introducing the said provision the legislator was aware that in some states divorce cases are dealt with by administrative organs. If, in spite of that fact, he opted against a broader formulation of the scope of judgments, then there is no ground for the application of the functional theory which leads to the equal treatment of decisions by other organs with those of courts. Such an opinion must be recognized as prevailing in the Polish doctrine concerning international civil procedure.

"Such a statement does not imply that in Poland the possibility to recognize judgements by administrative organs is entirely ruled out. Such a possibility does exist, but it results not from the provision of Article 1145, paragraph 1 of the Code of Civil Procedure but from the provisions of international treaties. (...)

"It must therefore be accepted that in the light of Article 1145, paragraph 1 of the Code of Civil Procedure the recognition in Poland of decisions or decrees of other foreign organs than courts is not allowed, even if they concern cases which in Poland are settled in courts. The possibility to recognize decisions or decrees of organs other than courts can result only from an international treaty.

"The recognition of the administrative decree would also lead to the violation of Article 1146, paragraph 1 of the Code of Civil Procedure Pursuant to that provision a judgement is subject to recognition provided (among others) that it is not in contradiction with the fundamental principles of the legal order of the Polish People's Republic. One must accept the stand taken in the appeal that the said principles cannot be understood in a way which would make them always and entirely consistent with all relevant provisions of Polish Law and even with essential provisions which are of the nature of *ius cogens*; on the other hand, it would be erroneous to adopt the view that the rendering

of the decision or decree by an administrative organ does not violate these principles. The opinion represented in the revision fails to take into account the fundamental difference in this respect.

"The system of divorce pronouncements by an administrative organ is based, in fact, on the registration of the parties' declarations as to divorce. This feature results clearly from the content of the decree the recognition of which is requested by the applicant.

"Contrary to that system, the conception of divorce rules out the possibility of its granting solely on the ground of the expressed intent of the parties and involves the thorough examination of the gathered evidence by the court with a view of ascertaining whether there is a permanent and complete breakdown of the marriage. The principle of judicial divorce is therefore one of the fundamental principles of Polish family law and, hence, one of the fundamental principles of the legal order *iri* our state. It rules out the possibility of recognition of a divorce decree granted by an administrative organ.

"It must therefore be assumed that the divorce decree granted by a foreign administrative organ contradicts the fundamental principles of Polish family law and, hence, the fundamental principle of the legal order of the Polish People's Republic in the meaning of Article 1146, paragraph 1, p. 5 of the Code of Civil Procedure."

Recognition of a Foreign Judgement 4

Judgement of an English court concerning probate of a will. Interpretation of the concept of a "judgement" Articles 1145 and 1146 of the Code of Civil Procedure.

Supreme Court, Civil Chamber. Decision of November 25, 1977 (1 CR 9/77) in the case submitted by Janina W. concerning the recognition of a judgement by a foreign court (Decisions of the Supreme Court, Civil Series, 1978 No. 9 item 162).

Janina W. requested the Voivodship Court in Warsaw to recognize a judgement made by the English High Court of Justice, January 10, 1975, which probated a will made by Eugeniusz W. who died in 1974 and who before his death was domiciled in London; the High Court of Justice ruled also that pursuant to the will the inheritance left by Eugeniusz W. was awarded to Janina W. instituted as the executor of the will.

The Voivodship Court dismissed the application by Janina W. considering that pursuant to Article 1145 of the Code of Civil Procedure only a judgement by a court can be recognized in Poland and only provided that it meets all the requirements set forth in Articles 1145 and 1146 of the Code of Civil Procedure. The Voivodship Court in Warsaw was of the opinion that the document the recognition of which was requested by Janina W. was not a judgement in the understanding of Article 1146 of the Code of Civil Procedure for it represents an

authorization issued by a court with the aim of executing the will of the testator in accordance with the administrative procedure. And while it is true that in the system of English law such an "authorization" is indispensable in order to implement a will and constitutes a certain stage in the inheritance procedure, it does not lay within the purview of Articles 1145 and 1146 of the Code of Civil Procedure.

Janina W. brought the appeal in the Supreme Court asking for a revision of that sentence and for the acceptance of her application.

The Supreme Court changed the appealed sentence of the Voivodship Court and recognized the judgement of the High Court of Justice of January 10, 1975 as far as the estate and assets of Eugeniusz W. in Poland were concerned. In the reasons of its decision the Supreme Court stated (among others) the following:

"The deceased husband of the applicant — Eugeniusz W. was of British nationality and therefore, pursuant to Article 1108, paragraph 1 of the Code of Civil Procedure, matters concerning the inheritance left by him are not subject to jurisdiction (of Polish courts — M.T.) The inheritance left by Eugeniusz W. is situated on the territory of the United Kingdom, with the exception of monetary assets in the National Bank of Poland. Since the deceased had no immovables in Poland a request presented to a Polish court with the aim of ascertaining the right to inherit from Eugeniusz W. would have been rejected in accordance with Article 1099 of the Code of Civil Procedure. (...)"

It is not possible to agree with the opinion of the court of first instance that the said document cannot be recognized since it does not represent a judgement in the understanding of Articles 1145 and 1146 of the Code of Civil Procedure.

As established by the court of first instance in accordance with the procedure provided for in Article 1143 of the Code of Civil Procedure, under English law there is no institution of ascertaining the right to inheritance in the same meaning as it results from the provisions of Polish law which provides for a resolution in the form of a ruling indicating the persons and shares of the heirs.

By 'judgement' in the sense of Articles 1145 and 1146 of the Code of Civil Procedure one must understand not only such a decision by a foreign court which in its form corresponds to the concept of judgement under Polish law, but all sorts of decisions which, according to the law of the state where they were issued, result in extra-judicial legal effects.

The dissimilarity of foreign law does not justify the deprivation of a document issued by a foreign court of its features of a court judgement if the said document because of its contents entails consequences which, according to Polish law, follow a judgement by a court.

The contents of the document presented by the applicant, as indicated above, indicate that it contains features of a court judgement entailing extra-judicial consequences. A contrary view of the court of first instance would result in effects hindering or rendering impossible the pursuit of the case. For because of the lack of jurisdiction of Polish courts in inheritance matters from Eugeniusz W. the refusal to recognize the said judgement of an English court would be tantamount to the exclusion of the possibility to implement the inheritance rights from Eugeniusz W. on Polish territory.

As it appears from the above considerations, the premise which led the Voivodship Court to discuss the application must be viewed as erroneous. And since there are no other negative premisses listed in Article 1146 of the Code of Civil Procedure, the Supreme Court acting under Article 390 of the Code of Legal Procedure introduced an appropriate modification in the appealed sentence. The exclusion from the recognition of immovables is connected with the exclusive jurisdiction of Polish courts, if the inheritance left by Eugeniusz W. had contained immovables located on the territory of the Polish People's Republic.

Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw

by **ANDRZEJ W. WISNIEWSKI**

1. Award of 12 December 1977 in the Case No. 107/76

Undertaking by an agent to look after bank's reports concerning the customers' solvency cannot be understood as the acceptance of "del credere" responsibility.

Excerpt from Reasons

In its claim filed with the Court of Arbitration on May 29, 1976 the firm "L" of Hamburg demanded from the respondent Polish foreign trade enterprise "C" the payment of 173,310 DM plus 8 per cent interest. As grounds for his demand the claimant stated that the respondent failed to pay the commission due for the period from December 1975 to March 1976 upon the income from sale contracts concluded by the respondent.

The respondent admitted that the claimant was entitled to the commission in the amount of 173,310 DM. However, the respondent retained this amount because the claimant failed to fulfil his obligation of securing the payment due to the respondent upon the contract with the firm "P." The firm "P" becoming insolvent, the respondent remained unpaid to the amount in question for the goods delivered.

The claimant denied the respondent's assertion that he undertook to guarantee the customers' solvency.

The Court of Arbitration established the following:

On April 4, 1968 the parties concluded an agency contract as the basis for their developing commercial cooperation. When in 1974 some economic disturbances occurred in the FRG which could have an effect upon the solvency of the respondent's customers, the parties consulted each other on the subject of securing the respondent's dues. Referring

to these consultations, the claimant sent to the respondent a letter dated December 20, 1974. In this letter the claimant recommended the introduction into contracts between the enterprise "C" and its customers of the following clause:

"The part of goods declared ready to dispatch, the customer shall order his bank to report to the firm "L" that the amount covering the invoice is disposable within 10 days from the date of receipt of goods and documents."

The letter in question stated also expressly that the respondent undertook to look after the said banks' reports. Following the further text of the letter, the enterprise "C" was obliged to declare promptly by telex of the rough quantity and value of goods.

The above understanding should be considered as an agreement upon the procedure of fulfilment of the agency contract. The interpretation of these provisions as the acceptance by the respondent of "del credere" responsibility cannot be admitted. Introducing of such responsibility would have caused a fundamental change of the character and purpose of the agency contract, what obviously wasn't the parties intention (cf. Arts 65 and 354 of the Polish Civil Code applicable under Art. 17 of the agency contract).

In the contract concluded by the respondent on April 15, 1975 with the firm "P" there was included the above clause agreed between the respondent and the claimant. The contract was registered by the claimant and consequently the claimant either took or, at least, was able to take account of his duty in this respect thus undertaking the obligations specified in the letter of December 20, 1974. It must be said, however, that the confirmation of the contract with the firm "P" by the agent couldn't introduce him as the party to the contract of sale.

Numerous telexes were exchanged between the parties on the subject of the contract with the firm "P," establishing various dates of deliveries following the buyer's requirements. The firm "P" insisted upon the delivery in two parts to be dispatched by railway on August 25 and September 27, 1975. By telex on the August 28, 1975 the respondent informed the claimant that the first part had not been dispatched because of the inferior quality. On August 29 the respondent informed the claimant of his efforts to dispatch the goods on September 13, by road transport, asking the claimant to ask the buyer for the acceptance of this date. On August 30 the respondent again telexed the claimant asking for the confirmation of the September 13 date of dispatch and informing that the second part shall be ready on September 27. In the telex of September 1 the respondent urged for the answer to the

last telex. On the same date the firm "P" accepted the dates proposed under condition that the delivery shall be made directly by road transport and without further delay.

The respondent assumed that the telex dated August 30 included the declaration of the goods being ready to dispatch within the meaning of the claimant's letter of December 20, 1974. It would be, therefore, the claimant's obligation to see to the customer's ordering his bank to report of the amount secured to cover the invoice. The claimant was of the opinion that the telex of August 30 could be treated as such declaration as it concerned nothing more than agreeing of a new delivery date. What's more, the claimant gave no credit to the respondent's meeting of the dates specified in the telex of August 28. The delay was due to the inferior quality of goods; it followed that the respondent did not dispose of the goods of proper quality.

In the above matter the Court of Arbitration took into account that the parties maintained good trade relations and, on the way of harmonious cooperation, advantageous commercial effects were achieved. Up to the delivery for the firm "P" all the dues were paid by customers and no difficulties occurred in this respect. As the result, the parties released the formal attitude to interchanged instruments. The statement included in the telex of August 30 could have been accepted by the claimant as the declaration that the goods are ready to dispatch and the measures in order to secure the payment to be undertaken. However, the claimant failed to undertake these measures.

This attitude of the claimant to a very large extent was caused by the respondent. Firstly, the text of his telex did not meet in full the requirements specified in the letter of December 20, 1974, lacking the definite statement that the goods are actually ready to dispatch and the statement of rough value of goods. The entire correspondence together with the wording of the telex of August 30 may in fact suggest that only the agreeing of new dates of delivery was concerned. Later, more reasons for such interpretation were given by the respondent when dispatching the goods with further delay, not corresponding to the agreed specification and defected.

The circumstances on the part of the respondent could not, nevertheless, fully exonerate the claimant. The claimant, even of pure diligence, should have taken measures securing the buyers' solvency as the transaction was to be, finally, carried. The claimant was aware that, the economic conditions on the market changing, the insolvency of some customers may be expected.

Consequently, the Court of Arbitration considered the attitude of the respondent as not totally excluding the claimant's responsibility

to secure the respondent's dues. This attitude, however, must be treated as contributing to the suffered loss within the meaning of Article 362 of the Polish Civil code. This contribution, in the opinion of the Court, amounts to 60 per cent.

The loss suffered by the respondent amounts to 173,310 DM. Such amount was retained by the respondent from the claimant's commission. Taking into account the 60 per cent respondent's contribution to this loss, the claimant should be paid by the respondent 103,986 DM. The interest in this amount was due from March 23, 1976 being the date of retention of the claimant's commission. The return of the costs of arbitration was adjudged in proportion with the success of the claim.

2. Award of 20 June 1978 in the Case No. 67/77

When executing his right to buy non-delivered goods on the marked on the seller's account, the buyer is obliged to act dilligently in order to obtain the goods at the average market price.

Excerpt from Reasons

In his claim filed with the Court of Arbitration on April 25, 1977 the claimant, the company "U" of Hamburg, demanded the respondent Polish foreign trade enterprise "A" to pay 16,764 DM with interest from the date of claim. The producer of the goods in question, the plant "Z," appeared before the Court as the intervening party on the part of the respondent.

The claim resulted from the difference between the contract price of caseine which delivery had been considerably delayed by the respondent, and the price effectively paid by the claimant being compelled to buy the goods on the respondent's account.

The contract in question was submitted to the General Conditions of Sale and Delivery of Polish Casein of June 15, 1972, attached thereto.

The respondent as well as the intervening party rejected the claim arguing that:

a) The respondent was not obliged to the "most prompt" delivery of the part of goods under dispute. The contract was to be executed within the period of time from March to June 1976 and the delivery was made within this period of time,

b) The fact that the part of casein under dispute had not been delivered in the time required by the claimant was due to the circumstances of *force majeure* within the meaning of the clause 6 c of the General Conditions of Sale and Delivery of Polish Casein stating that the seller is not liable for the delay caused by railway as the result of *force majeure*,

c) The claimant, in addition to not being entitled to the purchase of the respondent's account, had not executed due diligence to buy the goods at the lowest price and paid the price considerably higher than the prices on the FRG market in this time.

The respondent was ordered by the Court of Arbitration during the hearing of January 18, 1978 to present the proof of the force majeure circumstances within 30 days. In the last day of this term the respondent filed with the Secretariat of the Court a certificate in this respect issued on February 16, 1978 by the Polish Chamber of Foreign Trade.

The Court of Arbitration rejected the respondent's opinion that he was not bound to deliver in the time required by the claimant. Following the contract and the mentioned clause 6c of the General Conditions as well as the respondent's telexes, the respondent undertook to deliver caseine from March to June 1976 in parts required by the claimant at 14-days notice (as concerns the dispatch by railway). Taking into account that the first part had been required on February 26 it must be accepted that the respondent had been in delay with the delivery of 20 t. casein destined to Harzburg, already from March 11, 1976.

The Court of Arbitration did not share the respondent's opinion either that the delay in question had been due to the railway troubles being an effect of *force majeure*. The certificate issued by the Polish Chamber of Foreign Trade stated that it was issued upon the respondent's motion following Clause 6c of the General Conditions. However, the statement that the delay in the delivery "has been caused by the troubles in procuring an amount of proper railcoach in February and March 1976" does not indicate *force majeure*. Such troubles may exempt from the liability only provided that they are due to such *force majeure* events as e.g. flood or total breach of communication resulting from a plague which cannot be foreseen nor prevented. The respondent failed to present a proof of *force majeure*; moreover, this argument was introduced by him only after the dispute concerning the claimant's purchase had arisen. It is, then, pertinent to remind that in the international trade there is a generally established custom to inform the creditor without delay of *force majeure* events.

