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A R T I C L E S

Some Particular Aspects of Poland's Membership in International Organizations (UN, ICAO, GATT)

by WOJCIECH MORAWIECKI

I

International organizations constitute a modern mechanism whose function is to satisfy the requirements of advanced international cooperation that cannot be adequately met by others forms of international relations. The need for organized international cooperation has been growing with increasing speed in the new historical period that was started by the Second World War. It results from the processes of political, economic and social changes in the modern world that have accelerated since the Second World War.

The emergence of the Polish People's Republic and its socialist road of development were also one of the products of these changes. From the historical experiences of the Polish people and from the very substance of the socialist character of the reconstructed Polish State a deep interest was born in assuring international security and durable peace.

International organizations provide an important framework for the processes of peaceful cooperation among states. But to function optimally as a mechanism of fruitful cooperation they should be based on certain principles and fulfil definite political and institutional conditions. Under contemporary circumstances the aims and activities of an international organization should correspond with the convergent or common interests of its member states. In the new international system that arose after the Second World War and is characterised by the steadily increasing extent and influence of socialism, any international organization which sets out to cover relations between states belonging to different social systems should respect the basic principles of peaceful coexistence. Without analysing extensively the conditions to be fulfilled and political rules

to be observed by such an organization¹ it can be said that, in particular, all major powers and all the main groupings of member states should be allowed to participate in shaping and influencing the organization's activities. At the very least, each major grouping of members should be sufficiently safeguarded against the danger of decisions and actions being taken by such an organization in contradiction to the vital interests of any of them. An international organization which aspires to providing a framework for cooperation between socialist and capitalist states can successfully play its role only when in its activities it does not go too far beyond the area of convergent interests of the major systematic groupings. The extent of convergence of interests of its member states determines the possibilities and the effectiveness of a contemporary international organizations.

Participation in international organizations that fulfil the conditions posed by the principles of peaceful coexistence should be considered by a socialist state not only useful but necessary in contemporary circumstances. Poland in particular has been one of the countries in Eastern Europe that has demonstrated, from the very moment of her rebirth at the end of the War, the keenest interest in participating in international organizations. On the basis of her recent experience it was rightly concluded that for a country with limited resources and located at the crossroads of world politics it was not possible either to achieve economic growth or political security in the absence of close cooperation, on the regional scale with the kindred socialist countries and, on the global scale, with all other countries ready to accept the principles of peaceful coexistence.

II

However in the first period after the war the expectations of the new Polish State with regard to its cooperation within the framework of world organizations were not always fulfilled. Yet in this period it was the Polish nation if anyone, who had a full right to assistance from international organizations in overcoming the enormous difficulties of post-war reconstruction.

In actual fact Poland's very admission to some organizations belonging to the United Nations system, including the UN itself, encountered obstacles. Her path to these organizations was not an easy one and the

¹ For a more profound analysis of these problems see: W. MORAWIECKI, *Institutional and Political Conditions of Participation of Socialist States in International Organizations*: "A Polish View, International Organization," Vol. 22, 1968, No. 2.

unexpected difficulties that accompanied Poland's efforts to join them could have caused some embitterment.

The first impediments put in the way of Poland's entry into these international organizations were connected with the succession of government in a revolutionary way. Some lack of precision in international law in this domain was exploited for political purposes: to question the legitimacy of the new Polish Governmental authorities exercising effective power on the territory of the Polish State to represent this state in international relations.

When the People's Republic was founded towards the end of the second World War on liberated Polish territory the new governmental authorities declared themselves in principle to be the full successors of the former governments representing Poland in international relations. In particular, they resolved to recognize without reservations the legal acts of the Polish pre-war government as well as of the Polish government-in-exile in London concerning Poland's participation in international organizations. This attitude on the part of the State authorities of the Polish People's Republic was made unequivocally clear by their official statements and also by their actual behaviour towards the existing international organizations. Poland continued to be a member of all the international organizations to which she had belonged before the war as, for instance, the League of Nations, until its liquidation in 1946, the International Labour Organization, the Universal Postal Union etc. The new Polish government also recognized the legal acts of the *émigré* government which formed part of the process of setting up new organizations such as its signature of the Declaration of the United Nations of January 1, 1942 or its participation in the constitutive conferences of the FAO in 1943 and of the IMF and IBRD from July 1 to 22, 1944, that gave Poland the right to original membership in these organizations.

But equally unambiguous was the attitude of the new Polish governmental authorities as to the moment when the right of the government-in-exile in London to represent Poland in international relations extinguished and became the exclusive prerogative of the new revolutionary government. It came as soon as the latter begun to exercise effective power on Polish territory. The historic Manifesto of the Polish Committee of National Liberation (PKWN — for *Polski Komitet Wyzwolenia Narodowego*) issued on July 22, 1944 in the city of Chełm, the first piece of liberated Polish territory, declared:

"The government-in-exile in London and its delegacy in Poland constitute usurpatory and illegal organs. The National People's Council (KRN — for *Krajowa Rada Narodowa*), the provisional parliament of the Polish people has empowered

the Polish Committee of National Liberation to act as legitimate provisional executive authority for directing the struggle for national liberation, independence and reconstruction of Polish statehood [...].²

In keeping with this declaration of a constitutional character July 22, 1944 has to be recognized as the precise date of the final legal succession of the new people's government of Poland and its assumption of power from the preceding Polish authorities which claimed to represent this country in international relations. The Polish Committee of National Liberation constituted a *de facto* government of Poland possessing the legal capacity to represent the Polish State in relations with other states or international organizations. Of course the possibility of exercising this legal capacity was in practice restricted by the lack of recognition of the PKWN by other governments as the government of Poland.³ But this fact could not undermine the legal existence of such a capacity.

It is a justified assumption that the PKWN was recognized as the *de facto* government of Poland by countries which signed with it formal international treaties in 1944 namely the USSR, Ukrainian, Byelorussian and Lithuanian Soviet Republics and by countries which exchanged with it official documents or representatives, namely Czechoslovakia, Yugoslavia and France.

The National People's Council subsequently set up as of January 1, 1945, a Provisional Government, which was recognized *de jure* by the Soviet Union on January 5, by Czechoslovakia on January 30, and by Yugoslavia on March 30, 1945.

The Premier of the Provisional Government, Osóbka-Morawski, declared again officially that his Government would not respect the treaties and obligations contracted by the government-in-exile in London.⁴

The Yalta Conference had an essential impact on the recognition of the Provisional Polish Government by the Western Powers. In a Declaration concerning Poland, adopted on February 11, 1945 by the heads of governments of the three big Powers, it was announced⁵ that they would recognize the Provisional Government acting in Poland as soon as it was transformed on an enlarged political basis by including some

² "Dziennik Ustaw" [Journal of Laws], 1944, No. 1, Annex.

³ See R. BIERZANEK, *Międzynarodowe uznanie PKWN i Rządu Jedności Narodowej* [International Recognition of the PKWN and of the Government of National Unity], "Sprawy Międzynarodowe," 1964, No. 7, p. 42.

⁴ Records of the Plenary Meeting of the National People's Council [KRN] on December 31, 1944, and on January 2 and 3, 1945, Lublin 1945, p. 116.

⁵ In practice this meant the USA and United Kingdom as the USSR had already recognized the Provisional Government.

democratic leaders from among Poles abroad as well as in Poland.⁶ The Declaration did not so much as mention the government-in-exile. In its essence this meant recognition of the Provisional Government subject to some conditions. Such conditional recognition fully deserves, from the point of view of international law, the qualification as recognition *de facto* of the Provisional Government in Poland by the Western Powers.⁷ After the Yalta Conference the government-in-exile could no longer be considered by the Western Powers either as representing the Polish State in spite of the formal though only temporary diplomatic relations maintained with it. The wording of the Yalta Declaration on Poland meant logically *de facto* withdrawal of recognition from the government-in-exile by the Western Powers.

But until the formal withdrawal of recognition of the government-in-exile and formal recognition *de jure* of the Government acting in Poland this country was subjected by the Western Powers to a number of unfair and legally unjustified acts that in particular impeded her admission to some world organizations.

III

The first and very distressing example of such impediments was connected with Poland's participation in the conference for the constitution of the United Nations held in San Francisco from April 25 to June 25, 1945. The invitations to this conference were sent by the United States Government of behalf of the four Powers: the United States, the Soviet Union, the United Kingdom and China. According to the decisions of the Yalta conference all countries which adhered to the United Nations Declaration of January 1942 and had declared war on any of the Axis countries were to be invited. Poland had been the first nation to offer armed resistance to German aggression and her armed forces had fought uninterruptedly on almost all the fronts of the Second World War. Poland had also been among the original 26 signatories of the United Nations Declaration of 1942. Unfortunately, however, this nation's representatives were not among the 50 countries which attended

⁶ *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* [International Law and Diplomatic History. Selection of Documents], vol. 3, Warszawa 1960, p. 117.

⁷ See S. BORATYŃSKI, *Obrona suwerenności państw małych* [Defence of Sovereignty of Small States], Warszawa 1955, p. 355. He considers the relevant decisions of the Yalta Declaration as "the recognition *de facto* of the Provisional Government."

the San Francisco Conference, although there were 11 governments which had joined the United Nations coalition only formally at the last moment before the deadline of March 1, 1945, plus Argentina which had not even done that but on the initiative of the Western Powers had been invited to the Conference by a majority decision. At the same time the motion of the Soviet Union to invite the Polish Provisional Government was stubbornly opposed by the United States and United Kingdom on the pretext that this government had not been recognized by them. Consequently the motion did not gain the support of the necessary majority of participants at the San Francisco Conference.

In the light of the evidence and arguments mentioned here which demonstrate that the Western Powers had already resolved on the strength of the Yalta Declaration on Poland to recognize *de facto* the Provisional Government, their attitude towards Poland at the San Francisco Conference can be qualified as legally groundless. It seems to be a well-established rule of international law that mutual recognition of governments and their participation in multilateral conferences, conventions or organizations are acts legally independent of one another. Thus the reactions of the Western Powers towards the Polish Provisional Government were of a purely political character, the aim being to exert pressure on internal processes in Poland by encouraging the adversaries of the new revolutionary government and the socialist system.

It is worth noting that the question of inviting the government-in-exile in London was not raised by anybody in San Francisco. It was perfectly clear to all that this government had lost any legitimacy to represent the Polish State and to undertake international commitments.

To reduce the injustice done to the Polish Nation by eliminating it from participation in shaping the foundations of the organization of world peace and security it was decided at San Francisco to reserve for Poland a place among the founders of the United Nations. Thus Poland was the only country which in spite of being absent at the San Francisco Conference was invited to sign the Charter and was considered to be one of the 51 original members of the United Nations.

In actual fact only two days after the ending of the San Francisco Conference, namely on June 28, 1945, an agreement was reached on the enlargement of the composition of the Provisional Government and on its transformation into the Polish Government of National Unity. The latter was recognized *de jure* on July 5, 1945, by the United States and the United Kingdom and subsequently by other governments.

IV

Another example of similar difficulties springing more from political than juridical reasons, is the story of Poland's admission to the International Civil Aviation Organization (ICAO). The Convention providing for establishment of ICAO was adopted and signed on December 7, 1944, in Chicago. On the invitation of the United States Poland was represented at the Chicago Conference by delegates of the government-in-exile in London although its right to represent Poland had already been challenged by the Polish governmental authorities exercising effective power on liberated Polish territory. When after the Yalta Conference the formal recognition of the new people's government by Western Powers became only a matter of days, extremely significant was the great haste in which the government-in-exile proceeded with ratification of the Chicago Convention. As a matter of fact it was the first of all the signatories to do so, serving notice of ratification as early as April 6, 1945. The next ratifications followed much later.⁸

The United States Government being the depositary of the Chicago Convention accepted this ratification and recognized it as legally valid. In keeping with the formal obligations of a depositary it notified all the other signatories of the Convention of this. The ratification was consequently counted as one of the 26 necessary for the Convention to come into force which had some influence on its exact dating.⁹ At the same time the government-in-exile ratified the International Air Services Transit Agreement constituting a facultative annex to the Chicago Convention on ICAO. Both these ratifications as well as the previous signature of the respective documents could not have any legal value as far as the new Polish people's government was concerned.¹⁰

⁸ The next state to ratify the Convention was Turkey (December 20, 1945) and after it Nicaragua (December 28, 1945). Until the first session of the Provisional International Civil Aviation Organization in May 1946 only 5 governments of lesser importance in the field deposited the documents of ratification — International Civil Aviation 1949 - 1950, Department of State Publication 3915, 1950, p. 39 - 40.

⁹ According to article 91 b) of the Convention it was to come into force on the 30th day after the 26th government ratified it. According to the depositary's notification the 26th ratification was deposited by Spain on March 5, 1947. If we rule out the Polish government-in-exile ratification as not legally valid the 26th to ratify the Convention would be New Zealand on March 7, 1947.

¹⁰ To argue to the contrary would lead to completely absurd and unreal situations: holding the government of the Chinese People's Republic responsible for obligations contracted by the authorities on the island of Taiwan claiming to represent the whole Chinese state and recognized formally in such a capacity by some Western governments.

An additional question arises with regard to the behavior of the depositary. The United States government cannot be considered as acting in good faith when accepting and recognizing as valid the document of ratification sent by the Polish government-in-exile. It was well aware of the fact that the latter's legitimacy to act in the name of Poland had been seriously undermined by the existence of another government in Poland. The United States had decided already to withdraw formal recognition of the government-in-exile and the fulfillment of its Yalta obligations was to take place in a few weeks. Besides, the question of recognizing or not recognizing a government by the depositary government cannot determine such important issues for an international organization as its membership. The true role of a depositary of an international convention is reduced only to certain technical and nonpolitical functions¹¹, whereas the United States government demonstrated in this case a distinct and active political engagement.

The consequences of recognizing formally the validity of the ratification of the Chicago Convention of 1944 by the Polish government-in-exile were paradoxical.

The government of the Polish People's Republic became interested in membership of ICAO and on June 8, 1948 served notice to the government of the United States of its ratification of the Chicago Convention.¹² The US Secretary of State rejected this notification and in his note to the Polish Embassy in Washington declared as follows:

"The Government of the United States of America, as depositary of the Convention of December 7, 1944, is unable to accept the above mentioned note as a notification of adherence to the Convention by the Government of Poland in view of the fact that this Government received an instrument of ratification of that Convention on behalf of Poland on April 6, 1945 and the Convention has been considered in force with respect to Poland since April 4, 1947 on which date the Convention entered into force pursuant to the provisions of paragraph (b) of Article 91 thereof. The Polish instrument of ratification was in proper form when presented for deposit and the Government of the United States of America perceived no question as to its validity at the time that instrument was deposited or at any time subsequently."

¹¹ This was clearly stated by the UN General Assembly resolution No. 598 (VI) of January 12, 1952 with regard to the functions of the Secretary General as depositary of multilateral conventions.

¹² The notification of ratification contained a reservation to article 5 of the Convention. This article provides for some limitation of the sovereignty of the member-state over its air space. The question of the admissibility of such reservation was never raised with regard to the Polish ratification. But it seems to develop a general principle of inadmissibility of reservations to the conventions playing the role of the constitutions of international organizations. Later Poland did not insist on this reservation.

Replying this attitude of the United States government Polish Ambassador in Washington declared in a note to the State Department on August 10, 1948, as follows:

"The Polish Government cannot recognize the legal validity either of the signature or of the instrument of ratification of the Convention on International Civil Aviation, mentioned in your letter, because they were made and deposited after July 22, 1944."

The Polish government's wish to join the ICAO was again reiterated. There the exchange of letters between the Polish Embassy and the State Department in this matter ended. The depositary did not inform the contracting parties to the Convention, members of the ICAO, about this Polish application and the problem was not considered by any organ of the Organization.

The situation concerning Poland's relationship with ICAO became still more complicated by the fact that the main organs of the Organization and especially the Secretariat tried to ignore everything and treated Poland as a regular member. Invitations to participate in the sessions of the ICAO and requests to pay contributions to the budget were directed to the Polish government which refused to take note of them on the ground that they were deprived of any legal grounds. As a result the Assembly of the ICAO suspended Poland in her right to vote as early as 1948 considering this measure as a sanction against a member withholding its contributions.¹³ The peculiar situation of Poland with regard to the ICAO was qualified as "inactive membership" in the language of the Secretariat.¹⁴

The absurdity of the situation was striking. On the one hand the government of the United States and the organs of the ICAO tried to impose on Poland membership of an international organization against wishes of the Polish Government. On the other hand Poland expressing her desire and interest in becoming a member protested against being considered as such on the basis of instruments deposited by authorities illegally claiming to represent Poland in international relations. It seems that the obstinacy of the United States Government, followed by the organs of the ICAO, in defending the validity of the government-in-exile ratification, in spite of the fact that the price paid by the Organization was prevention of participation in its activities by an important country,

¹³ Resolutions of the Assembly from 1948, 1949 and 1953, ICAO Doc. 5692, Resolution A 2 - 1; ICAO Doc. 6968, Resolution A 3 - 6; ICAO Doc. 7367, Resolution A 6 - 2.

¹⁴ On problems of "inactive membership" see: W. MORAWIECKI, *The Question of "Non-active Membership" of Poland and other Socialist States in the WHO and UNESCO*, "Polish Western Affairs," Vol. 7, 1966, No. 1, p. 74 - 108. Also in French in "La Pologne et les Affaires Occidentales," Vol. 1, 1966, No. 1.

was due not so much to the firm attachment to certain legal principles but rather to the lack of real interest in having a socialist partner inside a predominantly capitalistic club. By maintaining Poland on the list of members the organization wished to appear, however, not as such a club but as a specialised institution of the United Nations able to serve as a framework for cooperation of all countries of the world regardless of their internal or regional systems. Such manouvering was conditioned by the then prevailing factors of the cold war.

This bizzare situation lasted for all of ten years. In the changed political atmosphere in international relations and in particular due to the improvement in relations between Poland and the United States, it proved to be not so difficult to find a practical compromise solution to the problem of Poland's membership in the ICAO that had seemed so intricate and intractable when considered from the perspective of the cold war.

Noting the essential changes in the international system in the second half of the 1950's and being practically interested in active participation in the ICAO the Polish government took an initiative in 1957 with a view to settlement of Poland's membership in this organization. Negotiations were started with the State Department representing not only the depositary of the ICAO Convention but at the same time the most influential member-state of the Organization. Parallel negotiations were conducted with the Secretary General of the ICAO, another important actor in the process of shaping the attitude of the Organization. The choice of partners for negotiating a solution to the problem of membership in the ICAO indicated that Poland was sincerely interested in acquiring a practical and acceptable decision. Both these partners constituted key factors in the decision-making process within the Organization.

Given the sincere willingness of all the negotiators to reach an agreement it proved fairly simple to find an adequate formula for the solution of the practical problems connected with clearing the way to Poland's active participation in the ICAO. Problems of no immediate practical importance, in particular the controversial juridical questions, were deliberately left aside. For instance Poland was not asked to recognize the acts of the former government-in-exile; the United States and ICAO were not asked to revise their juridical opinion that Poland was a member of the ICAO since 1947.

The pragmatic solution acceptable to both sides was reflected in the intentionally vague wording of the new official notification sent by the Polish Embassy to the State Department on May 9, 1957. It contained only a brief statement that the Ambassador of the Polish People's Republic "upon instructions from his Government has the honour to inform

the Government of the United States of America that Poland has adhered without qualifications to the Convention on International Civil Aviation signed at Chicago on December 7, 1944, and has become a member of the International Civil Aviation Organization". The date on which Poland became a member of the Organization was omitted as subject to juridical controversy. The parties to the dispute retained their legal standpoints. From the legal standpoint of the Polish Government Poland became a member of the ICAO on the basis of the notification of May 9, 1957 and her membership began at this date. The text of the Polish notification was formally communicated by the State Department without any comment to the Secretary General and to all members of the ICAO who also abstained from any comments.

As the next step toward solution of her membership Poland sent a delegation to the 11th ICAO Assembly in 1958 (May 20 - June 2). After additional negotiations between this delegation and the most influential member-states and the Secretariat, Poland submitted an agreed proposal on how to deal with the problem of the alleged accumulated back subscriptions which in the opinion of the ICAO Secretariat were formally due for the whole 10 years period of her "inactive membership." The compromise solution provided for payment by Poland of a lump sum of 106 thousand Canadian dollars and the cancellation of the remaining 415 thousand Canadian dollars of the theoretical total arrears in Poland's contributions to the ICAO budgets from 1947 to 1957. Poland did not, however, consider this payment as recognition of her being a member during this period but rather as some kind of compensation for the services rendered to Poland by ICAO (e.g. supplying of official documentation) or as participation in the costs of facilities which were made available to Poland at the moment of her joining the Organization effectively in 1957 (e.g. construction of the ICAO headquarters in Montreal). In fact the payment of this lump sum by Poland was also taken into account when the percentage of her regular contribution to the ICAO budget was considered and this helped to lead to certain reduction being made in this percentage.

When the Polish proposal concerning financial obligations was unanimously approved by the 11th Assembly of the ICAO it also decided formally to restore the voting rights of the Polish delegation.¹⁵ Thus the practical problems connected with Poland's active participation in the ICAO were finally solved.

¹⁵ ICAO Doc. 7960, A 12 - P/1, Annual Report of the Council to the Assembly for 1958, p. 75.

The ICAO Convention was formally ratified by the competent authorities of the Polish People's Republic and under Polish jurisdiction it is binding from November 20, 1958, the date of its publication in the *Official Journal*.¹⁶

The experience of a pragmatic, not legalistic solution of the controversy over Poland's membership of the ICAO demonstrates that the most decisive factor enabling cooperation among governments within as well as without international organization is the presence of a real and common interest in cooperation among the partners and the existence of a favourable political atmosphere. If they prevail in international relations, juridical or organizational obstacles that would otherwise seem unsurmountable can be quite easily removed and the road for peaceful cooperation can be cleared.

V

The story of Poland's admission to the General Agreement on Tariffs and Trade (GATT)¹⁷ constitutes the most interesting and instructive case, demonstrating the degree of this country's interest in a world's economic organization and its belief in the need for organized economic cooperation among states belonging to different social and economic systems.

Poland was not originally associated with GATT and her role in the preparatory work for an International Trade Organization in 1946 - 1948 was not significant. On the Eastern European countries only Czechoslovakia was among the 23 original contracting parties to the GATT. But Czechoslovakia's situation as a member of the GATT considerably deteriorated after a waiver, asked by the United States, had been adopted by the two-thirds majority of the contracting parties in 1951 depriving this country of the privileges of the most favoured nation clause. So the experience of the only socialist member in the GATT was rather discouraging.

Another discouraging political factor for potential Polish membership in the GATT should have been the critical situation of this institution in the late 1950's. Its role as a possible framework for promoting world trade had become subject to serious doubts. The principles on which the

¹⁶ Later, on March 17, 1959, Poland notified her acceptance of the International Air Services Transit Agreement, annexed to the Chicago Convention of 1944.

¹⁷ From an international agreement GATT was transformed by the extra-statutory means of decisions taken by the Contracting Parties, into a fully fledged international organization possessing a complete set of permanent organs.

GATT was based really favoured only trade relations among developed free market economies. Not without reason the less developed countries named the GATT a "rich man's club" and launched a strong campaign against it demanding the creation of a new world organization for economic cooperation based on principles better suited to the needs and conditions of the developing countries. This campaign coincided with the initiatives of the Soviet Union and other socialist countries at setting up a new International Trade Organization that could contribute toward normalization of economic relations between countries representing different social and economic systems. The combined efforts of the socialist and less developed countries resulted finally in the convocation of the United Nations Conference on Trade and Development in 1964 in Geneva which transformed itself in practice into a new specialized United Nations agency in spite of its formal character of a subsidiary organ of the UN General Assembly. UNCTAD in many respects could be considered as a rival organization with a tendency to replace the GATT.

The weakness of the GATT also sprang from the disintegration of the world capitalist market as a result of regional integration processes, especially the emergence of the EEC and EFTA in Western Europe. Even though the GATT acting under strong political pressure made certain attempts to meet the requirements of the less developed countries (Part IV of the Agreement added in 1965) and to reduce effects of the division of the world market into regional preferential blocs by a general across-the-board lowering of tariffs (Kennedy Round) its situation still remained weak as a possible framework for economic cooperation, especially between countries belonging to different economic systems.

In spite of these weaknesses in the GATT the Polish government was so interested in increasing its trade relations with Western countries that after having discovered some chances offered by GATT to remove certain obstacles and to serve as an instrument of promoting these relations it decided to apply for membership of the GATT. Since the GATT's basic objective is the liberalization of trade, Poland expected that through her participation in the GATT she would get better access to Western markets. Membership in the GATT would mean a considerable reduction of the barriers existing as a result of discriminatory treatment of Polish exports, subjected to higher tariff duties and severe quota restrictions, as well as of Polish imports liable to many prohibitions concerning so called strategic goods.

As early as 1957 Poland sent official observers to the GATT session and in 1958 expressed her wish to join the GATT. Consultations with the leaders of the GATT's Secretariat and with the more influential contract-

ing parties revealed however that the other side was not very enthusiastic about Poland's membership in the GATT. They tended to express doubts about the ability to fulfil the obligations of a member of the GATT with regard to reduction of tariffs and elimination of quantitative restrictions in its trade by a country with a socialist centrally planned economic system as these measures are not real instruments of its foreign trade policy. They questioned the possibility of getting adequate and equivalent concessions from Poland as a counterpart for the advantages granted to her by the other contracting parties in the form of reduced tariffs and elimination of quantitative restrictions in a situation where the access to the internal market of a centrally planned economy is not regulated by similar measures. In fact these apprehensions expressed by GATT boiled down to a general belief that a country with a socialist economic system and a state monopoly of foreign trade cannot be a normal partner in trade with countries with a free market economy. A list of questions resulting from these apprehensions was submitted to the Polish government but its answers did not completely convince the other side.

However, as a result of a certain convergency of interests both sides came to an agreement on a special relationship between Poland and the GATT. On November 9, 1959, the Conference of the Contracting Parties, GATT's plenary intergovernmental organ, adopted a Declaration concerning relations between Poland and the GATT. The content of it was practically reduced to mutual promises to make an attempt at developing trade and to consider in a friendly mood any representations or complaints by the partners. The Declaration provided also for annual surveys of trade relations between Poland and the members of the GATT and for an invitation to Poland to participate in the GATT's activities.¹⁸ The Declaration came into force on November 16, 1960 after having been formally accepted by two-thirds of the contracting parties to the GATT and by Poland. The Declaration acquired the character of an international agreement between Poland and the GATT.

The special relationship of Poland with the GATT, based on this Declaration, could be considered a kind of associate membership with very limited rights and obligations. But it constituted a starting point for an experimental process of cooperation between the contracting parties to the GATT and a country representing a typical socialist economy. In spite of the vague wording of the terms of cooperation this process yielded quite positive practical results. During the years that followed Poland participated actively in all the GATT's activities. During the annual surveys many problems could be explained or made clearer.

¹⁸ See GATT Doc. L/1120, December 10, 1959.

The most essential result of Poland's cooperation with the GATT during experimental period was certainly the acquisition of the status of most favoured nation in trade relations with practically all her Western partners including the United States and the member countries of the EEC as well as of EFTA. The application of the most favoured nation's clause to Poland was recognized by these countries on the basis of bilateral agreements or unilateral declarations. This was a great practical achievement for Poland that was due principally to the favourable political atmosphere to which the association of Poland with the GATT seemed to have considerably contributed. This was also a good example that pragmatic and functional solutions are a way of getting over intricate situations and of breaking vicious circles which may appear insoluble when the practical issues are approached from the standpoint of abstract conceptions.

As a result of a certain liberalization of Poland's access to foreign markets its turnover with the GATT countries during the first five years of her association with the GATT grew from approximately one billion dollars in 1959 to 1.7 billion dollars in 1963 to be doubled in 1964 - 1965.

One could easily come to the conclusion that Poland had in fact obtained almost all practical advantages that result from membership in the GATT without becoming a full member.

But being interested in a definitive solution the Polish government again and again pressed its demands to be granted the formal status of a regular member of the GATT. Several variants of the concessions Poland could offer in exchange for formal admission to full membership of the GATT were considered. However, Poland, in contrast to Yugoslavia which was also applying for membership of the GATT at the same time, was never willing to modify her economic system so as to make it better fit the pattern and rules of free market trading.

The general conference on tariff reduction that opened in 1964 under the name of the Kennedy Round constituted an opportunity for negotiating a final agreement on effective concessions on the part of Poland as some kind of full member's entrance fee to the GATT club. Poland's participation in the Kennedy Round was qualified as a "special case." After a series of consultations with the senior officials of the Secretariat and with the representatives of the most interested member-states organized in a special working group, Poland submitted a completely new formula of obligations based on the principle of definite "minimum import commitments."

This formula, without precedent in history, sets up some rules of mutually advantageous trade cooperation between free market and centrally planned economic systems without asking any of these systems

to subordinate itself or to make some essential adjustment to one another. From this point of view it can be considered as a model solution corresponding to the circumstances and requirements of the peaceful coexistence of capitalist and socialist states. The finding of such a formula was made possible by translating the benefits expected on the capitalist side into "the language of the economic plan" on the socialist side. For easier and greater access to their markets Poland should offer other contracting parties a guaranteed reasonable share on her internal market by promising that the benefits from liberalization of this access accruing to Poland would be used to increase her imports from member countries of the GATT.

This formula was finally adopted and found a quantitative expression in the Protocol for Accession of Poland to the GATT¹⁹ formally agreed upon at the end of the Kennedy Round conference in Geneva on June 30, 1967, which came into force on October 18, 1967, 30 days after having been signed by two thirds of the contracting parties to the GATT and by Poland.²⁰ In exchange for becoming a full member with all rights and privileges provided by the GATT, but qualified by the Protocol, Poland's contribution consisted in undertaking "to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum".²¹ This was the exact measure of Poland's main economic obligation towards GATT.

Trying to assess the benefits and costs of this arrangement for both sides one can hardly escape the impression that it was a result of a convergence of interests of a somewhat different character. Poland's interest in the GATT was primarily economic. Trade with the contracting parties to the GATT constitutes about 35% of her total foreign trade whereas the trade of the contracting parties with Poland constitutes only 1,3% of their total foreign trade. The economic importance of trade with Poland for the other contracting parties to the GATT as a whole is therefore not so significant as *vice versa*. In these circumstances one is inclined to assume that the Western countries which in practice constituted the "other side" to her partnership within the GATT must have been politically rather than economically interested in admitting Poland to the GATT.

¹⁹ The text of the Protocol drafted by the Working Group was published as GATT Doc. L/2806, June 23, 1967 and as a final document as GATT Doc. L/2851, September 19, 1967.

²⁰ Practically all contracting parties to the GATT signed it (with the sole exception of South Korea).

²¹ Annex B to the Protocol.

By becoming a full member of the GATT Poland undoubtedly obtained some benefits in addition to what she gained during the period of her association:

a) The most favoured nation's clause was now confirmed on the basis of a multilateral document more reliable than bilateral or unilateral acts.

b) The principle of multilateralism should now also apply to Poland's balance of payments with other contracting parties.

c) The Protocol contained a promise to remove all quantitative restrictions with regard to Polish imports to contracting parties (but a decision on this matter has been postponed without any precise time limit).

d) By becoming a member of the GATT Poland also gained the reputation of a more reliable and better trade partner.

e) Politically significant was also the implied recognition that the socialist system as such, in spite of its basic difference, can play the role of an equal partner in world trade.

The benefits for the GATT from Poland's membership represented at the same time the price paid by Poland for admission.

a) Poland's membership constituted an important gesture of political support of which the GATT was in great need in view of the strong criticism launched against it and the attempts made to replace it by a new world trade organization of the UNCTAD type. Poland's interest in admission and her membership might serve as an argument that GATT is not an organization of a certain group of countries but that it is able to play the role of a framework for economic cooperation between countries belonging to different social and economic systems.

b) Poland as the second largest country after the Soviet Union in the East European socialist system has been submitted to closer supervision of her economic policies especially by way of more formal annual surveys than before by GATT bodies which are politically controlled by Western countries.

c) The Polish market was made more accessible to exports from contracting parties to the GATT and this on the basis of a very rigid quantitative obligation by Poland to maintain a relatively high rate of growth of her imports.

From this assessment it seems to follow that the Polish government was ready to pay a relatively high price for its admission to the GATT on the basis of full membership. Poland's obligations in contrast to possible gains have been much more precisely determined and their implementation has been made subject to the control and judgement of a majority in the GATT's political organs.

The Polish government demonstrated in this case a high degree of faith in the possibility and reality of peaceful cooperation with countries with different social and economic system and so made an important and courageous, political gesture. It is quite clear that the good working of the mechanism of cooperation within the GATT between Poland and Western countries, which dominate world trade as well as this organization, depends primarily on the existence of a favourable political atmosphere conducive to mutual understanding and based on the principles of peaceful coexistence. This seems even more true with regard to Poland's participation in the GATT than with regard to the participation of socialist countries in world organizations in general, because of the particular type of functions and relationships of political forces in the GATT.

VI

Poland has become or sought to become a member of all specialized agencies within the United Nations system. But during the period of the cold war, in an unfavourable political atmosphere, the Polish government decided to withdraw from some of these organizations. In a difficult situation when opposed by a hostile numerical majority, Poland came to the conclusion that her membership of certain international organizations did her much more harm than good. Feeling that cooperation based on the principles of mutual respect for vital national interests and on mutual advantages was not possible under the then prevailing circumstances Poland took dramatic decisions on withdrawal from the International Monetary Fund (IMF) and from the International Bank for Reconstruction and Development (IBRD) in 1950, from the Food and Agriculture Organization (FAO) in 1950, from the World Health Organization (WHO) in 1950 and from UNESCO in 1952.

When, however, the alignment of forces in the world changed owing mainly to the growth of the power of the socialist countries and the emergence of the newly independent states of Asia and Africa and when the system of international relations transformed so that new possibilities of peaceful cooperation appeared within international organizations Poland rejoined UNESCO in 1954, WHO and FAO in 1957. Poland did not, however, rejoin IMF and IBRD and no other socialist state apart from Yugoslavia at present belongs to these financial organizations. It seems that the major obstacle to membership of socialist states in the Fund and the Bank results from the fact that under the institutional and political system of these organizations when even formally, with the weighted

voting, all power to make decisions is concentrated in the hands of four major contributors to the capital, namely the United States, the United Kingdom, West Germany and France, the advantages of participation of these states would on the whole depend on the favour of the main Western powers. As a matter of fact, while a member of these organizations from 1946 to 1950 Poland was systematically refused the loans she asked for to reconstruct her coal industry which at that time was of great importance not only for Poland but for the industrial recovery of other European countries.

In this connection it is worth noting that among the socialist countries Poland has joined the largest number of international organizations within the United Nations system.²² After having joined the GATT in 1967 Poland belongs to 12 such organizations including the United Nations itself, the only exceptions of being IMF and IBRD with its affiliated institutions.

Poland ranks quite high as far as a country's real role in international relations and organizations is concerned. This role can be only approximately measured in quantitative economic factors by the level of a member's contributions to the budget of a world organization which is usually fixed according to a combined index based on Gross National Product and national income per capita. As Poland's contribution to the United Nations budget amounts to 1.47% this gives her 11th place in the world among more than 130 countries.

The role of Poland in the world is considerably increased by the fact that she forms an integral part of a powerful community of socialist states with whom she is linked by a solidarity of interests. The common forces of this community enhance Poland's ability to achieve her positive aims as well as to defend her interests.

In keeping with her status as a nation-state and her conviction, based on historical experience, that her fortunes are closely linked with international peace and security, Poland has shown a determination to play an active and positive role in all international organizations to which she belongs. It is in her national interest to strive towards the realization of the prospects of international cooperation opened up by these organizations.

²² With the exception of Yugoslavia, which represents rather a special case and belongs to all UN agencies.

The Antiracist Convention

by JAN BALICKI

1. The adoption by the General Assembly of the United Nations of the text of the Convention on the Elimination of All Forms of Racial Discrimination,¹ which will be further called the Antiracist Convention, constitutes one of the basic stages of the development of international law in the domain of protecting the human being against discrimination in general and racial discrimination in particular.

The initial stage of this development were the provisions of the United Nation's Charter, devoted to human rights and directed *expressis verbis* against racial discrimination.²

One may consider the Nuremberg Laws³ as the second stage of this

¹ Annex to General Assembly resolution 2106A(XX), 1406th plenary meeting, December 21, 1965, General Assembly Official Records: Twentieth Session, Supplement No. 14/A/6014.

² In the Preamble the Charter proclaims the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [...]." Among the purposes and principles of the UN there are mentioned in Art. 1 para. 3 "promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." According to Art. 13 para. 1 the General Assembly initiates studies and makes recommendations, among others, for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Within the international economic and social cooperation the UN supports along the lines of Art. 55 "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" and in Art. 56 "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." The tasks of the system of trusteeship are according to Art. 76 item c), among others, "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and encourage recognition of interdependence of the peoples of the world."

³ Cf. A. KŁAFKOWSKI, *Zasady norymberskie a rozwój prawa międzynarodowego [Nuremberg Principles and the Development of International Law]*, Warszawa 1966.

development. In the Statute of the International Military Tribunal we find the definition of the crime against humanity i.e. the crime of discrimination.⁴

Further stages are constituted by numerous resolutions of United Nations organs, above all of the General Assembly, which developed the principles of the United Nations' Charter and are defining with a growing precision, within the wider context of the protection of human rights, the rule of international law prohibiting racial discrimination. The following ones are here of essential significance: the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁵ scores of UN General Assembly's resolutions condemning generally racial discrimination and directed especially against South African apartheid policy⁶ and five resolutions of the Security Council.⁷

Under the auspices of the United Nations Organization and its specialized agencies there were also elaborated texts of several conventions pertinent to the problem under discussion. Those texts include the following: the Convention on the Prevention and Punishment of the Crime of Genocide,⁸ the Convention concerning Discrimination in Respect of Employment and Occupation⁹ and the Convention against Discrimination

⁴ Art. 6 para. 2 (c) of the Statute: "[...] murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious reasons in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." The equality mark between the term "crime against humanity" and the term "crime of discrimination" was put appropriately in the collective paper *Crime of Discrimination in the Light of the Constitution of the Polish People's Republic*, submitted at the scientific Session of the Polish Academy of Sciences in July 1953 (Cf. vol. II of the PWN publication *Zagadnienia prawne Konstytucji Polskiej Rzeczypospolitej Ludowej* [Legal Problems of the Constitution of the Polish People's Republic], p. 305).

⁵ Cf. L. ANTONOWICZ, *Likwidacja kolonializmu ze stanowiska prawa międzynarodowego* [The Liquidation of Colonialism from the Viewpoint of International Law], Warszawa 1964.

⁶ Among others, the Resolution No. 2142(XXI) of October 26th, 1966 decidedly condemns racial discrimination and apartheid and proclaims the day of 21st March as the International Day for the struggle against racial discrimination, while the Resolution No. 2202(XXI) of December 16th, 1966 condemns apartheid as a crime against humanity.

⁷ Resolutions: 134/1960 of April 1st, 1960, 181/1963 of August 7th, 1963, 182/1963 of December 4th, 1963, 190/1964 of June 9th, 1964, 191/1964 of June 18th, 1964.

⁸ "Dziennik Ustaw" [Journal of Laws hereinafter cited as Dz. U.], 1952, No. 2, item 9.

⁹ Dz. U., 1961, No. 42, item 218.

in Education.¹⁰ The first of these Conventions is aimed against a qualified form of the crime against humanity. The two latter ones are aimed not only against racial discrimination, but also against other forms of discrimination — racial discrimination, however, ranking first both in the formulations of these Conventions and, most probably, in practice.

2. The Antiracist Convention belongs to a bigger set of UN acts aimed directly against certain types of discrimination, with racial discrimination foremost. This set includes the Declaration and the Convention, aimed against racial discrimination, and the Declaration and Convention aimed against religious discrimination. The first two acts were adopted,¹¹ the latter two are being elaborated by the UN.

The Convention was adopted unanimously by 107 votes. While the text was being passed a number of speakers emphasized that they considered that document as an extremely important step, one of the milestones on the way towards the formation of an international community living up to the principles of the UN Charter.¹²

The Convention entered into force on January, 4th, 1969, 30 days after the 27th instrument of ratification was deposited.¹³

It should be noted, parenthetically, that after the text of the Antiracist Convention was passed, the General Assembly adopted the texts of the International Covenants on Human Rights,¹⁴ which also belong to the great antidiscriminatory codification.¹⁵

The Convention already has its literature¹⁶ — moreover the text of

¹⁰ Dz. U., 1964, No. 40, item 268.

¹¹ The Antiracist Declaration is contained in the resolution 1906(XVIII) of November 20th, 1963.

¹² Cf. documents A/C.3/SR.1373 - 1374.

¹³ Till September 30th, 1969 there have been deposited 37 ratification documents.

¹⁴ Resolution No. 2200(XXI) of December 16th, 1966.

¹⁵ The Covenants on Human Rights contain first of all recommendations aiming at providing the individual with some minimum of rights. A number of the provisions of the Pacts, however, aim at ensuring for the human being the possession of rights not smaller than those of other individuals, and they are thus aimed against discrimination.

¹⁶ The following authors dealt with this issue: Z. RESICH, *Międzynarodowa konwencja o likwidacji wszelkich form dyskryminacji rasowej* [International Convention on the Elimination of all Forms of Racial Discrimination], "Nowe Prawo," 1966, No. 7/8, and H. ANDRZEJCZAK, *Prawnomaterialny zakres Konwencji ONZ w sprawie likwidacji wszelkich form dyskryminacji rasowej* [Substantive Legal Scope of the UN Convention on the Elimination of Any Forms of Racial Discrimination], "Sprawy Międzynarodowe," 1966, No. 12. In Western literature worthy of notice is the article by Z. SCHWELB, *The International Convention on the Elimination of all Forms of Racial Discrimination*, "The International and Comparative Law Quarterly," October 1966.

the Convention will be, undoubtedly, known to the Readers as a result of the obligation imposed on the signatories and the Secretary-General of the United Nations to distribute its text as widely as possible.¹⁷

The Convention consists of a Preamble and three basic parts. Part I (Art. 1 - 7) contains substantial provisions, Part II (Art. 8 - 16) — provisions concerning implementation, in Part III (Art. 17 - 25) we find the final provisions.

3. The Preamble offers a survey of previous stages of development of the rule of international law, forbidding the states to apply racial discrimination.

Para. 1 of the Preamble reminds of the principles of dignity and equality of human beings, which underlie the UN Charter, as well as the ensuing duties of member-states, concerning, among other things, non-application of racial discrimination. Para. 2 points to the provisions of the Universal Declaration of Human Rights in this matter. Para. 4 refers to the condemnation by the United Nations of colonialism and discrimination connected with it. Para. 5 mentions the Declaration on the Elimination of all Forms of Racial Discrimination. According to para. 11, the authors of the Convention took also into consideration conventions concerning: discrimination in respect of employment and occupation, as well as that against Discrimination in Education.

Para. 7 of the Preamble is of key importance. It indicates the danger for international peace and security which might result from discriminatory practices. In the light of this formulation racial discrimination cannot be considered as a matter which is essentially within the domestic jurisdiction of a state.¹⁸

Other formulations of the Preamble are important for establishing motives which led to the adoption of the text of the Convention. Para. 6 rejects doctrines on racial superiority as being scientifically false, immoral, unjust and dangerous. Para. 8 brings into relief the contradiction between racial barriers and the ideals of every human society. Para. 9 voices alarm because of manifestations of racial discrimination, in particular because of the policies of apartheid, segregation or separation. Finally the paras 10 and 12 express the determination to take practical steps against racial discrimination.

4. Part I of the Convention begins with the definition of racial discrimination contained in Article 1 para. 1 which reads as follows:

¹⁷ This obligation results from para. 4 of the resolution No. 2106(XX) as well as from Art. 7 of the Convention.

¹⁸ Cf. Art. 2 para. 7 and Chapter VII of the UN Charter.

"In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹⁹

In the wording of the above definition the reason for discrimination can be not only the race but also the colour of the skin, descent or the fact of belonging to a given national or ethnic group. This is a wider enumeration than in the acts preceding the Convention. In the above cited provisions the UN Charter prohibits making differences between people because of race, sex, language or religion; only the first criterion refers to the domain under discussion here. The Universal Declaration of Human Rights provides further criteria of discrimination and, while referring to racial discrimination the criterion of "colour" is being added to the criterion of "race".²⁰ We encounter the same two criteria in the Conventions aimed at combating discrimination in the domains of employment and education, as well as in the International Covenants on Human Rights.²¹ In the Convention under discussion there are five criteria.

Even if the introduction of the criterion of "colour" beside the criterion of "race" should not create greater difficulties in the interpretation and application of the Convention,²² the introduction of three additional elements does not contribute to a clearer formulation of the problem.

¹⁹ The construction of the definition is similar in two earlier anti-discriminatory conventions. According to the Convention concerning Discrimination in Respect of Employment and Occupation "discrimination" includes: "a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...]" According to the Convention Against Discrimination in Education the term "discrimination" includes "any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education [...]"

²⁰ Art. 2 of the Declaration.

²¹ Art. 2 of the Covenant on Civil Rights and Art. 2 of the Covenant on Economic, Social and Cultural Rights.

²² Even without the criterion of "colour" the definition would be clear and exhausting. As a matter of fact the difference of race does not mean that it must be accompanied by a difference in the colour. The statement is not reversible, the difference in colour means also a difference of race.

Firstly, the words "descent" and "origin" have an identical meaning.²³

Secondly, the differentiation between "national" and "ethnic" origin entails difficulties.²⁴

Moreover, the definition "national" in some languages, such as French and English, means belonging to a definite state, the citizenship of this state, while in other languages, Slavonic and German, it is linked with nationality and not with citizenship. In a Convention aimed at combating racial discrimination, only the second meaning of the word "national" seems to make sense, for a discrimination because of citizenship is not *eo ipso* a racial discrimination.²⁵ Using the definition "national" in this meaning can contribute to a closer definition and to detection of cases of national discrimination when the discriminating and discriminated nation belong to the same race.

5. Further paragraphs of Article 1 introduce some limitations of the definition contained in para. 1.

According to para. 2 the provisions of the Convention will not be applied to distinctions etc., made between citizens and non-citizens. This is an understandable provision — the general prohibition of discrimination cannot signify for any state an obligation of granting to a foreigner the same rights which are being enjoyed by the state's own citizens.

Similarly, no objections arise in connection with the provisions of para. 3 concerning the maintenance in force of the legal provisions of states parties concerning nationality, citizenship or naturalization. The problem of acquiring citizenship or the issue of some limitation in political rights of newly naturalized citizens or the question of access of such citizens to certain professions, belong to the exclusive jurisdiction of each state. There is, however, one additional, essential condition namely, that "rules of this kind do not discriminate against any particular nationality." Though this kind of condition is encountered in para. 3 only and not in

²³ Difficulties in understanding the sense of the word "descent" in the definition are encountered not only by translators but also by authors who are using the English language. SCHWELB (*op. cit.*, p. 1003) states that the definition became supplemented by the addition of this word in an amendment proposed by India; the record does not offer an indication, however, to which situations this definition was intended to cover. SCHWELB supposes that the term "descent" was somehow linked with the notion of "caste."

²⁴ RESICH, *op. cit.*, reminds that the French delegation believed the term "ethnic descent" to be sufficient, while the delegations of the socialist countries defended the retention of the term "national descent" for they believed that without this expression there will be no ground for a fight against discrimination if in the states with a language knowing these expressions there will occur cases of national differentiation within the population of the same ethnic origin.

²⁵ Cf. Art. 1 paras 2 and 3 of the Convention.

para. 2, it appears clearly from the spirit and letter of the Convention that, although foreigners, just as the naturalized citizens of the given state can be limited in some of their rights, the application of such limitations on a racial or nationality basis is inadmissible.

Para. 4 of Article 1 excludes from the term "discrimination" the separate treatment of racial or ethnic groups, or individuals — when such "special measures" are necessary to ensure to groups or individuals equal enjoyment of human rights. Such measures will not only be not considered as discrimination, but the parties to the Convention are committed to them according to Article 2 para. 2.

6. Part I of the Convention specifies next the duties of states in the domain of combating racial discrimination. The starting point is Article 2, para. 1, where we find a condemnation of racial discrimination. It might be an issue for discussion whether such a declaration is needed in the Convention since there exists the Antiracist Declaration unanimously adopted by the UN General Assembly and since the very fact of participating in the Convention with such a title and with such aims is a proof of condemning racism.

Further in para. 1 of Article 2 we find the commitment of the parties to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and of promoting mutual understanding among all races. [...]"

In the light of this provision attempts to cause delay or to only seemingly counteract racial discrimination will violate the Convention (and, consequently, they may bring about appropriate steps taken by other parties to the Convention — this is dealt with below).

The more concrete duties of the parties to the Convention are contained in sub-paragraphs a - e) of the paragraph under discussion.

Sub-paragraph a) defines the obligation of the state not to apply discriminatory practices and the obligation to ensure that public authorities and public institutions, both national and local, act in conformity with this obligation.²⁶

The duties of a state-party to the Convention cover not only actions and desistances of authorities and institutions, but they also reach deep into social life. According to sub-paragraph b) the parties commit themselves not to sponsor, defend or support racial discrimination applied by any person or organization.

²⁶ Such an approach to the obligation of the state excludes the possibility of shifting responsibility for racial discrimination by central authorities to other authorities, therefore it was logical to omit in the Convention the federal clause.

Sub-paragraph c) includes a provision ensuring the implementation of duties resulting from sub-paragraph a), committing the parties to take effective measures in order to review their policy and also to introduce legislative changes with the aim of abrogating all regulations which result in the creation or perpetuation of racial discrimination.

Sub-paragraph d) is of particular significance. It envisages that each state-party to the Convention shall prohibit and bring to an end, by all appropriate means, including legislation, as required by circumstances, racial discrimination applied by any persons, groups or organizations. Schwelb²⁷ considers this provision as "the most important and most far reaching" of all the provisions of the Convention; he maintains that hitherto none of the international acts aimed against discrimination has gone so far.²⁸ Resich also believes sub-paragraph, d) to be of particular importance.²⁹

The formulation "as required by circumstances" was introduced into the regulation in view of the fact that legislative changes will not be necessary in all states.

Finally, sub-paragraph e) of para. 1 specifies the duties concerning the encouragement by the state of integrationist multiracial organizations, the application of other means aimed at eliminating barriers between races, and the discouragement of anything tending to strengthen racial division.

Para. 2 of Article 2 concerns the admissibility and necessity of applying special provisions with regard to certain racial groups or to individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights. It is evident that this refers to temporary and exceptional situations to the backwardness of some groups as a result of racial discrimination practised against them. The purpose of this provision is to grant particularly active support to such racial groups with the definite reservation, however, that "these measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." This clear formulation makes it impossible to refer to this provision to justify a policy such as apartheid which consists in permanently keeping racial groups on different rungs of the social ladder, under the pretext of the "separate development" of these groups.

²⁷ SCHWELB, *op. cit.*, pp. 1017 - 1018.

²⁸ SCHWELB bases this statement on a thorough comparison of the pertinent regulations of the convention with the provisions of other antidiscriminations acts.

²⁹ RESICH, *op. cit.*

Moreover, clear-cut condemnation of apartheid can be found in a subsequent provision of the Convention, namely in Article 3. The authors of the Convention, as a matter of fact, tended to avoid the enumeration of the known types of discrimination in order not to weaken thereby the condemnation of those types not mentioned. With this justification, for example, a clear-cut condemnation of hitlerism was omitted. The exception made for apartheid was justified by the fact that at the moment of the adoption of the text of the Convention the Republic of South Africa was the only state officially engaged in a policy of racial discrimination.

7. Article 4 of the Convention is aimed against racist propaganda and racist organizations. Sub-paragraph a) covers the duty of states worded as follows:

"[They] — shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, included the financing thereof."

According to sub-paragraph b)

the states "shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and shall recognize participation in such organizations or activities as an offence punishable by law."

Sub-paragraph c) of the above mentioned Article defines the duty of the state not to permit public authorities or public institutions to promote or incite racial discrimination.³⁰

The duties defined in Article 4 are taken up by the states "with due regard to the principles embodied in the Universal Declaration of Human Rights and of the rights expressly set forth in Article 5 of this Convention." The above formulation was included in the Convention in result of a long-drawn dispute about the contents of Article 4. Delegations of a number of Western states, headed by the USA delegation, opposed the ban on racist organizations and racist propaganda referring in this connection to the freedom of speech and freedom of association guaranteed by internal regulations and by the Universal Declaration of Human Rights.³¹ The delegations of the socialist states combated this argumentation by showing that the struggle against racial discrimination cannot be successful without banning and condemning racist propaganda and the organizations serving discrimination.³² They also reminded that the

³⁰ This is another formulation of the obligation covered by Art. 2 para. 1 (a).

³¹ Art. 19 and 20.

³² Cf. ANDRZEJCZAK, *op. cit.* p. 98.

rights and liberties contained in the Universal Declaration of Human Rights "may in no case be exercised contrary to the purposes and principles of the United Nations"³³ and, thus, that it is not admissible to refer to freedom of speech and to the freedom of association while encroaching on the principles of the United Nations' Charter.

The above cited formulation was introduced into Article 4 at the proposal of the Scandinavian states with the motivation that the aims of Article 4 concerning the protection of certain human rights should not be achieved at the expense of other human rights.³⁴

Under a normal interpretation of the provisions of the Convention and of the provisions of the Universal Declaration of Human Rights this additional formulation should not lead to the waiving or attenuation of the absolute prohibition of racist propaganda and racist organizations. However, certain statements in the UN and certain comments³⁵ seem to indicate that this formulation might be used by certain Western states as a pretext to avoid taking appropriate steps against racist organizations and racist propaganda. Thus, for example, the representative of Great Britain stated that his state could never agree to punish by law somebody who paid a subscription to a Fascist organization.³⁶ While explaining their votes for the text of Article 4 of the Convention and then for the Convention as a whole, the representatives of the USA stated that this was possible only because, as a result of the Scandinavian amendment, Article 4 does not impose on the USA the obligation to take any action impairing the right of speech or the freedom of association.³⁷

In spite of some apprehension as to how their duties will be understood by some states, the adoption of Article 4 constitutes a significant achievement. When the Universal Declaration of Human Rights was being drafted the Western states managed to prevent the adoption of similar formulations.

8. Article 5 contains a list or a catalogue of rights concerned by the prohibition to apply racial discrimination. The wording is the following: "[...] States [...] undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin to equality before the law and notably in the enjoyment of the following rights (follows an enumeration)."

³³ Art. 29 para. 3 of the Declaration.

³⁴ Document A/C.3/L.1245.

³⁵ Cf. SCHWELB, *op. cit.* p. 1025.

³⁶ Document A/C.3/SR.1315.

³⁷ Documents A/C.3/SR.1318 and 1373.

The list is rather casuistic. It will not be repeated or summarised here, but some marginal comments seem appropriate. When confronting the rights enumerated in Article 5 with those defined in the Universal Declaration of Human Rights, or in the Antiracist Declaration, or in the International Covenants on Human Rights, we see that the lists of rights are not identical and that there are differences even in the definition of the same rights. Even the Antiracist Convention and the Antiracist Declaration, which both derive from same legislative stock, do not identically formulate the same ideas and do not broach an identical range of problems.

From among the rights enumerated in the Universal Declaration of Human Rights the following do not have their equivalent in the Antiracist Convention:³⁸ the right to recognition as a person before the law (Art. 6), prohibition of arbitrary arrest (Art. 9), the right of the defendant to be presumed innocent until proved guilty (Art. 11), the right to seek asylum (Art. 14), the right to rest and leisure (Art. 24), the right to an adequate living standard (Art. 25).

The right to life, liberty and security of each person (Art. 3 of the Universal Declaration) is matched in the Antiracist Convention by the "right to security of person and protection by the State against violence or bodily harm." (Art. 5 para. /b/). Thus the Convention while expanding the notion of security and protection does not name *expressis verbis* the right to life and to liberty.

The list of human rights contained in Article 7 of the Antiracist Declaration is more laconic and less exhaustive than the one contained in the Convention. On the other hand, the enumeration of those rights in the International Covenants on Human Rights is more extensive and detailed than in the Convention under discussion. Some of those rights have no equivalent in the text of the Convention, such as prohibition of arbitrary or unlawful interfering with privacy, family home, or correspondence as well as of unlawful attacks on the honour and reputation of a person (Art. 17 of the Covenant on Civil and Political Rights), or the right to safe and healthy working conditions (Art. 7 of the Covenant on Economic, Social and Cultural Rights).

On the other hand, however, certain rights unknown to the Universal Declaration are safeguarded in the Convention. One may mention here the "right to inherit" (Art. 5, para. d/vi) or the "right of access to any

³⁸ The list is not exhaustive. A thorough comparison of all provisions of anti-discriminatory acts would call for a vast monography.

place and service intended for use by the general public such as transport, hotels, restaurants, cafés, theatres and parks" (sub-paragraph /f/).⁸⁹

The above indicated discrepancies result to some extent from the decision-making procedure followed by international organizations. The final formulations contained in the resolutions, also in the adopted texts of international agreements, are not unfrequently the result of an accident, of a compromise, of decisions made at the last moment. It can be seen from the minutes of the meetings of UN bodies which elaborated the drafts of the Universal Declaration of Human Rights, the Antiracist Declaration, the Antiracist Convention, the International Covenants on Human Rights, how many drafts there had been presented for the formulation of single articles, how many amendments to these drafts, how many amendments to the amendments. In order to arrive at agreed upon texts, negotiations were conducted behind the scenes, negotiations that were not recorded (at any rate not included in the official minutes). While drafting compromise formulations time was often lacking to investigate all logical and legal consequences of such a compromise, to compare the given formulation with formulations concerning the same problem in other acts, or even with the formulations of other articles of the same act. What is more, the need for such comparisons seems not always to have been realized.

This technique explains some discrepancies, but it cannot constitute a full explanation. It does not explain, for example, why the already well-known and defined human rights were not mentioned in the Antiracist Convention.

One may attempt to explain in various manners the more narrow range of human rights enumerated in the Convention.

One may assume, for example, that Article 5 enumerates those of human rights which are most endangered by racial discrimination, while it omits rights which are not, or are to a minimal extent, endangered in this way. The practice of apartheid, however, shows that human rights which are not mentioned in the Convention, are much more often violated in relation to members of underprivileged racial groups than to members

⁸⁹ A separate formulation of this type of human rights in the Convention is justified by discrimination in this field of the non-white population in the Republic of South Africa; this discrimination is called there "petty apartheid." *Nota bene* we do not find an equivalent in the International Covenants of Human Rights. The equivalent although on a narrower scale can be found in Art. 3 para. 2 of the Antiracist Declaration.

of the ruling group. Thus, those human rights are threatened with violation precisely owing to racist reasons.⁴⁰

We could try to explain the differences between the catalogues of human rights by the fact that the Convention contains contractual commitments of states, while the Universal Declaration of Human Rights (and also the Antiracist Declaration) contain only desiderata and recommendations. Here, however, the following remarks suggest themselves:

a) If the above explanation were right, the Antiracist Declaration should include a catalogue of rights wider than the Convention, while in fact the opposite is true;

b) In the author's opinion the prohibition of racial discrimination exists in international law, regardless of conventions passed under the auspices of the UN and regardless of adopted declarations. This prohibition is established on the one hand owing to the provisions of the UN Charter and, on the other hand, owing to the Nuremberg Principles.⁴¹

The hypothesis might be set forth that only the most important rights were enumerated. But why then was not the right to life mentioned there *expressis verbis*?

Thus, there remains only the explanation that the enumeration is done by way of example and, that thus human rights not enumerated in the Convention, but which are covered by other international acts, adopted under the auspices of the UN, are not deprived of protection against racial discrimination. This conception is backed by the formulation of Article 5 ("[...] notably in the enjoyment of the following rights [...]").

Then, however, it is not easy to understand the random choice of examples,⁴² as well as their excessive number. The clarity of the Convention would have certainly benefited by the omission of such an enumeration altogether.

9. Article 6 of the Convention imposes on the parties the duty to assure to all persons within their jurisdiction an effective protection and remedies, through the competent national tribunals and other State in-

⁴⁰ For example, the South African legislation authorizes the police to arrest a non-white person under trifling pretexts; the conditions of work, the amount of wage, the leave depend on the skin colour. Cf. J. BALICKI, *Apartheid. Studium prawno-polityczne rasizmu w Afryce Południowej* [Apartheid, a Legal and Political Study of Racism in South Africa], Warszawa 1967.

⁴¹ I tried to prove this thesis in the article: *Dyskryminacja rasowa w świetle prawa międzynarodowego* [Racial discrimination in the light of international law], published in the "Annales" of the Marie Curie-Skłodowska University in Lublin in 1968.

⁴² To mention in the list the right to live would be, undoubtedly, more important than the inheritance right.

stitutions against any acts of racial discrimination. They also have the duty to guarantee to those persons the right to seek reparation or satisfaction for damages suffered as a result of such discrimination. The Convention does not and cannot go into details as to how individual states should fulfil the duties resulting from Article 6, whether they should set up special courts and institutions or grant new powers to the already existing courts and institutions. It cannot establish either what the reparation or satisfaction for damages resulting from discrimination should consist in. It is an internal problem of each state, but for the other parties to the Convention it is not indifferent whether the given state does take the necessary steps. The failure to take such steps or their insufficiency may constitute the basis for another state to take action against the given state in accordance with provisions of Part II of the Convention.

Article 7 specifies further duties of the parties to the Convention. They should take immediate and effective measures with a view to combating prejudices leading to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial groups, as well as to propagating the purposes and principles of basic international documents aimed against racial discrimination.

The control of the implementation of duties resulting from Article 6 seems to be more difficult than of those defined in Article 7.

10. Part II of the Convention contains provisions concerning the implementation of the Convention.

The Convention establishes a special organ — the Committee on the Elimination of Racial Discrimination. The Committee is charged with the examination of periodical reports submitted by the parties to the Convention. In the formulation of the Convention, each party to the Convention is authorized to control the implementation of its provisions by every other party. Moreover, provided some conditions are fulfilled, the initiative to investigate whether the action of a party to the Convention is compatible with its provisions, can be taken by individuals who consider that their rights were violated.

The regulations concerning implementation are extensive and detailed. We shall present here only the basic rules.

The above mentioned Committee consists of 18 experts of high moral standing, performing their functions in their personal capacity. They are elected by the states-parties to the Convention taking into consideration an equitable geographical distribution (Art. 8).

The parties present to the Committee through the intermediary of the Secretary-General of the UN reports on legislative, judicial and administrative steps "which they have adopted and which give effect to

the provisions of the Convention". The first report it to be submitted within one year after the entry into force of the Convention for the State concerned, and later on, every two years. The Committee may request further information to be furnished by the state. The Committee, in turn, will submit reports on its activities to the UN General Assembly, on this occasion it may also make suggestions and general recommendations. States-parties to the Convention may present their comments (Art. 9).

Each party to the Convention, which believes that another party does not give effect to the provisions of the Convention, may bring the matter to attention of the Committee; this becomes the starting point for a multiphase procedure.⁴³ The communication of the first State is transmitted to the second State which "shall submit to the Committee written explanations or statements clarifying the matter [...]". If within three months the matter is not adjusted to the satisfaction of both parties, each state has the right to refer the matter again to the Committee. The Committee will ascertain if in the given case all available domestic remedies have been invoked and exhausted in accordance with the generally recognized principles of international law. This principle, however, will not be applied in cases where the application of the remedies has been unreasonably prolonged. The Committee may demand additional information from the states (Art. 11).

After gathering information, the Chairman of the Committee appoints an *ad hoc* Conciliation Commission comprising 5 persons (Art. 12).

The Commission, after considering the matter, submits to the Chairman of the Committee a report embodying its findings in the controversial case, as well as recommendations as it may think proper for the amicable solution of the dispute. The Chairman communicates the report to the parties. They shall within three months inform the Chairman whether they accept the recommendations contained in the Commission's report. After that period the Chairman communicates the Commission's report and the declarations of the parties concerned to other parties to the Convention (Art. 13).

⁴³ Here the Convention does not deal with the dispute between states, this formulation can be found later on in Article 22 (see below). The state which is a party to the Convention may draw the attention of the Committee to the infringement of the provisions of the Convention by another party, not only when its interests or the interests of its citizens are jeopardized. In the light of the provisions of the Convention, if a state believes that on the territory of another state cases of racial discrimination occur and that thus the provisions of the Convention are being violated, it is authorized to call on the Committee to deal with this matter.

In principle, this terminates the investigatory and conciliatory activity of the Commission. This, however, need not be the end of the matter itself. Further provisions in this matter are to be found in Article 22, Part III of the Convention.⁴⁴ This Article reads as follows:

"Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall at the request of any of the parties of the dispute be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."⁴⁵

One should also mention the provision contained in Article 16 namely, that the provisions of the Convention concerning the settlement of disputes will be applied without prejudice to other procedures envisaged in international agreements in force between the parties. The Convention does not, however, provide any premises for establishing which kind of procedure, in the event of the possibility of choice, will have priority, or who will have the right to choose.⁴⁶

11. Article 14 offers to the parties the possibility of declaring that they recognize the competence of the Committee to receive and consider communications from individuals or groups of individuals subject to the jurisdiction of the given state claiming to be victims of a violation by that state of the rights established in the Convention. The Committee will be competent to exercise its function in such cases when at least ten states submit the declaration envisaged in Article 14. Such a declaration may be withdrawn at any time, but this will not affect communications pending before the Committee.

Thus Article 14 formulates the right of petition. The state accepting the provisions of Article 14 should establish or indicate an already existing body competent to receive and consider petitions. If the petitioner

⁴⁴ It might seem that the shifting of one of the implementation provisions to the final provisions affects the legislative clarity. This wording, however, seems justified since the parties cannot submit reservations as to the provisions concerning the competence of the Committee and of the Commission. Such reservations are admissible in reference to the competence of the International Court of Justice (see below).

⁴⁵ The obligatory jurisdiction of the International Court of Justice was already a subject of reservations submitted by socialist countries to the Convention on the Prevention and Punishment of the Crime of Genocide. The attitude taken in 1966 by the International Court of Justice in the dispute between Liberia and Ethiopia on the one hand and the Republic of South Africa on the other, which evaded the substantial consideration of the issue may affect the attitude of socialist countries and many other states towards the obligatory jurisdiction of the International Court of Justice.

⁴⁶ Cf. SCHWELB, *op. cit.*, p. 1046.

does not succeed in obtaining satisfaction from such a body, he is authorized to communicate the matter to the Committee within six months. The Committee confidentially brings such a communication to the attention of the state concerned. However, "the identity of the individual or groups of individuals concerned shall not be revealed without their express consent."

The state should submit explanations to the Committee within three months. The Committee will consider the matter in the light of all information made available to it by the state concerned and by the petitioner. The examination of the case depends on the exhaustion of all available domestic remedies, unless the application of the remedies is unreasonably prolonged.

The Committee will convey its eventual suggestions and recommendations to the state concerned and to the petitioner. Moreover, a summary of communications, explanations and statements in the given case will be included by the Committee in the yearly report to the UN General Assembly together with the Committee's own suggestions and recommendations.

However, not all provisions contained in Article 14 can be easily carried into effect.

Thus, for example, the provision concerning non-revealing of identity of the petitioner or group of petitioners seems unrealistic. The individual has to exhaust all available domestic remedies and it is impossible to approach one's own courts and authorities anonymously. The number of individuals accusing their own state of racial discrimination will probably not be great and the individual cases will differ from each other. Omitting the name of the petitioner in the correspondence between the Committee and the given state will not prevent the name from being disclosed by the state authorities.

This is not the only weak side of the institution of petition. In the international practice so far its effectiveness was rather insignificant.⁴⁷ One cannot expect too much from it in the future as well.

One should realize, above all, that the parties to the Convention undoubtedly will be states which, in fact, condemn, though perhaps not always with all consequences, racial discrimination. Secondly, states which will accept the provisions of Article 14 will undoubtedly be the states consistent in combating racial discrimination. Thirdly, it is not likely that in those states cases of discrimination might occur often and those states will probably take the necessary steps in order to eliminate a

⁴⁷ Cf. W. N. DURDIENIEVSKI and S. B. KRYLOV, *Podręcznik prawa międzynarodowego* [Textbook of International Law], Warszawa 1950, p. 417.

given abuse without the need of the case being examined in an international forum. And, finally, in case of a discrepancy between formal anti-racist declarations and the racist practice or, in case of a change in the political situation in a state being a party to the Convention and subject to Article 14 (for example, if a fascist coup takes place), such a state, even without denouncing the Convention, is sure to find easily a way to discourage its own citizens from accusing it of racialism in an international forum.

One way or the other, there will be rather few petitions.

