

**POLISH YEARBOOK OF
INTERNATIONAL LAW**

III

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INTERNATIONAL LAW**

III

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Contents

Foreword	7
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Articles

WOJCIECH MORAWIECKI, Lenin's Concept of Peaceful Coexistence	11
REMIGIUSZ ZAORSKI, Problems of Conservation of Living Resources of the Baltic Sea	39
KRZYSZTOF SKUBISZEWSKI, The Western Frontier of Poland and the Treaties with Federal Germany	53
STANISŁAW NAHLIK, L'immunité de juridiction des agents diplomatiques en matière de procédure civile	69
JAN KOLASA, La notion de droit interne des organisations internationales	95
JANUSZ SYMONIDES, Acquisitive Prescription in International Law	111
REMIGIUSZ BIERZANEK, Freedom of the Seas in the Diplomatic Correspondence of Sigismundus Augustus, King of Poland (16th century)	131
ZBIGNIEW ROTOCKI, Polish Directives of 1939 Concerning Aerial Bombardment in the Light of International Rules of Air Warfare	143
ZDZISŁAW GALICKI, Unlawful Seizure of Aircraft	171
JAN WOŹNOWSKI, The Socialist Countries' Membership in the GATT	199
MARIA FRANKOWSKA, The Vienna Convention on the Law of Treaties	227
ANDRZEJ STRABURZYŃSKI, Exclusive Fishery Zones: International and Polish Practices	257
JACEK MACHOWSKI, The Scientific and Technological Revolution as a Factor of Development of International Law	273
RENATA SZAFARZ, Reservations to Multilateral Treaties	293

Book Reviews * Comptes rendus

L. Dembiński, <i>Samostanowienie w prawie i praktyce ONZ</i> [<i>Self-determination in the Law and Practice of the United Nations</i>] — by A. Nartowski	317
L. Ehrlich, <i>Suwerenność Polski na Ziemiach Zachodnich i Północnych</i> [<i>Poland's Sovereignty in Western and Northern Territories</i>] — by A. Nartowski	320
A. Górbiel, <i>Konieczność wojskowa w prawie międzynarodowym</i> [<i>Military Necessity in International Law</i>] — by T. Jasudowicz	323
M. Iwanejko, <i>Międzynarodowy Trybunał Sprawiedliwości</i> [<i>International Court of Justice</i>] — by A. Basak	325
S. Kaźmierczyk, <i>Umowa międzynarodowa jako źródło prawa wewnętrznego</i>	

<i>Polskiej Rzeczypospolitej Ludowej [International Treaty as the Source of Municipal Law of the Polish People's Republic]</i> — by W. Szyszkowski .	326
A. Klafkowski, <i>Obozy koncentracyjne hitlerowskie jako zagadnienie prawa międzynarodowego [Nazi Concentration Camps as an International Law Problem]</i> — by L. Szpak .	327
A. Klafkowski, <i>Granica polsko-niemiecka po drugiej wojnie światowej [Polish-German Frontier after the World War II]</i> — by T. Jasudowicz .	329
Z. M. Klepacki, <i>Zachodnioeuropejskie zgromadzenia międzyparlamentarne [West European Interparliamentary Assemblies]</i> — by A. Całus .	330
Z. M. Klepacki, <i>Zachodnioeuropejskie organizacje międzynarodowe [West European International Organizations]</i> — by L. Ciamaga .	334
J. Kolasa, <i>Rules of Procedure of the United Nations General Assembly. A Legal Analysis</i> — by R. Bierzanek .	336
A. Kwilecki, <i>Idea zjednoczenia Europy [The Idea of European Unification]</i> — by W. Morawiecki .	339
K. Libera, <i>Międzynarodowy ruch osobowy [International Movement of Persons]</i> — by K. Równy .	342
K. Skubiszewski, <i>Wysiedlenie Niemców po II wojnie światowej [Transfer of Germans after World War II]</i> — by A. Jacewicz .	344
K. Skubiszewski, <i>Zachodnia granica Polski [The Western Frontier of Poland]</i> — by R. Bierzanek .	346
W. Suchecki, <i>Teoria federalizmu [Theory of Federalism]</i> — by W. Szyszkowski	349

Bibliography * Bibliographie

Polish Bibliography on International Law, 1969	351
--	-----

FOREWORD

The "Polish Yearbook of International Law" will be appearing from now on as a publication of the Institute of Legal Sciences of the Polish Academy of Sciences. The Editorial Committee appointed by the Academy has approved some general guidelines for the Yearbook.

The "Polish Yearbook of International Law" is to publish the findings and achievements of Polish international law studies in those fields of theory which are of concern to them.

The "Yearbook" is intended to revive and continue the progressive traditions of the Polish science of international law. The main purpose of The "Yearbook" is to present the Polish views on contemporary problems of international law and of international organizations: especially those problems which are connected with the interests and the role of Poland as a member of the international community.

The "Polish Yearbook of International Law" will thus be in a sense representative of Polish legal opinions and reactions with regard to problems that concern Poland. The Polish international law studies are marked by a great variety of methodological approaches and research techniques. This is, among other things, a sign of their vitality and creativity.

However, since the end of the last war a profound transformation of methodological attitudes has been taking place among Polish theoreticians under socialist conditions. This transformation is characterized by a definite trend towards an approach to problems of international law that may be said to typify modern Polish learning. This consists in the conscious direction of the scholar's attention to international problems and the approaching of solutions from the standpoint of the interests of Poland and of the whole socialist community of nations.

That is why the main subject-matters for Polish international law studies have always been and will continue to be provided by: 1) problems of international peace and security, 2) problems of political and economic co-operation within the framework of international organizations, 3) prob-

blems arising out of the emergence of a new European system after the second World War: those concerning the liquidation of the consequences of this war, the German question and especially those connected with the European security and cooperation, 4) problems of the political and economic cooperation within the socialist system.

The studies in the field of private international law tend to concentrate on problems connected with Poland's trade relations.