The Court of Arbitration found justified the respondent's opinion that the price paid by the claimant for the 20 t. casein in question has been excessive as compared with the prices on the FRGxmarket from March 15 to 20, 1976. The Court, however, rejected the objection as to the claimant's good faith in paying such price. The claimant have shown his good faith when repeatedly admonishing the respondent of his delay and insisting upon the dispatch to the last moment possible for him. The respondent made the claimant's position difficult failing to inform him, still in his telex of March 20, of the date of dispatch.

During the hearing the claimant agreed to accept the DM 2,950 per t. price of caseine in place of the effectively paid DM 3,180 per t. as the base for accounting his claim.

The Court of Arbitration, therefore, adjudged to the claimant DM 12,210 damages, this amount being the difference between the price of the delivery in dispute calculated upon the market price DM 2,950 per t. and the contract price thereof. The Court adjudged also the claimed 5 per cent interest.

3. Award of 21 April 1978 in the Case No. 74/77

The provisions of the frame-contract have priority before the provisions of general conditions attached to a singular contract. This principle, however, is valid only in relation to the goods covered by the frame-contract.

Excerpt of Reasons

On April 29, 1977 the Polish foreign trade enterprise "C" filed with the Court of Arbitration the claim of DM 59,869 with interest and costs of arbitration from the Company "K" of Neustadt in Holstein, FRG. The claim consisted of four items, and namely:

- 1) DM 55,269,17 as the price of goods delivered to the respondent during May 1976,
- 2) DM 1,860.00 as the price of goods delivered during November 1975,
- 3) DM 614,51 as the price of samples delivered in September 1975,
- 4) DM 2,126.08 as the balance from the invoice which has been calculated upon wrong price.

In its statement dated July 1, 1977 the Company "K" pleaded that the Court of Arbitration has no jurisdiction in this dispute.

On August 12, 1977 the claimant noticed the Court of Arbitration that the Company "K" have paid, on July 28, 1977, an amount of DM 54,069.00 from the item 1) of the claim and an amount of DM 614,51 to cover the item 3) of the claim. Thus, the claimant confined his claim to the interest as previously demanded and to the amount of DM 5,186.06.

On November 9, 1977 the Presidium of the Court of Arbitration decided upon the plea as to the jurisdiction of the Court. The Presidium, stating that the provisions of the frame-contract signed by the parties to the dispute on February 26, 1970 had priority before general conditions formed as a part of a singular contract, found the plea unjustified.

In the statement of February 21, 1978 the respondent stated that:

— The claimant, in spite of repeated demands, had failed to draw up the rendering of accounts between the parties; therefore, the respondent gave no reason for the initiation of arbitration proceedings and the cost thereof should be borne by the claimant,

— By the same reason, the claim of interest in the amounts already paid during the proceedings was not justified,

— As to the three items to which the principal claim of "C" was limited (by the notice of 12 August 1977):

1) The claim of DM 1,860.00 was not justified as "C" did not provide any proof as to the dispatch of the goods. Moreover, the claim concerned the ceramic goods which were not covered by the frame-contract of February 26, 1970 and, in the decision of the Presidium of the Court of Arbitration of November 9, 1977 lacking any statement in the respect of ceramic goods, the plea as to the jurisdiction of the Court was still valid in this respect,

2) The claim of DM 2,126.08 concerned the balance account which had been procured by the claimant only after 8 months from the date of delivery. In the meantime the goods were re-sold unpacked on the basis of the original invoice,

3) The claim of 1,199.98 DM deducted by the respondent when covering the original claim of April 29, 1977 (item 1) was not justified as this amount makes compensation for:

a) the amount of DM 72.80 to be paid to the respondent as costs of dispatch under contract No. 76521/51.543,

b) the amount of DM 850,00 mentioned in the account rendered between the parties on behalf of the firm "K,"

c) the amount of DM 96,90 due on grounds of the claim of non-delivered goods.

d) the amount of DM 44.40 claimed by the Company "K" upon the non-delivery of another part of goods,

e) the amount of DM 135.88 due for the goods bought by the firm "K" for the claimant.

In its statement of April 8, 1978 the enterprise "C" limited its claim to: 1) the amount of DM 4,182.38 with 8 per cent interest from February 17, 1977, 2) the 8 per cent interest in the amount of DM 614.51 for the period from February 17 to August 4, 1977, 3) the 8 per cent interest in the amount of DM 54,069.19 for the period from February 17 to July 28, 1977, 4) the return of the costs of arbitration.

During the hearing taking place on April 21, 1978 the parties defended their opinions expressed in previous statements.

The Court of Arbitration came to the following opinion:

1) The claim of DM 96.90 on grounds of non-delivery compensated by the firm "K" when paying the original claim of "C" was not proved during the proceedings. The amount of DM 99.40 had been paid by the claimant twice: by admitting the compensation and then during the proceedings. Therefore, the amount of 196.30 DM should have been adjudged to the claimant with interest.

2) The firm "K" was not right when objecting to the adjudgement of the interest in the amounts of DM 54,069.19 and DM 614.51 paid during the proceedings. The mutual accounts of both parties were, it is true, settled only during the proceedings. Nevertheless, the firm "K" failed to pay on the demand of the claimant without even objecting to the fact that the amounts in question were due and without any other grounds for their delay. Found in the debtor's delay, the firm "K" was liable to the claimant for the interest in the amounts in question from the date of the demand of payment (February 17, 1977) to the date of payment, the interest amounting under Polish law to 8 per cent yearly.

3) It must be denied also in the respondent's demand that the claimant should bear the costs of arbitration. Under Article 101 of the Polish Code of Civil Procedure the respondent may claim the return of the costs only provided that he gave no reason for the proceedings and admitted the claim in his first statement in the case. The respondent's position was contrary to both the mentioned premises as he failed to pay until the proceedings even these amounts that remained unquestioned by him and did not admit the claim in his first statement (dated July 1, 1977).

The Court of Arbitration decided to adjudge the costs of arbitration to the claimant from the firm "K". Dividing the costs of arbitration, the Court took into account the relation between the amount of the

payments adjudged from the claim plus the payments made by the respondent after the beginning of the proceedings and the amount of the payments in respect of which the claim had been denied or the motion rejected.

4) The firm "K" rightly assumed that the frame-contract providing for exclusive sales did not cover ceramic goods. The decision of the Presidium of the Court of Arbitration of November 9, 1977 stated that the provisions of the frame-contract had priority before general conditions of a singular contract. This, however, was related only to the goods covered by the frame-contract. As the consequence, the contract for ceramic goods was not subject to the arbitration clause contained in the frame-contract and the respective motion had to be rejected on grounds of the Court not being competent.

5) As to the amount of DM 2,126.08 as a balance for the delivery of goods wrongly invoiced, the results of the mistake should be borne by the claimant. The goods in question were invoiced on March 26, 1976 and the mistake indicated only on July 12 which letter, moreover, the firm "K" denied to receive. The demand of the balance was sent to the firm "K" on October 7, 1976. In this case the Court of Arbitration assumed that the claimant failed to observe the due diligence of a merchant. The Court trusted to the assertion of the respondent that the goods were re-sold unpacked on grounds of the original invoice. The claim in this point has been denied.

6) In relation to the amounts of DM 54,064.19 and DM 614.51 which were paid by the respondent during the proceedings and to the amount of DM 1,003.68 which the claimant excluded from his claim, the proceedings were stopped.

BOOK REVIEWS * COMPTES RENDUS

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. X, 1980
PL ISSN 0554-498X

Remigiusz BIERZANEK, *Zalatywianie sporów międzynarodowych 1945—1973. Studium prawnopolityczne [The Settlement of International Disputes 1945—1973. A Study of the Legal and Political Aspects]*, Warszawa 1975, MON Publ. 298 pp.

The peaceful settlement of international disputes has always been one of the key problems of international law and has acquired particular importance over the past fifty years. With the renunciation of war, the peaceful means of resolving international disputes have become universal norms binding on all states. They attract therefore the attention of a growing number of scientists and constitute the subject of scientific scrutiny not only from the legal but also from the political point of view. This is reflected in the work by Professor R. Bierzanek which deals with both legal and political aspects of the problem and in this approach lies its particular importance for our science of international law and international relations.

The scope of the study is very broad and comprehensive. The author analyses the legal and political aspects of all methods of resolving international disputes over the entire post-war period. He examines not only the area of application of specific means to resolve disputes but also their effectiveness, relating always the area of application and effectiveness of each method to the new political conditions of our present day international community. Hitherto nobody has undertaken in our country such a broad study.

It goes without saying that the

author was well aware of the fact that a full implementation of such a project would involve very broad research of a comparative nature. Indeed, it would have been necessary to analyse all international disputes of the past thirty years from the point of view of the legal and organizational measures undertaken to deal with the situation as well as from the point of view of the political aspects of the disputes and the means applied to resolve them. In order to cope with this task the author relied on the comparative research already carried out on the disputes of the post-war period and on the comprehensive political and legal studies dealing in a comparative way with international problems and attempting to elucidate the developmental trends in the settlement of international disputes. Using this type of studies R. Bierzanek tried to offer a synthesis and some conclusions of a prognostic nature.

The work by R. Bierzanek is divided into seven chapters. Chapter I is of an introductory character and, hence, its title "Definition and Types of International Disputes in the System of the United Nations." Chapter II bears the title "The Settlement of International Disputes in the System of the United Nations" and contains an analysis of the provisions of the Charter and the related Déclara-

tion of the Principles of International Law Concerning Friendly Relations and Cooperation Among States adopted October 24, 1970. Chapter III ("Studies on the Settlement of International Disputes in the Post-War Period") includes a general review of the disputes of that period, of the methods applied to resolve them and examines the factors which affect their solution.

The consecutive two Chapters are devoted entirely to a broad presentation of the methods used in the post-war years to resolve international disputes. Chapter IV deals first with diplomatic means, such as direct negotiations, good offices and mediation, investigation commissions and conciliation commissions. Chapter V examines international judiciary organs with special emphasis on the role and importance of the International Court of Justice.

Treating it as a separate subject, Professor Bierzanek examines in Chapter VI the role of international organizations in the settlement of international disputes and deals separately with the United Nations, the specialized agencies and the regional organizations. The last chapter bears the title "Theoretical Concepts Relating to International Disputes" and is followed by a series of concluding remarks.

The titles of the chapters reflect the broadness of the author's approach in dealing with the problem of the resolution of international disputes. Almost all related problems are being thoroughly analysed from both the political and legal points of view.

The fundamental thesis and the guiding idea of the book is the assertion that there is enough ground to consider the principle of the peaceful settlement of disputes as a universal principle of international law, which is binding all states. It goes without saying that this principle is

closely connected with the principle of refraining from the threat or the use of force. Both serve the same purpose—to maintain international peace and security. However, the author points out quite rightly that the principle of the peaceful settlement of international disputes cannot be treated only as a supplement to the principle prohibiting the use of force or as one of its aspects. In particular, it cannot be considered that a state fulfils its obligation to settle peacefully its disputes with other states by refraining only from the use of force. For it is not enough to adopt a passive attitude. States must actively aim at resolving their differences so as not to endanger international peace and security. Professor Bierzanek emphasizes strongly and quite convincingly the autonomous character of the principle of the peaceful settlement of disputes as related to the principle of refraining from the threat or use of force.

While presenting various methods of peaceful settlement of international disputes, Professor Bierzanek states that the prevailing opinion among scholars and writers is that the international judiciary and, especially, the International Court of Justice are in a state of deep crisis. The statement prompts him to take a closer look at this matter and, hence, the chapter entitled "International Judiciary" which is the most extensive in the whole book.

The author dissociates himself from the extreme views which contest the usefulness of the International Court of Justice. He refuses to relate the undeniable crisis of the international judiciary system in the last decades to the existence of a fundamental contradiction between the international judiciary system in general and the nature of international relations. The origin of the crisis must be sought, in his opinion, in the

first place in the conditions which determined the evolution of the post-war international relations and in the erroneous conception of an international judiciary. Too high hopes were set on international judiciary methods and, especially, on the International Court of Justice and no wonder that these hopes were shattered when confronted with actual life.

Not only does Professor Bierzanek refuse to share the pessimism with regard to the international judiciary system, he sees even a new chance for its activity in the development of interitatorial economic cooperation. He foresees that the development of economic contacts will give rise to a great number of disputes, in which the legal aspect will be predominant while the political aspect will be of minor importance. The author is quite right when he assumes that in such cases international courts

may prove to be the most useful method for the parties concerned in settling their differences.

In this review attention was drawn only to two problems among many others dealt with by Professor Bierzanek in his book. These two problems reflect well the character and scientific method applied by the author in all his considerations. In this connection, particular emphasis must be laid on the comprehensive treatment of all analysed phenomena on the basis of the most recent findings of world science and on the fact that they are considered in their relation to the various forces and conditions which determine the present state of international relations. It is a most recommendable book which both the expert in international law and the expert in political science will find most useful.

Jan Kolasa

Ludwik GELBERG, *Problemy prawne współpracy państw bałtyckich* [Legal Problems Arising from Cooperation of the Baltic States], Wrocław 1976, Ossolineum, 148 pp. Instytut Państwa i Prawa PAN (Institute of State and Law of the Polish Academy of Sciences).

The study by Professor Ludwik Gelberg is, in fact, a concise legal monograph of the Baltic Sea. It goes without saying that in a monograph of each sea, even so specific as the Baltic, the main emphasis must be put on international maritime law.

The author has divided, as it seems quite rightly, the presented material into nine chapters; the first deals with the Baltic Sea in its geographical and economic setting ["The Baltic Sea and Its Coastal States"]. Among the seven Baltic states with particular economic interests arising from their geographic position three (Poland, Finland and the German Democratic Republic) have to access

to another sea and therefore the Baltic Sea plays in their life an exceptional role. The mere fact that our country is among these three states justifies plainly the publication of that book; the second factor in favour of the publication is that the problem is of current interest, in view of the continuing debates in the UN Conference on the Law of the Sea.

The importance of the Baltic Sea for the remaining states which have access to other seas is out of proportion in relation to the importance of these other seas; this conclusion is borne out by a wealth of data quoted by the author and illustrating the tonnage of the merchant ships of

the Baltic states, the volume of production of their shipyards, the traffic in their ports, etc.

Chapter II offers a brief historical outline stretching from the period of struggle for the *dominium maris Baltici* in the past to the present time of the Baltic states' peaceful co-operation. This eventful and cruel history of the Baltic Sea leads us to the problems of history of international law of the sea dominated by the struggle of two approaches: one, trying to annex the sea and to subordinate it to the interests of only one state or sovereign and the second, on the contrary, fighting for the freedom of the sea, if only for the freedom of the high sea.

The struggle between these two concepts took place in the past (as reflected in the historical sources) with the parties being convinced that the Baltic Sea can be "closed" in the physical sense; hence the specific and important role of the entries into the Baltic, first of the Danish Straits and later also of the Kiel Canal. The author deals with these "links of the Baltic Sea with the world's ocean" in Chapter III.

Now I would like to recall the statement by W. Konopczyński who said that the Danes realized relatively early in history that the Sund was worth more than the herrings caught in its waters, for up to the year 1857 they levied Sund duties on ships and merchandise. The struggle for the abolition of the Sund duties ended only with the signing of the Treaty of Copenhagen; its origin and importance are so lively described by the author.

Professor Gelberg proceeds to deal with the present-day problems of sea straits and canals which took so much time of the UN Conference on the Law of the Sea. For our State a free access to the Baltic was and remains a fundamental condition of

the development of our maritime economy and foreign trade.