Article 15 of the Convention deals with the right of petition in a different context. The Committee will receive from UN organs copies of petitions on matters connected with the Convention and coming from inhabitants of Trust and Non-Self-Governing Territories and it will transmit to those UN organs its opinion and recommendations. Those matters will also be included in reports of the Committee to the UN General Assembly.

12. The right of petition, envisaged in Article 14, although dependent on the will of the parties to the Convention, although formulated in a limited way (since the Committee is not called upon to adjudicate in a dispute between the state and its citizen, but only to present suggestions and recommendations), and although not offering great practical possibilities, confronts international lawyers, not for the first time, with the problem of individuals as subjects of international law.

In the Western science the views on this topic are divided. There are even authors who consider the individuals as the only subjects of international law.⁴⁸ On the other hand, a number of Western authors recognize only states as subjects of international law.⁴⁹ Finally, there is an ever increasing number of authors who consider individuals, besides the states, as more or less limited subjects of international law.⁵⁰

The science of international law in socialist states in fair accordance, though not unanimously, rejects the notion of the individual as subject of international law.⁵¹

In the Soviet literature Krylov⁵² seemed to be of an opinion different from the majority. He wrote in a chapter entitled *Subjects of Interna-*

⁴⁸ Among others, DUGUIT, BAUMGARTEN, POLITIS, SCHELLE, Kelsen.

⁴⁹ Among others, MENZEL, ULLMANN, WHEATON.

⁵⁰ Among others LAUTERPACHT, FRANÇOIS, SCHWARZENBERGER, VERDROSS.

⁵¹ *Miezhdunarodnoye pravo [International Law]* under editorial supervision of KOROVIN, Moskva 1951; A. KŁAFKOWSKI: *Prawo międzynarodowe publiczne [Public International Law]*, Ed. II, revised, Warszawa 1966.

⁵² W. N. DURDIENIEVSKI and S. B. KRYLOV, *op. cit.*, p. 128.

tional Law of the Future the following: „One may assume that, in connection with the proclamation in the Charter of the United Nations of the protection of ‘human rights and fundamental freedoms’, it will so happen that an individual will approach international organs directly [...]”⁵³

In the Polish literature on this subject Berezowski⁵⁴ states the following (when commenting on the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, on November 4th, 1950): “One may thus acknowledge that for a small number of states agreeing to proceedings being initiated before the Commission in consequence of an individual claim, the individual is to a certain extent a subject of international law.” However, in mimeographed lectures published by the same author in 1967⁵⁵ the above viewpoint was not sustained. There we read: “If international law is granting individuals some protection or other and requires the parties to an agreement to respect human rights [...] this does not mean yet that individuals are subjects of international law. For the obligations resulting from agreements concerning protection of human rights are obligations of some states toward other states, but not legal international obligations of states toward individuals, obligations which could be claimed directly by the individuals on the international plane.”

Although nowadays, in principle, nobody denies that in contemporary international law there exist norms conferring rights upon individuals and also imposing duties on them, many scientists are reluctant to draw generalizing conclusions as to the role of the individual in international law. While denying this role various arguments are presented:⁵⁶

a) Argument one: Notion of the individual as a subject of international law cannot be reconciled with the definition of international law as a system of legal norms regulating inter-state relations.

This definition, however, does not prevent a number of authors, who approve it, to recognize as (limited) subjects of international law also international organizations or nations fighting for their liberation, to say nothing of the problem of the Holy See.

What is more, a definition is not something absolute and unchangeable, and thus cannot constitute a proof.

⁵³ This viewpoint, *nota bene*, was criticized by KOROVIN.

⁵⁴ C. BEREZOWSKI, *Prawo międzynarodowe publiczne [International Public Law]*, part I, Warszawa 1966, p. 127.

⁵⁵ *Prawo międzynarodowe publiczne [International Public Law]*, ed. C. BEREZOWSKI. Publications of the Warsaw University 1967, p. 125.

Furthermore, the above cited argument boils down to the *a priori* statement that an individual *cannot be* a subject of international law; it does not, however, contain a proof that he is *not* one.

b) Argument two: An individual is not an addressee of the norms of international law; on their basis he does not acquire rights or contract obligations. The state is here an intermediary which protects the rights of the individual and sees to it that his duties are fulfilled.

The question, however, who is the addressee of the norms of international law seems doubtful even to authors using this argument.⁵⁷

It is obvious that in case of a violation of the rights of an individual by a foreign state, the protection of his rights should be effected by his own state. The picture is less clear in case of the violation of the rights of a stateless person. The concept, however, of the realization of rights exclusively through the state is unacceptable in reference to an individual whose rights were violated by his own state and who seeks the protection from an international institution.

c) Argument three: The recognition of the competence of international organs is a gesture of the state, which can be withdrawn at any moment. The state can denounce the pertinent international agreement and deprive its citizen of the right of petition.

Such a decision of the state, however, does not generally bring about immediate effects. Thus, in the light of the Antiracist Convention the withdrawal of consent to submitting petitions does not apply to petitions previously submitted. The denunciation of the Convention comes in force after one year only. In the meantime the dispute between the state and its citizen can go on before an international organ, against the will of the state.

d) Argument four: "there are no provisions of international law, which would clearly grant such subjectivity to individuals".⁵⁸

One can answer to this that neither are there norms which would grant this subjectivity to anybody else.

e) Finally, the main, though not always clearly worded, objection against the notion of the individual as a subject of international law expresses the conviction that by admitting theoretically the existence

⁵⁶ The problem is dealt with here in short.

⁵⁷ Thus, for example, KŁAFKOWSKI, *op. cit.*, p. 106 says: "The norms of international law ... address directly the state and not a physical person [...]" Further on, however, we read "[...] Peace treaties concluded after World War I contain provisions addressed to physical persons [...]"

⁵⁸ C. BEREZOWSKI, *Zagadnienia zwierzchnictwa terytorialnego [The Problems of Territorial Sovereignty]*, Warszawa 1957, p. 31.

of subjects of international law other than states, the principle of the sovereignty of states is being impaired.

Undoubtedly, the recognition of certain rights of individuals independently of the state, of which they are citizens, can be defined as a limitation of the state's sovereignty.⁵⁹ Sovereignty, however, should be defended with eyes wide open, and as a living institution, not as a fetish. After all, each international agreement is in some way tantamount to a limitation of the state in its sovereign rights. The United Nations Charter constitutes a very considerable limitation of the sovereignty of all member-states, compared with the essence of the institution of sovereignty before World War II.

Limitations of sovereignty, voluntarily accepted by a state, linked with limitations of the sovereignty of other states, and which result in advantages for all states concerned — advantages consisting in the strengthening of international peace and security, in deepening understanding between nations, in removing serious causes of conflicts and friction, are to be recognized as a positive phenomenon. Those are precisely the results that should be obtained by the struggle against any discrimination and the strengthening of respect for human rights. The situation will not change of this limitation of sovereignty is manifested just in a direct guarantee of human rights by rules of international law.

The states which take upon themselves the duties arising from Article 14 of the Antiracist Convention, or similar obligations envisaged in other international acts, and which thus grant certain direct rights to their citizens on the international forum, accept in full awareness certain limitations of their sovereignty in order to strengthen the struggle against racial and other discrimination.

Anyway, the limitations are not too onerous. After all the competence of the organs called into being by the Antiracist Convention does not exceed the ascertainment of the fact of a discrimination towards an individual or a group. They do not, however, ensure direct protection against this discrimination.

There seems therefore to be no obstacle to the logical conclusion that the citizens of states which agreed to the application of Article 14 of the Convention, have certain limited rights directly deriving from the conventional international law.

It remains a question of terminology whether we recognize the individual as a subject of international law. Naturally, human beings will never be subjects of international law in the sense of the possibility to

⁵⁹ Since the "state as a sovereign determines itself the legal situation of the population on its territory" (KŁAFKOWSKI, *op. cit.*, p. 175).

conclude in their own name international agreements or to create customary international law. However, it could be stated, for example, that individuals have a limited international legal capacity and a limited capacity to dispose of rights — to use formulations borrowed from civil law.

Even if at the very beginning the number of states undertaking duties in keeping with Article 14 will be rather small⁶⁰ and it will be difficult to speak of a universal norm of international law yet, we seem, however, to witness the birth of a new rule which offers to the individual a possibility to protect his rights on the international forum against his own state.

13. Part III of the Convention contains final clauses.

The Convention can be signed or acceded to by any State being a member of the United Nations Organization or of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State invited by the UN General Assembly (Art. 17, 18). In the light of the practice to date this means that there is no possibility to become a party to the Convention for the German Democratic Republic, the Democratic Republic of Vietnam, the Korean People's Democratic Republic. This signifies a discrimination of some states concerning the access to a Convention, the aim of which is to counteract discrimination of individuals and groups.

On the other hand, as positive traits of the Convention may be considered the absence of a colonial or federal clause.

The Convention is subject to ratification.

The Convention can be denounced with effectiveness after one year (Art. 21).

Each state being a party to the Convention can at any time make a request for its revision. The General Assembly shall decide as to what steps are to be taken (Art. 23).

Article 22 concerning the competence of the International Court of Justice was mentioned above. Considering reservations already made and those to be expected in reference to this Article, worthy of careful attention is Article 20 concerning reservations to the Convention. Provisions contained in that Article sum up the present legal situation in the

⁶⁰ It should be remembered that the Optional Protocol to the International Covenant on Civil and Political Rights provides for the right of petition along similar principles, as the Antiracist Convention.

matter of reservations to multilateral agreements⁶¹ and also expand and enrich them to some extent.

According to para. 1 of Article 20 the Secretary-General will receive and circulate the reservations to the Convention to other parties. In case of lack of consent to the reservations, the objecting party should inform the Secretary-General about it within ninety days.

Para. 2 does not permit reservations: (a) which are incompatible with the object and purpose of the Convention, (b) which would "inhibit the operation of any of the bodies established by the Convention." Reservations will be considered as inadmissible for the above reasons if they are objected to by at least two-thirds of the states being parties to the Convention.

The first limitation of reservations is self-evident. Any state wishing to reserve for itself the possibility of applying any type of racial discrimination or to evade the fight against racism cannot be a party to the Antiracist Convention, and any reservation concerning Part I of the Convention would be tantamount to that.

The second limitation of reservations also seems to be just. Without some sort of international control of the implementation of the provisions of the Convention, these provisions could remain a dead letter, as shown by hitherto apparent practice of the codification of human rights.⁶²

Thus reservations directed against the competence of the Committee and of the Commission are inadmissible. It must be clearly emphasized, however, that this statement does not cover reservations concerning the competence of the International Court of Justice since it is not "an organ established by the Convention."

A certain *novum* in international practice may be found in the provision that the signatories will decide by a qualified majority of two-thirds which reservations are inadmissible (for reasons given in the Convention). In fact, up to now reservations contrary to the basic aim of an

⁶¹ Cf. M. LACHS, *Umowy wielostronne* [Multilateral Agreements], Warszawa 1968, p. 123 ff; S. E. NAHLIK, *Wstęp do nauki prawa międzynarodowego* [Introduction to the Science of International Law], Warszawa 1967, pp. 265 ff.

⁶² There is a remarkable resemblance of a number of institutions of the Antiracist Convention and of the International Covenants on Human Rights, but the problem of organs called to supervise those agreements is differently regulated. The parties to the Covenant on Civil and Political Human Rights are obliged, indeed, according to Art. 40, to submit to the appointed Committee periodical reports, but the right of some states to reproach other states before the Committee with the not-fulfilling of obligations deriving from the Covenant depends on a previous recognition of the competence of the Committee in such matters (Art. 41).

agreement could be rejected, but it was not clear what criteria were to be applied to establish that contradiction.

The majority required by Article 20 of the Convention for the recognition of a reservation as inadmissible is large enough to dispel the fears that reservations which are not essential could be recognized as such (for example reservations concerning the competence of the International Court of Justice).

There are two doubtful issues demanding clarification, namely: (a) what form will the conventional relations take between a state which submitted a non-essential reservation and a state which rejects this reservation according to Article 20 para. 1? (b) does the state whose essential reservation was rejected by the required majority remain a party to the Convention?

As to the first item: the party rejecting the reservation may accept that agreement as binding it with the party which submitted the reservation, with regard to all provisions except the one referred to in the reservation; or it may acknowledge that in consequence of the reservation the whole agreement does not bind it with the state submitting the reservation.⁶³

It does not seem very probable that in relation to the Antiracist Convention any party might assume the standpoint that, because of a reservation concerning a secondary provision of the Convention it will not consider itself bound with the state making that reservation by an agreement aimed at counteracting racial discrimination. For then a rather absurd situation would arise, namely, both states would be bound by the same provisions of the Convention aimed against racial discrimination, being apparently not mutually bound by these provisions.

As to the second item: there exist theoretically two possibilities. Either recognizing the reservation as inadmissible by a two-thirds majority means the rejection of the reservation without contesting the participation in the Convention of the state submitting the reservation, or, it means that the state submitting the reservation is not considered as a party. Both these conceptions are unsatisfactory; the first one because it would mean imposing on a state an international agreement in a wording which does not meet its requirements (but which, of course, it could denounce); The second one is wrong for it blocks for the state the road to a Convention of such a great significance. The matter is further complicated by time-limits envisaged by the Convention. A state becomes a party to the Convention thirty days after the instruments of ratification

⁶³ M. LACHS, *op. cit.*, p. 163.

are deposited. An objection to reservation submitted at the ratification may be announced by other states within ninety days. Thus it may occur that a state becomes a party to the Convention and, only after two more months elapse, it will turn out that the qualified majority rejects the reservations. What should be the proper attitude in such a case? Will the state automatically cease being a party to the Convention?

We have to wait for the interpretation of this provision in practice.

14. The Convention means for some of the parties the necessity of introducing important changes in their legislation and internal policy, the necessity of adapting the legal provisions and policy to the principles of the Convention, of combating manifestations of racism, of preventing its rebirth.

There is, however, a number of states in which, after the ratification of the Convention, the necessary changes in regulations and internal policy will be none or inconsiderable. Those are the states which include in their constitutional principles that of the equality of men, which combated racial discrimination before becoming parties to the Convention, or even before the UN started elaborating the set of anti-discrimination acts. Those are first of all the socialist states. Those are also many states of the Third World, and also quite numerous bourgeois states.

One cannot, however, disregard the fact, that in some states though there will be no necessity of changing the legislation, the necessity will exist to change the real policy. Even the most sublime constitutional principles are not always properly reflected in the everyday practice of the state administration or in the attitude of the community. The discrepancy between legal principles, be they of the highest rank, and the manner of their implementation in practice, is considered an internal affair of each state. We mentioned above, however, that in the light of the Convention, under some circumstances this discrepancy ceases to be an internal affair and it can be brought up to an international forum either by action taken by one of the parties to the Convention, or in using the right of petition.

15. The law of People's Poland condemns and prosecutes racial discrimination. The Decree of June 13th, 1946, concerning crimes particularly dangerous is the period of the reconstruction of the State (the so called Concise Penal Code⁶⁴) provided in Articles 30 - 34 for severe punishment for offences being a manifestation of nationalistic, religious or racial discrimination. According to those provisions the following were considered

⁶⁴ It is worth noting that the Concise Penal Code entered into force *before* the announcement of the verdict of the International Military Tribunal in Nuremberg.

as offences: inciting to nationalistic, religious or racial strife or its approval; insulting, deriding or humiliating a group of population or individual persons on these grounds; offences against life and health committed for the above motives; failure to counteract (against one's duty) the commission of such an offence.⁶⁵

Article 69 of the Constitution of the Polish People's Republic ranks the elimination of racial discrimination as one of the main constitutional principles, ensuring to the citizens equal rights in all spheres irrespective of nationality, race and religion, recognizing as an infringement of this principle and forbidding the spreading of hatred or contempt, the provocation of strife, or the humiliation of man on account of national, racial or religious differences.

16. The Antiracist Convention constitutes a conventional law between its parties in the field of combating racial discrimination.

It seems that, at least in the near future, this Convention will still be far from being obligatory for all states of the world.⁶⁶ What will then be the difference in obligations pertinent to combating racial discrimination between the states which are parties to the Convention and those which are not?

In the author's opinion the differences should not be sought in the fundamental provisions of the Convention since the ban on racial discrimination and the duty to combat it stem from the Nuremberg principles, from the UN Charter and from a number of unanimous resolutions of the General Assembly.⁶⁷

The differences will be rather of a procedural character. In reference to the parties to the Convention there will be operating a machinery set up according to its provisions. This machinery will serve to investigate violations of the norm of international law, aimed against racial discrimination, to solve interstate disputes arising in this connection; to examine the petitions of citizens of some of the parties.

There will be no differences, however, between the parties and other states as to the obligation to respect the antiracist norm.

⁶⁵ That Decree was abrogated when on January 1st, 1970 the new Penal Code entered into force. The new Code provides also, in articles 272 - 274, for a severe punishment of offences committed for racist or other discriminatory reasons.

⁶⁶ Such an important and, seemingly, incontestable international agreement as the Convention on the Prevention and Punishment of the Crime of Genocide has been ratified in the course of over 20 years since the moment of the adoption of its text by not more than 74 states.

⁶⁷ See footnote 41.

The Polish People's Republic and International Treaties Concluded by Poland before the World War II

by SŁAWOMIR DĄBROWA

I. Poland's Pre-war Treaties

In the years 1918 - 1939 the Polish Republic was a party to several hundred multilateral and bilateral international treaties. The repertory published by J. Makowski¹ — brought up to 1934 — lists about 160 multilateral and 520 bilateral treaties (not counting more than one hundred agreements between Poland and the Free City of Gdańsk, which were not regarded as international treaties in view of the specific relations between Poland and Gdańsk).

The 160 multilateral and the 520 bilateral treaties concluded up to 1934 plus about 30 multilateral and bilateral treaties concluded in 1935 - 1939² make for a total of about 720 international treaties concluded by Poland before the war.³

Assuming that about one half of these treaties became invalid still in the inter-war period, either because of their full implementation, or

¹ J. MAKOWSKI, *Umowy międzynarodowe Polski 1919 - 1934* [Poland's International Treaties 1919 - 1934], Warszawa 1935.

² This last figure is based on the list drawn up by S. HORAK, *Poland's International Affairs 1919 - 1960. A Calendar of Treaties, Agreements, Conventions and Other International Acts*, Bloomington 1964.

³ Neither can they be compared with the figure of 289 international treaties given by S. NAHLIK, *Umowy międzynarodowe Polski Ludowej w okresie dwudziestolecia* [International Treaties of People's Poland in the Course of Twenty Years], "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1964, No. 4, p. 40. S. Nahlik points out that he refers only to the treaties concluded by the Polish People's Republic in 1944 - 1964 and published in "Dziennik Ustaw" [Journal of Laws, hereinafter cited as Dz. U.] while — as it is known — not all treaties concluded by the Polish People's Republic are published there. Poland entered into more treaties in the post-war 20-year period than in the two inter-war decades. S. Horak lists, for instance, for the years 1919 - 1939 as many as 238 acts and for the years 1944 - 1960 — 540 acts.

substitution by other treaties, or else because of the expiration of the period for which they were concluded, denunciation by Poland or by the other party etc. several hundred treaties were still formally binding on Poland on September 1, 1939, i.e. at the outbreak of World War II.

What was the legal status of those treaties on July 22, 1944, that is at the time when Poland became a people's republic and thereafter?

The answer to this question is not an easy one for at least several substantive and formal reasons.

First of all, the hostilities of the World War II were going on on the territory of Poland during the 1939 - 1944 period. After this period a fundamental change of the social and economic system in Poland occurred leading to a basic change of Polish foreign policy of which the treaty policy is a part. In the course of hostilities the texts of many unpublished bilateral treaties were destroyed or lost. Hence, the material available for the research is incomplete. It would be superfluous to argue the paramount importance for each State to have established whether a given international treaties remains binding or not. The establishing of the validity of a given treaties concluded during the period between the two World Wars requires not infrequently long-lasting studies, negotiations with the other party (or parties), comparison with the legal status of other analogous treaties and basing on certain general premises which will be discussed in our subsequent considerations.

II. The Principle of the Validity of Pre-war Treaties

There is no doubt that Poland continues to be the same — though not identical — subject of international law as before the war.⁴ The Polish People's Republic is thus the heir to the treaty legacy of the Polish Republic. The PPR has recognized the principle of legal continuity in this domain. This has been confirmed in various ways, as, e.g.:

1. The PPR has remained a member of the international organizations in which it participated before the war and which continue their existence now, as e.g., the International Labour Organization. Membership status of the PPR in these organizations did not call for any confirmation by Poland or by any of these organizations.

2. The PPR ratified multilateral treaties which had been signed by

⁴ Cf. S. NAHLIK, *Umowy międzynarodowe w Polsce Ludowej* [International Treaties in People's Poland], in: *20 lat polityki zagranicznej Polski Ludowej* [20 Years of People's Poland Foreign Policy], Warszawa 1964, p. 248.

Poland's representatives before the war, e.g. in 1948 Poland ratified the Universal Postal Convention signed in 1939. As quoted by S. Nahlik, after World War II Poland became party to twenty one pre-war international treaties, 12 of them dealing with social matters, while 8 — with postal traffic. One agreement concerned the international exhibitions.⁵ Were it not for the principle of legal continuity, the acceptance by Poland of those treaties would have to be effected, in accordance with their final provisions, not by way of ratification but by way of accession.

3. In the *Journal of Laws* of the PPR, government statements are published on the accession of new States to the treaties to which Poland became a party before the war. Probably the oldest international treaty which continues to be binding on Poland is the Convention on the Protection of Submarine Cables signed in Paris in 1884. Poland became a party to that Convention in 1934.

4. Some pre-war treaties have been formally abrogated after the war by way of special protocols or new treaties. This testifies to the fact that up to the time of their abrogation they have been regarded as binding.

Those examples prove that the PPR recognizes the validity of treaties which were binding on Poland before the war. Obviously, the most conclusive is the very implementation by the PPR of a number of pre-war treaties like, e.g., consular conventions with the countries with which new consular conventions have not yet been concluded after the war: with France — of 1925, with Belgium — of 1928 and with Italy — of 1935.⁶

But even treaties which are not being applied in practice are regarded as formally binding and requiring formal abrogation, e.g. the Polish-Finnish Convention concerning the operation of scheduled air services of 1938 was not operative after the war. However, when a new agreement concerning civil air transport with Finland was concluded in 1963, a Protocol was drawn up on the abrogation of the 1938 Convention.⁷ The Protocol was drawn up and signed on Poland's initiative.

In view of the continuity of the Polish State, the thesis about the validity of pre-war treaties, is a consequence of the principle *pacta servanda sunt*. As is known, the principle claiming that the State has to implement *bona fide* the engagements it has entered into is one of the fundamental bases of international law. Originally, this principle was based on customary law. Failure by a State to fulfil the obligations undertaken by it invariably led to strong protests on the part of other

⁵ S. NAHLIK, *op. cit.*, p. 249.

⁶ The specific legal status of Polish—Italian pre-war treaties is dealt with in the subsequent part of this paper.

⁷ Dz. U. 1964, No. 21, item 133.

States. The *opinio iuris* according to which the international treaties entered into have to be respected was always shared by the States.

The principle *pacta servanda sunt* was introduced into the conventional law by the London Declaration of January 17, 1871, on the duty to respect treaties concluded.⁸ The signatories of the Declaration stated that they recognized as an essential principle of the law of nations the rule that no power can absolve itself from the obligations under a treaty nor change its provisions otherwise than with the consent of the contracting parties, reached by way of friendly understanding.

A number of other international treaties, and first of all the Charter of the United Nations, reaffirm that principle. Para. 3 of the Preamble to the Charter emphasizes the determination to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained. Article 26 of Vienna Convention of 1969 specifies this principle as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁹

The respect of engagements entered into by particular States is the basis of international cooperation, it is an indispensable premise of mutual confidence and friendly relations. This pertains to all the domains of international coexistence. A nihilistic approach to one's engagements would be equivalent to the negation of the rule of law in international relations in general. No normal relations can exist between the States without mutual and universal fulfilment of obligations in good faith. This principle, which has for long constituted an integral part of the system of international law, is today, moreover, an essential element of peaceful coexistence.¹⁰

The attitude of the Polish People's Republic in respect to the pre-war treaties testifies to the fact that Poland observes the principle *pacta servanda sunt*.

III. Exceptions to the Principle of Validity of Pre-war Treaties

One has necessarily to make some exceptions to the principle of the validity of pre-war treaties. Some of them must be regarded as invalidated

⁸ B. WINIARSKI, *Wybór źródeł do nauki prawa międzynarodowego* [A Selection of Sources for the Teaching of International Law], Warszawa 1938, p. 41.

⁹ UN Document No. A CONF. 39/27.

¹⁰ Cf. R. BIERZANEK, *Zasady prawne pokojowego współistnienia i ich kodyfikacja* [Legal Principles of Peaceful Coexistence and their Codification], Warszawa 1968, p. 143.

despite the lack of formal abrogation or denunciation. This concerns the following four groups of treaties:

1. Treaties with States which have ceased to be subjects of international law:¹¹

a) Poland's treaties with Lithuania, Latvia and Estonia which became part of the USSR in 1940. Multilateral treaties — called Baltic treaties — to which, among others, Lithuania, Latvia and Estonia were parties, continue to be binding between Poland and the other parties the legal status of which did not change (e.g., the Baltic Convention for the suppression of contraband in alcoholic merchandise, signed at Helsinki in 1925, to which Poland, the USSR, Sweden, Denmark, Finland, Norway, Lithuania, Latvia and Estonia were parties).

b) Poland's treaties with Germany. After World War II Germany as a subject of international law ceased to exist. Three autonomous political-legal units have been formed and do actually exist on German territory: German Democratic Republic, German Federal Republic and West Berlin. Hence, the pre-war Polish-German treaties are no more valid. Besides, these treaties fall at the same time into the subsequent category of treaties.

2. Treaties with States with which Poland was in the state of war, that is with Germany, Italy and Japan. This is explicitly specified in the letters of the Polish Ministry of Foreign Affairs of October 24, 1946 to the Ministry of Shipping and of November 16, 1946 to the Ministry of Finance stating that treaties with States with which Poland continued to be in the state of war should be considered as terminated *ipso iure*.¹² The state of war with Italy was terminated upon Poland's ratification in 1948 to the Treaty of Peace with Italy 1947, with Germany — by way of Poland's unilateral Declaration of January 31, 1955 and with Japan — upon the coming into force of the bilateral Polish-Japanese Agreement of 1957 on the Re-establishment of Normal Relations. Although the termina-

¹¹ In this connection one more group of treaties should be mentioned: those involving countries which became subjects of international law after the World War II. Some bilateral pre-war treaties concluded by Poland with colonial powers were made applicable by the latter to their dependent territories under the so-called colonial clause. Having gained independence, those countries decide in consultation with the PPR which of the pre-war treaties they wish to keep in force in their relations with Poland and which to abrogate (for details cf. S. DĄBROWA, *Nowe państwa a umowy międzynarodowe* [New States and International Treaties], "Sprawy Międzynarodowe," 1965, No. 6, pp. 77 - 94.

¹² Quoted after S. NAHLIK, *op. cit.*, p. 248, note 14.

tion of the state of war did not restore automatically the validity of the pre-war Poland's treaties with these States, however, the relevant treaties and agreements contain some stipulations concerning the legal status of bilateral treaties (see below).

3. Treaties the application of which is obviously impossible because of a change in the factual situation existing at the time they were entered into. Besides, it can be argued also that this is no exception to the general principle as the contracting parties do not repudiate the implementation of their contractual engagements; these engagements became — for objective reasons — immaterial. Typical examples are Polish-Roumanian conventions of 1929 on small frontier traffic and on preferential railway transit through a parcel of the territory of Roumania, between two small railway stations, both in Poland. Their application is impossible because Poland does not have now a common frontier with Roumania. To this group also belong other frontier agreements since Poland's frontiers have changed — legally and durably — as compared with those of 1939, as well as agreements relating to the Free City of Gdańsk since Gdańsk became a part of Poland under the Potsdam Agreement. Instead, those pre-war treaties which continue to be binding upon Poland apply to her entire territory within the present frontiers.

4. Treaties or parts of them which are clearly incompatible with the new socio-economic system in Poland.

From the practical point of view it is not difficult to classify a given agreement into one of the three first groups, because the criteria of such a classification are clearly stated. Instead, the determination of the scope of the fourth group involves considerable difficulties which will be discussed below.

From the theoretical point of view only the criteria specified with regard to the groups 1 and 2 give rise to no doubts. The criteria mentioned under 2 and 4 touch upon issues of international law which belong to the most controversial ones: The effect of war on treaties and the impact of a fundamental change of conditions on treaties. Thus — from the theoretical point of view — it seems more appropriate to derive the assertion of the non-validity of Polish-German pre-war treaties rather from the incontrovertible fact that the pre-war contracting party ceased to exist as a subject of international law than from the thesis that the state of war disrupted definitely the contractual relations between Poland and Germany. The doctrine of international law, as well as practice, are by no means unanimous as to whether the state of war disrupts definitely

the treaty relations between the belligerent parties.¹³ Assuming the first approach as correct — i.e. assuming that the contracting partner ceased to exist legally — the treaties concluded with such a partner could be regarded as invalidated *ipso facto* and *ipso iure*, while in the second case one should first provide the evidence that the war has disrupted definitely the treaty relations between Poland and Germany.

As regards the treaties with other States with which Poland was in state of war, i.e. Italy and Japan, there are some provisions in post-war treaties which clarify — to a high degree — the legal status of pre-war Polish-Italian treaties and provide certain indications as to the treatment of pre-war Polish-Japanese treaties.

Thus the Treaty of Peace with Italy signed in Paris on February 10, 1947, to which Poland became a party in 1948, provides in Article 44 that each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. All such treaties not so notified shall be regarded as abrogated.¹⁴ It follows from the above that a part of pre-war Polish-Italian treaties, at first regarded as abrogated *ipso iure* (cf. the quoted letters of the Polish Ministry of Foreign Affairs of 1946) have been thereafter restored by way of notification on the basis of Article 44 of the Treaty of Peace. The said article of the peace treaty is evidence that neither the state of war nor actual hostilities between two States involve automatically the abrogation of pre-war treaties.

Similar provisions are contained in the peace treaties concluded in Paris on February 10, 1947 with Bulgaria (Art. 8), Roumania (Art. 10), Hungary (Art. 10) and Finland (Art. 12). Poland is not a party to these treaties since it had not been in the state of war with those states. Poland, like other socialist countries, is not a party to the peace treaty with Japan signed in San Francisco on September 6, 1951 irrespective of the fact that it was in the state of war with Japan. The treaty provides in Article 7 that each of the Allied Powers, within one year after the Treaty has come into force between it and Japan, will notify Japan which of its

¹³ Cf. V. N. DURDIENIEVSKIĖ, *Dovoyennyye dogovory posle voyny* [Pre-war Treaties after the War], "Sovetskoye Gosudarstvo i Pravo," 1947, No. 1, p. 30 ff.; M. LACHS, *Umowy wielostronne* [Multilateral Treaties], Warszawa 1958, p. 233 ff.; McNAIR, *The Law of Treaties*, Oxford 1961, p. 697 ff.; J. ŠACH and M. TARCZEWSKI, *Niektóre zagadnienia wpływu wojny na umowy międzynarodowe* [Some Problems of the Effect of War on International Treaties], "Państwo i Prawo," 1957, No. 9, p. 425 ff.; S. NAHLIK, *Wstęp do nauki prawa międzynarodowego* [Introduction to the Science of International Law], Warszawa 1967, p. 297 ff.

¹⁴ Dz. U., 1949, No. 50, item 378.

pre-war bilateral treaties or conventions with Japan it wishes to continue in force or revive.¹⁵

The state of war between Poland and Japan was terminated by a bilateral treaty on the re-establishment of normal relations between the PPR and Japan signed in New York on February 8, 1957.¹⁶ That treaty does not, however, contain any provisions on the pre-war Polish-Japanese treaties. It can be presumed, however, that in view of the absence of any such provision, both parties recognized the pre-war treaties as expired, which coincides with the statements of the quoted letters of the Polish Ministry of Foreign Affairs (1946). Evidence of that might be the preamble to the Treaty on Commerce between the PPR and Japan, signed in Tokyo on April 26, 1958. In the preamble to that Treaty both parties state that they are concluding the new Treaty "considering that the Treaty of Commerce and Navigation between Poland and Japan, signed on December 7, 1922, had ceased to be in force."¹⁷ The fact that such formulation was included in the preamble and not in the final clauses, as is usually done, points clearly to the fact that the abrogation of the treaty of 1922 took place not as a result of the conclusion of the treaty on the same matter in 1958, but that the parties recognized the treaty of 1922 as having expired previously. Hence the conclusion that the parties implicitly recognized that the state of war had disrupted the treaty relations between them.

The State Treaty for the Re-establishment of an Independent and Democratic Austria signed in Vienna on May 15, 1955¹⁸, unlike the peace treaties concluded after World War II, does not contain any provisions on the binding force of pre-war treaties. Austria was to regulate these matters bilaterally with the States concerned.¹⁹

The most difficult problem to be solved is the determination of the scope of group 4 of treaties i.e. those which became invalidated in view of the changes in the socio-economic system in post-war Poland.

Assuming that this is an effective premise to consider some treaties or their parts as abrogated one should recognise the same right to serve the other contracting party as to this party, too, it may be not immaterial whether a given agreement binds it with capitalistic or socialist Poland. Obviously, this right should be made use of in good faith and, preferably, by way of an agreement — if possible — of the parties concerned.

¹⁵ United Nations Treaty Series, vol. 136, p. 46.

¹⁶ Dz. U., 1957, No. 49, item 233.

¹⁷ Dz. U., 1959, No. 19, item 118.

¹⁸ Dz. U., 19, item 94.

¹⁹ Cf. McNAIR, *op. cit.*, p. 727.

When discussing some time ago the problem of the effect exerted by a fundamental change of circumstances on the validity of international treaties, the UN International Law Commission was by no means unanimous as to whether the change in the policy itself of a given government may be regarded as a fundamental change of circumstances. Instead, the Commission was definitely positive in the assertion that a change in the policy connected with a change in socio-economic system of a given country should be regarded as a fundamental change of circumstances substantiating the recognition of certain formerly concluded treaties as no more valid.²⁰ The representatives of the socialist doctrine of international law participating in the discussions in the International Law Commission — i.e. the representatives of Poland, USSR and Yugoslavia — were unhesitating partisans of this opinion.²¹

The problem of termination of some treaties as a result of fundamental change of circumstances is too complicated and ample to be dealt with exhaustively in this paper. Thus, we shall confine ourselves to quote some examples of treaties terminated as a consequence of the change in the socio-economic system in Poland. Here belong, e.g., the pre-war political and military alliances. S. Nahlik assigns to this group also economic agreements, asserting that "a considerable number of bilateral agreements, in particular those of economic character, proved to be inapplicable in the new system."²² He goes on to say that "there is no doubt, however, that a considerable number of previously concluded agreements had in fact ceased to be applied even before the conclusion of new ones. This could be explained in two ways: either by *desuetudo* (abrogation of an agreement by actual bilateral non-application) or by a fundamental change of circumstances existing at the time the agreement was concluded."

Since — as it was shown above — the practical non-application of a given treaty could hardly be regarded as a sufficient criterion of its termination, we are left with the second element — the fundamental change of circumstances. The non-application of the treaty should be distinguished from the infringement of the treaty what — under certain conditions — may substantiate its abrogation by the other party (cf. art. 60 of Vienna Convention on the Law of Treaties, 1969).

²⁰ Report of the International Law Commission 1963, UN Document No. A/5509 (a commentary on the then worked out art. 44 of the draft of the law of treaties).

²¹ "Yearbook of the International Law Commission", vol. I, 1963; Summary Records of the 15th Session, p. 140, 145 and 149.

²² S. NAHLIK, *op. cit.*, p. 249.

IV. Various Modes of the Termination of Certain Treaties

Pre-war treaties have been brought to an end in various ways. As shown above, treaties with States which ceased to be subjects of international law, treaties with States with which Poland was in the state of war, treaties whose application is impossible in view of a definite change in the situation which existed at the time they were concluded and treaties which are incompatible with the new socio-economic system in Poland, can be recognized as terminated *ipso iure*, i.e. not necessarily in pursuance of their final provisions. Other pre-war treaties not terminated as a result of expiration of the term to which they were binding or due to their complete implementation or the occurrence of the resolute condition may be terminated in one of the following ways:

1. Denunciation by Poland. Thus for instance, in 1951 - 1953 Poland denounced formally and in accordance with the final provisions the conciliation and arbitration agreements with Sweden and Switzerland — of 1925, and that with Luxemburg — of 1928. Other treaties of that type, e.g. the conciliation treaty with Chile of 1929, continue to be binding since they have not been denounced.

In accordance with international law a treaty should be denounced by the same organ which concluded it or by an organ of the same or higher rank. That is why treaties concluded before the war in the name of the President of the Polish Republic are now being denounced by the Council of State. Treaties concluded by the Government of the Polish Republic are denounced by the Council of Ministers of the PPR. It is obvious that by denouncing pre-war treaties, the Council of State and the Council of Ministers exercise their powers under the Constitution of the PPR of 1952 and not under pre-war fundamental laws. Thus the denunciation of treaties ratified before the war with the participation of the Sejm as was provided for by the constitution then in force does not now require the participation of the Sejm.²³

2. Denunciation by the other party. For instance, Sweden denounced in 1957 the Convention with Poland on the mutual recognition of ships measurement certificates signed in Warsaw in 1928.

3. Termination in virtue of new treaties intended solely to terminate the pre-war treaties. Thus, on November 4, 1963 a Protocol was signed in Helsinki between the PPR and Finland concerning termination of the 1938 Polish-Finnish Convention on the operation of scheduled air services.

²³ Cf. K. SKUBISZEWSKI, *Sejm i zawieranie umów międzynarodowych* [The Sejm and the Concluding of International Treaties], "Państwo i Prawo," 1959, No. 3, p. 500 ff.

As the pre-war convention was ratified and the new air agreement concluded in 1963 did not require ratification, the latter could not, as an agreement of a lower order, formally terminate the Convention of 1938. That is why the said Protocol was adopted which consists of only two articles: The first terminates the Convention, the second — relates to the coming into force of the Protocol.²⁴ A similar Protocol between the PPR and the Czechoslovak Socialist Republic was signed in Warsaw on July 29, 1965²⁵ to terminate the conciliation and arbitration treaty of 1925 and the agreement on legal protection and legal assistance in taxation matters of 1925.

All these protocols are, obviously, intended to bring in formal order the legal status of pre-war treaties.

4. Termination in virtue of new treaties on the same subject-matter providing in their final clauses for termination of the corresponding pre-war treaties. Thus, e.g., Article 84 of the agreement between the PPR and the Roumanian People's Republic on legal assistance and legal relations in civil, family and penal matters, signed in Bucarest in 1962²⁶ explicitly terminates the Polish-Roumanian conventions on judicial assistance in civil matters of 1929 and on legal assistance in penal matters of 1930.

5. Termination of treaties by the conclusion of new treaties by the same parties on the same subject-matter, even if these treaties do not explicitly provide for termination of previous treaties, but the stipulations of the new treaty proved to be incompatible with those of the previous convention. A new treaty may replace a previous one in whole or in part. McNair regards the conclusion of a new treaty on the same subject-matter to which the earlier treaty related as its implied termination with the consent of both parties.²⁷

Termination in a way mentioned in points 3, 4 and 5 is effected with the consent of the parties, while that in points 1 and 2 by way of unilateral actions, but in accordance with the provisions of the treaty. Termination of a treaty does not invalidate the actions performed under it at the time when it was binding upon the parties.

²⁴ Dz. U., 1964, No. 21, item 133.

²⁵ Dz. U., 1966, No. 17, item 108.

²⁶ Dz. U., 1962, No. 63, item 301.

²⁷ McNAIR, *op. cit.*, p. 508.

V. Provisions of Vienna Convention on the Law of Treaties

To end the many years' work of the UN International Law Commission on the law of treaties by an actual achievement, UN called in 1968 and 1969 two important conferences on the law of treaties to Vienna. Polish delegation played an active part in both conferences. The second Vienna conference adopted at its closing session on May 23, 1969 the Vienna Convention on the Law of Treaties mentioned above.

The Convention contains an enlarged part defining the causes of invalidation and expiration of agreements (*Part V, Section 3: Termination or Suspension of the Operation of Treaties*). The problems we are concerned with in this paper are dealt with, in particular, in Articles 54, 59, 61 and 62 of the Convention.

As stated in Article 54 of the Convention, the termination of or the withdrawal from a treaty may take place either in conformity with provisions of the treaty or else by consent of all the parties. In pursuance of Article 59 a treaty shall be considered as terminated if all the parties to it concluded a later treaty dealing with the same subject-matter and it results from this later treaty that the parties intended that the matter should be governed by the treaty, or the provisions of the later treaty are so far incompatible with those of the earlier one, that the two treaties are not capable of being applied at the same time. Article 61 of the Convention recognizes the impossibility of performing of the treaty as a ground for terminating or withdrawing from it, if the impossibility results from the permanent disappearance or destruction of the object indispensable for the execution of the treaty. As stipulated in Article 62 of the Convention, the fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as the ground for terminating or withdrawing from the treaty unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is radically to transform the extent of obligation still to be performed under the treaty. However, the fundamental change of circumstance may not be invoked as a ground for terminating a treaty establishing a boundary States.

Both Vienna Conferences did not deal with the effect of the state of war on the international treaties and the legal succession of States with respect to the treaties. Consequently, these problems have been left out of the Convention. It will, of course, take some time before the Vienna Convention gets the required number of ratification to come into force.

Nonetheless, it may be doubtlessly regarded as the reflection of the actual state of international law in this domain. The comparison of the provisions of the Vienna Convention quoted above with the actual PPR practice as regards the pre-war treaties discussed in this paper does not display any deviation of our 25-years practice from the provisions of the Convention, in spite of the fact that they have not been codified on international scope until 1969.

Thus it may be stated that the Polish People's Republic always complied and continues to comply with the law of treaties recognising the principle of the validity of pre-war treaties entered into by Poland (*pacta servanda sunt*). The exceptions to this rule are but few and well substantiated. They are more numerous with respect to bilateral than to multilateral treaties. In each case open to doubt one has to presume the validity of the treaty unless an evidence to the contrary is afforded. In such cases the most suitable *modus procedendi* is to settle the legal status of the treaty by way of negotiations with the other party or parties as in each case the validity of a treaty depends ultimately on the will of the parties to this treaty.

Le problème des successions d'après les règles polonaises de droit international privé

par MIECZYSLAW SOŚNIAK

I. La règle fondamentale sur loi compétente au regard de la succession

Les problèmes qui nous occupent ici ont été réglés en droit polonais par deux lois successives portant droit international privé, à savoir dans celle du 2 août 1926 et celle du 12 novembre 1965. Ces problèmes sont également réglés par les conventions bilatérales sur l'assistance juridique, conclues par la Pologne après la Seconde Guerre mondiale. Face à cet état de choses et face aussi aux différences incontestables, qui se manifestent dans la réglementation des problèmes particuliers du droit successoral entre l'ancienne et la nouvelle loi d'une part, ainsi qu'entre ces lois et les dispositions des conventions susmentionnées, d'autre part, nous étudierons ces problèmes séparément au regard de chacune des sources légales en question.

En ce qui concerne la règle fondamentale de la compétence dans le domaine des rapports juridiques nés à l'occasion des successions, elle est identique dans les deux lois précitées. La loi compétente est la loi nationale du *de cuius* au moment de son décès¹. Le droit international privé polonais observe donc immuablement le principe de l'unité de la succession (sans égard au caractère mobilier ou immobilier des objets composant la succession), soumise à une unique règle fondamentale de compétence. Il convient d'ajouter d'ailleurs qu'à la suite des traductions erronées du texte de notre ancienne loi², celle-ci a souvent fait l'objet d'une interprétation inexacte dans la doctrine étrangère.

¹ Art. 28, al. 1 de la loi de 1926: «La loi compétente en matière successorale est la loi nationale du *de cuius* au moment de son décès». Art. 34 de la loi de 1965 en vigueur: «En matière successorale la loi compétente est la loi nationale du *de cuius* au moment de son décès».

² Ainsi une traduction inexacte de l'art. 28 précité de la loi de 1926 parut dans «Ostrecht» (1926, p. 1094) et dans les deux éditions du recueil de MAKAROW. En

Comme le souligne la doctrine polonaise³, cette règle fondamentale indique la compétence de la loi de l'État dont le *de cuius* était ressortissant au moment du décès. Les deux lois établissent en effet de cette manière le statut personnel du *de cuius*. Cette disposition toutefois ne préjuge pas les solutions relevant dans un système plurilégislatif soit les cas, dans lesquels il y a lieu de se demander lequel des systèmes internes en vigueur dans un État donné est applicable. Il ne résulte, en effet, aucunement de la compétence de la loi de l'État, dont le *de cuius* était ressortissant au moment du décès, que les règles de fond en vigueur dans cet État, au moment précis du décès, soient toujours compétentes. Ces règles pouvaient changer depuis. Dans ce cas, les règles transitoires de l'État en question tranchent la question de savoir quelles sont les règles modifiées qu'il faut appliquer dans ce cas. Le plus souvent ce seront les règles en vigueur au moment du décès du *de cuius*, mais des dérogations à ce principe, dérogations prévues par la loi interne de l'État en question, sont possibles.

Malgré l'identité de la règle fondamentale de compétence dans les deux lois, il existe entre elles une différence en ce qui concerne la détermination de la capacité successorale. En effet, d'après la loi de 1926, les héritiers devaient avoir «la capacité d'acquérir la succession non seulement d'après la loi compétente pour les droits successoraux, mais aussi d'après leur loi nationale» (art. 28 al. 2 de la loi). Bien qu'une disposition similaire se trouve dans l'une des conventions sur l'assistance juridique, conclues par la Pologne après la dernière guerre⁴, la condition de la «double» capacité des héritiers a en général été critiquée dans la

effet, «la loi nationale du *de cuius* au moment du décès» donnait en allemand la loi qui «zur Zeit seines Todes galt». Cette traduction a été rectifiée par MAKAROW dans l'article *Postmortale Aenderung der Sachnormen des Erbstatutes* («Rabels-Zeitschrift», 1957, p. 205). Cette rectification n'a pas été prise en considération par G. GEILKE («Recht in Ost und West», Berlin 1959, n° 5, p. 181), qui fondait la critique de la règle polonaise des conflits en cette matière sur cette traduction erronée. Cette traduction a été reprise dans le III^e volume de la publication de M. FERID, K. FIRSCHING, *Internationales Erbrecht*, München - Berlin 1964. Une traduction inexacte de l'art. 28 se trouve également dans le recueil de G. E. WILKOW: *Mejdunarodnoje častnoje pravo v izbrannyh dokumentah*, Moskva 1961, p. 238. Cf. pour cette question K. PRZYBYŁOWSKI, *Kodyfikacyjne zagadnienia polskiego prawa międzynarodowego prywatnego* [Problèmes de codification du droit international privé polonais], «Studia Cywilistyczne», Vol. V, 1964, p. 53.

³ Cf. l'ouvrage précité de PRZYBYŁOWSKI, p. 52.

⁴ Art. 42 de la Convention avec la République Démocratique Allemande de 1957: «Les ressortissants de l'une des Parties Contractantes, qui forment des prétentions successorales sur le territoire de l'autre Partie, doivent avoir la capacité successorale aussi bien d'après la loi de son État que d'après celle de l'autre Partie Contractante».

doctrine polonaise⁵. On lui reprochait notamment de provoquer des difficultés lors de la réalisation des droits successoraux⁶. Pour cette raison, la disposition en question n'a pas été reprise par la nouvelle loi. Celle-ci ne contient aucune mention sur la capacité des personnes ayant la vocation successorale.

La portée des règles de compétence ici débattues est très vaste⁷. Il serait donc incorrect de limiter son application uniquement à la question de l'héritage au sens strict du mot, donc aux droits successoraux dans le sens du droit subjectif à la succession. D'après la loi nationale du *de cujus*, au moment du décès nous déterminerons donc le cercle des héritiers, leur capacité successorale (par exemple la question de la succession du *nastiturus*) et les conditions de la succession (par exemple le problème de l'indignité successorale). Le statut successoral déterminera également la portée de la succession (en particulier la question des droits et obligations nés après le décès du *de cujus* au regard de la succession). D'après la loi polonaise le statut personnel du *de cujus* englobe également le problème de l'ouverture, de l'acceptation et de la répudiation de la succession, la responsabilité des héritiers pour les dettes de la succession, le genre et l'étendue de cette responsabilité, la réserve, le partage de la succession⁸.

En revanche, les questions qui ont bien leur importance en matière successorale, mais qui ne sont pas réglées par la loi successorale, les questions préalables seront appréciées par la loi compétente pour le genre donné des rapports juridiques. Ce sont, par exemple, les questions concernant la déclaration de décès, la parenté, la validité du mariage en vertu duquel le conjoint survivant affirme ses droits successoraux, etc. Toutes ces questions seront tranchées non pas d'après la loi compétente en matière successorale, mais d'après les dispositions d'autres parties du droit international privé polonais (droit des personnes, droit du mariage, etc.).

La règle de la compétence de la loi nationale du *de cujus* pour l'ensemble de la succession, règle adoptée par les deux lois polonaises,

⁵ Cf. notamment J. BALICKI, *Problemy kolizyjne prawa spadkowego* [Problèmes des conflits en matière successorale], Warszawa 1963, p. 103.

⁶ Ainsi PRZYBYŁOWSKI dans l'ouvrage précité de 1964, *loc. cit.*

⁷ Dans notre doctrine certains auteurs font remarquer qu'au lieu de l'ancienne expression «droits successoraux», la nouvelle loi parle des «affaires successorales», ce qui, à leur avis, indique un champ d'application plus vaste de la disposition en question. Ainsi E. WIERZBOWSKI, *Polskie prawo prywatne międzynarodowe* [Droit international privé polonais], Katowice 1966, p. 91 et W. LUDWICZAK, *Międzynarodowe prawo prywatne* [Droit international privé], Warszawa 1967, p. 226.

⁸ Les deux auteurs cités dans la note précédente arrivent aux conclusions semblables.

a été écartée dans certaines conventions conclues par la Pologne. A cet égard ces conventions peuvent être divisées en deux groupes. Le premier de ces groupes comprend les conventions adoptant la loi nationale du *de cuius* au moment du décès comme loi fondamentale en matière de compétence dans le domaine successoral. Le second groupe contient les conventions qui utilisent au regard des biens immobiliers le point de rattachement de la situation de l'immeuble, limitant la compétence de la loi nationale du *de cuius* aux meubles.

Dans le premier groupe, on peut classer les conventions avec la Tchécoslovaquie de 1961 (art. 22 al. 1), avec la Hongrie de 1959 (art. 47 al. 1), avec la R.D.A. de 1957 (art. 41) et avec la Yougoslavie de 1960 (art. 36). Dans le second groupe, on classe la Convention avec l'Union Soviétique de 1957 (art. 42). Certaines conventions (avec la Bulgarie de 1961 et avec la Roumanie de 1962) ont renoncé à une disposition générale formulant une règle fondamentale de compétence en matière successorale.

Néanmoins, on rencontre des cas de dérogation à la division fondamentale précitée. Même dans les conventions qui affirment la loi nationale du *de cuius* pour l'ensemble de la succession, on rencontre dans des dispositions particulières des dérogations, au regard, par exemple, des biens en déshérence.

Pour terminer cette brève étude de la règle fondamentale de compétence de la loi polonaise au regard de la succession, il faut signaler que l'ancienne loi prévoyait également des exceptions à cette règle, qui concernaient certains patrimoines déterminés. Ainsi les patrimoines, dont le *de cuius* ne pouvait pas disposer en cas de décès, n'étaient pas soumis à la loi nationale du *de cuius*, mais à la loi du pays de leur situation (art. 30 al. 1 de la loi de 1926). La même règle était applicable aux restrictions de droit public, auxquelles était soumise la succession ou des parties de celle-ci (art. 30 al. 2 de la loi précitée). Ces restrictions posaient donc un problème général intéressant aussi bien la succession *ab intestat* que la succession testamentaire.

On rencontre des restrictions semblables dans les dispositions de quelques conventions internationales, conclues par la Pologne après la Seconde Guerre mondiale. Ainsi l'article 41 al. 2 de la Convention avec la R.D.A. est conçu comme suit:

«Lorsque la loi de l'une des parties contractantes, sur le territoire de laquelle se trouvent des éléments patrimoniaux appartenant à la succession, prévoit des restrictions à disposer de ces éléments par les ressortissants de la partie en question, la loi applicable à la succession est alors celle de l'État sur le territoire duquel se trouvent ces éléments».

Ainsi la *lex rei sitae* vient à la place de la *lex patriae*. Un peu différemment sont formulées les dispositions en même matière dans la Con-

vention de 1961 avec la Tchécoslovaquie⁹ et dans la Convention avec la Hongrie¹⁰.

Dans la loi de 1965, un problème particulier est celui de la succession des exploitations agricoles. Bien qu'en principe l'article 34 de cette loi (compétence de la *lex patriae*) s'applique également à ces exploitations, l'article XXIII des dispositions introduisant le Code civil de 1964 prévoit des dérogations à ce principe. Conformément à cette disposition, les successeurs ou les légataires, qui sont ressortissants d'un État étranger, peuvent être, en vertu d'une disposition spéciale, écartés de la succession, d'une exploitation rurale, ou bien, leurs droits peuvent être limités à cet égard. Dans ce cas, ils ont droit à un équivalent en argent de la succession ou du legs, à condition de la réciprocité de traitement dans l'État, dont l'héritier ou le légataire ayant droit à cet équivalent est ressortissant. Dans les situations de ce genre, la succession est soumise à la loi polonaise et non pas à la loi personnelle du *de cuius*¹¹.

II. Les dispositions à cause de mort

Le problème des dispositions à cause de mort suscitait toujours en Pologne une ample discussion. Il a été réglé non seulement par les lois de 1926 et de 1965, mais aussi par plusieurs conventions sur l'assistance juridique que la Pologne a conclues après la Seconde Guerre mondiale. Cette question exige d'être étudiée séparément non seulement en ce qui concerne les deux lois et les conventions susmentionnées, mais aussi en ce qui concerne les différents éléments des dispositions à cause de mort.

La loi de 1926 soumettait la validité des dispositions de dernière volonté et des contrats sur les droits successoraux à la loi nationale du *de cuius* au moment de l'accomplissement de ces actes (art. 26). La dispo-

⁹ Art. 22, al. 2: «Lorsque la loi de l'une des parties contractantes, sur le territoire de laquelle se trouvent les biens constituant une succession, contient des restrictions à la succession de ces biens par les ressortissants de cette partie, ces restrictions sont applicables aux ressortissants de l'autre partie contractante».

¹⁰ Art. 47, al. 2: «Lorsque la loi de l'une des parties contractantes, sur le territoire de laquelle se trouvent des éléments patrimoniaux appartenant à une succession, prévoit des restrictions à la succession de tels éléments par les ressortissants de cette partie, ces restrictions sont applicables aux ressortissants de l'autre partie contractante».

¹¹ Étant donné le caractère général de notre article, il nous est impossible d'étudier plus amplement la question de la succession des exploitations agricoles en droit international privé polonais, question qui a une grande signification dans notre pays. Elle devrait faire l'objet d'une étude spéciale renouant avec les dispositions du droit successoral polonais en matière de succession de ces exploitations.

sition en cette matière, trop générale, suscitait des doutes, qui concernaient notamment la position de ce texte par rapport à la loi compétente en matière de succession (donc la loi nationale du *de cuius* au moment du décès) et aussi sa position à l'égard de la règle générale, insérée dans une autre partie de la loi, concernant la forme de tous les actes juridiques. Nous reviendrons plus loin à cette dernière question.

Le point de rattachement fondamental pour une disposition à cause de mort, soit la loi nationale du *de cuius* au moment de la confection du testament ou d'autres dispositions *mortis causa*, concernait la question de savoir si — et dans quelle mesure — ces dispositions (par exemple les contrats sur les droits successoraux) sont admissibles, ainsi que la question des conditions de leur validité. En revanche, la réalisation du contenu d'un testament devait être appréciée d'après le statut successoral fondamental, c'est-à-dire d'après la loi nationale du *de cuius* au moment du décès.

Dans la loi de 1965, nous rencontrons (art. 35) la règle qui nous est déjà connue de la compétence de la loi nationale du *de cuius*, au moment de la confection du testament en ce qui concerne l'appréciation «de la validité du testament et d'autres actes juridiques à cause de mort» (art. 35).

Comme nous l'avons déjà remarqué, c'est le problème de la forme du testament qui suscitait des doutes particuliers dans le contexte de l'ancienne loi. D'après l'article 29 de cette loi «les dispositions de dernière volonté et les conventions successorales sont soumises à la loi nationale du *de cuius* à l'époque de l'accomplissement de ces actes». Cette disposition ne dit rien sur la forme du testament, elle ne fait que régler généralement la compétence de la loi, à laquelle sont soumises les dispositions de dernière volonté et les contrats sur les droits successoraux. Mais la forme du testament, à quelle loi doit-elle être soumise? Est-ce à la loi nationale du *de cuius* au moment de la rédaction du testament, ou bien aux règles générales de la loi polonaise concernant la forme des actes juridiques en général? En ce qui concerne cette dernière, l'article 5 de l'ancienne loi était ainsi conçu: «La forme de l'acte juridique est soumise à la loi qui est compétente pour l'acte lui-même; cependant il suffit de se conformer à la loi en vigueur au lieu de l'accomplissement de l'acte, si ce lieu n'est pas douteux».

Les réponses à ces questions étaient très diverses. A l'avis d'une partie de la doctrine et des praticiens, la forme des actes juridiques à cause de mort doit être appréciée sur la base de l'article 5 susmentionné, en liaison avec l'article 29 précité. Sur cette base on admettrait la validité du testament rédigé non seulement suivant la forme prévue par loi nationale du *de cuius*, mais aussi suivant la forme prévue par la loi en vigueur au

lieu de la confection du testament¹². Cette opinion était représentée dans la jurisprudence polonaise entre les deux guerres¹³, et dominait dans la doctrine polonaise¹⁴ de même que dans les ouvrages en langues étrangères traitant ce problème dans le contexte du droit polonais¹⁵. En faveur de l'adoption de cette opinion se prononçaient les formules dans les matériaux de codification de la loi de 1926, où nous trouvons l'affirmation expresse de l'opinion d'après laquelle, en ce qui concerne le testament, comme d'ailleurs les autres actes, il suffit d'observer les dispositions sur la forme obligatoire au lieu de l'accomplissement de l'acte¹⁶.

¹² On trouve une caractéristique complète des deux opinions opposées dans une glose de K. PRZYBYŁOWSKI relative à la résolution de la Chambre Civile de la Cour Suprême du 16 octobre 1963, III CO 50/63, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* (abrégé. OSPiKA), 1964, texte 187.

¹³ Cf. par exemple l'arrêt de la Cour Suprême du 5 novembre 1935 (Zb. U. 1936, n° 176) où on appliqua la *lex loci actus* à la forme du testament dressé par un ressortissant polonais en U.S.A. (Minneapolis) ou l'arrêt du 22 avril 1937 («Przegląd Sądowy», 1937, *Orzecznictwo Sądowe*, texte 438), qui reconnut la validité quant à la forme d'un testament dressé par un citoyen polonais à Philadelphie (U.S.A.). Après la guerre, la même position est adoptée par la résolution de la Cour Suprême — Chambre Civile du 16 octobre 1963, III CO 50/63 concernant le testament dressé en 1961 par un ressortissant polonais en Australie. Le testateur n'avait observé aucune des formes prévues par la loi polonaise. Cependant le testament fut reconnu valable et la Cour Suprême formula le principe suivant: «Le testament rédigé par un ressortissant polonais à l'étranger, conforme quant à sa forme à la loi du lieu de sa rédaction, est valable sur le territoire de la Pologne quant à la forme».

¹⁴ Cette opinion est partagée par l'éminent spécialiste des problèmes des conflits de lois, le professeur K. PRZYBYŁOWSKI (qui se prononça sur cette matière dans la note précitée et dans d'autres travaux). En faveur de la même solution se prononçaient également: F. ZOLL, *Międzynarodowe prawo prywatne w zarysie* [*Précis de droit international privé*], 4^e éd., Kraków 1947, p. 88; M. SOSNIAK dans le manuel de B. WALASZEK et M. SOSNIAK, *Prawo międzynarodowe prywatne* [*Droit international privé*], Kraków 1959, p. 208; J. BALICKI, *Problemy kolizyjne...* (voir note 5), p. 53.

¹⁵ Cf. notamment J. SUŁKOWSKI, *Conception du droit international privé d'après la doctrine et la pratique en Pologne*, dans: *Recueil de Cours de l'Académie de droit international*, vol. 41, 1932 — III, p. 705; E. FRANKENSTEIN, («Ostrecht», Berlin 1926, p. 1087); M. UDINA, *Il diritto internazionale privato della repubblica Polacca*, «Rivista di diritto internazionale», 1927, p. 213 et s.; H. H. WIEBE, *Die erbrechtliche Stellung eines in Deutschland wohnhaften Polen nach deutschen und polnischem internationalen Privatrecht*, Berlin 1937, p. 80 et s.; R. K. KURATOWSKI, *A General Outline of Some Principles of Conflicts of Laws in Poland*, dans: *Studies in Polish and Comparative Laws*, London 1945, p. 111. En revanche, E. RABEL (*Conflict of Laws*, vol. 4, An Arbor 1958, p. 292) se borne à signaler le caractère controversé du problème dans le contexte du droit polonais, sans le résoudre.

¹⁶ Des informations précises en cette matière sont fournies par K. PRZYBYŁOWSKI dans la glose précitée, OSPiKA, 1964, p. 397.

Une autre fraction de la doctrine et des praticiens a des tendances à se prononcer en faveur de l'opinion selon laquelle — sur la base de l'article 29 précité — il faut admettre pour la forme du testament la compétence exclusive de la loi nationale du *de cuius* au moment de la rédaction du testament. Cette opinion était représentée dans des jugements peu nombreux et rendus par des tribunaux polonais d'instance inférieure, ainsi que dans quelques énonciations de la doctrine¹⁷. En effet, plusieurs considérations peuvent être avancées pour repousser cette opinion. Si l'on collationne l'article 5 avec l'article 29 de l'ancienne loi, on admettra facilement que la loi nationale du *de cuius* représente dans le cas en question la *lex causae*, donc la loi «compétente pour l'acte lui-même», dont parle l'article 5 précité. D'autre part, comme nous l'avons déjà signalé, la loi de 1926 ne contient aucune mention sur la forme du testament. Cela nous permet d'appliquer pleinement à cette forme l'article 5, et par cela même d'admettre la compétence de la *lex loci actus*. Cette solution se justifie également¹⁸ par la nécessité d'élargir la gamme des lois compétentes en matière de forme des actes à cause de mort. Il faut faciliter ces actes au testateur, car ainsi on a la pleine possibilité de tenir compte de ses dernières volontés¹⁹.

L'adoption de cette solution par la grande majorité de la doctrine et des praticiens polonais a exercé une influence décisive sur le règlement de cette question dans le nouveau droit international privé polonais de 1965. On y trouve une disposition (art. 35), admettant expressément la forme locale à côté de la forme prévue par la loi nationale du *de cuius*. Cette disposition est ainsi conçue: «De la validité des testaments et d'autres actes juridiques à cause de mort décide la loi nationale du *de cuius* au moment de l'accomplissement de ces actes. Il suffit cependant l'observer la forme prévue par la loi de l'État où l'acte est accompli»²⁰.

Finalement on peut dire, que le rapport entre la compétence de la *lex patriae* du testateur et la *lex loci actus* se présente comme suit en ce qui concerne les conditions de la validité du testament²¹. La loi du lieu

¹⁷ Cf., par exemple, Z. FENICHEL, *Aktualne problemy polskiego prawa międzynarodowego prywatnego* [Les problèmes actuels du droit international privé polonais], «Państwo i Prawo», 1948, n° 9/10, p. 51 ou G. GEILKE, *Recht in Ost und West*, Berlin 1959, n° 5, p. 183 et s.

¹⁸ Comme le fait remarquer PRZYBYŁOWSKI dans la glose précitée.

¹⁹ On observe cette tendance dans le droit contemporain. Cf., par exemple, A. E. OVERBECK, *L'unification des règles de conflits de lois en matière de forme de testaments*, Friburg 1961.

²⁰ Cf. sur cette disposition PRZYBYŁOWSKI dans *Kodyfikacyjne zagadnienia...*, 1964, p. 55 et aussi le manuel précité de W. LUDWICZAK, p. 229 et le précis de WIERZBOWSKI, p. 91.

²¹ Cf. la glose précitée de PRZYBYŁOWSKI, p. 398.

de l'accomplissement de l'acte est appliquée alors même que la loi nationale du testateur limiterait ou écarterait son application. Il suffit d'observer cette forme même, si le testateur ne le savait pas et s'il croyait à tort qu'il observe la forme indiquée par la *lex causae*. D'ailleurs, outre la *lex patriae* du *de cuius* et la *lex loci actus*, une autre loi peut encore entrer en jeu, en cas de renvoi fondé sur la loi nationale. Par la loi nationale du testateur, au moment de l'accomplissement de l'acte, il faut entendre la loi de l'État, dont le testateur était ressortissant au moment de l'accomplissement de l'acte donné. En revanche, n'est pas compétente à cet égard la loi de l'État, dont le testateur était ressortissant au moment du décès. En cas de violation des dispositions, aussi bien de la *lex loci actus* que de la *lex patriae*, les effets de l'inobservation de la forme prescrite sont appréciés d'après la *lex causae*, c'est-à-dire la loi nationale du testateur.

Pour terminer l'étude du problème de la forme du testament dans notre loi concernant le droit international privé, il convient de mentionner les doutes relatifs à la portée de la forme. On rencontre plus d'une fois des tendances à élargir le champ d'application des dispositions portant sur la forme. Ces tendances se sont manifestées, par exemple, au cours des travaux de la Convention de La Haye en 1960. Cependant, une implantation de telles tendances en droit polonais ne se justifierait pas. Ainsi, lorsque certaines personnes ne peuvent tester eu égard à leur âge ou à l'interdiction — selon tel ou tel autre système juridique — que suivant une forme déterminée, nous sommes en présence non pas d'un problème de la forme, mais d'un problème de la capacité de tester. Les restrictions de ce genre en matière de testament doivent donc être appréciées d'après la *lex patriae* et non pas d'après la *lex loci actus*²².

En ce qui concerne les conventions sur l'assistance juridique conclues par la Pologne, quelques-unes seulement se bornent à régler exclusivement des questions particulières concernant les dispositions en question. On trouve cette optique étroite dans la Convention polono-tchécoslovaque de 1949, qui d'ailleurs n'est plus en vigueur, et qui ne réglait, dans son article 31, que la question de la forme des dispositions à cause de mort, ou bien dans la Convention polono-soviétique qui se borne à régler la même question dans son article 44. En cas de rétrécissement de ce genre du contenu des dispositions, la nécessité s'impose d'une vaste interprétation complémentaire en ce qui concerne les autres questions relatives aux dispositions à cause de mort et qui ne sont pas envisagées par la Convention.

²² *Ibidem*.

Dans la majorité des conventions cependant, toutes les questions fondamentales en cette matière sont réglées. Citons l'exemple de l'article 24 de la Convention polono-tchécoslovaque de 1961, dont le premier alinéa règle la question de la capacité de tester et celle des vices des déclarations de volonté, et le second s'occupe de la forme. On trouve des dispositions similaires dans l'écrasante majorité des conventions²³.

De nombreuses conventions formulent expressément la règle de la compétence d'une loi déterminée en cette matière. Dans la majorité des cas, c'est la compétence de la loi nationale au moment de la disposition à cause de mort, donc à un moment différent de celui de l'appréciation de la compétence en ce qui concerne l'ensemble de la succession, donc le moment de décès.

Quelles sont les questions particulières concernant les dispositions à cause de mort, que les conventions en question résolvent expressément?

En premier lieu vient la question de l'admissibilité de différentes dispositions à cause de mort.

A quelle loi doit être soumise l'appréciation de cette admissibilité? La question n'est résolue que par quelques-unes des conventions²⁴, en préjugant la compétence sur ce point au profit de la loi nationale du *de cujus* au moment de la déclaration faite par lui. Il est significatif, que les réserves relatives à l'admissibilité des dispositions à cause de mort ne se trouvent pas dans les conventions qui ne s'occupent que de la forme des dispositions. Cela s'explique par la législation matérielle des pays participant aux conventions. Dans la majorité des cas la réserve en question figure dans les conventions conclues avec la R.D.A., car dans ce pays existent des dispositions inconnues dans les autres pays socialistes. Il convient de mentionner notamment les testaments conjoints

²³ Ainsi l'art. 49 de la Convention polono-hongroise, l'art. 38 de la Convention polono-roumaine et l'art. 36 de la Convention polono-bulgare. Nous avons traité cette question dans l'étude *Tendencje rozwojowe międzynarodowych stosunków cywilnoprawnych w obozie socjalistycznym w dziedzinie prawa spadkowego* [Tendances d'évolution des rapports internationaux de droit civil dans le camp socialiste en matière successorale], «Studia Prawnicze», 1968, n° 17, ainsi que dans l'ouvrage publié en russe *Voprosy nasledovaniya v dogovorah o pravovoj pomošči Polskoj Narodnoj Respubliki*, Académie des Sciences, l'U.R.S.S. Pravovoje sotrudničestvo meždú socjalističeskimi gosudarstvami, Moskva 1962, p. 231.