The new methodological approach in Polish international law studies was particularly pronounced in the last decade. A marked developmental trend set in, resulting in a fresh look being taken at the tasks of the internationalist.

Ever more ground has been gained by the conviction that it is necessary to widen the field of vision beyond a formalistic analysis. Polish jurists are increasingly interested in such questions as: What political and social processes constitute the source of certain norms and institutions? Do such norms and institutions satisfy the economic and social needs of a complex community? How effectively is a given social environment influenced by the laws and institutions designed to fit it?

Thus abstract analysis does not suffice. Both existing and proposed norms and institutions should be evaluated from the point of view of whether they serve the cause of progress, the protection of vital interests of nations, the promotion of peace and co-operation. A special attention should also be devoted to the assessment of costs and benefits of Poland's participation in international organizations. This undoubtedly brings international law closer to the realm of political science and it is consequently not by chance that so many specialists in international law play so prominent a part in the development in Poland of the study of international relations.

This methodological modernization also permits specialists to make a greater contribution to the practice of international law and of international organizations as well as to the decision-making in this field.

The scale on which international law is studied in present-day Poland may be gauged from the following details. It forms a subject in the curriculum of the Faculties of Law at the Universities in Warsaw, Cracow, Poznań, Wrocław, Toruń, Łódź, Lublin, Katowice and Gdańsk — as well as at the Central School of Planning and Statistics in Warsaw. Large centres of international law research also exist at the Institute of Legal Sciences of the Polish Academy of Sciences, at the Polish Institute of International Affairs (both in Warsaw), at the Western Institute in Poznań, the Silesian Institutes in Katowice and Opole and at the Baltic Institute in Gdańsk.

As may be seen from the number of new doctorates in the subject there

is a steadily growing number of Polish experts in international law. The research and didactic work of Polish scholars have also borne fruit in a spate of monographs, textbooks, papers, articles and critical surveys on international law.

While the average academic standard of all these achievements is a legitimate cause for pride, there is a growing conviction in the Polish academic world that the yardsticks hitherto used have grown inadequate. The academic community concerned is acutely mindful of the necessity of adapting itself to the new needs and conditions of the contemporary scene if they are to keep pace with the ever greater and more sophisticated demands of scientific and technological progress.

The "Yearbook" will consist of two main parts.

Part One will be made up of articles which will deal with both public and private international law. The Editors will do their utmost to ensure the consonance of their subject-matter with the guidelines and characteristics laid down for The "Yearbook."

Part Two will contain reviews of Polish publications in the field of international law as well as a complete bibliography of such publications.

The "Yearbook" will also try to report on the participation of Poland in the work of international organizations and on the decisions and findings of Polish courts in cases involving international law.

We hope that our efforts will not be in vain and that, as thus orientated, The "Polish Yearbook of International Law" will be sufficiently representative of Polish studies in this field. It will fulfil its task if it serves as a channel through which our readers may be kept abreast of the problems and achievements of Polish scholarship.

In this manner it will be possible for the "Yearbook" to play its part in ensuring Poland her due place in world international law studies and increasing her share in the process of developing international law as an instrument of peaceful co-operation between nations.

THE EDITORS

Lenin's Concept of Peaceful Coexistence

by WOJCIECH MORAWIECKI

WOJCIECH MORAWIECKI is professor of international law and director of the Centre of Studies on International Economic Organizations at the Central School of Planning and Statistics in Warsaw. His principal publications are: *"Definicja agresji w prawie międzynarodowym"* [Definition of Aggression in International Law] 1957, *"Organizacje międzynarodowe"* [International Organizations], two editions: 1961 and 1965; *"Narody Zjednoczone: zamierzenia i rzeczywistość"* [United Nations: Expectations and Reality], two editions: 1967 and 1970. He published also several studies in foreign journals; among them: *"Institutional and Political Conditions of Participation of Socialist States in International Organizations: A Polish View"*, *"International Organization"* (Boston), Vol. 22, 1968, No. 2.

Lenin's concept of peaceful coexistence, which has become the guideline of the foreign policy of the USSR and of other socialist states, has had a great impact on the evolution and shape of contemporary international law. The principles of peaceful coexistence have been gradually becoming principles of universal international law. Their legal and political contents have been getting ever richer. This can be seen in the main acts of international law and especially in the United Nations Charter.

In an attempt at codification, following several years of preparations, the United Nations Organization adopted on October 6, 1970, at its jubilee 25th session, a Declaration which systematized, evolved and solemnly confirmed the principles of peaceful coexistence contained in the United Nations Charter and in other important UN acts. The catalogue of those "principles of friendly relations and cooperation among states," included: 1) a ban on the use or the threat to use force in international relations; 2) the necessity to settle by peaceful means all international disputes; 3) non-interference into internal affairs of other countries; 4) peaceful cooperation of states in accordance with decisions of the United Nations Charter; 5) equal rights for all states and self-determination of nations;

6) sovereign equality of all states; 7) execution in good faith of the commitments in keeping with the United Nations Charter.

When interpreting the above principles of international law it is important to understand properly the Leninist concept of peaceful coexistence. The concept was and continues to be developed by socialist states and of communist parties which strive to bring it into practice. A content analysis of adequate pronouncements by Lenin, by subsequent leaders of the Soviet Union, by leaders of People's Poland, as well as an analysis of decisions and assessments of national and international congresses of communist and workers' parties, may contribute to proper understanding of the idea of peaceful coexistence, its conditions, requirements and prospects.

I. Coexistence of Socialist and Capitalist Systems

The fathers of scientific socialism, Marx and Engels, did not foresee coexistence of socialist alongside capitalist states. Knowing only 19th-century conditions of the evolution of capitalism, they were inclined to believe that socialist revolution would win simultaneously in leading capitalist countries and that this would bring the victory of the socialist system upon the whole world.¹

Analysing the evolution of capitalism in the period of imperialism, Lenin was gradually reaching other conclusions. The whole strategy and tactics of the Lenin-led Bolshevik party were based on the conviction that capitalism as a world system at large had objectively matured for socialist revolution and that in those conditions the decisive role must be played by a subjective factor: revolutionary action. That is why Lenin put to the fore, as a task that had to be completed without further delay, the necessity to give the working class an indispensable leadership in the form of a revolutionary party.