As it is well known, the law of the sea is not limited to merchant shipping it was always interested in the movement of warships and in the exploitation of the resources of the sea i.e. in fishery. These vital economic problems are connected not only with the freedom of navigation but, above all, with the division of the seas according to the international law into internal waters, territorial sea, contiguous zones, as well as with the expected possibility of exploiting the resources of the sea bed and of the exploitation of mineral resources (oil, ores, etc.) hidden beneath the sea bed. The author deals with the division of the waters of the Baltic Sea in Chapter IV and discusses the legislation of the Baltic States; these legal acts are generally unknown in Poland and almost not commented. The wealth of factual material illustrating the legal position and the juridical analysis of that material represent in my opinion the greatest value of the reviewed book, for it offers practically a full picture of the legal status of the Baltic Sea under international law and describes the legal frame work within which each Baltic state operates.

Of particular interest are the author's views contained in the four subsequent chapters dealing with the problems of the continental shelf of the Baltic (which it may be recalled is an entirely shelf-sea) with the problems of the protection of the living resources of the Baltic, with the problems of the protection of the maritime environment and with the co-operation of the Baltic states in the field of maritime salvage. The book closes with a chapter entitled: "Problems of the Legal Situation of the Baltic Seas" containing the author's conclusions. This is followed by the texts of a series of documents which,

to the best of my knowledge, have been published in Polish for the first time.

It seems to me that with the publication of Professor Gelberg's book, our still non-rich literature on the law of the sea has been enriched by a valuable monograph on the Baltic Sea, all the more needed in the present era of expected and already occurring major changes in international maritime law.

I would like, none the less, to rise three problems which, of course, are not of equal importance but which, in my view, have not been fully explored and explained by the author of the reviewed book.

In the inter-war period two international treaties concerning the Baltic Sea have been signed: the first, a convention on the suppression of alcohol contraband was signed in Helsinki August 19, 1925 and ratified by Poland (see "Dziennik Ustaw" — "Journal of Laws," 1927, No. 75, item 656); its signatories included the USSR, Germany, Denmark, Finland, Sweden, Norway and Poland; the second was an international agreement regulating the catch of certain species on the Baltic, signed in Berlin December 17, 1926 and ratified by Poland (see "Journal of Laws," 1931, No. 30, item 207). These two agreements are continuously listed in the Polish index of legal acts; the question arises as to whether they are still considered to be binding by the remaining signatories. It seems that the very stringent rules provided by the convention on the suppression of alcohol contraband are not followed in many a port of the Baltic states which, formally, are parties to this convention. I realize that in order to provide an authoritative answer to this question the author would have to carry out a difficult and time consuming investigations covering the internal legislation of the Baltic states

as well as their legal practice (*praeter legem*). From the point of view of the doctrine of international law the question as to what happened to this convention is quite in order. The same question could be put with respect to the Berlin agreement of 1926 which is mentioned by Professor Gelberg on p. 71 of his book but which lost its binding force in view of subsequent agreements. Taking this problem in a broad sense one may ask: how does the doctrine of international law treat international agreements which were not formally denounced but ceased to operate? Is this the result of the presumed clause of *rebus sic stantibus* which means that in view of the changed conditions resulting from World War II these agreements have lost their force of law?

The second and third problem are interconnected and result from the specific legal status with which, it seems, the author would like to endow the Baltic Sea. I agree that the Baltic is an "inland sea" surrounded by seven coastal states, that it has its specific features, that it should become "a sea of peace"; I must however express some reservations as to the excessive regulations (which may be justified as the means to protect the environment), needed to enhance the legal particularity of the Baltic Sea which may disturb the navigation of merchant ships. For example, Denmark introduced a (still voluntary) piloting of big ships passing through the Danish Straits; if this provision regulating the traffic of big ships were to go further, it could adversely affect the situation of the Baltic ports, and it has to be recalled that we are expanding at present the Northern Port so as to enable it to accommodate big ships which represent, by their very nature, a greater navigation risk. Here lies a very difficult dilemma: the implementation

of some political and legal objectives (which—I would emphasize that again—may be justified from the point of view of environmental protection, of protection of the living resources of the Baltic) may be prejudicial to the interests of the Baltic ports. Some used to call once the Baltic Sea “The puddle of the Atlantic” and some masters of larger vessels are still afraid to enter the Baltic Sea as allegedly “too narrow and shallow.” I think therefore that regional, Baltic agreements ought to (and can) supplement only and fill certain gap in the common law of the sea but should in no way hamper the shipping trade. Being engaged for more than twenty five years in the study and practice of commercial maritime law I am always prejudiced against too specific a treatment of every kind of maritime legal problems, including problems of the international law of the sea, for fear that such treatment may frighten away shipping customers. I agree with the author that the Baltic Sea requires specific legal regulation provided only that this be kept within reasonable limits (it may be recalled that this concept was introduced into the law of the sea by the commercial maritime law).

I do not share the opinion that from the point of view of the security of the Baltic states it is necessary (following the legal status of

the Black Sea) to limit the tonnage of the biggest foreign warship which enters the Baltic Sea: at present such a “big” warship could only serve the purpose of “showing the flag,” but could hardly constitute a threat to the security of the Baltic states. The air force would easily locate such a ship. Besides, such a target would be extremely vulnerable in the narrow and shallow waters of the Baltic. The experience of World War II demonstrates that the larger Polish warships as destroyers’ had to leave the Baltic Sea, that even submarines were easily detectable from the air. These considerations lead to the conclusion that peaceful visits of foreign warships, whatever their size, represent no danger, whereas inimical demonstrations of even small ships cannot be tolerated. The decisive factor in this respect is the intention of the state and its allegiance to the principles of peaceful intercourse.

Professor Gelberg’s book fills a gap in our literature on the law of the sea. Its right conclusions will, no doubt, contribute to a better knowledge and understanding of the extremely important role in our national economy of the Baltic Sea which became only in the course of our times a sea of peace, a sea which does not separate but brings nations closer together.

Stanislaw Matysik

Andrzej JACEWICZ, *Pojęcie siły w Karcie Narodów Zjednoczonych* [*The Concept of Force in the Charter of the United Nations*], Warszawa 1977, MON, 176 pp. Polski Instytut Spraw Międzynarodowych (Polish Institute of International Affairs).

The question of prohibition of threat or use of force has been a particular issue of interest for the international community. The prohibition has been instituted in the in-

ternational law as a result of its progressive development since the October Revolution. The traditional theory of international law not only allowed the war, but it recognized

the right to make war as an attribute of the state sovereignty. The Covenant of the League of Nations signed in the 1919 had still permitted in some situations lawful resorting to the military aggression. The crucial change in the discussed subject was brought by the Briand-Kellogg Pact signed in 1928. It made any war illegal with the exception of self-defense and the war resulting from the application of the sanctions of the League of Nations. In the 1945 the Charter of the United Nations brought further development in the area of illicit coercion prohibiting then not only the war but "the threat or use of force" (para. 4 of Art. 2). The principle of refraining by the states from the threat or use of force has been confirmed in a number of later agreements, conventions and international declarations.

The principle under discussion plays an immense role and it occupies a particular place in the international legal system. It lays a corner-stone for the idea of peaceful co-existence. Observing it is, as a matter of fact, the initial condition for the effective implementation of other principles of international law.

The problem of interpretation of the concept of force has been in the centre of attention in the UN for several years and it also presented a controversial issue at the Conference on Security and Co-operation in Europe. Namely, has the UN Charter in the prohibition of paragraph 4 of Article 2 included only the military force or also other non-military forms of coercion such as for example the economic or political pressure. This particular problem has been treated by Andrzej Jacewicz in his work "The Concept of Force in the Charter of the United Nations."

In order to answer the question about the content of the concept of force, the author presents a detailed

and precise literal, logical, teleological and systematic interpretation of the UN Charter and further—the practical interpretation (a formal and factual verification) of the concept of force by the members of international community. There have been also included the auxiliary means of interpretation—travaux préparatoires of the UN Charter and the international practice of the years before the 1945.

Employing the literal interpretation the author comes to the conclusion that paragraph 4 of Article 2 of the UN Charter allows both the narrow and wide definition of the term "force." Similarly, the logical interpretation leads to an identical conclusion. The teleological interpretation permits of taking the wide concept of force. Also making the systematic interpretation, the author believes that the wide understanding of the word "force" of paragraph 4 of Article 2 of the UN Charter is the necessary condition for preventing the gap and contradictions in the system of the principle of international law included in it.

Although the UN Charter plainly allows for accepting the wide interpretation of the term "force," the opinions of the members of the United Nations on this issue are, according to the author, essential. Hence, A. Jacewicz set to study the interpretation of the UN Charter as it has been done in practice. He carried out the formal test of the resolutions of the UN General Assembly and the particular intergovernmental agreements. Unfortunately, the wording of the resolutions does not present a basis for the solution of the definition of the term "force." Similarly, a review of particular international agreements leads to the conclusion that only the Programme of Peace and International Co-operation resolved on the II Conference of the Heads of

Government of non-aligned countries in Cairo in the 1964 accepts, without any doubt, the wide definition.

Trying to test the actual point of view of the international community the author considers the records of debate and the projects for the definition of force presented at the time of works over both the codification of international principles of law CONCERNING with friendly relations and co-operation among the states and the codification of the law of treaties. At that very time especially the problem interesting to the author was extensively discussed. Although the presented review of opinions of a number of countries induces to the conclusion that there is no agreement on the definition of the concept of force, it was possible to establish the number and determine the political geography of adherents to either the narrow or wide definition. The author of the reviewed book maintains that ultimately, 79 out of the 94 states whose opinion on the issue of meaning of the term "force" has been recorded, have declared for the wide definition. This represents about eighty five per cent. "Naturally — A. Jacewicz argues — if we knew opinions of all states, this percentage could change, but one cannot exclude a possibility that it would rise even higher." Except for several states from Latin America, one can say that the group of adherents to the narrow interpretation of the term "force" coincides now with the number of merely over ten most developed capitalist states. The review of practical interpretation of the UN Charter by its signatories exhausts the list of basic means which have to be considered in the interpretation of international agreement. The author was right, however, to have recourse to historical interpretation in order to consider the concept of force in the light of documents of the San Francisco Conference and the in-

ternational practice before the 1945. This is because one of the arguments of the adversaries of wide concept of force was the statement that it had been clearly the intention, resulting from the travaux préparatoires, of the founders of the UN Charter to limit the prohibition to the armed force. The studies carried out lead to the conclusion that the term "force" had not been a synonym to the armed force even in the past.

What is the author's final conclusions? — He rightly affirms that there are no convincing legal arguments which would bar from accepting the wide concept of unlawful force by all the international community. As A. Jacewicz correctly says, it is the arguments of political and not legal nature, contrary to all the official assurances of governments of the developed capitalist countries, which are decisive in rebutting the wide interpretation! of the discussed term.

The clarity and high precision of the author's argumentation must be stressed in the review of the discussed book. The author's reasoning is coherent and conclusions are correct and well grounded.

The book's wide range of sources and exhaustive literature on the subject in several languages are of high value; the bibliography, excluding the UN documentation and dictionaries, embraces 200 items. The vast documentary material and the toil of its systematisation are well worth stressing. The author has accomplished this immaculately. Thousands of documents of various UN organs, several special committees, the First and Sixth Committees, the General Assembly, the Security Council, the International Law Commission, the Vienna Conference on the Law of Treaties, and also the documentation dealing with other organizations including the review of international

practice of the in-between the wars period and the debate of San Francisco Conference—all prove distinctly the amount of interest, time and effort which have been devoted to the issue of force. This is worth noting with regard to the surprising lack of reference to the problem in many textbooks of international law.

It has to be included among the merits of the book that it gives a detailed analysis of the views of states and the doctrine of the studied subject. The established conclusions result from the text and the critical analysis of arguments of parties in conflict but never from the opinion assumed in the outset. This is simultaneously accompanied by A. Jacewicz's not stereotyped approach to the few statements and conjectures which have been widely propagated in the academic works. He questioned, for example, the narrowing of the concept of peace to the antithesis of war or use of armed force, and also the separate treatment of the rule prohibiting threat and use of force from the rule of non-intervention. After deep analysis of the above problems the author comes to the conclusions which, according to the reviewer, initiate an interesting doctrinal discussion. These very parts of author's discussion are the most interesting themes of the work which, in effect,

strengthen the general thesis of the book.

At the XXXI Session of the UN General Assembly the Soviet Union presented its initiative for the conclusion of a world treaty non-use of force in international relations. The Soviet proposal captured the world opinion. The UN General Assembly at the XXXII session decided to establish a Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. The committee will be in charge of preparing a draft world agreement on the non-use of force in international relations, the pacific settlement of disputes and other recommendations. It must be added that the agreement would not only be the confirmation of the principle from the UN Charter, but —its development and refinement. Hence comes the need for a discussion, and perhaps, even a chance of taking the wide definition of force. With this optimistic notion A. Jacewicz closes the book.

The reviewed book has received one of the annual prizes of the Polish Institute of International Affairs, awarded for the best research works on contemporary international relations published in the 1977 in Poland.

A. E. Lebiecki

Organs of International Organizations, PWN – Polish Scientific Publishers, Warszawa, Poland. Sijthoff Noordhoff International Publishers BW, Alphen van de Rijn, The Netherlands, 1978, 137 pp.

Krystyna Michalowska-Gorywoda

Volume 10 pages 287-290

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Jan ŁOPUSKI, Janusz SYMONIDES, *Międzynarodowe organizacje morskie [International Maritime Organizations]*, Wydawnictwo Morskie, Gdańsk 1978, 292 pp.

For more than a decade the international community has been following with keen interest the developments of the maritime economy. Many problems are calling for urgent solutions and regulation as they effect significantly the future of mankind. These are, on the one hand, such problems as the careless exploitation of the living resources of the seas, the rapidly progressing pollution of the marine environment, the growing congestion of the maritime routes and,

on the other hand, such problems as the important potential place of the seas as a source of food and of the seabed as a source of raw materials. Because of the specific legal situation of the sea, these and many other problems can not be solved or regulated by single states and require coordinated action by many states. Therefore, in contrast to problems connected with the activities of men and states on the land, the overwhelming majority of maritime problems fall within

the scope of activity of international organizations.

Till now, the vast Polish literature devoted to international organizations had no monograph dealing with international maritime cooperation. The book by Jan Łopuski and Janusz Symonides fills therefore an important gap. On the one hand, it offers a presentation of the organizational framework of international cooperation arising from man's activities on the sea and, on the other hand, a wealth of fundamental information about international organizations dealing with maritime problems with a view of satisfying in the first place the needs of those engaged in practical action.

Part I of the book is of a theoretical nature. In a very concise and readable form the authors examine the evolution of the institutional system of international cooperation on the sea against the background of the broader system of international relations, taking into consideration the role played by the three main categories of international organizations: the UN system, the intergovernmental organizations and the non-governmental organizations. Among the considerable number of problems they selected and presented clearly, though perhaps too shortly, all basic elements of the system of international cooperation on the sea and the role of the above mentioned three groups of international organizations.

They begin with a discussion of the factors affecting the development of international maritime cooperation. Further, they examine the role of the UN system in this field, emphasizing quite rightly its central place in organizing that cooperation. They analyse the activities of the UN system in four fundamental areas of basic interest and great achievement, namely: the codification and development of the law of the sea, the pro-

tection of the marine environment, the planning and coordination of oceanologic research, the peaceful uses of the seabed and ocean floor.

Analysing the role of intergovernmental organizations not belonging to the UN system in the field of international maritime cooperation, the authors point out that, while the organizations of the UN system deal with almost all relevant problems and, as a rule, on a world scale, the intergovernmental organizations devote their attention to the same problems but on a regional scale, with special emphasis on navigation and sea transport and, in some cases, on fisheries and fishing industry (p. 44).