²⁴ Elles contiennent, en effet, des formules sur les «genres de dispositions», par exemple l'art. 29 al. 2 de la Convention polono-hongroise, ou bien sur les genres de dispositions à cause de mort qui sont admissibles (art. 44 al. 2 de la Convention polono-allemande, art. 24 al. 1 de la Convention polono-tchécoslovaque de 1961, art. 38 al. 2 de la Convention polono-roumaine, art. 36 al. 1 de la Convention polono-bulgare).

et les contrats successoraux expressément prohibés par les légations de certains pays socialistes²⁵.

Conformément aux principes adoptés, lorsqu'il s'agit des conventions qui ne contiennent pas de dispositions à cause de mort, cette appréciation est effectuée d'après les règles générales des conflits de lois, fixées pour l'ensemble de la matière successorale.

Une autre question spéciale concernant les dispositions à cause de mort, qui exige à être examinée, est celle de la capacité de faire des dispositions, ainsi que la question des vices de volonté dans ces dispositions. Les conventions insistent très nettement sur la compétence de la loi nationale du *de cuius*, appréciée au moment où la disposition est faite, au regard de l'appréciation de la capacité du *de cuius* de faire une telle disposition, et au regard des effets des vices des déclarations de volonté. Certaines conventions règlent cette question dans une seule norme²⁶, d'autres s'en occupent dans des normes spéciales²⁷.

Les dispositions, soumettant la capacité de disposer à cause de mort à la loi nationale du *de cuius* au moment de la déclaration, se trouvent dans plusieurs conventions²⁸.

Le changement ultérieur de nationalité n'influe pas sur la validité du testament rédigé par une personne capable au moment de la rédaction d'après sa loi nationale.

La disposition concernant la capacité de tester a une grande importance pratique, étant donné qu'elle est réglée de différentes manières suivant la législation matérielle dans divers pays socialistes.

Également, les effets des vices de la déclaration de volonté dans les dispositions à cause de mort sont appréciés, comme nous l'avons déjà dit, d'après la loi nationale du *de cuius* à l'époque où la disposition a été prise²⁹.

²⁵ Inadmissibles en droit polonais en vertu des articles 941 et 942 du Code civil, en droit bulgare d'après l'art. 15 de la loi successorale de Bulgarie, etc.

²⁶ Ainsi l'art. 24 al. 1 de la Convention polono-tchécoslovaque de 1961, art. 36 al. 1 de la Convention polono-bulgare, l'art. 38 al. 2 de la Convention polono-roumaine.

²⁷ Ainsi la Convention polono-allemande qui consacre à cette question les alinéas 2 et 3 de l'art. 44 ou la Convention polono-hongroise qui y consacre les alinéas 2 et 3 de l'art. 49.

²⁸ Notamment l'art. 44 al. 2 de la Convention polono-allemande, l'art. 49 al. 2 de la Convention polono-hongroise, l'art. 24 al. 1 de la Convention polono-tchécoslovaque de 1961, l'art. 36 al. 1 de la Convention polono-bulgare, l'art. 38 al. 2 de la Convention polono-roumaine, l'art. 37 de la Convention polono-yougoslave.

²⁹ Des dispositions de ce genre se trouvent dans l'art. 44 al. 3 de la Convention polono-allemande, dans l'art. 49 al. 3 de la Convention polono-hongroise, dans l'art. 24 al. 1 de la Convention polono-tchécoslovaque de 1961, dans l'art. 36 al. 1 de la Convention polono-bulgare et dans l'art. 38 al. 2 de la Convention polono-roumaine.

En revanche, on ne trouve pas de disposition qui concernerait expressément la réalisation de la disposition à cause de mort. Il faudrait appliquer ici le statut successoral fondamental et non pas la loi nationale au moment de la disposition, mais la question est très discutable.

De nouveaux doutes surgissent à propos du problème de la forme des dispositions. En ce qui concerne la forme de l'acte juridique, des règles ont été élaborées qui sont en général adoptées par les conventions, par exemple, dans l'article 44 al. 1 de la Convention polono-hongroise.

D'après ces règles, la forme est soumise à la loi compétente pour l'acte lui-même, mais il suffit d'observer la loi du lieu de l'accomplissement de l'acte. Une règle similaire, qui nous est déjà connue à l'occasion des considérations concernant le droit international privé polonais, se trouve également dans l'article 45 al. 1 de la Convention polono-bulgare, qui contient dans l'alinéa 2 du même article une réserve au profit de la compétence de la *lex rei sitae* pour les actes portant sur les immeubles. Cette règle a été transportée dans la matière successorale dans une formule prévoyant que la forme de la rédaction et de la révocation des dispositions à cause de mort est soumise à la loi de l'État, dont le *de cuius* était ressortissant au moment de la révocation de cette disposition. Il suffit cependant d'observer la loi du lieu, où la disposition à cause de mort a été rédigée ou révoquée³⁰.

Il ne faut pas oublier, que dans cette alternative il ne s'agit point d'un choix de la loi, alors même que les deux termes seraient séparés dans une disposition par la conjonction «ou». En effet, même si le testateur s'est décidé à observer la forme prévue par l'une des lois, qui sont à sa disposition, il suffit de remplir les conditions requises par la seconde de ces lois. Ce sont donc les éléments objectifs et non pas le facteur subjectif de la volonté des parties qui décident.

III. Les droits successoraux du Fisc

La question de la succession vacante a toujours été discutée en ce qui concerne les conflits de lois. La réglementation de cette question par la loi de 1926 (d'ailleurs largement discutée au cours des travaux de codification) a été contestée dès la parution d'une nouvelle loi de 1946 unifiant le droit successoral polonais. La situation a changé de nouveau après l'adoption du nouveau droit international privé polonais de 1965.

³⁰ Cf. l'art. 24 al. 2 de la Convention polono-tchécoslovaque de 1961; une règle semblable se trouve notamment dans les conventions: polono-yougoslave — art. 38, polono-tchécoslovaque de 1949 — art. 31, polono-bulgare — art. 36 al. 2, polono-soviétique — art. 44, polono-allemande — art. 44 al. 1 et polono-hongroise — art. 49 al. 1.

En premier lieu, nous nous occuperons brièvement de la réglementation de 1926, et ensuite nous exposerons les opinions concernant la situation telle qu'elle se présentait après l'adoption du droit successoral unifié de 1946.

L'article 31 de la loi de 1926, concernant les successions vacantes renfermait deux règles: une règle des conflits statuant que «les biens, qui d'après la loi nationale du *de cuius* sont en déshérence, sont soumis, en tant que succession vacante, à la loi de l'État où ils se trouvent au moment du décès du *de cuius*, ainsi qu'une règle de qualification rédigée comme suit: «sont considérés comme vacants les biens qui, d'après la loi nationale du *de cuius* et à défaut d'autres héritiers, sont dévolus en vertu de la loi à l'État ou à d'autres personnes juridiques».

En ce qui concerne la seconde règle, il ne faut pas oublier que l'on considère comme vacante la succession qui va en vertu de la loi à l'État ou à d'autres personnes juridiques dans le cas aussi où la loi nationale du *de cuius* accorde à l'État ou à d'autres personnes juridiques le caractère de successeurs légaux.

Lors de l'unification du droit civil, en 1946, la commune et le Fisc ont été reconnus successeurs légaux, et, en même temps, une règle expresse a été édictée en ce qui concerne les immeubles situés à l'étranger (art. 27 du décret portant droit successoral du 8 octobre 1946). Cette disposition reste en relation avec la règle de l'article XX des dispositions introduisant le décret en question. D'après cette dernière règle (§ 1), les règles de la succession par le Fisc sont applicables, quel que soit le genre des biens, à toutes les successions ouvertes avant l'entrée en vigueur du droit successoral unifié, si d'après les dispositions préexistantes ces successions sont vacantes ou en déshérence, à moins que la procédure concernant une telle succession ne soit déjà terminée par une décision ayant l'autorité de la force jugée. D'après le § 2 du même article, cette solution ne porte pas atteinte aux droits des personnes appelées à la succession légale d'après les dispositions, préexistantes, à moins que ces personnes ne perdent ces droits du fait de n'avoir pas pris possession de la succession ou du fait qu'une procédure successorale n'ait pas été intentée avec leur participation. Cependant aucune modification n'a été apportée à la loi portant droit international privé. Cette situation a fait naître des doutes en ce qui concerne le rapport du droit successoral de 1946 et de l'article 31 précité de la loi de 1926. Ces doutes se sont notamment manifestés dans la doctrine³¹. Parmi les opinions énoncées à cette époque,

³¹ Ces doutes sont énumérés dans le passage précité du manuel susmentionné p. 211 et suiv. Certains auteurs considéraient la disposition de l'art. 31 comme étant toujours en vigueur. Cf., par exemple, F. ZOLL, *Międzynarodowe prawo prywatne*

la plus exacte semblait celle qui reconnaissait la succession du Fisc des biens de ressortissants polonais, à défaut de parents et de conjoint appelés à la succession, où que se trouve la succession et quelle que soit sa composition (meubles et immeubles). En ce qui concerne les États étrangers, ils pouvaient, d'après l'opinion prédominante, réaliser en Pologne leurs droits successoraux sur les biens de leurs ressortissants, aussi bien en appuyant leurs prétentions sur un titre privé, qu'en formulant ces prétentions sur les successions en déshérence laissées en Pologne par leurs ressortissants, en vertu des titres de droit public³².

La nouvelle loi polonaise de 1965 n'a pas réglé la question de la succession vacante. Par conséquent, la succession légale du Fisc est soumise à la règle des conflits concernant la succession. C'est donc la loi nationale du *de cuius* au moment du décès qui est décisive³³.

En ce qui concerne la solution de ce problème dans les conventions sur l'assistance juridique, on y rencontre parfois des solutions expresses. La Convention de la Pologne avec l'U.R.S.S. de 1957 prévoit dans son article 43 la transmission de la propriété des biens meubles laissés en déshérence au profit de l'État, dont le *de cuius* était ressortissant au moment du décès, ainsi que la transmission des biens immobiliers au profit de l'État, sur le territoire duquel ces biens sont situés. Cette convention donne aussi une qualification des biens en déshérence, en précisant qu'il s'agit des biens qui vont à l'État en tant que successeur en vertu de la loi.

Des dispositions similaires se trouvent dans la Convention de 1957 avec la R.D.A. (art. 43) et dans la Convention avec la Hongrie de 1959 (art. 48).

w zarysie [*Précis de droit international privé*], 4^e éd., Kraków 1947, p. 89 et W. LUDWICZAK, *Międzynarodowe prawo prywatne* [*Droit international privé*], Poznań 1955, p. 109. Une opinion différente était représentée, entre autres, par BAZIŃSKI, *Prawo spadkowe. Komentarz* [*Droit successoral. Commentaire*], Łódź 1948, p. 104 et s.

³² Les remarques de K. PRZYBYŁOWSKI dans le manuel précité, p. 213. Voir aussi dans ce manuel la solution des problèmes intertemporels survenus après l'entrée en vigueur du droit successoral de 1946.

³³ Cf. K. PRZYBYŁOWSKI, *Nowe polskie unormowanie problematyki kolizyjnej prawa prywatnego międzynarodowego* [*Les nouvelles règles des conflits en droit international privé polonais*], «*Studia Cywilistyczne*», Vol. 8, Kraków 1966, p. 32 et du même auteur, *Nowe polskie prawo prywatne międzynarodowe* [*Le nouveau droit international privé polonais*], «*Państwo i Prawo*», 1966, (1), p. 33. Au cours des travaux de codification on a bien attiré l'attention sur les difficultés pouvant surgir lorsque des biens en déshérence sont laissés en Pologne par un *de cuius*, dont la loi nationale ne prévoit pas la succession légale du Fisc. Il a été reconnu toutefois que ces cas sont extrêmement rares dans la pratique: cf. à ce propos *Kodyfikacyjne zagadnienia...* de K. PRZYBYŁOWSKI (suprà) de 1964, p. 56.

IV. La juridiction en matière successorale

Des différences notables existent entre l'ancienne et la nouvelle réglementation des questions concernant la procédure relative aux droits successoraux, qui font l'objet des conflits. Ces différences portent aussi bien sur la réglementation elle-même, que sur les sources légales.

La loi de 1926 renfermait plusieurs dispositions sur la procédure successorale (articles 33 - 35). Elles adoptaient le principe de la compétence des autorités de l'État dont le *de cujus* était ressortissant. Ainsi, d'un côté la procédure successorale concernait les biens laissés par un ressortissant polonais, alors même que son patrimoine se trouvait à l'étranger, et de l'autre côté, en ce qui concerne les biens laissés par l'étranger, on reconnaissait, en principe, la compétence des autorités étrangères, alors même que la succession se trouvait en Pologne. Les autorités polonaises se bornaient, dans ce cas, à prendre des mesures conservatoires.

Une dérogation, fondée sur l'article 34 de la loi, était prévue à la dernière règle. En effet, sur la demande d'une personne justifiant de ses droits successoraux et domiciliée en Pologne, les autorités polonaises devaient faire appliquer la procédure qui était à suivre pour la succession laissée par un ressortissant polonais. C'est la *lex fori* qui était applicable en matière de procédure, tandis qu'en ce qui concerne le droit matériel, la loi applicable était celle indiquée par les règles exposées ci-dessus.

La délivrance de la succession au-delà des frontières polonaises (art. 35 de la loi) ne pouvait avoir lieu qu'après la satisfaction ou la conservation requise des prétentions et des droits successoraux des ressortissants polonais, des étrangers domiciliés en Pologne et du Fisc.

Le décret de 1946 sur la procédure successorale a fait naître une nouvelle situation. D'après l'opinion prédominante de la doctrine, ce décret complétait la loi de 1926, mais on rencontrait aussi des opinions contraires. D'après ces dernières, le décret en question aurait aboli, en ce qui concerne les matières réglées par lui, la force obligatoire des dispositions susmentionnées (articles 33 - 35 de la loi de 1926). Il semble cependant que cette opinion allait trop loin. En effet, les dispositions des articles 165 - 174 du décret en question ne renfermaient que des règles de procédure destinées à mettre en oeuvre le contenu des normes formulées par les articles 33 - 35 de la loi de 1926.

La situation a changé de fond en comble après la publication de la nouvelle loi, portant droit international privé. De même qu' en d'autres matières (droit du mariage, par exemple), cette loi ne contient pas de règles de procédure. Le règlement des questions du procès civil international a été laissé en entier aux dispositions du nouveau Code polonais de procédure civile, datant de 1964. Selon ce Code, les tribunaux polonais

sont compétents en matière de succession ouverte en Pologne et qui fait l'objet d'un procès (art. 1103 p. 3 du même Code)³⁴. En revanche, lorsqu'il s'agit des questions instruites suivant la procédure non contentieuse, les tribunaux polonais sont compétents si le *de cujus* était ressortissant polonais au moment du décès, ou s'il était apatride domicilié en Pologne (art. 1108 du même Code). Si le décès d'un ressortissant polonais survient en Pologne, la compétence du tribunal polonais est exclusive. Les tribunaux polonais sont exclusivement compétents aussi pour les affaires successorales concernant un immeuble situé en Pologne, instruites suivant la procédure contentieuse ou non contentieuse.

Passons maintenant à une brève analyse des dispositions concernant la procédure successorale, dans les conventions internationales sur l'assistance juridique, en vigueur en Pologne. Dans une caractéristique générale de ces dispositions, il y a lieu de distinguer deux groupes fondamentaux. Le premier groupe indique la loi nationale du *de cujus*, au moment de l'ouverture de la succession, comme décisive pour la compétence des autorités en matière successorale. Le second groupe fait dépendre la compétence des autorités du caractère mobilier ou immobilier de la succession, en soumettant la succession mobilière à la compétence des autorités indiquée par la loi nationale du *de cujus* au moment de l'ouverture de la succession, et la succession immobilière aux autorités de l'État sur le territoire duquel elle est située. Dans le premier groupe, on trouve notamment la Convention polono-hongroise (art. 50) et la Convention polono-allemande (art. 45). Dans le second groupe, on peut classer la majorité des conventions conclues par la Pologne: polono-soviétique (art. 45), polono-tchécoslovaque (art. 25), polono-bulgare (art. 37) et polono-roumaine (art. 39).

Chacune de ces règles fondamentales connaît de nombreuses dérogations, qui ont été dictées par les considérations tendant à faciliter la coopération et à simplifier la procédure, ce qui, sur le plan juridictionnel, est encore plus important que dans les matières traitées jusqu'ici.

En ce qui concerne la procédure successorale, on accorde de vastes compétences aux représentants diplomatiques et consulaires. Ils sont autorisés à représenter les intérêts des ressortissants de leur État en matière successorale. Ils peuvent agir devant les organes de l'État, où se déroule la procédure successorale, sans avoir à présenter une procuration, si les ressortissants qu'ils représentent ne sont pas domiciliés sur le territoire de l'État, où se déroule la procédure, et s'ils n'ont pas institué un représentant.

³⁴ Cf. à ce propos E. WIERZBOWSKI, *Polskie prawo prywatne międzynarodowe* [Droit international privé polonais], Katowice 1966, p. 93.

La première mesure à prendre dans la procédure successorale consiste à informer du décès, des successeurs, de légataires, de l'importance et de la valeur de la succession, etc. Presque toutes les conventions contiennent des dispositions détaillées en cette matière.

La seconde mesure consiste à conserver les biens de la succession. Les mesures concernant la conservation ou l'administration de ces biens sont prises par l'organe compétent de l'État, sur le territoire duquel se trouve la succession.

Lorsque le *de cuius* laisse un testament, les dispositions des conventions prévoient la compétence des autorités en ce qui concerne l'ouverture de la publication du testament. A cet égard l'organe compétent est celui, qui reconnaît des affaires successorales sur le territoire de la partie contractante où se trouve le testament.

La délivrance de la succession intéresse les meubles et les sommes en argent obtenues de la vente des biens mobiliers ou immobiliers. En règle générale, la délivrance se fait entre les mains du représentant consulaire ou diplomatique de l'État dont les successeurs sont ressortissants. La délivrance s'effectue en vertu d'une décision rendue par l'organe compétent en matière successorale. Les biens ne peuvent être remis aux successeurs qu'à certaines conditions. Les conventions sur l'assistance juridique font dépendre cette opération de la conservation ou de la satisfaction de toutes les prétentions des créanciers du *de cuius*, déclarées dans le délai fixé par la loi de l'État où se trouvent les biens de la succession. D'autre part, elles exigent que soient payés ou conservés tous les impôts et d'autres contributions grevant la succession, et, enfin, que les organes compétents autorisent, si en existe le besoin, à l'export des biens de la succession. Le transfert des sommes en argent s'effectue conformément aux prescriptions du change en vigueur dans les États contractants.

En dehors de ces règles générales de la délivrance des biens de la succession, les conventions prévoient quelques situations spéciales où ces règles se trouvent sensiblement simplifiées. Cela se produit, lorsque la valeur des biens mobiliers ne dépasse pas le montant fixé dans la convention internationale ou lorsque ce sont des biens de peu de valeur. Il en est de même en cas de décès survenu au cours d'un voyage dans un État étranger. Dans ce dernier cas, les objets, que le voyageur avait sur lui, sont délivrés sans aucune procédure entre les mains du représentant consulaire ou diplomatique de l'État, dont le *de cuius* avait la nationalité au moment du décès.

Resolutions of International Organizations and Municipal Law

By KRZYSZTOF SKUBISZEWSKI

The acts to be considered in this paper are those which bear on the process of law-making through methods other than treaties and custom. International judgments, arbitral awards, and executive (administrative) acts are equally excluded from the purview of this paper.

The following categories of acts and their place in municipal law will be discussed: (1) law-making resolutions of international organizations, with the exclusion of supranational communities (European Communities); (2) binding interpretative decisions of the UN specialized agencies; and (3) non-binding resolutions of a general nature, i.e. acts which belong to the no man's land of quasi legislation. The third category is vast, and for reasons of space, it will be explored on the basis of the examples of two organizations, viz. one universal — the United Nations, and one regional — the Council for Mutual Economic Assistance.

I. General Observations on the Place of Acts of International Organs in Municipal Law

The problem of the place which the various acts of international organizations have in the domestic legal systems of member States should be considered under three headings. First, there is the preliminary question of the legal nature of these acts. This problem must be clarified, although the legal nature of such acts does not always decide or influence their place in the sphere regulated by municipal law. Second, there is the question of the binding force of international acts in the municipal law and before the domestic organs of members. Third, there is the question of resolving the conflict between, on the one hand, a rule or act of domestic law, and, on the other, a rule made or an obligation imposed by an international organization.

State practice, domestic law and the opinions of jurists furnish a number of solutions to these questions in the context of the relation between municipal law and international custom or treaties. A certain analogy¹ between those solutions and the determination of the place that international acts have or should have in a system of national law is inevitable. For the law made by international organizations is international law and the obligations or rights that follow therefrom are international obligations and rights while in the domestic sphere municipal law is *prima facie* contrasted with the whole of international law and the resulting international duties and rights. Thus the different sources from which the several international rules, rights and obligations originate may appear as a distinct problem, to which the national organ need not always devote attention. The Constitutions of States do not necessarily distinguish between the procedures that gave birth to a new international obligation of the State, but rather between the subject-matters of the obligation entered into.²

If, on the other hand, municipal law does not differentiate, as not infrequently happens, between the sources from which international legal rules, rights and obligations emanate, and does provide for them a place that depends on their source, then there is room for the analogous application to the acts of international organs of patterns which in State practice and municipal law have been worked out with regard to treaties.³ But, as will be shown below, there are limits to such an analogy.

¹ It is pointed out, i.a., by F. MÜNCH, *Die Abgrenzung des Rechtsbereiches der supranationalen Gemeinschaft gegenüber dem innerstaatlichen Recht*, "Berichte der Deutschen Gesellschaft für Völkerrecht," Vol. 2, 1957, pp. 82 et seq.; M. MERLE, *Le pouvoir réglementaire des institutions internationales*, "Annuaire Français de Droit International," Vol. 4, 1958, p. 357; U. SCHEFNER, *Die Rechtssetzungsbefugnis internationaler Gemeinschaften*, in: *Völkerrecht und rechtliches Weltbild, Festschrift für Alfred Verdross*, Wien 1960, pp. 229-242, *passim*; H. J. SCHLOCHAUER, *Das Verhältnis des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten*, "Archiv des Völkerrechts," Vol. 11, 1963-1964, pp. 1-34, *passim*.

² P. FREYMOND, *Les 'décisions' de l'Organisation Européenne de Coopération Économique (OECE). Contribution à l'étude des procédures à l'effet de conclure des traités*, "Annuaire Suisse de Droit International," Vol. 11, 1954, p. 82.

³ Cf. P. de VISCHER, *La Communauté Européenne du Charbon et de l'Acier et les États membres*, in: *Congrès international l'Études sur la CECA*, Milano 1957, p. 55; P. REUTER, *Organisations internationales et évolution du droit*, in: *L'évolution du droit public. Études offertes à Achille Mestre*, Paris 1956, p. 453, mentions the difficulties which, in his opinion, a municipal court would face if the domestic law regulated only the relationship between itself and treaties and were silent on the position of regulative acts. Cf. also Ch. ROUSSEAU's views in "Revue générale de droit international public," Vol. 66, 1962, pp. 868-869.

The status of law-making and quasi-legislative resolutions in the municipal sphere is of paramount importance when their application and their influence on domestic policies are considered. For often their purpose can be achieved only if they have obligatory force for the domestic organs of the State, and for individuals and corporations. This is especially true when the acts of international organs primarily concern not the mutual relations of States but questions which arise and must be solved internally within each State. These acts can play their true role only when they penetrate into domestic law and administration.

II. Law-making Resolutions of International Organizations

1. Legal Nature. A law-making (regulative, administrative) resolutions of an international organization is one which is binding on its addressees by virtue of the decision of the organization and which lays down general rules of conduct. By general rules of conduct are understood rules that cover an unlimited number of situations and are applicable to any, and not a specific, addressee who happens to find himself within the ambit of the rule. The generality, in the sense referred to, of the provisions of the law-making resolutions distinguishes them from mandatory but particularized, i.e. individual, decisions. A law-making act is always characterized by an abstract formulation of its provisions, while executive decisions concern exclusively specific addressees and situations.⁴

The present law of international organizations other than supranational bodies contains two categories of law-making resolutions that are of interest to this paper. First, there are resolutions adopted by a unanimous vote of the member States. Second, there are resolutions adopted by majority decisions with the safeguard, however, that dissenting members can make reservations to, or even reject, such regulations. The right to reject the enactment is the reason why this system of legislation is called one of contracting-out. It may be added that the international organizations that fall under this head also enact certain rules by a majority vote that binds the outvoted minority. This is the third category of law-making resolutions, namely those which create the internal law of the organizations: rules or procedure of its organs,

⁴ The judgments of the Court of Justice of the European Coal and Steel Community (now the Court of Justice of the European Communities) in Cases Nos. 8/55 and 13/57, though relating to the decisions of a supranational body, contain some illuminating dicta on the nature of general and individual acts, "Recueil de la jurisprudence de CJCE," Vol. 2, 1955-1956, p. 201 and Vol. 4, 1958, p. 263, English translation in "International Law Report," Vol. 25, pp. 417 and 484.

financial and budgetary regulations, staff and personnel regulations, headquarters regulations, etc. The internal law of the organization applies to its internal councils and functioning and therefore does not come in contact with the municipal law of the country where the organization pursues its activities. Only in rare and exceptional circumstances will the two jurisdictions (the State's domestic and the organization's internal) overlap; but the summary nature of the present study excludes the marginal cases involving the relationship between the internal law of international organizations and the municipal law of member States being considered here.

Unanimous enactments are made by the Central Commission for the Navigation of the Rhine,⁵ the Benelux Economic Union,⁶ The European Free Trade Association (EFTA),⁷ the Economic Association between El Salvador, Honduras and Guatemala,⁸ and the Organization for Economic Co-operation and Development (OECD).⁹

Majority enactments within the system of contracting-out are adopted by the International Civil Aviation Organization (ICAO),¹⁰ the World Health Organization (WHO),¹¹ the World Meteorological Organization (WMO)¹² and the North-East Atlantic Fisheries Commission.¹³

Several writers contend that the unanimous enactments are treaties concluded according to special procedures.¹⁴ If this view is accepted, then the enactments under consideration must be equated, with regard to their position and effects in domestic law, to treaties of that special kind. In an international organ, a unanimous vote on future rights and obligations of all member States may amount to the conclusion of an agreement

⁵ Mannheim Convention of 1868, Art. 46, G. F. MARTENS, *Nouveau recueil général*, Vol. 20, p. 355 and Strasbourg Convention of 1963, "European Yearbook," Vol. 11, 1963, The Hague 1965, p. 175

⁶ Treaty of 1958, Art. 19(a), "UN Treaty Series," Vol. 381, p. 165.

⁷ Stockholm Convention of 1960, Art. 3(5), 10(10), 15(3), 16(4), 24(2) and 32(4) and (5), *ibid.*, Vol. 370, p. 3.

⁸ Treaty signed at Guatemala City in 1960, Art. XXII, *ibid.*, Vol. 383, p. 3.

⁹ Paris Convention of 1960, Art. 5(a), "European Yearbook," Vol. 8, 1960, The Hague 1961, p. 259.

¹⁰ Chicago Convention of 1944, Art. 37-40, 54(1) and 90, "UN Treaty Series," Vol. 15, p. 295.

¹¹ Constitution of 1946, Art. 21, *ibid.*, Vol. 14, p. 185.

¹² Washington Convention of 1947, Art. 7(d), *ibid.*, Vol. 77, p. 143.

¹³ Convention of 1959, *ibid.*, Vol. 486, p. 157.

¹⁴ Cf. H. Kelsen, *Principles of International Law*, New York 1952, p. 366; FREYMOND, *op. cit.*, p. 69. See also G. SCHULZ, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, p. 66, and cf. the more cautious formulation by A. J. P. Tammes, *Decisions of International Organs as a Source of International Law*, "Recueil des cours," Vol. 94, 1958 - II, p. 90.

between them, which in its contents is identical with the resolution as voted by the organ. However, a State that votes for the adoption of a regulative resolution acts not only as a subject of international law which expresses its consent (here an analogy with a treaty is apparent) but primarily as a participant in the making of an act which is one of the organization, i.e. of a legal person as distinct from a member State. The validity, binding force, application and termination of the law-making resolutions are governed not by the law of treaties but by the law of the organization which adopted the resolution. Nor did the practice of States attribute the nature of treaties to the unanimous enactments.

The foregoing arguments apply *a fortiori* to the law-making resolutions adopted in the framework of the system of contracting-out. By definition this system seems to exclude the possibility of regarding the enactments that are its result as treaties. For does not the conclusion of treaties rely in essence on contracting-in, not contracting-out? In the system of contracting-out the State is often bound through its tacit agreement. But treaties come into effect through the express agreement of parties; and the concept of tacit assent becomes a legal fiction if the State notified its rejection of, or reservation to, the enactment beyond the prescribed time limit or failed to act by omission. Nonetheless some writers do not distinguish such enactments from treaties.¹⁵

In conclusion it should be noted that law-making resolutions of international organisations are a source of law distinct from treaties.

2. Binding Effect in Municipal Law. The law made by international organizations other than the European Communities is not automatically of its own force part of the internal legal orders to the member States.¹⁶

¹⁵ On the ICAO regulations, see H. HART JONES, *Amending the Chicago Convention and Its Technical Standards — Can Consent of All Members Be Eliminated?*, "Journal of Air Law and Commerce," Vol. 16, 1949, p. 190; E. PÉPIN, *ICAO and Other Agencies Dealing with Air Regulation*, *ibid.*, Vol. 19, 1952, pp. 152 - 155; and J. SCHENKMAN, *International Civil Aviation Organization*, Genève 1955, p. 262. On the WHO regulations, see R. AGO, *Die internationalen Organisationen und ihre Funktionen im innern Tätigkeitsgebiet der Staaten*, in: *Rechtsfragen der internationalen Organisationen. Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, Frankfurt am Main 1956, p. 28; H. BLIX, *Treaty-Making Power*, London and New York 1960, pp. 293 - 296; P. GUGGENHEIM und K. MAREK, *Völkerrechtliche Verträge*, in: *Strupp-Schlochauer Wörterbuch des Völkerrechts*, Berlin 1962, Vol. III, pp. 535 and 536; and G. I. TUNKIN, *Voprosy teorii mezhdunarodnogo prava*, Moskva 1962, p. 131. On the other hand, C. H. VIGNES, *Le Règlement sanitaire international. Aspects juridiques*, "Annuaire Français de Droit International," Vol. XI, 1965, p. 658, rightly states that "à bien des égards le Règlement se présente comme une véritable législation internationale."

¹⁶ H. MOSLER, *Internationale Organisation und Staatsverfassung*, in: *Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg*, Frankfurt

National action is necessary to introduce that law and make it effective in the municipal sphere.¹⁷ Writers¹⁸ sometimes refer to the decisions of the International Air Navigation Commission established under the Paris Convention of 1919 as international regulations directly and automatically applicable in the municipal systems of the member States. The Commission admittedly had the power to amend annexes A-G to the Convention. But without investigating whether the acts of the Commission (which were only revisions of instruments that were already in force in the member States by virtue of those States' consent) did operate automatically in internal law, it must be emphasized that this is not the case today with the regulative acts of most international organizations. To be effective and applicable in the domestic sphere, they must normally undergo transformation, or some kind of remission (*renvoi*), or be backed up by legislative action by the State.

Transformation effects the reception of the act into the municipal system. It may be either general, as when the national law provides in advance for the introduction of a wide category of international rules into the municipal system. Or it may be particular, when a specific act or rule made by an international organization is given legislative approval and thereby introduced into the municipal law. Thus, ICAO Annex No. 2 was transformed into French law by virtue of Decrees Nos. 57 - 597 and 57 - 598 of 13 May 1957, and it is interesting to note that the trans-

am Mein 1956, p. 286. Sub-paragraph (2) repeats what this writer said in his article in "British Year Book," pp. 267 - 269, cited in footnote 1.

¹⁷ With regard to the Rhine Regulations, see H. WALTHER, *Le Statut international de la navigation du Rhin*, "European Yearbook," Vol. 2, 1954, The Hague 1956, p. 14. With regard to the ICAO Annexes, see the debate on their internal binding force which took place in the ICAO Council in 1951, and especially the United Kingdom's view that the Annexes acquired binding force in the territory of each member only through national legislation: ICAO Docs. 7328 - 15/16/17/18, C/835, pp. 169, 181, 193 and 209; and 7361 - 5/13/15, C/858, pp. 56, 162 and 192, cited by R. H. MANKIEWICZ, *L'adoption des annexes à la Convention de Chicago par le Conseil de l'Organisation de l'Aviation Civile Internationale*, in: *Beiträge zum internationalen Luftfracht. Festschrift zur Ehren von Prof. Dr. jur. Alex Meyer*, Düsseldorf 1954, p. 89; see also O. RIESE, *Luftrecht*, Stuttgart 1949, pp. 118 - 119 and 126 - 128; P. CHAUVEAU, *Droit aérien*, Paris 1951, p. 350; MANKIEWICZ, *op. cit.*, pp. 90 and 93; A. MALINTOPPI, *La fonction 'normative' de l'OACI*, "Revue générale de l'air," Vol. 13, 1950, p. 1053; SCHULTZ, *op. cit.*, p. 56. With regard to WHO regulations, see *The First Ten Years of the World Health Organization*, Geneva 1958, p. 264. For contrary views, see C. W. JENKS, *The Impact of International Organizations on Public and Private International Law*, "Transactions of the Grotius Society," Vol. 37, pp. 34 - 35 and M. Le GOFF, *L'activité des divisions techniques au sein de l'OACI*, "Revue générale de l'air," Vol. 14, 1951, p. 426.

¹⁸ See, for instance, MANKIEWICZ, *op. cit.*, p. 90.

formation of Annexes Nos. 6 and 14 was accomplished through acts of a lower rank than the decree.¹⁹ Again, the publication of the International Sanitary Regulations in the Journal of Laws of the Federal Republic of Germany transformed them into the federal law of the country.²⁰

The term remission (*renvoi*) is here used in a loose sense not identical with that found in the conflict of laws; it is intended to denote a provision of internal law which indicates the acts of the organization as the source of the law to be applied by the national court or executive organ. In these cases the international rule does not become an actual part of internal law, but is nevertheless effective in the domestic sphere.

Finally, instead of resorting to any of these methods a State may introduce new legislation embodying the substantive rules of the international act. Then the international regulative act will not be effective as such in the State concerned, only the new municipal law which introduces its substance into internal law. Thus, the technical annexes of ICAO provide "principles for incorporation into the regulations and administrative practices of each contracting State."²¹ Again, the internal law of members of the World Health Organization relating to quarantine had to be revised as a result of the adoption of the International Sanitary Regulations.²²

The manner in which regulative acts of an international organization are promulgated and published in a State may differ. In some States they are published in the journal of laws, official journals, or Government gazettes. In France the possibility of publishing a special bulletin has been envisaged.²³ In France also, provided the act meets certain requirements, its publication in the official journal or bulletin of the organization is sufficient to make it effective in French law.²⁴

¹⁹ M. MERLE, *op. cit.*, p. 358.

²⁰ "Bundesgesetzblatt," 1955, Part II, p. 1062, though the Federal German Government explained that the Regulations related to the rights and duties of the Government.

²¹ ICAO International Standards and Recommended Practices Annex 7 (2nd printing, 1953), p. 6; I. DETTER, *Law Making by International Organizations*, Stockholm 1965, pp. 255 - 258.

²² *The First Ten Years*, p. 264.

²³ By the Decree 53 - 192 of 14 March 1953, "Journal officiel de la République Française: Lois et décrets," 1953, p. 2436.

²⁴ This is so "lorsque ces règlements sont intégralement publiés dans le Bulletin officiel de cette organisation, offert au public, et lorsque cette publication suffit, en vertu des dispositions expresses d'une convention engageant la France à rendre ces règlements applicables aux particuliers"; Article 3 of the Decree cited in the preceding footnote. MERLE, *op. cit.*, p. 358 explains that this provision has been adopted in view of France's participation in the European Coal and Steel Community.

3. **Conflict with Municipal Law.** It is here submitted that such a conflict will be solved on the same principles as conflicts between treaties and domestic law. National organs, both judicial and executive, will proceed according to the patterns established in their respective countries with regard to treaties. If priority is given to domestic law and the act of the organization is not applied, the responsibility of the State is in consequence engaged for a violation of its obligations towards the organization and the other members.

III. Binding Interpretative Decisions of Financial Organizations

1. **Legal Nature.** Under the Agreements creating the International Bank for Reconstruction and Development (Art. IX),²⁵ the International Monetary Fund (Art. XVIII)²⁶ and the International Finance Corporation (IFC, Art. VIII),²⁷ their Executive Directors have the power to give binding interpretative decisions.²⁸ (The Bank and the Fund are specialized agencies of the United Nations, while the IFC is affiliated to the Bank). These decisions may bear on any provisions of the Agreements that is subject to a question arising between any member and the agency or between any members. The decision of the Executive Directors is final and obligatory unless the member requests that the question be referred to the Board of Governors which then decides finally.

The wording of the provisions on interpretation is very broad. The constitutions of the three agencies do not require that only when a dispute between the member States or between a member and the organization arises, can proceedings that lead to an interpretative decision be instituted. The member may simply ask for the clarification of a provision in view of a future and potential problem. Thus India secured a decision which clarified the term of appointed executive directors,²⁹ though at the moment she submitted her question there arose no problem involving

²⁵ Bretton Woods Agreements of 1944, UNTS, Vol. 2, p. 134.

²⁶ *Ibid.*, p. 39.

²⁷ Agreement of 1955, *ibid.*, Vol. 264, p. 117.

²⁸ J. GOLD, *The Interpretation by the International Monetary Fund of its Articles of Agreement*, "International and Comparative Law Quarterly," Vol. 3, 1954, pp. 256 - 276; E. P. HEXNER, *Interpretation by Public International Organizations of Their Basic Instruments*, "American Journal of International Law," Vol. 53, 1959, pp. 341 - 370.

²⁹ Decision of 8 May 1946, No. 2 - 1, Fund, First Annual Meeting of the Board of Governors, Report of the Executive Directors and Summary Proceedings, 1946, p. 107.

the maintenance in office of the Indian director. The organs of the agencies are also competent to initiate the interpretative proceedings.

Any provision of the constitutive instruments of the Bank, the Fund, or the IFC can be subject to an interpretative decision, i.e. any activity and any problem of these agencies.

In fact, the decisions that up till now have been rendered by the Bank and the Fund, lay down, with one or two exceptions,³⁰ general rules of conduct that bind the members and the agency concerned. This raises the question whether these interpretative decisions do not belong to the category of law-making resolutions. For do not they fulfill the requirements of both the generality of formulation and binding force?

Theoretically the answer must be in the negative, because a line of division is to be maintained between legislation and interpretation, and the constructive instruments of the three organizations expressly refer to the latter function. Nonetheless the interpretative decisions *de facto* expanded the powers and the functions of the Bank and the Fund. In view, however, of the wide competence of interpretation conferred on the Executive Directors,³¹ the decision do not constitute amendments to the Bretton Woods Agreements.³² In the rich variety of acts of international organs, the interpretative decisions stand very close to the law-making resolutions, much closer than the quasi-legislative resolutions described in Section IV below.

The binding and final nature of the decisions of the Bank, the Fund, and the IFC bestows on them the character of authoritative interpretation. It may be added that authoritative decisions on interpretation by an international organ are still a rare phenomenon in the law of intergovernmental institutions.

2. Effects in Municipal Law. The interpretative decisions of the Bank, the Fund, or the IFC have the same place in the municipal law of member States as the treaties under which these agencies function.

The principle of good faith requires that full effect be given to the provisions of the constitutions of the Bank, the Fund, and the IFC. The members agreed in advance that the interpretative decisions of the Executive Directors would be final. Once the meaning of a provision

³⁰ For instance, the interpretation of Article IV, Section 2(a), of the Bank Agreement Decision of 20 June 1946, concerned the power of a specific member (the United States) to control the use of a specific currency (US dollars) paid to the Bank in lieu of gold.

³¹ A. BROCHES, *International Legal Aspects of the Operations of the World Bank*, "Recueil des Cours," Vol. 98, 1959 - III, p. 336.

³² R. ZACKLIN, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, Leyden 1968, p. 180.

has been obligatorily explained in such a decision, the member State cannot divorce its obligations under the treaty provision from the decision of the Executive Directors. Their interpretation prevails and the member is under a duty to apply the treaty provisions in question strictly in line with the meaning ascribed to it by the Directors.

The foregoing opinion on the equal status of treaty provisions and interpretative decisions in the domestic sphere finds corroboration in the Bretton Woods Agreements Act of the United States.³³ This Act provided that an amendment of certain provisions of these Agreements be sought if the requested interpretation were not satisfactory to the interests of the United States. A US quasi-judicial organ has stated that this reference to the interpretation procedure of the Bank and the Fund means that "the United States Congress [...] appears to have recognized [...] that the United States is bound by the results of the interpretations."³⁴

Some judicial decisions have enforced interpretations of the Bank or Fund.

The leading case is the decision of the US Federal Communications Commission in the *Matter of International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables Radio, Inc., and Other Cable Companies*.³⁵ The dispute concerned the right of the Bank and the Fund to send messages at privileged, and not commercial, rates. According to the interpretation given by the Executive Directors,³⁶ the two agencies continued to enjoy privileged rates irrespective of the tariff revision adopted by the private US cable companies in 1949. The case involved the interpretation of Article VII, Section 7, of the Bank Agreement and of Article IX, Section 7, of the Fund Agreement. The Commission held that the problem of interpretation was conclusively determined by the decisions of the two agencies. They were thus entitled to the privileged rates (subject to certain conditions of reciprocity accorded to the United States and the US cable companies).

In *Société Filature et Tissage X. Jourdain v. Époux Heynen-Bintner*,³⁷ a Luxembourg civil court dealt with an exchange contract falling under Article VIII, Section 2/b/ of the Fund Agreement. This provision regulates the unenforceability of a certain category of exchange contracts. The court adopted as the basis of its judgment the interpretative decision on the meaning and purpose of the said provision given by the Executive

³³ "United States Statutes at Large," Vol. 59, 1945, p. 512.

³⁴ Citation taken from the decision quoted in footnote 36.

³⁵ FCC. Docket No. 9362; International Law Reports, Vol. 22 (1955), p. 705.

³⁶ Decision of 20 February 1950, No. 534 - 3, Fund, Annual Report, 1950, p. 118.

³⁷ *Pasicrisie Luxembourgeoise*, 1957, p. 35; "International Law Reports," Vol. 22 (1955), p. 729.

Directors of the Fund.³⁸ The interpretation of the Directors, though perhaps in a less explicit manner, became also the basis of the holding in two American cases (*Perutz v. Bohemian District³⁹ Bank* and in the *Matter of Brecher-Wolff⁴⁰*). In *Banco do Brasil, SA v. AC Israel Commodity Co. Inc. et al.* (1963),⁴¹ the Court of Appeals of New York arrived at its own conclusions regarding the meaning of Article VIII, Section 2/b/, and then found that its position coincided with the interpretation of the Fund.

While the bulk of cases that deal with contracts falling under Article VIII, Section 2/b/ of the Fund Agreement follow the decision of the Executive Directors, (sometimes *in merite* only, that is without any explicit reference to the Fund decision),⁴² it should be noted that there are cases which adopt a somewhat different interpretation of that provision. A case in point seems to be *Emek v. Bossers and Mouthaan* (1953)⁴³ where the Commercial Tribunal of Courts upheld the plaintiffs in an action for breach of contract by Dutch defendants, though the contract was contrary to the exchange control regulations of the Netherlands and, therefore, should have been declared void according to the Fund interpretation.

In conclusion it may be observed that if the constitutive instruments of the Bank, the Fund, or the IFC are not enforceable in the domestic sphere of a member, or there are obstacles that stand in the way of full enforceability, any interpretative decision has no better standing than these instruments and will consequently have no effects in the municipal law of the member concerned or, depending on circumstances, its effects will remain limited.

3. Conflict with Municipal Law. The conflict between, on the one hand, municipal law and domestic measures and, on the other, the interpretative decisions of the Bank, the Fund or the IFC are to be resolved according to the concepts and rules that govern the solution of conflicts between the constitutive instruments of these three agencies and the municipal law of the country involved. *The Emek* case⁴⁴ is not an illustra-

³⁸ Decision of 10 June 1949, No. 446 - 4, Fund, Annual Report, 1949, p. 82.

³⁹ "North Eastern Reporter," Second Series, Vol. 110, p. 6 (Court of Appeals of New York); "International Law Reports," Vol. 22 (1955), p. 715.

⁴⁰ Department of Justice, Office of Alien Property, Docket No. 1698, "International Law Reports," Vol. 22 (1955), p. 718.

⁴¹ "North Eastern Reporter," second Series, Vol. 190, p. 235 (Court of Appeals of New York); "International Law Reports," Vol. 32, p. 371.

⁴² See *ibid.*, Vol. 22 (1955), pp. 713, 715, 719, 721, 725 and 730.

⁴³ *Ibid.*, p. 722.

⁴⁴ See footnote 44.

tion of the conflict between domestic law and a decision of the Fund but rather of broader and more restrictive interpretations of the same provision by the Executive Directors and the national court respectively. The case decided by the US Federal Communications Commission⁴⁵ is one where the interpretative decisions of the Bank and the Fund prevailed over the domestic measure (tariffs).

IV. Quasi-Legislative Resolutions of International Organizations

1. Differences from Law-making Resolutions. The notion of the quasi-legislative function of the international organization covers a wide variety of instruments. It is easier to give a definition of quasi-legislation by contrasting it with law-making *sensu stricto*.

A quasi-legislative resolution lays down general rules of conduct, i.e. rules that relate to an unlimited number of situations of the kind regulated and are applicable to any, and not a specific, addressee who happens to find himself within the ambit of the rule. So far it is a feature which the quasi-legislative resolution shares with a law-making act: regulation of general, in contradistinction to specific or individual, situations. Here, however, the analogy ends. For a quasi-legislative resolution lacks the obligatory force of a true enactment of law. It is not binding.

In spite of the absence of obligatory force, some quasi-legislative resolutions did influence national action and found their way into the domestic sphere of States. The subject deserves attention because most international organizations do not have any regulative powers *sensu stricto* — the list of those that fall under Section II above is short. Yet organizations that participate in the process of international law-making are not limited to that list. For such a participation involves various formes and procedures, and one of them is the adoption of quasi-legislative resolutions.

The number of these resolutions is legion. They vary in subject-matter and legal characteristics. Apart from the absence of obligatory force, which is the common feature of all such resolutions, their remaining juridical aspects may differ considerably from one another. The point is well illustrated by the quasi-legislative resolutions of the General Assembly of the United Nations.

2. Quasi-Legislative Resolutions of the UN General Assembly. The General Assembly adopts resolutions that purport to have a prescribing effect by virtue of Articles 11 and 13 of the Charter of the United Na-

⁴⁵ See footnote 36.

tions.⁴⁶ Articles 55 and 60 imply the Assembly's competence to vote such resolutions in the broad field of economic and social co-operation, including human rights.

Article 11, para. 1, gives the General Assembly the power "to consider the general principles of co-operation in the maintenance of international peace and security" and the Assembly "may make recommendations with regard to such principles to the Members." Article 13, para. 1, empowers the Assembly to "initiate studies and make recommendations for the purpose of [...] promoting international co-operation," including encouragement for the progressive development of international law and its codification. Two learned commentators of the Charter expressed the view that Article 13, para. 1, provided for functions that are "more nearly legislative in character."⁴⁷

While in the sphere of its internal functioning (procedure, budget, subsidiary organs, etc.) the Assembly has regulative powers and enacts the internal law of the United Nations (which is not of interest to this paper), it possesses recommendatory competence only whenever it lays down general rules of conduct in other spheres for States.

Between 1946 and 1968, the General Assembly adopted some resolutions that fall under the heading of quasi-legislation. According to their subject-matter, they can be divided into the following categories:

First, there are resolutions that deal with the basic relationships among States. Here the Assembly confirms, restates or lays down rules that in its view facilitate, or are indispensable to, the maintenance of peaceful and friendly relations among States. Some of these resolutions emphasize the prevention and limitation of the use of armed force. Thus in resolution 95(I) the Assembly affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." Resolution 378(V)A deals with the duties of States in the event of the outbreak of hostilities. In resolution 1653(XVI) the prohibition of the use of nuclear and thermo-nuclear weapons was enunciated. Still other resolutions went beyond the problems of use of force or dealt with them in a broader frame of reference. By resolution 375(IV) the Assembly noted the draft Declaration of Rights and Duties of States which had been prepared by the International Law Commission. Resolution 2131(XX) embodies the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

⁴⁶ US Department of State, Facsimile of the Charter of the United Nations [...] in five languages (1945).

⁴⁷ L. M. GOODRICH and E. HAMBRO, *Charter of the United Nations: Commentary and Documents*, 2nd ed., Boston 1949, p. 175.

Second, the General Assembly adopted resolutions whereby it set up new politico-territorial orders or contributed to their creation. In regard to the trust territories of the United Nations the Assembly possessed powers larger than the making of mere recommendations. However, here the Assembly acted beyond the general authorization of Articles 11 and 13, as its competence derived from Chapter XII and XIII of the Charter and the trusteeship agreements, and States that served in the capacity of administering authorities in the trust territories had specific obligations toward the Organization. The Assembly assumed quasi-legislative powers with respect to Palestine and the future government of that country (resolution 181/II/): the partition plan — Arab State, Jewish State, and Jerusalem). Still different was the case of the former Italian colonies, because here the great powers delegated to the Assembly the competence to recommend the disposal of the said colonies, and the great powers agreed to accept and enforce the Assembly's recommendation.⁴⁸ The Assembly discharged its function with respect to the former Italian colonies in resolutions 289(IV)A, 387(V)A, 388(V)A, 390(V)A, 392(V) and 530(VI). On 14 December 1960 the Assembly adopted resolution 1514(XV) which embodied the Declaration on the Granting of Independence to Colonial Countries and Peoples. This Declaration constitutes the framework in which the United Nations deals now with the emancipation and the eventual attainment of sovereignty by the non-self-governing territories.

Third, there is the subject of sovereignty and economic development. In this field the Assembly adopted resolution 1803(XVII) which contains a declaration of eight principles on permanent sovereignty and natural resources.

Fourth, the General Assembly initiated the work on the making and development of the law relating to outer space. In resolution 1721(XVI)A the Assembly commended to States two legal principles for their guidance in the exploration and use of outer space. Resolution 1962(XVIII) embodied a Draft Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, while the resolution 1884(XVIII) called upon States to refrain from placing in the outer space any nuclear weapons or weapons of mass destruction. The significance of these resolutions diminished when States signed treaties relating to the legal regime of outer space.

Fifth, and finally, the General Assembly vigorously exercised its quasi-legislative function in the vast area of human rights. In resolution 96(I) the Assembly defined genocide and affirmed that genocide

⁴⁸ Peace Treaty with Italy of 1947, Articles 23(3) and Annex XI.

was a crime; in 1948 the Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide whereby the original resolution lost much of its law-clarifying effect. Further, several declarations should be noted: Universal Declaration of Human Rights — resolution 217(III), Declaration of the Rights of the Child — resolution 1886(XIV), Declaration on the Elimination of All Forms of Racial Discrimination — resolution 1904(XVIII), Declaration on the Promotion among Youth of the Ideal of Peace, Mutual Respect and Understanding between Peoples — resolution 2037(XX), Declaration on the Elimination of Discrimination against Women — resolution 2263(XXII), and Declaration on Territorial Asylum — resolution 2312(XXII). Also by resolution 2018(XX) the General Assembly adopted three principles dealing with the consent to marriage, minimum age for marriage and registration of marriages, and recommended that members should give effect to these principles through national legislation and other measures.

For the fifteen European States which have ratified the European Convention on Human Rights of 1950, the significance of these Declarations is rather small. The same is true for parties to the International Convention on the Elimination of All Forms of Racial Discrimination; this Convention is annexed to the Assembly resolution 2106(XX). On the other hand, the slow progress of ratifications of, or accessions to, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 1966 results in the continued importance of the Universal Declaration of Human Rights of 1948.

3. Diversity of Legal Nature and Municipal Effects of Quasi-Legislative Resolutions. By definition, a quasi-legislative resolution is not binding. Apart, however, from this basic feature, the legal nature and effects of the quasi-legislative resolutions vary from case to case. They depend on a combination of factors, which comprise the intention of the organ that adopted the resolution, the attitude of member States, and subsequent practice.

Thus it is not possible to define once and for all the legal nature and effects of a quasi-legislative act. The point is well illustrated by the resolutions of the UN General Assembly. The various possible categories will now be considered.

(a) *Legislation*. This category, as already mentioned, is excluded by the very definition of a quasi-legislative resolution (it is not a direct source of rights and/or obligations). Nonetheless member States sometimes referred to the purported legislative effect of an Assembly resolution. Such statements have usually been made in ambiguous terms and while they applied to one resolution they were often implicitly rescinded by the same State with respect to another act. The example is the views

of France and Belgium on the Universal Declaration of Human Rights.⁴⁹ Another instance is Yugoslavia. In 1950 she introduced a draft which later became resolution 378(V)A on the duties of States in the event of the outbreak of hostilities. She then upheld the view that the General Assembly had the power to legislate in the matter.⁵⁰ Law-making effects were equally attached, though in rather unclear language,⁵¹ to the 1960 Declaration on the Independence of Colonial Countries.⁵² The resolution on the legal principles of outer space, in spite of being expressly denominated a Draft (i.e. non-binding) Declaration, evoked comment by Bulgaria that it contained the element of "legal regulation."⁵³ There were also references to the law-making powers of the Assembly during the debate on the principles relating to friendly relations and co-operation among nations.⁵⁴

The occasional and vague views of members on the legislative result that is supposedly produced by some of the Assembly resolutions are meaningless for a legal analysis. These views cannot modify the basic rule of the Charter of the United Nations that the General Assembly is not empowered, except in the field of its internal procedure and functioning, to make law for members. Unanimous resolutions of the Assembly are no exception to this rule.⁵⁵

⁴⁹ General Assembly Official Records, 3rd Sess., 1st Part, 3rd Cmtte., 92nd and 108th Mtgs., 2 and 20 October 1948, pp. 61 and 199-200. For a critique of these views, see H. LAUTERPACHT, *The Universal Declaration of Human Rights*, "British Yearbook of International Law," Vol. 25, 1948, pp. 363-366.

⁵⁰ General Assembly Official Records, 5th Sess., Annexes, Agenda Item 72, U.N.Doc. A/1399, paras 5 and 11; *ibid.*, 1st Cmtte., 384th Mtg., 4 November 1950, p. 248, paras 9 and 11, and p. 249, para. 17.

⁵¹ Ceylon, *ibid.*, 15th Sess., PI., Vol. 2, 926th Mtg., 28 November 1960, pp. 1002-1003, paras 136-137.

⁵² Czechoslovakia, *ibid.*, 17th Sess., 6th Cmtte., 753rd Mtg., 5 November 1962, p. 97, para. 17.

⁵³ UNDoc. A/C. 1/SR. 1343, p. 13 and 14. Cf. also Roumania *ibid.*, 1344, 4 December 1963, p. 6.

⁵⁴ Ceylon, General Assembly Official Records, 17th Sess., 6th Cmtte., 763rd Mtg., 20 November 1962, p. 150, para. 4; Czechoslovakia, UNDoc. A/C. 1/SR. 802, 29 October 1963, p. 3; Hungary, *ibid.*, 806, 6 November 1963, p. 3 and 832, 10 December 1963, p. 10; and Indonesia, *ibid.*, 809, 12 November 1963, p. 3.

⁵⁵ On the contrary, F. I. KOZHEVNIKOV, *Obshchepriznannye principy i normy mezhdunarodnogo prava*, "Sovetskoe Gosudarstvo i Pravo", 1957, No. 12, at p. 17 and G. I. TUNKIN, *Voprosy teorii mezhdunarodnogo prava*, Moskva 1962, here cited the German translation: *Das Völkerrecht der Gegenwart. Theorie und Praxis*, Berlin 1963, pp. 103-107 and 110, express the view that the unanimous resolutions of the General Assembly cease to be mere recommendations and acquire binding force. Cf. also P. C. JESSUP, *A Modern Law of Nations. An introduction*, New York 1950, p. 47.

(b) *Custom*. The Assembly resolutions of a general nature, and this applies to similar acts of other organizations, may prove to be of evidential value in ascertaining the existence of a custom. In the resolution members may state what in their opinion constitutes practice which has matured into usage, and whether such a usage has been accepted as binding. The Assembly thus elucidates customary law and prepares the way for its eventual codification by treaty.

Close to the foregoing, though theoretically belonging to a different category, stand resolutions in which the Assembly confirms or restates the law in a field where it seems uncertain or controversial. The Assembly's resolutions on genocide and, perhaps to a lesser degree, on the International Military Tribunal at Nuremberg fall under this heading.

The problem of custom, which is important for the study of the functions of international organizations, particularly in the field of their contribution to the growth of law, lies beyond the scope of this paper. If an Assembly resolution plays a role in the making of customary rules, the effects of such a resolution in municipal law bear on the place of international custom in the domestic sphere. One question, however, belongs to our subject. It is the significance which a domestic organ of the State will accord to an Assembly resolution when it weighs the evidence of customary law. In this respect the affirmation of principles of the Nuremberg Tribunal (both of its character and judgment) should again be mentioned. As one writer observed "although the General Assembly lacks general legislative power, a vote of this character is highly persuasive evidence of universal acceptance of the law that the Tribunal applied."⁵⁶ While the Nuremberg judgment was naturally a precedent for other courts that were set up by the occupying authorities in Germany (e.g. the United States tribunals established under Law No. 10 of the Control Council in Berlin⁵⁷) and was also adopted as such in numerous decisions of municipal courts, it is open to doubt whether the Assembly resolution became instrumental in strengthening the Nuremberg precedent, in particular whether it helped to persuade those critical of the Nuremberg trial to accept the judgment as good law. States which were ready to follow the Nuremberg judgment in their domestic sphere did

⁵⁶ R. R. BAXTER, *The Effects of Ill-conceived Codification and Development of International Law*, in: *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève 1968, at p. 151.

⁵⁷ E.g. in *United States v. Altstoetter et. al.* (The Justice Case), "Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law" No. 10, Vol. III, p. 968 - 969. Here the Tribunal quoted the Asembly resolution as establishing that "the IMT Charter must be deemed as declaratory of the principles of international law."

not need additional corroboration from the United Nations, while the sceptical judges in other countries did not seem to be influenced by a vote in that Organization. It may be added by way of example that Poland brought the provisions of its law on war crimes into line with the charter and judgment of the Nuremberg Tribunal prior to the adoption of resolution 95(I).⁵⁸

The case of the *Anglo-Iranian Oil Company Ltd. v. SUPOR (Unione Petrolifera per l'Oriente, SPA)*⁵⁹ supplies a rare example where the municipal court cited a UN resolution in support of its views on customary international law. In this case the Civil Court of Rome invoked resolution 626(VII) on the right to exploit freely natural wealth and resources as constituting "a clear recognition of the international lawfulness of the Persian Nationalization Laws" of 1951 relating to the property of the Anglo-Iranian Oil Company.⁶⁰ Whether the Court was correct in its assumption is another matter.

(c) *Agreement*. A non-binding declaration that enunciates general rules of conduct for States is often preparatory to the conclusion of a treaty on the subject. In the United Nations this was the case of recommendations on genocide, racial non-discrimination, outer space and human rights. However, until the treaty is concluded, States may agree that they will abide the rules contained in the Assembly resolution. Here the agreement of States is embodied in the act of the Organization. Such a resolution is never binding *proprio vigore*; what is binding is not the act of the Organization but the rules therein formulated, which acquired their obligatory force through agreement of States only and exclusively.⁶¹

It is rarely that States will conclude an agreement in the form of a resolution. But sometimes they do. When the agreement concerns the Organization's functions, the resolution may prove a convenient form of arranging the matter. Thus resolution 1903(XVIII) provides that the General Assembly is the appropriate organ of the United Nations to exercise the power conferred by multilateral treaties of a technical and non-political character, prior to 1945, on the Council of the League of Na-

⁵⁸ Decree of December 1945, „Dziennik Ustaw RP” [Journal of Laws] 1946, No. 69, items 376 and 377.

⁵⁹ „Foro Italiano,” 1955, Vol. I, P. 256; „International Law Reports,” Vol. 22 (1955), p. 23, Cited by O. Y. ASAMOAH, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1966, p. 230.

⁶⁰ *Ibid.*, pp. 40 - 41.

⁶¹ O. Y. ASAMOAH, (*op. cit.*, p. 52) writes “No [General Assembly] declaration is binding *per se* unless it can be held to constitute agreement.” In fact, it is the agreement that binds, not the declaration: the exception he formulates is apparent, not real.

tions to invite States to accede to these treaties. But it is not resolution 1903(XVIII) that revised the treaties with regard to the inviting organ — such a power of revision is not possessed by the Assembly. Resolution 1903(XVIII) records the assent of members to the revision — it is their agreement, and not the resolution, that brought about the change in treaty law.⁶²

Another instance of agreement through resolution is when the subject is still not ripe for the conclusion of a treaty and yet the matter requires that rights and obligations of States be defined. The Assembly may lay down the necessary rules while States agree to abide by them — through their own volition and not because they have been so ordered by the international organ. During the discussion on the Draft Declaration of Legal Principles Relating to Outer Space, several States, including the USSR and the United States, announced that they would abide by the rules formulated therein, though the resolution as such was not binding.⁶³

If a resolution adopted by an international organ embodies an agreement by States and thus constitutes their contractual instrument, its effects in municipal law are equal to those of treaties concluded in simplified form (*accords en forme simplifiée*). The problem then turns to be one of the place that a particular category of treaties retains in the domestic law and administration.

(d) Interpretation. It should be noted at the outset that non-binding interpretative resolutions of international organizations, though they deal with the interpretation of the constitutive treaty, do not occupy the same position in the municipal law as the treaty itself. This distinguishes them from the authoritative interpretations of some of the UN specialized agencies discussed in Section III. It may be added that unanimous resolutions could be regarded as evidence of authoritative interpretation provided they have been expressly adopted with this specific purpose in mind and the unanimity is complete, i.e. all members have voted for the resolutions — no negative votes have been cast nor any abstentions recorded. Such resolutions are a rare phenomenon in the practice of the international organizations.

Some of the quasi legislative resolutions of the General Assembly contain rules which may be regarded as elucidating and interpreting the provisions of the Charter of the United Nations. The Universal Declaration of Human Rights is particularly suited to serve as a test of the

⁶² See also resolution 24(I). The two resolutions are discussed by O. Y. ASAMOAH, *op. cit.*, p. 64.

⁶³ UN Docs. A/C. 1/SR. 1342, 2 December 1963, pp. 3,7,8,15, and 16; 1343, 3 December 1963, p. 4; 1344, 4 December 1963, pp. 7 and 14; and 1345, 5 December 1963, p. 4.

municipal effectiveness and validity of this type of resolution. For its very purpose and contents concern matters that arise in the domestic sphere of States.

In several provisions the Charter of the United Nations imposes on the member States the duty to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (preamble, Articles 1/3/, 13, 55, 62/2/ and 68). But the Charter does not define nor does it list these rights and freedoms, which, though not a definite bar, is an obstacle to their full and effective enforcement.

The Universal Declaration of Human Rights enumerates those rights and freedoms in thirty articles. But the Declaration was not adopted as an instrument containing obligations legally binding and rights legally conferred on States. In proclaiming the Declaration, Assembly explicitly said that the instrument was to serve "as a common standard of achievement [...] to the end that every individual and every organ of society keeping this declaration constantly in mind shall strive [...] by progressive measures, national and international, to secure their universal and effective recognition and observance [...]." In other words, binding rules on the subject were, in 1948, a matter of future development and were to be formulated in other instruments. However, this did not prevent the Assembly, twelve years later, from implying that the Universal Declaration of Human Rights had become a binding act. In para. 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, the Assembly said that "all States" should "observe faithfully and strictly" *inter alia* the Declaration of Human Rights. A similar statement is to be found in resolution 1904(XVIII) on racial discrimination.

This attitude on the part of the Assembly seems natural, though in strict law it does not possess the power to transform its recommendations into binding decisions. Until the International Conventions of Human Rights become general law, and the chances for such a development are rather remote, the Declaration constitutes a standard or yardstick with which the Assembly can measure the lawfulness and justifiability of the conduct of States in the field of human rights. It is, therefore, not astonishing that the General Assembly in several resolutions passed judgment on the behaviour of States in the light of the Declaration. It thereby implied that members of the United Nations should conform to the Declaration.

What was the response to the Assembly's exhortations in the municipal law and domestic administration of States? It was not impressive. In 1962, in resolution 1775(XVII), the Assembly recognized that, "notwithstanding some progress, the situation regarding compliance with

recommendations made in the Declaration (remained) unsatisfactory in many parts of the world."

The reflection of the Declaration in the municipal law and judicial decisions of States gives only a fractional picture of the compliance with the ideal set up by the Declaration. The reader who wishes to obtain more complete view of the question must be referred to the vast bibliography on human rights in general. The rather technical subject of this paper limits the discussion to two points: first, the impact of the Declaration on constitutional law, and, second, its place in judicial decisions. These will not be considered.

(e) Declaration of Human Rights and National Constitutions. The Universal Declaration of Human Rights influenced the constitutional law of States in several ways.⁶⁴

First, there is the rare instance of the constitution of Rwanda (1962) whereby the "fundamental freedoms as defined by the Universal Declaration of Human Rights are guaranteed to all citizens." Thus the Declaration has been incorporated⁶⁵ into the constitutional law of Rwanda and given the rank of the law. The constitution of Somalia (1960) announced the adoption "as far as applicable" of the articles of the Declaration. This provision, in contradistinction to the constitution of Rwanda, did not result in direct incorporation of the Declaration into the law of the country.

Second, numerous constitutions endorse *expressis verbis* the Declaration. Such an endorsement is to be found in the constitutions of Haiti (1950), San Salvador (1950), Libya and Eritrea (1951), Egypt (1956), Vietnam (South, 1956), Guatemala (1956) and of twelve African States that have formerly been part of the French colonial empire: Chad, Congo (Brazzaville), Guinea, Ivory Coast, Dahomey, Gabon, Madagascar, Mali, Mauritania, Niger, Senegal and Upper Volta. The constitutions of Togo and the Cameroons (1961) proclaimed the attachment of their peoples to the Declaration. The Declaration is also mentioned in the constitution of Burundi (1962). The effect that such references to the Declaration have in municipal law may vary from case to case. All depends on the position taken by the courts and the executive organs. They can use the constitutional endorsement or affirmation of the Declaration as a point of

⁶⁴ The impact of the Declaration on domestic constitutions is discussed by E. SCHWELB, *The Influence of the Universal Declaration of Human Rights on International and National Law*, "Proceedings of the ASIL," Vol. 53, 1959, at pp. 222-226 and *Human Rights and the International Community. The Roots and Growth of the Universal Declaration of Human Rights*, 1948-1963, Chicago 1964, pp. 50-52. See also O. Y. ASAMOAH, *op. cit.* pp. 232-233.

⁶⁵ E. SCHWELB, *The Influence*,..., p. 51.

departure in the interpretation and application of the municipal law in conformity with the Declaration. Whether the general references to the Declaration, which figure in the various constitutions, are meaningless or, on the contrary, helpful in securing compliance with the Declaration depends on practice by domestic organs.

Third, constitution-makers in several countries have been influenced, in their legislative work, by the contents and for mulations of the Declaration.⁶⁶ Though the constitutional law of many States does not refer explicitly to the Declaration, its impact is visible in the language that the law employs when it lays down rules on human rights.

(f) Declaration of Human Rights and Municipal Courts. Municipal courts are naturally aware of the non-binding nature of the instrument in question. However, they draw different conclusions from it. Sometimes they discard the Declaration, while on other occasions they make use of it irrespective of its lack of obligatory force. In judgments known to this writer, the latter position is prevailing, though one must remember that the great majority of judicial decisions that deal with human rights are altogether silent on the Declaration. This silence permits of more than one interpretation on the courts' view on the relevance or applicability of the Declaration and thus prevents one from formulating any definite inferences on the basis of those few judgments which make use of the Declaration.