Lenin came also to a conclusion that Tsarist Russia was the weakest link in the world imperialist system and that this link should be crushed

¹ However, later such a "model" of the world socialist revolution was not regarded by Engels as the only possible one as shown by his letter to Kautsky of September 12th, 1882. In this letter, which was quoted later on by Lenin, Engels suggested a possibility of a non-concurrent victory of the socialist revolution in various countries. He also formulated the principle on which the relations between a socialist country and other countries should be based: "I think that an attempt to define through what social and political stages these countries will have to pass until they reach a socialist organization, would lead to a rather void hypothesis. However, one thing is certain: the victorious proletariat should not impose their own happiness upon any other nation without endangering the roots of their own victory." Cf. W. I. LENIN, *Dzieła* [Works, Polish edition in 41 volumes, Warszawa 1950-1969, hereinafter referred to as *Works*], vol. 22, p. 402.

in the first place. The outbreak of the First World War was recognized by Lenin as a manifestation of a general crisis of the capitalist system. The war inevitably created an objective revolutionary situation which had to be used without reserve to bring down capitalism, primarily in its weakest spot. In an attempt to meet practical and mature needs of the revolutionary movement, Lenin carried out profound studies during the war, which were crowned with two works: *Imperialism as the Highest Stage of Capitalism* (1916)² and *State and Revolution* (1917).³

The exposure of the basic features and the laws governing economic and political development of capitalist countries at that time allowed Lenin both to explain the causes of imperialist wars and indicate the way for the development of socialist revolution.

A chance for socialist revolution to win first in one or in several countries, arises from the law of uneven economic and political development of capitalist countries. In the *War Programme of Proletarian Revolution* Lenin stated clearly the necessity of coexistence between socialist and capitalist states: "Evolution of capitalism is usually uneven in different countries. It cannot be otherwise, for that matter, in conditions of commodity production. Hence, an unquestionable conclusion: socialism cannot win simultaneously in all countries. It will win first in one or in several countries while others will remain for some time bourgeois or pre-bourgeois states."⁴ This confirmed Lenin in his belief that the Bolsheviks must not wait until the revolution breaks out or wins in higher developed capitalist countries.

Considering that the Russian revolution could and should play the role of an avant-garde of the world revolution, Lenin expected, however, that shortly other European capitalist countries would follow Russia's example. But when socialist revolution won first in one country only it was impossible to wait passively for other revolutions. At the 10th Congress of the Russian Communist Party which gathered on March 8 1921, Lenin made it a point that international revolution will come but that its date was put off. He also stated that Soviet Russia had come victorious from the civil war and the war waged by foreign interventionists.⁵ Coexistence of a socialist state with capitalist countries, although not peaceful yet, became an accomplished fact.

At the all-Russian Conference of the Communist Party, on May 21, 1921, Lenin pointed out already the possibility of a peaceful coexistence, conditioned by the balance of power existing at that time. Treating Soviet

² LENIN, *Dziela [Works]*, vol. 22, pp. 213 - 346.

³ LENIN, *Dziela [Works]*, vol. 25, pp. 409 - 530.

⁴ LENIN, *Dziela [Works]*, vol. 23, p. 78.

⁵ LENIN, *Dziela [Works]*, vol. 32, p. 180.

Russia as a component part of the world revolutionary process he declared: "Now we have a bearing on international revolution mostly through our economic policy."⁶ Thus was crystallizing the concept of the road for the world revolution influenced by the radiation of the example set by the first socialist state. That this road could be very long resulted from Lenin's meditations in one of his latest publications: the pamphlet *Less but Better* dated March 2, 1923. "So, in the present moment — writes Lenin — we are faced with the problem: shall we be able to hold out, considering our small and the smallest peasant production and our ruin, until West European capitalist countries end their evolution towards socialism? But they end this process not in a way we earlier expected them to do. They end it not through an evenly 'maturing' socialism within them but through exploitation of one states by others, through exploitation of the states defeated during the imperialist war, exploitation combined with the exploitation of the whole East. On the other hand however, the East has definitely entered the road of a revolutionary movement precisely as a result of that first imperialist war and has been ultimately involved into the orbit of the world revolutionary movement."⁷ Lenin clearly pinned his hopes on Asia and gave it to understand that centres of revolution would be shifted in that direction. "Can we escape a clash with imperialist states, which awaits us? — asked Lenin — Can we hope that internal conflicts between the prospering imperialist states [...] will bring us a delay [...]. The outcome of the struggle will be decided in the final count by the fact that Russia, India, China, etc., constitute a huge majority of the world population."⁸

It followed from this Lenin's vision that a whole historical period, longer than it could be expected, will be needed to pass from capitalism to socialism on a world scale. For it became clear that capitalism as a system did not exhaust yet all its possibilities and demonstrated certain ability to readjust itself to new conditions.

At the same time Lenin expressed a conviction that socialism could be built in a single country with such resources as the USSR had, even if the Soviet state had to exist for a longer period of time in the capitalist surrounding. This conviction was shaped gradually on the basis of practical experience, during the process of revolutionary struggle, when the first steps were made towards political and economic construction of socialism. This was by no means any theoretical assumption formulated a priori. Lenin was only gradually drawing conclusions from the evaluation of existing conditions.

⁶ *Ibid.* p. 436.

⁷ LENIN, *Dzieła* [Works], vol. 33, p. 518.

⁸ *Ibid.* p. 520.

It is obvious that construction of socialism in one country only, even if it was the USSR, involved greater risks and costs than those sustained if the process embraced larger number of countries, for instance, if revolution spread to Germany at least, a thing Lenin hoped so much to happen.

The decision to build socialism in the USSR was made in the struggle against opposition in his own party and in full consciousness of the risks and costs. The risk arose almost exclusively from the danger of an armed attack by imperialist states. Greater costs, not only economic ones, stemmed from the necessity to prepare the country for defence against that danger.