The analysis leads the authors to a very interesting conclusion. They point out that as a result of the consideration of maritime navigation problems as one of the elements of a system of economic relations embracing a given economic region or an integration grouping, the states of such a region or grouping refrain from establishing separate intergovernmental organizations to deal with maritime navigation problems on a regional scale preferring to include these problems in the activities of organizations which are concerned in a much broader sense with the economic problems of that region or grouping. Separate shipping organizations are, on the other hand, created by economic units from that region as non-governmental organizations.

The authors discuss the role of international organizations of the three groups of states: socialist, capitalist and developing states in regulating cooperation of these states in the field of shipping and fisheries. As far as the analysis of the role of the international organizations of the socialist states is concerned, attention must be drawn to two erroneous statements. The first speaks of the "spe-

cialized organizations which emanate from the Council for Mutual Economic Assistance and which are taking over some specific functions" (p. 47). The truth is, however, that the specialized organizations of the CMEA are not an emanation of the Council, but are created independently, although in most cases on the initiative of the Council. Their authority reflects the will of the founding member-states and is not the result of a transfer of authority by the CMEA.

The second statement, reflecting a formula contained in the *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych* [Encyclopedia of International Law and International Relations], Warszawa 1976, p. 321, asserts that as a result of the establishment of a series of organizations of socialist system of the Organization of American states lies not in the states with restricted functions, a whole system of specialized organizations of the CMEA with more than 20 such organizations came into being (p. 47). However the essence of the concept of a "specialized organization," be it in the United Nations system or in the CMEA system or in the system of the Organization of American States lies not in the restricted (specialized) scope of its powers, but in its legal structure, which determines its special relationship with the parent body. The term "specialized organization" denotes a legal and not a technical concept. In other words, not each organization of socialist states with a restricted (specialized) competence is a specialized organization of the CMEA, but only such an organization which—apart from its restricted competence—has a special relationship with the CMFA determined by a special agreement concluded by the CMEA with that organization. In 1979 only 14 organizations of socialist states, and not 20, had the sta-

tus of specialized organizations of the CMEA.¹

The theoretical part of the book closes with considerations on the role of international non-governmental organizations in the field of international maritime cooperation.

The second part of the book contains some basic information about the various organizations engaged in international maritime cooperation. These organizations are divided into seven groups according to their principal field of activity: shipping and sea transport, working conditions of seamen, maritime legislation, fisheries, protection of the marine environment, scientific research, social and cultural problems. The presentation of specific organizations belonging to a particular group is preceded by general remarks concerning the nature of the problems with which these organizations are dealing and the organizations themselves. In all, 170 organizations have been covered along the following pattern: name of the organization, its membership, aims and purposes of the organization, structure of the organization. If the organization is of major importance its activities are also discussed. The analysis is carried out in a conscientious and businesslike manner. Since—as stated by the authors in the introduction—the book is meant to be used above all by people engaged in practical work, it would be advisable to add in the second printing a description

¹ Cf. Z. M. KLEPACKI, *Podstawy prawne oraz zasady współpracy i koordynacji działalności socjalistycznych organizacji międzynarodowych* [Legal Foundations and Principles of Cooperation and Coordination of the Activities of the Socialist international Organizations], in: *polska i świat* [Poland and the World], Poznań 1978; *Soviet Ekonomičeskoj VzaimopoSōj, Osnovnye pravovye problemy*, Moskva 1975, pp. 290–301; P. A. TOKAREVA, *Pravovoj status specjaliizirovanyh organizacii SEV*, „Sovetskoe Gosudarstvo i Pravo”, 1973, No. 8, p. 128.

of the activities of a greater number of organizations. This would, no doubt, enhance the usefulness of the study.

To sum up, it can be stated that the reviewed book is valuable and necessary. It contains a wealth of interesting considerations and inform-

ation and marks a step forward in Polish research into the role of international organizations in the development of international cooperation.

Zbigniew M. Klepacki

Stanisław E. NAHLIK, *Kodeks prawa traktatów* [The Code of the Law of Treaties], Warszawa 1976, PWN, 514 pp.

As of today the Vienna Convention on the Law of Treaties was ratified and adhered to by 30 states. Thus, after eight years of waiting the day approaches when following the deposition of the 35th ratification instruments or documents of accession the Convention will enter into force. Hitherto, only Yugoslavia among the socialist states deposited its ratification instrument. However, there are no fundamental obstacles which may prevent the ratification of the Convention (with appropriate reservations) by the remaining socialist states.

The book by Professor Nahlik justifies fully such an optimistic conclusion. The author draws the attention to the fact that almost half of all articles of the Convention was adopted unanimously. About 25 per cent of all articles were adopted by a majority vote. Only in eight cases more than five per cent of the 110 states represented in Vienna voted against the articles of the Convention. The greatest controversy arose in connection with Article 66 providing for the compulsory jurisdiction of the International Court of Justice in the case of a dispute over the conflict of a treaty with *ius cogens*. The socialist states were also opposed to Articles 15, 81 and 83, in view of their discriminatory character. However, since the problem of the representation of China in the UN had been solved and the German Democratic Republic and

Vietnam admitted to the UN, the problem of universality lost its importance, compared to 1969, and should not stand in the way of the ratification of the Convention.

Professor Nahlik was a member of the Polish delegation to the Vienna Conference and participated in the work of its Drafting Committee. This could not but influence the contents of his book. Some parts have been written with such an emotional commitment that one reads them in one breath, forgetting that the book is *par excellence* a scientific orfe. As a case in point one may mention some parts of the chapter entitled "Limits of Effectiveness of Treaties" which deals with the dramatic events of the last days of the Vienna Conference which was deadlocked at its last stage because the socialist states together with some Third World states were willing to make concessions with respect to the compulsory jurisdiction of the International Court of Justice only in exchange for concessions on matters of universality. The report on the events which led to the successful conclusion of the Conference represents a novelty in the literature dealing with international legal problems and reinforces our conviction that these problems can be treated in an exciting and vivid way. It may be added in passing that it is not for the first time that Professor Nahlik succeeded in avoiding the stereotype

of legalistic language and to offer a work which is an interesting in contents as original in style.

But it is not only its masterly form which makes the "Code of the Law of Treaties" a book worthy of particular attention to all who are interested in the study of international treaties. The book is composed of three closely interconnected parts. The introduction presents a general outline of the codification process which culminated in the adoption of the Vienna Convention. The second part contains a meticulous analysis of all provisions of the Convention. The author did not limit himself to the consideration of the final provisions but examined the codification efforts which preceded their adoption including the drafts prepared by the four consecutive rapporteurs and accepted after discussion by the International Law Commission and the work of the Vienna Conference.

While reviewing a book of such importance it would be unfitting to dwell upon minor drafting inaccuracies. It may be stressed that they are quite few. It is, however, necessary to devote some attention to those parts of the book which contain no critical comment on the solutions adopted by the Vienna Convention. The absence of such comment calls for a discussion with the author.

Professor Nahlik has no critical comment to make with respect to Article 46 of the Convention entitled "The Provisions of Internal Law Regarding Competence to Conclude Treaties." The Article in question considers the manifest violation of internal law concerning a rule of fundamental importance as a factor justifying the nullity of the consent to be bound by a treaty. It may be doubted whether the inclusion of Article 46 in the Convention was at all necessary. In connection with the problem of the importance of internal law for

the invalidity of international treaties, a considerable controversy arose in science as well as in the International Law Commission. Its latest rapporteur H. Waldock expressed in 1963 his doubts as to the introduction of an exception from the rule of ostensible authority and stated that the rule eliminates the need to examine by the negotiating parties their internal situation as determined by their constitutions. On the other hand, a whole series of arguments can be adduced against the solution adopted in Article 46. This solution is not in accordance with the conclusions arising from actual practice and international jurisdiction and is based on unprecise concepts which could facilitate the nullification of a treaty by a state acting in bad faith. The International Law Commission realising the lack of precision of the concept of "manifest violation" tried to explain that in its view there is a case of manifest violation when a treaty was concluded in contradiction with the unequivocal provisions of the constitution. As an example of such a provision the Commission quoted Article II of the Constitution of the United States. However, Article II does not prevent a state negotiating a treaty with the United States from ascertaining whether the treaty has to be ratified by a two thirds majority of the Senate. Furthermore, Article II provides no clear indication as to the matters which must be regulated by treaty and to those which can be dealt with in executive agreements concluded by the President. It can be said that in general, there are no such clear constitutional provisions which could always be understood unequivocally and would never require interpretation.

The solution adopted in Article 46 compels states to evaluate the nature of the violated restrictions and thus to interpret the laws of another

state. A perplexing question arises as to how a state wishing to ascertain in the course of a negotiation whether a treaty will not be threatened in the future by the objection that it violated obvious constitutional provisions ought to act. It would be absurd to address such a question to the other party, since its readiness to conclude a treaty is the best proof that it sees no obstacle arising from internal law. A second possibility of verifying the authority of the negotiating state could consist in asking for an opinion of legal experts. A negative opinion would then be tantamount to pointing one's finger at somebody's lack of authority. Such an action would constitute an interference whereas its absence could involve the risk that the treaty may be declared null and void. For these reasons Article 46 deserves a critical examination.

Some doubts must also be expressed with regard to the affirmative attitude of the author towards the solution adopted in Article 53 of the Convention entitled "Treaties Conflicting with a Peremptory Norm of General International Law (*ius cogens*)."

The general definition of *ius cogens* contained therein is quite acceptable and constitutes a proof of the meticulous approach of the authors of the Convention to their task. Professor Nahlik himself had contributed to it as a member of the Drafting Committee which was responsible for the final text of the Article. The definition of *ius cogens* without indication of the rules which have a peremptory character does not seem to be the best solution of the problem of the conflict of treaties with *ius cogens*. This was well understood by H. Waldock who in 1963 listed indirectly and in part the rules of *ius cogens*. He gave up finally this attempt mainly under the influence

of the International Law Commission who criticized the tendency to support the draft article by examples. Professor Nahlik expressed at the Vienna Conference the opinion that such an "exhaustive" list of rules of *ius cogens* would quickly become outdated and an "exemplary" list would lower the rank of the rules not covered by examples (p. 322). While agreeing with the negative opinion concerning the "exemplary" list it has to be pointed out that the absence of any indication as to what rules are of the nature of *ius cogens* constitutes a fundamental drawback of the adopted solution. Article 53 without a listing of the rules of *ius cogens* binding on states can be compared with a provision of the penal code which states that immoral acts are punishable by imprisonment but fails to indicate what are the immoral acts which are criminal. Politicians and legal experts must know what rules have the character of *ius cogens* so as to avoid concluding treaties which are inconsistent with them. The absence of a list of peremptory norms accepted by states should have discouraged the authors of the Convention from the inclusion in Article 53 of a general definition only. The question of the outdated list raised by Professor Nahlik could have been solved in the spirit of the British amendment of 1968 which aimed at adopting the principle of including the rules of *ius cogens* in protocols to conventions negotiated now and then after the signing of the Vienna Convention. A similar problem arose in the Committee of 35 states which dealt with the definition of aggression. Conflicting views were voiced as to whether a general or an enumerative definition should be adopted. A general definition was considered to be too abstract and liable to arbitrary interpretation, an enumerative one—too casuistic. In the Resolution of the UN General

Assembly 3314(XXIX) of December 14, 1974 both definitions were used simultaneously. It can be argued that the application of the same method in the Vienna Convention would have proved highly beneficial for the respect of international law.

The book by Professor Nahlik represents a remarkable achievement and an unprecedented in its accuracy a recapitulation of the state of the law of treaties. It is to be regretted

that it will reach only those who read Polish. The English summary is hardly anything more than a listing of its chapters. The publishers would be well advised to consider an edition in a foreign language. This would be a highly recommendable step in the direction leading to the strengthening of the position of Polish science of international law in the world.

Jan Sandorski

Henryk OLSZEWSKI (ed.), *Polska i świat. Studia nad prawem międzynarodowym i współczesnymi stosunkami międzynarodowymi* [Poland and the World. Studies in International Law and Contemporary International Relations], Poznań 1978, Wydawnictwo Uniwersytetu Poznańskiego, series Prawo, No. 68, pp. 657.

It is not very often, even on the occasion of jubilee celebrations of eminent scientists that one is gratified by such a valuable publication as the one published in honour of Professor Alfons Klafkowski who celebrated the 40 anniversary of his scholarly activities. It is a large volume containing incidental articles and studies by 48 authors, among whom the names of the most eminent Polish scholars can be found.

The volume opens with an introduction written by the President of the Poznań University Professor Benon Miśkiewicz, dedicated to his predecessor at the same post Professor Alfons Klafkowski. The articles and studies written "with Professor Klafkowski in mind" says Professor Miśkiewicz "will contribute to further reflections and will perhaps serve to encourage new research or engender the need to clarify or to rectify current opinions." The title of the volume in honour of Professor Klafkowski, says further Professor Miśkiewicz, "represents a symbolic reflection of the scope of the scientific activity and political action of one of the most eminent scholars and practitioners in

the world—Professor Alfons Klafkowski." This is a very laudable evaluation and even the most creative scholar could not wish for a better one. Its direct complement is the study by Henryk Olszewski entitled "International Law and the Polish Reason of State—an Essay at the Characteristics of the Scientific Work of Alfons Klafkowski." It is not by accident that the volume in honour of Professor Klafkowski bears the title "Poland and the World—Studies in International Law and Contemporary International Relations." And its reading can be a source of great gratification. It offers a deep insight into the contribution of Polish science and diplomacy to the shaping of progressive rules of international law and to the constructive development of international relations. The material contained in the volume can be segregated in several basis groups of problems.

Those closest to the scientific activity of Professor Klafkowski are the articles which are devoted to the problem of the sources of international law in general and of treaty law in particular, to the law of war and

the liquidation of the effects of World War II to international détente, arms limitation and disarmament. These topics are covered in the following studies: Janusz Gilas — "Norms of International Law," Jan Sandorski — "*Jus Cogens* in International Public Law," Stanisław E. Nahlik — "Some Considerations on the Codification of International Law," Kazimierz Kocot — "Diplomatic and Legal Interpretation of International Treaties," Józef Górski — "The Foundations and Scope of the Obligatory Nature of International Convention in Poland," Jerzy Wisłocki — "Concordats as International Treaties *sui generis*," Lesław Kański — "The Participation of the United States in the Conclusion of International Treaties," and Karol Wolfke — "The Prospects of the Development and Codification of International Law Dealing with the Environment." Closely related with this range of topics are the articles by Jerzy Tyranowski — "The Principle of *Uti Possidetis* in International Law," which tries to elucidate the legal premisses of the boundary disputes opposing come post-colonial states especially in Africa, and by Jerzy Pieńkos — "The Theory of Succession of States and its Contemporary Trends in the Doctrine of International Law."

The problems of the law of war are dealt with by Remigiusz Bierzanek — "War Reprisals as a Means of Enforcing Compliance with International Law," and by Zbigniew Rotocki — "Self-Defence and the Problem of Freedom of Navigation on the High Seas." Various aspects of responsibility for war crimes and crimes against humanity and the liquidation of the effects of the World War II are examined in the following papers: Tadeusz Cyprian — "Poland's Contribution to the Nuremberg Trial," Czesław Pilichowski — "Legal Assistance by Poland in the Prosecution of Nazi

Criminals," Józef Radzicki — "Pseudo-euthanasia in the Third Reich as a Crime Against Humanity," Janusz Wąsicki — "The Legal Problems of the Abolition of the State of Prussia in 1947," and Tadeusz Walichnowski — "The Problem of Revindication and Restitution of Cultural Treasures."

The problems of international détente, arms limitation and disarmament are examined in the following studies: Eugeniusz Noworyta — "Poland's Contribution to the Consolidation of the Process of Détente," Mieczysław Paszkowski — "The Principles of Peaceful Coexistence in the Final Act of the Conference on Security and Cooperation in Europe," Sławomir Dąbrowa — "Legal Aspects of the Vienna Negotiations on the Reduction of Armed Forces and Armaments in Central Europe," Wojciech Multan — "Détente and Disarmament, Some Thoughts," and Jan Majewski — "The Indian Ocean a Zone of Peace."