An example of explicit denial that the Declaration is relevant is the *Beck's case* (1949).⁶⁷ Here the Special Court of Cassation of the Netherlands rejected the accused's argument that his trial was governed by the Declaration. As the Declaration, in this respect, did more create a bar to the persecution of war criminals, and Beck was indicted under this heading, the Court's position was right irrespective of what were its views on the possible use of the Declaration in domestic penal proceedings. Nonetheless the Court stated at the outset that the Declaration "was not intended as a binding instrument,"⁶⁸ whereby it generally implied, and this conclusion is borne out by the rest of the opinion, that such an instrument must always be irrelevant in giving a judgment.⁶⁹

⁶⁶ Cf. *ibid.*, pp. 51 - 52 and pp. 224 - 226.

⁶⁷ "Nederlandse Jurisprudentie," 1949, No. 437; "Annual Digest and Reports of Public International Law Cases," Vol. 16, 1949, p. 279, No. 93.

⁶⁸ *Ibid.*, p. 280.

⁶⁹ In some other cases involving war criminals the accused also invoked the Declaration. While the courts rejected the accused's pleas in this respect, they did not say that the Declaration was altogether irrelevant. See the second decision of the Special Court of Cassation in the *Rauter case* (application for revision of conviction), *ibid.*, p. 546 and the decision of the Supreme Court of Denmark In re *Beat*

This approach found a vocal supporter in the Supreme Court of Ireland which, in *The State (Duggan) v. Taplev* (1950), said that the Declaration did not "purport to be a statement of the existing law of nations. Far from it." The Court quoted from its preamble and concluded that the Declaration, "though of great importance and significance in many ways, (was) not a guide to discover the existing principles of international law."⁷⁰

But other courts took a different view of the matter. In *Auditeur Militaire v. Krumkamp* (1950),⁷¹ the Military Court of Brabant said that in its search for the "principles of international law arising out of the usages established by civilized nations, the laws of humanity, and the requirement of the public conscience," it was guided by the Declaration. The Court quoted its Article 5 prohibiting torture and similar treatment.⁷² In the *Teut* case (1954),⁷³ which involved the judicial establishment of the statelessness of the petitioner, the Court of Taranto, Italy, came to the conclusion that "though not having the force of a binding rule of law, the provisions of the Declaration nevertheless (constituted) guiding principles of the highest moral value." In particular, the court quoted Article 15 of the Declaration as "an expression of (the) tendency" that rejects "any form of automatic rule in the attribution of citizenship to individuals, even in cases of transfers of territory" and regards "citizenship as an essentially voluntary relationship."⁷⁴

In the cases *Borovsky* and *Chirskoff*,⁷⁵ the Supreme Court of the Philippines bases its decisions, i.e., on the Declaration. Article 3 of the Declaration figured as the first ground for the order of the President of the Court of First Instance of Courtrai, Belgium, which concerned the release of a person from a mental institution.⁷⁶

There are judgments where the Courts relied on the Declaration when they decided the question whether a particular right was one of the rights

and Others, *Ugeskrift for Retsveesen*, 1950, p. 453; "International Law Reports," Vol. 17, 1950, p. 434, No. 146 at p. 437.

⁷⁰ "Irish Law Reports," 1952, p. 62; "International Law Reports," Vol. 18, 1951, p. 336, No. 109, the quotation *ibid.*, at p. 342.

⁷¹ "Pasicrisie Belge," 1950, III, p. 35; "International Law Reports," Vol. 17, 1950, p. 388, No. 122.

⁷² *Ibid.*, p. 390.

⁷³ "Giurisprudenza Italiana," 1954, first part, II, p. 573; "Yearbook on Human Rights for 1954," p. 169, col. 1. The case is cited by E. SCHWELB, *The Influence...*, p. 227.

⁷⁴ "Yearbook on Human Rights for 1954," p. 171, col. 1.

⁷⁵ "Yearbook on Human Rights for 1951," pp. 287 - 288, cited by E. SCHWELB, *The Influence...*, p. 227.

⁷⁶ "Yearbook on Human Rights for 1954," p. 21, col. 2, cited by E. SCHWELB, *The Influence...*, p. 227.

of man. Thus In *re Flesche* (1949),⁷⁷ the Special Court of Cassation of the Netherlands invoked the Declaration and found no basis for the contention that the so-called principle of speciality in extradition protected a war criminal. In *re Krüger* (1951),⁷⁸ the Council for the Restoration of Legal Rights (Judicial Division) at The Hague cited Article 15(2) of the Declaration in support of the rule that "no State is competent or in a position *propria auctoritate* to deprive of their citizenship aliens who are resident on its territory."⁷⁹

In several cases the courts interpreted the municipal law so as to harmonise it with the Declaration and thus to avoid a conflict between the two sets of standards. This was the attitude adopted by the Penal chamber of the Supreme Court of the Netherlands in a case involving the freedom of press⁸⁰ and by the Federal Constitutional Court (Western Germany) in a case concerning the joint assessment of the income of husband and wife.⁸¹ The unwritten rule to the effect that the domestic legislation is to be construed so as to remain in harmony with the Declaration may invest the latter with the role of a criterion for ascertaining what accords with public policy in the field of human rights. While this seems to have been the position of the Belgian courts in the cases of *Pietras* (1951),⁸² *Bukowicz* (1952)⁸³ and *Vanderginste v. Sulman*,⁸⁴ these courts were not willing to treat the Declaration as the ultimate yardstick in other cases, i.e. they admitted that in certain matters national law and policies would prevail.⁸⁵ This approach, more cautious as it is, found expression in a decision by an Indian Court. In *Biswambha Singh and Another v. The State of Orissa* (1957),⁸⁶ decided by the High Court of

⁷⁷ "Nederlandse Jurisprudentie," 1949, No. 548; "Annual Digest and Reports of Public International Law Cases," Vol. 16, 1949, p. 266, No. 87, at p. 269.

⁷⁸ "Rechts-herstel," 1951, No. 108; "International Law Reports," Vol. 18(1951), p. 258, No. 68.

⁷⁹ *Ibid.*, p. 259.

⁸⁰ "Yearbook on Human Rights for 1951," p. 251, cited by E. SCHWELB, *The Influence...*, p. 227.

⁸¹ Entscheidungen des Bundesverfassungsgerichts, Vol. 6, 1957, p. 55, discussed by E. SCHWELB, *The Influence...*, pp. 224 - 225.

⁸² "Yearbook of Human Rights for 1951," p. 15, cited by E. SCHWELB, *The Influence...*, p. 227 and O. Y. ASAMOAH, *op. cit.*, p. 230.

⁸³ "Yearbook on Human Rights for 1953," p. 21, cited by E. SCHWELB, *The Influence...*, p. 227.

⁸⁴ "Yearbook on Human Rights for 1956," p. 23, cited by O. Y. ASAMOAH, *op. cit.*, p. 231.

⁸⁵ Cf. *Vanderginste v. Vanderginste*, "Yearbook on Human Rights for 1956," p. 23. The conclusion is rightly drawn by O. Y. ASAMOAH, *op. cit.*, p. 231.

⁸⁶ "The All India Reporter," 1957, Orissa, p. 247; "International Law Reports," Vol. 24, 1957, p. 425.

Orissa, the petitioners challenged the constitutional validity of a statute on the basis, i.a., of Article 17 of the Declaration. Their appeal to the High Court failed, but the Court admitted that in different circumstances the Declaration "might possibly be invoked in favour of the petitioners, on the doctrine of wise use of public policy."⁸⁷

In some cases the Declaration was mentioned in support of the court's decision. Examples are the American cases of *Pujii v. State of California* (1950)⁸⁸ and *Wilson v. Hacker* (1950).⁸⁹ Another example is the Extradition of *Greek National (Germany)* case (1955)⁹⁰ where the Federal Supreme Court admitted that the Constitution of Federal Germany sought "generally speaking, to follow" the Universal Declaration of Human Rights and it referred to Article 14 of the Declaration as additional support for its opinion on one of the problems discussed in the judgment. In *Fallimento Ditta Maggi v. Ministry of Finance* (1959),⁹¹ the Tribunal of Rome cited the Declaration as one of the sources of law on which the Tribunal relied in deciding the case. The Declaration was mentioned in support of the Court's view on the meaning of one of the provisions of the Italian Constitution. While the significance of the Declaration for the court's decisions in these cases is not entirely beyond doubt, the ambiguity increases when the court simply mentions the Declaration or one of its provisions and does not hint, even by implication, at the meaning and purpose of such a reference.⁹²

Finally, it may be observed that there were cases in which the plaintiffs (or appellants or petitioners) invoked the Universal Declaration of Human Rights, but when they did not succeed in the municipal sphere they brought their grievances before international organs;⁹³ however,

⁸⁷ *Ibid.*, p. 427.

⁸⁸ "Pacific Reporter," second series, Vol. 217, 1950, pp. 481 and 488, Vol. 218, p. 595 and Vol. 242, p. 617; "International Law Reports," Vol. 19, 1952, p. 312.

⁸⁹ "New York Supplement," second series, Vol. 101, 1950, p. 461, New York Supreme Court.

⁹⁰ "Neue Juristische Wohenschrift," Vol. 8, 1955, p. 1365; "International Law Reports," Vol. 22, 1955, p. 520, at p. 524.

⁹¹ "Foro italiano," Vol. 85, 1960, I, col. 505; "International Law Reports," Vol. 28, p. 607.

⁹² Cf. Extradition (Ecuadorian National) Case (1953) decided by the Federal Supreme Court (Western Germany), "Neue Juristische Wohenschrift," Vol. 6, 1953, p. 392; "International Law Reports," Vol. 20, 1953, p. 370. Mandoza-Martinez and Cort cases (1963) decided by the Supreme Court of the United States, "United States Supreme Court Reports," Vol. 372, 1963, at p. 162, note 1; "International Law Reports," Vol. 34, at p. 112, note 1.

⁹³ See, for instance, Re Application No. 511/59 (*Gudmundsson v. Iceland*), "Yearbook of the European Convention on Human Rights," 1960, p. 394; "International Law Reports," Vol. 30, p. 253.

the decisions of the latter, and the use they make of the Declaration, lie outside the scope of this paper as they concern international, and not municipal jurisdiction.

4. Recommendations of the Council for Mutual Economic Assistance.

While the resolutions of the UN General Assembly provide the lawyer with a wide variety of patterns regarding the legal nature and municipal effects of international quasi-legislation, they do not exhaust the various methods by which the acts of this category penetrate into the national law and administration. Regional organizations that serve economic purposes have developed some practices peculiar to themselves and the Council for Mutual Economic Assistance (CMEA), set up in 1949 and functioning under the Statute of 1959⁹⁴ (thereafter amended) is a case in point.

The Council adopts recommendations on questions of economic, scientific and technical co-operation, and they are communicated to the member States for further consideration. Each State then decides whether it accepts a recommendation or not. If it does, the recommendation is implemented through decisions of the Government or other organs of the State, in conformity with national law (Art. IV, para. 1). Thus the organization has not been, under the Statute of 1959, empowered to legislate for members. Nonetheless, it can and does play a role in the unification of certain portions of law that regulates the economic relations of members.

The Council is competent to draft a quasi-legislative text and authenticate it *ne varietur* through the voting of its recommendatory resolution. Thus on 13 December 1957, the Council's Commission for Foreign Trade adopted an instrument which bears the name of General Conditions of Delivery of Goods between Foreign-Trade Enterprises of Member-Countries of the Council for Mutual Economic Assistance.⁹⁵ In 1962 the Commission adopted the General Conditions of Mounting and other Technical Services⁹⁶ and the General Conditions of Technical Operations.⁹⁷

The Council was unable to impose any of these texts on the members, but the members (some or all) agreed to accept the Council's texts and to abide by them. The next step was taken in the sphere of municipal law. The Minister of Foreign Trade of each of the accepting States enacted

⁹⁴ "UN Treaty Series," Vol. 368, p. 253.

⁹⁵ For an English translation, see text appended to H. J. BERMAN, *Unification of Contract Clauses in Trade between Member-Countries of the Council for Mutual Economic Aid*, "International and Comparative Law Quarterly," Vol. 7, 1958, p. 665.

⁹⁶ "Dziennik Urzędowy Ministerstwa Handlu Zagranicznego" [Official Journal of Law of the Polish Ministry of Foreign Trade], 1962, No. 15, Item 140.

⁹⁷ *Ibid.*, No. 19, Item 170.

ordinances that repeated the provisions of the three sets of General Conditions. Through this ordinances, the General Conditions became binding on their addressees, i.e. on State enterprises or corporations engaged in foreign trade. The source of law was and remains strictly domestic, for it is constituted by the ordinance of the respective Minister for Foreign Trade.⁹⁸ However, the contents of each of these ordinances are identical with those of the Council's recommendations.

This is not an instance of transformation⁹⁹ of international legal rules into municipal law. For such rules did not then exist on the international plane, a recommendation being unable to create them. It is rather an instance of literal incorporation of the international text into a municipal enactment, whereby this text acquired binding force.

The device developed in the practice of the Council and its members guarantees full domestic compliance with the organization's instruments that were aimed at law-making. The necessary basis, however, for its successful application is a prior agreement by members, no matter how informal, that they will accept the Council's recommendation and give effect to it in their municipal jurisdictions. The pattern followed with regard to the three sets of General Conditions of the CMEA is a combination of action by international organization, agreement by member States, and domestic measures of a legislative nature. The process may seem complicated, but until now it functioned smoothly and contributed to a rapid unification of certain juridico-economic procedures among the members of the CMEA.

⁹⁸ Cf. L. LUNC, *Mezhdunarodnoe tchastnoe pravo. Obshchaia tchast'*, Moskva 1959, pp. 82 - 83 and H. TRAMMER, *Krótki komentarz do Ogólnych warunków RWPG 1958* [A Short Commentary on the General Conditions of Delivery of CMEA 1958], Warszawa 1961, p. 7. On the other hand, J. JAKUBOWSKI, *Prawne ramy obrotu handlu zagranicznego między krajami socjalistycznymi* [Legal Framework of Foreign Trade between Socialist Countries], "Państwo i Prawo," Vol. 16, 1961-II, at pp. 530 - 531, distinguishes between the international and municipal obligatory force of the General Conditions of Delivery. According to him the resolution whereby the Council adopted the General Conditions of Delivery constitutes the source of their obligatory force on the international plane. The fact is that on that plane the Council's resolutions are devoid of any binding effect, and the only force they can acquire is through municipal action. This is the position under the Statute of the CMEA as of the end of 1968. See, generally, J. SANDORSKI, *Uchwały RWPG a prawo wewnętrzne PRL* [Resolutions of the CMEA and the Municipal Law of Poland], "Nowe Prawo," Vol. 23, 1967, pp. 1329 - 1334.

⁹⁹ The transformation theory is upheld by J. JAKUBOWSKI, *Próby unifikacji prawa w ramach RWPG* [Attempts at the Unification of Law in the CMEA], "Sprawy Międzynarodowe," Vol. 18, 1965, No. 9 at p. 52.

V. Conclusions

In this paper the domestic effects of three categories of acts of international organs have been considered.

The first category is law-making resolutions *sensu stricto*. Their introduction into the municipal law is governed by rules similar to those that concern the domestic effects of treaties. But the law-making resolution is not necessarily equated, with regard to its status in municipal law, with the treaty under which the legislating organization functions. The place of the former may be lower than that which the latter occupies in the hierarchy of legal rules enforced within the State. It is the substance of the law-making resolution that may influence its place in the domestic sphere. For instance, the technical nature of the resolution may reserve for it a status that is comparable to agreements concluded by the specialized departments of Government (health, communications, finance, etc.) and not to treaties entered into by the Head of State. The basic requirement is that national action (transformation, remission, or other legislative measures) is necessary to introduce a law-making resolution and make it effective in the municipal sphere. The exception to this requirement is the explicit municipal rule that makes the resolution self-executing (the French decree of 1953). In case of conflict between a law-making resolution and municipal law the analogy to treaties seems to be full unless there is a domestic rule to the contrary.

The second category is binding interpretative decisions of some financial organizations. These decisions have the same place in the municipal law of member States as the treaties under which the interpreting agencies function. The rule of identity applies equally to conflicts with municipal law.

The last and third category is quasi-legislative resolutions. In strict law no State is under a duty to apply them, yet some of these resolutions have successfully penetrated into the national law and judicial decisions of the States, often through a combination of different factors, both domestic and international. If a quasi-legislative resolution embodies an agreement by States, the matter belongs to the realm of relationships between international contractual instruments and municipal law. Domestic courts played an important part, more so than constitutional provisions, in giving a place to the UN Declaration of Human Rights in the internal legal order of States. This sets a pattern that could be imitated in regard to other instances of quasi legislation that bear on internal problems of the State.

This paper has been limited to international organizations that are, because of their structure and powers, termed classical or traditional,

and are contrasted with supranational organizations such as the European Communities. Up till now the model of the supranational bodies in the field covered by the subject of this paper has had no visible influence on other international organizations. This model consists of solutions and procedures that are different from those discussed in the present paper, and they should be the subject of a separate study. Whether a comparison of the two systems, the traditional and the supranational, may contribute to the perfection of the techniques of the former seems to be a matter of legitimate interest, though it remains mainly academic in character.

Les dommages résultant des vols supersoniques *

par CEZARY BEREZOWSKI

1. Le développement des sciences techniques nous apparaît souvent comme une menace pour l'homme, pour ses pensées, pour sa tranquillité, et même pour son avenir. Des découvertes existent qui peuvent être qualifiées comme découvertes criminelles, puisqu'elles peuvent mener l'humanité toute entière vers un désastre complet. Il suffit de penser à l'énergie atomique conduisant aux bombes «A» et «H».

Mais, pour ne pas être trop pessimiste, on peut rester dans un domaine moins dangereux, celui du bruit, lequel, en principe, résulte aussi du développement des sciences techniques, étant, en même temps, un phénomène peu désirable pour la tranquillité et pour la vie normale des personnes, et nous sommes souvent témoins des activités réglementaires visant le bruit excessif, surtout dans les agglomérations urbaines¹.

Le développement de la navigation aérienne, commençant par les appareils à piston, et allant aux appareils à réaction dont la vitesse dépasse celle du son, a déjà posé — et le fera d'une façon beaucoup plus large dans un proche avenir — un problème nouveau, celui des déflagrations sonores, des «bangs supersoniques» qui résultent du passage du mur du son².

2. Le problème des ondes de choc est un problème relativement nouveau et se présente, du point de vue pratique, comme un problème évoqué

* Le sujet a été traité dans le rapport présenté au huitième Congrès International de Droit Comparé en 1970.

¹ Voir l'étude de M. PORCELET, *La navigation aérienne et le bruit*, «Revue Générale de l'Air et de l'Espace», 1968, p. 149.

² B. DESLANDES donne l'explication technique suivante: «Tout corps évoluant dans l'atmosphère à une vitesse supérieure ou égale à celle du son (environ 1230 km/heure au niveau de la mer) émet autour de lui des ondes sonores comparables aux rides provoquées lors de la chute d'une pierre dans l'eau — un avion volant à une telle vitesse crée de ce fait un cône d'ondes (appelées ondes de choc) qui, partant du nez de l'appareil, le suit pendant toute la durée du vol en régime supersonique». (*Le contentieux du mur du son*, «Revue Générale de l'Air», 1965, p. 145).

par les avions militaires dont la vitesse supersonique fut atteinte aux États-Unis en 1947³ et en France en 1951⁴. Quant à l'aviation civile, c'est seulement vers la fin de décembre 1968 que les essais de l'appareil soviétique «TU-144» et vers la fin de février 1969 du prototype français le «Concorde» ont démontré leur navigabilité; en construction se trouve l'aéronef supersonique américain, le «Boeing 2707/30» (SST).

C'est dans les États-Unis d'Amérique, qu'on a publié les résultats des expériences avec les vols supersoniques: elles ont démontré qu'aux alentours de St. Louis, en 1961 - 1962, 150 vols supersoniques ont provoqué 5000 demandes en réparation, parmi lesquelles seulement 1624 ont été reconnues bien fondées; aux alentours d'Oklahoma City, en 1964, 1253 vols ont provoqué 15116 plaintes (seulement 4629 bien fondées), et en 1965, dans la région de Chicago, 49 vols supersoniques ont donné suite aux 7116 plaintes, dont 2964 ont été acceptées⁵. On signale d'autre part que, dans le même pays, pour faire protéger les bâtiments dans les limites de 10 km autour de 19 ports aériens principaux — il faudrait une somme de \$ 7 000 000 000⁶.

En même temps, à la demande du président Johnson la «Federal Aviation Agency» enquêta la nuisance minime causée par le bruit. D'autre part, un rapport présenté en France au premier ministre propose de faire passer à 18 000 pieds d'altitude et à Mach 1,4 les avions à réaction pour mesurer l'intensité du bruit et des ondes de choc⁷. On signale qu'en France, pour le premier semestre de 1967, 1122 plaintes avec demande d'indemnisation ont été enregistrées, dont 224 ont été retenues, les autres étant soumises à une enquête, et un total de 285 940 F a été versé à titre des dommages provoqués par les bangs supersoniques⁸.

Sur le terrain international, au sein de l'Organisation de l'Aviation Civile Internationale (O.A.C.I.), les débats du Sous-Comité chargé de la révision de la Convention de Rome du 7 octobre 1952 relative aux dommages causés par les aéronefs aux tiers à la surface ont approché le problème de l'indemnisation de tels dommages résultant des ondes de choc⁹.

³ A. J. ORTNER, *Sonic Boom. Containment or Confrontation*, «Journal of Air Law and Commerce», 1968, p. 208.

⁴ B. DESLANDES, *op. cit.*, p. 144.

⁵ Voir la table présentée par A. J. ORTNER (*op. cit.*, p. 209).

⁶ W. S. STRAUSS, *Die Rechtslage bei Lärmstörungen durch Strahlflugzeuge in den Vereinigten Staaten von America*, «Zeitschrift für Luftrecht und Weltraumrechtsfragen», 1963, p. 266.

⁷ POURCELET, *op. cit.*, p. 152 *in fine*.

⁸ E. GEORGIADIS dans une note publiée dans la «Revue Française de Droit Aérien», 1967, p. 448.

⁹ «O.A.C.I. Bulletin», 1966, n° 5, p. 8.

La Cinquième Conférence de la navigation aérienne, qui s'est tenue en 1967 au siège de l'O.A.C.I., a étudié le problème du bruit aux abords des aérodromes. La Conférence a estimé que le bruit des avions aux bords des aérodromes est un facteur, qui mérite d'être étudié avec soin par l'O.A.C.I., et a jugé que le niveau de bruit perçu (PNdB) devrait être adopté ¹⁰.

La France, le Royaume Uni et les États-Unis prennent part dans l'élaboration d'un plan de certificat de bruit des aéronefs. Selon ce plan, préparé à Washington en 1968, chaque État participant s'engage à demander au aéronef atterrissant ou décollant dans un aéroport situé dans cet État — de posséder un certificat de bruit; chaque État participant peut révoquer le certificat s'il constate que l'aéronef ne répond plus aux normes établies; mais, le champs d'application de ce plan ne s'étend pas aux aéronefs supersoniques ¹¹.

Et la I.A.T.A., dans son commentaire concernant ce plan, exprime l'opinion que les aéronefs supersoniques doivent répondre aux normes établies pour les aéronefs d'autres catégories ¹².

3. Quelles sont les sources du droit applicable à la responsabilité pour dommages causés par les vols des appareils supersoniques?

On peut appeler exceptionnels les cas où le législateur a accompli sa tâche en édictant une loi spéciale concernant ce problème.

Un tel cas exceptionnel s'est présenté, en 1968, aux États-Unis d'Amérique, lorsqu'un projet de loi fut déposé à la Chambre des Représentants: le *Sonic Boom Damage Recovery Act* ¹³. Ce projet aperçoit une nouvelle époque de l'aviation — l'époque des aéronefs supersoniques et constate la nécessité de fixer les moyens adéquats pour indemniser les dommages causés par les ondes de choc aux personnes et aux biens, en prévoyant l'établissement à ces fins d'un fond spécial (*sonic boom damage fund*).

A défaut de législation spéciale, ce sont les règles juridiques concernant généralement la réparation des dommages causés aux personnes et aux biens à la surface qui sont applicables par analogie. En Pologne, le droit aérien du 31 mai 1962 ¹⁴ renvoie le problème de la responsabilité des exploitants des aéronefs pour dommages résultant des évolutions des aéronefs aux dispositions du Code civil en matière de responsabilité pour dommages résultant de l'exploitation des engins mécaniques de communication actionnés par les forces de la nature (art. 72 al. 1) ¹⁵. Ce renvoi

¹⁰ «Revue Générale de l'Air et de l'Espace», 1968, p. 86.

¹¹ IATA Mémoire du 20 août 1968 (annexe 1).

¹² IATA Mémoire du 21 octobre 1968 (12/417).

¹³ Le même Mémoire (12/521, annexe).

¹⁴ Dziennik Ustaw [Journal des Lois, abrég. J. des L.], 1962, n° 32, texte 153, «Droit Polonais Contemporain», 1963, n° 2, p. 103 (en anglais).

¹⁵ C. BEREZOWSKI, *Międzynarodowe prawo lotnicze* [Droit aérien international],

est un renvoi relatif, puisque la loi de 1962 traite d'une façon plus large que le Code civil l'exonération de la responsabilité¹⁶ et elle définit elle-même la personne responsable (art. 73).

Dans la plupart des pays, dont les législations ne s'occupent pas directement des dommages causés par le bruit des aéronefs et par les ondes de choc, qui résultent de la vitesse supersonique, la tâche de la jurisprudence est d'autant plus grande, car elle doit remplir les lacunes créées par le manque d'une législation spéciale (le contentieux du son)¹⁷. Et c'est pour cette raison que tous ceux, qui s'occupent des aspects juridiques du bruit et des ondes de choc, passent en revue une jurisprudence déterminée, ou bien, en appliquant la méthode comparative, donnent un aperçu de quelques jurisprudences nationales choisies¹⁸.

Si on passe du terrain national au terrain international, on doit constater, que le rôle joué par le droit conventionnel a moins d'importance que le rôle joué par les législations nationales. Il n'y a pas de convention internationale spéciale qui s'occuperait des dommages causés par le bruit des aéronefs ou par les ondes de choc résultant de la vitesse supersonique. En même temps, il faut ajouter, que le droit conventionnel en vigueur, contenant des règles générales, n'est obligatoire que seulement pour une vingtaine d'États. C'est la Convention de Rome du 7 octobre 1952, relative aux dommages causés par les aéronefs aux tiers à la surface¹⁹, laquelle ne contient aucune référence spéciale au bruit ou aux ondes de choc, provoqués par les aéronefs. Mais il nous semble, que les dommages résultant des faits sus-mentionnés peuvent être soumis aux dispositions de cette convention, puisqu'elle concerne, en général, chaque dommage causé par les aéronefs en vol.

Le but de cette convention, qui devait remplacer la Convention de Rome de 1933, est l'unification de certaines règles en matière de dommages causés par les aéronefs aux tiers à la surface. Ces règles internationales sont jusqu'à présent l'unique loi spéciale concernant, en général et par analogie, notre problème.

La Convention s'occupe des dommages, causés sur le territoire d'un État contractant par un aéronef immatriculé dans un autre État con-

Warszawa 1964, p. 148; T. USZYŃSKI, *Polskie prawo lotnicze z komentarzem [Droit aérien polonais avec commentaire]*, Warszawa 1966, p. 110.

¹⁶ En prévoyant une telle exonération dans le cas où le vol s'accomplit conformément aux règles de l'air (al. 2).

¹⁷ Cette dénomination est due à DESLANDES, *loc. cit.*

¹⁸ Comme le fait A. TEMPESTA, *Note di diritto comparato sulla responsabilità per danni da rumore di aeromobili*, «Il Diritto Aero», 1965, n° 13, p. 10.

¹⁹ *Recueil des traités*, vol. 310, p. 181. La Pologne n'est pas une des parties contractantes ni à la Convention de 1952, ni à la convention antérieure (de 1933).

tractant, et aussi des dommages, causés aux navires et aux aéronefs, se trouvant en haute mer. La Convention ne s'applique pas aux dommages résultant de l'abordage aérien ni à ceux causés par les aéronefs militaires, de douane ou de police.

La responsabilité est une responsabilité objective de l'exploitant de l'aéronef, il suffit donc que la victime prouve que le dommage a été causé par l'aéronef en vol²⁰, c'est-à-dire du moment, où la force motrice est employée pour décoller, jusqu'au moment, où l'atterrissage s'est terminé.

La responsabilité incombe à l'exploitant de l'aéronef, elle peut être écartée par la preuve, que le dommage est dû exclusivement à la faute de la victime ou de ses préposés.

4. Lorsqu'il s'agit des causes de responsabilité donnant droit à une indemnité, il est nécessaire de faire une stricte distinction entre les dommages produits par les déflagrations supersoniques et ceux causés par les appareils supersoniques en vol infrasonique.

Ce sont seulement les dommages de première catégorie qui peuvent être qualifiés comme dommages causés exclusivement par les aéronefs supersoniques. Quant aux autres dommages, ils sont les mêmes que les dommages causés par tout aéronef en vol.

Si on accepte la notion du vol contenue dans la Convention de Rome de 1952, un dommage causé par l'appareil supersonique doit être considéré comme étant un dommage causé par chaque aéronef, à partir du moment où la force motrice est employée pour décoller, pendant le survol et après le passage du mur du son, jusqu'au moment où l'atterrissage s'est terminé. De cette façon, la différence entre un aéronef supersonique et autre ne se traduit que par la vitesse du survol.

En traitant le problème de la responsabilité pour dommages causés par les aéronefs supersoniques, on doit se rendre compte de l'ensemble du problème, embrassant et les dommages causés par les ondes de choc, et les autres dommages causés à la surface.

5. Il existe donc deux traits caractéristiques du dommage causé par les aéronefs supersoniques en vol: l'un d'eux — ce sont les dommages causés par le bruit infrasonique, et l'autre — les dommages causés par les ondes de choc. Quant aux autres dommages à la surface, comme par exemple résultant de la chute de l'appareil volant ou des choses se trouvant à son bord, — ils ne diffèrent pas de dommages causés par chaque aéronef en vol. Ces derniers n'exigent donc pas une étude spéciale,

²⁰ H. MAZEAUD souligne que cette responsabilité est «objective, limitée et garantie» (préface au livre de M. de JOUGLART, *La Convention de Rome du 7 octobre 1952 relative aux dommages causés par les aéronefs aux tiers à la surface*, Paris 1956, p. V).

quand nous parlons des dommages causés par les aéronefs supersoniques.

Il serait difficile de défendre la thèse, selon laquelle chaque bruit ou chaque onde de choc seraient de nature de provoquer des dommages. Le bruit ou l'onde de choc doivent être nocifs aux personnes humaines ou à leurs biens. Il serait difficile de démontrer qu'un bruit, dont l'intensité ne dépasse pas 60 db, ou une onde de choc non ressentie à la surface, sont nocifs.

D'autre part, il faut se rendre compte des conditions sociales et économiques existant dans un État déterminé, qui peuvent, comme dans les États socialistes, restreindre les droits privés exercés par les personnes, si les exigences sociales et économiques demandent une telle restriction. En Pologne, l'article 5 du Code civil dispose que:

«Nul ne peut faire usage de son droit d'une manière contraire à son but social ou économique ou aux règles de la vie en société en vigueur [...] Une telle action ou abstention n'est pas considérée comme exercice du droit et ne jouit pas de protection légale²¹».

Ce principe se trouve aussi dans l'article 143 qui dispose que:

«Dans les limites déterminées par la destination socio-économique du fonds, la propriété de celui-ci s'étend au-dessus [...] de sa surface».

Dans les cas sus-mentionnés, il appartient donc à une législation spéciale ou à la jurisprudence de déterminer le rapport entre les personnes et les biens à la surface, d'une part — et le bruit et les ondes de choc, d'autre part — d'une telle manière, que les exigences de la vie économique (transport aérien) soient respectées.

Dans les pays non socialistes, on trouve quelquefois des règles juridiques qui permettent d'arriver aux autres conclusions. A titre d'exemple, on peut se référer à l'article L. 131 - 2 du Code français de l'aviation civile²², qui reconnaît la priorité des intérêts du propriétaire, en statuant que «Le droit pour un aéronef de survoler les propriétés privées ne peut s'exercer dans des conditions telles qu'il entraverait l'exercice du droit du propriétaire». Dans un autre pays non-socialiste, aux États-Unis, la jurisprudence a abandonné le principe de la propriété *usque ad coelum* en décidant que l'espace aérien, à l'exception des couches les plus proches du sol, est une partie du domaine public²³.

Les personnes se trouvant à la surface peuvent être endommagées par le bruit causé par les aéronefs supersoniques à la santé, provoquant des maladies physiques et des troubles psychiques; on soutient la thèse, selon laquelle les réactions du cerveau provoquées par le bruit d'un aéronef

²¹ *Code civil de la République de Pologne*, traduction française, Varsovie 1966.

²² *Journal Officiel*, 1967, n° 84.

²³ Cf. ORTNER, *op. cit.*, p. 215.

à réaction sont analogues à celles qu'il manifeste lors d'une crise d'épilepsie²⁴.

Quant aux biens à la surface, un tel bruit peut rendre le vin impropre à la consommation, produire des pertes dans l'élevage des visons ou des poules faisanes, peut déprécier la valeur des propriétés, peut produire des difficultés de vente ou de location des immeubles, etc.²⁵.

D'autre part, les ondes de choc causent des dommages à la surface, lesquels, en France, sont portés devant les tribunaux plus souvent que dans les cas du contentieux relatif au bruit causé par le survol des propriétés²⁶.

La réaction des personnes aux ondes de choc n'est pas toujours la même; les recherches faites en Amérique par le National Opinion Research Center ont établi, que la superpression évoquée par le passage du mur du son est acceptable pour l'homme, si elle ne dépasse pas 0,5 psf (en livres sur un pied carré)²⁷.

Les ondes de choc produisent souvent des dégâts aux bâtiments à la surface, en brisant les vitres, en détruisant les murs, et même un bâtiment tout entier, comme c'était le cas à Donnelly Field, Montgomery, Alabama, où un *sonic boom* a détruit en 1958 la tour de contrôle²⁸. Les dommages causés aux bâtiments peuvent, en même temps, porter préjudice aux personnes, comme en 1967, quand à Mauron, en France, une onde de choc a détruit une maison de campagne, ce qui provoqua la mort de trois personnes²⁹.

Pour qu'on puisse parler de l'obligation de réparer le préjudice causé à la surface par un aéronef supersonique en vol, et spécialement par le bang du son, il est nécessaire que la personne, dont les intérêts ont été endommagés, se réfère au lien entre le bruit ou l'onde de choc et le dommage, et que ce lien et le bien fondé de la réclamation soient établis par tous moyens de preuve (comme expertise) qui sont à la disposition de l'instance judiciaire ou autre, devant laquelle la personne lésée défend son droit.

La nécessité d'établir un tel lien de causalité est reconnue par les différentes jurisprudences statuant en cas de dommages causés à la surface par le bruit des aéronefs ou par leurs ondes de choc. Une importance toute particulière possède l'arrêt du 8 mai 1968 de la Cour de Cassation (2 Ch.Civ.) dans l'affaire Compagnie Air France c. Société E.R.V.E. et

²⁴ Voir l'étude de POURCELET, *op. cit.*, p. 15 *in fine*.

²⁵ *Ibidem*.

²⁶ POURCELET, *op. cit.*, p. 158.

²⁷ ORTNER, *op. cit.*, p. 210.

²⁸ *Ibidem*, p. 212.

²⁹ *Ibidem*.

autres⁸⁰. L'affaire concernait les dommages apportés à une propriété par les évolutions des appareils à réaction. La Cour a reconnu, entre autres, que l'action du propriétaire est fondée, si ce propriétaire établit que par les évolutions de ces aéronefs il a subi un dommage excédant les inconvénients normaux de voisinage d'un aérodrome.

La victime des dommages, causés à la surface par les aéronefs supersoniques en vol ou par les ondes de choc, ne peut pas recourir à l'auto-défense⁸¹.

La jurisprudence américaine, en statuant sur la réparation des dommages à la surface causés, en général, par les aéronefs, base ses jugements sur le principe d'indemnité due dans le cas d'expropriation⁸².

6. La responsabilité pour dommages causés à la surface par les aéronefs supersoniques en vol et par leurs ondes de choc est aussi une responsabilité objective⁸³. Ce principe est reconnu par les législations nationales des différents pays, aussi bien par les législations spéciales que par les codes civils. A titre d'exemple on peut invoquer l'article L. 141-2 du Code français de l'aviation civile, lequel dispose que l'exploitant de l'aéronef est responsable de plein droit des dommages causés par les évolutions de l'aéronef ou des objets, qui s'en détacheraient — aux personnes et aux biens situés à la surface. Le même article prévoit que seulement par la preuve de la faute de la victime cette responsabilité peut être atténuée ou écartée (al. 2). Dans l'arrêt du 8 mai 1968, la Cour de Cassation a expliqué, que la responsabilité objective doit être retenue indépendamment de toute notion de faute, d'abus ou d'usage normal ou anormal; en même temps, la Cour de Cassation a ajouté:

«Peut être considéré comme ayant commis une faute de nature à exonérer la Compagnie aérienne de la responsabilité de plein droit [...] le tiers qui fait construire un immeuble à la proximité d'un aérodrome sans se renseigner auparavant sur les conditions d'exploitation contemporaines ou futures normalement prévisibles de l'aérodrome, sans dresser des plans afin de limiter, dans la mesure du possible, la gêne due aux bruits des avions, sans adopter à cette fin la meilleure orientation de l'immeuble, sans prévoir l'emploi des matériaux appropriés et de procédés d'isolation phonique afin de ramener l'intensité du bruit dans les ap-

⁸⁰ «Revue Française de Droit Aérien», 1968, p. 327. Cf. aussi le Conseil d'État le 10 janvier 1962, «Revue Générale de l'Air et de l'Espace», 1962, p. 73, et Cour de Cassation du 1^{er} juillet 1966, «Revue Française de Droit Aérien», 1966, p. 452, note E. G.

⁸¹ Mais, dans l'affaire Viens c. Aérodrome de Genève Cointrin la Cour d'Appel de Lyon a reconnu qu'aucun texte législatif ne punissait l'entrave ou la tentative d'entrave à la navigation aérienne («Revue Française de Droit Aérien», 1954, p. 453, note E. Georgiades).

⁸² STRAUSS, *op. cit.*, p. 262.

⁸³ Comme la responsabilité pour dommages causés par les aéronefs en général (cf. plus haut, p. 8).

partements au niveau sonore le plus proche de celui que pouvait supporter un homme normal»⁸⁴.

En Pologne, selon les articles 435 et 436 du Code civil, qui sont applicables dans ces cas, l'exploitant «d'un engin mécanique de communication, actionné par les forces de la nature, encourt la responsabilité du dommage causé à la personne ou aux biens de qui que ce soit», mais cette responsabilité, étant une responsabilité objective, n'existe pas, si le dommage est dû à un cas de force majeure ou est survenu exclusivement par la faute de la victime ou d'un tiers, dont le possesseur d'engin n'est pas responsable, ainsi que dans le cas où le dommage résulte du seul fait de survol accompli selon les règles de l'air (art. 72 al. 2 de la loi polonaise)⁸⁵.

7. Les législations nationales, spéciales ou générales, désignent l'exploitant de l'aéronef comme personne responsable des dommages à la surface, ce qui veut dire, en ce qui concerne les aéronefs supersoniques, des dommages résultant de leur vol et des ondes de choc. D'après la loi polonaise de 1962, la responsabilité en espèce est la responsabilité de l'exploitant d'un aéronef, c'est-à-dire de la personne, qui utilise l'aéronef au moment où le dommage a été causé, ainsi que de la personne, qui a autorisé une autre personne à l'utilisation de l'aéronef en réservant le droit de régler le vol. La loi comprend par la personne qui utilise l'aéronef aussi bien la personne qui utilise elle-même, que ses préposés. Le propriétaire est présumé d'être l'exploitant, tant qu'il n'a pas démontré qu'une autre personne a exploité l'aéronef. Est responsable aussi la personne qui utilise l'aéronef sans une autorisation. La loi prévoit aussi la responsabilité solidaire des personnes sus-mentionnées et des personnes qui, par leur faute, ont causé le dommage à la surface⁸⁶.

L'identification de la personne de l'exploitant d'un aéronef, qui par son vol ou par le passage du mur du son a causé un préjudice aux per-

⁸⁴ En outre, le Tribunal Administratif de Besançon dans son arrêt du 16 décembre 1960, Chauvey c. l'État, a exprimé l'opinion que «le vol à basse altitude et le franchissement du mur du son par des avions à réaction, dans certaines conditions, constitue une activité naturellement dangereuse [...] de nature à être génératrice de responsabilité, sans que la victime ait à établir l'existence d'une faute de service, et ensuite que cette responsabilité est susceptible d'être atténuée notamment par la faute ou le fait de la victime» («Revue Générale de l'Air», 1960, p. 365).

⁸⁵ J. RAJSKI conclut que dans ce cas la responsabilité de l'exploitant existe seulement si les règles de l'air ont été violées (*Basic Principles of Polish Air Law*, «Yearbook of Air and Space Law», 1966, p. 100):

⁸⁶ Article 72 al. 2 - 7. Uszyński souligne, à juste titre, la différence qui existe entre les dispositions de la loi spéciale et les dispositions du Code civil qui parle de la responsabilité du possesseur originaire ou du possesseur dérivé (*op. cit.*, p. 111).

sonnes ou aux biens à la surface, n'est pas facile: le dommage peut être causé au moment où l'aéronef survolant avec une vitesse supersonique se trouve déjà très loin du lieu du dommage. On soutient, du point de vue technique, que le bang supersonique provenant du passage du mur du son par «SST», à une hauteur de 60 000 pieds, devrait être ressenti à la surface au moment où l'aéronef sera déjà éloigné de 20 milles⁸⁷.

En réalité, ce sont jusqu'à présent les aéronefs militaires qui sont responsables des dommages résultant de leur vol ou de leur passage du mur du son. Il faudrait alors se demander, si une telle responsabilité incombe à l'exploitant. Au cas où une législation nationale évoquerait l'immunité de juridiction de l'autorité militaire, la réalisation de la responsabilité serait difficile, sinon impossible. C'est pour cette raison, que la tendance des législations et des jurisprudences nationales ne laisse aucun doute quant à la reconnaissance dans ces cas de la responsabilité pour dommages causés par les aéronefs militaires. En Pologne, la loi de 1962 dispose que ses articles 72 et 73 (sur la responsabilité des personnes exploitant les aéronefs pour dommages causés par leur mouvement) sont applicables aux aéronefs militaires et aux aéronefs affectés au service de douane et de l'ordre public (article 93)⁸⁸. Dans ce cas, comme l'article 72 contient un renvoi partiel au Code civil, il est nécessaire de noter que, d'après l'article 417 de ce dernier, le Fisc est responsable du dommage causé par un fonctionnaire d'État dans l'exécution de l'acte qui lui a été confié; en même temps, cet article dispose que sont fonctionnaires d'État aussi les soldats des forces armées.

8. Les règles juridiques en vigueur en Pologne concernent, en principe, les relations sans un élément étranger. Les dommages, causés par le bruit ou le bang des aéronefs polonais aux personnes de nationalité polonaise ou aux biens leur appartenant et à la surface du territoire polonais, seront toujours soumis au droit polonais et à la juridiction des autorités polonaises. Mais, il en est autrement, s'il y existe un élément étranger, ce qui peut être le cas où le dommage a été causé aux étrangers ou aux biens leur appartenant à la surface du territoire polonais, et où le dommage a été causé à l'étranger par un aéronef polonais.

Comme la Pologne n'est pas partie contractante ni à la Convention de Rome de 1933, ni à la Convention de Rome de 1952, qui contiennent

⁸⁷ ORTNER, *op. cit.*, p. 219.

⁸⁸ D'après l'article L. 110 - 2 du Code français de l'aviation civile, sont soumis à l'application des règles relatives à la responsabilité du propriétaire ou de l'exploitant — les aéronefs militaires et les aéronefs appartenant à l'État et exclusivement affectés à un service public.

les règles unifiées, c'est aux dispositions du droit international privé qu'il faut avoir recours.

Le problème du conflit des lois en matière de droit aérien a été discuté par l'Institut de Droit International, lequel, en 1963, adopta à l'unanimité une résolution prévoyant, que les dommages causés par l'aéronef aux tiers à la surface sont régis par la loi du lieu où ils ont été causés; la résolution ajoute que si les dommages ont été causés dans une région non soumise à une souveraineté étatique, la loi nationale de l'aéronef s'applique³⁹.

La loi polonaise du 31 mai 1962 sur le droit aérien s'approche, en général, de la résolution de l'Institut, lorsqu'elle stipule que les demandes, concernant l'indemnisation des dommages causés par l'utilisation des aéronefs aux personnes et aux biens qui se trouvent en dehors de cet aéronef, sont soumises à la loi de l'État, sur le territoire duquel s'est produit le fait générateur de l'obligation; si ce fait s'est produit dans une région non soumise à la souveraineté étatique, la loi du for s'applique (art. 11 al. 1^{er}).

Le principe de nationalité possède une priorité devant le principe territorial ou le principe de la loi du for, si les parties intéressées et les aéronefs, dont le différend concerne, possèdent la même nationalité; dans ce cas, c'est la loi de nationalité qui prévaut (art. 11 al. 2).

Dans les cas prévus par l'article 11 de la loi de 1962, la loi étrangère sera donc applicable par un tribunal polonais, si, par exemple, une personne de nationalité étrangère subit un dommage causé à l'étranger par le bruit ou le bang d'un aéronef supersonique polonais et présente sa demande aux autorités polonaises, qui reconnaissent leur compétence, ou si un tel dommage a été causé par un aéronef étranger de la nationalité possédée par la victime et si la victime s'adresse aux autorités polonaises, qui reconnaissent aussi dans ce cas leur compétence.

Bien entendu, les dispositions de l'article 11 de la loi de 1962 ne seront pas appliquées, si elles sont éliminées par la clause de l'ordre public contenue dans l'article 14 de la même loi; cet article stipule, que la loi étrangère peut être appliquée en Pologne seulement dans le cas, où elle n'est pas contraire aux principes fondamentaux de l'ordre juridique en vigueur dans cet État.

9. Des différents remèdes ont été proposés pour atténuer les conséquences nuisibles des vols effectués par les appareils supersoniques⁴⁰.

³⁹ «Annuaire de l'Institut de Droit International», Vol. II, 1963, p. 365.

⁴⁰ Les consignes suivantes de l'Armée de l'Air en France sont appliquées: les vols à vitesse supersonique en montée, en palier ou en léger piqué ne sont autorisés au-dessus du territoire qu'à partir d'une altitude de 8000 m; les vols à vitesse super-

En traitant ce problème, il est nécessaire de faire une distinction entre les propositions tendant à éviter les préjudices causés par le bruit d'un aéronef supersonique et, d'autre part, celles qui s'occupent des conséquences des ondes de choc.

Quant aux premières, elles visent les préjudices semblables à ceux qui résultent du bruit d'un aéronef quelconque, aussi bien supersonique qu'infrasonique. Dans des cas pareils, on peut parler des moteurs — réducteurs du bruit (plus ou moins silencieux), des éliminations des vols à basse altitude, etc.

Pour éviter les dommages causés par le bruit, on cherche des différentes solutions et, entre autres, des moyens techniques et juridiques déterminant, quelle est l'intensité du bruit produisant les dommages. A la Conférence internationale de I.A.T.A., en novembre 1966 à Londres, on a présenté du côté américain un papier s'occupant de ce problème ⁴¹. En cherchant des solutions satisfaisantes aux intérêts des personnes et de leurs biens se trouvant aux environs des aéroports et les intérêts des lignes aériennes américaines — ce papier s'occupe, en principe, du bruit causé pendant l'approche à l'atterrissage, pendant l'atterrissage et le décollage. L'auteur de ce document est d'avis que le nombre des personnes affectées sérieusement par le bruit dans les aéroports dépasse le chiffre de 100 000. Mesuré en db, le niveau de la pression du son produit par les moteurs Jet est de 140 - 170, tandis que ce niveau, pendant une conversation dans un appartement, est de 40 db et, dans une chambre très tranquille, de 20 db.

Ce document nous apprend que l'autorité de l'aéroport international de New York permet le décollage d'un aéronef sous condition qu'un tel décollage ne produise pas un bruit dépassant 112 db, mesurés des points indiqués sur un plan annexé. L'autorité de l'aéroport de Los Angeles, en pensant aux aéronefs supersoniques, a exprimé le vœu que le bruit ne dépasse pas 120 db, mesurés d'une distance de 1400 pieds en cas du décollage, et de 4000 pieds en cas d'approchement à l'atterrissage.

Quant aux autres propositions, elles ne sont applicables qu'aux aéronefs supersoniques. Il faut se rendre compte, que la largeur du cône des ondes de choc est grande et elle peut atteindre 50 milles ⁴². Le plus

sonique en piqué accentué ne sont effectués qu'au-dessus de la mer; en outre, dans toute la mesure compatible avec l'intérêt des missions les vols à MACH élevé s'effectuent sur des itinéraires judicieusement choisis (v. DESLANDES, *op. cit.*, p. 149 et s.).

⁴¹ *Regulation by Law of Aircraft Noise from the Viewpoint of United States Airlines* — by John E. STEPHEN.

⁴² Voir POURCELET, *op. cit.*, p. 152.

souvent on propose d'effectuer le passage du mur du son au-dessus des régions désertes ou de la mer, mais, en cherchant des solutions plus ou moins adéquates et, en même temps, réalisables, cette solution ne semble pas être justifiée. Le bang supersonique peut aussi bien causer des dommages à la surface de la mer (mer cotière ou pleine mer) aux biens (navires) et aux personnes (à bord) se trouvant dans une telle région. La même remarque peut être faite, si on pense aux surfaces des régions désertes, dans lesquelles l'homme peut se trouver aussi. Il faut remarquer, en même temps, que l'interdiction de passer le mur du son au-dessus des régions habitées peut être réalisable, si elle concerne les vols supersoniques intercontinentaux, dans lesquels on pourrait exiger que ce passage s'effectue au-dessus de la pleine mer. Mais, ce n'est pas tout: et les vols supersoniques ne dépassant pas un continent? et, spécialement, les vols supersoniques des avions militaires à courte distance? On voit donc que la proposition sus-mentionnée n'est pas adéquate, quoiqu'elle semble être réalisable.

On pourrait éviter, peut-être, les préjudices nuisibles causés par le bang supersonique en délimitant l'espace aérien et en interdisant ses couches inférieures aux évolutions des aéronefs pour passer le mur du son et pour effectuer des vols avec une vitesse égale ou supérieure à la vitesse du son.

Cette solution nous semble être la plus raisonnable, comme étant, en même temps, adéquate et réalisable. Ce but pourrait être atteint par les législations nationales spéciales. La recherche d'une convention internationale introduisant des règles uniformes⁴³ semble être aussi pleinement justifiée.

⁴³ Comme le propose E. GEORGIADIS, «Revue Française de Droit Aérien», 1967, p. 449.

Legal Forms of Specialization and Cooperation in Production within the CMEA

by HENRYK DE FIUMEL

I

One of the basic functions of the Council for Mutual Economic Assistance is cooperation "in the improvement of the international socialist division of labour through a coordination of plans for the development of the national economy, *specialization and cooperation* (italics added — *H.F.*) in production of member countries" (Art. III, para. 1/b/ of the Statute of the CMEA, version of 1962).¹

The further development of economic cooperation between the member countries is effected precisely through an increasingly effective specialization in production, in such forms as would be economically most advantageous to all participating states.²

As is known, the first steps in the field of specialization and cooperation in production were undertaken in the CMEA back in 1955. At the VIIth Session of the Council in Berlin recommendations were adopted on specialization in the production of 613 basic products of the engineering and other industries.³

Since that time substantial progress has been made in extending and deepening the process of specialization in production, which brought the member countries of the Council considerable economic benefits. Par-

¹ Rada Wzajemnej Pomocy Gospodarczej. Wybór materiałów i dokumentów [The Council for Mutual Economic Assistance. Selected Materials and Documents], Warszawa 1964, p. 193.

² Cf. Y. N. BELAYEV, *Sblizhenye urovney ekonomicheskogo razvitya sotsyalisticheskikh stran* [Narrowing the Differences Between the Levels of Economic Development of the Socialist Countries], Moskva 1967, p. 190.

³ Z. KEH, *Dorobek Komisji Maszynowej RWPG* [The Achievements of the Engineering Commission of the CMEA], "Życie Gospodarcze," No. 39, 25 September 1966, p. 4.

ticularly great benefits have been achieved in the rolling bearing and chemical apparatus industries. So far specialization has covered about 2000 varieties and types of machines and installations of which Polish industry specializes in the production of about 550 items. As regards rolling bearings, about 2000 types and sizes has been divided among the participating countries, Polish industry specializing in the production of 584 items.⁴

At a conference devoted to the problems of specialization and co-operation in production, organized by the Secretariat of the Council in Moscow in February 1966, specialists of a number of member countries of the Council pointed out that it was necessary to develop further and improve the process of specialization and cooperation in production within the CMEA. The participants in the conference were in principle in agreement that specialization should concentrate mainly on the production of machines and installations not produced hitherto and that more attention should be also given to the *cooperation* through a division of production tasks among states producing different parts of a given machine or installation, especially as regards relatively complex machines.⁵

Among the specialists of the CMEA member countries the conviction has recently gained ground (and this was also reflected at the above mentioned conference) that apart from improvement of the very substance of specialization, the improvement of the *legal* forms within which this process takes place, is an essential and very important condition of the effectiveness of specialization and cooperation in production.

II

We are concerned here with the multilateral specialization and co-operation in production within the CMEA, and not with bilateral specialization developing parallelly, which is not a direct result of arrangements made at the Council forum.

It is worth recalling that at the XXIXth meeting of the Executive Committee of the CMEA (May 1967), it was established that specialization was of a multilateral nature and the subject of interest of the CMEA organs "if *three or more* (*italics — H.F.*) countries express their interest

⁴ Cf. Z. KEH, *op. cit.*

⁵ Cf., for instance, statement by A. BODNAR (Poland), *Materialy konferentsyi po spetsyalizatsiyi i kooperirovanyu proizvodstva* [Materials of the Conference on Specialization and Cooperation in Production], Moskva 1966, vol. 2, pp. 52 - 53.

in the working out of proposals relating to specialization and cooperation in production.”⁶

As a result of understandings reached at the CMEA forum, organs of the Council have been adopting appropriate decisions in the form of *recommendations* addressed to particular member countries. The adoption of the form of recommendations in these matters has been motivated by the fact that under the CMEA Statute (Article IV, para. 1) “recommendations are adopted in matters of economic and scientific-technical cooperation,” and “economic cooperation” undoubtedly includes specialization and cooperation in production.

At the same time it should be pointed out that the recommendations adopted in this field (like most of the recommendations of the CMEA organs⁷ have been formulated, as a rule in a very general way. They have not been specifying the terms under which the member states concerned have to implement these recommendations.

What has been the further procedure then? In accordance with the Statute, the recommendations were being transmitted to the member states for consideration and comments. Within 60 days from the adoption of the recommendation by a given organ of the CMEA, member states have had to inform the Secretary of the Council about the results of their consideration.⁸ If, as a result of such consideration, member states endorse (accept) such recommendations, “they assume the character of reciprocal obligations between all the CMEA member countries concerned.”⁹

In the practice prevailing hitherto, the implementation of such obligations in respect to specialization consisted in account being taken of them in the trade exchange between the states concerned. And thus in trade agreements (both long-term ones as well as additional annual protocols) concluded between states and also in contracts signed on the basis of such agreements between foreign trade enterprises of the member countries provision has also been made for deliveries of specialized pro-

⁶ Annex 3 to the Minutes of the XXIXth meeting of the Executive Committee.

⁷ For more details on the nature of the CMEA recommendations cf. de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawnomiędzynarodowe* [The Council for Mutual Economic Assistance. International Law Study], Warszawa 1967, pp. 103-115.

⁸ Cf., e.g., Article 23 of the Rules of the Executive Committee of the CMEA, in: *Mnogostoronnoye ekonomicheskoye sotrudnichestvo sotsyalisticheskikh stran — sbornik dokumentov* [Multilateral Economic Cooperation among Socialist Countries. Collection of Documents], Moskva 1967, p. 70.

⁹ Principles of international specialization and cooperation in production in the engineering industry of the CMEA member countries (para. 27) — text in: *Rada Wzajemnej Pomocy Gospodarczej... [The Council for Mutual...]*, p. 237.

duction (marked by the letter "S") within the over-all trade exchange.

In this respect, at least as regards the specialization in the engineering industry, there exists even an explicit provision fixing a time-limit for the conclusion of an appropriate agreement. And thus para. 28 of the Principles of international specialization and cooperation in production in the engineering industry of the CMEA member countries provides that "in keeping with the relevant decisions of state organs on the implementation of specialization recommendations, agreements or contracts for reciprocal deliveries of specialized production shall be concluded between countries within a period of three months after the adoption of the specialization recommendation by the CMEA organs."¹⁰

At the specialization conference in Moscow (February 1966) representatives of a number of member states of the Council rightly emphasized that the trade agreements and contracts concluded hitherto within the CMEA failed not only to reflect fully the specialization obligations of states, but also — to cover obligations relating to the sphere of *production* itself, as well as a number of other issues going beyond the framework of agreements on trade exchange.¹¹

Consequently, the legal regulation of specialization and cooperation in production within the CMEA must be regarded not sufficiently developed.¹² This view was expressed by virtually all the specialists taking part in the Moscow specialization conference, with the exception of the Rumanian representatives according to whose view the mode practiced hitherto was satisfactory and did not call for any changes and improvements.¹³

It is, of course, understandable that full and effective implementation of specialization obligations by the member countries of CMEA is dependent, above all, upon the most appropriate selection of their substance, which would bring the greatest possible benefits to all states concerned.

Nonetheless, the application of the most adequate legal forms of the specialization and cooperation in production within the CMEA is undoubtedly also an essential condition for its effectiveness.

¹⁰ *Ibid.*, pp. 237 - 238.

¹¹ Cf. *Materialy... [Materials...]*, vol. I., p. 279.

¹² Cf. O. BOGOMOLOV, *Nekotorye problemy spetsyalizatsyi i kooperirovaniya proizvodstva mezhdru stranami SEV [Some Problems of Specialization and Cooperation in Production Between the CMEA Countries]*, "Mirovaya Ekonomika i Mezhdunarodnye Otnosheniya," 1967, No. 5, pp. 80 - 81.

¹³ *Materialy... [Materials...]*, vol. I., pp. 61, 196.

III

The recognition of a need for *special agreements* regulating those questions is now fairly wide spread.¹⁴

It should be recalled that at its XVIIIth Session in 1963, the Council stated that the work in the field of specialization and cooperation in production could be regarded as completed when obligations of a given state arising from recommendations of the CMEA organs on specialization were taken account of in current and long-term national planning and were reflected in bilateral and multilateral agreements and contracts, concluded for a period of several years, determining the obligations of states-producers as well as of states-recipients of the specialized production.¹⁵

The basic argument here is the fact that specialization and cooperation in production is, a question the essence of which lies in the sphere of *production*. Hence it is necessary to determine as accurately and comprehensively as possible the reciprocal obligations of states in this very field; and all these obligations ought to be covered by a special legal form, that is by specialization agreements. These agreements would constitute an *intermediate* link between the recommendation of the CMEA organ and the agreement on reciprocal commodity exchange (or would possibly cover also exchange of specialized production).

Even in the past, as we have pointed out with regard to all the Council's recommendations,¹⁶ the acceptance by member states of a recommendation formulated in a very general way could be interpreted as an *obligation* on the part of those states to *conclude* appropriate international agreements which would specify the obligations arising from that recommendation and make possible their implementation in practice.

This, of course, applies also in the first place to a specific category of recommendations of the CMEA, that is, to recommendations on specialization and cooperation in production.

At the 1966 Moscow conference, *Hungarian* specialists clearly emphasized that recommendations on specialization in production "ought to signify obligations on the part of the states accepting those recommendations to instruct their economic organs or organizations to enter

¹⁴ Cf. *Materialy... [Materials...]*, vol. 1., pp. 323 - 325, 327, 329; M. BOGUSLAVSKY, *Pravovye formy obezpecheniya mezhdunarodnoy spetsyalizatsyi i kooperirovaniya proizvodstva stran-chlenov SEV [Legal Forms of Securing International Specialization and Cooperation in Production of the CMEA Member Countries]*, "Sovetskoye Gosudarstvo i Pravo," 1966, No. 8, p. 6.

¹⁵ BOGOMOLOV, *op. cit.*, p. 80.

¹⁶ Cf. de FIUMEL, *op. cit.*, p. 107.

into negotiations with a view to concluding an agreement on specialization in production.”¹⁷

In this sense the very acceptance by a given member state of a specialization recommendation would not yet amount to an obligation to carry out the substance of the recommendation, but only to an obligation to conclude an appropriate agreement which would specify all the conditions for the implementation of the specialization obligations.

In this context it seems understandable that it is necessary at the same time to set some time-limit for the conclusion of such agreements, because the present three months limit relates, as we have seen, to agreements on the reciprocal exchange of specialized production, that is to say to the final stage of the whole process and not to agreements specifying the details of the specialized production itself.

IV

One of the essential and at once controversial issues connected with specialization agreements is the question of the parties to those agreements; the particular point here is whether these are to be inter-state (inter-governmental or inter-ministerial) agreements or else, contracts entered into directly by producers, that is industrial enterprises or their associations, or perhaps both? Moreover, the question arises whether these are to be state organs and enterprises representing the sphere of production alone (that is industrial ministries and production enterprises) or whether these agreements are at the same time to be signed also by foreign trade units (ministries of foreign trade and foreign trade agencies)?

In this respect specialists of the CMEA member countries express different opinions. And thus, at the 1966 Moscow conference the *Bulgarian* specialists expressed the view that the question of specialization is one belonging to interstate relations and cannot be reduced to relations between particular enterprises. Therefore, agreements on specialization must have the character of inter-state agreements. This does not, of course, exclude the purposefulness of parallel contacts directly between production enterprises with a view to discussing all details relating to the production of particular goods.¹⁸

Specialists of the remaining member countries represented generally the view that a certain flexibility was necessary here and that, depending

¹⁷ *Materialy...* [*Materials...*], vol. 1., pp. 19, 184.

¹⁸ *Ibid.*, pp. 16, 44, 323.

on the system of management of the national economy prevailing in a given state or on the object of specialization, both inter-state agreements as well as contracts concluded between individual production enterprises might be applicable.

And thus the *Polish* specialists pointed out that inter-state agreements could be concluded as regards particularly important specialized products, while in respect of goods which are not of such great importance to the partners, contracts could be concluded directly between the enterprises concerned.¹⁹

In the opinion of the *Hungarian* specialists a compromise is possible between the view advocating the inter-state level and that giving preference to the direct contracts between enterprises. And notably: such organs ought to act as contracting parties, which have appropriate competences under the regulations in force in the given state; consequently, in one country this could be a state organ and in another — an economic organization. As for the Hungarian People's Republic, this would be in most cases economic organizations. However, as regards particularly important products involving considerable investment outlays, state organs might also act as parties. It was the view of the Hungarian specialists that even in the case of the conclusion of a contract between economic organizations, the state might, with the consent of both parties, take upon itself the obligation with regard to the implementation of the specialization undertakings agreed upon.²⁰

According to the *Czechoslovak* specialists, the main emphasis should be placed on specialization agreements concluded between the economic organizations directly involved in the production and delivery of specialized goods.²¹ However, before that appropriate international agreements should be concluded.²²

Specialists of the *German Democratic Republic* emphasized that specialization agreements ought to be concluded between the state organs which directly fulfilled the economic tasks and bore full responsibility for their execution.²³

In the view of the *Soviet* specialists, long-term, inter-state agreements on specialization and cooperation in production ought to be concluded, since specialization obligations are of an inter-state character. Such agreements would be concluded at government or ministerial level. Pursuant to those agreements and in order to make them more specific,

¹⁹ *Ibid.*, pp. 160 - 161.

²⁰ *Ibid.*, pp. 183 - 185.

²¹ *Ibid.*, p. 329.

²² *Ibid.*, pp. 79 - 80.

²³ *Ibid.*, p. 325.

agreements between economic organizations (associations of enterprises, enterprises) would be concluded. Another possibility envisages that, pursuant to an inter-governmental agreement, a contract would be concluded to which a ministry or association and a foreign trade agency would be parties at the same time.²⁴

Surely, one can agree that this problem cannot be dealt with in a schematic way, and that a certain flexibility is necessary. There is no doubt, nonetheless, that specialization and cooperation in production between the CMEA member countries is a question so essential for their economies that it must be reflected in appropriate agreements of an inter-state character. It seems, therefore, that the appropriate agreements should be concluded between the governments of member states to stress the general economic importance of the specialization in production for particular states.

As has rightly been pointed out, only agreements concluded between states and not between enterprises can guarantee a successful implementation of measures intended to ensure the all-sided development of national economy of a given country.²⁵

It seems that such agreements (i.e. inter-governmental) should be the *rule* with respect to the specialization and cooperation in production and in any case with respect to products of great importance to the national economies of the member states concerned.²⁶

It does not seem, however that such agreements are to be the only legal form with regard to obligations in the field of specialization. Surely, account should be taken, above all, of the nature of the *object of specialization*. E.g. in the field of final products it does not seem necessary to go down to production units and to conclude appropriate agreements between them. Since the entire product (machine, installation) is manufactured in one country the need does not arise for direct contacts between the production units of the two countries. That is why an inter-governmental, or an inter-ministerial, agreement may be recognized as the only and sufficient form of mutual relations in this field.

However, in a number of cases specialization will consist in *cooperation* in the production of various parts of a given machine or installation, and this form of specialization will increasingly develop in the future. In this kind of specialization, apart from the need to conclude inter-state agreements regulating basic problems, it would seem purposeful to con-

²⁴ *Ibid.*, pp. 136 - 137, 327 - 328.

²⁵ *Ibid.*, p. 44.

²⁶ *Ibid.*, pp. 20, 161, 185.

clude, as if pursuant to such basic agreements, compacts²⁷ between immediate producers, that is industrial associations or production enterprises. Such compacts seem essential in as much as the effectiveness of such cooperation is, undoubtedly, dependent upon a very close cooperation between the said enterprises.²⁸

A possibility to have such compacts depends, of course, on the powers of the production units to enter into direct contractual relations with production enterprises of another socialist state. It should be pointed out that the reforms of the system of management of the national economy recently introduced in the socialist countries provide in this respect real possibilities for a number of key production enterprises.

It should also be emphasized that such compacts between production enterprises of two socialist states are, naturally, not agreements in the sense of public international law, but civil law contracts, just like those for delivery of commodities concluded between foreign trade enterprises of the CMEA member countries.

Another problem arising in connection with compacts entered into at the enterprise level is the question whether production units alone should appear as parties to it or whether they should appear jointly with foreign trade enterprises.

Among the specialists of the CMEA member countries, opinion is widespread enough that industrial units and foreign trade enterprises should act here concurrently.²⁹ It is also a known fact that there are already precedents for this type of compacts on specialization.³⁰

While not denying the purposefulness of such a system, it seems, however, that other solutions are also possible. E.g. only production units (industrial associations, production establishments) might be parties to compacts on specialization relating to production obligations alone, while foreign trade organizations — on the other hand — would conclude contracts for the delivery of the specialized production.

Attention should be drawn to the fact that Annex 3 to the minutes of the XXIXth meeting of the CMEA Executive Committee (May 1967) explicitly states in para. 5.1, sub-paragraph 2, that "an agreement (understanding) relating to specialization and cooperation in production *does not replace* a contract for deliveries." (Italics — H.F.)

²⁷ The question of the proper name for this kind of agreement is, of course, debatable, but it would surely not be advisable to use in this case the term "contract," because this name is commonly used for agreements on commodity deliveries, concluded between foreign trade enterprises of socialist countries.

²⁸ *Materialy... [Materials...]*, vol. 2, p. 12.

²⁹ *Ibid.*, vol. 1, pp. 79, 137, 161, 186.

³⁰ Although, as it seems, these are mainly compacts relating to *bilateral* and

Consequently, an agreement on specialization cannot cover all the questions relating to the exchange of specialized production, that is all the questions which are normally the subject of contracts concluded between foreign trade enterprises.

In connection with the question of deliveries of specialized production yet another problem arises. In accordance with prevailing practice, specialized products have been covered by *general* trade agreements concluded between two CMEA member states and by contracts concluded between the foreign trade enterprises of those states.