The question of the possibility itself of peaceful coexistence of a socialist state with capitalist states, the question of the substance this coexistence assumed — all that was of crucial importance for the future of the USSR and affected processes of its internal development and external role. The USSR, the first and then the chief socialist power, became not only the bridgehead but also the main stronghold and support for the whole battle front of revolutionary and progressive forces in the world.

II. War Tendencies of Capitalism

Lenin explained the economic and political background of aggressiveness in foreign policies of capitalist governments. The working of the law of uneven economic and political development of individual capitalist states provided Lenin with a basis for the formulation of the so-called law of inevitability of wars in the period of imperialism. In view of the continuing re-emergence of contradiction between the balance of real political and economic forces of the states and their blocks, on the one hand, and the territorial division of the world, on the other — described as a crisis of the world capitalist system — attempts are made to revise that division. "Financial capital and trusts — said Lenin — do not weaken but intensify the differences in the rate of development of various spheres of the world economy. And if the balance of forces has changed, then how contradictions can be solved in capitalist conditions if not by force."⁹ "There is no other way — says Lenin in the same place — in the capitalist system to restore the balance upset now and again than by crises in industry, wars in politics."¹⁰

The tendency to apply armed violence is an unquestionable result of

⁹ LENIN, *Imperializm jako najwyższe stadium kapitalizmu* [Imperialism as the Highest Stage of Capitalism], in: *Dzieła* [Works], vol. 22, p. 312.

¹⁰ LENIN, *O haśle Stanów Zjednoczonych Europy* [On the Idea of the United States of Europe], in: *Dzieła* [Works], vol. 21, p. 360.

deep and dangerous contradictions appearing in the imperialist system, contradictions which it is unable to solve by peaceful means. So, by unleashing wars or, at least arms race, big capital circles, which shape the policy of their respective countries, try to boost the economy and prevent economic crises.

.. Militarization of social life in capitalist countries provides favourable conditions for application of armed violence to do with home opposition, with home revolutionary movement.

The use of armed violence is a traditional way of quelling liberation and independence movements in colonies and dependent countries. The strongest and most aggressive imperialist powers resort to the use, or a threat to use, armed violence against other countries in a struggle for expansion of their sphere of economic and political influence, and even in an attempt to rule the whole world.

Finally, since the socialist system constitutes the main, threat to the capitalist system and the mainstay for all anti-imperialist movements, imperialist countries tend to solve the contradictions between the two opposing systems by way of war crusades against socialist states.¹¹

Therefore, in the period of coexistence the imperialist tendency towards war finds its sharpest expression in the attitude to socialist states. On 6 December 1920 after the first aggression on the Soviet Republic had been repelled, aggression which took the form of an armed intervention involving all main capitalist countries and their allies, Lenin said about the peace that came: "It is a postponement of the war. The capitalists will look for reasons to conduct war [...]"¹²

All the time the Soviet Union and then all other arising socialist states have been under more or less direct threat of war from the main imperialist powers and were forced to take up and continue serious defence efforts. With amazing regularity did imperialist powers react to the emergence of every new socialist state, to the entry of a new country onto the road of

¹¹ This was pointed out by Stalin's report to the Central Committee delivered at the 16th Congress of the Communist Party of the Soviet Union (Bolsheviks) on June 27, 1930. "Each time when contradictions within capitalism are more strikingly thrown into relief, the bourgeoisie turns its attention to the USSR: would it not be possible to remove this or the other contradiction in capitalism, or perhaps all of them at once at the expense of the USSR, the country of the Soviets, a fortress of revolution, the very existence of which revolutionizes the working class and the colonies, and makes futile all the attempts to unleash a new war, to divide the world again, to rule over vast capitalist domestic market, so very much needed by the capitalists, especially now in connection with the economic crisis" — STALIN, *Dziela [Works]*, Warszawa 1951, vol. 12, p. 258.

¹² LENIN, [*Speech at the meeting of activists of the Moscow branch of the Russian Communist Party (Bolsheviks)*], in: *Dziela [Works]*, vol. 31, p. 465.

progressive development, with attempts at checking historical processes by the use of armed force. This was the case first with the USSR, and after the Second World War, the same attitude was adopted towards the countries of people's democracy in eastern Europe (NATO, support of armed subversions), towards China, Korea, Vietnam, Cuba; towards Guatemala, Dominican Republic, Congo, Egypt.

The mentioned contradictions within the capitalist system appear in definite situations with a differing degree of intensification and in concrete circumstances, one of them tends to dominate over the rest. For example, on the eve of World War Two and during the War controversies between two imperialist blocs grew in strength and predominated over controversies between the United States, Britain and France on the one hand, and the Soviet Union on the other. This created conditions for setting up the coalition of the United Nations. So, the war was in the main a product of the law of uneven development and of the crisis of the world capitalist system, just as Lenin had described it.

It must be stated that the law of uneven development of capitalist countries, disclosed by Lenin, works today with even greater intensity than before, as science and technique have made such a tremendous progress known as scientific and technical revolution. In the capitalist world it only widens the gap between highly and poorly developed countries which differ so much as far as the levels of their economic development are concerned. However, in relations between developed capitalist countries a quick and fundamental change in the alignment of forces takes place, to the benefit of such countries as Japan, West Germany or Italy, the powers defeated during the last world war. Though the dominant position of the United States is still unquestionable, the countries developing more rapidly must inevitably run into conflicts with the leading imperialist power. In an attempt to play a more independent role they unite into groupings, like the European Economic Community, and may threaten the US domination in the capitalist world.¹³