Among all these studies which cover such a wide area attention may be drawn to the papers of Kazimierz Kocot, Janusz Gilas, Janusz Sandorski and Józef Górski for their exceptional theoretical and cognitive value. The contribution by Józef Górski is of particular importance because of the great impact that his legal constructions and the conclusions deriving therefrom can have on the understanding of the intended consequences of the acceptance of international treaty obligations in Poland. The paper by Czesław Pilichowski is of unquestionable informative value and concerns a problem of particular moral importance for our nation.

A special place in the volume is taken up by studies dealing with the protection of human rights. Five authors devote their attention to this problem: Janusz Symonides in his "Principle of Human Rights Protection in the Final Act of the Con-

ference on Security and Cooperation in Europe;" Anna Michalska in her "Consequences of the Entry Into Force of the International Covenants of Human Rights;" Zbigniew Resich in his "System of Human Rights Protection within the Framework of the Council of Europe and the Covenants of Human Rights;" Dionizy Wojtkowiak in his "Constitutional Framework of the Rights, Freedoms and Obligations of Citizens in the Post-Colonial States of a Socialist Orientation;" Krystyna Sikorska-Dzięgielewska in her "Individual Rights in the Constitution and Practice of the Federal Republic of Germany." All these papers complement each other. Their authors draw rightly our attention to the fact that the Covenants formulate only minimum standards of human rights on a general level. Anna Michalska emphasizes the principle according to which the Covenants cannot be invoked in order to justify a restrictive interpretation of those provisions which are more favourable compared with those contained in the Covenants.

Two papers deal with various aspects of the integration process of the member-states of the Council for Mutual Economic Assistance. These are: by Zbigniew M. Kelpacki — "Legal Foundations of Cooperation and Coordination of the Activities of Socialist International Organizations," and the most interesting comparative study by Stanisław Sołtysiński entitled "The Moscow Agreement on the Legal Protection of Joint Discoveries: Integration of the Systems of Legal Protection of Industrial Property of the Member-States of the Council for Mutual Economic Assistance;" Wojciech Góralczyk writes about "The Evolution of the Concept of the Continental Shelf in the Law of the Sea;" and Andrzej Straburzyński devoted his study to "The Functional Division of the Rights of the Coastal

States on the Maritime Areas;" Remigiusz Zaorski deals with "The Division of Maritime Waters in the Light of the III Conference on the Law of the Sea."

Among the other studies included in the volume one may mention a study by Marian Iwanejko which deals with the evolution of the means of settling international disputes. Jerzy Topolski deals with "Political History in Historical Synthesis" and takes up the very intricate problem of the methodology of historical inquiry. I would recommend this rather short essay to all those who are interested in historical writing and in the art of proper reading of historical texts. There is also an interesting article by Kazimierz Oryl — "The Social and Economic Conditions of Development and Contemporary International Relations," which can be read as a supplement to the consecutive Reports of the Club of Rome. While original in his thinking, the author offers some controversial assertions such as for example the assertion about the progressive exhaustion of the resources of the developed countries. The author seems to imply that the development of the poor countries can take place only at the expense of the rich ones. This is a widespread opinion, but in my view a sterile and fallacious one.

Marian Dobrosielski writes about the Polish initiative in the UN on the protection and development of cultural values. Franciszek Stachowiak evaluates the internal and foreign policies of the Chinese People's Republic after the death of Mao Tse-Tung. Tadeusz Gatkowski analyses the foundations of the control activities of the International Atomic Energy Agency. The same author is responsible for the scientific bibliography of Professor Klafkowski and for the analysis of his contribution to the theory and practice of training

of scientific workers. Other papers dealing with miscellaneous problems include a paper by Eugenia Podbierowa on the role of women's organizations in the development programme of the United Nations, a paper by Alfred Ochanowicz which examines the premisses and fundamental institutions of the new civil code of the German Democratic Republic. Attention must also be drawn to a study by Witalis Ludwiczak in which the author analyses the law of the GDR dealing with international economic contracts and follows with a series of considerations on the desired direction which might be taken in the search for solutions in the Polish code of international commercial law which is now in preparation. This is a very valuable contribution in the discussion on that legal act which is of such importance for our foreign

commercial and economic relations. Of interest is also a study by Jan Kolasa entitled "International Law in the New Curriculum of the Faculty of Law and Administration." The author of this review cannot but express his complete agreement with the opinions presented therein.

Finally, there are two papers devoted to the crucial problems of functioning of socialist democracy. Adam Łopatka writes about "The Idea of the State," and Sylwester Zawadzki about "The Conception of Local Democracy in a Socialist State."

To sum up it can be stated that the volume will attract the attention of all those who follow current developments in the field of contemporary international relations and international law.

Eugeniusz Piontek

Jan SANDORSKI, *RWPG — forma prawna integracji gospodarczej państw socjalistycznych* [CMEA — *Legal Form of Economic Integration of Socialist States*], Poznań 1977, UAM, 156 pp.

The ever growing importance of the Council for Mutual Economic Assistance (CMEA) justifies fully the need for deeper research into the legal aspects of this most important international organization of the socialist states. In this respect the reviewed book meets undoubtedly the requirements of such a study.

Sandorski is not offering a complete and comprehensive analysis of all legal problems of the CMEA. He deals only with some selected ones which he considers to be of particular weight. And indeed they are of major significance, and also sometimes of a controversial nature. In taking them up, the author expresses his own and very often quite original point of view.

The book has four chapters, in

which Sandorski deals consecutively with the following problems: the CMEA and the economic integration of the socialist states; the structural principles of the CMEA; the limits of economic integration of the socialist states and the territory of the CMEA; the law-making competence of the CMEA organs. The book closes with some concluding remarks. Enclosed is also a summary in English and Russian.

Considering the legal character of the CMEA the author defines the CMEA as an integrating organization, in view of its aims as set forth in the Comprehensive Programme of Socialist Economic Integration. One may, however, doubt whether on that basis it is possible to agree with the author who defines the CMEA as a legal form

of economic integration of the socialist states (comp. the book's title and p. 31) and as one of the forms of activity of that universal world cooperative, which Lenin had in mind (p. 6). It seems to me that at the present stage of economic cooperation of the member-states of the CMEA such an assertion has no basis in fact. Furthermore one is entitled to ask whether it does not contradict another of the author's assertions that the process of socialist economic integration is only in its initial stage (p. 30) and that integration as such is, at present, rather an objective than an existing reality (p. 15).

Sandorski reviews the definitions of socialist integration found in literature, stressing the correctness of the opinion according to which the essence of integration must be sought in material relationships, as the institutional and legal elements serve only as means to implement political and economic objectives and are not an end in themselves (pp. 24—25). However, it must be pointed out that—as proven by actual practice—the above mentioned institutional elements are intimately related to the implementation of economic aims. This is exemplified by the existing international integration groupings.

Of interest are the author's remarks concerning the legal analysis of the procedure which was applied in connection with the modifications of the CMEA Charter adopted at the XVI, XVII and XXV sessions of the Council. He states that the three times repeated application of the same procedure without the ratification requirement by the active CMEA members proves that the states "viewed the unanimous consent to modify the Charter by the states present at the Council's Session as a condition sufficient to introduce such modifications" (p. 14). Sandorski interprets this as the establishment of a

customary rule governing such statutory changes. However, this thesis fails to take into consideration the fact that the member-states of the CMEA adopted in Sofia on June 21, 1974 a special protocol dealing with the above mentioned modifications of the Charter and that the protocol was subject to ratification and was, in fact, ratified by the member-states of the CMEA (Poland ratified it on December 5, 1974). In the light of these events the author's opinion on the subject requires, to say the least, further verification.

Dealing with the structural principles of the CMEA, the author analyses first of all the principle of sovereign equality which he rightly considers to be supreme constitutional principle of the CMEA (p. 34). At this juncture he dwells upon the possibility of the legal restriction of the sovereignty of states, but his opinions on the subject cannot be entirely accepted. It is equally difficult to agree with his thesis that "the restriction in the exercise of sovereignty is inherent in every international treaty" (p. 40), for it can be rightly asserted that the conclusion of an international treaty is an expression of state sovereignty. No less arguable is another thesis, in view of its categorical form and supporting arguments, according to which the existence of international organizations as such restricts the exercise of state sovereignty by member-states, for the very purpose of these organizations is the development of international relations and, hence, "the imposition on growing restrictions on the freedom of states" (p. 40).

This thesis fails to recognize the great variety of existing international organizations from the point of view of the scope of their competence *vis-à-vis* their members-states. Generally, such restrictions of the

freedom of states are relatively rare. Whatever the case may be, such an assertion is not in keeping with the essence and legal character of the CMEA and it has to be regretted that the author imputes to this organization the power to restrict the exercise of the sovereignty of its member-states, albeit—as he admits himself—only “to a small degree” (p. 52).

Equally controversial are the assertions related to the above mentioned problem concerning the legal personality of the CMEA in international law. Sandorski states quite rightly that the legal personality of the CMEA under the internal law of the member-states does not, in itself, predetermine its personality under international law (p. 44); however, he negates the existence of the latter, for in his view the CMEA has no autonomy of will, for the will of its organs is always identical with the will of its member-states (either all of them or only those directly interested (pp. 49—50)).

Putting aside the most controversial concept of the “autonomous will of the organization” it seems that this criterium cannot be viewed as the fundamental, let alone the sole and unique premise of the legal personality^o of an international organization in international law. More than that, the author fails to see that in the CMEA, like in other international organizations, the adopted decisions are always a unilateral act of the organization as such, and for this reason alone cannot be treated as a mere sum of the wills of member-states. Following the reasoning of the author we would be inevitably led to ignore the difference between the decisions of international conferences which are, indeed, the direct expression of the will of the participating states and the decision adopted by international organizations. It may

also be added that Sandorski fails to take into consideration the undeniable difference existing within the CMEA itself between the decision of the organization (which may take the form of a decision or a recommendation) and an agreement (in Russian *dogovorinnost'*) reached by the organs of the CMEA and is an expression of the will of the member-states which is not considered to be a reflection of the will of the CMEA as such, or its decision.

Interesting, although rather controversial, are Sandorski's views concerning the principle of unanimity in the CMEA. The author considers this principle in the context of the voting procedure in the CMEA organs. While some of his observations are undoubtedly logically correct, it must be pointed out that in actual practice there is no voting *sensu stricto* in the organs of the CMEA, for the decisions are taken by way of consensus of all member-states or only those directly interested. One can therefore hardly speak of “voting” in the CMEA.

One can agree with the author when he writes that the unanimity of the member-states when adopting decisions must not necessarily be understood as the logical consequence of the principle of sovereign equality, for this principle does not imply unanimity in voting (pp. 60—61). Sandorski reviews the implications of the application of the formula of “interested state” in the decision-making process of the CMEA and he emphasizes quite rightly that under existing conditions there are no legal means which would make it possible to eliminate the effects of the opposition of a state considering itself to be an interested party (p. 68). On the other hand, it is difficult to agree with the author when he states that Article IV of the CMEA Charter serves better the interests of those states which

are not very keen to intensify the process of integration (!) (p. 68). It seems that it serves equally the interests of all member-states, for they are all in favour of the intensification of the integration process.

In view of the existing decision-making procedure in the CMEA the author advocates the advisability of adopting in the future the principle of majority vote by stages. In this connection he refers to the solutions applied in other socialist international organizations (p. 69). It must however be pointed out that the CMEA is a specific organization of a general economic nature and not a specialized body dealing with some technical matters and that this feature in particular cannot remain without influence on the powers of the organization with regard to its member-states as well as on the decision-making procedure.

Of interest are Sandorski's opinions concerning the legal nature of the principle of brotherly mutual assistance and of its essential scope. The author defines quite rightly the principle in question as one of the fundamental legal principles which govern the mutual relations of socialist states. He considers it in the context of the concept of socialist internationalism which he views as solely a political and not a legal principle under international law (p. 71).

Dealing with the problem of CMEA membership the author analyses among other things the case of Albania and comes to the conclusion that Albania must be considered as a non-active member of the organization and that this state of affairs results in specific legal consequences (for instance with regard to the procedure concerning Charter modifications). He is right when considering the CMEA as an organization open practically only for membership of socialist states, while at the same time admitting

the possibility of participation in the activities of its organs of non socialist states, but only as observers (p. 94). He analyses the legal forms of the participation in the work of the CMEA organs of Yugoslavia and the cooperation of Finland with the CMEA.

In the final chapter of his book the author discusses the organizational structure of the CMEA and the legal nature of its decisions. He devotes his major attention to the recommendations of the CMEA. Considering the problem of the premisses of the validity of the decisions he points out quite rightly that a state not interested in a given problem does not participate in the decision-making process, but he goes rather too far when concluding that for such a decision to be valid it is even not necessary for such a non-interested state to be present at the session of the CMEA organ (p. 112).

Analysing the decisions of the CMEA Sandorski divides them into two categories: the first covers decisions of a general nature and the second decisions of an executive nature. Only the former belong to the internal law of the CMEA. He supports the view that the internal law of an international organization constitutes a separate source of law (p. 117).

Extensive considerations are devoted to the recommendations by the CMEA. The author states that duly adopted recommendations are not binding on states to which they are addressed, but constitute an appeal to those concerned that by accepting them they implement their provisions (p. 118—119). He discusses the opinions of legal doctrine concerning the legal essence of the CMEA recommendations and concludes that the acceptance of a recommendation by states transforms non-obligatory norms contained in such a recommendation

in obligatory norms for these states; a recommendation thus accepted is not being transformed into an international treaty but remains a CMEA decisions with the sole difference that this decision is binding (p. 124). This conclusion seems convincing.

The author represents an original view, rather remote from that generally accepted in literature on the obligatory character of the CMEA recommendations accepted by states in their internal law. Analysing the provision of Article IV, p. 1 of the CMEA Charter he arrives at the conclusion that this provision deals only with the implementation of accepted recommendations by states (i.e. the procedure of their implementation) but does not determine the procedure of recommendation acceptance (p. 127). The author states that the accepted recommendations are binding in the internal law of the Polish People's Republic in their own right in the same way as inter-governmental economic agreements (p. 128). It must be confessed that this view is quite convincing; one may only regret that it was not confronted with the actual practice of the CMEA.

In his final remarks concerning the decision-making powers of the CMEA the author advocates the need of a gradual broadening of these powers towards its member-states. This

he views as a long term process to be implemented in four stages.

In the concluding part of his book Sandorski offers some thoughts concerning, in particular, the future development of socialist integration and all-European economic cooperation (including cooperation between the CMEA and the European Economic Community). The author sees the need of greater intensification of the integration process, in particular by way of developing international specialization and industrial cooperation.

As can be seen from the presentation of the book, Sandorski touches upon many interesting legal problems concerning the CMEA; his approach is original, his attitude critical. Some of his assertions cannot be accepted without reservation. He seems to overestimate the importance of the legal framework without taking into account its economic foundation; he adopts sometimes a too dogmatic attitude towards some of the legal problems of the CMEA, for example in the case of the analysis of the CMEA recommendations. His book will, no doubt, give rise to further discussion on the legal problems of the CMEA and this was surely one of the objectives pursued by the author.

Henryk de Fiumel

Jan SANDORSKI, *Nieważność umów międzynarodowych [The Invalidity of International Treaties]*, Poznań 1978, Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, 234 pp.