In both cases the agreements have not covered specialized production alone, but also other commodity items not resulting from specialization arrangements. In accordance with prevailing practice, specialized products have been marked by the letter "S." It seems advisable that deliveries of specialized production should be dealt with in *separate* agreements both at the foreign trade ministry level as well as at the foreign trade enterprise level. Such separate agreements on deliveries of specialized production would emphasize the importance of specialization itself and could, moreover, help in ensuring more effective and more easily controllable deliveries of specialized production, because the specialized commodities would not be "diluted" in the mass of other commodities.

V

It seems that the substance of a specialization agreement depends to a large extent on who is to be a contracting party as well as on the period for which it has been concluded. The substance of the agreement also depends on whether it relates to specialization in final products or to cooperation in the production of the component parts of a given product.

Generally speaking, such an agreement should be of a comprehensive character and should cover, first of all, such questions which relate to the sphere of specialized production.³¹

By way of example, mention could be made of the following data which should be included into agreements on specialization:

1. names of the contracting parties (designation of the subjects of the agreement);
2. name of the specialized production, with an indication of the specializing party;

not to multilateral specialization (agreed upon at the CMEA forum).

³¹ Cf. BOGUSLAVSKY, *op. cit.*, pp. 9 - 10.

3. dates on which production of the specialized goods is to begin and dates on which production in non-specializing countries is to cease;
4. all questions relating to cooperation in production;
5. size and dates of deliveries of specialized production — breakdown by assortments and years;
6. assortment and technical parameters of specialized production;
7. scientific-technical cooperation and in particular the procedure and terms of transmitting technical documentation, of utilizing patents, licences, trade marks, and so on;
8. conditions relating to technical service, spare parts, assemblage and so on;
9. prices for specialized products or the mode of fixing them;
10. sanctions for non-fulfilment of accepted obligations;
11. method of settling possible disputes;
12. period of validity of the specialization agreement;
13. conditions for its entry into force.³²

VI

The question of *responsibility* of the CMEA member states for obligations arising from recommendations of the Council's organs in general, is becoming more and more acute and calls for regulation.³³ This question is of particular importance as regards obligations arising in the field of specialization and cooperation in production.

The very principle of responsibility has been explicitly emphasized in para. 18 of the Principles of international specialization and cooperation in production in the engineering industry of the CMEA member countries which stipulates that: "International specialization and cooperation in production in the engineering industry implies the *responsibility* (italics — H.F.) of countries for the fulfilment of obligations undertaken by them in the *field of specialization* and reciprocal deliveries of specialized production of the engineering industry."³⁴

The Principles do not specify, however, what this responsibility should consist in. In the practice of the CMEA countries responsibility has hitherto rested only with foreign trade enterprises for the non-fulfilment of the terms of contracts for the delivery of goods. It is thus a responsibility not of the state as such but of a state enterprise which

³² Cf. *Materialy... [Materials...]*, vol. I, pp. 279 - 280.

³³ Cf. on this matter: de FIUMEL, *op. cit.*, pp. 114 - 118.

³⁴ *Rada Wzajemnej... [The Council for Mutual...]*, p. 234.

is a legal person and constitutes a certain independent economic unit. This responsibility has thus the character of a civil law responsibility.

Apart from that, this responsibility is limited as to the object of the agreement, because it arises only as a result of the failure to effect of the *delivery of goods*, that is failure to implement the final stage of the international socialist division of labour. However, such a regulation of the problem, at least with regard to obligations in the field of specialization and cooperation in production, does not seem to be satisfactory. This problem has already been dealt with in socialist literature⁸⁵ and it was also fairly widely discussed at the 1966 Moscow specialization conference.⁸⁶

There is a more or less general consensus of opinion that sanctions for failure to fulfil a contract on deliveries of specialized production ought to be much higher than those provided for in the General Conditions of Deliveries within the CMEA, 1958 (penalty not exceeding 8 per cent). This, however, would be anyway limited to the deliveries of specialized production and would not cover the responsibility for the non-fulfilment of obligations relating to specialization itself. The question arises therefore whether even higher penalties for non-delivery would provide a satisfactory solution to the problem as a whole.

Since, as we have stated above, the problem of specialization and cooperation in production within the CMEA is, above all, an inter-state problem, it seems advisable to consider possibilities for establishing the principle of responsibility of the *state as such* for the non-fulfilment of obligations in the field of production it has voluntarily undertaken.

Naturally, this is a difficult and debatable problem. At the Moscow specialization conference some of its participants (for instance from Czechoslovakia) emphasized that *economic organizations* alone could and ought to bear financial responsibility for all accepted obligations with regard to specialization in production, and that material sanctions could be applied to them alone.⁸⁷

Taking up this problem M. M. Boguslavsky says: "We can now speak, it seems, of determining in intergovernmental agreements only the mode and conditions of the responsibility of economic organizations and *not* of establishing the material responsibility of *states* in the field of specialization"⁸⁸ (*italics — H.F.*). In the writer's view, the question looks dif-

⁸⁵ Cf. de FIUMEL, *op. cit.*, p. 115 ff.; BOGUSLAVSKY, *op. cit.*, pp. 10-11; O. BOGOMOLOV, *Aktualnye voprosy sotrudnichestva* [Current Questions of Cooperation], "Ekonomicheskaya Gazeta," No. 13, 31 March 1965, p. 41.

⁸⁶ *Materialy...* [Materials...], vol. I, pp. 57, 82, 139-140, vol. II, p. 43.

⁸⁷ *Materialy...* [Materials...], vol. I, p. 329.

⁸⁸ BOGUSLAVSKY, *op. cit.*, p. 10.

ferent as regards responsibility of economic and foreign trade organizations. These organizations can bear their own material responsibility for non-fulfilment of obligations undertaken by them. Thus, for instance, provision can be made here for responsibility for failure to fulfil obligations as regards cessation of production of specified products or a reduction in prices can be provided for in the case of low quality production, and so on. Penalties might also be envisaged for failure to deliver all the specialized products which were to be produced to meet the needs of other states.³⁹

However, even if we accept only the possibility of responsibility borne by those economic units which conclude a specialization understanding of a civil law character, there still remains open the question of responsibility which is to be borne, alongside foreign trade enterprises, also by *industrial* enterprises (or their associations) in the case where such understanding has been concluded also on their behalf.

Some authors propose that industrial enterprises, too, bear responsibility for the non-implementation of an agreement in the form of adequately high contractual penalties paid through foreign trade enterprises.⁴⁰

It seems that, irrespective of the question of the responsibility of enterprises — both foreign trade and industrial — it would seem reasonable to introduce also a principle of financial liability of the state as such for the non-fulfilment of the substantive obligations with regard to specialization and cooperation in production specified in an intergovernmental agreement concluded between the CMEA member states concerned.

Nothing, it seems, stands in the way for the CMEA member states to agree voluntarily upon such responsibility on a reciprocal basis. It should also be pointed out that the principles regarding the preparation, conclusion and implementation of agreements on specialization and cooperation in production, established at the XXIXth meeting of the CMEA Executive Committee in 1967 (already quoted earlier), envisage in para. 5 that as parties to specialization agreements should appear such national organs or economic institutions which "are in position to take up the responsibility for their implementation." There seems to be no doubt that such responsibility can be undertaken particularly by a state through the intermediary of its own organ.

³⁹ BOGUSLAVSKY, *op. cit.*, pp. 10 - 11.

⁴⁰ Cf. S. GIERCZAK, *Uwagi o porozumieniach specjalizacyjnych* [Remarks on Specialization Agreements], "Prawo w Handlu Zagranicznym," 1967, No. 17, pp. 15, 19.

VII

The question of responsibility is closely linked with that of the procedure for settling *disputes* which may arise in this connection between the parties to an agreement on specialization.

And here again prevailing practice knows only the procedure of settling disputes between foreign trade enterprises. Such disputes, arising from the non-fulfilment of contracts for reciprocal deliveries of goods, are being settled by way of national arbitration provided by the chambers of foreign trade in the CMEA member countries.⁴¹ This arbitration thus relates only to disputes arising from foreign trade and only in the relations between enterprises.

Is such procedure sufficient also with regard to disputes which may arise in the case of non-fulfilment of specialization obligations?

Some specialists answer this question in the affirmative.⁴² However, a different view has also been expressed, particularly by the Polish specialists at the Moscow specialization conference who proposed an *international* arbitration for settling disputes arising from specialization obligations.⁴³ This would probably be an arbitration court run jointly by the chambers of trade of the CMEA member states. Such a court would keep a panel of arbitrators composed of citizens of all the member states of CMEA.⁴⁴

It thus seems that the existing procedure for the settlement of disputes arising from specialization and cooperation in production must, in any case, be recognized as insufficient. Proposals advanced in the literature include, i.a. a two-phase procedure: first, conciliation between the partners with the possible participation of their superior units and second — recourse to arbitration if that first stage does not bring about positive results.⁴⁵

Just as we have stated that in the field of specialization and cooperation in production states as such ought to bear the responsibility, it

⁴¹ Cf. J. JAKUBOWSKI, *Z problematyki rozstrzygania sporów wynikających z handlu między krajami członkowskimi RWP* [Some Problems Relating to the Settlement of Disputes Arising from Trade Between the Member Countries], "Palestra," 1966, Nos 11, 12; 1967, No. 1.

⁴² Cf. *Materialy...* [Materials...], vol. I, p. 329.

⁴³ *Ibid.*, pp. 57, 326.

⁴⁴ Cf. JAKUBOWSKI, *op. cit.*, 1967, No. 1, p. 63. This writer postulates (incidentally not in connection with specialization in production) the setting up of an international arbitration court of private law for the settling of disputes between enterprises on the one hand and on the other, of a court of public international law as a CMEA court for settling inter-state disputes.

⁴⁵ Cf. GIERCZAK, *op. cit.*, p. 20.

similarly seems possible and purposeful to set up a procedure for the settlement of possible disputes in this field between the Council's member states. This could be effected by means of international, inter-state arbitration, or before a special court as a CMEA organ. Such a court, being a permanent organ of the Council, would consist of judges coming from the particular member countries and would be competent to settle all disputes between member countries arising in connection with the implementation of recommendations of the CMEA organs in general and in particular also of recommendations in the field of specialization and cooperation in production.⁴⁶

In both cases states would act as parties to the dispute, and the subject of the dispute would, of course, relate to the substance of the obligations contained in an inter-state agreement on specialization.

Naturally, these are proposals *de lege ferenda* and it is hard to foresee to what extent and at what time they can be put into effect. It seems, nonetheless, that the problem itself will become more and more pressing as the process of specialization in production within the CMEA develops and as, consequently, the number of specialization agreements grows.

⁴⁶ Cf. de FIUMEL, *op. cit.*, p. 118; JAKUBOWSKI, *op. cit.*, p. 63.

La compétence des tribunaux dans le droit polonais de procédure civile internationale

par EUSTACHY WIERZBOWSKI

Introduction

Le principe de souveraineté implique le droit de chaque État à fixer librement les formes et le champ d'activité de ses tribunaux et d'autres organes, ainsi que les règles de procédure à suivre devant ces tribunaux ou organes.

Ces règles ne fonctionnent que sur le territoire de l'État qui les a instituées. Cette restriction au fonctionnement des règles de procédure dans l'espace, restriction résultant du principe de territorialité, reste en relation avec la compétence exclusive des organes de l'État d'accomplir sur le territoire de cet État des actes officiels. La règle concerne, bien entendu, la compétence et les actes des tribunaux.

Il n'en reste pas moins que dans le monde contemporain les relations internationales et l'échange des biens ont atteint un degré de développement tel que les différents États doivent, dans leurs relations mutuelles, tenir de plus en plus compte du principe de la coexistence pacifique, et notamment du principe du respect de leurs intérêts respectifs. Ce principe implique, en particulier, la nécessité de respecter la compétence des autorités des États étrangers, donc de la juridiction des tribunaux et de la compétence d'autres organes de ces États. Le respect mutuel des compétences a pour but d'éviter les conflits de juridictions, dans l'intérêt des particuliers et de l'organisation interne des États. Prenant en considération ce principe, la République Populaire de Pologne a réglé, elle aussi, la juridiction de ses tribunaux dans les conventions internationales et dans la législation interne qui tient compte des intérêts d'autres États souverains en même temps que de l'intérêt national. Ce principe se reflète dans les dispositions des articles 1097 - 1116 du Code de procédure civile polonais qui règlent la compétence des tribunaux polonais. Les dispositions en question déterminent, à l'aide des

points de rattachement appropriés, les différentes catégories d'affaires qui peuvent se dérouler devant les tribunaux polonais et qui se rattachent par leur objet ou par la personne qui y participe au territoire de la République Populaire de Pologne. D'autre part, le Code met en relief ce principe en établissant la compétence exclusive des tribunaux polonais seulement dans des cas peu nombreux et les plus justifiés, c'est-à-dire lorsqu'il s'agit de trancher des questions personnelles d'un ressortissant polonais ou bien des questions relatives à un immeuble situé en Pologne.

Le respect de la juridiction des tribunaux et de la compétence des organes étrangers, de même que la fixation de la juridiction des tribunaux nationaux, doit prendre encore en considération un autre aspect, fort important, des relations internationales, qui consiste à assurer la reconnaissance à l'étranger de l'efficacité des décisions judiciaires et d'autres actes officiels rendus dans le cadre de la compétence nationale. Pour cette raison, le règle de la juridiction exclusive doit être bien pesée par le législateur, de manière à ne pas susciter des conflits de juridictions qui empêchent la reconnaissance des décisions judiciaires polonaises par les tribunaux étrangers. Conformément à ce principe, le Code de procédure civile polonais non seulement reconnaît expressément la juridiction des tribunaux étrangers (art. 1145 § 2 et art. 1146 § 2), mais la fait reconnaître encore comme juridiction exclusive (art. 1146 § 1 p. 2 et § 3)¹.

I. La notion et la fonction de la juridiction nationale (Compétence internationale)

Dans toute affaire civile où entre en jeu un élément étranger, le tribunal considère en premier lieu la question de savoir si dans cette affaire existe un point de rattachement à l'État polonais, justifiant la compétence du tribunal de connaître de cette affaire et de la trancher. Le Code de procédure civile qualifie cette compétence de *juridiction nationale*, ce qui équivaut à la notion de *compétence internationale* selon la terminologie utilisée dans la science juridique des pays occidentaux.

La doctrine² entend par cette notion l'étendue de la force obligatoire de la procédure civile polonaise eu égard au genre de l'affaire. Cela veut

¹ Cf. J. JODŁOWSKI, *Zasady przewodnie polskiego międzynarodowego prawa procesowego cywilnego* [Les principes directeurs du droit international privé polonais en matière de procédure civile], dans: *Księga pamiątkowa ku czci prof. dra Kamila Stęfki*, Warszawa-Wrocław 1967, pp. 137 - 139.

² Cf. H. TRAMMER, *Zarys problematyki międzynarodowego procesu cywilnego państw kapitalistycznych* [Précis de la problématique du procès civil international dans les pays capitalistes], Warszawa 1956, p. 16; W. BRONIEWICZ, *Jurysdykcja kra-*

dire que l'État doit préciser par la loi ou par une convention internationale si les tribunaux polonais sont appelés à exercer la justice, dans quelles situations, dans quelle mesure et dans quelles affaires civiles ils peuvent le faire.

Les arrêts de la Cour Suprême soulignent expressément que la juridiction nationale est un attribut de l'État en tant que détenteur du pouvoir souverain d'examiner et de trancher les affaires civiles³. Cet attribut est mis en oeuvre par les tribunaux en vertu d'une loi qui leur confie l'exercice du pouvoir étatique, loi définissant les limites dans lesquelles ces tribunaux peuvent exercer la justice et établissant qui et dans quelles affaires est soumis au pouvoir juridictionnel de l'État. Les dispositions de la loi établissant l'étendue de la force obligatoire de la procédure civile polonaise ont donc le caractère des dispositions impératives adressées aussi bien aux tribunaux qu'aux parties et aux participants à la procédure. Comme les relations internationales entrent ici en jeu, ces dispositions sont absolument obligatoires et ne sont pas susceptibles d'interprétation extensive. Lorsque les tribunaux polonais ne sont pas compétents dans une affaire donnée, le droit ou le rapport juridique litigieux ne peuvent par être poursuivis en Pologne⁴. Les traits caractéristiques susmentionnés de la notion de la juridiction nationale montrent que le législateur la considère comme une condition distincte absolue du procès⁵.

La source des règles concernant la juridiction nationale est constituée, outre la législation interne, par les dispositions des conventions inter-

jowa w postępowaniu cywilnym według kpc [La juridiction nationale dans la procédure civile d'après le C.p.c.], «Palestra», 1966, n° 2, p. 32; J. RAJSKI, *Niektóre zagadnienia kodyfikacji prawa międzynarodowego postępowania cywilnego* [Quelques problèmes de la codification du droit international en matière de procédure civile], «Państwo i Prawo» [abrév. PiP], 1961, n° 8/9, p. 302 et *Jurysdykcja krajowa a właściwość sądów w sprawach cywilnych* [La juridiction nationale et la compétence des tribunaux en matière civile], PiP, 1961, n° 4/5, p. 688; E. WENGEREK, *Jurysdykcja krajowa w sprawach cywilnych w świetle kodeksu postępowania cywilnego* [La juridiction nationale en matière civile d'après le Code de procédure civile], dans: *Księga pamiątkowa ku czci prof. dra Kamila Stefki*, p. 403; W. LUDWICZAK qualifie la juridiction d'un «droit et en même temps d'un devoir de l'État souverain à exercer la protection légale», *Międzynarodowe prawo prywatne* [Droit international privé], Warszawa 1967, p. 106.

³ Cf. résolution de la Cour Suprême du 12 mars 1957, I Co. 43/56 — OSN 1957, texte 91; arrêt de la Cour Suprême du 22 février 1966, III Cr 395/65 — OSN 1966, texte 197.

⁴ Il faut cependant attirer l'attention sur ce que l'«incompétence reconnue par erreur des tribunaux polonais est une atteinte aux intérêts de la R.P.P.» [souligné par l'auteur]. Cf. arrêt de la Cour Suprême du 22 septembre 1966, III CR 150/65, PiP, 1967, n° 3.

⁵ Cf. BRONIEWICZ, *op. cit.*, p. 38.

nationales fixant la juridiction respective des tribunaux des États signataires pour les catégories déterminées d'affaires.

Ces conventions déterminent la juridiction dans les dispositions qui emploient l'expression *compétence des tribunaux*, dans le sens de la délimitation des compétences des organes de l'administration de la justice des États signataires de connaître de différentes catégories d'affaires en matière civile. Cela ne concerne pas évidemment la compétence territoriale des tribunaux de ces États, qui est réglée par leur législation interne respective⁶.

Les dispositions des conventions en question ne prévoient pas toujours la juridiction alternative (subsidaire) pour les différentes situations, et par conséquent elles établissent la juridiction exclusive lorsqu'elles ont à fixer quel est l'État dont les tribunaux sont compétents de trancher des affaires déterminées⁷.

En ce qui concerne le rapport entre les règles conventionnelles et les règles internes en matière de compétence, conformément à l'article 1096 du C.p.c., les dispositions de convention internationale ont la priorité sur les dispositions nationales. Cependant, lorsque la convention internationale ne prévoit pas de règles de juridiction pour une certaine catégorie d'affaires, les dispositions sur la compétence nationale fixées par la législation interne sont applicables.

Les dispositions des conventions internationales dont la Pologne fait partie et concernant la juridiction, ainsi que les dispositions sur la juridiction nationale que contient le Code de procédure civile, de même que l'article 7 de la loi du 28 avril 1952 concernant le travail à bord des navires de commerce polonais dans la navigation internationale, constituent les règles polonaises de solution des conflits de juridictions. Il s'agit des règles de conflit, parce que bien que nationales — car instituées par la volonté de l'État polonais — elles ont une fonction internationale. En effet, en tant qu'une partie composante du droit international privé polonais en matière de procédure civile, elles délimitent la zone d'influence de l'administration polonaise de la justice de la zone d'influence de l'administration de la justice d'autres États. Autrement dit, elles délimitent la portée respective de la jurisprudence des tribunaux polonais et de ceux d'autres États, en précisant quelles affaires peuvent

⁶ Cf. L. A. LUNC, *Meždunarodnyj graždanskij proces*, Moskva 1966, p. 117.

⁷ Cf. J. JODŁOWSKI, *Nowe przepisy kpc z zakresu międzynarodowego postępowania cywilnego* [Les nouvelles dispositions du C.p.c. en matière de procédure civile internationale], Warszawa 1962, p. 32. Le même point de vue a été adopté par la Cour Suprême dans son arrêt du 23 août 1966, II CZ 101/66, avec note positive de J. JODŁOWSKI, PiP 1968, pp. 4 - 5.

être examinées par les tribunaux polonais et quelles autres peuvent l'être par les tribunaux étrangers (ainsi l'art. 1102 § 2 du C.p.c. écarte expressément la compétence des tribunaux polonais).

Les règles délimitant la compétence des tribunaux n'ont pas pour objet de fixer la compétence d'un seul État une fois pour toutes, mais, tout au contraire — elles fixent en règle générale la compétence facultative des tribunaux de plusieurs États de connaître d'une affaire donnée, et c'est à titre exceptionnel qu'elles déterminent la compétence exclusive d'un État. La compétence des tribunaux de différents États est indiquée de telle manière qu'on détermine les points de rattachement qui peuvent être plusieurs pour une catégorie donnée d'affaires. Par conséquent, à côté du tribunal polonais, les tribunaux d'un ou de plusieurs autres États indiqués par les points de rattachement équivalents peuvent être compétents pour trancher une affaire donnée⁸.

Ainsi se trouve réalisé le principe de la protection légale des ressortissants étrangers qui peuvent s'adresser soit à un tribunal polonais, soit à un tribunal étranger, le jugement dans ce second cas pouvant être reconnu ou exécuté en Pologne.

II. Les limites de la compétence nationale

D'après le Code de procédure civile, la compétence des tribunaux polonais en ce qui concerne les justiciables s'étend à tous les ressortissants polonais résidant ou domiciliés en Pologne ou à l'étranger, aux apatrides domiciliés en Pologne et, en principe, à toutes les autres personnes résidant ou domiciliées en Pologne. En ce qui concerne les apatrides, qui ne font que résider en Pologne, et les étrangers résidant ou domiciliés à l'étranger, les dispositions du Code de procédure civile, en fixant la compétence nationale pour les différentes catégories d'affaires, leur permettent d'agir devant les tribunaux polonais en qualité de demandeurs ou de participants à la procédure. De cette manière, elles leur garantissent la protection légale et, d'autre part, permettent aux ressortissants polonais et aux autres personnes résidant ou domiciliées en Pologne de citer de tels étrangers ou apatrides devant le tribunal polonais, à condition, bien entendu, que la compétence de ce tribunal soit prévue pour l'affaire donnée.

Du point de vue des conditions du procès, il y a lieu de distinguer entre l'existence de la compétence nationale et la recevabilité de la voie judiciaire. La compétence nationale est une condition distincte du procès, indépendante de la recevabilité de la voie judiciaire⁹. La question de

⁸ Cf. TRAMMER, *op. cit.*, p. 16; JODŁOWSKI, *Zasady przewodnie...*, p. 138.

⁹ Cf. W. BRONIEWICZ, *op. cit.*, p. 38.

la recevabilité de la voie judiciaire n'intéresse que la délimitation interne des compétences de différents organes de l'État: d'un côté, des tribunaux de droit commun, et de l'autre côté, des organes administratifs, la décision de savoir si la voie judiciaire est recevable ou non appartenant au tribunal de droit commun, et non à l'organe administratif¹⁰. Le rapport entre la compétence nationale et la recevabilité de la voie judiciaire se ramène à ce que le défaut de compétence «entraîne — comme le constate W. Broniewicz — l'irrecevabilité de l'affaire par le tribunal polonais, tandis que l'irrecevabilité de la voie judiciaire entraîne l'irrecevabilité de l'affaire par un tribunal de droit commun»¹¹.

Conformément à la règle générale, la question de la recevabilité de la voie judiciaire est appréciée selon la loi de l'État dont le tribunal a été saisi, c'est-à-dire d'après la *lex fori*. Ainsi, en vertu de l'article 202 en relation avec l'article 199 § 1 p. 1 du Code de procédure civile, le tribunal polonais prend cette question en considération d'office en tout état de cause. Lorsqu'il constate que, d'après la loi polonaise, la voie judiciaire est irrecevable, la demande est rejetée, alors même que d'après la loi étrangère, qui aurait pu être appliquée pour apprécier le rapport juridique donné, la voie judiciaire serait recevable. Dans le cas inverse, lorsque d'après la loi en vigueur en Pologne la voie judiciaire est recevable, tandis que dans l'État étranger, dont la loi doit être appliquée dans l'affaire, la voie judiciaire est exclue, le tribunal polonais ne tiendra pas compte, en principe, de cette irrecevabilité, à moins qu'il ne soit prouvé que le demandeur étranger n'a saisi le tribunal polonais que pour éluder la prohibition de recourir à la voie judiciaire dans son pays¹². Cependant, une telle action n'est pas présumée et le tribunal ne cherche pas d'office à connaître les intentions de l'étranger qui a saisi le tribunal polonais.

Dans certains cas, le tribunal polonais n'est pas compétent pour cette raison que notre législateur reconnaît la compétence exclusive indirecte des tribunaux étrangers. Cette compétence est fixée en vertu des mêmes points de rattachement qui justifient la compétence exclusive des tribunaux polonais. Par conséquent, le tribunal polonais n'est pas compétent:

- a) dans les affaires portant sur les droits réels et sur la possession d'un immeuble situé à l'étranger (art. 1102 § 2 C.p.c.);
- b) dans les affaires en interdiction d'un étranger;
- c) dans les affaires successorales lorsque le *de cujus*, ressortissant

¹⁰ Cf. H. TRAMMER, *op. cit.*, pp. 18, 19; E. RIEZLER, *Internationales Zivilprozessrecht und prozessuales Fremdenrecht*, Berlin 1949, pp. 213 - 215.

¹¹ BRONIEWICZ, *op. cit.*, p. 39.

¹² Cf. TRAMMER, *op. cit.*, p. 19; RIEZLER, *op. cit.*, p. 215.

étranger, est décédé à l'étranger, sauf le cas où la succession comprend un immeuble situé en Pologne;

d) dans les affaires portant sur le mariage, sur les rapports entre parents et enfants et sur l'adoption, lorsque les deux parties sont des étrangers domiciliés dans l'État dont ils sont ressortissants¹³.

D'autre part, le tribunal polonais n'est pas compétent dans les affaires où le litige a pour objet les prétentions étrangères de droit public, par exemple lorsqu'un État étranger agit contre son ressortissant domicilié en Pologne en paiement des impôts arriérés.

III. Les règles générales de compétence d'après le Code de procédure civile

1. La continuité de la compétence nationale. Lorsque dans une affaire avec un élément étranger la compétence nationale est appliquée en vertu d'un point de rattachement déterminé, la question se pose de savoir quelle est la durée de cette compétence et qu'advient-il lorsque le point de rattachement vient à changer au cours de la procédure, soit lorsque le fondement même de la compétence cesse d'exister. Ainsi, dans une instance en divorce, la nationalité polonaise du demandeur agissant contre la défenderesse étrangère domiciliée à l'étranger a été le point de rattachement justifiant la compétence nationale et au cours de l'instance le demandeur acquiert la nationalité étrangère. Ou bien, dans une affaire portant sur une prétention réelle, le demandeur, domicilié en Pologne, émigre au cours de l'instance à l'étranger. Dans les deux cas les points de rattachement ont changé, entraînant le défaut de fondement de la compétence nationale. Faut-il en conclure que la compétence nationale n'existe plus et que le tribunal doit rejeter la demande? Cette question, très douteuse sous le régime de l'ancien Code de procédure civile et très controversée dans la doctrine polonaise¹⁴, a été résolue d'une façon claire par la loi du 15 février 1962 modifiant les dispositions de la procédure en matière civile¹⁵, qui, dans l'article 4 § 2 de l'ancien C.p.c., prévoyait la

¹³ Cf. JODŁOWSKI, *op. cit.*, p. 140.

¹⁴ J. RAJSKI, *Zagadnienie perpetuatio iurisdictionis w międzynarodowym procesie cywilnym* [Le problème de la perpétuation de la compétence dans le procès civil international], PiP, 1959, n° 10, pp. 592 - 595; H. TRAMMER, *W sprawie perpetuacji jurysdykcji krajowej* [Sur la perpétuation de la compétence nationale], PiP, 1960, n° 1, p. 123; J. JODŁOWSKI, W. SIEDLECKI, *Postępowanie cywilne, część ogólna* [Procédure civile, partie générale], Warszawa 1958, p. 59; JODŁOWSKI, *Nowe przepisy...*, pp. 8 - 9.

¹⁵ Journal des Lois [abrév. J. des L.], n° 10, texte 46. Cette loi n'est plus applicable dès que les dispositions introduisant le C.p.c. du 17 novembre 1964 sont entrées en vigueur.

continuité de la compétence des tribunaux polonais, existant au moment de l'ouverture de l'instance, alors même qu'elle cesserait d'être fondée au cours de l'instance.

Cette règle se retrouve dans la disposition de l'article 1097 du Code de procédure civile, qui est ainsi conçue: «La compétence nationale existant au moment de l'ouverture de l'instance est maintenue alors même qu'elle cesserait d'être fondée au cours de l'instance». Par conséquent si, au cours de l'instance, un des points de rattachement venait à changer, cela n'empêcherait pas l'examen de l'affaire et n'entraînerait pas le rejet de la demande ou de la requête. Il suffit, qu'au moment de l'ouverture de l'instance, la compétence nationale existe pour que la procédure se poursuive, alors même que l'une des parties change de nationalité, que le défendeur quitte à jamais son domicile en Pologne ou n'a plus le droit de séjourner en Pologne. Comme le constate Broniewicz, la compétence nationale existant au moment de l'ouverture de l'instance s'est consolidée¹⁶.

De cette manière, le législateur a adopté la conception de la continuité de la compétence nationale, en établissant le principe de la *perpetuatio iurisdictionis*, qui tient compte des intérêts de l'État et de ceux des échanges juridiques internationaux, et assure la stabilité de la juridiction polonaise. Cette solution favorise l'économie du procès en faisant éviter la nécessité d'engager une nouvelle instance devant le tribunal d'un autre pays et prévient l'augmentation des frais du procès.

En utilisant le terme «ouverture de l'instance», le Code de procédure civile souligne que le principe de continuité concerne aussi bien les affaires instruites par la voie du procès que suivant la procédure non contentieuse. Pour apprécier, si la compétence nationale existe ou non, le moment décisif est celui de l'ouverture de l'instance, c'est-à-dire celui de l'introduction de la demande, lorsqu'il s'agit d'un procès ou d'une requête dans l'hypothèse d'une procédure non contentieuse¹⁷. Conformément à l'article 1103 p. 1 du Code de procédure civile, les affaires instruites par la voie du procès relèvent de la compétence nationale lorsque la partie défenderesse séjourne, réside ou est domiciliée en Pologne au moment de la signification de la demande. Cette disposition représente donc une exception à la règle de l'article 1097 du Code de procédure civile, puisque le moment décisif pour la compétence nationale est celui de la signification de la demande à la partie défenderesse.

S'il arrive que le tribunal laisse échapper le défaut de compétence au moment de l'ouverture de l'instance, mais que cette compétence se ma-

¹⁶ BRONIEWICZ, *op. cit.*, p. 34.

¹⁷ Cf. WENGEREK, *op. cit.*, p. 420.

nifeste au cours de la procédure du fait qu'un point de rattachement justifiant la compétence nationale fait attacher l'affaire au territoire polonais, le tribunal ne peut plus rejeter la demande ou la requête¹⁸.

Ainsi, un étranger domicilié en Pologne saisit un tribunal polonais d'une demande en divorce contre sa femme domiciliée à l'étranger et n'ayant pas la nationalité polonaise. Dans ce cas, le tribunal polonais n'est pas compétent (art. 1100 § 3 C.p.c.), mais si au cours de l'instance poursuivie en dépit de cet empêchement le demandeur obtenait la nationalité polonaise, il y aurait un fondement à la compétence nationale.

Il peut arriver également que la personne contre laquelle l'instance a été engagée cesse de relever de la compétence du tribunal polonais au cours de l'instance. Dans ce cas le tribunal ne peut plus poursuivre la procédure et doit l'annuler d'office (art. 1113 en relation avec l'art. 355 § 1 C.p.c.).

Ainsi un défendeur, étranger domicilié en Pologne, obtient au cours de l'instance une immunité de juridiction après avoir été nommé par ses autorités membre du personnel diplomatique de son pays en Pologne. D'après la règle adoptée par le Code de procédure civile, la disposition de l'article 1113 est une disposition spéciale par rapport à l'art. 1099 et l'annulation de la procédure résulte de l'article 355 § 1, en vertu duquel la prononciation d'un jugement est devenue «pour d'autres raisons [...] inadmissible». Dans notre cas, la raison consiste en ce que la condition absolue du procès, soit la compétence nationale à l'égard du défendeur, a cessé d'exister¹⁹.

2. La litispendance devant un tribunal étranger. Les dispositions de l'ancien Code de procédure civile ne réglaient pas expressément la question de savoir si la litispendance devant un tribunal étranger constitue un empêchement qui ne permet pas de saisir d'une demande le tribunal polonais²⁰. L'amendement de 1962 n'avait pas non plus réglé directement cette question, mais énumérait parmi les conditions écartant la reconnaissance d'un jugement étranger l'ouverture de l'instance devant le tribunal polonais, avant que la décision du tribunal étranger n'ait acquis la force de la chose jugée (art. 474³ de l'ancien Code de procédure civile), ce qui impliquait indirectement que la litispendance de l'affaire

¹⁸ Cf. B. DOBRZAŃSKI, M. LISIEWSKI, Z. RESICH, W. SIEDLECKI, *Kodeks postępowania cywilnego. Komentarz II* [Code de procédure civile. Commentaire II], Warszawa 1969 [cité plus loin en abrégé: *Kpc — Komentarz II*], p. 1381.

¹⁹ Cf. W. BRONIEWICZ, *Umorzenie postępowania w procesie cywilnym* [L'annulation de la procédure dans le procès civil], dans: *Księga pamiątkowa ku czci prof. dra Kamila Stefki*, p. 34.

²⁰ J. RAJSKI, *Procesowe skutki wytoczenia powództwa za granicą* [Les effets processuels d'une demande en justice à l'étranger], «Palestra», 1961, n° 8, p. 13 et s.

devant un tribunal étranger (*lis alibi pendens*) ne constituait pas une condition négative du procès²¹. Cette question a été expressément réglée par l'article 1098 du nouveau Code, qui précise que «les tribunaux polonais ont la compétence prévue par ce Code, alors même que dans une même affaire et entre les mêmes parties une instance se déroulerait devant le tribunal d'un État étranger». Ainsi la litispendance entre les mêmes parties devant un tribunal étranger n'est pas une condition processuelle négative pour la compétence nationale des tribunaux polonais. Par conséquent, la partie peut saisir un tribunal polonais si, dans cette catégorie d'affaires, la compétence nationale est justifiée par un point de rattachement déterminé, tandis que le défendeur n'est pas en mesure de soulever l'exception de litispendance devant le tribunal d'un État étranger ni exiger le rejet de la demande. Cette solution est étroitement liée à la question de la reconnaissance et de l'*exequatur* en Pologne des décisions des tribunaux étrangers (art. 1146 § 1 p. 4 et art. 1150 § 1 p. 3 C.p.c.)

En effet, la reconnaissance et l'exécution de telles décisions dépendent de la question de savoir si l'affaire n'a pas été intentée devant un tribunal polonais appelé à la trancher avant que la décision du tribunal étranger n'ait acquis la force de la chose jugée. Étant donné que même une décision du tribunal étranger passée, en force de chose, jugée avant d'être reconnue ou d'avoir obtenu l'*exequatur* par le tribunal polonais ne peut avoir d'influence sur la procédure poursuivie en Pologne, la procédure engagée entre les mêmes parties devant un tribunal étranger ne saurait, d'autant plus, avoir des effets sur la procédure déjà engagée en Pologne²². Il en est de même en ce qui concerne la décision dont la reconnaissance ou l'exécution a été refusée par le tribunal polonais. Par conséquent, seule une décision étrangère reconnue ou déclarée exécutoire en Pologne a l'autorité de la chose jugée et empêche les mêmes parties d'intenter le même procès devant un tribunal polonais, à moins qu'une convention internationale n'en dispose autrement.

Lorsque la décision du tribunal étranger ne peut produire d'effets en Pologne, du fait de n'avoir pas été déclarée exécutoire en Pologne, tous les actes tendant à obtenir une telle décision, y compris l'introduction de la demande, ne produisent aucun effet et, en particulier, n'interrompent pas le cours de la prescription.

3. Le défaut de compétence nationale. Les cas susmentionnés où le tribunal polonais n'est pas compétent montrent que le défaut de compétence nationale dans ces affaires résulte du défaut d'institution de la compétence nationale par les dispositions du Code de procédure civile.

²¹ Cf. JODŁOWSKI, *Nowe przepisy...*, pp. 34 - 35.

²² Cf. WENGEREK, *op. cit.*, p. 420.

Le défaut de compétence nationale peut résulter également des dispositions d'une convention internationale dont la Pologne est signataire. Cela se produit lorsque la convention internationale prévoit pour une catégorie donnée d'affaires la compétence exclusive de l'autre État signataire. D'autre part, conformément au Code de procédure civile, le défaut de compétence nationale se produit lorsque pour une affaire donnée la compétence est bien prévue par une disposition du Code et se trouve justifiée par un point de rattachement déterminé, mais lorsqu'en même temps la juridiction nationale est exclue en vertu d'une autre disposition du même Code²³. Cette exclusion a lieu dans les cas surtout où des personnes déterminées ne sont pas soumises à la compétence nationale. Les personnes en question bénéficient d'une immunité processuelle (immunité de juridiction dans la procédure d'instruction et immunité d'exécution dans la procédure d'exécution). L'effet de l'immunité de juridiction consiste à ce que les personnes qui en bénéficient ne peuvent pas être citées devant un tribunal polonais (art. 1111 § 1 et art. 1112 § 1 C.p.c.), tandis que l'effet de l'immunité d'exécution consiste à ce qu'on n'a pas le droit d'intenter une exécution contre les personnes qui en bénéficient (art. 1115 § 1 C.p.c.)²⁴.

L'exclusion de la compétence nationale peut se produire également en vertu d'un contrat écrit passé entre une unité polonaise de l'économie socialisée et son contractant étranger (art. 1105 § 1 C.p.c.).

Étant donné que la compétence nationale est l'une des conditions absolues du procès²⁵, le Code de procédure civile prévoit dans son art. 1099 que le défaut de cette compétence est une cause de nullité de la procédure, que le tribunal prend en considération d'office en tout état de procédure. La constatation du défaut de compétence nationale entraîne obligatoirement le rejet de la demande ou de la requête.

Le devoir de prendre en considération d'office cette cause de nullité implique le rôle actif du tribunal. Celui-ci n'attend pas qu'une partie souleve l'exception du défaut de compétence nationale, mais procède d'office aux actes tendant à éclaircir les points suivants: la compétence nationale dans l'affaire donnée est-elle fondée sur les dispositions du Code de procédure civile ou d'une convention internationale, ou bien sur un contrat conclu entre les parties du rapport juridique intéressé (art. 1104

²³ Cf. BRONIEWICZ, *Jurysdykcja krajowa...*, p. 35.

²⁴ Cf. F. PRZETACZNIK, *Kodeks postępowania cywilnego a prawo międzynarodowe* [Le Code de procédure civile et la loi internationale], «Nowe Prawo», 1965, n° 9, p. 996.

²⁵ Cf. Z. RESICH, *Przesłanki procesowe* [Les conditions du procès], Warszawa 1966, p. 129 et s.; W. SIEDLECKI, *Nieważność procesu cywilnego* [La nullité du procès civil], Warszawa 1965, p. 85 et s.

C.p.c.); la compétence nationale est-elle fondée sur le fait que la personne bénéficiant d'une immunité de juridiction s'est soumise à cette compétence ou bien sur le fait que l'État intéressé a renoncé à l'immunité de la personne visée (art. 1114 C.p.c.).

D'un autre côté le tribunal doit examiner très scrupuleusement la question de savoir si le défaut de compétence n'est pas dû à une des causes susmentionnées: défaut d'une disposition du Code ou d'une convention internationale instituant la compétence des tribunaux polonais et exclusion en vertu du Code, par dispense accordée à des personnes déterminées.

Le tribunal ne prend en considération l'exclusion au profit des tribunaux d'un État étranger en vertu d'un contrat que sur exception soulevée par la partie. L'exception doit être soulevée et dûment motivée avant les débats sur le fond (art. 1105 § 2 C.p.c.). L'analyse de l'exception doit porter également sur la possibilité même de la conclusion d'un contrat dans l'affaire donnée, soit sur la question de savoir si l'affaire ne relève pas de la compétence exclusive des tribunaux polonais (art. 1105 § 1 C.p.c.).

L'existence de la compétence nationale doit être examinée «en tout état de cause», donc non seulement au cours de la procédure devant le tribunal de première instance (avant que l'audience ne soit fixée en chambre du conseil et au cours de l'audience), mais aussi devant le tribunal statuant sur le pourvoi en révision, qui «prend d'office en considération [...] la nullité de la procédure» (articles 381 § 1 et 388 § 2 C.p.c.).

Le défaut de compétence nationale sert de fondement au pourvoi en révision (art. 368 p. 2 C.p.c.). L'instruction de l'affaire par un tribunal polonais malgré son incompétence est une atteinte manifeste à la loi du procès, qui entraîne la nullité de la procédure. En même temps c'est toujours une atteinte aux intérêts de la République Populaire de Pologne (il s'agit d'une atteinte aux intérêts internationaux de notre État à la suite du dépassement des limites de la compétence des tribunaux polonais, fixées par la loi ou par une convention internationale). Par conséquent, les irrégularités ainsi cumulées peuvent servir de fondement à un pourvoi en révision extraordinaire contre la décision ayant la force de la chose jugée et justifient la cassation de ce jugement, ainsi que le rejet de la demande ou de la requête, qu'elles soient introduites avant ou après l'expiration d'un délai de 6 mois à compter du jour où le jugement a acquis la force de la chose jugée. Cette solution est fondée sur la disposition de l'article 421 § 2 C.p.c. d'après lequel, lorsque l'intérêt de la République Populaire de Pologne est atteint, la Cour Suprême examine la révision extraordinaire, alors même qu'elle serait introduite après le délai prescrit. En revanche, cette solution ne saurait être fondée

sur l'article 421 § 3 C.p.c., car celui-ci concerne les affaires ne relevant pas de la juridiction des tribunaux de droit commun et non pas les affaires ne relevant pas de la juridiction des tribunaux polonais. Il s'agit là des deux conditions processuelles bien distinctes (irrecevabilité de la voie judiciaire et défaut de compétence nationale), tandis que la disposition de l'article 421 § 3 n'envisage que la première de ces conditions.

IV. Règles de compétence des tribunaux polonais dans les différentes affaires civiles

Les règles instituant la compétence des tribunaux polonais se trouvent en premier lieu dans les conventions internationales dont la Pologne est signataire. Parmi ces conventions il faut mentionner, tout d'abord, les conventions bilatérales sur les échanges juridiques, conclues avec les pays socialistes, car elles instituent la compétence des tribunaux pour une gamme assez vaste des catégories d'affaires. Ce sont les conventions avec la Bulgarie de 1961, la Tchécoslovaquie de 1961, la Yougoslavie de 1960, la République Démocratique Allemande de 1957, la Roumanie de 1962, la Hongrie de 1959 et l'Union Soviétique de 1957. Elles définissent la compétence des tribunaux et d'autres organes dans les affaires relevant du droit des personnes, du droit de famille et de tutelle, du droit des successions, du droit des choses et, en partie, du droit des obligations. La compétence des tribunaux a également été fixée dans une convention bilatérale de 1967 avec la France, mais dans une mesure plus restreinte, car elle ne concerne que les affaires relevant du droit des personnes, ainsi que du droit de famille et de tutelle.

Étant donné que les conventions internationales sont toujours le résultat d'un compromis entre des points de vue et les systèmes juridiques en vigueur des États contractants, les dispositions de ces conventions fixant la compétence des tribunaux sont également le résultat des solutions de compromis adoptées dans les rapports avec les différents États. Pour cette raison, la compétence des tribunaux dans les conventions bilatérales a été, dans certains cas, réglée de manière différente même pour la même catégorie d'affaires, compte étant tenu de diverses situations des ressortissants des États contractants.

Les règles de compétence se trouvent en outre dans les conventions multilatérales, telles que les conventions de La Haye de 1902 concernant la tutelle des mineurs et de 1905 concernant l'interdiction et les mesures de tutelle similaires²⁶, les conventions concernant le transport aérien,

²⁶ Nous avons laissé de côté la convention de La Haye de 1962 concernant le divorce, car elle a été dénoncée par la Pologne en 1969.

maritime et routier ainsi que la convention de Vienne de 1961 sur les relations diplomatiques. La grande majorité des dispositions fondamentales de cette dernière convention sur l'immunité diplomatique ont été directement incorporées à la III^e partie du Code de procédure civile sous forme des dispositions dispensant certaines personnes de la compétence nationale (articles 1111, 1113 et 1115 C.p.c.).

La Pologne est liée par des conventions internationales en cette matière avec des pays relativement peu nombreux. Pour cette raison, les dispositions de la II^e partie du Code de procédure civile, réglant d'une façon complète la compétence nationale dans les différentes catégories d'affaires, ont une importance fondamentale dans les relations avec les pays qui ne sont pas liés par une convention avec notre pays.

Les dispositions sur la compétence nationale sont classées en trois groupes du point de vue des modes de procédure d'instruction prévus par le Code de procédure civile. Le premier groupe toutefois renferme des dispositions conjointes sur la compétence dans la procédure contentieuse et non contentieuse (art. 1100 § 1 et 3 et art. 110 § 1 et 3) dans les affaires portant sur le mariage, sur les rapports entre parents et enfants et sur l'adoption, lorsque l'une des parties au moins (conjoint, père ou mère, enfant, adoptant, adopté ou adoptable) a la nationalité polonaise ou, n'ayant aucune nationalité, est domiciliée en Pologne. Ce groupe comporte également les affaires entre étrangers lorsque les deux parties sont domiciliées en Pologne.

Le deuxième groupe ne comprend que les affaires instruites par la voie du procès (art. 1103), soit toutes les affaires civiles lorsque la partie défenderesse séjourne, réside ou est domiciliée en Pologne au moment de la signification de la demande, ou encore lorsqu'elle a des biens ou des droits patrimoniaux en Pologne. D'autre part, ce groupe comporte les affaires dans lesquelles l'objet du litige se trouve en Pologne, les affaires concernant une succession ouverte en Pologne ou une obligation qui est née ou qui doit être exécutée en Pologne.

Le troisième groupe comporte les affaires qui ne sont instruites que suivant la procédure non contentieuse (articles 1106, 1107 § 1 et 3, 1108 § 1 et 1110). Ce sont les affaires suivantes:

1° en interdiction d'un ressortissant polonais ou d'un apatride domicilié en Pologne,

2° en déclaration de décès (d'un absent):

a) d'un ressortissant polonais;

b) d'un apatride domicilié en Pologne;

c) d'un étranger, lorsque la personne autorisée à introduire la requête est domiciliée en Pologne ou bien lorsque l'étranger était domicilié en Pologne ou lorsque ses biens se trouvent en Pologne;

3° en constatation du fait de décès²⁷ d'un ressortissant polonais, d'un apatride ou d'un étranger, si le décès est survenu en Pologne;

4° les affaires concernant la tutelle et la curatelle d'un ressortissant polonais ou d'un apatride domicilié en Pologne, ainsi que d'un étranger domicilié ou ayant ses biens en Pologne, s'il est nécessaire de prendre des mesures en matière de tutelle et de curatelle pour la protection de ses intérêts;

5° les affaires successorales, lorsque le *de cuius*, au moment du décès, avait la nationalité polonaise ou étant apatride était domicilié en Pologne;

6° les autres affaires instruites suivant la procédure non contentieuse lorsqu'un au moins des participants à la procédure est ressortissant polonais ou bien réside ou séjourne en Pologne.

Il convient de signaler que dans la majorité des cas le législateur a institué la compétence alternative, tandis que la compétence exclusive n'est prévue que dans des cas strictement déterminés. Cette solution est importante pour la question de la reconnaissance ou de l'exécution en Pologne d'une décision du tribunal étranger. En effet, en cas de compétence alternative, la décision d'un tribunal étranger peut être efficace en Pologne de plein droit, conformément à l'article 1145 § 2 du Code de procédure civile, c'est-à-dire sans procédure en reconnaissance (à l'exception des cas où la décision étrangère doit servir de fondement à la conclusion d'un mariage ou bien à l'inscription dans un registre de l'état civil, dans un registre foncier ou autre en Pologne, la procédure en reconnaissance étant alors nécessaire). La décision peut également devenir efficace après avoir été reconnue par un tribunal polonais en vertu de l'article 1145 § 1 du Code ou bien son application peut résulter d'une décision du tribunal polonais déclarant *l'exequatur* conformément aux dispositions de l'art. 1150 et suivants du Code. En cas de compétence exclusive du tribunal polonais, la décision du tribunal étranger ne peut être ni reconnue ni exécutée en Pologne en raison des empêchements résultant de l'article 1146 § 1 p. 2 et de l'article 1150 § 1 p. 3 du Code de procédure civile.

Le Code prévoit la compétence exclusive des tribunaux polonais dans les dispositions suivantes:

1° article 1100 § 2 et article 1101 § 2 – pour les affaires relatives au mariage, aux rapports entre parents et enfants et à l'adoption lorsque

²⁷ A côté de déclaration de décès (d'une personne absente), le droit polonais prévoit l'institution de la constatation judiciaire du fait de décès dans le cas où la mort d'une personne est hors de doute, mais l'officier de l'état civil ne peut pas ériger (par exemple à cause du manque du cadavre) l'acte du décès.

les deux parties sont domiciliées en Pologne et une d'entre elles est ressortissant polonais ou apatride;

2° article 1102 § 1 — pour les affaires concernant les droits réels sur un immeuble et la possession d'un immeuble situé en Pologne, le bail à loyer et le bail à ferme d'un tel immeuble, à l'exception des affaires portant sur le loyer ainsi que dans les autres affaires dans la mesure où la solution concerne l'immeuble situé en Pologne;

3° article 1106 § 1 — pour les affaires en interdiction ou en déclaration de décès d'un ressortissant polonais ou d'un apatride domicilié en Pologne;

4° article 1106 § 3 — pour les affaires en constatation du fait de décès lorsque le décès a eu lieu en Pologne;

5° article 1107 § 1 — pour les affaires concernant la tutelle ou la curatelle d'un ressortissant polonais ou d'un apatride domicilié en Pologne;

6° article 1108 § 2 — pour les affaires successorales lorsque le *de cujus* était ressortissant polonais au moment du décès et lorsqu'il est décédé en Pologne.

La compétence exclusive du tribunal polonais est prévue en outre par l'art. 7 de la loi du 28 avril 1952 concernant le travail à bord des navires de commerce polonais dans la navigation internationale (J. des L. n° 25, texte 171) pour les affaires concernant les rapports de travail à bord des navires battant le pavillon polonais (à l'exception des rapports de travail à bord des navires de pêche maritime).

V. L'influence de la volonté des parties sur la compétence des tribunaux

Le Code de procédure civile prévoit des dérogations aux règles relatives à la compétence nationale dans les affaires instruites par la voie du procès. Ces dérogations laissent aux parties la faculté de conclure un contrat soumettant l'affaire à la juridiction nationale ou bien excluant la compétence des tribunaux polonais (articles 1104 et 1105 § 1 et 3). Cela signifie que dans des limites déterminées on admet l'influence de la volonté des parties qui, par le contrat en question, peuvent:

a) établir la compétence du tribunal polonais lorsqu'elle n'est pas prévue dans une affaire donnée ou bien établir la compétence exclusive du tribunal polonais lorsqu'elle est prévue à titre alternatif (contrat de prorogation),

b) écarter la compétence nationale au profit des tribunaux d'un État étranger (contrat de dérogation), sous cette réserve que la dérogation n'est admissible que dans une affaire pour laquelle la compétence du tribunal polonais n'est pas exclusive (art. 1105 § 1, 2^e phrase).

Ni le contrat de prorogation, ni celui de dérogation ne peuvent concerner les procès entre les parties en général. Un contrat de prorogation ne peut soumettre au tribunal polonais que les affaires résultant ou pouvant résulter d'un rapport juridique déterminé. Dans un contrat de dérogation, une unité polonaise de l'économie socialisée peut convenir de soumettre au tribunal d'un État étranger les affaires résultant ou pouvant résulter en matière d'obligations des contrats, à condition que la loi de l'État envisagé reconnaisse la recevabilité et l'efficacité d'un contrat de dérogation.

La recevabilité et l'applicabilité des contrats de prorogation et de dérogation sont appréciées selon la *lex fori*²⁸. Lorsque le tribunal polonais qui a été saisi constate qu'il n'a pas de compétence nationale dans l'affaire donnée et lorsque la partie intéressée invoque la prorogation, la question de savoir si la compétence existe en vertu de la volonté des parties et si cette compétence est recevable et efficace est appréciée par le tribunal d'après la loi polonaise. Il en est de même en ce qui concerne l'exception de dérogation, lorsque le tribunal polonais reconnaît l'existence de la compétence nationale dans l'affaire donnée, mais la partie défenderesse invoque l'exclusion de cette compétence par le contrat.

Un contrat de prorogation soumettant une affaire à la compétence des tribunaux polonais peut être conclu par les parties à un rapport juridique déterminé. Il peut être conclu aussi bien par les personnes physiques que juridiques, par les ressortissants polonais aussi bien que les étrangers²⁹. Le contrat ne peut concerner que les affaires patrimoniales. La forme écrite est requise pour la validité du contrat qui doit indiquer le rapport juridique visé et renfermer une clause expressément convenue par les parties, soumettant à la compétence des tribunaux polonais les litiges à caractère patrimonial qui ont surgi ou qui peuvent surgir de ce rapport juridique. D'autre part, il faut souligner que le contrat de prorogation ne peut concerner les affaires relevant de la compétence exclusive des tribunaux polonais d'après les dispositions du Code de procédure civile (art. 1102 § 2) ou d'une convention internationale dont la Pologne est partie³⁰.

Un contrat de dérogation, qui exclut la compétence des tribunaux polonais au profit des tribunaux d'un État étranger, ne peut être conclu que par les unités polonaises de l'économie socialisée, sans qu'on ait à distinguer entre les personnes physiques ou juridiques ou entre les

²⁸ Cf. TRAMMER, *Zarys problematyki...*, p. 29.

²⁹ Cf. *Kpc — Komentarz II*, p. 1385.

³⁰ Ainsi l'art. 46 al. 1 de la convention avec la Bulgarie, l'art. 35 al. 1 de la convention avec la Tchécoslovaquie, l'art. 33 de la convention avec la Yougoslavie et l'art. 45 de la convention avec la Hongrie.

ressortissants polonais et les étrangers. Le contrat peut être conclu à condition que pour les affaires données ne soit pas prévue la compétence exclusive, mais seulement la compétence alternative du tribunal polonais, et que les tribunaux de l'État étranger aient également la compétence alternative en cette matière. Si les parties dérogent à la compétence alternative du tribunal polonais, le contrat signifiera l'établissement de la compétence exclusive du tribunal étranger. Si les parties concluent un contrat soumettant l'affaire à un tribunal étranger qui n'a pas la compétence alternative, il peut arriver que le tribunal convenu ne reconnaisse pas la recevabilité de l'affaire en question, d'après les dispositions de son pays en matière du compétence et alors la question se pose de savoir si le contrat de dérogation est applicable. La disposition de l'article 1105 § 1, 1^{ère} phrase C.p.c. souligne expressément que le contrat conclu par une unité polonaise de l'économie socialisée, soumettant l'affaire à la compétence d'un tribunal étranger, doit être efficace d'après la loi de l'État dont le tribunal a été choisi par les parties. Le contrat de dérogation doit être dressé par écrit. Le tribunal polonais ne prend en considération la dérogation à la compétence nationale et son efficacité³¹ que sur exception soulevée par la partie et non pas d'office, et seulement dans le cas où l'exception est soulevée avant les débats sur le fond (art. 1105 § 2 C.p.c.). Il ne peut le faire bien entendu que si la demande dont il est saisi concerne la même affaire pour laquelle la partie invoque le contrat de dérogation.

Outre le contrat de dérogation au profit des tribunaux étrangers, le Code de procédure civile prévoit dans son article 1105 § 3 la faculté pour l'unité polonaise de l'économie socialisée de conclure un contrat soumettant les litiges portant sur les droits patrimoniaux en matière d'obligations à la compétence d'une cour d'arbitrage fonctionnant à l'étranger. Les dispositions de l'article 1105 § 1 et 2, ainsi que de l'article 667 du Code de procédure civile sont applicables au contrat en question. Dans ce cas, il s'agit d'un contrat concernant les litiges avec les parties domiciliées ou ayant leur siège à l'étranger. Les contrats de ce genre sont conclus le plus souvent dans le domaine du commerce international où

³¹ Dans son arrêt du 22 avril 1966 (I CR 44/64 avec glose positive de I. Łopuski, OSPiKA 1967, texte 7) la Cour Suprême a statué qu'une mention faite dans le connaissance sur la compétence d'un tribunal étranger dans tous les litiges résultant de ce connaissance n'a pas de force juridique, car le destinataire n'est pas lié au transporteur par un contrat de charte-partie, tandis que les dispositions d'une convention internationale d'après lesquelles l'entreprise convient de la compétence d'une cour d'arbitrage ne sont qu'une recommandation qui ne saurait suppléer à une clause de prorogation.

la clause d'arbitrage est devenue une règle ³². L'importance de cette question est mise en valeur par la conclusion des conventions internationales, telles que le Protocole sur les clauses d'arbitrage du 24 septembre 1923 (ratifié par la Pologne en 1931, J. des. L. 1932, n° 84 texte 648), la Convention européenne concernant l'arbitrage commercial international du 21 avril 1961 (ratifié par la Pologne en 1964, J. des. L. 1964, n° 40 texte 270) et la Convention concernant la reconnaissance et l'exécution des sentences arbitrales étrangères du 10 juin 1958 (ratifié par la Pologne en 1961, J. des. L. 1962, n° 9 texte 41).

³² Voir J. JAKUBOWSKI, *Rozstrzyganie sporów w polskim handlu zagranicznym* [La solution des litiges dans le commerce extérieur polonais], «Palestra», 1965, n° 5, p. 42 et s.

The Notion of Personal Inviolability of Diplomatic Agents in the Doctrine of International Law

by FRANCISZEK PRZETACZNIK

Since the entry into force of the Vienna Convention on Diplomatic Relations on April 24, 1964,¹ personal inviolability of a diplomatic agent has become a norm of conventional law for the States — parties to the Convention.

Although the question of personal inviolability of a diplomatic agent is dealt with in Article 29 of the Vienna Convention, it is necessary to refer also to doctrine in order to explain more profoundly the notion of inviolability and all the consequences resulting therefrom.

It is not easy to define personal inviolability of a diplomatic agent. Even Grotius pointed out that "the question of the inviolability of envoys is more difficult and is differently presented by reputed authors of our age."²

The difficulty pointed out by Grotius has become greater with the passage of time since the number of people dealing with that question has greatly increased and consequently the number of various definitions of inviolability has grown. This was admitted, among others, by A. Hammarskjöld who wrote that "inviolability is very differently conceived by different doctrinal schools."³

Also the commentary to Article 17 of the Harvard Draft Convention on Diplomatic Privileges and Immunities states that: "The term is one which possesses as great a variety of meanings and as undefined a sense

¹ The Vienna Convention came into force for Poland on May 19, 1965 (*Dziennik Ustaw*) [Journal of Laws], No. 37, item 232).

² H. GROTIUS, *O prawie wojny i pokoju* [On the Law of War and Peace] transl. by R. Bierzanek, vol. 2, Warszawa 1957, p. 24.

³ A. HAMMARSKJÖLD, *Les immunités des personnes investies de fonctions internationales*, "Recueil des Cours," Académie de Droit International, Vol. 56, 1936 (II), p. 169.

as does extrterritoriality.”⁴ Some writers dealing with the question of inviolability of diplomatic agents do not define this institution at all, some others try to give a definition or to explain the essence of that institution.

I. Writers Who Do Not Give a Definition of Personal Inviolability of a Diplomatic Agent

Some writers, assuming that the notion of personal inviolability of a diplomatic agent is universally known as an axiom of international law⁵ and universally understood and applied in practice, confine themselves to the statement that diplomatic agents are sacrosanct and inviolable⁶ or that they are inviolable or enjoy inviolability of their person.⁷

Thus Uhlich, for example, emphasizes that “diplomatic agents are sacrosanct and inviolable.”⁸ Torres Campos gives an analogous definition of that institution: “The person of a diplomatic agent is sacrosanct and inviolable.”⁹

Fiore in Article 452 of the Draft Code of 1890 writes that “the diplomatic agent is entitled to personal inviolability.”¹⁰

⁴ *Research in International Law, I: Diplomatic Privileges and Immunities*, Harvard Law School, Cambridge, Mass. 1932, p. 91.

⁵ According to P. FAUCHILLE “that principle [personal inviolability of a diplomatic agent—F.P.] is considered now as an axiom of international law” (*Traité de droit international public*, vol. 1, partie III, Paris 1926, p. 65). Cf. also D. S. PLANAS SUAREZ, *Tratado de derecho internacional publico*, Madrid 1916, p. 394; G. VIDAL y SAURA, *Tratado de derecho diplomatico*, Madrid 1925, p. 251; D. LORDA, *Derecho internacional en paz y en guerra*, Madrid 1949, p. 218.

⁶ Cf. e.g. A. CAVAGLIERI, *Corso di diritto internazionale*, Napoli 1934, p. 396; Ch. G. FENWICK, *International Law*, New York 1948 p. 497; R. GENET, *Traité de diplomatie et de droit diplomatique*, Paris 1931, vol. 1, p. 497; J. B. MOORE, *Digest of International Law*, vol. 4, Washington 1906, pp. 622-626; Ph. CAHIER writes the following on the question of sacrosanctity: “Aujourd’hui [...] le caractère sacré de l’ambassadeur a disparu [...]” (*Le droit diplomatique contemporain*, Paris 1962, p. 195).

⁷ Cf. e.g. R. VERA, *Manuel para diplomaticos y consules*, Santiago de Chile, 1909, p. 118; L. M. MORENO QUINTANA, *Tratado de derecho internacional*, vol. I, Buenos Aires 1963, p. 493; J. DEVAUX, *Traité élémentaire de droit international public*, Paris 1935, p. 379.

⁸ J. G. UHLICH, *Les droits des ambassadeurs et des autres ministres publics*, Leipzig 1730-1731, p. 84.

⁹ M. TORRES CAMPOS, *Elementos de derecho internacional publico*, Madrid 1912, p. 188.

¹⁰ P. FIORE, *International Law Codified and Its Legal Sanction or the Legal Organization of the Society of States*, transl. by B. M. Bochard, New York 1918, p. 435.

Monnet indicates that "their [diplomatic agents — *F. P.*] person is inviolable."¹¹ A similar approach to personal inviolability of a diplomatic agent is reflected in various documents, official as well as private ones. E.g. Article 19 of the Project of the International Commission of American Jurists No VII on diplomatic agents stipulates that "diplomatic officers shall be inviolable as to their person [...]"¹² The Havana Convention on Diplomatic Officers of 20 February, 1928¹³ contains in Article 14 an identical stipulation.

A similar provision is embodied also in Article 1 of the Draft Code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan) of 1926 on norms relating to privileges and immunities of diplomatic agents, which provides that "diplomatic agents are inviolable as to their person [...]"¹⁴

II. Writers Who Offer a Definition of Personal Inviolability of a Diplomatic Agent

To this group of writers belong primarily F. Pietri, Pradier-Fodéré, P. Patau, F. J. Kozhevnikow and D. B. Levin.

According to F. Pietri "inviolability is the right to absolute and complete security, it is freedom without restrictions, that is inviolability in every case."¹⁵ Personal inviolability of a diplomatic agent as formulated by Pietri has two aspects. On the one hand, it implies the right of a diplomatic agent to security — absolute and complete, i.e. he is protected against any unlawful act in an absolute and complete way. On the other hand, this inviolability means freedom of a diplomatic agent without restrictions. This view can be supported only as far as that freedom extends to those activities of a diplomatic agent which are connected with the exercise of his functions in accordance with international law. A diplomatic agent is entitled to personal inviolability so that he can

¹¹ R. MONNET, *Manuel diplomatique et consulaire*, Paris 1910, p. 33. In identical terms this institution is defined by T. J. LAWRENCE, *A Handbook of Public International Law*, London 1913, p. 82.

¹² Comisión Internacional de Jurisconsultos Americanos. Reunion de 1927, IV, Rio de Janeiro, 1927, AJIL, Vol. 22, Supplement, Special Number 1928, p. 249.

¹³ Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928, League of Nations, Treaty Series, Vol. 154, 1934 - 1935, No. 3581, p. 280.

¹⁴ Draft Code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan), International Law Association, Report of the Thirty Fourth Conference, Vienna 1926, p. 380.

¹⁵ F. PIETRI, *Étude critique sur la fiction d'exterritorialité*, Paris 1895, p. 106. Cf. also A. MERIGNHAC, *Traité de droit international public*, Vol. 2, Paris 1907, p. 264.

exercise his functions, but that right cannot be used to sanction unlawful acts of an agent which have nothing in common with the functions of a diplomatic mission.

In his definition of inviolability F. Pietri approaches this problem from one side only, that is from the point of view of the person of the diplomatic agent.

Pradier-Fodéré defines personal inviolability of a diplomatic agent as follows: "absolute and most complete security, it is the right to the most vigilant and most effective protection."¹⁶

Also the definition of personal inviolability of a diplomatic agent, as formulated by Pradier-Fodéré, seems to be too general and one-sided, because it covers, in principle, only one aspect of it. That is why for more adequate presentation of this institution he gives on subsequent pages a detailed explanation of what the essence of that institution consist in.¹⁷

According to P. Patau "personal inviolability of a diplomatic agent [...] is not only ordinary protection which the [receiving — F. P.]. State accords to all persons who stay in its territory, it is a right to absolute and complete security, it is freedom without restrictions, the person's inviolability in every situation."¹⁸

Kozhevnikov understands inviolability in the sense of inadmissibility of applying with respect to the person of the diplomat of any measures of constraint (detention, arrest) and the necessity to protect the diplomatic agent against any assaults on the part of the inhabitants of the country in which he is staying.¹⁹

In Kozhevnikov's definition the wording "inhabitants of the receiving State" might require some clarification since according to its literal meaning it might be construed as not covering the protection of a diplomatic agent against assaults on the part of persons who are on the territory of the receiving State but have no permanent residence there.

¹⁶ P. PRADIER-FODÉRE, *Cours de droit diplomatique*, vol. 2, Paris 1899, p. 12. According to E. de VATTEL inviolability means security. He writes that "inviolability of a public minister, that is security which should be ensured to him more scrupulously and solicitously than to any other alien or national." *Prawo narodów [The Law of Nations]*, translated by B. Winiarski, vol. 2, Warszawa 1958, p. 359.

¹⁷ P. PRADIER-FODÉRE, *op. cit.*, pp. 13-14. According to L. Cavaré personal inviolability means that "the person of a diplomatic agent is inviolable." Further the author adds that a diplomatic agent has the right to absolute and complete security (*Le droit international public positif*, vol. 2, Paris 1962, p. 22).

¹⁸ P. PATAU, *De la situation comparée des agents diplomatiques et consulaires*, Toulouse 1910, p. 143.

¹⁹ F. I. KOZHEVNIKOV, *Russkoye gosudarstvo i mezhdunarodnoye pravo [The Russian State and International Law]*, Moskva 1947, p. 18.

According to D. B. Levin "the right to personal inviolability [...] is the right of diplomatic agents to increased protection on the part of the receiving State through special judicial and administrative means against any attacks, affront or violence to which they might be subjected on its territory by particular persons — whether nationals of the receiving State, or aliens."²⁰

This definition in turn seems to narrow the notion of personal inviolability of a diplomatic agent by restricting it to increased protection on the part of the receiving State.

The definitions discussed above seem to be not elaborate and precise enough as regards the essence of personal inviolability of a diplomatic agent but only present some aspects of this institution.

III. Writers who discuss the consequences arising from personal inviolability of a diplomatic agent

Most writers dealing with personal inviolability of a diplomatic agent do not give a definition of that institution, but discuss only some of its aspects or enumerate the consequences arising therefrom.

1. Some writers stress the protection against the application of measures of constraint upon a diplomatic agent, or a guarantee of the receiving State not to apply measures of constraint with respect to him.