¹³ In the Resolution of the Fourth Congress of the Polish United Workers' Party (PUWP) in 1964 we can find the following appraisal of these processes: "In Western Europe tendencies towards growing independence from the United States began to gain momentum. Integrational processes in Western Europe, especially the development of the Common Market, have led to the disintegration of the Atlantic bloc, and to the appearance of sharp contradictions between individual powers in connection with the competitive struggle for markets and the heritage of the colonial empires." *IV Zjazd Polskiej Zjednoczonej Partii Robotniczej, 15 - 20 czerwca, 1964 r. Podstawowe materiały i dokumenty [Fourth Congress of the Polish United Workers' Party, June 15th - 20th, 1964. Basic Materials and Documents, herein after cited as 4th Congress of the PUWP]*, Warszawa 1964, pp. 365 - 366. The report of the Central Committee to the Congress declared that the Common Market "has developed con-

The tendency towards war, proper to the whole capitalist system, may find various expressions. In situations when resort to an open war proves risky or unprofitable because of the existing balance of power, imperialist powers use less drastic measures in an attempt to solve the same contradictions. Thus, for instance, instead of suppressing with arms aspirations for independence in colonial countries, imperialist powers started to use neocolonial methods to keep those countries under dependence. Instead of making a new territorial division of the world, they try to extend their spheres of economic and political influence with the help of non-military methods. Instead of resorting to armed intervention and attack on socialist states they prefer to use cold-war instruments: ideological, political or military subversion aimed at the same goal — the weakening and then crushing of the socialist system in its various links.

Thus, the aggressive tendencies of capitalism can be manifested in definite conditions by various forms adapted to the changing circumstances.

In this respect the situation has not changed since the time when Lenin laid down his thesis about the objective tendency to wars, proper to capitalism. This is confirmed by the basic documents of individual communist parties and their international conferences. For instance, the resolution passed at the 20th Congress of the Communist Party of the Soviet Union (CPSU) in 1956 says that arms race, strivings to rule the world, stirring up of cold war, and preparations for bloody wars, are dominant lines in the policies of the main capitalist countries.¹⁴ The same opinion is aired in the CPSU Programme adopted at the 22nd Congress in 1961.¹⁵ The resolution of the 4th Congress of the Polish United Workers Party (PUWP) in 1964 states the danger of a war on the part of capitalism and warns: "A war could break out if the leading circles of the world capitalism had arrived at a conclusion that they could win it."¹⁶ The resolution adopted at the conference of 75 communist parties in Moscow in 1969 says: "Impe-

trary to the interests of the United States and that not only regarding the economic interests. France and the German Federal Republic, the main member states of the Common Market led by different or even sometimes opposite interests have launched a struggle for priority." (*Ibid.* p. 173).

¹⁴ *Materiały XX Zjazdu Komunistycznej Partii Związku Radzieckiego, 14 - 25 lutego, 1956* [Materials of the 20th Congress of the Communist Party of the Soviet Union, February 14 - 25, 1956, herein after cited as *20th Congress of the CPSU*], Warszawa, p. 587.

¹⁵ *XXII Zjazd Komunistycznej Partii Związku Radzieckiego, Referaty i Uchwały, 17 - 31 października, 1961* [23rd Congress of the Communist Party of the Soviet Union. Reports and Resolutions, October 17 - 31, 1961, herein after cited as *22nd Congress of the CPSU*], Warszawa, p. 521.

¹⁶ *4th Congress of the PUPW*, p. 193.

rialism continues to be the source of constant threat to peace and social progress." ¹⁷

The objective tendency of the capitalist system toward wars encounters, however, numerous objective and subjective obstacles. These can be described in general as the forces interested in keeping peace. In particular, under conditions of coexistence the objective tendency of capitalism to wars is opposed by the objective tendency of socialism to peace. In this situation the whole question of war and peace acquires a new perspective and becomes at present the key problem of contemporary world.

III. Tendency of Socialism Toward Peace

For the classics of Marxism the peaceful character of a socialist state was an obvious truth from the very beginning. In their first works already Marx and Engels thought that the principle of peace will be the principle of socialist society. In the Elberfeld speeches of 1845 Engels firmly argued that such a society could not under any circumstances lead aggressive wars. ¹⁸

Lenin laid a strong emphasis on these pronouncements by Marx and Engels ¹⁹ and adopted them as political directives for the revolutionary movement, which he guided, and for the first socialist state. "Socialists have always condemned wars between nations, considering them barbarous and bestial," said Lenin. ²⁰ However, unlike bourgeois pacifists, the classics of Marxism did more than to call merely the working masses to fight against wars. If a war became a fact against their will they joined it actively in a way that depended on whether it was a just or unjust fight.

Lenin's teaching about just and unjust wars is closely linked with his stand on the national question and constitutes a great contribution to Marxism. Lenin appraised the First World War as unjust on both belligerent sides, primarily because none of the imperialist coalitions set itself the aim to conquer new nations. They merely wanted to divide between themselves the already subjugated colonial and dependent countries. Consequently, none of the sides had to defend its national independence or

¹⁷ *O jedności międzynarodowego ruchu robotniczego* [For the Unity of the International Working Class Movement], Warszawa 1969 [herein after referred to as Conference 1969], p. 83.

¹⁸ K. MARKS, F. ENGELS, *Socinieniya* [Works, in Russian] vol. 3, p. 278.

¹⁹ Lenin in his work *Results of Discussion on Self-determination* written in 1916, in particular quoted the letter from Engels to Kautsky. Cf. excerpt cited in Footnote 1.

²⁰ LENIN, *Socjalizm a wojna* [Socialism and War], *Dziela* [Works] vol. 21, p. 313.

existence and thereby could not justify its war.²¹ The objective aim of the revolutionary movement was to bring about a defeat of its own state engaged in an unjust war and use that defeat for taking over power.

The situation was essentially different during the Second World War. German fascism set itself then the aim to conquer the world and bring it under its domination, or even destroy the assaulted nations. Therefore the war against Nazi Germany and its allies was from the very start just and progressive. Justice was on the side of those Polish communists who took up arms to defend their country when it was attacked on the 1st of September in 1939.