The book by Dr. Jan Sandorski is the first in Polish literature and one among the few monographs in world literature dealing with the rules of contemporary law of treaties concerning the invalidity of treaties, or to use the words of the author with "the law in the case of lawless-

ness arising from the contents of a treaty or from the circumstances surrounding such treaty" (pp. 28—30). Richly documented, reflecting extensive expert knowledge and written in good style the book is bound to arouse the interest not only of a narrow group of specialists but also of all

those who are engaged in the study of international law and international relations.

The invalidity of a treaty is *per se* an abnormal situation, generally fraught with serious dangers. It undermines in each case the principle of *pacta sunt servanda* which is of such fundamental importance for the international community. That explains why the definition of proper and—as far as possible—precise rules which may constitute the legal basis for the invalidation of a treaty has such bearing for the stability of inter-state relations and for the security of international intercourse. These rules were defined in the Vienna Convention on the Law of Treaties of 1969. That fact in itself represents one of the major achievements of the Vienna Conference.

True enough, the Convention has not yet entered into force, however its provisions are, no doubt, the most authoritative expression of the rules of customary law. But is authoritative tantamount to proper? The author of the reviewed book attempts to provide the answer to this question. In his own words the objective he pursues is to find out “to what extent the convention reflects the state of customary law concerning the invalidity of international treaties, how far its rules go in meeting the actual requirements of the international community” (pp. 10—11). But this is easier said than done. Dr. Sandorski has set himself the task of reviewing the extensive practice of states, the doctrine and judicial decision prevailing before and after the signing of the Convention. He has also studied carefully the work of the International Law Commission, these “long and arduous efforts by eminent scholars to grapple with a substance which quite often hardly yields itself to the form of legal rule” (p. 14), as well as the lengthy deliberations of the

two sessions of the Vienna Conference. The material to be digested was vast indeed but the author deals with it with astounding ease.

The Vienna Convention provides for eight causes of invalidity of treaties. This is, in principle, a limitative specification. In the four main chapters of his book Dr. Sandorski devoted his attention to these causes. The chapters are supplemented by annexes containing hypothetical situations illustrating the discussed causes of invalidity with the accompanying legal questions and answers following the pattern of an advisory opinion of an international court. On the other hand, nowhere are the provisions of the Vienna Convention to be found, which is a most unfortunate editorial commission hampering the understanding of the author's arguments.

The book opens with a general expose (pp. 5—32) in which the author i.a. defines the concepts which he is about to use in his book and presents the legal essence of the general solutions concerning the invalidity of treaties. Briefly, but with clarity he deals here with the question of presumption of validity of treaties, with the procedure to be followed with respect to invalidity and the consequences of invalidity, as well as with the problem of convalidation and separability of the provisions of a treaty affected by invalidity.

The main point of this part of the book is the distinction made by the author between absolute invalidity which “appears automatically with the manifestation of the cause which brought that about” (p. 25), which cannot be convalidated and results in the invalidity of the treaty as a whole (it is caused by the coercion of the representative of a state or of the state itself, or by violation of *jus cogens*) and relative invalidity which does not bear these features. At this point the author criticizes the solu-

tions adopted by the Convention. In his opinion, it erroneously restricts the right to claim invalidity of a treaty in all cases only to aparty or parties concerned of the treaty. When a treaty is affected by absolute invalidity, in view of the author "each state must have the right to invoke its invalidity" (p. 25). The author reverts to this question later on when discussing the problem of treaties conflicting with norms of *jus cogens*. His argument runs as follows: the violation of a norm of *jus cogens*, recognized by the entire international community as a norm from which no derogation is permitted, harms that community; and since there is no organ able to act on behalf of the international community and to question the validity of a treaty violating a rule of such nature, then all states belonging to that community "must themselves aim at exposing the violations of peremptory norms of general international law and depriving a given treaty of its legal consequences" (p. 194). This view, which is shared by some other scholars, seems erroneous to me and resting upon a misunderstanding. For, we have to make a difference between the right of third states to question the validity of a treaty, and the right of such states to initiate the procedure to be followed with respect to invalidity as provided for in the Convention. The Convention has fixed certain procedural rules which form part of a general procedure including the termination and suspension of the operation of a treaty. The Convention has created a well balanced mechanism in which there is no place for claims by states other than those directly concerned, a mechanism all the more valuable as it was so hard to agree upon. The right of third states to question the validity of a treaty must be viewed in another context. The Convention does not deprive such states of their right to express their

opinion about a treaty or about the facts which surrounded its conclusion. If a third state considers that a specific legal event, including the invalidity of a treaty affects adversely its interests it is entitled to protest against it or to refuse to recognize its consequences. This is an urfallienable right of each state. And this is the only way open to the members of the international community wishing to react against a treaty violating the norms of *ius cogens*.

The first of the chapters dealing with concrete causes of invalidity (pp. 33—97) is devoted to two causes connected with the violation of internal law (Articles 46 and 47 of the Convention). The author pays particular attention to Article 46 providing for the right of a state to invalidate its consent to be bound by a treaty when this consent has been exposed manifest in violation of a fundamental provision of its internal law regarding competence to conclude treaties. He questions the existence of this cause of invalidity in the contemporary customary law and assails the solution adopted in Article 46 as "contrary to the conclusions which stem from practice and judicial decisions" (p. 63). This part of the book is very well documented, the problem is studied in depth and the arguments are presented with real strength. I am personally inclined to agree with the author that Article 46 causes a lot of confusion, but I do not think that it has no place in the Convention. The fact that on many occasions states adduced that cause of invalidity and, above all the fact that Article 46 was so widely supported at the Vienna Conference contradicts the existence of an *opinio iuris* accepting the opposite rule. And it seems to be an oversimplification to assert that Article 46 found its way into the Convention only because the governments of states represented in Vienna were

afraid "that their support for a Convention which entirely ignores restrictions of a constitutional nature might be interpreted in their countries as an attempt by the executive branch to minimize the role and importance of the constitution" (p. 62).

The second of the provisions of the Convention dealt with in this chapter and concerning the violation of specific restrictions on authority of a state representative is, in principle, accepted by the author as sound. He deplores however the lack of "the indication of the source from which these restrictions emanate." If I understand his arguments correctly, he considers that the source is represented only by "credentials and instructions duly documented, formally presented and accepted by other states" (p. 93). This, in my opinion, is too narrow a view. It seems that the specific restrictions on authority of state representatives may result, for example, from the provisions of a treaty which accords to specific persons the competence to bind states in international relations, to mention only chairmen of mixed commissions or other common bodies.

The third chapter (pp. 98—126) contains a comprehensive analysis of error and fraud and interesting, fully original consideration on the subject of corruption of a state representative. International practice knows of no case of invalidation of a treaty for the above mentioned reasons. None the less, the inclusion in the convention of provisions to that effect seems entirely justified. Such is also the opinion of the author, who sees however certain shortcomings in the wording of the relevant articles. In particular, he takes a critical view of the solution adopted in Article 50 of the Convention which allows for the invalidation of a State's consent to be bound only when the act of corruption has been procured by another

state's organs or persons acting on their behalf. He considers that this creates a "loophole for states which do not intend to apply the principle of good faith in international relations" as it opens a possibility of corruption procured by third persons (pp. 124—125).

The next chapter (pp. 129—169) deals with causes of invalidity which are of great importance in international practice, namely with those arising from the application of coercion. Coercion of a state representative is discussed briefly, and rightly so, for this is a generally accepted and never questioned cause of invalidity. The draft of the relevant provision aroused no controversy at the Vienna Conference and Article 51 of the Convention adopted without a dissenting vote "permits to conclude that the customary rule expressed therein constitutes a preemptory norm of general international law" (p. 134). On the other hand, the discussion of the provision concerning coercion by the threat or use of force against a state led to a fundamental political confrontation. It goes without saying that nobody questioned the rule that a treaty concluded as a result of the threat or use of force is invalid. And although this rule is of a rather recent origin it is recognized by the international community as one of the norms of *ius cogens*. There were however stormy discussions when the developing countries, supported by the socialist and non-aligned states, attempted to stretch the concept of force with the aim to cover also economic and political coercion. An amendment to that effect had all the chances of adoption by a majority vote, however the attempt was abandoned when the Western powers indicated that the inclusion of such a provision in the Convention would jeopardize the entire work on the codification of the law of treaties. In

the end a declaration condemning the threat or use of pressure any in form, whether military political, or economic was adopted. The question of the legal consequences of these forms of pressure as regards the validity of treaties remained therefore unresolved, and this induced the author to devote to it the major part of his considerations.

Dr. J. Sandorski's demonstration that the application of economic coercion is prohibited under contemporary international law and can cause invalidity of a treaty is two fold. First, he argues that "the illegality of economic coercion dates, at least, from the moment of the establishment of the United Nations. The legal basis of the illegality of economic coercion is formed by [...] the prohibition to use force in the broad sense of this term" (p. 157). It can, therefore, be surmised that he considers that it is possible to deduce the rule which recognizes as invalid treaties concluded under economic coercion from Article 52 of the Vienna Convention. Article 52 speaks about "the threat or the use of force in violation of the principles of international law embodied in the Charter of the United Nations," thus referring to the Charter the definition of the term "force." If we adopt a broad interpretation of that term the conclusion becomes self-evident. However, the author states that "the invalidity of treaties concluded under economic coercion has, so far, not found its expression in the form of a written rule of international law" (p. 162). He pursues, none the less, his argument in favour of the existence of such a rule considering that although "it is still impossible to state unequivocally that the term "force covers also political and economic coercion" there is enough material evidence to affirm that contemporary international law has accepted the

principle that the use of economic and political coercion is illegal. "The logical consequence of the existence of such a legal norm" concludes the author "must be the invalidation of the effects which result from the application of such forms of coercion" (p. 155). It seems to me that one line of argument would have been more convincing.

The last chapter concerns a complex and at the same time very important question of the invalidity of treaties conflicting with peremptory norms of general international law (*ius cogens*). The concept of peremptory norms is relatively new in international law. However, to all but one of those taking part in the Vienna Conference it was obvious that treaties violating such norms cannot be valid. The problem they were faced with was how to identify these norms. The International Law Commission confined itself to offer a general definition and failed to list a catalogue of these rules. The author of the book takes a critical view of that fact and considers that "the Commission has chosen the easiest path and failing to accomplish its task it placed the whole burden on practice, thus reducing the chance of full implementation of the objective of depriving treaties violating *ius cogens* of their binding force." The Vienna Conference did no better, which—in the opinion of Dr. Sandorski—"impaired seriously the practical usefulness of Article 53" (p. 205). It seems to me however that the attitude of International Law Commission and that of the states participating in the Vienna Conference reflected the actual state of development of the international community. True enough, this is an unsatisfactory state and the international community must do better than that to ensure the rule of law. It is up to legal experts to see to it that the system of international law is being

continuously perfected. The author of the reviewed book is fully aware of that and tries to contribute to the achievement of that objective. When analysing the problems arising from the invalidity of treaties which are in conflict with *ius cogens* he expresses views which reflect his real concern for the strengthening and improvement of the legal system governing international relations. His views are always supported by logical arguments based on the interpretation of

a carefully selected source material. His concern for legal solutions which protect weaker and smaller states, for legal rules which ensure justice in international relations, represents a valuable contribution to the development of progressive doctrine of international law.

The very carefully edited book contains a bibliography and summaries in English and Russian.

Maria Frankowska

Julian SUTOR, *Prawo dyplomatyczne i konsularne* [Diplomatic and Consular Law], Warszawa 1977, PWN, 405 pp.

A book written by a Polish diplomat and at the same time expert on theoretical problems of diplomatic and consular law will be of interest to a wide public. It joins great scientific value to literary merit of language and style. The book can thus be read not only by lawyers but also by people professionally active in the Polish foreign service who ought to be familiar with the problems of diplomatic and consular law. This is of particular importance for those employed in Polish foreign trade.

The book opens with a concise and well written chapter containing a historical outline of the development of diplomatic law; the author proceeds then with a discussion of the concept of diplomatic law, of its sources and codification. The following chapter deals with the internal and external organs of states in charge of international relations, including the Minister and Ministry of Foreign Trade and Shipping of the Polish People's Republic. The subsequent chapters discuss the problems of establishing diplomatic relations and the kinds, classes and ranks and titles of heads and members of diplomatic missions.

Of particular interest is, in my

opinion, the chapter dealing with diplomatic privileges and immunities which contains a subsection entitled "State Monopoly of Foreign Trade and Diplomatic Privileges and Immunities." Here are some relevant excerpts: "By virtue of the foreign trade monopoly the state acts as the owner of the means of production and as the sole representative of the national economy as a whole. The principle of sovereign equality implies that no state can judge another sovereign state, for they are equal in the eye of the law. That is why the states and their property enjoy immunity from jurisdiction. However, both doctrine and jurisprudence of the majority of capitalist states do not recognize the immunity of states as far as jurisdiction in civil cases is concerned and, in particular in commercial matters, admitting the competence of the courts of the receiving state" (p. 156). Further on the author has this to say: "On the other hand the theory and practice of the socialist states is based on the recognition of the immunity from jurisdiction of a foreign state. However, in order to ensure the development of normal international intercourse, states with a foreign trade

monopoly, as a rule, renounce partially their immunity from jurisdiction either expressly by international treaty, or tacitly as the state itself appears in court thus recognizing the competence of a foreign court. In actual practice the state does not act as a party in trade deals but confers this function to specialized trading enterprises, joint stock companies or other economic organizations endowed with legal personality and transferable property. Under these circumstances, the state accepts responsibility only for its own obligations and not for the obligations of economic organizations which have full economic and financial autonomy. The obligations of these organizations result from the contracts concluded by them under civil law" (p. 157). In connection with these considerations the author discusses the problem of the legal status of the commercial councillors of the socialist states. He states, among other things that: "As far as the status of the commercial councillors and commercial attachés of Poland and other socialist states is concerned, it is similar to the status of the so-called *torgpredstva* (trade representatives of the USSR). There are, none the less, essential differences between them. For example, the offices of commercial councillors have no right to conclude commercial contracts and their members are appointed by the minister of foreign affairs upon recommendation of the minister of foreign trade. As part of diplomatic missions they enjoy diplomatic privileges and immunities. The scope of these privileges and immunities does not differ from those granted to the other members of the diplomatic mission to which they belong. Apart from the offices of commercial councillors and commercial attachés various economic organizations maintain abroad representatives who do not represent directly the

state, are not part of diplomatic missions and do not enjoy (with the exception of some socialist states) a privileged status." (pp. 159—160).

The author of the review considers that, in view of the importance and rank of the economic services which implement the foreign economic policy of the socialist state, these problems merit greater attention, the more so, that in accordance with the strategy of social and economic development adopted by this country the role of that section of the foreign service will steadily increase. From that point of view, of great interest are also the chapters dealing with consular relations which are so essential for the development of economic cooperation of States.

From the actual commercial practice of the socialist states it is well known that consular provisions can influence considerably economic cooperation with a given country or group of countries. Aji important part of so-called non-tariff barriers to trade is concealed in the principles of consular law and results from its application. One may quote the example of many capitalist states or even developing states which hamper the development of economic cooperation with the socialist states by applying restrictive visa policies or complicated provisions concerning the legalization of invoices and other commercial documents. It may also be mentioned that some of our foreign trade personnel is directly connected with consular offices. This question could have been discussed by the author in greater detail.

The arguments in favour of appointing honorary consuls mainly from among representatives of the economic community of a given country put forward by Dr. Sutor merit particular attention. These honorary consuls can play a significant role (still underestimated in our

country) in the promotion of trade and economic cooperation with Poland. The author refers to an interesting opinion by a USSR legal expert, I. P. Blišćenko and writes: "The importance of this problem is emphasized, among others, by I. P. Blišćenko who sees great value in the institution of honorary consuls, mainly in such states with which the delegating state has no diplomatic relations and where the institution of honorary consuls could act as a stimulus to the development of economic and trading relations" (p. 392).