The best exponent of that view is Pitt Cobbet, who states that "the inviolability which attaches to the person of an ambassador confers a right apart from any question of jurisdiction or judicial proceedings to freedom from arrest or molestation, as against the receiving State or its officials."²¹

De la Vega believes that "inviolability exempts the political representative from the jurisdiction of the monarch to whom he is accredited; he cannot be subject to any authority — judicial or administrative."²² In other words, by inviolability the author understands immunity of the diplomatic agent from any authority, judicial or administrative, of the receiving State.

J. Bénézet understands personal inviolability of a diplomatic agent in

²⁰ D. B. LEVIN, *Diplomatičeskij immunitet* [*The Diplomatic Immunity*], Moskva 1949, p. 300.

²¹ P. COBBET, *Cases on International Law*, London 1947, vol 1, p. 340.

²² G. de la VEGA, *Guide pratique des agents politiques du ministère des affaires étrangères de Belgique*, Paris 1899, p. 340.

a similar way. He states that "inviolability of diplomatic agents exempts them from the application of legal force with respect to them."²³

Many other authors conceive personal inviolability of a diplomatic agent in the same way.²⁴

A similar point of view was expressed in a resolution of the Institute of International Law of 1929 on diplomatic immunities, in which personal inviolability is described as the interdiction of all constraint on the part of the receiving State with respect to the person of a diplomatic agent. Article 6 of that resolution provides that immunities cover: "personal inviolability,"²⁵ and Article 7 explains that "inviolability as to the person includes the interdiction of all constraint, arrest, extradition or expulsion."²⁶

Starke writes in this matter that "this right [the inviolability of the person — *F.P.*] protects them [diplomatic agents — *F.P.*] from molestation of any kind, and of course from arrest by the local authorities."²⁷

To these views one may perhaps rightly relate the opinion that "many writers have devoted considerable attention to the right of a diplomatic envoy to personal inviolability, although occasionally they do not clearly distinguish between true personal inviolability and mere freedom from arrest and trial which is really no more than immunity from the jurisdiction of the courts of the receiving State."²⁸

2. Some writers describe personal inviolability of a diplomatic agent as the right to increased protection on the part of the receiving State.

For instance, according to Podesta Costa "on the basis of inviolability a diplomatic agent should be protected [...]"²⁹ Ehrlich understands per-

²³ J. BÉNEZET, *Etude théorique sur les immunités diplomatiques*, Toulouse 1901; p. 23.

²⁴ Cf. R. QUARDI, *Diritto internazionale pubblico*, Palermo 1956, p. 374; W. N. DURDIENIEVSKIJ, S. B. KRYLOV, *Mezhdunarodnoye pravo* [International Law], Moskva 1947; L. A. PODESTA COSTA, *Derecho internacional publico*, Buenos Aires 1955, vol. 1, p. 349; Ch. ROUSSEAU, *Droit international public*, Paris 1953, p. 342; A. KŁAFKOWSKI, *Prawo międzynarodowe publiczne* [Public International Law], Warszawa 1964, p. 208.

²⁵ "Annuaire de l'Institut de Droit International, Session de New York," 1929, vol. 2, p. 307.

²⁶ *Ibid.*

²⁷ J. G. STARKE, *An Introduction to the International Law*, London 1954, p. 287.

²⁸ A. B. LYONS, *Personal Immunities of Diplomatic Agents*, "British Yearbook of International Law," 1954, vol. 31, p. 299; M. GIULIANO having in mind personal inviolability of a diplomatic agent, clearly emphasizes that the point at issue is not the protection against the exercise of constraint upon that agent, but protection against any illegal attack on his person, freedom and honour on the part of particular individuals (*Les relations et immunités diplomatiques*, "Recueil des Cours," Académie de Droit International 1960 (II) vol. 100, p. 125).

²⁹ According to A. PODESTA COSTA, *Manuel de derecho internacional publico*, Buenos Aires 1947, p. 103; Article 17 of the Harvard Draft stipulates the protection

sonal inviolability of an agent in a similar way. In his manual of international law he called "protection of the person"⁸⁰ without using the term "personal inviolability." According to Despagnet "inviolability consists in protection which is due to the person of the diplomatic agent, both as regards attacks by the government or the authorities of the State in which he performs his mission, as well as attacks on the part of particular individuals, which attacks the local government should prevent."⁸¹

In comparison with the writers mentioned above, Kazansky is more categorical in his formulations relating to inviolability. On the basis of inviolability he imposes on the receiving State the obligation of increased protection of the person of the diplomatic agent.⁸² A similar view is expressed by Stirling, who states that "the term inviolability implies a higher degree of protection to the person of diplomatic agent."⁸³

Von Schuschnigg understands personal inviolability of a diplomatic agent in a similar way. He writes on the duty of "special" protection on the part of the receiving State. He does not, however, disclose more specifically what that "special" duty consists in.⁸⁴

3. The next group is represented by writers who define personal inviolability not only as a right of a diplomatic agent to greater protection of his person, but also as a guarantee of the non-exercise by the receiving State of measures of constraint upon his person. The description of inviolability by the writers of this group, as compared with the description by the writers of the two preceding groups, is a great step forward towards a more exhaustive presentation of the essence of personal in-

of diplomatic agents against any interference with their security, peace or dignity (*Harvard Law School, Research in International Law*, vol. 1, Cambridge Mass. 1932, pp. 22 and 90). Cf. also G. SCELLE, *Cours de droit international public*, Paris 1948, p. 54.

⁸⁰ According to L. EHRLICH "The receiving State is bound to protect the person of the diplomatic agent by assuring to him security in advance by police measures, as well as by punishing perpetrators of attacks which could not be prevented," *Prawo Międzynarodowe [International Law]*, Warszawa 1958, p. 198; cf. also F. de MARTENS, *Traité de droit international*, vol. 2, Paris 1886, p. 58; J. MAKOWSKI, *Organa państwa w stosunkach międzynarodowych [State Organs in International Relations]*, Warszawa 1957, p. 64; M. GĄSIOROWSKI, *Dyplomaci i konsulowie [Diplomats and Consuls]*, Warszawa 1966, pp. 119 - 120.

⁸¹ F. DESPAGNET, *Cours de droit international public*, Paris 1899, p. 231.

⁸² Cf. P. KAZANSKY, *Učebnik mezhdunarodnovo prava publichnovo i grazhdan-skovo [Manual of International Law — Public and Private]*, Odessa 1904, p. 205.

⁸³ P. STIRLING, *The Immunities of Diplomatic Agents*, "The Law Journal," vol. 108, 1958, p. 243.

⁸⁴ Cf. K. von SCHUSCHNINGG, *International Law*, 1955, p. 244; Cf. also A. CAVAGLIERI, *op. cit.*, p. 396; L. Le FUR, *Précis de droit international public*, Paris 1931, p. 232; H. ACCIOLY, *Traité de droit international public*, vol. 2, Paris 1941, p. 335.

violability of the diplomatic agent, because according to the writers of this group inviolability includes at once two aspects.

The writers of that group can in turn be generally divided into two sub-groups, according to their description of personal inviolability of a diplomatic agent.

(a) The first sub-group are those, who in defining inviolability of a diplomatic agent clearly emphasize that it has two aspects: non-exercise of measures of constraint upon the person of the diplomatic agent and the extension of special protection to him. Among these writers are: Ph. Cahier, Perrenoud and Balladore Pallieri and Myslil.³⁵

Cahier underlines that in his view "inviolability has two aspects: on the one hand, it obligates the receiving State to refrain from any force with respect to the diplomatic mission and its members, and on the other — it obligates the receiving State to accord to them [the diplomatic mission and its members — *F.P.*] special material and legal protections."³⁶

The description of inviolability given by Cahier is clear, it includes two aspects. One consists in that the receiving State has the duty not to exercise constraint upon the person of the diplomatic agent, that is to say that it may not arrest or detain him. On the other hand, however, the receiving State is under the duty to accord to the diplomatic agent special protection, which should be material and moral. Balladore Pallieri discussing personal inviolability of the diplomatic agent also draws attention to two aspects of that institution.³⁷ In contradiction to those writers, Perrenoud and Myslil do not use that description. They emphasize, however, the dual obligation resting on the receiving State with respect to the diplomatic agent — the positive and the negative one.

Perrenoud writes about the obligation to protect and the obligation to refrain,³⁸ by which he understands the non-exercise of legal force. Myslil, on the other hand, speaks about the receiving State having:

— the negative obligation consisting in the non-exercise with respect to the diplomatic agent of measures of constraint, such as arrest and detention,

— the positive obligation consisting in the extension of special pro-

³⁵ Cf. Ph. CAHIER, *op. cit.*, pp. 196 and 221; G. BALLADORE PALLIERI, *Diritto internazionale pubblico*, Milano 1956, p. 356; G. PERRENOUD, *Régime des privilèges et immunités des missions diplomatiques et des organisations internationales en Suisse*, Lausanne 1944, p. 33; S. MYSLIL, *Diplomatické styky a imunity* [*Diplomatic Relations and Immunities*], Prague 1964, p. 219.

³⁶ Ph. CAHIER, *op. cit.*, p. 196.

³⁷ G. BALLADORE PALLIERI, *op. cit.*, p. 356.

³⁸ G. PERRENOUD, *op. cit.*, p. 33.

tection, that is in taking all appropriate measures in order to prevent any assaults on his person, freedom and dignity.³⁹

(b) The second sub-group are writers, who in defining inviolability do not clearly underline the two aspects of it and do not pay special attention to them, but from an analysis of the descriptions of that institution given by them it is clear that in their view it also includes these two aspects. Those writers include, among others, Mme Bastid, Calvo, Diena, Hammarskjöld, Liszt, Sibert, Spiropoulos and Shurshalov.⁴⁰ Descriptions of inviolability given by those writers also have those two aspects, although they do not bring them out in the same way as do the writers of the former sub-group.

According to Liszt, personal inviolability of an envoy obligates the receiving State to ensure to him increased protection and to provide for particularly severe penalties for insults to him; on the other hand inviolability requires that except in the case of extraordinary necessity, the receiving State do not apply constraint with respect to him in case he violates the legal order.⁴¹

Personal inviolability of a diplomatic agent in Liszt's formulation thus contains two elements:

- 1) increased protection through particularly severe penalties provided for its violation;
- 2) the non-exercise of constraint.

In this description it is worth noting that personal inviolability of a diplomatic agent is not conceived as absolute and that there may occur exceptions in "cases of extraordinary necessity." Liszt does not explain what these cases of extraordinary necessity are.

Spiropoulos defines that institution in the following way: "Inviolability of a person means that the receiving States is obliged to accord to the diplomatic agent special protection [...] The notion of inviolability includes at the same time exemption of the diplomatic agent from legal constraint."⁴²

According to Shurshalov, on the basis of personal inviolability "the [receiving — F.P.] State and its organs are obliged to protect the diplo-

³⁹ S. MYSLIL, *op. cit.*, p. 219.

⁴⁰ F. LISZT, *Le droit international*, Paris 1927, p. 131 - 132; J. SPIROPOULOS, *Traité théorique et pratique du droit international public*, Paris 1939, p. 211; B. M. SHURSHALOV, in: *Mezhdunarodnoje pravo [International Law]*, ed. F. I. Kozhevnikov, Moskva 1957, p. 293; Mme P. BASTID, *Droit des gens*, Paris 1956 - 57, p. 273; C. CALVO, *Le droit international théorique et pratique*, vol. 3, Paris p. 296; A. HAMMARSKJÖLD, *op. cit.*, p. 160; M. SIBERT, *op. cit.*, vol. 2, p. 24; J. DIENA, *Derecho internacional publico*, trad. par M. Trias de Bes y J. Quero Molares, Barcelona 1932, p. 403.

⁴¹ F. LISZT, *op. cit.*, p. 132.

⁴² J. SPIROPOULOS, *loc. cit.*

matic agent of a foreign State against any attacks on his person and dignity and are also obliged to guarantee non-application of measures of constraint with respect to the diplomat.”⁴³

Guggenheim defines personal inviolability of a diplomatic agent in a specific way. According to him “inviolability means, above all, that the person enjoying it has the right to be exempt from certain obligations which the administrative law of the receiving State imposes on individuals. But inviolability of the person of the diplomatic agent has yet another meaning, viz. increased special protection.”⁴⁴

Guggenheim differs from the aforementioned writers, who stress the impossibility to apply any measures of constraint with respect to the diplomatic agent as one of the aspects of inviolability. Since by measures of constraint those writers understand detention and arrest, that is to say measures which are applicable when violation of the law occurs. Consequently, this aspect of personal inviolability of a diplomatic agent is conceived as protection against the exercise of measures of constraint upon his person in case he violates the law.

The aspect of personal inviolability discussed by Guggenheim, which consists in the exemption of a diplomatic agent in the receiving State from certain obligations imposed on individuals by the administrative law of that State, relates to another field than the application of measures of constraint in case of violation of law. In other words, we come across yet another description of the notion of inviolability.⁴⁵

IV. The Vienna Convention and the Definition of Personal Inviolability

In comparison with all the former descriptions of the notion of personal inviolability of a diplomatic agent, the Vienna Convention on Diplomatic Relations made a step forward towards a more exhaustive elaboration on the contents of that institution. Article 29 defines personal inviolability of the diplomatic agent as follows:

“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect

⁴³ B. M. SHURSHALOV, *loc. cit.*

⁴⁴ P. GUGGENHEIM, *Traité de droit international public*, vol. 1, Genève 1953, p. 502.

⁴⁵ H. HILL regards as one of the aspects of personal inviolability “exemption from police registration for aliens,” the other aspects of it in the writer's view are “special protection and inviolability of the residence” (*Immunities and Privileges of International Officials*, Washington 1947, pp. 27 and 29).

and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”⁴⁶

The writers who have dealt with this question already after the adoption of the Vienna Convention simply adopt the description of that institution as contained in Article 29 of the said Convention.⁴⁷ In this regards Sen writes: “The term ‘inviolability’ means that the envoy shall be immune from any form of arrest or detention. The receiving State shall treat him with due respect, and it is required to take all appropriate steps to prevent any attack on his person, freedom or dignity. It implies that the receiving State is obliged to afford a higher degree of protection to the person of the diplomatic agent than is accorded to a private person.”⁴⁸

It seems, however, that the description of personal inviolability of a diplomatic agent contained in the Vienna Convention calls for more detailed clarification.

The formulation that a diplomatic agent shall not be liable to any form of arrest or detention, might be construed as limiting the interdiction of the application of legal force only to “arrest and detention,” while there exist still other measures of legal force which should not be applied with respect to a diplomatic agent. That is why this principle should be formulated in a general way, so as to cover all measures of constraint. Moreover, it should be stressed — as it has been done in Article 22 of the Convention as regards the obligations of the receiving State with respect to the premises of the mission — that the receiving State is under a special duty to take all appropriate steps to protect him and to prevent any attacks on his freedom or dignity. The formulation that the State “shall take” all appropriate steps seems too weak.

It seems that the substance of the institution of personal inviolability of a diplomatic agent should be formulated in the following way:

⁴⁶ In the course of the work on the Draft Convention the wording of that article underwent certain changes. For original version cf. UN doc. A/CN.4/91, “Yearbook of the International Law Commission,” 1955.

⁴⁷ *Mezhdunarodnoye pravo* [International Law] ed. by F. I. KOZHEVNIKOV, W. I. MENZHYNISKI, C. Y. MOROZOV, W. A. ROMANOV, Moskva 1964, p. 397; W. A. ROMANOV, *The Vienna Convention on Diplomatic Intercourse and Fundamental Questions of the Codification of International Law regarding Diplomatic Privileges and Immunities*, “Sovietsky Yezhegodnik Mezhdunarodnovo Prava,” 1961, p. 70; O. N. KHESTOV, *Novoye polozheniye ob inostrannykh diplomatcheskikh i konsulskikh predstavitelstvakh* [New Regulations on Foreign Diplomatic and Consular Missions], “Sovietskoje Gosudarstvo i Pravo,” 1966, No. 8, p. 33; E. USTOR, *A diplomáciai kapcsolatok joga* [The Law of Diplomatic Relations], Budapest 1965, p. 315 ff.

⁴⁸ B. SEN, *A Diplomat's Handbook of International Law and Practice*, the Hague 1965, p. 90.

Personal inviolability of a diplomatic agent means on the one hand a guarantee of non-application of any measures of legal constraint with respect to his person, and on the other, it imposes on the receiving State the special obligation not only to treat him with due respect, but also to take all appropriate steps to protect him and to prevent any attack on his person, freedom and dignity.

V. Personal Inviolability — a Privilege or Immunity?

1. There is a divergence of views among the writers not only as regards the description of the substance of the institution of inviolability, but also as regards the classification of that institution among diplomatic privileges or immunities. Various writers discussing personal inviolability of a diplomatic agent call it a privilege, immunity, right or prerogative. There are also instances when the very same writers are using these terms interchangeably with respect to the personal inviolability. It is worth emphasizing that in most cases the writers do not give definitions of these terms.

2. As personal inviolability is defined by various writers in different ways, that notion should be considered in the light of known definitions of privileges and immunities since in that way it will be possible to classify it appropriately. The Vienna Convention does not give definitions of the notions "privileges" and "immunities" used therein and does not determine whether personal inviolability is a "privilege" or an "immunity." However, a number of writers try to distinguish between these two notions.

Morton defines privileges as "the right to do something that other persons have no right to do" and immunities as "the right by virtue of which one need not do what other persons are obliged to do."⁴⁹

Stefko understands immunities as "exemption from the jurisdiction of local authorities" and privileges as "any other favourable treatment of foreign persons, beyond the scope of immunities."⁵⁰

Blishchenko and Durdienievsky under the notion of immunity understand, in principle, "exemption [...] of diplomatic agents [...] staying

⁴⁹ Ch. MORTON, *Les privilèges et immunités diplomatiques*, Lausanne 1928, p. 12. Similarly K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [*Principles of International Consular Law*], Warszawa 1960, p. 256.

⁵⁰ K. STEFKO, *Dyplomatyczne zwolnienie od jurysdykcji cywilnej* [*Diplomatic Exemption from Civil Jurisdiction*], Lwów 1938, p. 30. Similarly J. MAKOWSKI, *op. cit.*, p. 52.

abroad from compulsory jurisdiction of the courts, financial organs and those of the security service of the country in which they are staying [...] and in particular from summons, arrest, search, investigation, embargo and requisition.” Under the notion privilege on the other hand, they understand “special legal prerogatives [...] of diplomatic agents [...]”⁵¹

3. In the light of the definitions quoted above, one may wonder whether personal inviolability of a diplomatic agent should be considered as a privilege or as an immunity. Without going into the details of those definitions, it can be said that the notion of personal inviolability of a diplomatic agent is not covered by the above-mentioned definitions of “privilege,” because inviolability can be regarded neither as a right to do what other persons have no right to do (Morton) nor as legal capacity to do or to demand what others have no right to do or to demand (Libera), nor as any other favourable treatment (Stefko).

It seems, however, that the substance of inviolability of a diplomatic agent can be brought under the category of “immunity,” which consist in exemption from the jurisdiction of local authorities (Stefko), from local jurisdiction (Makowski), from the jurisdiction of the security organs of the receiving country (Blishchenko and Durdienievsky). It should, be emphasized, however, that the substance of the inviolability goes even beyond the scope of immunity and that personal inviolability is not an immunity in the strict sense, but is an immunity *sui generis*. Since it has more characteristics of an immunity than of a privilege, it should be called an immunity rather than a privilege. In fact there is a noticeable tendency in the science of international law towards increasingly wider recognition of that institution as an immunity. This is seen most clearly in the works of the Institute of International Law which in Article 2 of its resolution of 1895 defines personal inviolability of a diplomatic agent as a “privilege” and in Articles 6 and 7 of its resolution of 1929 on diplomatic immunities — as an “immunity.” The situation is similar in the French doctrine, where Dietrich (1896) and Fauchille (1926) regard personal inviolability of a diplomatic agent as a “privilege” while in the later period Goulé (1929), Rousseau (1953), Scelle (1948), Sibert (1951) and Mme Bastid (1956) regard that institution as an “immunity.”

4. Personal inviolability of a diplomatic agent is a fundamental immunity and the most important of all diplomatic privileges and immunities. Inviolability is the basis for all other diplomatic immunities which derive from it.

⁵¹ I. P. BLISHCHENKO, N. W. DURDIENIEVSKIJ, *op cit.*, p. 328.

Maritime Arbitration in Poland

by JERZY JAKUBOWSKI

I. Introduction

In the present-day international economic relations the arbitration plays a major role in settling disputes which arise out of contracts. This applies also to maritime disputes.

A tremendous development of the international commercial arbitration is due to several causes.

1. The principle of the single instance and the less formalized proceedings make arbitration more expeditious in comparison with the proceedings before the State courts.

2. Arbitration is generally cheaper than trials before State courts.

3. Arbitration usually guarantees the parties concerned that its object and results remain known only to a limited circle of people, the proceedings being legally or practically in camera and the awards, as a rule, unpublished.

4. It is sometimes emphasized that arbitration originated and developed because the State courts lacked special knowledge of economic problems. This was in particular the case with the development of highly specialized arbitration of branch trade associations (dealing e.g., in corn, cotton, jute).

5. It is of importance that the parties could exert an influence on a number of elements in the proceedings, such as

- a) the composition of the arbitration court,

- b) the establishment of the rules of procedure to be followed by the arbitrators.

6. The arbitral courts do not apply any substantive law, or apply it less rigorously than the State court would have done. This is particularly important in international trade when for the lack of a fully uniform international system of commercial law, the law of a certain State has

to be applied; it is a generally known fact that difficulties arise when it is to be specified which law to follow and what is its contents.

7. As the world is divided into different socio-economic systems, parties to a contract — mistrusting the law courts in the States which belong to a different system — prefer to submit their disputes by an agreement to arbitration, as a non-state institution, remote from socio-economic problems and guided by the interests and rules of trade.

The tendency to develop international commercial arbitration is undoubtedly sound and fits the needs of international trade. This aspect, however, should not obscure certain weak points of the said institution.

First of all, there is a strikingly large number of permanent arbitral institutions all over the world called up to settle commercial disputes what means their great "atomization." The *ad hoc* arbitration displays of course, an even higher degree of "atomization." Recently, however, certain trends towards concentration and consolidation in the field of arbitration have been manifested. For instance, tendencies towards uniformity of rules adopted by arbitral institutions are noted. The *ad hoc* arbitration tends to decline, whereas permanent arbitral institutions are developing.¹

Great hopes can be set on the action undertaken by the UN Economic Commission for Europe and the arbitration rules prepared by it. In virtue of Article IV of the European Convention on International Commercial Arbitration of 21st April, 1961, a special committee has been established, the membership and procedure of which are specified in the Annex to the said Convention. Under Article IV of the Convention the Committee is performing a number of functions. This seems to be beginnings of a world arbitration centre.²

Another weakness of the arbitration is actually its single instance system which makes impossible to correct erroneous decisions.

Arbitral awards are generally neither published nor commented upon. This confidential character of arbitration, welcome among the economic

¹ This opinion is represented by C. M. SCHMITTHOFF, *The Law of International Trade, its Growth, Formulation and Operation*, in collection of works edited by the SAME AUTHOR: *The Sources of the Law of International Trade, with Special Reference to East-West Trade*, London 1964, p. 25.

² On the 3rd International Arbitration Congress (Venice 6 - 8, October, 1969) the creation of a non-governmental organization of arbitral institutions under the name "International Organization of Commercial Arbitration" was suggested by J. Jakubowski in the report on promotion of co-operation in the domain of international commercial arbitration practice. The materials of the Congress were published in "Revue de l'Arbitrage" (4/1969) and in a special publication *Coopération entre organismes d'arbitrage — Co-operation among Arbitration Organizations*, Turin 1970.

circles,³ was one of the causes why arbitration developed. It has, however, some negative aspects, since correct awards cannot be taken as an example for subsequent cases, thereby forming a body of precedents, and on the other hand, erroneous decisions cannot be improved by criticising them.⁴ As an exception, certain permanent arbitral institutions, particularly in the Socialist countries, publish their more important awards which express some general thesis.⁵ While publishing an arbitral award, the names of the parties are omitted. It is noteworthy that the law in certain countries (especially in the United States of America and in the member countries of the British Commonwealth of Nations) does not require arbitral awards to be provided with any written opinion.⁶ Unquestionably an award which gives no reasons for the decision cannot produce any impact on the rules of behaviour, and remains merely a means of settling a particular dispute.

Permanent arbitral institutions have hitherto as a rule panels of arbitrators of one nationality. As a result, objections may occasionally be raised as to the guaranty of the arbitrators' full impartiality. To eliminate this sort of objections, pending the formation of arbitral institutions with multi-national panels, foreigners should be admitted as arbitrators appointed by foreign parties as the first step towards rendering commercial arbitration truly international.

Arbitration has also been adopted in maritime affairs. It is common to insert arbitration clauses in maritime contracts regarding e.g. building a ship, charter parties, time charter, salvage, as well as in bills of lading, etc. Arbitration is also applied to existing disputes, particularly those

³ The 1st International Arbitration Congress held in Paris, May 11 - 13, 1961, recommended non-public hearings; cf. "Revue de l'Arbitrage," Vol. 2, 1961, p. 98.

⁴ This weak point of arbitration has been stressed by numerous writers, among others E. J. COHN, *Economic Integration and International Commercial Arbitration*, in collection of works edited by M. DOMKE, *International Trade Arbitration — A Road to World-wide Cooperation*, New York 1958, p. 23; P. H. NEUHAUS, *Die Grundbegriffe des internationalen Privatrechts*, Berlin-Tubingen 1962, p. 9.

⁵ For instance in Poland in periodicals "Handel Zagraniczny" and "Prawo w Handlu Zagranicznym," in the German Democratic Republic in the monthly "Recht in der Aussenwirtschaft" in Czechoslovakia in the monthly "Právni Zpravodaj čs, zahraničního obchodu." In Holland since 1919, all the more important arbitral awards are published in the periodical "Arbitrale Rechtspraak"; cf. P. SANDERS, *Arbitrage international commercial*, Paris 1958, vol. I, p. 398.

⁶ M. DOMKE, *Arbitral Awards without Written Opinions. Comparative Aspects of International Commercial Arbitration*, in a collection of papers: *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of H. E. Yntema*, Leiden 1961, p. 253.

which arise from the collision of ships.⁷ Arbitration has developed in maritime cases mainly thanks to the opportunity which they afford of submitting disputes to be decided by experts: the arbitrators are usually specialists in complicated maritime problems.

In Poland a marked trend is noticeable to settle maritime disputes by arbitration. Before, we proceed to discussing the structure of permanent arbitral institutions in Poland, which settle this kind of disputes, the legal basis of arbitration in this country will be presented.

II. The Legal Basis of Arbitration in Poland

The institution of arbitration has been known in Polish law for a long time. At present it is regulated by Book Three in Part I of the Code of Civil Procedure (Nov. 17th, 1964).⁸

According to Article 695 of the Code the provisions of the said Book are applicable to the *ad hoc* arbitration as well as to permanent arbitral institutions.

Pursuant to Article 697.1 the parties — within their capacity to contract and convey — can submit to an arbitral institution any disputes the object of which are rights to be expressed in money, except any disputes regarding alimony or allowances for children, or arising out of labour relations. Thus it is possible to submit to arbitration any maritime disputes, except those which arise out of labour relations.

A dispute is referred to arbitration by a contractual arrangement, called an arbitration agreement. Such an agreement should be in writing and signed by both the contracting parties (Art. 698.1) and ought to specify the object of the dispute or the relation out of which the dispute has arisen or may arise (Art. 698.2). This means that Polish law admits an agreed reference to arbitration of either an already existing dispute or a dispute which may arise from a specified legal relation in future, the latter usually taking the form of an arbitration clause.

An arbitration agreement may — but need not — specify the names of the arbitrators and of the presiding arbitrator, or the number of arbitrators and how either of these is to be appointed (Art. 698.2).

In pursuance of Article 697.2 of the Code of Civil Procedure, as long as the parties are bound by such an agreement, the State court is incompetent to settle the dispute covered by the agreement.

⁷ Cf. S. MATYSIK, *Podręcznik prawa morskiego* [Handbook of Maritime Law], third ed., Warszawa 1967, p. 293.

⁸ "Dziennik Ustaw" [Journal of Laws hereinafter cited as Dz. U.], 1964, No. 43, item 296.

The Code of Civil Procedure imposes a restriction upon the right of Polish socialized enterprises to resort to arbitration. According to Article 697.3 an order to be issued by the Council of Ministers shall specify the cases in which such enterprises may conclude an arbitration agreement. No such order has been issued as yet. In any case the restriction does not affect foreign trade, since Article 697.4 of the Code entitles such enterprises to conclude arbitration agreements regarding any dispute in which one contracting party has the domicile or seat outside Poland.

According to Article 699.1 any natural person with the full capacity to legal acts and enjoying full citizen's honorary rights may be appointed an arbitrator. However, State judges are not eligible for this function (Art. 699.2).

The parties may specify the composition and the mode of constituting an arbitration court. The Code provides that — in absence of an agreement between the parties in this respect — the arbitration court shall consist of three arbitrators, each party appointing one, and both the arbitrators proceeding to appoint the presiding arbitrator (Art. 700). When there are difficulties in the formation of an arbitration court, an application may be made to the relevant district court of justice to appoint an arbitrator (on behalf of the defendant), or the presiding arbitrator (Art. 701).

Pursuant to Article 703.1 each party may demand the exclusion of either an arbitrator or the presiding arbitrator for the same reasons which are applied in cases of exclusion of a judge.

The arbitrator is entitled to a remuneration for his work (Art. 704).

Until the proceedings start, the parties may specify arbitration rules to be followed by the arbitration court in the examination and settlement of the dispute (Art. 705.1). If they fail to do so, the arbitration court follows such rules of procedure as it deems appropriate. The arbitration court is not sensed to follow the rules of civil procedure. Nevertheless, it shall thoroughly examine all the relevant facts necessary for the settlement of the dispute (Art. 705.2).

The parties, witnesses, and experts may be examined and oath be taken if the arbitration court wishes so, but it cannot apply any compulsory measures. If the arbitration court is unable to perform a given action, it applies to have it done to the district law court in whose region the action is to be performed (Art. 706).

The award is given by an absolute majority of votes, unless unanimity is required in the agreement. When the number of votes *pro* and *contra* is equal, the vote of the presiding arbitrator decides (Art. 707.1). If, when giving an award the unanimity of votes is required by the agreement, or — in other cases — the majority of votes cannot be attained as to the

whole, or part of, the object of the dispute, the arbitration agreement becomes null and void in this respect (Art. 707.2).

Pursuant to Article 708.1 the arbitral award should contain:

1. the specification of the arbitration agreement;
2. place and date of pronouncement;
3. parties and arbitrators;
4. the decision as to the claims of the parties;
5. reasons for the award;
6. signatures of all the arbitartors.

If any arbitrator refuses to sign or cannot sign the award, a relevant note is made on the face of it (Art. 708.2). The award signed by the majority of arbitrators has legal validity (Art. 708.2).

The arbitration court serves a copy of the award signed like the original on the parties against receipt (Art. 709). After a copy of the award has been served on the parties, the arbitration court deposits the records of the proceedings with the law court which would have been competent to adjudicate, had the parties not concluded an arbitration agreement. Permanent arbitration courts may keep the records in their files and should produce them for inspection on demand by the law court (Art. 710).

No appeal lies from the award (Art. 711.1).

The award or the settlement reached before the arbitration court have legal validity in law like judgements pronounced by, and settlements made before, the law courts after the order of execution has been issued. The order of execution relating to an arbitral award or settlement is issued by the law courts at a closed session. The law court shall refuse such an order when it is evident from the deposited records of the arbitration court that the arbitral award or settlement is in conflict with legality or the rules of social relations in the Polish People's Republic. A plea can be lodged with regard to an order of execution (Art. 711, paras 2, 3 and 4). It should be emphasized that what is involved is not any conflict with the rules of substantive law, but a conflict with "public policy" (*ordre public*), similar as in Article 6 of the Polish Private International Law Act of 1965.

As stated above, no appeal lies from an award given by the arbitration court. It is final. Yet in some instances to be discussed below — the party may apply to the court of justice to set aside the award. This legal means is called "a plea aiming at setting aside an arbitration award."

Conformably to Article 712.1, the party may ask the law court to set aside an arbitral award:

1. for non-existence of an arbitration agreement, or if such an agreement was null and void, or its time of validity has lapsed;
2. if the party which requests the setting aside of the award was not

afforded an opportunity to present its standpoint before the arbitration court;

3. when the arbitral procedure established by the agreement of the parties or the procedure provided by the law, particularly the provisions with regard to the composition of the arbitral court, to the voting, exclusion of arbitrators or award, have not been observed;

4. if the decision as to the claims of the parties is obscure, inconsistent or in conflict with legality or rules of social relations in the Polish People's Republic;

5. for reasons which are grounds for a plea to re-try the case according to the regulations of the Code of Civil Procedure.

Item 3 and 4 seem to call for further commentaries. Item 3 does not refer to a conflict with any regulations of the civil procedure, but only with its basic principles, most of which have been quoted above. Item 4 refers to substantive law and consequently limits the grounds for setting aside an award for an infringement of substantive law exclusively to the cases of a conflict with the rules of legality or social relations, that is — as we have already said — with public policy (*ordre public*).

It is worth noting that exceeding the scope of the arbitration agreement may not be a basis for a plea to set aside the award, unless during the proceedings the party raised objections to the examining of claims over and above the scope of the agreement (Art. 712.2).

Part III of the Code of Civil Procedure, devoted to the international civil process, contains some relevant provisions.⁹

Article 1105.3 settles the jurisdiction with regard to commercial arbitration: a Polish socialized enterprise can submit to a foreign arbitration court a dispute the object of which are rights to be expressed in money arising from obligations, provided such an agreement is valid under the law of the country in which arbitration is to be held. Such agreements will be recognized by a Polish State court only if a party raises a duly substantiated plea as to the existence of arbitration agreement prior to the entering into the substance of the dispute.

⁹ On the regulation of the international civil procedure in the Polish Code of Civil Procedure viz. J. JODŁOWSKI, *Zasady przewodnie polskiego prawa międzynarodowego procesowego cywilnego* [Guiding Principles of the Polish International Civil Procedure] in: *Księga pamiątkowa dla K. Stefki* [Legal Essays in Honour of K. Stefko], Warszawa 1966, pp. 119 - 143; W. BRONIEWICZ, *Jurysdykcja krajowa w postępowaniu cywilnym według k.p.c.* [Internal Competence in Civil Procedure under the Code of Civil Procedure], "Palestra", 1966, No. 2, pp. 31 - 38; E. WENGEREK, *La détermination du tribunal compétent en droit international privé*, in: *Rapports polonais au VII^{ème} Congrès International du Droit Comparé*, Warszawa 1966, pp. 377 - 419.

Article 1150 of the Code of Civil Procedure regulates the execution of awards issued in foreign countries. Such awards are enforceable in Poland if an international agreement signed by Poland provides they shall be enforceable.

While speaking of Polish regulations on arbitration, one should bear in mind the fact that the provisions of international agreements to which Poland is a party come before the regulations of the Code. This is explicitly stated in Article 1150 the enforcement depends on the relevant international agreement.

III. Poland and the International Conventions on Commercial Arbitration

Poland is a party to several international conventions on commercial arbitration.

Poland is a party to the chronologically first agreement in this respect, i.e. the Protocol on Arbitration Clauses signed in Geneva on 24th September, 1923.¹⁰ While signing the Protocol — pursuant to Article 1 — Poland made a reservation that it would apply the Protocol only to contracts which are considered commercial under Polish law. The Geneva Protocol refers also to arbitration clauses in maritime contracts.

Poland participated actively in the preparation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10th June, 1958 and is a party to this Convention.¹¹ The New York Convention refers, among others, to maritime disputes.

Poland also took an active part in the preparation of the European Convention on International Commercial Arbitration, signed in Geneva on 21st April, 1961. Poland signed and ratified this Convention.¹²

Pursuant to Article 1a) of the Geneva Convention of 1961, the Convention shall apply to arbitration agreements concluded for the purpose of settling disputes arising from international trade. "International trade" can be conceived as comprising maritime contracts of carriage and ancil-

¹⁰ Dz. U. of 1931, No. 84, item 648. On the Geneva Protocol viz. H. TRAMMER, *Zarys problematyki międzynarodowego procesu cywilnego państw kapitalistycznych* [An Outline of the International Civil Procedure in the Capitalist States], Warszawa 1956, p. 97.

¹¹ Dz. U. of 1962, No. 9, Annex to item 41. On the Convention viz. H. TRAMMER, *Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych* [The Convention on the Recognition and Enforcement of Foreign Arbitral Awards], "Państwo i Prawo," 1961, No. 11, pp: 738 - 750.

¹² Dz. U. of 1964, No. 40, item 270, Annex. On the Convention viz. H. TRAMMER, *Konwencja europejska o międzynarodowym arbitrażu handlowym* [The European Convention on International Commercial Arbitration], "Prawo w Handlu Zagranicznym," 1965, No. 8, pp. 11 - 28.

lary contracts, with the assumption that the term "trade" in this context is not to be interpreted in the economic sense (i.e. as the exchange of goods), but in the legal sense (i.e. designating an economic activity in general). "Trade" covers maritime contractual relations, that is to say it refers to the notion of commercial law, and consequently includes maritime contracts.¹³

The Polish delegation participated actively in the working group dealing with arbitration in the UN Economic Commission for Europe which prepared the last-mentioned Convention. Many contracts concluded between Polish and foreign enterprises refer in its arbitration clause to the standard Arbitration Rules of the Economic Commission for Europe, prepared by the said working group.

When speaking of arbitration in the Polish foreign relations, mention should be made of the provisions on arbitration in the General Conditions of Contracts binding between Member-States of the Council for Mutual Economic Assistance (such as General Conditions of Deliveries 1968 paras 90 and 91, General Conditions of Erection and Other Technical Services 1962, para. 47, and General Conditions of Technical Service 1962, para. 28. The Statute of the International Bank of Economic Co-operation, founded in 1963 (Art. 37) also provides for arbitration.¹⁴

In the relations between Poland and the German Democratic Republic the recognition and enforcement in one of the States are governed by the Convention of 1st February 1957,¹⁵ on legal relations in civil, family and criminal law cases. Pursuant to Article 54 para. 2 of the said Convention, arbitral awards of one contracting party are equalized with domestic awards of the other party.

IV. Permanent Arbitral Institutions in Poland Settling Maritime Disputes

In Poland there are two permanent arbitral institutions settling maritime disputes: the International Arbitration Court for Maritime and

¹³ A similar statement to be found in E. WENGEREK, M. TYCZKA, *Sądownictwo polubowne w handlu zagranicznym i międzynarodowym obrocie morskim* [Arbitration in Foreign Trade and in International Maritime Commerce], "Przegląd Ustawodawstwa Gospodarczego," No. 6, p. 125.

¹⁴ On Arbitration within the Council for Mutual Economic Assistance viz. J. JAKUBOWSKI, *Z problematyki rozstrzygania sporów wynikających z handlu między krajami członkowskimi RWPG* [Problems Connected with the Settlement of Disputes Arising out of Trade between the Member States of the Council for Mutual Economic Assistance], "Palestra," 1966, No. 11, pp. 14 - 17, No. 12, pp. 65 - 73, 1967, No. 1, pp. 57 - 63.

¹⁵ Dz. U. of 1958, No. 27, item 114.

Inland Navigation in Gdynia, and the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw.¹⁶

The International Arbitration Court for Maritime and Inland Navigation was created by an agreement concluded in Gdynia on 17th June, 1959, by the chambers of commerce of three countries: the Czechoslovak Chamber of Trade, the Chamber of Foreign Trade of the German Democratic Republic and the Polish Chamber of Foreign Trade. According to the Agreement, the purpose of the International Court is expeditious, uncomplicated and skillful settlement of civil-law disputes which may arise from maritime and inland navigation. The Agreement is open for accession by chambers of commerce of other States provided the parties to the Agreement express their consent (para. 6). As to its origin and nature, the Court is — as we can see — international.

In pursuance of para. 1 of the Rules of the Court, it settles any civil-law disputes which may arise out of any maritime and inland navigation matters, in particular disputes arising from freight and charter-party contracts, bills of lading, insurance contracts, collision of ships, salvage, with regard to vessels employed in inland and maritime navigation, getting out damaged harbour devices, general average. The International Arbitration Court is not competent to settle disputes arising out of labour contracts.

Pursuant to para. 2 of the Rules, the International Arbitration Court is competent to settle a dispute if:

1. the parties have concluded a written agreement to refer to it,
2. the plaintiff in the request for arbitration submitted to the Court, and the defendant, when asked by the Court, agreed in writing to its jurisdiction, or
3. an international agreement provides for it.

The International Arbitration Court consists of the Presiding Board, President, persons enlisted in the panel of arbitrators, and Secretary (para. 4). The members of the Presiding Board are appointed by the contracting Chambers, each Chamber appointing one member and his deputy.

¹⁶ On arbitral institutions in Poland viz. J. JAKUBOWSKI, *The Settlement of Foreign Trade Disputes in Poland*, "International and Comparative Law Quarterly," 1962, No. 3, pp. 806 - 821; by the SAME AUTHOR, *Rozstrzygnięcie sporów w polskim handlu zagranicznym* [The Settlement of Disputes in the Polish Foreign Trade], "Palestra," 1965, No. 5, pp. 37 - 50; by the SAME AUTHOR, *Le règlement des conflits internationaux en matière économique en Pologne*, "Cahiers de Droit Comparé," 1965, No. 1, pp. 140 - 151; by the SAME AUTHOR, *L'arbitrage commercial en Pologne*, "Il Diritto negli Scambi Internazionali," 1967, No. 4, pp. 563 - 574; Z. L. NANOWSKI, *L'arbitrage commercial international en Pologne*, "Revue de l'Arbitrage," 1966, pp. 78 - 92.

The function of the President is performed for one year successively by each member or — if hindered — by his deputy (para. 5).

As many as 30 eminent specialists in transport, insurance, as well as maritime and insurance law from the three countries are in the panel of arbitrators of the Court (para. 9, items 1 - 5), the panel thus being multinational.

The arbitrator is independent and receives no instructions. He performs his duties in an impartial manner, to his best knowledge and in good faith. He is obliged to keep matters secret. He does not represent the interests of either party (para. 9.6).

The disputes are examined and settled by tribunals consisted of three arbitrators: each party appoints one arbitrator from the panel, and the appointed arbitrators choose the presiding arbitrator (para. 10). As a rule, arbitration takes place in Gdynia, i.e. in the seat of the Court; the parties can, however, arrange that arbitration, be held in Berlin, Prague or Warsaw. If requested by one of the parties, and after hearing the opinion of the other party, the President of the Court can order to hold arbitration elsewhere (para. 3).

It has been said that the parties appoint arbitrators from the panel of arbitrators. Nevertheless the presiding arbitrator may be a person from outside the panel (para. 9.3), consequently the presiding arbitrator can be a citizen of any State.

Any contentious proceedings can — on application by the plaintiff unopposed by the defendant — be preceded by conciliatory proceedings. The Secretary of the International Arbitration Court states the date and conducts conciliatory proceedings (para. 14, item 1 and 2).

Hearings before the arbitral tribunal are open to the public. On motion by either party, or ex officio, the arbitral tribunal may decide that the hearing be not open to the public (para. 20, item 1 - 3). Hearings are — as a rule — oral, but on the motion of the parties it is possible to depart from this rule (para. 21.1).

According to the Rules, the parties must be afforded an opportunity — with regard both to law and fact — to present their cases how they wish. They can be represented by a counsel (para. 21, item 2 and 3).

It is up to the parties to produce necessary evidence. The arbitral tribunal decides on applications at its discretion and examines witnesses and experts, makes investigations and carries out other evidence proceedings if it considers these steps conclusive to the settlement of the dispute (para. 23).

The decisions are taken by the arbitral tribunal by a majority of votes. The deliberations and voting of the arbitral tribunal are not open to the public and the parties (para. 25, item 1 and 2).

Other more detailed procedural rules are to be found in the Rules which also stipulate that any procedural problems not dealt with therein will be decided by the arbitral tribunal with due regard to the local civil procedure (para. 27).

As far as the substantive legal basis of settling a dispute is concerned, para. 28 of the Rules provides that the arbitral tribunal shall apply the law of the State strictly connected with the dispute, first of all complying with the will of the parties concerned. The principles of good faith and pertinent commercial, maritime, and navigational usages are taken into consideration to the extent admitted by the applicable law. The important point in this regulation is that the parties enjoy unrestricted autonomy of the will to choose the law to be applied to a given case.

This principle is in line with Article 11 of the Polish Maritime Code of December 15, 1961,¹⁷ which provides for an unrestricted autonomy of the will of the parties concerned with respect to the applicable law in maritime relations.

Pursuant to para. 29 of the Rules of the International Arbitration Court, the arbitral award shall be pronounced after the last hearing has been closed, within a period to be specified by the arbitral tribunal (but not to exceed 14 days), supplied with a written opinion and served on the parties (para. 29 item 1).

According to para. 30 the award is final and no appeal whatsoever lies from it.

The provisions of para. 31 are worth noting: if either party has failed to perform the award, the Presiding Board of the International Arbitration Court — on the motion of the opposing party and with the consent of the arbitral tribunal which has given the award in question — may order other arbitral institutions, stock-exchange courts and similar bodies at home and abroad to be informed about the failure to perform the award.¹⁸

¹⁷ Dz. U. 1961, No. 58, item 318.

¹⁸ On the International Arbitration Court for Disputes Involved in Highseas and Inland Navigation, viz., among others: V. SEDLACEK, *Mezinárodní rozhodčí soud pro námořní a vnitrozemskou plavbu v Gdyni* [International Arbitration Court for Maritime and Inland Navigation at Gdynia], "Právní Zpravodaj čs. zahraničního obchodu," 1959, No. 10; H. FELLHAUER, *Der Aussenhandelskaufmann und die Schiedsgerichte*, Berlin 1959, p. 169 ff.; by the SAME AUTHOR, *Das Internationale Schiedsgericht für See — und Binnenschifffahrt in Gdynia*, "Recht im Aussenhandel," 1960, No. 11, pp. 1 - 2, Z. N., *Międzynarodowy Sąd Arbitrażowy dla Żeglugi Morskiej i Śródlądowej* [The International Arbitration Court for Maritime and Inland Navigation], "Handel Zagraniczny," 1962, No. 10, p. 465; Ł. A. ŁUNC, *Mieżdunarodnyj graždanskij process* [International Civil Procedure], Moskva, p. 171; H. STROHBACH, *Rechtsgrundlagen der Gdynia — Arbitrage*, "Recht im Aussenhandel," 1967, No. 3, pp. 1 - 9.

Since 1959, i.e. the foundation of the International Arbitration Court, it has been steadily developing. Scores of disputes are referred to it for settlement every year. It is worth emphasizing that these are not only the disputes submitted by one or both parties from the three countries: Czechoslovakia, the German Democratic Republic and Poland but also the disputes in which neither party comes from any of these countries.

There is an ever-growing number of disputes submitted to the International Arbitration Court by enterprises from other countries, both Socialist (such as the Soviet Union, Hungary the People's Republic of China), and Capitalist (France, Great Britain, Sweden, the German Federal Republic, Japan). Among others, the French Comité des Assureurs submitted to the Court a dozen or so disputes, and the insurers from West Germany — several disputes.

All this proves the international recognition of the Court as a competent and fully impartial institution.

The Arbitration Court at the Polish Chamber of Foreign Trade was set up by the Council of the Chamber in pursuance of Art. 5.14 of the Decree-law of September 28, 1949, on the institution of the Chamber.¹⁰ The Chamber issued Rules of the Arbitration Court.

After the foundation of the International Arbitration Court for Maritime and Inland Navigation in Gdynia in 1959, the importance of the Arbitration Court at the Polish Chamber of Foreign Trade with regard to settling maritime disputes has considerably decreased. Fewer and fewer disputes in this field have been submitted to the Arbitration Court ever since. For this reason, and due to the similarity of the Rules of the Arbitration Court and the Rules of the International Arbitration Court for Maritime and Inland Navigation, we shall devote only a few remarks to the former.

The Court settles disputes arising out of commercial transactions, transportation or insurance of goods, if one of the parties to the dispute is a physical or legal person which has a domicile or seat outside the Poland.

The Arbitration Court consists of the Presiding Board, Secretary and his Deputy and persons enlisted on the panel of arbitartors. The Presiding Board consists of the President and three Deputies.

The Arbitration Court keeps a panel of arbitrators, in which both nationals and foreigners with a full capacity to legal acts and enjoying full citizen's rights can be entered. The panel comprises of at least 30 arbitrators, eminent specialists in trade, industry, transport, insurance, technology and law (experts, University professors and advocates).

¹⁰ Dz. U. No. 53, item 103.

B O O K R E V I E W S

Cezary BEREZOWSKI, *Prawo międzynarodowe publiczne [International Public Law]*, PWN, Part I, Warszawa 1966, 268 pp.; Part II, Warszawa 1969, 224 pp.

A number of handbooks of international public law may be put to the credit of Polish legal literature during the period between the two World Wars (three handbooks published by Professors Z. Cybichowski, L. Ehrlich and J. Makowski) as well as in post-war years (revised and amended editions of handbooks by Professors L. Ehrlich and J. Makowski, a collective work under the editorial guidance of Professor M. Muszkat, the handbook by Professor A. Klafkowski). In spite of these achievements, the situation is by no means satisfactory. The lack of a handbook reflecting the actual development of science — shaped more broadly than the minimum to stand the student's test — is acutely felt not only in didactics but also among persons professionally interested in the knowledge of this branch of legal science (Foreign Office servants, columnists and so on). The handbooks of this type called usually "systems" — in contradistinction to "outlines" or "manuals" — may look in this discipline upon a certain tradition, their use is universally recognized and some of them acquired an international authority and widespread popularity. Let us quote here as an example the two-volume Oppenheim's handbook *International Law* supplemented successively by other British scientists; it got several editions and translations, a.o. into Russian in 1949.

The two first volumes (published in 1966 and 1969) of Professor Berezowski's system of *International Public Law*

make us hope that the gap mentioned above will be filled. In the introductory note the Author writes: "The elaboration of the whole material will give what is called a system within the scope of legal sciences."

The first volume deals in three chapters with general problems of international law, with the topics involved in the notion of subjectivity in international law and finally with the territory in the light of international law. In the second volume the Author is concerned with the problems of air law and of what is called space law, with population in international law, with the sources of international law and with problems of diplomatic and consular law. Volume III will be devoted to the problems of the maintenance of the international peace and security, international organizations, liquidation of colonial system, economic international cooperation, the peaceful settlement of international disputes and war law.

The sequence in discussing particular sets of problems in international law handbooks varies widely. It is commonly agreed that one has to begin with general problems followed by the problems of historical development of international law and the science of this branch of law. To some extent it is also believed that one of the first group of problems to be considered should be the subjectivity in international law and the last the problems of peaceful settlement of international disputes and of war law. The remaining

groups of problems are dealt with by particular authors of handbooks in various sequence. The structure of Professor Berezowski's handbook is a very specific one. He deals primarily with legal problems pertaining to the territory and population. Such a structure of the book is, obviously, deeply connected with the fundamental theses of the Author's work, wherein the principle of sovereignty of particular states participating in the international community is strongly emphasized. By the same, the essential elements of the state—territory and population—had to be put in forefront of Author's considerations. Next follows the problems of sources of international law, the diplomatic and consular law and the other domains of international legal commerce.

Professor Berezowski has solved the problem of how to quote the references to the relevant literature, very ample, indeed, in the domain of international law in a manner most convenient for the reader: Besides the comparatively few footnotes on particular pages indicating the sources of a given information, each of the subject-matters forming a part of the chapter is preceded by a list of most important bibliographical items of the relevant literature. They are listed, as a rule, in three separate alineas: Polish works, the works by the authors of other socialist countries and in the third alinea all the other papers. Polish literature on the given subject is largely quoted and so are the works of other socialist countries, while as regards the literature of western countries only the most important items are referred to.

It is, obviously, impossible to deal within the framework of this concise review with all—or even the most important—problems discussed in the first two volumes of Berezowski's *International Public Law*. Thus, we shall confine ourselves to a few selected prob-

lems namely to those which give rise to particularly vivid scientific controversies. Let us begin with the definition of the international law. The Author is satisfied with a very concise definition stating that the international law is "a system of norms recognized by the states and pertaining to their external relations" (p. 11). Thus, he deliberately does not include in his definition the specific features of contemporary international relations, as it was done, as a rule, in handbooks published so far in socialist countries. The expression "external relations of states" involved in the above definition refers not only to the mutual relations between the states but also to the relations between the states and other subjects of international law. In spite of the fact that the characteristic of contemporary international relations does not appear in the definition, due attention is paid to the problem itself in the handbook reviewed. The starting point of Professor Berezowski's system is the assertion that "the subject-matter of international law are international relations" and "when investigating the contemporary international relations from the point of view of the science of law attention should be paid first and foremost to two elements of these relations: the state and the international organizations." Thereafter, in separate sections the author discusses amply and with much insight such topics as international relations in the epoch of co-existence and mutual relations between the socialist countries. Much attention is paid also to the notion of sovereignty.

Of particular interest are the Author's considerations on the protection of human rights and also the chapter headed "The Legal-international Protection of Human Groups," wherein, besides the problems of national minorities, also the conventions pertaining to racial discrimination are dealt with. As regards the still controversial problem who is

the subject of international law, the Author states that "each state is the subject of international law; international organization or a nation may acquire such a status, that is to say that their subjectivity is facultative" (p. 123). In his subsequent consideration Professor Berezowski — basing on legal analysis of essential features of international organizations — arrives at the conclusion that the subjects of international law are UN and its specialized agencies, as e.g. International Civil Aviation Organization, Intergovernmental Maritime Consultative Organization. As regards other international organizations which are not specialized UN agencies they may acquire the status of a subject in international legal commerce if the relevant convention stipulates explicitly they should. Certain international regional organizations are also subjects of international law as a.o. European Community of Coal and Steel, European Common Market, Council for Mutual Economic Assistance. The chapter headed "The Subjectivity of a Nation Struggling for Liberation" deserves particular attention. The right of each nation to self-determination, the Author says, implies the right "to call into being its own state" and — transposing the problem on the plane of attributes of state sovereignty — "it may be asserted that each nation has the right to its own sovereignty" or — to put it in other words — "within the framework of legal-international subjectivity it may be said that each nation has the right to its own subjectivity which consists either in the right to safeguard this subjectivity if the nation has its own state organization or else in the right to acquire this subjectivity if a given nation still fights for it" (p. 164). A significant trait of the epoch we live in as compared to the period between the two World Wars is "an increase in the number of states and international organizations, the international law ex-

tending more and more decisively on individual persons." However, "it would be premature to conclude on the subjectivity of individual persons in the light of international law" (p. 9).

As regards the concept of general principles of law (specified in Art. 38, para. 1, al. 3) — a problem controversial for a long time — the Author advances the interpretation that they are "the principles met with in each domain of law, be it national or international." "General principles of law" — says the Author — "are the manifestation of basic tendencies encountered in various systems of law and in various branches of law such as civil law, criminal law, state law, administrative law and so on." General principles of law "are a notion of a more large scope than the notion of principles of national law those international law [...] they may serve as a basis for passing a judgement only if they are generally recognized, i.e. both in legal systems and in actual practice of the majority of states taking part in international commerce" (p. 86). The Author does not share the opinion advanced in Anglo-Saxon doctrine that in international law the national law principles are applied *per analogiam*. Neither does he agree with the opinion shared by a number of Soviet scientists that the principles of law, if they have to be recognized as general, should necessarily be international.

The problem of law-generating character of decisions of international organizations is dealt with at some length. In this case the opinions of the Author may be qualified as reluctant to assign to them such a character. He reminds us that the statute of the International Court of Justice does not include those decisions into the sources for passing judgements. Thus, "not being a source for passing judgements for any international court they are *a fortiori* no sources of law" (p. 89ff). The author seems to concur in the opinion that at

present there are no international organizations — with the participation of the countries of both socio-political systems — the resolutions of which would generate directly the norms of international law. The situation is however, different with respect to regional organizations which are the product of more or less intense process of integration as, e.g., the European Common Market. Such an integration does not occur in the case of the Council for Mutual Economic Assistance as regards both its structure and activity.

The custom has been defined by the Author as a "common procedure of several states generating the law" (p. 132). The Author takes notice of the tendency to universality displayed by the customary law. He seems, however, to neglect the psychological moment — the consciousness or the conviction that a given norm of proceeding is of legal character — which for a long time numerous authors have considered (*opinio iuris vel necessitas*) as an essential element of customary law in parallel with the practice (*usus*).

Similarly as in problems mentioned above, Professor Berezowski's handbook shows also with respect to other problems a deep theoretical insight, interesting conclusions and bold generalizations and observations. A great number of Professor Berezowski's statements are of high originality. This appraisal pertains in particular to such topics as the formation and the collapse of the state, sovereignty and recognition, authority over a territory, international relations in the epoch of co-existence. Some of the generalizations may give rise to doubts in the reader's mind, as e.g. the distinction made between the obligatory character and the applicability of international law (when discussing the problem of international and national laws). Nevertheless the logical consistency of the general concept of the handbook consequently observed in

all the considerations of particular problems could hardly be denied. If by the term "a system" we mean a handbook, wherein besides an exposition presenting the regulations and institutions of a given branch of law also theoretical considerations are included based on a deep legal analysis of particular institutions and regulations, then Professor Berezowski's handbook complies with this condition and in this respect it is superior to all those published in Poland so far.

Let us point to some other merits of the handbook reviewed, namely a very lucid grouping of the material and conciseness of style; in this way the Author succeeded in exposing a rich material within a volume of comparatively modest size. Next, let us mention the actualization of the material brought almost up to date, particularly as regards the examples of application of particular regulations. In contradistinction to numerous other handbooks dealing mainly with ancient "cases," Professor Berezowski does not hesitate to invest time and work in order to gather the examples from the recent years and to present to the reader the most actual material. We have to remark, however, that in some cases the actuality of the material is somehow neglected. Thus, for instance, when dealing with the principle of equality in sovereignty the Author refers to a number of formulations in some international documents from previous years, neglecting the most exhaustive formulation adopted by the UNO Special Committee 1964 in Mexico City.

The material contained in Professor Berezowski's handbook is well above the level the students of the departments of law are censed to be acquainted with. Nonetheless, it will be of great help in teaching international law. The book reviewed is a synthesis of creative scientific work of the Author. On the other hand, it is a result of the Author's

long experience in teaching international law. It is doubtlessly the top achievement of Polish science of international law. It is, to be sure, a valuable item not only for students but also for all readers interested in problems

of international law. In view of the ever increasing interest in international politics — the number of eventual readers is steadily increasing, too.

Remigiusz Bierzanek

Remigiusz BIERZANEK, *Zasady prawne pokojowego współistnienia i ich kodyfikacja* [Les principes juridiques de la coexistence pacifique et leur codification], PWN Warszawa 1968, 269 pp.

L'intérêt général qu'éveille un problème, le fait qu'on le commente souvent dans la presse, dans la radio, au sein de diverses organisations, crée parfois l'impression qu'il serait difficile, voire impossible de dire à son sujet quelque chose de nouveau. Rien de plus erroné qu'une telle impression. De tels faits laissent dans la conscience du grand public tout au plus certains clichés de caractère très général, sans que le problème en cause soit véritablement connu et compris. Cela s'applique, entre autres, à la notion de la «coexistence pacifique». Ainsi, bien qu'on en ait beaucoup parlé et écrit, une monographie correspondant à toutes les exigences scientifiques nous a manqué. Cette lacune se voit comblée par le livre du professeur Bierzanek qui a participé à de nombreuses réunions internationales ayant eu pour but soit de mieux définir la notion même de la coexistence pacifique, soit de codifier son contenu juridique.

Le livre porte l'empreinte de la grande érudition de son auteur. R. Bierzanek a pris en considération la science aussi bien des pays capitalistes et des pays socialistes, que d'assez nombreux pays du «tiers monde», de même que la documentation abondante des organisations tant gouvernementales (surtout l'O.N.U.) que non gouvernementales (surtout l'I.L.A. — International Law Association). L'auteur, après avoir classé ces riches matériaux, en tire ce qui est le plus essentiel et le soumet à une analyse détaillée, alors que son jugement per-

sonnel, bien qu'on devine ses positions idéologiques, reste généralement plutôt modéré, voire circonspect.

Dans le premier chapitre, R. Bierzanek fait ressortir la dépendance du droit international de l'état des relations internationales et, avec un esprit historique remarquable, caractérise les changements survenus dans ces relations depuis la Première Guerre mondiale, changements qui ont influé de façon décisive sur le développement du droit international. C'est sur ce fond qu'il tâche de définir la notion de la coexistence pacifique, à son avis jusqu'ici non encore suffisamment comprise. Cette notion comporte, selon R. Bierzanek (p. 35 - 36), quatre éléments, à savoir: a) coopération entre pays à des systèmes politiques, sociaux et économiques différents et, partant, opposés les uns aux autres; b) coopération active, s'étendant à des domaines fort divers, mais accentuant surtout la conservation de la paix et la sécurité internationale; c) coopération conforme aux buts et aux principes de l'O.N.U.; d) coopération suivant la dynamique du développement des relations internationales.

Le chapitre II, consacré au développement historique de la notion de la coexistence pacifique, polémique avec les tentatives d'en faire remonter les sources jusqu'à des époques très éloignées (coexistence de la chrétienté et de l'islam au Moyen Age, coexistence du catholicisme et du protestantisme dans l'époque moderne). Ce qu'on comprend

aujourd'hui sous ce terme est enraciné dans la Grande Révolution d'Octobre et provient directement de la pensée de Lénine. R. Bierzanek souligne pourtant la contribution importante qu'ont apportée au développement de l'idée de la coexistence pacifique, notamment après la Deuxième Guerre mondiale, les pays du « tiers monde » (Puncha Shila, Déclaration de Bandoeng, etc.).

Chez les partisans de l'idée de la coexistence pacifique, R. Bierzanek décèle, dans le chapitre III de son livre, quatre approches possibles: a) approche marxiste (en l'exporant, il polémique fort pertinemment avec certains auteurs occidentaux qui la présentent sous un jour tout à fait faux); b) approche qu'il appelle «réaliste» et dans laquelle il range tous les auteurs et hommes d'État occidentaux qui acceptent l'idée (pas nécessairement le nom) de la coexistence pacifique en tant qu'une nécessité historique; c) approche «chrétienne» (dont la présentation aurait gagné si l'auteur avait distingué entre la variante protestante et la variante catholique de cette approche et si, dans le cadre de celle-ci, il avait mis en relief la contribution personnelle du pape Jean XXIII, ainsi que les débats relatifs à ce problème qui s'étaient déroulés au Concile du Vatican; d) approche, diversifiée certes mais identique quant à son sens, des pays du « tiers monde ». M. Bierzanek passe en outre succinctement en revue les adversaires de la conception de la coexistence pacifique s'opposant à leurs vues lorsqu'ils prétendent que celle-ci n'est guidée que par des motifs tactiques.

La valeur toute particulière du chapitre IV consiste en ce que l'auteur y donne les renseignements, souvent peu connus et qu'il possède en tant que participant à de bien nombreuses réunions convoquées à cet effet, sur les activités de certaines organisations non gouvernementales. Une partie considérable de ce chapitre traite des travaux de l'I.L.A.

qui s'est occupée de ce sujet à partir de son congrès de 1956 tenu à Dubrovnik et dont la contribution dans ce domaine fut remarquable. Des mentions plus brèves, mais fort instructives, ont été consacrées dans le cadre du même chapitre à l'Association des Juristes Démocrates, ainsi qu'à l'A.A.A. (Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Haye).

Les travaux de l'O.N.U. ayant pour but la codification des principes de la coexistence pacifique font l'objet du chapitre V. Ici encore, le fait que l'auteur a participé à certains des travaux en cause prête un caractère d'authenticité convaincante à tout ce qui se rapporte aux activités du Comité spécial qui s'était rassemblé en 1964 au Mexique, en 1966 — à New York. La méfiance de certains milieux occidentaux même à l'égard de la terminologie avancée du côté socialiste a rendu nécessaire, il est vrai, de parler lors des débats de ce Comité des « principes de relations amicales et de coopération entre les États », au lieu de parler carrément de la « coexistence pacifique ». R. Bierzanek, se basant d'ailleurs sur bien des énonciations d'autres autorités également (p. 120 et s.), émet toutefois l'avis que, malgré les différences terminologiques, l'essentiel reste identique.

Le plus important, du point de vue purement juridique, semble être le chapitre VI. L'auteur y passe en revue les différents techniques et manières dont les principes concrétisés de la coexistence pacifique pourraient être incorporés dans le droit international en vigueur. Dans la partie introductive de chapitre, M. Bierzanek dit, à juste titre, qu'il y aurait lieu au préalable d'uniformiser les terms employés jusqu'ici d'une façon plutôt chaotique. Ses remarques au sujet du terme même « principes » se distinguent surtout par leur perspicacité. Il y compare les divers emplois de ce terme lorsque celui-ci fait son apparition tan-

tôt en guise des «principes du droit international» sans un contexte défini quelconque, tantôt comme «principes» dans le sens de l'article 2 de la Charte de Nations Unies, tantôt comme «principes» dans le sens du statut du Tribunal militaire international de Nuremberg, tantôt enfin comme «principes généraux de droit reconnus par les nations civilisées» dans le sens de l'art. 38 al. 1 lettre c, du statut de la C.I.J. C'est cette dernière acception surtout qui est la plus controversée et l'avis du professeur Bierzanek, formulé d'ailleurs d'une manière très circonspecte (p. 186 et s.), d'après lequel les principes en cause ne constitueraient point une source autonome du droit international, ne saurait pas trouver un appui général.

Ce qui est par contre très convaincant, c'est la façon dont M. Bierzanek expose les risques qu'on courrait si l'on voulait codifier les principes de la coexistence pacifique au moyen d'une convention. Suivent les remarques fort pertinentes sur la naissance des règles du droit coutumier, notamment celles qui soulignent le rôle dans ce processus d'élément psychologique. En troisième lieu, l'auteur débat la questions si et avec quel effet juridique la codification en cause pourrait être opérée en moyen des résolutions de l'Assemblée générale de l'O.N.U. (p. 213 et s.) M. Bierzanek passe ici en revue les divers avis débattant le caractère juridique de ces résolutions (il est à regretter que, parmi de tels avis, il n'a pas inclus celui de K. Skubiszewski, pourtant fort intéressant). Son opinion propre (p. 232 et s.) tend à reconnaître à ces résolutions sur-

tout une valeur interprétative de la Charte.

Les travaux menés jusqu'alors au sein de l'O.N.U. sur la codification des principes de la coexistence pacifique ressemblaient beaucoup — d'après le professeur Bierzanek — aux processus au cours desquels naissent les règles du droit coutumier. Il souligne à ce propos le rôle que jouent les différents organes de l'O.N.U. puisqu'ils établissent dans leur pratique subséquente, donc au moyen de l'interprétation usuelle, le sens juridique qu'ils entendent donner à leurs propres résolutions.

Dans ses conclusions (p. 252 et s.), E. Bierzanek, tout en reconnaissant l'existence de certaines difficultés, émet l'opinion que la conscience de la nécessité de codifier les principes de la coexistence pacifique se répand de plus en plus. Il y aurait donc lieu de persévérer dans les travaux y relatifs. La participation à de tels travaux sera toujours pour un juriste «une tâche fort intéressante et utile» (p. 262). La conclusion de E. Bierzanek est donc plutôt optimiste.

Le livre du professeur Bierzanek, écrit à la fois d'une manière fort érudite et pleine de verve, compte sans aucun doute parmi les meilleures monographies dans le champ du droit international qui ont été dernièrement publiées en Pologne. Il donne crédit aussi bien à son auteur qu'à son inspirateur (Institut polonais des Affaires internationales) et à son éditeur (Éditions Scientifiques de Pologne).

Stanisław E. Nahlik

Władysław BRAS, *Międzynarodowe publiczne prawo kolejowe [International Public Railway Law]*, Wydawnictwa Komunikacji i Łączności, Warszawa, 1968, 200 pp.

As it is known, the regulations of international railway law fall into two different legal domains. The rules governing relations between the rail-

ways and their uses are of civil character. This set of problems is not the concern of the author. Instead, he discusses in depth and in an original ar-

rangement the regulations of public law which define the principles and conditions of cooperation between states in railway transport and demarcate their powers in this field and the rules which govern cooperation between railway administrations where these are public bodies. The analysis is confined to the regulations in force of the Eurasian continent.

The following groups of problems are examined by the author: The sources of the international legal norms governing railway transport, the basic issues requiring international regulation, the unification of railway tracks and rolling stock, the mutual use of railway cars, the organization of international railway traffic and international time-tables, the freedom of international railway transport and freedom of transit, the public law elements of international transport law, the legal situation of frontier railway traffic and international railway administration.

In the author's views the list of railway transport problems which require international regulation will be continually expanded. At the same time he is in favour of a systematization and codification of international railway law which he agrees is out of date and needs modernizing.