The present struggle against wars which were set off (eg., in Korea, Indochina, in the Middle East) or were and are prepared by imperialist powers, is also a just and progressive struggle. New elements have appeared in contemporary wars: they are instruments of a policy to subjugate nations and threaten them with mass annihilation because of the application of formidable modern technique. Therefore *the national question* plays in those wars an essentially new part. In this situation, a struggle against the aggressor by attacked nations or those which are under a threat of aggression is always a just and progressive struggle even if it is waged by capitalist elements. This, of course, allows to build up a very broad movement of the struggle against the danger of modern wars threatening the whole humanity.

Socialist states are deeply committed to the maintenance of peace for many reasons. Peace provides most beneficial conditions to build economic foundations for a socialist society, the prime goal of which is not to get the greatest possible profits but to meet in the possibly fullest manner the material and cultural needs of all working people. Lenin made it clear that what the Soviet Republic needed most badly were conditions for a quiet work²² and the shifting of the competition with capitalism onto the economic platform. He was of the opinion that socialism can act best "by the force of its examples."²³ Being convinced of the superiority of the socialist system over capitalism, Lenin rejected the idea of implanting socialism in other countries by way of wars or violence and ruled out the concept of the so-called "export of revolution."²⁴ Considering present condi-

²¹ LENIN, *O karykaturze marksizmu i o "imperialistycznym ekonomizmie"* [On Caricature of Marxism and on "Imperialist Economism"], *Dziela* [Works], vol. 23, p. 24 - 25.

²² LENIN, *Dziela* [Works], vol. 31, p. 501.

²³ LENIN, *Przemówienie na zebraniu aktyw... 1920* [Speech Delivered at the Meeting of Activists... 1920], *Dziela*, [Works], vol. 31, p. 465.

²⁴ See Footnote 1.

tions, socialist states should be all the more against using wars for speeding up the victory of socialism throughout the world. Certain doubts on that matter could have been cast by some forecasts made by certain socialist leaders. For example, in his speech made in 1949, which was the quintessence of Stalin's earlier and later pronouncements, G. Malenkov said among other things: "What historical experience teaches us? It teaches us that the first world war unleashed by imperialists led to the victory of the Great Socialist Revolution in our country. Historical experience shows also that the Second World War, unleashed by imperialists, led to the formation of people's democracies in a number of countries in central and south-eastern Europe, led to the victory of the great Chinese nation. Can there be any doubts then that if a third world war were unleashed by imperialists it would turn out to be a grave not for separate capitalist countries but for the whole capitalist world."²⁵ Could not this simplified argumentation lead to a simplified conclusion that a new world war can lie in the interest of socialism, a belief that seemed to be shared by the leaders of the Communist Party of China? Such conclusions have nothing in common with Leninist concepts.

From the first moment of its existence Soviet government and Lenin himself absolutely rejected wars as an instrument of the policy of a socialist state. In a report on peace, made on 8 November 1917, Lenin set out the basic guidelines of the foreign policy of the Soviet state, pointing out that it should seek peaceful settlement of relations with capitalist countries.²⁶ The peaceful line of this policy resulted from such steadfast Leninist principles concerning relations between nations, as equal rights for all nations, the right of every nation to self-determination, a ban on interference into the internal affairs of other nations. The Decree on Peace signed by Lenin on the same day and adopted by the All-Russian Congress of Soviets, which condemned wars as "the heaviest crime against humanity,"²⁷ reflected political and humanitarian considerations by which socialism is guided.

Continuing the Leninist teaching about the peaceful substance of the socialist state, the Programme of the CPSU adopted at the 22nd Congress in 1961 says: "The experience of the USSR has proved that socialism and

²⁵ G. M. MALENKOV, *Przemówienie z okazji 32 rocznicy Wielkiej Socjalistycznej Rewolucji Październikowej* [Speech Delivered on the Occasion of the 32nd Anniversary of the Great Socialist October Revolution], "Bolshevik," 1949, No. 21. The same was almost exactly repeated by N. Krushev, cf. *Przemówienie na I Sesji Rady Najwyższej ZSRR*, 6. IV.1954 [Speech at the 1st Session of the Supreme Council of the USSR, April 6, 1954], Warszawa 1954, p. 50.

²⁶ LENIN, *Dzieła wybrane* [Selected Works], vol. 2, Warszawa 1955, p. 228.

²⁷ *Ibid.*

peace are indivisible.”²⁸ Among contemporary problems the Programme gives prominence to the question of war and peace and stresses that “the most important thing is to prevent a thermonuclear war and ward off its outbreak.”²⁹ The Programme states next that the state of peace is most conducive for progress and socialism: “In conditions of peaceful coexistence the working class in capitalist countries has more favourable possibilities to go on with its struggle, easier is also the liberation fight of colonial and dependent countries.”³⁰ The resolution of the Moscow Conference in 1969 also points out that “peaceful coexistence policy favours a positive solution of economic and social problems of developing countries.”³¹ The resolution of the 5th PUWP Congress held in 1968 states that “peaceful coexistence means an action for the security of our country and creation of better conditions for its socialist development.”³²

Thus, socialist states and the communist movement are deeply convinced that peace serves best all interests of socialism. It follows from the Leninist teaching that international tensions, militarization or the use of armed force could never be conducive to the solution of any contradiction that might exist in the internal system of socialist countries or between them. Socialist societies have no economic or class reasons that would induce them to start a war. That is why they are so deeply interested in international peace and put it on one of the top places in the hierarchy of values.

It would be erroneous, however, to think that the socialist system values peace above anything else and wants to keep it at any price. Lenin once said that “Russian workers and peasants place benefits of peace above anything else but will agree to make concessions in the name of peace only to a degree.”³³ He said that when his country was ravaged and exhausted by the long war, by the civil war and war against foreign intervention. His words are timely in our days, although the situation of the socialist system is different and although the scope of a contemporary war is another. Capitulation to imperialism, renunciation of freedom by a nation, including the freedom of choice of a social system, can on no account

²⁸ 22nd Congress of the CPSU, p. 511.

²⁹ *Ibid.*, p. 544.

³⁰ *Ibid.*, p. 557.

³¹ *Conference 1969...*, p. 119.