The author discusses not only the conventional forms of maintaining diplomatic relations with other countries but also the problems of multilateral diplomacy and special missions. The book contains also many practical information relating to the conduct of diplomatic affairs (there is a chapter dealing with diplomatic acts, diplomatic correspondence, diplomatic etiquette and protocol).

The book closes with a carefully selected bibliography.

Witold Jurasz

Obituary Notice

Marian Iwanejko
1922—1978

Professor Marian Iwanejko, an eminent expert and scholar in international law passed away in Kraków on July 31, 1978. He was born on March 25, 1922 in Skołyszyn, Jasło district. The Second World War interrupted his secondary education. He took part in the 1939 September Campaign against the German invasion as a volunteer in the ranks of a school battalion. Attached to an auxiliary service he fought against the Germans in the region of Lublin and at the end of the September Campaign joined the partisan group of captain "Wilczek" (Depołyccze Królewskie, near Chełm). After his return to Kraków he joined the underground organization ZWZ [*Związek Walki Zbrojnej*—Union of Armed Struggle]. In April 1940 he was seized when attempting to cross the border in order to escape to Hungary and put in jail at Komańcza, Zagórze and Sanok. Following a successful escape he returned to Kraków where he went into hiding under the false identity of Edward Gołąb. He fought against the German occupation in the region of Kielce in the ranks of the Polish underground army AK [*Armia Krajowa*—Home Army], under the *nom de guerre* of "Ryszard."

When the war ended Marian Iwanejko returned to secondary school and at the same time registered at the Kraków University as an extern at the Law Faculty. Immatriculated in July 1945 he received his masters degree in law in June 1947. He then studied English literature at the Kraków University, political science at the Political Science Academy in Warsaw and at the Political Science School at the Law Faculty of the Kraków University (1947—1949).

In 1947 Marian Iwanejko began doing research work in international law under the guidance of Professor Ludwik Ehrlich. His main fields of interest were: history of international law, in particular maritime law and the settlement of international disputes especially international judicial processes.

His historical interest found its reflection in his doctoral thesis entitled "The Law of War *Boty* in the Doctrine of the 16th—18th Cen-

turies" (Kraków 1959). This study is the result of extensive research based to a large extent on written sources of the canonistic period.

Before the first United Nations Conference on the Law of the Sea Marian Iwanejko took part, together with Professor L. Ehrlich in the Polish preparatory work on the codification of the law of the sea. He began research into the legal status of ports and this resulted in the presentation of a thesis to qualify as assistant professor entitled "The Status of Maritime Ports in the Light of International Law" (Kraków 1963) at the University of Poznań under the guidance of Professor A. Klafkowski. Marian Iwanejko dealt in his study with a problem which was not settled by the Geneva Conventions on the Law of the Sea (1958) and on the subject of which nothing was published since 1928. His study was also connected with research work carried out in London in 1957—1958 where his post-graduate studies were crowned by the award of the Academic Postgraduate Diploma in Law following the presentation of a dissertation entitled "International Status of Maritime Ports."

His second field of interest was that of the settlement of international disputes. He published several papers on the problem of international jurisdiction and a book entitled *Międzynarodowy Trybunał Sprawiedliwości* [*International Court of Justice*], Kraków 1969 which preceded his appointment as professor extraordinary. The book contains a thorough analysis of the structure activities and jurisdiction of the Hague Court. The expansion of the same line of research resulted in the publication of Professor Iwanejko's last book entitled *Spory międzynarodowe* [*International Disputes*], Warszawa 1976, which was honoured a special award by the Polish Institute of International Affairs in 1977.

In the field of the theory of international law Professor Iwanejko's interest concentrated on the problems of the responsibility of states and of the sources of international law. He took part twice in the sessions of the Centre for Studies and Research in International Law and International Relations at the Hague Academy of International Law and presented there two papers: one entitled *Certain Aspects of Responsibility of States* (1957), the second entitled "Effects of Uniform Treaty Clauses" (1960). The latter was later published as an article under the same title in the revue "Ruch Prawniczy, Ekonomiczny i Socjologiczny" (1961). Professor Iwanejko wrote also on customary law and published in "Archivum Iuridicum Cracoviense," 1968 an article entitled "Local or Regional Custom in Judicial Practice."

Till 1972 Professor Iwanejko was very active as a scientist and teacher at the University of Kraków. In October 1972 he began work in the Institute of International Social and Economic Relations of the

Economic Academy in Kraków as head of the Department of International Economic Organizations. The didactic needs of the Institute resulted in Professor Iwanejko's interest moving towards new problems connected with international economic law and international organizations. He started work on a new book entitled *UNCTAD — Its Role in the Shaping of a New International Economic Order* which has not yet been published. Over the past few years he was called upon to offer his expert opinion on the following matters: the role of the ECOSOC in the coordination of economic, scientific and technical cooperation within the United Nations system and the prospects of scientific and technical cooperation in the international economic organizations, both prepared for the Polish Institute of International Affairs in 1973.

Professor Iwanejko was also interested in the problems of environmental protection and organized the first scientific conference on the international protection of the natural environment to be held in Poland (Kraków, 13—15 December, 1971).

Professor Iwanejko devoted much of his time to teaching: from 1947 to 1972 at the University of Krakow and from 1962 to 1969 at the branch of the Kraków University in Katowice as the tutor of the Chair of International Law and International Relations. In 1972—1978 he devoted much of his time to teaching at the Kraków Economic Academy but did not give up his lectures at the Kraków University on political science and his seminars for postgraduate students in political science. Under his guidance 12 people received a doctor's degree and 250 people a master's degree.

His personal qualities, his eloquence won him the hearths of his students and scientific workers. He was decorated for military gallantry and for his political activity with the following medals: Virtuti Military Cross, Allied Partisan Cross, Military Cross, Victory Medal, Polonia Restituta Order, Cross of Merit, etc.

We lost a man of great vital power, a true scientist an excellent organizer, a valiant soldier a fervent patriot. It is hard to accept the thought that he is no more among us. We shall remember him as a self-effacing man of great generosity and gentleness devoted to his cherished science of international law.

Zofia Szafrńska

Kazimierz Kocot

1915—1978

Professor Kazimierz Kocot died on September 27, 1978.

He was born on September 1, 1915 at Trzebinia (the Cracow Voivodship) where he completed his secondary education. Between 1935 and 1938 he studied at High School for Foreign Trade and subsequently at the Law Faculty of Lvov University. There he obtained his Master of Law and Master of Diplomatic Sciences degrees.

He was keenly interested in international law already during his law studies while attending Professor Ehrlich's seminars on this subject. In 1938, he became professor's assistant, first voluntary and then full time, at the International Law Department of Lvov University.

During World War II Kazimierz Kocot worked as a clerk in an oil refinery and subsequently, between 1944 and 1945, took part in the military struggle for the liberation of Poland.

Immediately after the demobilization, in March 1946, he resumed his scientific activities at the newly established Polish University of Wrocław where, starting from the position of senior assistant, in 1976 he became full professor of international public law.

Professor Kocot's scientific investigations encompassed a wide range of problems, and his scientific output is considerable. He was mainly engaged in basic and at the same time current problems of the theory of international law, as well as in the historical development of this branch of science in Poland.

In the initial period of his scientific career, he devoted much attention to the sources of international law. Apart from his non-published doctoral thesis and several articles on this subject, mention should be made of his monography on *Zagadnienia źródeł prawa międzynarodowego a walka o pokój* [Problems of Sources of International Law and the Struggle for Peace] of 1953. His further scientific investigations were concerned with international organizations. Eventually he published two works: *Sposoby interpretacji Karty Narodów Zjednoczonych* [Ways of Interpretation of the Charter of the United Nations] in 1957 and *Organizacje międzynarodowe (systematyczny zarys zagadnień prawa międzynarodowego)* [International Organizations (A System-

atic *Outline of the Problems of International Law*) in 1971. Also attention should be drawn to Professor Kocot's attempts to apply computer techniques to investigate the legal motivations of the UN General Assembly decisions. These investigations resulted, i.a., in an article published in the "Polich Yearbook of International Law," vol. 1, under the title *Legal Motivations of the Decisions of International Organs*. And finally, a work on peaceful settlement of international disputes, "*Rokowania dyplomatyczne [Diplomatic Negotiations]*," published in 1969, belongs to his writings on basic problems of international law.

His contribution to the studies on certain aspects of the history of international law teaching in Poland is also important. In this context, his extensive *Nauka prawa narodów w Ateneum Gdańskim (1580—1793)* [*Studies and Courses in the Law of Nations at the Gdańsk Atheneum (1580—1793)*] published by the Wrocław Scientific Society in 1961, must be singled out as an outstanding work.

Also other domains of international law attracted his attention, namely, the law of war and the protection of human rights. An shortly before his death he was engaged in researching and lecturing connected with a new domain of international law: the protection of the natural environment. His lectures: *Prawnomiędzynarodowe zasady sozologii* [*International Legal Principles of Sozology*] published in 1975 and 1977, contain a novel approach to environmental problems.

Apart from scientific work, he intensely participated in scientific life in his country and abroad. He was a member of the Wrocław Scientific Society and cooperated with other scientific centres, especially with the Chief Commission for the Investigation of Nazi Crimes in Poland.

Professor Kocot was deeply devoted to the teaching of international law. He left an important output as a contributor to a manual and to a Polish encyclopedia of international law. He was also co-author of a collection of documents: *Selection of Documents for Teaching International Law*, first published already in 1947 and supplemented several times since.

The death of Professor Kocot has bereaved the Polish science of international law of a devoted and meritorious scholar and teacher.

Karol Wojfca

Zbigniew Rotocki

1920—1978

Professor Zbigniew Rotocki died in Łódź, May 12, 1978.

He was born in Lublin on February 8, 1920. After his graduation from secondary school in Warsaw in 1938 he was called up to do his military service and in September 1939 took part in the campaign against the Nazi invasion of Poland. In the years 1944 and 1945 he fought again in the ranks of the Polish People's Army and was awarded the military Grunwald Cross for outstanding gallantry.

In 1945 he began his studies of law at the newly created Łódź University and graduated in 1949. In 1950 he received his doctor's degree upon presentation of a thesis entitled *War Neutrality in Its Historical Development*. From 1951 to 1956 he held a leading post in a state enterprise in Łódź. From 1957 to 1959 he was a Ford Foundation fellow in Paris where he studied political science under the direction of Professor G. Burdeau and Professor M. Duverger and international public law under the direction of Professor Ch. Rousseau, Professor P. Reuter and Professor A. Gervais. He received a doctor's degree of the University of Paris following the presentation of thesis entitled *Le réarmement de l'Allemagne Fédérale* which he prepared under the guidance of Professor M. Duverger. He graduated also the École des Hautes Études Internationales and achieved the Orientation à la fonction internationale.

In 1960 he became lecturer at the faculty of law of the Łódź University in the department of international public law. In 1963 he qualified as Assistant Professor (*docent*) upon presentation of a study entitled *Prawo wizyty i rewizji* [*The Right of Visit and Search*] and was appointed associate professor. From 1965 till his death he directed the department of international public law, first as associated professor and later as full professor.

His scientific contribution includes 35 published studies (together with 3 contributions to collective works). His principal scientific interest centered though not exclusively, around the problem of the law of warfare, with particular reference to sea and air warfare. His studies on these subjects bear the characteristics of a thorough and compre-

hensive legal and political analysis of the legal institutions which are set in a broad historical context. They represent a valuable and original contribution to the science of international law in general and bear witness to the astounding erudition and diligence of their author, who made use of all available sources in seven foreign languages. Mention must be made, in the first place of such books as: *Prawo wizyty i rewizji* [The Law of Visit and Search] published in Łódź in 1962; *Wojna domowa na morza w świetle prawa międzynarodowego* [Civil War on the Sea in the Light of International Law], published in Łódź in 1976; *Neutralność w ramach bezpieczeństwa zbiorowego* [Neutrality Within the Framework of Collective Security], published in Wrocław in 1977 and several studies devoted to the law of warfare and dealing with the application of aircraft, rockets, u-boats and also with war occupation. Among Polish scholars in international law, who only incidentally turn their attention to the problems of the law of warfare, he stands out as the sole scholar for whom these problems were the principal subject of study. But apart from that he was also the author of valuable studies devoted to the history of international law, modern political and legal doctrines and maritime law.

Professor Rotocki collaborated closely with the "Polish Yearbook of International Law" for many years as a member of the Editorial Committee and as author of several studies such as: *Polish Directives of 1939 Concerning Aerial Bombardments in the Light of International Rules of Air Warfare* (1970); *Aircraft and Prize in Sea Warfare* (1971); *Les operations de Vaviation allemande en Pologne en 1939 a la lumière du droit international* (1974) and *Civil War and Merchant Shipping of Third States* (1975).

Professor Rotocki took an active part in the activities of social organizations and devoted great attention to sport clubs, which he considered to be of great educational value. For many years he was a member of the leadership of the Łódź Sports Club and chairman of the group which was entrusted with the educational activities of the Club.

His personality, straightforwardness, friendly manner, his readiness to help and personal charm secured him the friendship of those who knew him. He was popular with his students and highly esteemed by them. He was a man of great ability and astounding erudition, an ardent patriot, a praised author of scientific works and a meritorious teacher. Such a personality cannot be forgotten. He will live long in the memory of all those who had the privilege to approach him.

Remigiusz Bierzanek

Accords internationaux entrés en vigueur à l'égard de la Pologne ou dénoncés par la Pologne en 1977 et 1978

La liste publiée ci-dessous comprend les plus importants accords internationaux, bilatéraux et multilatéraux, entrés en vigueur à l'égard de la Pologne (ou dénoncés par elle) en 1977 et 1978. Les arrangements administratifs (accords conclus entre les ministères des deux États) sont absents de ce registre qui ne contient que les accords conclus au nom du Conseil d'État ou du Gouvernement polonais. Les protocoles (p. ex. protocoles annuels rentrant dans le cadre d'un accord à long terme), les plans et les programmes d'exécution joints aux accords en question ne figurent non plus sur cette liste.

Conformément à la Constitution de la Pologne, le Conseil d'État — composé de 17 députés à la Diète (Parlement) — est le seul organe autorisé à ratifier et à dénoncer les traités internationaux. Indépendamment de la ratification, le consentement à être lié par un accord peut aussi être exprimé par le Conseil des Ministres qui le donne soit sous forme d'approbation (approval), soit sous forme de signature par un plénipotentiaire dûment autorisé; certains accords sont conclus sous forme d'échange de notes. Enfin, les ministres ont également la compétence pour conclure les accords internationaux, à condition que la matière régie par l'accord soit du ressort d'un ministre (arrangements administratifs).

La Constitution polonaise ne précise pas quels sont les accords qui nécessitent de la procédure de ratification. Selon la résolution conjointe du Conseil d'État et du Conseil des Ministres, en date du 28 décembre 1968, relative à la conclusion et à la dénonciation des traités, sont soumis à la ratification les traités ayant une importance particulière dont:

- les traités de paix ainsi que les traités d'amitié, de coopération et d'assistance mutuelle,
- d'autres traités ayant le caractère politique,
- les traités concernant les matières régies, en droit interne, par les lois,
- les traités contenant des dispositions qui diffèrent des solutions retenues par la législation interne,
- d'autres traités pour lesquels la Pologne s'est engagée à suivre la procédure de ratification afin de satisfaire aux exigences de droit de l'autre partie contractante, ou si les parties sont convenues de procéder de cette manière pour des raisons particulières.

La résolution de 1968 ne spécifie pas quels traités doivent être obligatoirement soumis à la procédure d'approbation.