The book under review, the most extensive work to appear in Polish on international public railway law, is to be commended in the first place as an invaluable source of information. The author is primarily interested in a detailed presentation of positive law supplemented, at times, by interesting outlines of the historical evolution in the approach to a given problem. Despite such terms of reference, undoubtedly very useful though are, the author does not avoid discussing certain theoretical and controversial problems and ones which are contentions in actual practice. Let us quote, as an example, his interesting reflections on freedom of

international railway transport and freedom of transit.

The reader's attention will also be attracted by the fairly wide treatment of some relatively practical problems connected with the participation of the majority of socialist European states in the two main international railway organizations: Union Internationale des Chemins de Fer (UIC) and Organizatsiya Sotrudnichestva Zheleznikh Dorog (OSZhD) grouping European and Asiatic socialist states.

The literature of the subject both in socialist countries and in western Europe has been widely drawn on. The author has also marshalled an ample array of legal documents listing 17 multilateral conventions and 114 bilateral and tripartite agreements pertaining entirely to railway regulations. Moreover, he quotes 36 peace treaties and 57 other international conventions in which there is reference to railway problems.

The reference section of the book also lists the minutes of intergovernmental conferences and the acts of international organizations relating to the problems discussed. Specifically these are the records of the League of Nations, the UN, the OCTI, the CMEA and the relevant register of publications of the Permanent Tribunal of International Justice and of the International Court of Justice.

A list of agreements (38 entries) between railway administrations and the records of railway organizations are also provided.

The author's meticulous collection of such wide ranging documentary material deserves special emphasis; it is one of the elements which makes his book of more than passing value and of great benefit to other authors interested in the problems of international railway law. After reading it one cannot help being struck once again by the expansion of modern international law which is encompassing ever new areas of life and imposing on them detailed regula-

tion. It is significant that in these new fields—economic in the broad sense—so far almost completely neglected by theory involved in analysis of classical problems, the international law is en-

joying a heyday and proving itself in practice, if by that we mean the effectiveness of the obligations entered into by particular states.

Andrzej Wasilkowski

Henryk de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawnomiędzynarodowe* [Council of Mutual Economic Assistance. An Inquiry into Legal-International Problems], PWN, Warszawa 1967, 139 pp. Series: Dissertationes Universitatis Varsoviensis.

The book reviewed is the first monograph in Polish literature giving a comprehensive exposition and analysis of legal-international problems, relating to the Council of Mutual Economic Assistance (CMEA).¹ This in itself would be a sufficient reason for the interest to which this item gives rise. Moreover, the reader will be pleased to have at last an exhaustive legal analysis of problems intimately connected with the international economic situation of Poland.

The whole material of the book is divided into seven chapters wherein the following groups of problems are dealt with: The origin of CMEA, its aims and functions, the principles of its activity, the partnership in CMEA, organs of CMEA and their functions, legal forms of CMEA activity, and, finally, the problems of legal-international subjectivity of the Council for Mutual Economic Assistance. The headings of particular chapters provide a fairly accurate description of the subject-matters dealt with in the book reviewed. Let us add only that in the last chapter the Author—when considering the problem of legal—international subjectivity of CMEA—discusses the con-

vention on legal capacity of CMEA, on its privileges and immunities and also the agreements concluded by CMEA with certain member-states as, e.g., those determining the legal status of the central seat of CMEA, and with certain international organizations. In chapter IV the author analyses the convention passed between the CMEA and Yugoslavia establishing the conditions of Yugoslavia's partnership in the activities of particular organs of CMEA. Thus it appears that in the book reviewed we have a complete outline of legal-international problems within the range announced in the book's heading.

The descriptive and descriptive-comparative method is dominating in the treatment of the material presented. It will be out of place to discuss here the merits and drawbacks of this method. To tell the truth, I am not enthusiastic about this method. One has, however, to take into account that the documentation pertaining to CMEA is, in part, hardly accessible and that the Author had to overcome a number of difficulties till he succeeded in collecting and making available to the reader an ample legal material. Under these conditions the descriptive method is probably justified. It is plausible to assume that the main purpose of the Author was to provide a reliable documentary basis for further theoretical research. If so, his purpose has been successfully attained.

¹ In L. CIAMAGA'S book *Od współpracy do integracji. Zarys organizacji i działalności RWPG w latach 1949 - 1964* [From Cooperation to Integration, An Outline of Organization and Activity of CMEA 1949 - 1964], Warszawa 1964. The legal problems are dealt with only marginally.

Besides, the Author does not shun theoretical problems. The very structure of his book—we may call it a developed commentary to the statute of CMEA—does not favour bringing into prominence the theoretical aspect of the problems. The elements of theoretical analysis are non-uniformly distributed. In some parts of the work the Author grants himself the privilege to depart from the descriptive method (in the sequel we shall dwell on these cases). Then his considerations become broader, they display a remarkable precision in legal analysis advancing some interesting postulates. On the contrary, in other cases, where the predilection to the descriptive method prevails, the Author comes close to the frontier separating a scientific dissertation from a simple directory (cf., e.g., Chap. V).

The method applied by the Author may give rise to objections that the economic problems the CMEA has to solve are treated but formally and superficially. It is surprising, first of all, that there is no presentation—be it even most concise—of the problems of international socialist division of labour. The Author confines himself to mentioning (following Art. III, item 1b of the statute) that the Council has to contribute to the advancement of this division of labour. In actual fact, however, the organization of the international division of labour is not simply one of the numerous functions of CMEA (as it would result apparently from a purely formalist analysis of the statute), but its main task in the present stage of its development. The whole activity of CMEA is in fact subordinated to this essential task.

Similarly, in some other cases a distinct outline of economic background of legal solutions adopted in the statute of CMEA seems purposeful, not to say indispensable. This holds true, e.g., for the passing of resolutions as function of interest of particular member-states

in a given problem (Art. IV of the Statute). This most original legal solution should not be interpreted only under its formal aspect. It is first and foremost a reflection of the differences in levels and stages attained in the economies of particular member-states which, in turn, predetermine the concepts of their future economic development.

From the theoretical point of view the most interesting parts of the book reviewed are those devoted to the problem of whether the CMEA is an integration organization (p. 16 ff.). The author advances his own original interpretation of Art. IV of the CMEA statute with regard to the passing of resolutions in function of interest of particular member-states (p. 41 ff.), discusses the legal meaning of recommendations of CMEA (p. 103 ff.) and the problem of responsibility of member-states for meeting the obligations resulting from the recommendations of CMEA accepted by given member-states (p. 115 ff.).

The notion of economic integration is by no means univocally established. Nor is it an easy problem to determine the relation between the economic substance of the integration process and its legal-international form.² One should take into account that the overwhelming majority of theoretical considerations and attempts to define the true meaning of "integration" is based on the analysis of processes occurring in the capitalist world, in particular in Western Europe. At the same time, we do not know ex-

² The legal-international concept of integration was dealt with in C. BEREZOWSKI'S *Prawo międzynarodowe publiczne* [International Public Law], Part I, Warszawa 1966, p. 23. Cf. also J. SIOTIS, *The Secretariat of the United Nations Economic Commission for Europe and European Economic Integration: The First Ten Years*, "International Organization", 1965, No. 2, p. 178; R. GREGG, *The UN Regional Economic Commissions and Integration in the Undeveloped Countries*, "Intern. Organ.", 1966, No. 2, p. 208.

actly the true meaning to the notion of economic integration of socialist countries. In spite of this, some authors ascribe to the CMEA integration aims. Dealing with this problem H. de Fiumel introduces a meaningful distinction between the maturing of objective premises for integration—which is, obviously, prompted by the activity of CMEA—and the integrational purpose (p. 17). This integrational purpose does not result in the least from the statute of CMEA. The Author is right in stressing that the coordination of economic plans is not itself a manifestation of integration.

We are indebted to H. de Fiumel for his valuable theoretical contribution to the discussion on the subject of the legal structure of CMEA recommendations. In spite of the fact that this is the most frequently debated problem yet it has remained obscure and controversial in many points. In this part of the work reviewed the legal skill of the Author becomes manifest. Arguing the thesis that the recommendations of CMEA if accepted by the member-states transform themselves into international agreements, the Author formulates several important remarks of some value for the theory of recommendations of international organizations. This holds true, in particular, for the Author's assertion, richly substantiated, that the recommendations are but unilateral acts of an international organization as they are the manifestation of will of an organ of this organization as such and not of the will of the states represented in the organization (p. 104). The same refers to the thesis and its demonstration that the recommendation cannot "transform itself" into an international agreement (p. 105).

H. de Fiumel is the first author to raise the problem—not as an incidental one—of financial responsibility of member-states of CMEA for liabilities resulting from the recommendations of

the Council accepted by the member-states. The Author advances the postulate that a permanent judicial body should be formed wherein judges of all the member-states would participate within the framework of CMEA competent to issue final and absolutely binding decisions for the parties as well as competent to interpret the stipulations of the statute of CMEA, the decisions of its organs and the agreements concluded. The jurisdiction of such a tribunal should be obligatory.

The postulates advanced by the Author are motivated by the requirements of cooperation within the framework of CMEA which, in turn, calls for the observance of the principle of the inviolability of obligations assumed. Moreover, the method of direct negotiations to settle disputes and determine financial responsibilities of particular states proved to be of poor effectiveness. He emphasizes correctly that the obligations assumed within the CMEA are, as a rule, multilateral. Let us add that even in the case of bilateral obligations assumed in pursuance of CMEA recommendations, the CMEA has legal interest in settling eventual disputes in accordance with the principles of cooperation within the CMEA and in conformity with the requirements of future development of this cooperation. Thus, the very idea that CMEA should be vested with the right to supervise the implementation of its recommendations should not be questioned. It seems, however, that the Author's suggestions should be considered rather as a bold attempt to indicate the trend of future development than as actual proposals *de lege ferenda*. More limited suggestions—which, unfortunately, the author did not advance—could serve as successive stages leading to such a radical change in CMEA structure and traditions of cooperation of socialist countries.

The review of problems dealt with by H. de Fiumel, presented in this note

is, of course, only perfunctory. Nonetheless, it leads to the conclusion that—in spite of some drawbacks connected primarily with insufficient analysis of economic background and excessive use of descriptive method — de Fiumel's

book constitutes one of the important positions in the literature of socialist countries dealing with legal aspects of the CMEA activity.

Andrzej Wasilkowski

Janusz GILAS, *Zagadnienie rozbrojenia* [The Question of Disarmament], "Studia Jurisdicta," Vol. 7, 1966, No. 2, 139 pp. Towarzystwo Naukowe w Toruniu.

The study of Janusz Gilas constitutes an interesting attempt at a scientific analysis of the important and at the same time complex problem of disarmament. The Author discusses successively the history of disarmament negotiations and precedents of disarmament, the notion of disarmament, disarmament talks after the World War II, organs dealing with disarmament and the legal substance of general and complete disarmament.

The legal analysis of those problems is based on a broad source material and the Author managed to maintain a balance between the main elements of his argumentation, i.e. the legal ones and the subsidiary subjects relating to a wide gamut of political, military and economic problems.

In his work Janusz Gilas analyzes a number of important, though often still controversial disarmament problems. One of them is the definition of disarmament. In the literature of international law one can find many diverse definitions of disarmament. They can be divided into two basic groups: teleological and functional. In the first sense disarmament signifies a complex of measures undertaken by States aimed at the complete elimination by all States of armaments and armed forces, with the exclusion of those which are indispensable for the maintenance of internal order and for ensuring international security in case of its violation. In the second sense disarmament signifies such actions by States as "reduc-

tion," "limitation," "regulation" of armaments or any other forms of State activities commonly referred to as "partial measures," which are designed to reduce armaments and the number of troops to an agreed extent.

Adopting the teleological definition, J. Gilas conceives disarmament as "complete solutions." Disarmament, as the Author understands it, is an international action provided for by treaty and designed "to eliminate peacetime armaments and to liquidate other armaments or transfer them to peaceful purposes without converting them or after their conversion." Thus, the Author introduced to his definition of disarmament certain elements which are of negligible significance for the determination of *differentia specifica* of disarmament (e.g. the determination of the method of disarmament), while omitting at the same time other elements more important for the determination of the legal essence of contemporary disarmament like, e.g. the set of obligations of States, envisaged in the case of complete solutions to ensure the security of a disarming and disarmed world.

The Author has dealt in his work also with another question, namely — the obligation of disarmament. While at the turn of 1959 to 1960 that problem was controversial, later years have led States to recognize that obligation. However, the problem of the sources of that international legal obligation continues to be controversial. In the literature, reference is made to the general principles

of international law, the Charter of the United Nations, international agreements and resolutions of the General Assembly of the United Nations. Janusz Gilas, too, points to resolutions of the General Assembly as to one of the basic sources of the international legal obligation of disarmament. Without denying the role these resolutions play in the law-making process, the general view that they do not have the value of sources of international rights and obligations of States should not be neglected.

On the other hand the obligation of disarmament follows from the general provisions of the Charter of the United Nations, i.e., from the determination contained in its preamble to institute methods ensuring that armed force shall not be used, save in the common interest of the international community, and from some international treaties. One of them is the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of August 5, 1963 in which the parties proclaimed as their principal aim "the speediest possible achievement of an agreement on general and complete disarmament." It appears, that—contrary to the view of Janusz Gilas—this constitutes an act transforming "the political principle of general and complete disarmament, recognized in the legal sense only by some States, into a general principle of contemporary international law."

In the context of the interesting argumentation of the Author, a reflection occurs whether consideration of the legal essence of disarmament should be confined exclusively to the problem of the

"obligation of disarmament." This problem is of practical significance to many smaller States entangled by the Big Powers in the arms race. For many such States the question of relieving themselves from various forms of armaments of their own and of foreign armaments is an important element in their endeavours to consolidate their sovereignty. This is manifested in the active role they play, by presenting various proposals for partial and regional disarmament (proposals for the liquidation of foreign bases, for the setting up of atom-free zones, for the withdrawal of foreign troops, for the limitation of armaments and of armed forces). In putting forward these proposals, the States concerned refer to their right to relieve themselves of the burden of armaments and to create conditions of security for themselves or for their region, based on principles other than the armaments race.

Janusz Gilas did not confine himself to discussing the general problems of general and complete disarmament but also devoted large parts of his work to a discussion of partial solutions, among them also of the initiatives advanced by Poland, especially—of the Adam Rapacki Plan to set up an atom-free zone in Central Europe.

It is a matter of satisfaction that the problem of disarmament which holds such an important place in the diplomacy of the Polish People's Republic is increasingly taken account of also in the Polish legal literature. Janusz Gilas's book constitutes in this respect an important contribution.

Andrzej Skowroński

Jerzy JAKUBOWSKI, *Umowa sprzedaży w handlu międzynarodowym. Metody i formy regulacji* [*Contract of Sale in International Trade. Methods and Forms of Regulation*], PWN, Warszawa 1966, 301 pp.

In modern science of international law the question of a special legal system governing international economic turnover, and particularly trade, is widely discussed. Jakubowski's monographic work *Contract of Sale in International Trade* summarizes his many years research in this field and at the same time represents a successful attempt at systematizing and evaluating the more important concepts relating to the "autonomous character" of international commercial law.

Jakubowski deals with the international contract of sale in the context of relations between the seller and the buyer. And, as he points out, the analysis belongs thereby to the sphere of private international law. Consequently, the writer is in favour of a broad concept of private international law whose scope would not be limited to rules of conflict, as is often the case in Polish science.

The writer is fully aware of the many aspects of the reglamentation of an international contract of sale. This fact on the one hand makes it difficult to systematize the foundations of the regime governing such a contract, and on the other, provokes views on a special character of norms regulating international trade. By limiting the scope of his study to relations between the seller and the buyer, the writer confines his analysis to the sphere of civil and commercial law.

The first chapter of the work is a presentation of views on the "autonomous character" of the law on the international sale of goods. Having defined (in Chapter II) the scope of and the methods to be applied in the consideration of the subject, the writer analyzes in the next three chapters international contracts of sale in the

aspects of non-state, inter-state, and intra-state reglamentation.

Jakubowski deals most extensively with non-state reglamentation. In the chapter devoted to non-state methods and forms of reglamentation, the author gives a comprehensive analysis of the principle of freedom of contract; of the conclusion of contracts according to standard contracts (particularly those drafted by international organizations); of the commercial usages becoming internationally uniform; and of the development of a special set of legal rules, as a result of the operation of commercial arbitration.

Jakubowski points out that most writers consider the autonomous character of the *lex mercatoria* as an autonomy from the national civil or commercial law. He clearly shows, however, that non-state reglamentation does not lead to autonomy from national law. It is that law which in the last instance decides whether such regulation is legally admissible. Moreover, these rules, as Jakubowski correctly shows, do not have the character of legal norms, and in most cases the explicit or implied will of the parties is required for their application.

In Jakubowski's view, inter-state regulation is of essential importance for the creation of a special legal system to govern international contracts of sale. The author distinguishes three methods of unification: through international conventions, through uniform laws annexed to such conventions, and through model laws introduced, at discretion, to national legislations. The writer considers it necessary and desirable to unify the law on the international sale of goods by means of inter-state regulation, although he is fully aware of the,

difficulties involved in such a unification, as well as of its limited character.

As regards general unification the author discusses the Hague conventions of 1964 as well as the Hague conventions of 1955 and 1958. Particularly interesting is the analysis of the 1964 Convention relating to a Uniform Law on the International Sale of Goods. He appraises that convention favourably and postulates Poland's accession to it, when it comes into force.

As regards regional unification, the writer devotes the greatest attention to an analysis and evaluation of the work done within the Council for Mutual Economic Assistance, and deals mainly with the General Conditions of Delivery of 1958. He expresses the opinion that in relations between the CMEA member states they have the force of an international convention, while in the legal systems of the particular member states they constitute internal *jus specialis*. In view, however, of some doubts as regards that question, on the part of scholars of the socialist countries, the writer favours the conclusion of a formal international convention in this subject.

As regards the system of methods and forms of regulation of a contract for the international sale of goods, the author attaches great importance to the national legislations.

Jakubowski makes here a distinction between a structural separation, consisting in the development of separate sources of law for the regulation of international economic relations and a functional separation. In the latter case, the norms of the general civil or commercial law continue to form the basis of the regulation of international economic relations. However, the additional provisions relating exclusively to economic relations with foreign countries and a special interpretation of general norms take into account the specific con-

ditions of international economic turnover.

From the analysis given by the writer it transpires that most legal systems have failed so far to separate the sources of the law of the international sale of goods. In most cases there is some evidence of a functional separation. An exceptional example of structural separation is provided by the legislation of Czechoslovakia, where a special code of international trade was promulgated in 1963. Contracts for the international sale of goods will be separated in a similar way in the systems of internal laws upon the entry into force of the Hague Convention of 1964 together with the law on international sale of goods annexed to it.

The author considers the existence of a separate set of legal norms adjusted to the conditions of international economic relations as the most convenient solution. However in Polish law in view of the adoption of the civil code of 1964, he rightly does not see any possibility for a separation of the sources of law on the international sale of goods. In this context he makes interesting comments on the way in which the norms of the civil code of 1964 should be interpreted for the needs of international economic turnover.

Dr Jakubowski's work is a theoretical study. Its content is best described by the sub-title "Methods and Forms of Regulation." The author skillfully combines problems relating to a contract of sale with general theoretical issues, and refers, moreover, not only to the theory of law, but also to the theory of social sciences in general. Two of his conclusions are particularly worth emphasizing. First, the view that the question whether a given rule of conduct has the character of a legal norm is determined by its connection with a State authority which gives it the necessary sanction. Second, the concept according to which legal norms on private rela-

tions contained in international conventions belong at the same time to two legal orders—international law and national law. Full use is made by the author of the abundant literature of

both the socialist and the capitalist countries as well as of the source documentation.

Andrzej Całus

Alfons KŁAFKOWSKI, *Prawo międzynarodowe publiczne* [Public International Law], 2nd enlarged edition, Warszawa 1966, 327 pp.

The book presents a theoretically compact system of international law written in the form of a textbook for law students. For some years (the first edition appeared in 1964¹) it has been a standard work used in virtually all departments of law at the higher schools in Poland.

In view of what has just been said a review of this book must concentrate not only on the theoretical principles of the system but also on its didactic values.

In the theory of international law with no superior legislature standing above its sovereign subjects, the basic division is between the positivist schools and the representatives of movements which have varied widely in different periods and which might be designated with the joint name of "non-positivist." In other words, the fundamental feature of every theoretical system of international law is its legal method. In this respect, Professor Klafkowski's textbook can be described as an exposition in depth of positive public international law: its subject is "the law created and followed by states in a specified place and time." It constitutes a "system of rules" and so it is a law in which norms in an objective sense can be distinguished from subjective rights and the source of law from the source of obligations. The concept of the system is referred

to, and defined on the basis of, the socialist general theory of law.

The development of universal multilateral conventions and the codifications of the International Law Commission have enabled the Author to base the whole of his argument on legal definitions, or rather on definitions culled chiefly from the rules of established law. Multilateral agreements and the papers of the International Law Commission form the principal bearings of what he has to say about the contents of legal norms. On the other hand, bilateral agreements are quoted almost invariably only by way of exemplification or for a more detailed description of the obligations and rules of international law on Poland. But in principle the system embodies the universal international law created by all states on a basis of equality but exercising in practice a varying degree of influence on its formation.

Just as the legal method is the most typical feature determining the basic aspect of the author's theoretical system, so didactic considerations have swayed the form and range of his exposition.

The traditional textbooks have followed the classics and made a division into the law of war and the law of peace, with priority or even exclusive attention being given, as the subject developed, to peacetime relations. In Polish jurisprudence Ludwik Ehrlich divided his textbook into a general and a detailed section, though he abandoned this classification in the final edition. The

¹ Alfons KŁAFKOWSKI, *Prawo międzynarodowe publiczne* [Public International Law], Warszawa 1964.

development of international organisations, that is subjects of international law of a functional nature, has led certain writers to produce a systematization of international law reflecting the complex character of international-law personality. The diversity in this field is great; each author is concerned with the originality of the internal construction of his work. Generally speaking it could be argued that the decisive factor here is not the didactic element, but the need to bring out in this way certain gaps or typical features relating to what are sometimes the fundamental principles of the author's system.

Professor Klafkowski has taken a different course: he is guided solely by the practical requirements of a textbook which he says forms no more than "a minimum outline of the basic problems of our subject".² As a result it is divided into the following chapters: fundamental concepts (definition, the international community, sources, codification, relationship to domestic law, etc.); subjects, territory, and population followed by the third element of the classic definition of the State, that is the supreme authority. The latter section covers the whole set of problems connected with State organs in international relations, including consular relations. Then come chapters on the open sea, international treaties, and universal international governmental organisations. Chapter IX discusses the settlement of disputes. The last chapter is headed "International Law and War."

In Professor Klafkowski's treatment, his outline lacks a separate historical section. He is of the opinion — and backs

it with examples from other countries, among them, the Soviet Union — that the history of international law and of its study is a separate subject and should not encroach on the limited amount of time allotted to the teaching of international law. It belongs to the research and didactic province of law historians. Not, of course, that this means foregoing a historical view of the subject. Sometimes this historical perspective is implicit in the substance of his argument; elsewhere it is brought out explicitly in the course of his remarks, as for instance when he discusses the position of the Holy See treated in socialist jurisprudence as a "quasi-state" (pp. 62 ff.) and quoted by Professor Klafkowski as an example of the "creation by States of a subject of international law," or in his exposition as when he describes Polish studies of international law, the League of Nations and many other topics (e.g. pp. 24 - 26, 40 - 42, 53 - 56, 276 ff.).

The author is, of course, widely read in the foreign literature and makes clear the attitude of jurisprudence of the socialist states. It has been his aim to make the fullest possible use of the most recent achievements of Polish writers. Almost all the works available have been noted in the textbook, which can help students to extend their knowledge of each issue through readings in their own language.

The method adopted by the author and described here as well as his way of presentation are of great didactic value, especially for students educated not on a system of common but of statute law. The consistent positivism underlying the author's method will encourage them to think in terms of statute law about international relations as well. Every experienced teacher will appreciate the importance of such a disposition in pondering the legal aspects of international relations.

If there is criticism to be made, it

² Professor Klafkowski points out that his textbook is intended chiefly for the third-year rudimentary course of international law and that further specialization at undergraduate level requires the use of Polish and foreign textbooks representing various schools. In his introduction he lists the textbooks which have preceded his and the encyclopedic publications he used in checking his material.

chiefly concerns the historical part. The approach to this issue, though justified by the requirements of the syllabus, gives rise to certain theoretical reservations. The author's remarks on this point apply mainly to the so-called historical introductions, so disliked by students, in those areas of domestic law which have long developed as established law. On the other hand, it is arguable, even given an extreme form of positivism, in a system which until recently unfolded as natural or common law. As

a result the author has not been able to avoid certain difficulties as regards the basic principles of international law and its supreme authority, reducing the role of *pacta sunt servanda* to a form of insurance of the fulfilment of obligations. The positivist method leads the author to certain extreme statements, for instance with reference to the international-law personality of international organizations and the concept of international rules and customs.

Kazimierz Kocot

Witalis LUDWICZAK *Międzynarodowe prawo prywatne [Private International Law]*, PWN, Warszawa 1967, 245 pp.

It should be pointed out at the very outset that the book under review is the first manual of private international law after the enactment of the new Polish Act on Private International Law. It is a new book and not a revised edition of the manual published by that writer in 1955 which appeared in four editions. The Author has done an immense work writing the manual on the basis of the new legislation (the Act on Private International Law of 1965, the third part of the Code of Civil Procedure of 1964, the Maritime Code of 1961 etc).

The substantive scope of the manual reflects the Author's view on the limits of private international law. He tends to follow the traditional approach and to reduce the subject-matter of that branch of law to rules determining the applicability of substantive law. On the other hand, however, the Author rightly makes a compromise with the needs of life by including in his book chapters on the international civil procedure and on the rights of aliens, justifying it by the "close connection between these matters" (pp. 104, 232).

Before presenting the problems of the conflict of laws, the Author usually gives

a general characteristic of the given institution of civil law in selected legal systems. On the other hand, he displays restraint in applying those "comparative legal characteristics," perhaps with the exception of the chapter on transport law, in which he gives a very broad account of the substantive provisions of Polish law (especially of the Maritime Code and of the Air Law).

Worth emphasizing is the fact that the writer has included a number of questions previously underestimated, e.g. a subchapter on international trade arbitration.

The arrangement of the material is logical and clear. An innovation of the book is Professor W. Ludwiczak's chapter on the international civil procedure in the general part of his book. It seems that the Author has achieved his objective by drawing attention to the correlation between the provisions on jurisdiction as well as on recognition and enforcement of foreign decisions on the one hand, and the provisions on the applicability of substantive law — on the other.

W. Ludwiczak's manual stands out for its considerable didactic qualities —

an easily intelligible language and a simple and clear style. Certain ambiguities from the point of view of the clarity of reasoning arise in the Author's presentation of the problem of the change of the applicable law (pp. 31 and 38-91). It should be, however, noted that these are some of the most difficult questions in the theory of private international law and that in this respect opinions are extremely divergent. The same is true to some extent of the problem of classification (pp. 73-77).

It should be also stressed that the Author has taken into account the latest developments in that branch of law not only in Poland but in other countries as well. The book also reflects some of the most recent trends in the theory of private international law.

In reviewing a manual, it is difficult to go into a discussion on all the problems contained therein. It appears, however, that the Author's traditional approach with regard to the scope of private international law seems to be questionable (p. 12)¹ and the same opinion applies to his approach to the question as to when a conflict rule is applicable; the Author uses here the notion of the "foreign element" (p. 9).²

¹ Cf. J. JAKUBOWSKI, *Funckje i zakres prawa prywatnego międzynarodowego* [Functions and Scope of Private International Law], "Państwo i Prawo", 1966, No. 11, pp. 683-684.

² Cf. H. TRAMMER, *Zasięg obowiązywania*

The Author very rightly detaches the question of application of foreign law from that of the recognition of a State (p. 10).

As regards the structure of the conflict rule, the Author's position seems to be too traditional and it may not withstand the test of a closer analysis of the issue, particularly when account is taken of the most recent trends in the general theory of law (pp. 20-22).

In his remarks about the personal connecting factor the writer should have included — in my view — the notion of the person's habitual residence (*résidence habituelle, gewöhnlicher Aufenthalt*), not only because it appears ever more often in the legislation of other countries, but also because it can be said that the Polish legislation of 1965 has really that notion most often in view.

The book under review has the value not only as an academic textbook, but also as a compendium of knowledge on private international law for practitioners in the legal profession (judges, lawyers, legal counsellors etc).

As a manual it will be of particular value to the foreign readers.

Jerzy Jakubowski

prawa prywatnego międzynarodowego [The Scope of Application of Private International Law] "Państwo i Prawo", 1966, No. 12, pp. 866-873.

Jacek MACHOWSKI, *Sytuacja Antarktyki w świetle prawa międzynarodowego* [The Position of Antarctica in the Light of International Law], Wrocław—Warszawa—Kra-ków 1968, Ossolineum, 150 pp.

Although this book is devoted to the legal status of a region very distant from Poland, Antarctica is not the virgin territory as it might appear to be in the Polish science. In fact it can look back upon a long tradition of Polar explorations Antarctica included. For instance two Poles, Henryk Arctowski and

Antoni Dobrowolski, were members of A. de Gerlach's Belgian Antarctic Expedition (1897-1899). In December 1958 the first Polish expedition set out for Antarctica; in January 1959 it took over one of the Soviet stations there and began a research programme.

Although this is a legal study, its author is also a geographer and has to his name a book on Antarctica written from this point of view.¹ His knowledge of geographical realities has undoubtedly made for deeper and more practical approach to the legal issues.

His study consists of six chapters. The first is of a general nature and is entitled: *Antarctica as an Object of International Law*. Subsequent chapters deal with the legal status of the land and sea areas of Antarctica, its ice cap and its air space. The 6th and last chapter is a discussion of the legal status of Antarctica in the light of the provisions of the Washington Convention of 1959.

When discussing specific legal provisions J. Machowski always sketches them against their background and shows how these rules were shaped by practical necessities, technical progress and above all the complex interplay of the interests of various states. He makes the point that in the conditions of peaceful coexistence between countries with various socio-economic systems, Antarctica is equally subject to the influence of all the factors impinging on the pattern of cooperation and competition in our divided world. Interest in Antarctica, he says, springs from political, military, economic and scientific considerations.

In Chapter II, in which the legal status of the Antarctic land areas are examined, he gives an interesting account of developments in the theory and practice of the priority rights to a territory and the possibility of applying them to Antarctica. Although some of the Author's points seem arguable, he is surely right in pointing in the final conclusions of the chapter to the lack of any definitive regulation of the problem of sovereignty in the Antarctic regions.

The provisions of the 1959 Washington Convention have not pre-empted the ultimate decisions on the territorial claims to Antarctica, but will suffice at the present stage of scientific exploration. In the future, however, another solution may be found practically necessary, if, for instance, valuable and commercially viable deposits of natural resources were to be discovered in Antarctica.

One can agree with the Author's argument about the possibility of the appropriation and subjection to state sovereignty of the permanent ice cap (Chap. IV, pp. 91 and 96-97), but it is very hard to share his view about admissibility also of the "appropriation of the floating ice" irrespective of the legal status of the sea area through which it is drifting (p. 101).

As regards the legal status of the stations situated on drifting ice, the Author makes a comparison with that of ships or islands, but neither of these analogies seems convincing. The legal status of these stations should be considered from a more pragmatic point of view. The state to which the station on drifting ice belongs undoubtedly exercises authority over it, but it is authority over persons and things rather than authority over the territory. Any intervention by another state in the affairs of such a station or obstruction of its work would certainly be an unfriendly act, incompatible with the general principles of international cooperation, but not a violation of territory.

Analyzing the Washington Convention of 1959 the Author rightly points to a number of progressive elements which are a triumph for the idea of peaceful coexistence. On the other hand, there are certain shortcomings, loopholes and ambiguities in the agreement due to the necessity of reaching a compromise in a complicated international situation. Among the positive elements of the Washington Convention should be quot-

¹ J. MACHOWSKI *Antarktyka* [Antarctica], Warszawa 1957.

ed, first of all, the demilitarization and denuclearization of this region, which became the first atom-free zone in the world, and the freedom of scientific research in the whole region of Antarctica.

These progressive provisions in the Washington Convention could be applied *per analogiam* to other similarly inaccessible and inappropriate regions which should be barred to military use and be left open to exploration and, if feasible, exploitation by all countries.

The Author observes, for example, that the basic assumptions of the Antarctic treaty have been reflected to some extent in the development of the rules of outer space law. Let us add that in a similar way they could also exert an

influence on regulation of the legal status of the sea bed and its subsoil beyond the limits of the continental shelf. Obviously, none of these analogies can be pushed too far in view of the differences in the physical characters of the regions compared.

In his book Dr Machowski has drawn widely on the available records and literature. There is also a bibliography and brief English and Russian summaries.

Although some of his claims are open to argument, this should not obscure the fundamental scholarly merits of his study. A valuable and interesting monograph has been added to the Polish science of international law.

Wojciech Góralczyk

Wojciech MORAWIECKI, *Organizacje międzynarodowe [International Organizations]*, 2nd ed. enlarged, PWN, Warszawa 1965, 551 pp.

The work under review is of the character of a manual to meet first of all the needs of students in international relations and covers all the most important contemporary international inter-governmental organizations.

The first part of the book is wholly devoted to the United Nations. In the second part the writer discusses the following groups of organizations: universal international organizations with special competence (ILO, FAO, UNESCO, WHO, IMF, IBRD, IFC, IDA, ICAO, UPU, ITU, WMO, IMCO, IAEA, GATT); regional organizations of a general nature (the Organization of American States, the League of Arab States, the Organization of African Unity); military organizations dominated by the Western powers (NATO, the West European Union, SEATO, CENTO); West-European organizations (the Organization of Economic Co-operation and Development, the Council of Europe, the European Coal and Steel Community, Euratom,

the European Economic Community, EFTA); international organizations of the socialist states (CMEA, the Warsaw Pact).

The various organizations are discussed following an uniform scheme: origin, main purposes and tasks, principles of operation, organizational structure (including membership and composition of the organs), voting procedures and the legal character of decisions; highlights of practical activity, developmental tendencies; and—when applicable—the participation of Poland and of other socialist States in the work of the organization. The descriptive and informative material is accompanied by a critical appraisal of the basic legal and political problems concerning the organization in question.

The Author's attention is concentrated mainly on the United Nations. Apart from the purely descriptive parts of the book, more elaborated than those devoted to other organizations covered by

the manual, the reader will find there a thorough analysis and views of the Author on a number of theoretical questions discussed in the literature and related to the legal character of the provisions of the UN Charter, to the place of the UN Charter in the hierarchy of norms of international law, to the revision and interpretation of the provisions of the Charter, to the character of the United Nations as an international organization and to the legal character of its decisions. Much space is devoted to the essential premises of the proper functioning of the United Nations, which consists not in settling of basic contradictions between States by means of decisions in favour of one of the parties, but "[...] in ensuring peaceful forms of solving those contradictions and in seeking compromise solutions to which both parties could agree" (pp. 93 - 94).

A concerted action of the Big Powers — or at least some degree of understanding between them — is, in the Author's conviction, a basic political condition on which the success of the United Nations depends. The writer, however, does not regard this as a condition *sine qua non* for the functioning of the United Nations. In the absence of that basic conditions the United Nations does not lose its *raison d'être* — it is then perhaps even more necessary than ever, though its work is not too effective.

The second edition of the book has been supplemented by an introductory chapter, which gives the reader an idea about the general regularities and developmental tendencies of international organizations and makes it easier to understand their character and role in modern international relations.

The Author has included in this chapter a synthesis of such theoretical problems of international organizations as their classification, origin, definition, organs, as well as their status as subject

of law. The Author classifies international organizations according to the scope of their membership — into universal and particular, comprising States corresponding to a certain criterion of selection. This criterion may be a definite geographical region to which the State belongs (regional organizations) or the social and economic system (socialist organizations and capitalist organizations). A concurrence of political, military or economic interests is, in the Author's opinion, the objective social precondition for the establishment of an organization (p. 11).

The Author considers the scope of competence of an international organization as the criterion of distinction between international organizations of general competence (he includes here, apart from the United Nations, the Organization of American States, the Organization of African Unity and the League of Arab States), and organizations of special competence.

Passing on to the origin of international organizations, the writer points to the process of creation of the world market, of its consolidation and the growing economic inter-dependence of States as the basic condition which caused the emergence of the first international organizations. Presenting next the successive stages of the process of the growth of international organizations in number, the Author attaches particular importance to the composition of the organ preparing the statute of the organization and to the membership of the founding conference. These are two elements, on which — in the Author's opinion — largely depends the character of the organization to be set up.

The following definition of an international organization is proposed by the Author:

"An international organization (inter-governmental) is a form of co-operation between sovereign States, defined in a

multilateral international treaty, with a relatively fixed participation, and whose basic feature is the existence of permanent organs with competence and rights as defined in the treaty, which works for the achievement of common objectives" (p. 31).

The various elements of that definition are subject to the Author's separate comments. He devotes most of his attention to the organs and primarily to the means of ensuring a representative character of the organs with limited membership, especially in view of a tendency to shift the main responsibility for the work of the organization to those organs.

Passing on to the question of the legal nature of the resolutions of an organization, the Author expresses the view that recommendations, which constitute the major part of those resolutions, do not impose legal obligations upon States but may entail definite legal

effects (pp. 47-48). The writer draws attention to the risks inherent in the principle of majority voting — both for States being in a minority as well as for the organization itself and he points to possible safeguards against the danger of a definite group of States being outvoted by the other States.

The last theoretical problem which the writer deals with in the introductory chapter is the problem of international organizations as subjects of law. The task that the Author sets for himself here consists in suggesting a method of seeking an answer to this very controversial question, rather than in providing a final answer himself. The Author believes that the only way to establish whether an organization is a subject of international law, or not, is to examine the rights of that organization in order to establish the degree of its autonomy in relation to its members.

Halina Okularczyk

Stanisław E. NAHLIK, *Wstęp do nauki prawa międzynarodowego* [Introduction to the Science of International Law], PWN, Warszawa 1967, 432 pp.

The author's purpose in writing the book was to provide an introduction to the system of international law as a whole. This system is meant as consisting of three parts: I — The International Community (an anatomy of international relations) and two parts on the relations within that community, i.e. II — Cooperation (physiology) and III — Conflicts (pathology). The use of biological terminology does not, of course, mean leaning towards organic theories; the terms used have only a *figurative* and not a *literal* meaning.

In the scientific system of international law the criteria according to which facts are selected, and information provided as well as legal methods adopted, are of basic importance. This is why the purport of the "Introduction"

is of decisive significance for the whole system.

S. Nahlik belongs to that generation of international lawyers who have already been making use in their legal method of the judgments of the Permanent Court of International Justice and of the International Court of Justice. However, under the influence of the latest development of international law, he refers above all to the authority of materials connected with the development of multilateral treaties, and in the chapter on auxiliary means to establish the existing law he gives priority to doctrine rather than to judgements. Similarly, when discussing universally binding norms, the writer draws on the materials of the International Law Commission without specially substantiat-

ing them. Professor Nahlik attempts to create a system *in statu nascendi*, which takes account of the historical achievements in the field of international law, but which is adjusted to the latest development of international law and to the requirements of the modern world. However, this attempt aiming at a balanced normative system has resulted in certain inconsistencies. It should be pointed out that the writer has taken particular care to make his system meet the needs of the period of socialist construction. In some parts of the "Introduction" this assumes the form of very useful information, relating to Poland's international practice. Abundant references are made to literature published in Poland, in the Soviet Union and in the West. This relates, above all, to the luminaries and writers of recognized authority, and to the authors of specially important monographs. Valuable references are made to the writings of the young generation of Polish internationalists.

The historical aspects in the "Introduction" are of great significance. It is now general practice both abroad as in the Polish science of international law to take account of historical aspects. The author gives a review of what he regards as the most important elements in the development of the international community, as well as of the norms of international law and of the science of international law. And he rightly recalls the great role played by the science of diplomacy in the development of the law of nations.

The review of the development of Polish science of international law takes account of the most recent research in this field. In his appraisal of the Polish school of the 15th century the author emphatically underlines the importance of views of the law of war and peace expressed by the Polish writers of the Renaissance. As regards the 18th century, the Author fails to mention the

system of Tadeusz Werenko and the Madrid edition of Święcicki. The importance of the writings of Polish internationalists of the 19th century has been clearly underestimated in the "Introduction." No mention is made, for instance, of such an interesting work as *Rys rozwoju prawa narodów* [An Outline of the Development of the Law of Nations] by K. B. Szczaniecki.

The inclusion of the entire branch of the law of treaties into the science on the sources of international law arouses the greatest doubts. The scope of the considerations about the sources ought to be determined by a definition of sources in the legal sense. The writer conceives sources in the formal sense rather broadly, but not to such an extent that would warrant the inclusion of the entire science on treaties as documents in the technical sense. The more so that the remarks on other sources do not go beyond the scope of traditional textbooks. The chapter on treaties can thus be regarded as a monographic study of that important, or even nowadays most important branch of the science of international relations. The writer's remarks often go beyond the scope of textbook information; in this field he has shown himself an outstanding expert. As a monographic study this is one of the best parts of the book under review, of particular value also to practitioners.

Throughout the book the author takes account of new tendencies and often follows prevailing "trends," which are based on theoretical principles other than those adopted by him. As an example, mention could be made of the writer's remarks on the question of organizations being subjects of international law, while in most cases he confines his exposition to states. Even more striking is the reference to the concept of the absolutely binding law (*jus cogens*), while he at the same time expresses the extreme view that "in practice each

state conceives the scope of the notion of international law differently" (p. 22).

Among the new publications of manuals the "Introduction" represents an important scientific contribution based on good scholarly workmanship. It will certainly fulfil a great role as a sup-

plementary textbook for international law students and seminars. In future editions the system ought to be made theoretically more cohesive, particularly as regards the legal method.

Kazimierz Kocot

Maksymilian PAZDAN, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym* [The Capacity to Legal Acts of Physical Persons under the Polish Private International Law], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego," Prace Prawnicze, No. 41, Kraków 1967, 126 pp.

The capacity to legal acts should be discussed with reference to particular sections of the civil law and to individual concrete legal institutions. That is how Pazdan approached the subject. He made a full use of the literature of the subject taking into account books on basic problems, handbooks and monographs. He also took into consideration the jurisdiction, both Polish and foreign. He successfully applies the comparative method. The author gives an interesting presentation *de lege ferenda* of the application to legal acts of the law applicable to these acts (although *de lege lata* Polish law does not accept such a solution in general).

Some opinions expressed by the author seem to be controversial. It is doubtful, e.g., whether the omission in the new Polish private international law of Nov. 12, 1965, of the principle: *Semel maior, semper maior*, means that this principle is now not applicable (p. 26). A view is expressed in the theory of the private international law that the principle: *Semel maior, semper maior* should be treated as an unwritten, always applicable norm.

Another disputable view of the author is that under the new Polish Act on Private International Law the conflict rules on tutelage and guardianship (Art. 23 para. 1) should be applicable to the

conditions of interdiction. Among Polish scientists the opinion seems to prevail — this being shared by the reviewer of the present book — that for lack of a conflict rule referring directly to interdiction (the situation is similar under the new law as it was under the former law), both the legal effects and conditions of interdiction should be estimated on the basis of the conflict rule applicable to the capacity to legal acts. This follows from the principle of *analogia legis*. As there is no conflict rule with regard to interdiction in the Polish national laws, the *analogia legis* should be made use of. The nearest norm is that which refers to the capacity to legal acts, as interdiction can be understood, among others, as a means by which a physical person is deprived of the capacity to legal acts, or restricted in this respect.

The above remarks express merely different opinions of the reviewer of the present book, and by no means intend to qualify the Author's findings as erroneous. The point is only a different scientific interpretation. In general, Pazdan's book should be estimated favourably, because it contributes a number of valuable elements to the Polish theory of private international law.

Jerzy Fabian

Bolesław PAZDZIOR, *Office Européen des Nations Unies à Genève*, PWN, Wrocław 1969, 126 pp.

When Jean Henri Dunant, a citizen of Geneva, launched in the middle of the 19th century his campaign for an international organization to aid wounded soldiers, he not only contributed to the development of international cooperation but also took the first step perhaps towards the transformation of his city into a centre of international conferences and organizations.

The century since then has witnessed a rapid development of organizational forms of inter-state relations. The province, the powers and the membership of various organizations have widened steadily, and externally this process has been reflected in a rapid expansion of their structure. However, it was not till after the last war that this new development in international life began to attract any major scholarly interest. And although a substantial body of wide-ranging research into international organizations has now accumulated, there are still many issues which have not yet received exhaustive analysis. Even the numerous works dealing with the United Nations have left certain questions barely touched upon; for instance, the work of its European Office has been almost completely neglected. All the more welcome, therefore, is this new book which describes the structure and functions of the largest UN office outside its Headquarters.

The story of the origin and development of the European Office is somewhat out of the ordinary and has been the result of various factors. It began, in principle, with the decision of the states which met in San Francisco to locate the UN headquarters outside Europe. The reason for this decision and the attitudes of different countries on the matter are discussed in Chapter I of the book.

The second chapter is devoted to the

structural premises of the United Nations. According to the original concept of the UN Charter the whole institutional apparatus was to be concentrated in a single place, the idea being that this would ensure efficient coordination and cooperation between the various organs and specialized agencies. In practice, however, things took a different course. In view of the geographic expansion of the United Nations and the growth of its activities the principle of concentration had to be abandoned. Not only was it found more advisable to have the headquarters of the specialized agencies outside the USA, but as early as 1946 the Secretary General recommended setting up two UN offices in addition to its headquarters: one in Geneva and the other somewhere in the Pacific region. The establishment of regional economic commissions, ECE among them, hastened this decision, and one of the results was the European Office in Geneva. The choice of Geneva was, of course, largely affected by the fact that the UN had inherited the Palace of Nations equipped with all the technical installations essential to the holding of international conferences, and the League of Nations archives and library (Chap. III). This made it possible for the Office to start working at once and develop rapidly, especially as there was also highly qualified personnel available in Geneva.

The author distinguishes three stages in the growth of the UN European Office. The first was connected mainly with the establishment of the Economic Commission for Europe; the second involved the development of a rational structural organization, and the third and latest has been the outcome of the reorganization of the whole UN Secretariat and the intensification of the activities of the European Office.

The chapter devoted to the structure of the European Office is divided into two parts: the first deals with the services of the Office, the second with the composition of the staff. The author breaks down the organization of the Office into three categories: I—internal services, under which he includes buildings management and engineering division; II—general services such as administration finance division, personnel division, purchase, supply and transport division and conference services (languages and stenographic and documents division); III—units entrusted with the study of particular problems. The last group comprises the secretariats of UN agencies based on Geneva such as the Economic Commission for Europe, the Narcotic Drugs Supervisory Body of the Economic and Social Council, Permanent Central Opium Board, Office of Social Problems, Registration of Deceases of Missing Persons, Information Centre and Library.

The classification of the staff of the European Office is based on the same criteria as of Headquarters. It is divided into the Professional category and General service personnel. In addition there is also in the European Office a "E" category which provides the cleaning and linen services ("E" for "entretien"?—the author does not explain the derivation of the symbol). The recruitment of personnel follows the rules set out in Art. 101 of the UN Charter; in other words the requirements are the highest professional qualifications and the widest possible geographical basis, though the latter principle does not apply to employees in "G" and "E" categories who are recruited, as a rule, from the local population. In actual practice, however, over 50 per cent of the staff in the professional category consists of British and French citizens and more than two thirds of the posts in the principal Officer and Director category are held

by French, British and American citizens. Nor, though the author does not comment on this fact, is the principle of geographical distribution applied to the principal level in the "G" category which is contrary to the practice of Headquarters and rule 104.5 of the staff rules.

The next problem dealt with by the author is the position of the European Office within the organizational framework of the Secretariat. From his analysis of the functions of the Office he rejects the view that the European Office is merely a regional office dealing primarily with European affairs. Nor does he agree that it is a "specialized agency," its activity being confined to socio-economic problems. From the organizational point of view the European Office is an integral part of the UN Secretariat and the Director of the Office has the rank of Under-Secretary, though his responsibilities are purely administrative, the actual work of the Office being guided and supervised by the appropriate departments at Headquarters. A special position within the framework of the European Office is occupied by the ECE Secretariat; it is headed by an Under-Secretary directly responsible to the Department of Socio-Economic Affairs.

In the subsequent three chapters the author describes the functions of the European Office as headquarters of various UN agencies, as an international conference forum and as a coordination centre. The following international organizations and agencies are based on the European Office: the Economic Commission for Europe, the Commission on Narcotic Drugs, the Permanent Central Opium Board, the High Commissioner for Refugees and some subsidiary *ad hoc* agencies. The International Law Commission also holds its session in the European Office. The author examines the legal basis of the definition of headquarters and sets out the arguments

which favoured the location of these various agencies in the European Office.

Among the most important functions of the European Office are its services for international conferences. Over 3,000 meetings are held each year at the European Office. It is worth noting that, apart from some of the organs of specialized and non-governmental organizations, various UN organs also meet in Geneva, for instance the summer session of the Social and Economic Council and also international conferences of particular importance. This is due, according to the author, to both the central location of Geneva and to its climate which is better than New York's. However, he remarks, "un facteur plus important encore est le climat politique de New York et son atmosphère générale, tous deux défavorables à un travail qui doit être réalisé dans la sérénité et libéré des influences politiques si sujettes aux fluctuations" (p. 90).

In his concluding chapter, dealing with coordination problems, the author outlines the tasks of the European Office in maintaining liaison between particular organizations, coordinating their activities, representing the United Nations with respect to the Swiss authorities and other organizations. This classification

is open to certain formal reservations since liaison and representation are, as a rule, subsumed under coordination.

In his final remarks the author makes the point that the present role of the European Office demonstrates the usefulness of organizing such large international centres, which make not only for rational management of material and financial resources but also for efficient coordination of the activities of the various organizations in a given region.

Dr Paździor's book is undoubtedly a valuable contribution to the study of the institutional and legal problems of international organizations. One only regrets that, given such a detailed presentation of the structure and functions of the European Office, so little space is devoted to analysis of the actual work of the European Office and to certain structural problems.

Finally, acknowledgement should be extended to the University of Wrocław Scientific Society for a very useful project which has already yielded a number of papers on international law in foreign languages, to mention only K. Wolfke, *Custom in Present International Law*, 1964, J. Kolasa, *Rules of Procedure of the United Nations General Assembly*, 1967.

Renata Sonnenfeld

Rozbrojenie — szkice i rozprawy [Disarmament — Sketches and Treatises], Polish Institute of International Affairs, Warszawa 1966, 324 pp.

The present collective work, issued by the Polish Institute of International Affairs, devoted to the problems of disarmament, merits attention as the first attempt to approach synthetically this complex and important problem. The volume comprises 11 studies out of which only the most important will be discussed herein; some general remarks will also be given.

The book opens with A. Kruczkowski's, *Disarmament — an Imperative of Our Times*. In a few pages the author synthetically confronted the attitudes of both the socialist and the capitalist States to the question of general and total disarmament, as well as to the so-called partial disarmament measures. Fundamental differences in these attitudes follow straightforward from the

divergences in the approach to the principle of a peaceful co-existence. Undoubtedly, these remarks constitute a necessary reference point which enables to see a number of problems to be discussed in a proper perspective.

It seems, however, that the selection of topics making up the book under review does not give a full image of the problems involved in disarmament. The enclosed Polish bibliography, compiled by A. Towpik, evinces that certain problems have traditionally been an object of interest to Polish science, and mainly these have also been dealt with in the present book.

A theoretical paper by M. Lachs, *Atom-free Zones. The Development of a New Concept*, deserves special attention and *Economic Aspects of Disarmament* by J. Zdanowicz is worth mentioning due to its theoretical value. This difficult problem has been presented in a comprehensive and interesting manner. An economist making such a valuable contribution to the present book makes one wonder if it might not be advisable to invite military specialists, sociologists and technical experts to cooperate in investigating the problems of disarmament, as these people would certainly introduce a lot of new elements into the said study.

Two topics are found to predominate in the book. These are a presentation of disarmament negotiations, and the problems involved in nuclear disarmament in general. The latter range of subjects—which is of greater interest—is represented, besides the above-quoted treatise by M. Lachs, by the following studies based on comprehensive and thorough investigations: A. Skowroński, *Polish Initiatives as Regards the Formation of an Atom-free Zone and Freezing Nuclear Armaments in Central Europe*, J. Gilas, *Non-Proliferation of Nuclear and Thermonuclear Weapons*, S. Dąbrowa, *Ban on the Experiments with Nuclear Weapons*. It might prove

useful to supplement these topics by presenting the problem of the legality of using nuclear weapons, mainly the so-called tactical weapons. Some publications have been devoted to the latter question in the Western countries.

Among some commentators interested in international affairs the opinion prevails that any legal discussions on disarmament are futile. Such statements are unwarranted. Obviously, a legal approach or analysis is one out of a number of alternatives, and—in fact—it does not provide an adequate answer to all the questions involved in disarmament. Yet it would be a mistake to disqualify international law considerations for this very reason, as at times international law proves to be the best—if not the sole—plane of discussion. This view is supported by a probing study by C. Berzowski and J. Šach, devoted to military bases in foreign territories.

In conclusion, the present book can be evaluated favourably, first of all due to the fact that it covers numerous problems which—though in most cases previously dealt with in Polish publications—are nor easily accessible to the general reader. Moreover, the collection within one book of a number of problems and their analysis enables comprehensively to cover the problems involved in disarmament, and to draw correct conclusions. Like any collective work, the present volume contains papers of non-equal values. However, any critical remarks should be attenuated bearing in mind the precedence of this sort of publication.

It is hoped that *Disarmament* is the first but not the only book to be issued by the Polish Institute of International Affairs, dealing with “the problem of international problems,” assuming that any subsequent publications, preferably in languages having a broader reception than Polish, will be of a more specialist nature.

Janusz Symonides

Bronisław WALASZEK, *Przysposobienie w polskim prawie rodzinnym oraz w polskim prawie międzynarodowym prywatnym i procesowym* [Adoption in Polish Family Law and in Polish Private and Procedural International Law], Warszawa 1966, 318 pp.

Professor Walaszek has written some papers from the field of Polish family law and conflict of laws in this sphere. In one of his books he tried to correlate the issues of Polish substantive family law with Polish private international law and to present both these problems in the light of procedural law. I mean the monograph *Establishment of Marital Paternity in Polish Family Law, in Polish Private International and Procedural Law* (Cracow 1962). The work under review is therefore the second book written by Professor Walaszek according to a model in which an institution of family law is a subject to a deep study. It is composed in such a way that each part of the institution under examination is analysed on a comparative background, consisting of all the legal systems of the European Socialist countries, the basic legal system of the Romanic and Germanic Systems, and also the Scandinavian and English-speaking countries' systems. This comparative study is conducted parallel to each of the issues which form the subject of the study. It is supplemented by a discussion of the international agreements which Poland has concluded in the matter of adoption. Here attention is concentrated mainly on the agreements with Bulgaria, Czechoslovakia, Hungary, Yugoslavia, the German Democratic Republic, Rumania and the Soviet Union.

The book was published shortly after the appearance of the new Polish legislation in the domain of civil law and it has taken note of the new codes: the Family Code of 25 February 1964, the Act of 12 November 1965 on Private International Law and the Code of Civil Procedure of 17 November 1964.

The core of the book revolves around four topics. These are: 1) the features

and range of the institution of adoption in the Family and Guardianship Code and in the Act of Private International Law; 2) the effecting of adoption; 3) the consequences of adoption; and 4) the international law of civil procedure in the field of adoption. These questions form the subject of the second, third, fourth and sixth chapters. In addition there is an introduction (Chapter One) and a discussion of intertemporal questions (Chapter Five).

Re. 1). An adoption application is of a twofold nature. On the one hand it is an affirmation that the prospective adopting person has decided to adopt a certain person into his family as a child in law. In this respect the application is a substantive law declaration of will. On the other hand, it is also a procedural act in order to establish that the declaration of will expressing the applicant's wish to adopt another person in the character of a child is in fact justified.

The Author is of the view that on the basis of analysis he is justified to conclude that the act of adoption is similar to the conclusion of a contract. This would seem to be implied by the similar declaration of intent concerning the same purpose. It might therefore be thought that according to the Family and Guardianship Code the adoption is decided by the will of the parties and requires only the endorsement of the court. The author maintains, however, that the similarity of the actions undertaken by the parties in adoption proceedings does not mean that the Code has taken over the traditional adoption agreement from certain capitalist legislation, whose subject is to secure certain property aims, and in particular to provide legal grounds entitling the adopted person to inherit from the

adopting person. In such a system the role of the court is confined solely to the control of the adoption to check its compliance with the public interest.

This is not the position taken by the Family and Guardianship Code. It provides for two types of adoption: complete (*adoption plena*) and incomplete (*adoption minus quam plena*). This being so, the form of adoption is not contingent on the will of the parties since they can only choose one of the forms presented by the statute. *Tertium non datur*. The Author argues that so important a matter as the status of a child cannot be left to the decision of the parties. For this reason it is essential that the authorities are intervening in the adoption proceedings, and that adoption is decided by a court judgement. Consequently it is of a constituent nature.

Having clarified this fundamental issue, the Author makes a wide-ranging and deep analysis of the two types of adoption incorporated in the Family and Guardianship Code, i.e. complete and incomplete adoption. He also draws attention to a new construction in the Code: anonymous adoption.

The second part of the examination of the features of adoption in Polish law is devoted to conflicts of laws embodied in Article 22 of the Act on Private International Law. This question is discussed in the first place in reference to the connecting factor and then treated from the angle of the scope of the conflict of laws rule. The Author does not dispute that the applicable law in the case of adoption is the domestic legislation of the adopting person and adds that this connecting factor applies not only to the act of adoption itself but also to all questions arising between the adopting person and the adopted person while the relationship lasts. Departures from this principle occur only in the act of adoption i.e. when the law requires the consent of the adopted

person, his parents or guardian or the permission of the competent authorities. In these cases the applicable law is that of the adoptee's country. As for the scope of the rule of conflict of laws, the Author believes that its substance are the family relationships inherent in the concept of adoption recognized by almost all substantive laws in the world. He notes, however, that certain doubts may arise in relation to the concepts embodied in some legislation, e.g. the Italian *affiliazione*, the legitimated adoption in the French Civil Code and others.

Re. 2). In the chapter about the way in which adoption is effected the chief point raised is the adopted person. The Author is concerned principally with the question who can be adopted. In this connection he also examines whether it is possible to adopt one's own child born in wedlock and decides that the answer is no. The adoption of an illegitimate child is, however, another matter. This is regarded as permissible, and the author notes that adoption is a more suitable form of admitting the child to enter into the family than acknowledgement of the child or a judicial establishment of paternity. On the other hand he argues that adoption of an illegitimate child who has been previously acknowledged or has been the subject of paternity proceedings is inadmissible. So is adoption of a sibling. Adoption by grandparents, however, is considered not only permissible, but even, if necessary, desirable.

Among the other points discussed is the question of adoption of a foetus in the mother's womb (the Author examined this issue also in the second chapter in the course of his general survey). He believes that according to the Family and Guardianship Code adoption of an unborn baby is not permissible. His argument is based on Article 120 of the Code which declares that the consent of the parents to adoption cannot be given

earlier than a month after the birth of the child.

The Author regards the act of consent to adoption as a matter of substantive and procedural law. In consequence it would be useful to consider also the effect of defects in the declaration of will on the validity of adoption.

Next comes a discussion of the problem from the angle of conflicts of laws. The questions arising in connection with the adopting person are treated according to the same scheme. The first point examined is the capacity of the adopting person to undertake an adoption followed by the question of the consent of the other spouse to adoption and joint adoption which according to the Family and Guardianship Code can only be effected by husband and wife together.

Among the legal requirements demanded as to the adopting person in order to make adoption valid the Author examines in the context of the Act on Private International Law the question of the age difference between the adopting and adopted person, the marital status of the adopting person and the requirements as to his motives.

The chapter ends with an analysis of adoption proceedings and a survey of the judicial decisions on this matter. Finally there is an account of the forms

of adoption in private international law.

Re. 3). The Family and Guardianship Code distinguished between the consequences of complete and incomplete adoption. First comes the problem of the parental authority of the adopting person, then the rights and obligations of the adopted person with regard to the relatives of the adopting person in the case of complete adoption, the question of the name of the adopted person and the obstacles to marriage between adopting and adopted person. Then, in compliance with the composition of the book, the Author discusses the consequences of adoption according to Polish private international law, i.e. the question of the proper law for the consequences of adoption, the proper law in inheriting from the adopting or adopted person, and the legal relationship between the adopted person and his natural relatives.

Re. 4). The discussion of the international law of civil procedure on adoption centres on such points as: jurisdiction, procedural legitimation, judicial and procedural competence, adoption applications and suits, the effects of judgments in adoption cases and the recognition and enforcement of such judgments.

Witalis Ludwiczak

Bronisław WALASZEK, Mieczysław SOŚNIAK, *Zarys prawa międzynarodowego prywatnego* [An Outline of Private International Law], Warszawa 1968, 290 pp.

It is an evidence of the dynamics of Polish jurists engaged in the study of private international law that since the Polish parliament passed on 12 November 1965 a new bill on private international law two handbooks discussing this act have already appeared. The first was written by Professor Witalis Ludwiczak of Adam Mickiewicz University in Poznań and is reviewed

elsewhere in this volume of the Yearbook.

The handbook reviewed here is the work of two authors: Professor Bronisław Walaszek of Jagiellonian University in Cracow and Professor Mieczysław Sośniak of the newly established Silesian University in Katowice. Both these writers, pupils of the dean of the Polish specialists of private international law,

Kazimierz Przybyłowski, have published, apart from a number of publications on civil law, some monographs and papers on private international law.

The composition and scope of the handbook follow the classic central-European concept of private international law as a collection of rules of conflict of laws. This design has been followed more consistently than in Professor W. Ludwiczak's handbook in which, though Professor Ludwiczak adopted a similar definition of this branch of law, one chapter was devoted to the problems of jurisdiction and the recognition and execution of judgements on the grounds, in my view justified, that is essential in view of the functional relationship between these issues and the application of substantial law. But even the handbook under review is not fully consistent in this respect since it also, in certain cases, makes reference to questions of jurisdiction (pp. 264, 279). A second deviation from the definition of private international law adopted by the authors is the inclusion, in the form of an appendix, of the law of aliens (pp. 128 ff.).

While on the subject of the design and scope of the handbook, it is worth noting that considerable attention has been given to transport law and certain areas of family law, but that not enough space has been devoted to the problems of the law of obligations together with the issues raised by Poland's participation in the unification of law within the Council for Mutual Economic Assistance, I, personally, have certain objections to the accuracy of the comments on the General Conditions of the CMEA contained in the textbook.

The handbook has a relatively elabor-

ate theoretical section. Worth noting is the discussion of the latest developments in the theory of private international law, including the newest trends in the American literature (B. Currie, A. A. Ehrenzweig and others).

Like W. Ludwiczak, the authors adopt the traditional concept of the structure of the rule of conflict of laws (pp. 52 ff).

The best parts of the handbook are those based on the authors own monographs. The intertemporal issues in the field of private international law (pp. 57 - 60), the public policy (pp. 117 - 127), obligations not deriving from legal acts (pp. 172 - 179), the conclusion and dissolution of marriage (pp. 195 - 207), the kinship relations and legal relations between parents and children (pp. 215 - 246) and adoption (pp. 247 - 265), should be mentioned, though the last question has been treated in too great detail and length for a book of this size.

Like Ludwiczak's handbook, this one also discusses in detail Polish problems of private law, both at the legislative and judicial level and on the theoretical and scientific plane. Although the Polish judicial practice in the field of conflict of laws is relatively modest in quantity, it is essential to discuss those judgements that have been given in order to show how the problems are looking in the practice.

Professor Walaszek and Professor Sośniak have written an important and valuable book on private international law, of benefit not only to students, but also to practitioners (judges, notaries etc.). For the foreign reader it can serve, like Ludwiczak's handbook, as a useful work of information and reference about Polish private international law.

Jerzy Jakubowski

C H R O N I C L E

Poland and General International Organizations

(Review of topical problems which are the subject of Poland's particular interest in the United Nations and its specialized agencies (Selected issues: 1968—1969))

I. THE UNITED NATIONS

1. Effects of the Possible Use of Nuclear Weapons
2. Punishment of War Criminals
3. Covenants on Human Rights
4. Elimination of All Forms of Racial Discrimination
5. Elimination of Discrimination Against Women
6. Legal Questions of Space Exploration
7. Friendly Relations and Cooperation Among States
8. Sovereignty over Natural Resources
9. Codification of the Law of Treaties

II. OTHER ORGANIZATIONS

1. United Nations Educational, Scientific and Cultural Organization
2. General Agreement on Tariffs and Trade

I. THE UNITED NATIONS

1. Effects of the Possible Use of Nuclear Weapons

At the First Committee meeting on October 25, 1966, Poland submitted a draft resolution¹ whereby the General Assembly would: (1) request the Secretary General to prepare a concise report on the effects of the use of nuclear weapons; (2) recommend that the report should be based on accessible material and worked out with the assistance of appropriate experts-consultants appointed by the Secretary General; (3) call upon Governments, national and international scientific and other institutions and organizations to co-operate with the Secretary General in the preparation of the report; (4) request that the report should be published and transmitted to the Governments of State Members of the United Nations not later than

¹ Of. UN Doc. A/C. 1/L. 370.

1 June 1967; (5) call upon the Governments of all States to secure the widest possible distribution of the report in their respective languages, and to acquaint public opinion with its contents also through other media of communication; (6) decide to include the report of the Secretary General in the agenda of the General Assembly at its twenty-second session for consideration.

The idea of such report was first developed by Poland in 1960. At the plenary meeting of the General Assembly on September 27 the Chairman of the Polish Delegation to the XVth Session of the United Nations General Assembly, Władysław Gomułka stated the reasons of the initiative Poland had been undertaking.

"It is of the utmost importance — Władysław Gomułka said — that mankind be fully aware of the dangers inherent in modern warfare. We have no right to conceal from the nations the truth about the real effects of nuclear arms and of weapons of mass destruction. On the contrary, we are in duty bound to spread this truth in order to make it easier for all nations to join their efforts in the struggle against the threat of war and for general and complete disarmament.

"It is the view of the Polish Delegation that, under the auspices of the United Nations a special committee should be set up to study and report, on the basis of available scientific data, on the effects of the use of nuclear weapons on human life and health, on the world economy and the cultural heritage of mankind. The committee should be composed of eminent scientists from various countries. Its report should be widely circulated by all Governments among citizens of their respective countries".²

The above-mentioned Polish draft Resolution of October 25, 1966, was adopted unanimously with some amendments, on November 23, 1966 by the First Committee³ and subsequently — also unanimously — by the General Assembly of the United Nations on December 5, 1966.⁴

In pursuance of the Resolution 2162 A/XXI the Secretary General appointed a group of consultant experts consisting of twelve members from Canada, France, India, Japan, Mexico, Nigeria, Norway, Poland, Sweden, USSR, UK and USA. Their meetings were presided over by Mr. M. A. Vellodi, Deputy to the Under-Secretary, Department of Political and Security Council Affairs of the United Nations Secretariat.

On October 6, 1967 the group transmitted the report to the Secretary General who published it on October 10, 1967.

The report, a first study of this kind by the UN body, states that in a case of large nuclear conflict, "hundreds of millions of people might be killed, and civilization as we know it, as well as organized community life, would inevitably come to an end in the countries involved in the conflict."⁵

According to the report, the explosion of one megaton nuclear weapon — at ground level of a city with a population of just over one million would result in one third of a million fatal casualties, i.e., approximately the same number of civilians who were killed by air raids both in Germany and in Japan during the whole period of the World War II. It is estimated that 40 per cent of the population of such a city would be injured by blast of the same bomb detonated at the height of about 3,000 metres. A ten megaton bomb would produce complete or serious destruction of the entire such city. In the case of an air burst of a twenty megaton

² UN Doc. A/PV. 874, p. 163.

³ Cf. the Report of the First Committee — UN Doc. A/6529, p. 6.

⁴ Resolution 2162 A/XXI.

⁵ UN Doc. A/6858, p. 5.

bomb the heat which would result would be intense enough to start fires as far as thirty kilometres from a point of detonation, and could endanger the lives of people in an area with a radius of nearly sixty kilometres. The surface explosion of a twenty megaton bomb would result in the formation of a crater 75-90 metres deep and 800 metres in diameter.

"It is my hope — said the Secretary General — that this report, and the ensuing debate by the General Assembly, will not only provide a deeper and clearer understanding of the effects of the nuclear arms race but also positively contribute to the search for ways to bring it to an end."⁶ It would be useless to add anything to these words.