³² V Zjazd Polskiej Zjednoczonej Partii Robotniczej, 11 - 16 listopada 1968 r. *Podstawowe materiały i dokumenty* [5th Congress of the Polish United Workers' Party, 11 - 16th November, 1968. *Basic Materials and Documents*, herein after cited as 5th Congress of the PUWP], Warszawa 1968, p. 297.

³³ LENIN, *Przemówienie na IX ogólnorosyjskim Zjeździe Rad*, 23.XII.1921 [Speech Delivered on the 9th All-Russian Congress of the Soviets, 23rd December, 1921]. *Dziela* [Works], vol. 33, p. 146.

be a price paid for peace. The heroic struggle fought by the Vietnamese nation brought that truth home to the minds of whole mankind.

An explicit declaration that peace with capitalist countries is of tremendous importance for socialism but that this importance has some limits, is essential in the conditions of peaceful coexistence between the two systems, because it is a warning against the risk of crossing a certain edge of the abyss which would mean for the world a war.

On the other hand, we must realize that there are also certain definite limits to the contents of peaceful coexistence, stemming first of all from antagonisms between socialism and capitalism. It is obvious that in the Leninist concepts peace not only did not imply any capitulation to capitalism but also ruled out the concessions in the sphere of ideology and principles of the social system. So, one has to bear in mind that there is an upper and a lower border line of peaceful coexistence. It seems it would be good to draw thus conceived frontiers of peace between socialism and capitalism on the map of the contemporary world. Within such frontiers the concrete substance of peaceful coexistence may differ and change, dependently on historic conditions and, primarily, on the actual balance of forces of the socialist and the capitalist systems.

IV. Substance of Peaceful Coexistence

At the first glance it would seem that relations between two antagonistic socio-economic systems, which represent two opposing general tendencies toward war and peace, cannot be settled by peaceful ways. Under such assumption peaceful coexistence would be a *postulate* only, put forward by the socialist state in a hope that it will win sympathy and support for that state among the social classes and groups which are hostile toward imperialism and war. This was precisely the situation after the Bolsheviks took over in Russia. The Decree about Peace, as well as other acts and appeals were mostly of that character. For the country of Soviets was at that time engaged in an armed conflict with imperialist interventionists, as far as up to 1921, while in the next few years the main western powers refused to recognize it, putting it virtually outside the law (France and Britain until 1924 and the United States up to 1933).

The *substance of peaceful coexistence* conceived as a state of relations between socialist and capitalist countries does involve a bilateral stand of the partners. The minimum goal set to peaceful coexistence amounts to renunciation of the use of armed force. In a concrete form the substance of peaceful coexistence has even narrower meaning and is contained in

a statement that in a given period of time there are no armed hostilities between a given socialist state and a given capitalist state.

Under appropriate conditions, peaceful coexistence may turn into a continuous and *long-lasting process* involving not only competition but also cooperation. To provide possibilities for a peaceful competition within the scope of peaceful coexistence, capitalist states should abandon — in a relatively permanent manner — their attempts to solve controversies with socialist states by the use of force. Bilateral recognition of a certain range of convergent or common interests is one of the provisions for cooperation between socialist and capitalist states. A careful study of these problems leads to the conclusion that the substance of the idea of peaceful coexistence understood as a process of peaceful competition and cooperation, can be different. There can be also differences in the opinions of capitalist governments on how strong is the necessity to renounce force or a threat to use force in relations with socialist countries; different can be also the range of subjects covered by concordant interests of the states concerned and the degree of the concordance, as well as the degree to which the governments concerned came to realize that.

Differences in the understanding of the idea of peaceful coexistence as a postulate, state or process of relations between socialist and capitalist states in various bilateral alignments are a normal phenomenon. They appeared first in a differentiated treatment given to the first socialist state by individual capitalist countries between 1917 and 1945. Later, different treatment was given also to individual socialist states or their groups by the same capitalist countries. This was particularly conspicuous in the attitudes of those capitalist states towards China and also towards the German Democratic Republic, Korea or Vietnam, or, finally to Cuba. New aspects appeared in the situation within the past fifteen years, when the principle of "selective coexistence" became a conscious policy line of the United States and of other western powers in their attitude towards the socialist countries. The West tried to make use of certain differences in the situation of the latter for its own benefit and to disrupt the unity of the socialist camp. It must be also realized that other socialist countries (e.g. Vietnam or Cuba) can have other concepts of the chances, character and essence of peaceful coexistence, upon which their own experience is bound to have an effect.

Doubtless, the idea itself of the possibility of peaceful coexistence and the evaluation of its substance and prospects made by Lenin and by the Bolshevik party, were based on the conclusions drawn from practical experience and on the assessment of the developing balance of power.

Foreseeing the inevitable victory of socialism first in one or several countries, Lenin wrote in 1916 that "this will have to cause not only fric-

tions but even direct efforts of the bourgeoisie of other countries to crush the victorious proletariat of the socialist state."³⁴ These expectations came true, but the first socialist state took up the war against interventionists in a conviction that it had to hold out until socialism has won in a few other countries, in the first place those which were economically more mature for socialism, like Germany for instance.

When the Republic of the Soviets successfully ended the armed struggle, the question came up how to shape its relations with the capitalist surrounding. Lenin arrived at a conclusion that coexistence would last for some time and was of the opinion that competition in the economic sphere will be its essence. Economic targets had to be given priority in a country poorly developed and devastated by the war, which, on top of that, decided to stand up alone to capitalist challenge. "Capitalism has created labour productivity unknown to the feudal system. Capitalism can and will be defeated eventually owing to the fact that socialism creates new and much higher labour productivity. This is a very difficult matter requiring a very long period of time, but it has been already initiated [...]," wrote Lenin in the pamphlet *Big Initiative*, dated 28 April 1919.³⁵