Dans la pratique, seulement 20-30% des traités bilatéraux et multilatéraux, conclus au nom du Conseil d'État ou du Gouvernement, suivent la procédure

de ratification. Tous les traités ratifiés sont publiés dans « Dziennik Ustaw » (Journal des Lois, destiné à la publication des lois et des règlements).

Les traités bilatéraux figurent sur cette liste par pays, dans l'ordre alphabétique (alphabet français), selon le schéma suivant: titre du traité, lieu et date de sa signature, mode d'expression par la Pologne du consentement à être lié, date de l'entrée en vigueur à l'égard de la Pologne.

Les traités multilatéraux observent le même schéma.

Traités bilatéraux

Albanie

— Protocole concernant l'échange de marchandises et les paiements dans les années 1976 - 1980, Varsovie, le 31 janvier 1977, signature; le 31 janvier 1977.

Algérie

— Accord commercial à long terme, Varsovie, le 5 mai 1978; approbation; appliqué provisoirement dès la date de la signature.

République démocratique allemande

— Accord concernant l'équivalence des certificats d'études, des grades et titres scientifiques délivrés en République populaire de Pologne et en R.D.A., Varsovie, le 24 février 1977; approbation; le 5 mai 1977.

— Traité d'amitié, de coopération et d'assistance mutuelle, Berlin, le 28 mai 1977; ratification; le 13 juillet 1977.

— Protocole relatif aux postes de passage sur la frontière d'État commune, Varsovie le 13 octobre 1977; signature; le 1^{er} novembre 1977.

République fédérale d'Allemagne

— Accord de coopération culturelle, Bonn, le 11 juin 1976; ratification; le 25 novembre 1977.

— Convention relative à la taxation des transports routiers internationaux, Varsovie, le 19 juillet 1976; approbation; le 7 octobre 1978.

— Déclaration commune du Premier secrétaire du Parti ouvrier unifié polonais et du Chancelier fédéral, Varsovie, le 25 novembre 1977; signature; le 25 novembre 1977.

— Dénonciation par la Pologne de l'Accord entre la Pologne et la R.F.A. relatif à l'attribution par la Pologne aux bateaux de pêche de la R.F.A. du droit de pêche dans la zone de pêche maritime polonaise, signé à Varsovie le 14 décembre 1973; notification par la Pologne le 28 décembre 1977, l'Accord a pris fin le 29 décembre 1977.

Angola

— Déclaration sur le renforcement de l'amitié et sur l'approfondissement de la coopération, Varsovie, le 28 avril 1977; signature; le 28 avril 1977.

— Accord commercial, Varsovie, le 28 avril 1977; approbation; appliqué provisoirement à partir de la date de la signature.

— Accord en matière de pêche, Varsovie, le 28 avril 1977; approbation; appliqué provisoirement à partir de la date de la signature.

— Accord de coopération économique, Varsovie, le 28 avril 1977; approbation; appliqué provisoirement dès la date de la signature.

Autriche

— Accord pluriannuel relatif aux échanges commerciaux, aux paiements et

à la coopération économique, Vienne, le 22 septembre 1976; signature; le 1^{er} janvier 1977.

— Accord relatif à la coopération et à l'assistance réciproque en matière douanière, Vienne, le 16 décembre 1977; approbation; le 10 novembre 1978.

Belgique

— Accord de coopération dans le domaine du tourisme, Varsovie, le 14 octobre 1977; approbation; le 14 mai 1978.

— Convention tendant à éviter la double imposition et à prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune, Bruxelles, le 14 septembre 1976; ratification; le 21 septembre 1978.

Benin

— Accord commercial, Varsovie, le 23 septembre 1978; approbation; appliqué provisoirement dès la date de la signature.

Birmanie

— Air Transport Agreement, Warsaw, 15 June 1977; signature; 15 June 1977.

Bolivie

— Accord commercial, La Paz, le 20 mai 1976; approbation; le 10 mars 1977.

Brésil

— Agreement on maritime transport, Warsaw, 26 November 1976; approval; 21 July 1977.

Canada

— Air Transport Agreement, Ottawa, 14 May 1976; approval; 28 October 1977.

— Long-term grain agreement, Ottawa, 19 April 1977; signature; appliqué avec effet rétroactif à partir du 1^{er} janvier 1977.

République populaire de Chine.

— Accord sur l'échange de marchandises et sur les paiements pour l'année 1977, Varsovie, le 23 mai 1977; signature; avec effet rétroactif à partir du 1^{er} janvier 1977.

— Accord sur l'échange de marchandises et sur les paiements pour l'année 1978, Pékin, le 30 janvier 1978; signature; avec effet rétroactif à partir du 1^{er} janvier 1978.

Cuba

— Accord relatif aux échanges commerciaux au cours des années 1976-1980, La Havane, le 30 mars 1977; approbation; appliqué avec effet rétroactif à partir du 1^{er} janvier 1976.

Danemark

— Dénonciation par la Pologne de l'Accord entre la Pologne et le Danemark relatif à l'attribution réciproque du droit de pêche dans leurs zones de pêche maritime respectives, signé à Copenhague le 1^{er} juin 1971; notification par la Pologne le 28 décembre 1977, l'Accord a pris fin le 29 décembre 1977.

Espagne

— Accord de coopération culturelle et scientifique, Varsovie, le 27 mai 1977; ratification; le 1^{er} mars 1978.

— Accord relatif aux transports routiers internationaux, Varsovie, le 1^{er} mars 1978; approbation; le 22 septembre 1978.

— Déclaration commune polono-espagnole, Varsovie, le 1^{er} mars 1978; signature; le 1^{er} mars 1978.

États-Unis

— Exchange of notes concerning the extension of validity of the Agreement on cooperation in science and technology of 1972, Warsaw, 31 October 1977; exchange of notes; 31 October 1977.

— Agreement on the participation of small and medium-sized firms* and economic organizations in trade and in economic and industrial cooperation, Washington, 9 November 1978; signature; 9 November 1978.

Éthiopie

— Agreement for air services between and beyond their respective territories, Addis Abeba, 29 July 1977; approval; 23 August 1978.

— Commercial agreement, Warsaw, 19 July 1977; approval; 17 May 1978.

— Declaration of friendship and cooperation, Warsaw, 12 December 1978; signature; 12 December 1978.

Finlande

— Agreement on the reciprocal* removal of obstacles to trade, Helsinki, 29 September 1976; approval; 1 April 1978.

France

— Convention consulaire, Paris, le 20 février 1976; ratification; le 19 juin 1977.

— Déclaration polono-française, Paris, 14 septembre 1977; signature; 14 septembre 1977.

— Accord relatif à l'élargissement de la coopération polono-française entre les petites et moyennes entreprises, Paris, le 14 septembre 1977; signature; le 14 septembre 1977.

Grèce

— Agreement on cultural and scientific cooperation, Athens, 31 March 1976; ratification; 26 November 1977.

Guinée

— Accord de commerce et de paiement, Conakry, le 25 mars 1975; approbation; le 16 mars 1978.

Hongrie

— Accord intergouvernemental concernant la cession réciproque et l'usufruit gratuit des parcelles de terrain destinées à la construction des ambassades et des bureaux des conseillers commerciaux, Budapest, le 14 décembre 1977; signature; le 14 décembre 1977.

— Accord de coopération dans le domaine des télécommunication, Cracovie, le 20 mars 1978; approbation; le 5 septembre 1978.

Inde

— Agreement relating to air services, New Delhi, 25 January 1977; signature; 25 January 1977.

Iran

— Accord relatif aux transports routiers internationaux, Varsovie, le 4 décembre 1976; approbation; le 1^{er} avril 1978.

— Long-term agreement on the development of economic and industrial co-operation, Warsaw, 25 August 1977; approval; 22 July 1978.

Irlande

— Agreement concerning civil air transport, Warsaw, 21 April 1977; approval; 17 January 1978.

— Agreement on the development of economic, industrial, scientific and technological co-operation, Poznań, 13 June 1977; approval; 21 Septembre 1977.

Islande

— Accord de coopération scientifique et technique en matière de pêche, Reykjavik, le 9 septembre 1977; signature; le 9 septembre 1977.

Italie

— Convention consulaire, Rome, le 9 novembre 1973; ratification; le 17 mars 1977.

— Agreement for the avoidance of double taxation of revenues arising from the exercise of maritime and air navigation; Rome, 9 November 1973; ratification; 15 February 1977.

— Déclaration commune polono-italienne, Rome, le 29 novembre 1977; signature; le 29 novembre 1977.

— Accord relatif à l'élargissement de la coopération polono-italienne entre les petites et moyennes entreprises Rome, le 29 novembre 1977; signature; le 29 novembre 1977.

— Accord relatif aux transports aériens civils, Rome, le 20 février 1975; approbation; le 3 octobre 1978.

Japon

— Accord de coopération culturelle, Tokyo, le 16 novembre 1978; échange de notes; le 16 novembre 1978.

— Accord de coopération scientifique et technique, Tokyo, le 16 novembre 1978; signature; le 16 novembre 1978.

Jordanie

— Long-term trade and payments agreement, Warsaw, 13 October 1977; approval; 10 January 1978.

Koweït

— Air transport agreement, Koweit, 31 May 1977; approval; provisional application as of 31 May 1977.

Laos

— Accord de coopération scientifique et technique, Varsovie, le 4 octobre 1976; approbation; le 28 mars 1977.

— Accord relatif aux transports aériens civils, Varsovie, le 4 octobre 1976; approbation; le 28 mars 1977.

Libye

— Accord de coopération culturelle et scientifique, Tripoli, le 27 octobre 1976; ratification; le 10 novembre 1977.

— Agreement on scheduled air service between and beyond their respective territories, Tripoli, 27 October 1976; approval; 14 April 1977.

Malte

— Long-term agreement on economic cooperation, trade and shipping, La Valette, 21 October 1977; approval; 10 March 1978.

Maroc

— Protocole relatif au passage du régime de paiements en clearing au régime de paiements en devises convertibles, Varsovie, le 22 juin 1974; approbation; le 19 janvier 1977.

— Accord commercial à long terme, Varsovie, le 22 juin 1974; approbation; le 19 janvier 1977.

Mexique

— Accord commercial, Mexico, le 2 mars 1976; approbation; le 16 mars 1977.

Nigeria

— Accord de coopération culturelle et scientifique, Varsovie, le 16 juin 1976; ratification; le 10 février 1977.

— Accord de coopération économique et technique, Lagos, le 24 octobre 1977; approbation; le 18 février 1978.

— Déclaration commune polono-nigérienne, Varsovie, le 9 juin 1978; signature; le 9 juin 1978.

— Accord portant création de la commission mixte pour la coopération économique, scientifique, technique et culturelle, Varsovie, le 9 juin 1978; approbation; appliqué provisoirement dès la date de la signature.

Norvège

— Agreement on fisheries, Oslo, 28 March 1977; approval; 6 September 1977.

— Protocol amending the Agreement on fisheries, Oslo, 24 May 1977; approval; 6 September 1977.

Panama

— Accord de coopération culturelle et scientifique, Panama, le 17 février 1978; ratification; appliqué provisoirement dès la date de la signature.

Pays-Bas

— Déclaration commune polono-neerlandaise, La Haye, le 15 mars 1977; signature; le 15 mars 1977.

Philippines

— Accord commercial, Manille, le 12 février 1976; approbation; le 7 juin 1977.

Portugal

— Accord relatif à la navigation commerciale maritime, Varsovie, le 14 mai 1976; approbation; le 29 novembre 1977.

— Accord de coopération culturelle et scientifique, Varsovie, le 30 septembre 1975; ratification; le 2 février 1977.

— Accord relatif aux transports aériens, Varsovie, le 30 septembre 1975; approbation; le 15 mars 1977 (appliqué provisoirement à partir de la date de la signature).

Roumanie

— Protocole portant abrogation de l'Accord relatif aux transports aériens conclu entre la Pologne et la Roumanie le 9 août 1947, Bucarest, le 29 janvier 1977; ratification; le 25 juin 1977.

— Accord relatif aux transports aériens civils, Bucarest, le 29 janvier 1977; approbation; le 25 juin 1977.

— Accord sur les fournitures d'essieux montés (roumains) en contrepartie des fournitures équivalentes du coke métallurgique, de produits sidérurgiques, de machines et d'équipements (polonais) au cours des années 1981-1985, Bucarest, le 29 janvier 1977; approbation; le 11 juin 1977.

— Accord au sujet de la coopération dans la production de machines-outils, Varsovie, le 19 mai 1977; approbation; le 24 septembre 1977.

Royaume-Uni

— Protocol amending the Consular Convention signed at London on 23-2-1967, London, 16 December 1976; ratification; 23 September 1978.

— Convention for the avoidance of double taxation with respect to taxes on income and capital gains, London, 16 December 1976; ratification; 25 February 1978.

— Five-year agreement on economic co-operation, London, 16 December 1976; approval; 22 April 1977.

El Salvador

— Accord commercial, San Salvador, le 6 septembre 1976; approbation; le 11 janvier 1977.

Suède

— Convention with Sweden for the avoidance of double taxation with respect

to taxes on income and capital, Stockholm, 5 May 1975; ratification; 18 February 1977.

— Agreement on fisheries, Warsaw, 1 February 1978; ratification; 23 August 1978.

— Long-term trade agreement, Warsaw, 13 April 1978; approval; 13 Novembre 1978.

Suisse

— Accord relatif aux transports routiers internationaux, Berne, le 31 janvier 1975; approbation; le 13 septembre 1977.

Tchécoslovaquie

— Accord relatif à la coopération en matière de transit de marchandises jusqu'à 1980, Varsovie, le 24 juin 1977; signature; le 24 juin 1977.

— Accord concernant les facilités de déplacement des ressortissants des deux États, Varsovie, le 20 juillet 1977; signature; le 20 août 1977.

Thaïlande

— Agreement for air services between and beyond their respective territories, Warsaw, 19 May 1976; approval; 3 June 1977.

Turquie

— Accord relatif aux transports routiers internationaux, Ankara, le 9 septembre 1977; approbation; le 29 mars 1978.

Vietnam

— Accord concernant l'allocation par le Gouvernement polonais du crédit financier au Gouvernement de la République socialiste du Vietnam, Varsovie, le 21 janvier 1977; signature; le 21 janvier 1977.

— Accord de coopération culturelle et scientifique; Varsovie, le 16 août 1977; ratification; le 22 février 1978.

— Accord concernant l'allocation par le Gouvernement polonais du crédit financier au Gouvernement de la République socialiste du Vietnam, Hanoi, le 10 mars 1978; signature; le 10 mars 1978.

Traités multilatéraux

— Convention internationale des télécommunications, Malaga-Torremolinos, le 25 octobre 1973; ratification; le 13 janvier 1977 la Pologne a déposé son instrument de ratification avec effet rétroactif à partir 1^{er} janvier 1975.

— Convention internationale pour l'unification de certaines règles sur la saisie conservatoire des navires de mer, Bruxelles, le 10 mai 1952; ratification; le 16 janvier 1977.

— International Convention for the unification of certain rules concerning the immunity of State-owned ships, Brussels, 10 April 1926; ratification; 16 January 1977.

— Deuxième protocole additionnel à la Constitution de l'Union postale universelle, Lausanne, le 5 juillet 1974; ratification; le 4 février 1977 la Pologne a déposé son instrument de ratification avec effet rétroactif à partir du 1^{er} janvier 1976.

— Convention universelle sur le droit d'auteur et les protocoles annexes 1 et 2 à cette Convention, Paris, le 24 juillet 1971; ratification; le 9 mars 1977.

— Convention 103 de l'Organisation internationale du travail concernant la protection de la maternité (révisée en 1952), Genève, le 28 juin 1952; ratification; le 10 mars 1977.

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POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. X, 1980
PL ISSN 0554-498X

Polish Bibliography of International Law, 1977

Public International Law

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