2. Punishment of War Criminal and of Persons who Have Committed Crimes Against Humanity

For years Poland has been demanding at various occasions that no one guilty of war crimes or of crimes against humanity in the Nazi period shall escape the bar of justice wherever he may be and whenever he may be detected.

Polish demands have been aimed at the full implementation of the norms of international law established at the end of the World War II, as well as at discouragement for others to commit similar crimes — since otherwise, dangerous temptations threatening international peace and security might be created. Having lost 1/5 of its population during the World War II, Poland considered her historical duty to warn other nations as to the possible repetition of war crimes and crimes against humanity.

In 1965 twenty years elapsed since the end of the World War II. According to municipal laws of some countries the prosecution of the gravest crimes could not be extended beyond the period of twenty years. So it was in Poland. However, in order to prevent Nazi criminals from escaping penal responsibility, the statute of limitation for criminal prosecution and for the pronouncement of judgment, as provided for by Articles 86 and 87 of the Polish Code of Criminal Procedure, has been withheld in Poland by the Law of April 22, 1964,⁷ with respect to the perpetrators of crimes defined in Article 1, para. 1 of the Decree of August 31, 1944 concerning the punishment of fascist-Hitlerite criminals guilty of murdering or persecuting civilians and of traitors to the Polish Nation.⁸

But before that date Poland decided to submit this question to the Commission on Human Rights. The explanatory memorandum⁹ of March 5, 1965 has been addressed by the Polish Permanent Mission in New York to the Secretariat of the United Nations. Almost at the same time as Bundestag of West Germany was discussing whether to extend or not the period of limitation with respect to the Nazi crimes, the Commission on Human Rights, acting on the basis of a proposal submitted by the delegation of Poland,¹⁰ adopted on April 9, 1965 the Resolution *Question of punishment of war criminals and of persons who have committed crimes against humanity*.¹¹

⁶ *Ibid.*, p. 2.

⁷ Cf. "Dziennik Ustaw PRL", ["Journal of Laws of the Polish People's Republic"] 1964, No. 15, item 86.

⁸ Cf. "Dziennik Ustaw RP" [Journal of Laws of the Republic of Poland] 1944, No. 4, item 16.

⁹ Cf. UN Doc. E/CN. 4/885.

¹⁰ Cf. UN Doc. E/CN. 4/L. 733/Rev. 1.

¹¹ Resolution 3/XXI.

By this resolution the Commission on Human Rights expressed its view that the prosecution of and punishment for war crimes and crimes against humanity would prevent others from the commission of similar crimes, protect human rights and fundamental freedoms, promote confidence among peoples, and contribute to international peace and security. Furthermore, it noted that while some measures have been undertaken to make possible the prosecution of war crimes and crimes against humanity, the variety of such measures requires that further steps be taken. The Commission urged all states to continue their efforts to ensure that, in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and punished by the competent courts in accordance with existing laws.

In the last paragraph of the preamble the resolution says that the United Nations "must, in particular, study possible ways and means of establishing the principle that there is no period of limitation for such crimes in international law."

The problem whether this principle is already existing in international law or should be established has been largely discussed in various UN bodies. At the XXIIInd session of the Commission on Human Rights in 1966, the representative of Poland submitted a draft resolution¹² stating, i.a. that the UN must contribute to the "implementation of the just principle that there is no period of limitation for such crimes in international law" while Austria, France, Israel, the Netherlands and the United States submitted jointly an amendment¹³ saying of "the desirability of establishing a principle of international law that there is no period of limitation for war crimes and crimes against humanity." However, the final text of the resolution, as adopted by the Commission on March 28, 1966, recognized the actual existence of the principle and, furthermore, considered "that the United Nations should take all possible actions to affirm and implement such a principle of international law and secure its universal application."¹⁴

An excellent study on this subject, prepared by the Office of Legal Affairs of the UN Secretariat, was, no doubt, extremely helpful in all preparatory works. The above Resolution 3/XXII expressed appreciation to the Secretary General for that study entitled *Question of the non-applicability of statutory limitation to war crimes and crimes against humanity*.¹⁵ "This study—the resolution said—lends further support to the desirability of affirming, in international law, the principle that there is no period of limitation for war crimes and crimes against humanity."

In 1967 the question went, for the first time, to the UN General Assembly. The working group consisting of fifteen members (Dahomey, France, Guinea, India, Lebanon, Mexico, the Netherlands, Peru, Philippines, Poland, Soviet Union, Tanzania, United Arab Republic, United Kingdom and United States) prepared its first draft convention by, November 30, 1967, recognizing "that it is necessary and timely to affirm, in international law through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."¹⁶

The final settlement of this question was adjourned in 1967 for further discussions at the next sessions of the United Nations.

¹² Cf. UN Doc. E/CN. 4/L. 800.

¹³ Cf. UN Doc. E/CN. 4/L. 830 and Add. 1.

¹⁴ Resolution 3/XXII.

¹⁵ UN Doc. E/CN. 4/908.

¹⁶ Report of the Joint Working Group, UN Doc. A/C. 3/L. 1503, p. 5.

Work on the Convention could not be completed at the 22nd Session because of the strong opposition of a number of western countries acting on the instigation of the GFR. Under these circumstances a resolution was adopted which asked the Secretary General to circulate the draft among the Governments of the Member States for comment and stipulated that priority be given to this topic at the next session.

At the 23rd Session of the General Assembly after heated discussions the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was finally adopted on 26 November 1968.¹⁷ The Convention was passed with 58 States for (all the socialist countries and most of the African and Asian States), six against (the USA, South Africa, Portugal, Great Britain, Australia, Honduras) and 36 abstentions (the NATO countries, Scandinavia and Latin America except Mexico and Chile).

The Convention consists of a preamble and eight articles. The basic principle of the Convention is set out in Article I which states that war crimes and crimes against humanity are subject to no statutory limitations irrespective of their date of commission. These crimes are defined as:

a) war crimes as defined in the Charter of the International Military Tribunal, including the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

b) crimes against humanity as defined in the Charter of the International Military Tribunal, eviction by armed attack or occupation, inhuman acts resulting from apartheid and the crime of genocide as defined in the 1948 Convention the Prevention and Punishment of the Crime of Genocide.

The Convention explicitly states that all the acts under paragraph b) are crimes against humanity "even, if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Poland was the first country to sign the Convention on 16 December 1968.

Speaking on the day the Convention was adopted the Polish delegate, Zbigniew Resich, declared: "As a result of Nazi crimes Poland suffered the heaviest losses of any country in the world. This was the motive which led Poland four years ago to propose the drafting of a convention excluding limitations in the case of war crimes. She felt it was her moral duty to mankind. Poland considers that by doing so she is fulfilling a historical mission." He ended with the words that "the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity is, alongside the Charter of the International Military Tribunal, the Convention on Genocide and other international acts, a new and extremely important document in the protection of human rights. A profound conviction must be planted among the peoples of the whole world that no one can commit war crimes and crimes against humanity with impunity even if he wears an army uniform.

3. International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights

On December 16, 1966 the General Assembly of the United Nations, by its Resolution 2200/XXI, adopted unanimously:

1. The International Covenant on Economic, Social and Cultural Rights;

¹⁷ Resolution 2391/XXIII.

2. The International Covenant on Civil and Political Rights;
3. The Optional Protocol to the International Covenant on Civil and Political Rights.

The adoption of these instruments, which advanced the principles proclaimed in the Universal Declaration of Human Rights, was an important step forward in the efforts to codify human rights, marking a turning point in the developments in this field. As a whole they formed a kind of international code of human rights considered as one of the most important documents in United Nations history.

In both Covenants a vital problem was the measures of implementation, adopted finally after years of arduous work, in which Poland has had its part, especially as one of principal sponsors of the very idea of the implementation of Covenants.

There were two principal points of view as far as the measures of implementation were concerned. One group of States supported the idea that each Covenant should have its own system. The others, among them Poland, were of the view that both Covenants should have a uniform system of implementation, in particular because originally there was to be only one Covenant, and even in the decision to divide it, taken by the General Assembly by a very narrow majority, stipulation was made that the two Covenants should "contain [...] as many similar provisions as possible."¹⁸

Thus, the Polish representative pointed out that the argument, advanced by several delegations, that economic, social and cultural rights should be implemented progressively while civil and political rights must be implemented immediately did not carry weight because the obligation by which a State was bound under the terms of the Covenant, is a real one from the outset and, while the extent of the obligation depended on the possibilities of each State to carry them out progressively, it was always feasible to see immediately whether its commitments were being fulfilled. Economic, social and cultural rights were as important as civil and political rights; that fact must be recognized by the adoption of a uniform system of implementation for both Covenants.¹⁹

A concern for widest possible acceptance of the Covenants led to a compromise. The most disputed measures of implementation were embodied in optional clauses whose application was subjected to the agreement of the Contracting States.

This compromise idea of optional and obligatory clauses, which may be found in the Covenants, was advanced by Poland in 1965. The Polish delegation recognized that the measures of implementation should not result in interference in the domestic affairs or encroachment upon the sovereignty of the Contracting States and should be calculated to gain the approval of the greatest possible number of States. An alternative suggestion were the optional clauses.²⁰

At the XXIst session of the General Assembly, the Polish delegation successfully advocated for the deletion of the colonial and reservation clauses. The proposal to include in the Covenants a clause of universal participation was not adopted and the Covenants are opened only to States Members of the United Nations or members of any of its specialized agencies, to States parties to the Statute of the International Court of Justice, and to other States which have been invited by the General Assembly of the United Nations to become a party to the Covenants. The fact that the instruments aimed at the elimination of the discrimination contain the discriminatory clauses is particularly regrettable.

¹⁸ Resolution 543/VI, (27 in favour, 20 against, with 3 abstentions).

¹⁹ Cf. UN Doc. A/C. 3/SR. 1396, Provisional, p. 3.

²⁰ Cf. UN Doc. A/C. 3/SR. 1347, p. 341.

Poland has represented the view that the principle of equal rights of peoples is one of the fundamental principles of the Charter, and the universality of rights is a corollary of it. Consequently, a State could not legitimately be prevented from becoming a party to an international treaty which concerned the whole of mankind.²¹

Poland has made an important contribution in drafting the provisions of the International Covenant on Economic, Social and Cultural Rights concerning the rights of children. An International Seminar on this subject under the UN auspices was held in Warsaw on 6-19 August 1963.

On 15-28 August 1967 another International Seminar under the UN auspices was held in Warsaw. Its subject was the implementation of the economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights.

Among topics discussed at the Seminar were:

1. Measures for recognition and protection of economic and social rights, such as their inclusion in constitutions in basic or other legislation, in declarations or statements of official policy or directives.

2. Review of legal and practical measures for the implementation of economic and social rights.

3. The role of economic and social planning and co-ordination of economic and social development of the country, including provision of facilities ensuring an all-round and optimum development of the whole community and equal possibilities of social advancement.

4. The role and responsibilities of the central and local authorities (legislative, executive, administrative and judiciary), of social organizations, of groups and individuals in the practical implementation of economic and social rights.²²

As many as 104 persons were listed in the Seminar documents as the national participants and alternates (49 from 25 countries), as the observers from Governments (20 from 3 Governments), as the guests of the Government of Poland (2), as the representatives of specialized agencies (3), and as the observers from NGOs in consultative status with the ECOSOC (30 from 30 organizations). The Secretary General of the United Nations was represented by Mr. Edward Lawson. Mr. Zbigniew Resich, First President of the Supreme Court of Poland, served as the chairman.

The purpose of the Seminar, organized under General Assembly Resolution 926/X and ECOSOC Resolution 605/XXI, was to bring together high-ranking officials and other key persons from various European countries who have had practical experience in problems relating to the implementation of the economic and social rights contained in the Universal Declaration of Human Rights. References were made to the International Covenant on Economic, Social and Cultural Rights, although it was adopted by the UN General Assembly after the adoption of the Seminar agenda.

One of the Seminar conclusions was that the only practical difference between political and civil rights—on one hand, and economic and social rights—on the other hand, was that full implementation of economic and social rights by a State was conditioned by the material means available to that State. In any case, however, this character of economic and social rights did not diminish the obligations

²¹ Doc. A/C. 3/SR. 1407 (Provisional), p. 5.

²² For details of discussion cf.: Z. RESICH, *Seminarium ONZ na temat praw ekonomicznych i społecznych* [The UN Seminar on Economic and Social Rights], "Prawo i Życie", 1967, No. 19; K. BILANÓW, *Realizacja ekonomicznych i społecznych praw człowieka. Seminarium ONZ w Warszawie* [Implementation of Economic and Social Rights of Man. The UN Seminar in Warsaw], "Sprawy Międzynarodowe", 1967, No. 11, p. 188.

to strive for their immediate implementation by all existing means. This obligation on the part of States was very important and urgent, and was stressed in the preamble to the International Covenant on Economic, Social and Cultural Rights and in the Universal Declaration of Human Rights.

The General Assembly declared 1968 International Year for Human Rights.

In Poland, on 22 January 1968, a meeting of representatives of the Government, various State institutions, social organizations and national committees for co-operation with UN specialized Agencies was held at which the Polish Committee for the International Year for Human Rights was set up. It adopted a programme based on the recommendations of the General Assembly. A statement opening the celebrations of International Year for Human Rights in Poland was issued on the same date.

The main celebrations of International Year for Human Rights in Poland included the following:

— On 21 March 1968 International Day Against Racial Discrimination and Apartheid, a special meeting was held in Warsaw, which adopted a resolution condemning all forms of racial discrimination, particularly such contemporary forms of racism as apartheid, neo-Nazism etc.;

— In June 1968 a conference of Polish historians was organized by the Chief Commission for the Investigation of Nazi Crimes in Poland to discuss the topic of the non-applicability of statutory limitations to Nazi war crimes and crimes against humanity. New light was shed on a number of Nazi crimes committed in the last months of World War II which have just been discovered. The Polish historians emphasized the necessity of the complete disclosure of all Nazi crimes against civilians;

— On 10 - 11 December 1968 a students' seminar on human rights was organized at Warsaw University by the local branch of the United Nations Students Association. The participants included a number of experts on human rights legislation and members of the Polish Committee for the International Year for Human Rights;

— On 12 - 14 December 1968 a conference devoted to the Covenants of political, economic and social human rights was held in Toruń and carried out a thorough theoretical analysis of the issues arising out of them. Emphasis was laid on the significance of the social and economic achievements of the working class and individuals under the system established in this country. The legal aspects of the future application of the Covenants were widely reviewed. The meeting gave a large group of academics and educators a further knowledge of various aspects of human rights protection under Polish municipal law and international conventions.

The Polish United Nations Association has published a monograph on International Protection of Human Rights prepared by Dr J. Machowski and including all the relevant legal texts.

At the international level, an International Conference on Human Rights was held in Teheran from 22 April to 13 May 1968. The Polish delegate was elected one of the Vice-Chairman of the Conference. The Polish group made an active contribution to the work of the Conference. In particular it urged the participants to be vigilant towards the danger of neo-Nazism and recommended a study of the whole set of problems relating to responsibility for the war crimes and crimes against humanity. During the discussion of the progress achieved and the obstacles encountered in the field of human rights since the adoption and proclamation of the Universal Declaration of Human Rights the representative of Poland observed that "the achievements have been shadowed by the persistence of war, colonialism,

apartheid and racialism. There will be no real progress until these scourges have been eliminated."²³ He also declared that "there is one basic weakness in United Nations practice: accession to its various instruments is limited to a certain category of States. This is incompatible with the contemporary concept of international law, especially as the instruments in question are of humanitarian importance not only for the Members of the United Nations but for the whole community."²⁴ He emphasized the need for states to adopt the appropriate legislative, administrative, social and other measures guaranteeing the observance and protection of human rights and to make regular reports to the UN on the steps taken to implement the Covenants and provide a suitable basis for the protection of human rights.

4. Elimination of All Forms of Racial Discrimination

On December 21, 1965 the General Assembly of the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination²⁵ which constitutes further development of principles proclaimed in the Declaration on the Elimination of All Forms of Racial Discrimination of November 20, 1963.

The Convention, however, does not supersede the Declaration because it would have effect only to States-parties to it, while the Declaration applies to all States. It was also one of the most important instruments in the whole UN work in the field of the protection of human rights.

At all stages of work on the Declaration and, subsequently, on the Convention, the Polish delegation was one of the most active. The Commission on Human Rights adopted the Declaration while its session was presided over by the Polish delegate. In the discussion in the Third Committee, at the XXth Session of the General Assembly Poland made a number of important suggestions concerning the draft Convention.

A very controversial problem, discussed previously in the Commission of Human Rights, was whether to include or not in the text of the Convention any reference to specific forms of racial discrimination. Poland proposed to mention also the Nazist practices, while the United States of America and Brasil proposed a new article specifically condemning anti-Semitism. Finally, the Committee adopted a compromise resolution proposed by Greece and Hungary²⁶ not to mention any specific form of racial discrimination, except of apartheid and racial segregation which were adopted previously. The Polish delegation explained afterwards in the discussion that it had voted in favour of the compromise resolution, bearing in mind that the record of the discussion on the first Polish amendment²⁷ and on related amendments would make it amply clear that delegations had vigorously condemned Nazism as one manifestation of racial discrimination²⁸ and that it would serve as a basis for the historical interpretation of the Convention.

The paragraph (b) of the Article 4 of the Convention (States Parties) declaring illegal and prohibiting organizations and all propaganda activities, which promote and incite racial discrimination, was adopted in the same wording as proposed by Poland.²⁹

²³ See: Doc. A/CONF. 32/SR. 14 - 27, p. 166.

²⁴ See: Doc. A/CONF. 32/SR. 1 - 13, s. 127.

²⁵ Resolution 2106/XX.

²⁶ Cf. UN Doc. A/C. 3/L. 1244.

²⁷ Cf. UN Doc. A/C. 3/L. 1210.

²⁸ Cf. UN Doc. A/C. 3/SR. 1313, p. 123.

²⁹ Cf. UN Doc. A/C. 3/L. 1210.

Poland was also one of the sponsors of a joint amendment³⁰ to Article 1 (1) and to Article 2 (1c). This amendment was adopted unanimously.

In the discussion on the articles concerning the measures of implementation, Poland, taking into consideration the differences between the States, has proposed to divide these articles into two categories: optional and obligatory. This idea was also accepted.

To the final clauses of the Convention Poland submitted, several amendments.

1. The amendment to Art. 17 para. 1: to the effect that the Convention be open for signature by all States³¹ rejected by 41 to 32 with 18 abstentions. The objection raised against this amendment was that, if adopted, it would involve a political decision by the Secretary General to decide whether a particular political entity is a state or not. Poland was of the view that there was no legal justification for limiting participation in a convention of great humanitarian importance.³² The similar Polish amendment as to the accession was rejected by 43 votes to 29, with 19 abstentions.

2. The Polish amendment to delete the so-called colonial clause was adopted by 66 votes to 3, with 8 abstentions.³³ The arguments given by the Polish delegate, were appreciated by other delegations and the delegate of Venezuela requested that the Polish representative's statement should be circulated as a Committee document.³⁴

3. The Committee adopted by 63 votes to 7, with 16 abstentions the amendment of Poland to delete the so-called federal clause.³⁵

Poland ratified the Convention on December 5, 1968³⁶ and is supporting in the United Nations all measures which would ensure the largest possible number of ratifications of the Convention. An early entry into force of the Convention and its full implementation are particularly important because of the racist practices of all kinds still existing in the world.

5. Elimination of Discrimination Against Women

Realizing that, in spite of adoption of the Universal Declaration of Human Rights, and of numerous conventions, the discrimination of women in many fields still exists in practice and even in law, the Polish delegation proposed at the XVIIth Session of the UN General Assembly to work out a declaration on the elimination of discrimination against women. Polish view was that such a declaration would result in growing number of States ratifying respective international acts, and would be particularly helpful for women of the third world.

The relevant resolution, which had been adopted by the General Assembly at its XVIIIth session, requested the Economic and Social Council to invite the Commission on the Status of Women to prepare a draft declaration.³⁷

Such a draft declaration have been submitted by the representative of Poland to the Commission of the Status of Women at its XVIIIth session in March 1965.³⁸

³⁰ Cf. UN Doc. A/C. 3/L. 1238.

³¹ Doc. A/C. 3/L. 1272.

³² Cf. UN Doc. A/C. 3/SR. 1358, p. 398.

³³ Cf. The Report Third Committee of the — UN Doc. A/6181, p. 69.

³⁴ Cf. UN Doc. A/C. 3/SR. 1358, p. 400.

³⁵ Cf. UN Doc. A/6181, p. 70.

³⁶ Cf. "Dziennik Ustaw PRL", 1969, No. 25, item 187.

³⁷ Resolution 1921/XVIII.

³⁸ Cf. UN Doc. E/CN. 6/L. 396.

The Polish text as well as the drafts prepared by Ghana and Great Britain were discussed also at XIXth (February-March 1966) and XX (February-March 1967) sessions of the Commission, which finally adopted a draft declaration on March 2, 1967.

The draft declaration was considered by the Third Committee at the XXIInd session of the UN General Assembly from 2 to 16 October 1967. Many delegations emphasised in the course of the general debate the importance of the draft declaration. It was described as a landmark in the history of efforts to eliminate discrimination against women, which was contrary to human dignity. It was also pointed out that the society could no longer afford to be deprived of the talents of at least half of its members—some delegations pointed out. Other delegations stressed the fact that the declaration should aim at setting attainable goals. A view was expressed that the declaration should be followed by a convention on the same subject.³⁹

Declaration on the Elimination of Discrimination against Women, adopted unanimously as a draft by the Third Committee on October 16, 1967 and finally by the General Assembly also unanimously on November 7, 1967,⁴⁰ has retained all the general ideas of Polish initiative of 1965.

In view of the implementation of the Declaration, The International Conference on Human Rights held in Teheran from 22 April to 13 May 1968 adopted unanimously a resolution in which it called upon States and peoples to take immediate and effective measures to ensure equality between men and women and eliminate discrimination against women. The Conference proposed the following measures: ratification of the international conventions; adaptation of States' constitutions to international conventions and recommendations; establishment of national commissions on the status of women; adoption of a programme for the participation of women in the process of national development; creation of social services for women; promotion of vocational training for women in order to ensure their full participation in the economic life of the country; equal treatment of men and women in the field of economic and social rights; equal civil rights for women; and the admission of women to responsible posts.

The resolution instructed the Commission on the Status of Women to give priority to problems relating to the education of women and their participation in the process of development. The Commission is also expected to consider the possibility of preparing conventions on the status of women the private law and in other spheres in which there is discrimination against them.⁴¹

6. Legal Questions of Space Exploration

The Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space since its creation in 1962 has been working under the chairmanship of the Polish representative Professor Manfred Lachs. In 1967, in connection with his election to the International Court of Justice, he has been replaced as the Chairman by another Polish delegate, Mr. Eugeniusz Wyzner.

The work of the Sub-Committee culminated in the elaboration in 1966, of the Treaty on Principles Governing the Activities of States in the Exploration and Use

³⁹ Cf. The Report of the Third Committee—UN Doc. A/6880, p. 3.

⁴⁰ Cf. Resolution 2263/XXII.

⁴¹ See: The Final Act of the International Conference on Human Rights. Teheran, 22 April—13 May 1968. Res. IX.

of Outer Space, including the Moon and Other Celestial Bodies. The Treaty was signed by Poland on the day of its opening for signatures, i.e. January 27, 1967, and was ratified by Poland on December 22, 1967.⁴²

A further step towards the codification of space law was the adoption by the Legal Sub-Committee during its special session on 14-15 December 1967 of the final text of a draft agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space.⁴³ This agreement, subsequently endorsed in a General Assembly resolution adopted on 19 December 1967 (Res. 2345/XXII, came into force on 3 December 1968. Poland, which was one of the authors of this resolution, ratified the agreement on 28 December 1968.⁴⁴

The most urgent task now before the Legal Sub-Committee is to complete the preparation of a draft agreement on liability for damage caused by the launching of objects into outer space. The Sub-Committee discussed this problem during its sixth (1967) and seventh (1968) sessions. A substantial number of points and wordings were agreed, including the terms "damage" and "launching," the applicability of the future agreement and exemptions from its provisions, the joint liability of states and international organizations, absolute liability and exemption from liability, calculation of damages, presentation of claims, pursuit of remedies and other issues.⁴⁵ The following problems require further consideration: 1. whether the agreement should apply to damages sustained by persons who are permanent residents of the applicant state or by a space craft and its personnel during launching; 2. compensation for damage caused to space objects which have left the surface of the earth; 3. the rights of international organizations under the agreement. The Sub-Committee is expected to finish the preparation of the draft agreement by 1969, before the twenty-fourth session of the General Assembly.

Although the results of the work on legal questions of space exploration already achieved are appreciable, much remains to be done. The Polish Chairman of the Sub-Committee pointed out in this connection that it should endeavour to bridge the gap between the spectacular advances of science and technology in space research and work on the legal status of outer space, which was proceeding more slowly.⁴⁶

7. Friendly Relations and Co-operation Among States

The General Assembly of the United Nations decided at its seventeenth session by Resolution 1815/XVII to undertake a study on the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. These principles were as follows:

1. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

2. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

⁴² Cf. "Dziennik Ustaw PRL", No. 14, item 82.

⁴³ See: Report of the Legal Sub-Committee, Doc. A/AC. 105/45.

⁴⁴ Cf. "Dziennik Ustaw", 1969, No. 15, item 110.

⁴⁵ See: Report of the Legal Sub-Committee, Doc. A/AC. 105/37 and A/AC. 105/45.

⁴⁶ Cf. UN Doc. A/AC. 105/C. 2/SR. 74, p. 3.

3. The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
4. The principle of the sovereign equality of States;
5. The duty of States to co-operate with one another in accordance with the Charter;
6. The principle of equal rights and self-determination of peoples;
7. The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

To consider these principles, a special committee was established in 1964 which, subsequently, held its session in Mexico City from August 27 to October 2, 1964 but failed to accomplish its work. In 1966 it had been reconstituted by General Assembly Resolution 2103/XX and continued discussion on the above principles at its sessions in New York (March 8—April 25, 1966) and at Geneva (July 17—August 18, 1967).

During the 1966 session,⁴⁷ the second principle has been unanimously adopted. The Special Committee, also unanimously, adopted a text which made an addition to the text of fourth principle adopted in Mexico City in 1964. In regard to the third principle, the Special Committee had adopted a resolution whereby it decided that "the Special Committee will abide by General Assembly Resolution 2131/XX of December 21, 1965" (a resolution entitled "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"), and instructed its Drafting Committee to direct its work on the principle "towards the consideration of additional proposals, with the aim of widening the area of agreement of General Assembly Resolution 2131/XX."⁴⁸

During the 1967 session the Committee made further progress by adoption of the fifth and seventh principles.

At its fourth session held in New York from 9 to 30 September, 1968, the Special Committee was requested by Resolution 2327/XXII of the General Assembly to complete the drafting of the principle of the non-use of force and the principle of equal rights and self-determination of peoples, and to consider proposals relating to the third principle—the obligation of non-intervention in matters within the domestic jurisdiction of any State, in accordance with the Charter.⁴⁹

Although the Committee failed to adopt the final text of any of these principles, some real progress was nevertheless made especially as far as the first principle was concerned.

A considerable advance has been noted towards the framing of a general prohibition of force. Agreement has also been reached on inclusion in the wording of the principle of the non-use of force references to the following points: 1. the obligation of States to refrain from propaganda for wars of aggression; 2. the obligation of States to refrain from acts of reprisal. Some progress has also been made on issues relating to the United Nations security system and to territorial disputes and frontier problems since no delegation has rejected outright the idea of including in the formula a reference to international lines of demarcation.

⁴⁷ For an article on earlier works see: R. BIERZANEK, *Zasady prawne pokojowego współistnienia na forum ONZ* [The Legal Principles of Peaceful Co-existence at UN Forum], "Sprawy Międzynarodowe", 1966, No. 4, p. 75.

⁴⁸ Doc. A/6799 of September 26, 1967, p. 16.

⁴⁹ See: Doc. A/7326.

The major cause of disagreement on the final wording of the principle of the non-use of force and the principle of equal rights and self-determination of peoples was the reluctance of certain Governments to recognize the necessity of completing decolonization as soon as possible. Some Governments refused to acknowledge the right of colonial peoples to use force and arms if necessary in their struggle to win independence and exercise their right of self-determination and denied the right of the international community to prohibit the use of force against them. The difficulty of its task had not prevented the Special Committee from making definite progress, since, apart from the four formulation it had produced, its work had clarified many questions which were of great importance to the development of international law. It is the Polish view, shared by a number of other countries, that, despite the existence of the Charter of the United Nations, it is not enough simply to reiterate the principles of the Charter but those principles must be enhanced and deepened. A precisely worded formulation of principles concerning friendly relations and co-operation among States would, in particular, further the development of the international community.

For the above reasons Poland took an active part in the works of the Special Committee.

In respect of the first principle, the Polish delegates pointed out that it was essential to prohibit any propaganda for war, rightly condemned by a large segment of world public opinion, which considered it an international offence. Forty years previously, Poland had played an important part in trying to arouse awareness of the danger of such propaganda; for it was at Warsaw, in 1927, during the first conference on the unification of penal codes, that a draft text concerning penal liability for propaganda in favour of aggression had been submitted. The question had been discussed in the literature and a provision had been included in the Polish Penal Code of 1932, laying down a penalty of five years imprisonment for public calls for a war of aggression. This principle is the corner-stone of the contemporary international legal order and the basis of all others. It is, therefore, urgently necessary to formulate it, in the interest of States which sought their security in an effective international legal order. Poland, in particular, in view of its past experiences, could only regret that it had not been possible to reach agreement on certain elements of that principle. It would like it to be formally established that international crimes against peace gave rise to political and material responsibility of States as well as to penal liability of the perpetrators of those crimes.⁵⁰

During debate on the second principle at the Special Committee in 1966, Poland stressed that every country is free to choose a mean of peaceful settlement of a dispute.⁵¹

The third principle. Poland, in particular, gave a theoretical justification of a necessity of non-interference in internal affairs of other States, already existing as a principle in a number of international instruments and in the doctrine.

In respect of the fourth principle, Poland defended the rights of States to dispose of their natural resources stating namely that the exploitation of these

⁵⁰ For instance J. OSIECKI, Doc. A/C. 6/SR/997 of November 17, 1967, p. 6-7.

⁵¹ A. OLSZÓWKA, *Zasady prawne pokojowego współistnienia w pracach Komitetu Specjalnego ONZ [The Legal Principles of Peaceful Co-existence in the Works of UN Special Committee]*, "Sprawy Międzynarodowe", 1967, No. 2, p. 86. The article gives a detailed analysis of 1966 session of the Special Committee.

resources in each country shall always be conducted in accordance with its national laws and regulations.

As far as the fifth principle was concerned, Poland spoke for non-discrimination of States as to the possibility to accede to the international agreements. Furthermore, it expressed the view that in formulating this principle it should be clearly stated that all States are obliged to co-operate regardless their political, economic or social structures.⁵²

With respect to the sixth principle, Poland considers it a matter of priority. In studying that principle—the Polish delegate said—it was essential to take three points into account. First, the right of peoples to self-determination resulted from the principle of equal rights. Secondly, that right must be recognized without any reservation by all States. Thirdly, the right of self-defence arose when certain States failed to recognize the right of self-determination and thus violated a principle of international law.⁵³

The seventh principle. Poland stated that the duty to comply with treaty obligations did not apply to unequal treaties, and only treaties which were freely concluded on a basis of equality were binding. That duty did not also apply to treaties inconsistent with the Charter⁵⁴ and with the basic principles of international law.

8. Sovereignty Over Natural Resources

Poland and the United Arab Republic submitted in 1965 a draft resolution,⁵⁵ sponsored subsequently by a number of other States, concerning the permanent sovereignty of the developing countries over their natural resources.

The main purpose of the draft resolution was to develop and give a concrete form to the ideas contained in the resolutions already adopted, and to find ways and means of accelerating their implementation. The draft resolution centered around the problem of sovereignty over natural resources only in the developing countries.

The draft resolution recognized that natural resources of the developing countries constitute a basis of their economic development in general and of their industrial progress in particular. According to the draft resolution the best way of ensuring permanent sovereignty of the developing countries over their natural resources is their exploitation and marketing by themselves and hence it is necessary to create conditions conducive to the attainment of this goal, including an appropriate international action. In particular, the United Nations should undertake a maximum concerted effort to ensure the permanent sovereignty of the developing countries over their natural resources.

The sponsors of the draft resolution firmly believed that the provisions it contained were just and equitable, and also practicable. "Adoption of the draft resolution—said the Polish delegate—would encourage the developing countries to exploit their own natural resources and help them to overcome the difficulties and opposition they were likely to encounter."⁵⁶

⁵² Doc. A/AC. 125/SR. 35, pp. 7—9.

⁵³ Doc. A/C. 6/SR. 997, p. 7.

⁵⁴ Doc. A/AC. 125/SR, pp. 5—7.

⁵⁵ Cf. UN Doc. A/C. 2/L. 828 and Add. 1.

⁵⁶ Cf. UN Doc. A/C. 2/SR. 1010, p. 313. Cf. Doc. A/C. 2/L. 870 and Corr. 1.

After discussion in 1965 the draft resolution with some amendments has been again submitted for discussion of the Second Committee of the General Assembly in 1966 as a joint proposal sponsored by Algeria, Burma, Iran, Iraq, Panama, Poland, Syria, the Ukrainian Soviet Socialist Republic, the United Arab Republic, the United Republic of Tanzania and Yugoslavia.

The draft resolution got wide support and on November 7, 1966 was adopted by the Second Committee by 99 votes to none, with 8 abstentions.⁵⁷ Subsequently, it was adopted on November 25, 1966 by the General Assembly of the United Nations.⁵⁸

9. Codification of the Law of Treaties

The International Law Commission at its first session in 1949 listed the law of treaties as one of the subjects of international law suitable for codification.

The drafting of the articles on the law of treaties lasted several years. Quite exceptionally four Special Rapporteurs were appointed by the Commission to prepare these drafts: James Leslie Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Woldock. Each of them presented to the Commission a completely new draft, often based on completely different premises.

The first two Special Rapporteurs on the law of treaties assumed that the Commission would produce a draft convention. The third Special Rapporteur, Sir Gerald Fitzmaurice, however, drafted his reports in the form of an expository code. At its thirteenth session, in 1961, the Commission, in appointing Sir Humphrey Waldock as its fourth Rapporteur, decided, "that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention".⁵⁹ Thus the Commission changed the scheme of its work from a mere expository statement on the law to the preparation of draft articles capable of serving as a basis for an instrument intended to become legally binding.

After a very long debate the Commission adopted the final text of its draft articles on the law of treaties at its eighteenth session held in Geneva from 4 May to 19 July 1966.

In its report to the General Assembly, the Commission recommended that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.⁶⁰

The Commission's draft was first discussed by the the general Assembly, at its 21st and 22nd sessions.

On 5 December 1966 the General Assembly adopted a resolution in which it authorized the Secretary-General to convene the international conference of plenipotentiaries as recommended by the International Law Commission.⁶¹

The first session of the United Nations Conference on the Law of Treaties was held in Vienna on 26 March—24 May 1968. The Polish delegate, Stanisław Nahlik, was elected one of the fifteen members of the Drafting Committee of the Conference.

⁵⁷ Doc. A/C. 2/SR. 1061, of November 7, 1966, p. 224.

⁵⁸ Resolution 2158/XXI.

⁵⁹ See: "Yearbook of the International Law Commission". Vol. II, 1961, p. 128, para. 39.

⁶⁰ See: Report of the Commission to the General Assembly, Doc. A/6309/Rev. 1, para. 36.

⁶¹ See: Resolution 2166/XXI.

During the Conference an agreement was reached on 66 out of the 75 draft articles prepared by the International Law Commission; 32 articles were adopted without any major revisions, 33 articles were substantially amended and 1 article was deleted from the Commission's draft.

There are still nine articles of the Commission's draft left and some new proposals submitted by states on which the Conference failed to reach agreement during its first session and decided to adjourn the discussion to its second session, which is expected to begin in April 1969.

Among these outstanding points the most controversial ones seems to be the problem of the right of accession to general multilateral treaties and the problem of the settlement of disputes.

In Article 8 of the 1962 draft of the International Law Commission there were explicit provision to the effect that every state would become a party to a general multilateral treaty. The Commission, however, later deleted this article because of the impossibility of reaching agreement on the subject. The dropping of this article was criticized by many states, among them Poland and other socialist countries.

In his comments on the Commission's draft the representative of Poland at the 21st General Assembly declared:

"Full equality implies universality. It is right that no State, whose participation would serve the objectives and purposes of a treaty and whose interest in it is legitimate, should be barred from being a party to it. There is a growing trend towards opening all treaties to all interested States. This trend will ultimately prevail and dispose of many of the practical and theoretical difficulties still remaining. Despite arguments to the contrary, the principle of universality has in no way affected the freedom of states to select partners in the international instruments they concluded; nor has it prejudiced the question of the recognition of States, which has no bearing on the subject. It is therefore regrettable that, having once included an article affirming this principle in its 1962 draft the Commission later deleted it because of the impossibility of reaching agreement on the subject."⁶²

During the first session of the United Nations Conference on the law of treaties the states which are in favour of the universality of the general multilateral treaties proposed the inclusion in the convention on the law of treaties of a new article, stating the right of every state to participate in any multilateral treaty codifying or developing the rules of international law or in a treaty subject and purpose of which are of interest to the whole international community of states.⁶³ This proposal will be discussed at the second session of the Conference.

Another issue still unsettled is participation in the convention on the law of treaties.

No invitation to the first session of the Vienna Conference was sent to such states as China, German Democratic Republic, the Democratic Republic of Vietnam and the People's Democratic Republic of Korea. This was due to adoption of a discrimination formula of invitation to the Conference by the General Assembly in its Resolution 2166/XXI. It listed the following categories of states: members of the specialized agencies parties to the Statute of the International Court of Justice; states that the General Assembly decides specially to invite.

The efforts made by the socialist and other states to eliminate this discriminatory practice at the first session of the Conference⁶⁴ were unsuccessful. The problem

⁶² See: Official Records of the General Assembly, XXI session, 913th mtg. para. 12.

⁶³ Doc. A/CONF. 39/C. 1/L. 389 and Corr. 1.

⁶⁴ See: Statement made by the representative of Poland, doc. A/CONF. 39/11, p. 4.

now is to prevent the automatic application of the discrimination formula of invitation to the Conference of the provisions of the convention concerning the right to sign and ratify the convention or the right to accede to the convention by states not participating in the Conference.

Poland together with Rumania, Hungary and the Soviet Union has submitted an amendment using the formula of "all states", which guarantees the right of every state to participate in the Convention.⁶⁵ This amendment will be discussed during the second session of the Conference.

Another very important and controversial problem is the procedure of settlement of international disputes.

The International Law Commission's draft provides in Article 62 that in the case of any dispute over the invalidity, termination, withdrawal from or suspension of the operation of a treaty the parties to the dispute have to seek a solution by peaceful means of their own choice, according to Article 33 of the UN Charter.

This stipulation became the subject of great controversy. The first session of the Conference devoted eight meetings to discussion of this problem. Many states deemed the Commission's solution unsatisfactory and suggested that the convention should provide for some sort of compulsory jurisdiction. Another group of states, among them all the socialist ones supported the solution adopted by the Commission as the most realistic arrangement and one fully consistent with current stage in the development of international relations.

The position of Poland on the subject is as follows:

"Article 62 of the draft represents the current stage in the development of international relations. The reference to the means of settlement of disputes indicated in Article 33 of the Charter was a realistic formula which respected the sovereignty of States [...] (it) has proved itself and despite world developments has not needed any alternation [...]"

"The Convention of the law of treaties is the least suitable of all for the institution of compulsory jurisdiction, because, in the case of this Convention, compulsory procedure would have to apply to all treaties, even those affecting vital interests traditionally regarded as not amenable to jurisdiction. There is nothing to justify such a leap forward at the present stage. The position is different in the case of treaties having specific objectives, for instance financial or technical agreements. Poland is a party to a number of such treaties containing a freely accepted and perfectly comprehensible limitation on the parties sovereignty in the form of a compulsory jurisdiction clause. Thus Poland is not opposed to the principle of compulsory jurisdiction as such although as far as the Convention on the law of treaties is concerned the scope and nature of the issues subject to compulsory jurisdiction would be impossible to foresee and difficult to establish."⁶⁶

The Committee of the Whole of the first session of the Conference on the law of treaties accepted Article 62 as formulated by the Commission, but this does not mean that the problem has been definitively solved. States which submitted amendments to Article 62 providing for compulsory jurisdiction have reserved the right to bring them before the second session of the Conference and have them discussed in connection with the proposed new Article 62 bis.

The problem of compulsory jurisdiction has also been raised in connection on the law of treaties. France has submitted an amendment to the Commission's draft providing for a new article to the effect that any dispute over interpreta-

⁶⁵ See: Doc. A/CONF. 39/C. 1/L. 389 and Corr. 1.

⁶⁶ See: Doc. A/CONF. 39/11, p. 411.

tion or application of the convention lies within the compulsory jurisdiction of the International Court of Justice.⁶⁷

It is difficult to say what solution of the problem of the settlement of disputes will finally be adopted. But it must be noted that the proposals advocating compulsory jurisdiction deviate from international practice. Compulsory jurisdiction has never been agreed to when it was a question of codifying a particular sphere of international relations, for example in the Convention on the Law of the Sea, the Convention on Diplomatic Relations and the Convention on Consular Relations. Furthermore, less than half the Members of the United Nations have accepted the compulsory jurisdiction of the International Court of Justice, and in many cases acceptance has been accompanied by such reservations that its practical value remains enigmatic. In these circumstances, the introduction of a provision on compulsory jurisdiction into the text of the convention on the law of treaties may become a serious obstacle to the accession of many states to the convention.

II. OTHER ORGANIZATIONS

1. United Nations Educational, Scientific and Cultural Organization

a) In 1966 ten years elapsed since the UNESCO program called "the associated schools" had been introduced in Poland. There are now in Poland 37 associated schools in 20 towns.

The associated schools are the "pilot-schools" ("écoles-pilotes") attempting to find, work out and apply the most efficient and interesting methods of teaching. They are also trying to adopt forms of education in the spirit of mutual understanding and peaceful co-operation peoples.

The pupils, by different ways, are being acquainted with the aims and the significance of the United Nations, UNESCO and other international organizations and their work. A special part in the educative programme has been reserved for human rights. A series of events were intended to commemorate in 1968, "The International Year for Human Rights," and the twentieth anniversary of the Universal Declaration of Human Rights.

The teachers at these schools have lectures on problems relating to the international co-operation, human rights and foreign countries. Some of the subjects were: "Protest Against Social Injustice in the Light of Works of Writers of Various Countries," "New Faces of Africa," "The Activity of UNESCO in Favour of Developing Countries," "The Role of UN in Contemporary World," "Struggle against Racism."

All associated schools have been establishing new contacts with the schools in foreign countries. The summer camps have been organized for eight years in Poland for Polish and foreign participants who are obliged to use only one selected language: English, Russian or French. Over 1,500 pupils of the associated schools from several countries took part in these camps.

The main goal of the above experiment is to promote among pupils the human ideas which would influence their relations with foreign nations and countries.

b) On the occasion of the 100th anniversary of birth of Maria Skłodowska-Curie, UNESCO adopted a resolution calling for an international celebration which would give the large public a better knowledge of works of this great scientist. In Poland

⁶⁷ See: Dor. A/CONF. 39/C. 1/L. 49.

the international colloquium commemorating this anniversary was held in collaboration with UNESCO in Warsaw on 17 - 20 October 1967, with the participation of 88 foreign and 60 Polish eminent nuclear physicists.

The participants from 22 countries agreed that such meetings should be organized also in future. It had been proposed to call them "Maria Skłodowska-Curie Colloquia". Poland declared its readiness to welcome future colloquia.

Simultaneously the International Meeting of Scientific Journalists was organized in Warsaw under the auspices of UNESCO by the Association of Polish Journalists, in which 60 journalists from 16 countries, including both German states took part. Two main items of the agenda were: (1) new tasks and responsibilities resulting from the popularization of science by mass-media in the nuclear age, and, (2) problems of international collaboration of scientific journalists.

c) Another "expérience-pilote" of UNESCO in Poland is the education of adults by TV. It is destined for working people willing to supplement their secondary-school education and who live in small towns and villages where the traditional system of teaching for adults does not exist. Because of growing needs for engineers and technicians—the technical studies have been selected for beginning in TV.

Within eight days after announcement of the TV studies in 1966 about 25.000 copies of the study-guide were ordered and finally 58.000 people acquired it.

This experiment constitutes an attempt to put together three elements: the didactics, the TV techniques, and the journalist methods and, in the opinion of organizers, it may promote the improvement of professional qualifications and also an improvement—of the efficiency of the education itself.

A detailed analysis of the experiment will be communicated to UNESCO and subsequently UNESCO will transmit it to the States members concerned because "cette expérience aborde des problèmes qui sont loin de se poser à la seule Pologne."⁶⁸

From 9 to 16 September a European Conference on TV Education was held in Warsaw. The Conference was organized by the Polish Government in association with UNESCO, in keeping with a resolution adopted by the General Conference of UNESCO in November 1966. The Representatives of the following European countries took part in the Conference: Belgium, Bulgaria, Finland, France the German Democratic Republic, the German Federal Republic, Hungary, Italy, Poland, Rumania, the Soviet Union and Yugoslavia. Canada and Japan sent observers to the Conference.

The following problems were discussed during the Warsaw Conference:

- objectives and purposes of adult education on television;
- organization of education by TV;
- the methods and values of this form of education;
- efficacy of the TV adult education programmes;
- profitability of the economic and other costs.

The Polish delegation presented three papers devoted to the TV Polytechnic in Poland, its organization, functioning and popularity. All three papers were heard with great interest by the participants at the Conference, who expressed their appreciation of the progress achieved by Poland in the field of adult education on television.

The Conference concluded that the following steps are necessary to accomplish the tasks in the field of TV education; cooperation between various educational institutions and TV; the creative integration of TV education with other means of

⁶⁸ Informations UNESCO, No. 481, p. 10.

education; intensification of the international cooperation by means of an exchange of information, documents and specialists. It was also noted that it would be useful to have some kind of international periodical devoted to the problems of TV education and to make arrangements for an exchange of the programs through Intervention and Eurovision.⁶⁹

2. General Agreement on Tariffs and Trade

As far as economic relations are concerned, some details should be given here on the last developments in relations between Poland and GATT.

The Polish requests for accession were made in 1959 and 1966 and after negotiations and the Decision (L/2843) of the Contracting Parties to GATT of September 4, 1967,⁷⁰ Poland's accession to GATT was possible.

On the terms set out in the Protocol for the Accession of Poland,⁷¹ signed by Poland on September 18, 1967, this country became a Contracting Party to the General Agreement on Tariffs and Trade on October 18, 1967.

This accession should facilitate and promote the development of commercial exchange between Poland and states-members to GATT. Among others, on the terms of Annex B to the Protocol, Poland shall, with effect from the date of this Protocol, undertake to increase the total value of its imports from the territories of Contracting Parties by not less than 7 per cent per annum.

However, on January 1, 1971 and thereafter on the date specified in paragraph 1 of Article XXVIII of the General Agreement Poland may, by negotiation and agreement with the Contracting Parties, modify these commitments. Should this negotiation not lead to agreement between Poland and the Contracting Parties, Poland, shall, nevertheless, be free to modify this commitment. Contracting Parties shall than be free to modify equivalent commitments.

According to the paragraph 5 of the Protocol of Accession, the Polish Government shall consult annually with the Contracting Parties "with a view to reaching agreement on Polish targets for imports from the territories of the contracting parties as a whole in the following year."

The first consultations with the Government of Poland took place on 25 March, 25 - 26 June, 30 September - 1 October and 28 October 1968. The main subjects for discussion were the following: 1. trade between Poland and the contracting parties in the initial period eg. in the years 1965, 1966 and 1967; trade between Poland and the contracting parties in the first three months of 1968; action taken or envisaged by the contracting parties towards removing the prohibitions and quota restrictions in force on 30 June 1967 with regard to imports from Poland; Polish import targets for 1968 and 1969: Poland's balance of payments with the contracting parties.

During the consultations the representative of Poland gave a general picture of the economic situation of his country in 1967, explained his Government's intentions in acceding to the General Agreement and indicated the manner in which it intended to apply and would wish to see its partners apply the provisions of the Protocol of Accession.

The representative of Poland said that "the aim of his Government in acceding to the GATT was the multilateralization of trade relations between Poland and the

⁶⁹ Bulletin of the Polish UNESCO Committee, 1968, No. 9, pp. 11-15.

⁷⁰ See: GATT. "Basic Instruments and Selected Documents," Fifteenth Supplement, 1968, p. 60.

⁷¹ Text of the Protocol, *ibid.*, pp. 46-52.

other contracting parties." Stressing the rapid increase of Polish imports from GATT countries, which were 22 per cent higher in the first quarter of 1968 than in the same period the proceeding year, he noted with regret that several contracting parties were still maintaining discriminatory quantitative restrictions on imports from Poland and had submitted no or incomplete information regarding such restrictions. Taking this into account he said that "Poland's possibilities of fulfilling its commitments under the Protocol would obviously depend on action taken by other contracting parties towards liberalizing imports from Poland."¹²

Leszek Masznicz and Halina Okularczyk

Judicial Decisions in Poland

Supreme Court of the Polish People's Republic

1. The railway's liability under the Bern Convention (CIM)

The Supreme Court considering the case II CR 106/65 established in the sentence passed on April 28, 1965 the meaning of the notion of imminent danger connected with the transportation in flatcars.

The facts of the case were as follows: The plaintiff claimed an indemnity from the defendant for a motor car destroyed (due to its burning) when transported from Vienna to Poland. The event occurred during the transportation through the territory of Czechoslovakia and was due—after the plaintiff—to the fault of the railway administration which transported the motor car in a flatcar exposed to the action of locomotive's sparks. The defendant postulated the rejection of the demand. The court of the first instance (court for the voivodship of Cracow) adjudged to the plaintiff the indemnity required admitting the liability of the defendant. The defendant party appealed against this sentence of the voivodship court to the Supreme Court, arguing that in accordance with Article 41 and 53 of the Convention on the transportation of goods by railway (CIM) signed at Bern on October 25, 1952 and also in accordance with Article 27, para. 3, al. a of this Convention the railway administration is free of any liability in the case when the missing of or damage to the goods are due to the transportation in a flat car.

The Supreme Court rejected the appeal. In the motivation of this sentence the Supreme Court stated *inter alia* as follows: "The notion of the danger connected with the transportation in flatcars was specified by the Supreme Court [...] in its sentence of April 6, 1957 (I CR 138/56) stating that the notion of 'danger' connected with the transportation in flatcars refers only to the danger which is in no relation whatever with the railway traffic itself. As examples of such a danger may serve atmospheric effects (falls, temperature) and solar radiation and even larceny or damages if committed by persons not being officials of the railway. The Supreme Court includes into this category of dangers also the fire, provided it is due to causes which have nothing in common with the work of the railway." This opinion was

¹² See: Report of the Working Party of GATT adopted on 14 November 1968. GATT. "Basic Instruments and Selected Documents", Sixteenth Supplement, 1969, p. 70.

shared by the Supreme Court also in this case. At the same time, the Supreme Court established that it is not incumbent on the plaintiff to prove that the loss he has suffered is due to the fault of the railway administration (Art. 28, para. 2 of the Convention, 1952). "The liability of the railway administration resulting from an excessive damage caused to the goods in the course of their transportation should be considered in the light of Article 27 of the Convention stating that the railway administration could release itself from the liability, if it brings evidence that the damage caused to the goods transported is due to the fault of the entitled person, to the order given by this person and not due to a fault of the railway administration, to a defect in the goods themselves (inner deterioration, ullage and so on) or to the events which could neither be avoided nor prevented by the railway administration. As the railway administration failed to afford such an evidence, it has to bear the responsibility for the loss caused to the plaintiff."

2. Jurisdiction in succession of real estates

In a sentence passed on February 22, 1966 (III CR 395/65) the Court established that if the legal proceedings in inheritance left by a foreigner concerns a real estate situated in Poland, the case falls into the sole competence of Polish courts in pursuance of art. 1102 of the Civil Procedure Code of November 17, 1964.¹

3. Jurisdiction clause in a bill of lading and the jurisdiction in disputes between parties to a charter party

In a decision passed on April 22, 1966 (I CR 433/64) in the case: *Polish Insurance and Reinsurance Company W., branch in G., versus the Czechoslovak Shipping Company C. in P.* the Supreme Court established that the bill of lading is the basis of the legal relation between the carrier and the consignee only if there is no charter party between the consignee and the carrier. Otherwise, the charter party is the sole basis of the legal relation between the carrier and the freighter being at the same time the consignee. Consequently, the jurisdiction (prorogation) clause inserted into the bill of lading is non valid in the relation between these parties.

In the same case, the Supreme Court established that the provisions of international agreement stipulating that the interested enterprises will agree upon the competence of the arbitration court to settle potential disputes should be regarded only as a recommendation which cannot be substituted for the prorogation clause inserted in the contract between the enterprises which would substantiate the preclusion of the competence of ordinary courts with regard to the dispute.

4. Rights of the heir overlooked in the succession proceedings before a foreign court

In a sentence passed on March 17, 1967 (I CR 370/66) the Supreme Court formulated an interesting principle stating that a person who, owing to a simple mistake, was left out as a heir in legal proceedings carried out by a foreign court can vindicate before the home court its claims—for the reason of unjustified enrichment—against the co-successors if the latter, as a result of the partition of

¹ "Dziennik Ustaw" ["Journal of Laws"] 1964, No. 43, item 296.

the succession, came into possession of a part thereof which falls to the share of this person.

5. Foreigners as heirs of farms situated in Poland

In a sentence passed on January 22, 1968 (III CPZ 18/67) the Seven-member Adjudicative Panel of the Supreme Court established the following legal principle ordering it to be inserted in the Records of Legal Principles:

"When stating upon the scope of rights provided for in Article XXIII of Introducing Regulations to the Civil Code² with regard to a foreign citizen being a heir or legatee, the rules contained in Article 1078 of the Civil Code are irrelevant for the estimation of the value of a farm, unless the laws of the state of which the mentioned heir or legatee is citizen provide — with respect to the Polish citizens — for an analogous limitation of rights as that of Article 1078 of the Civil Code."³

Court of Arbitration at the Polish Chamber of Foreign Trade

1. Has the court of arbitration the right to reduce conventional penalty according to General Conditions of Delivery of the CMEA?

The Praesidium of the Court of Arbitration examined a motion put forth by the arbitral tribunal in the case between the plaintiff — a Hungarian enterprise — and the defendant — a Polish enterprise — requesting the latter to pay the conventional penalty for the delay in the delivery of the goods. In this motion the arbitral tribunal asked the Praesidium of the Court of Arbitration to settle the legal question whether "the conventional penalty due in virtue of para. 59 of General Conditions of Delivery of the Council for Mutual Economic Assistance 1958 can be reduced?" The Praesidium acting in virtue of para. 10 al. 4 pt. e. in connection with para. 28 of the Regulations of the Court of Arbitration issued on May 25 1965 an opinion wherein the following answer was given to the above question: The conventional penalty due in virtue of para. 59 of the General Conditions of Delivery of the CMEA 1958, if properly determined in accordance with this paragraph, cannot be reduced by the arbitral tribunal. The Praesidium stated that the problem had been exhaustively dealt with in the General Conditions and, consequently, there is no premise to apply — in virtue of para. 74 of these Conditions — municipal legislation as a subsidiary law.

2. Effects of chargement of the time delivery

In an award passed on July 12, 1965 in a case of a Czechoslovak enterprise

² The above rule as follows: "To foreign citizens, heirs or legatees, whose rights to a farm have been precluded or limited in virtue of special regulations a pecuniary equivalent of the succession or legacy is to be paid by the heirs who profited from this preclusion or limitation within the scope of the succession or legacy, which — after deduction of liabilities — would be due to the heirs or legatees, foreign state citizens, were their rights to the succession or legacy not precluded or limited. This rule holds true provided there is reciprocity in the State of the heir or legatee, entitled to obtain the pecuniary equivalent."

³ Art. 1078 of the Civil Code reads as follows: "The estimation of the value of a farm in order to settle the values of the succession parts is carried out in accordance with the regulations pertaining to the sale of State-owned rural estates."

against a Polish enterprise (case No. 314/65) arbitral tribunal established that if the purchaser has asked the seller to shift the term of the delivery of goods agreed upon, he cannot require the payment of the conventional penalty for the delay in the delivery, the more so if the seller promised to comply, if possible, with the demand mentioned.

3. How to count the guarantee period in the case of complex equipment?

A Polish enterprise concluded a contract with a Czechoslovak enterprise providing for a delivery by the Polish party of some equipment for a sulphuric acid plant under construction. It was agreed upon that the guarantee period should be 12 months from the day of putting the equipment in motion, not more, however, than 18 months from the day of the delivery of the equipment.

The component part of one of the equipments delivered by the Polish seller within the framework of the contract mentioned above happened to be an economizer delivered on November 4-7, 1962. The delivery of the remaining parts of this equipment was accomplished in April 1963. After the defects of the economizer became apparent, the Czechoslovak buyer lodged a complaint on August 25, 1964, requesting the replacement of the delivered economizer by an improved one as well as a group of specialists to arrive. Since this request was not complied with, the Czechoslovak buyer brought before the Arbitration Court an action against the seller requesting to obligate the defendant to deliver free of charge an "improved" economizer with a 12 month guarantee period not later than a month after the notification of the award and to charge the expenses of the arbitration proceedings to the defendant.

The defendant postulated the rejection of the demand arguing that the complaint pertaining to the economizer has been lodged in after the guarantee period had already expired. This period—asserted the defendant—should be counted beginning from the day of the delivery of the economizer and not from the day of the delivery of the complete equipment. The defendant did not contest the statements of the plaintiff either as regards the defectuousity of the economizer or the dates of the deliveries or the date of the complaint.

In the course of proceedings the arbitral tribunal found that the economizer called in question by the plaintiff was a component part of a certain equipment delivered by the defendant for the plant and that the checking of the technical properties and of the usability of this component part was not possible until the whole equipment was put in motion. Taking into account this ascertainment and in virtue of para. 10 of the General Conditions of Delivery of the Council Mutual Economic Assistance 1958 the arbitral tribunal concluded that the 18-months' guarantee period provided for in the contract should be counted beginning with the day of delivery of the last element necessary to put in motion the whole equipment and not with the day of delivery of the component part in question. Accordingly, the arbitral tribunal admitted, in principle, the demand.

When motivating its award (issued on August 28, 1965) the arbitral tribunal pointed to the fact that the termination of the 18-months' period as counted from the delivery of the component part indispensable for the putting in motion of the plant equipment could not induce the termination of the guarantee period if one has to assemble the elements, to put the equipment in motion and start its working which only made it possible to check the usability of the equipment. Another interpretation would lead—in the opinion of the arbitral tribunal—to make the guarantee ineffective.

4. The passing of risk as to the goods delivered

In an award passed on January 26, 1966 in the case No. 332/65 of a German Democratic Republic enterprise against a Polish enterprise the arbitral tribunal of the Court of Arbitration rejected the request charging the proceedings expenses to the plaintiff.

In pursuance of a contract concluded by the parties, the Polish party sent on May 3, 1963 to the plaintiff a tank-car with phenol. As asserted by the plaintiff, the phenol in the tank-car solidified and it proved necessary for the buyer to pre-heat the tank to make its emptying possible; during this pre-heating a part of the phenol—owing to the non-closing of the blow-off bottom valve—leaked into the canal. According to plaintiff's assertions, the bottom valve was not accurately screwed home already when filling the tank by the Polish party because the phenol solidification proceeds at such a rate that six hours after the filling of the tank the valve cannot be screwed home owing to the phenol solidification. Moreover, the buyer ascertained the lack of the gasket in one of the turn—buttons. The plaintiff lodged a complaint with the defendant summoning him to pay back a part of the price. The plaintiff adjoined to his charge the protocol established by the railway administration of the German Democratic Republic stating that the bottom valve had been found unclosed and that in the turn-button of the discharge pipe the gasket failed. It appeared from the content of this protocol that it was established after the phenol had leaked.

The plaintiff was obligated—in virtue of a sentence issued by the internal arbitration in the German Democratic Republic—to pay an indemnity to his home contracting party; in the present case he requested the sum paid to be restored to him by the Polish enterprise.

The defendant did not admit the complaint arguing that had the valve not been screwed home the phenol would have leaked from the tank-car already in the course of its filling. This, however, was not the case; the carrier (Polish State Railways) took over the tank-car without any reservation. The defendant postulated the rejection of the demand arguing that the valve had been necessarily screwed off in the heating hall, since this could not be done in the course of transportation because of the crystallization of the phenol; that, had the valve been screwed off during the filling of the tank, the phenol would have leaked from the tank; that in view of the toxic properties of phenol the unloader is bound to check the tank before the unloading; that the buyer—after having ascertained that the phenol leaks—was bound to prevent immediately the leakage not allowing such a large quantity (1120 kg) of phenol being wasted. At the same time, the defendant produced an attest of the technical state of the tank-car before its loading, certifying that the state of the coil and fittings in the tank was satisfactory.

In the course of the trial plaintiff's plenipotentiary afforded the evidence that during the proceedings before the internal arbitration in the German Democratic Republic an expert had been invited, who stated: The phenol does not leak during the filling of the tank because phenol crystallization occurs first (at 40 - 41°C) in down pipes of the tank, where the valves and bonnet covers are placed. The plaintiff's plenipotentiary produced a drawing (accompanied by the opinion) made by the expert in order to show why the phenol did not leak immediately after the tank had been filled and why it proved to be impossible—during the frontier railway clearance—to check if the valves were not screwed off. It results from this ex-

pertise that the valve and the cock were not accurately screwed home; moreover, at the side of the not screwed home cock the gasket failed which could induce the leakage of phenol after it had been heated. It is impossible to ascertain the position of the valve with the help of the Knob intended to open the discharge valve in the case of phenol solidification placed in the upper part of the tank. Under these conditions the valve cannot be screwed home by hand because it is blocked by the solidified phenol.

The arbitral tribunal decided as follows:

The plaintiff states in his own declaration that the phenol leaked from the tank on the territory of GDR. In virtue of para. 4 al. b of General Conditions of Delivery of CMEA 1958 the right of property of the phenol as well as the risk of fortuitous loss of or fortuitous damage to the phenol is transferred to the purchaser after the merchandise has been passed by the Polish to the German railway. In accordance with para. 47 of these General Conditions, after the ownership and the risk are transferred to the purchaser, the seller bears the responsibility for the changes in the quality in the merchandise, its damage, loss or defects only if these are due to seller's fault.

The plaintiff, however, did not produce any evidence of the defendant being guilty. Neither is convincing the plaintiff's assertion that at the moment of filling the tank three of its ring gates were not working efficiently, because if so the phenol would necessarily leak from the tank at the very moment of its filling (the phenol solidifies within six hours). This would be immediately taken notice of by the team filling the tank, all the more so as phenol—as it is known—is a highly toxic compound and its handling is subject in Poland to particularly strict provisions. Also the protocol established by the GDR railway administration stating that the bottom valve was not screwed home cannot be regarded as an evidence of the defendant's fault, since—as it appears from this very document—it was established after the phenol had leaked, i.e., after the tank had been heated and, consequently, after the valve could be handled. As regards the alledged lack of the gasket, it would be a defect in the technical state of the car for which the carrier and not the defendant is responsible. The defendant got from the carrier a certificate stating that the technical state of the car as well as of its fittings were satisfactory. Thus, the defendant cannot be censured guilty of any negligence of his duties.

Under these conditions, since the risk of a fortuitous loss of or a fortuitous damage to the merchandise had already been transferred to the purchaser and the latter failed to produce an evidence of seller's fault, the charge should be rejected.

5. The importance of the mailing direction

In an award issued on April 26, 1966 the arbitral tribunal of the Court of Arbitration after the trial of the case. No. 355/65 of a Rumanian plaintiff against a Polish defendant established that if the seller did not get a mailing direction as provided for in para. 28 of the General Conditions of Delivery of CMEA, 1958, he is not guilty of delay of the delivery even if he did not make use of the right to store the merchandise in pursuance of para. 29 of these General Conditions.

International Arbitration Court for Maritime and Inland Navigation**1. The meaning of the term "time lost"**

The charterer X brought an action before the International Arbitration Court in Gdynia against the importer Y summoning the latter to pay 14, 717.13 West-Germany marks as an indemnity for the standstill he incurred in the unloading harbour, i.e. in Szczecin.

The situation which gave rise to the dispute was as follows:

In virtue of the charter party, based on the standard pattern Gencon CP, agreed upon in Stockholm on May 22, 1964, the charterer committed himself to carry for the importer 9,400 tons of apatites from Murmansk to Szczecin. The ship took the load to Murmansk and started its way to Szczecin. It arrived carrying the apatites at the roadstead of Świnoujście on July 11, 1964 at 19 o'clock, it could not, however, be let into the Szczecin harbour, as there was no place free at the landing pier. The ship cast anchor on Saturday, i.e., on the day of its arrival and had to wait till Wednesday, July 15, 1964 to be let into the harbour of Szczecin and to wharf at the assigned unloading pier. The charterer let the importer know the arrival of the ship by telegraph (he sent three telegrams at various times). The unloading of the ship was definitely brought to an end on July 23, 1964.

The charterer sent a note to the importer specifying the standstill time lost in pursuance of the charter party. A part of the request specified in this note was accepted by the importer; he refused, however, to pay the amount mentioned above. This sum is the object of dispute.

The plaintiff based his claim on the charter clause (line No. 73) which reads as follows: The time lost in waiting for the unloading should be counted as the time of unloading. In virtue of this clause, argues the plaintiff, the arrival of the ship at Świnoujście and its waiting to be let into the harbour is the time lost beginning with the day of arrival at Świnoujście as the ship could not be let into the harbour since there was no free place in Szczecin for the unloading of the apatites.

The defendant did not comply with the plaintiff's request and claimed the rejection of the demand arguing that the ship did not arrive at the place agreed upon, i.e. at Szczecin, consequently, one cannot regard as the standstill time the waiting on the roadstead in Świnoujście, while the place indicated in the charter party was Szczecin.

Thus the contestation was, in principle, confined to the interpretation of the line No. 73 of the charter party and the plaintiff's claims based thereon.

In accordance with the will of the parties as expressed in clause 73 of the charter party, the arbitral tribunal established that the contractual provisions are explicit and correspond exactly to the will of the parties. Hence, the provisions of the clause 73 on the time lost cannot be connected with other provisions contained in the clause 6 on the lodging of the note of readiness since the counting of the time lost owing to the waiting for the unloading wharf does not depend on the lodging of the note of readiness provided for the clause 6 of the charter party. In the opinion of the arbitral tribunal, the provision of the clause 73 is independent and has an autonomous existence of a legal norm, which does not make the counting of time lost depend on a definite place of waiting taking into account that the ship arrived at Szczecin as closely as possible. Thus, it is immaterial for the

case considered whether the roadstead of Świnoujście is the roadstead of Szczecin harbour or not. The ship arrived as closely as it could safely be done and was waiting to be let into the harbour. The consignee was kept informed of this event.

Under these conditions the arbitral tribunal had to settle the essential problem, controversial between the parties, namely what should be regarded as the time lost. The provision of the clause 73 of the charter party transfers to the charge of the chartering importer the expenses of the time loss due to the waiting of the ship for the unloading place to be free.

Consequently, the arbitral tribunal considered the hypothetical situation of the ship were the place at the unloading pier in the Szczecin harbour free. It is beyond doubt that the ship—if arrived on Saturday at 19 o'clock at Świnoujście or at the roadstead of Świnoujście—would arrive at the unloading pier in the harbour on Sunday at 1 o'clock (6-7 hrs the way through the canal, obligatory pilot's service). It would be hardly possible under normal conditions to start the unloading work on Sunday night and to continue it during the whole Sunday, since in Polish ports, similarly as in foreign ones, Sunday is a holiday. Thus, the starting of the unloading of the apatites would be possible not earlier than on Monday morning at 6 o'clock, i.e. with the first work shift. Thus, since under normal conditions the unloading of the ship could not start before Monday, the arbitral tribunal recognized as the time lost—basing on the clause mentioned above—the time from Monday 6 o'clock on excluding Saturday and Sunday as the time not lost by the charterer. The ship arriving at the roadstead in Świnoujście on Saturday was aware (or at least should be aware) of the fact that it could arrive unimpeded at Szczecin past midnight Saturday-Sunday. This, however, would not give rise to the right to any standstill indemnity, since in view of the holiday the unloading under normal conditions could not start on Sunday but only on Monday morning at 6 o'clock. Consequently, the arbitral tribunal recognized as time lost the time of the standstill of the ship on the roadstead from 6 o'clock on Monday to the starting of the unloading in the Szczecin harbour.

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