Lenin saw the prospects of peaceful rivalry and even of limited peaceful cooperation as far back as of the time when peaceful coexistence was hardly more than a postulate. He also pointed to a certain concordance of the interests of some bourgeois groups and the interests of the Soviet Russia. At the 9th Congress of the Russian Communist Party, held in April 1920, Lenin thus explained the fact that Soviet Russia had succeeded in passing from the state of war to the state of peace with the capitalist surrounding: "We have succeeded to win over to our side not only workers of all countries but also the bourgeois class of small countries, because imperialists oppress not only workers in their own countries but also the bourgeois class in small countries. You know how we have won over to our side the hesitating bourgeois class in leading countries [...]"³⁶ Later in the same year Lenin was saying: "We have won for ourselves conditions which allow us to exist alongside capitalist powers compelled now to establish with us trade relations."³⁷ And at the 9th All-Russian Congress of Soviets in December 1921 he said: "There is a force stronger than the desire, the will or decision of any of the governments or classes hostile to us — this force are international economic ties which make our enemies to establish with us economic relations."³⁸ "Bourgeois countries — argued Lenin —

³⁴ LENIN, *Dziela [Works]*, vol. 23, p. 78.

³⁵ LENIN, *Dziela [Works]*, vol. 29, p. 422.

³⁶ LENIN, *Dziela [Works]*, vol. 30, p. 463.

³⁷ LENIN, *Dziela [Works]*, vol. 31, p. 418 - 419.

³⁸ LENIN, *Dziela [Works]*, vol. 33, p. 151.

need trading with Russia: they know that without one or another form of mutual economic contacts the process of decay will continue within their ranks.”³⁹

As objective and subjective conditions were maturing, the substance of peaceful coexistence was getting richer, both as regards the postulates of socialist states and the real state and process of competition and cooperation.

At the time in which Lenin acted, peaceful coexistence meant, to a large degree, a breathing period for the socialist state, a period after which an armed assault could be inevitably expected. In such atmosphere the Soviet State acted also later, until the outbreak of the Second World War.

Between 1945 and 1955, the competition between the socialist system and the capitalist system led to a decisive breakthrough in the balance of forces. This was of crucial importance as it changed the conditions of coexistence. The resolution adopted at the 20th CPSU Congress (1956) which opened a new period in relations between socialism and capitalism, formulated in the following way the basic principles of peaceful coexistence:

- “mutual respect for territorial integrity and sovereignty — non-aggression;
- mutual non-interference into internal affairs;
- promotion of inter-state relations on the basis of equality and mutual advantages;
- peaceful coexistence and economic cooperation;
- disarmament and a ban on nuclear weapons;
- collective security in Europe and Asia.”⁴⁰

It is easy to notice that these principles of peaceful coexistence have assumed the character of the principles of international law. They could be included into that universal law thanks to its progressive evolution which was made mostly under the influence of the USSR and other socialist states. The resolution of the 20th Congress spoke also of the “possibility to prevent wars in the present epoch,”⁴¹ stating consequently that it is feasible to eliminate wars from relations between states also before the liquidation of the capitalist system, although the existence of the latter will always be a threat, to peace.⁴²

The programme adopted at the 22nd Congress of the CPSU reaffirms in principle the evaluation made at the 20th Congress: “The most impor-

³⁹ LENIN, *Przemówienie z 6 marca 1922 r.* [Speech of 6th March, 1922], *Dzieła* [Works], vol. 33, p. 216.

⁴⁰ *20th Congress CPSU*, p. 588.

⁴¹ *Ibid.*, p. 589.

⁴² The Resolution of the 20th Congress said in connection with this subject: “The most important task of the Soviet Union, of the socialist countries and of large strata of the people’s masses in all countries is to maintain and consolidate peace and to

tant thing is to prevent a thermo-nuclear war, to ward off its outbreak. And the present generation can do that." ⁴³ But the Programme was more cautious about the real possibilities of peace, confining them to prevention of a thermonuclear war.

What matters in the present balance of power, changed radically to the benefit of the socialist system, is not only a mere survival between one war and another but elimination of, at least, a thermonuclear war which could prove fatal for whole civilization. The essence of the process of coexistence has changed. From the military field, in which socialism could not but take the challenge of the adversary and in which it proved its unquestionable superiority, the emphasis is being shifted now to other spheres. There have emerged new practical possibilities of cooperation between the two systems in political, economic, scientific and technical fields, to solve the new problems important for the entire world. In view of that, postulates put forward by socialist states, in which they show the way towards further progress of peaceful coexistence, have assumed a new significance. A proof of that was the programme of general and complete disarmament proposed by the Soviet Union in 1959. The report of the Central Committee to the 4th Congress of the PUWP thus described the importance of that programme: "In our epoch peaceful coexistence is not possible in the long run without disarmament. The formidable arms race has become by itself the most important factor of international tension. If this destructive arms race is not stopped, sooner or later it will lead to an intended or unintentional war." ⁴⁴

Not only an armed attack but also a threat to use force and exploitation of any hostile acts typical for cold war, should now be regarded as a violation of the principles of peaceful coexistence.

In slightly changed conditions the 5th Congress of the PUWP held in 1968 emphasized in its resolution some aspects of peaceful coexistence which became then especially acute as attempts were made to split the unity of socialist states from the inside with the help of infiltrated revisionist ideology. "Peaceful coexistence is a political concept aimed to ease international tensions, to build up a system of collective security, to pre-

prevent a new war, a new aggression. In the present international situation, concrete conditions were created to check the aggressive forces of imperialism which are trying to push the people's into new wars and this, considering the present level of war technology, would mean disaster and destruction for the nations. [...] However, Lenin's thesis is still valid: as long as imperialism exists there will also be an economic foundation for war [...]. But we cannot say that wars are absolutely inevitable" *20th Congress of the CPSU*, p. 590.

⁴³ *22nd Congress of the CPSU*, p. 554 - 555.

⁴⁴ *4th Congress of the PUWP*, p. 196.

vent wars and a nuclear disaster [...] Socio-economic systems can cooperate, especially in economic and scientific domains, but they can never penetrate one another or be integrated.”⁴⁵ It became necessary to call attention to the obvious fact that peaceful coexistence is a form of class struggle which has not stopped and continues also in inter-state relations. The resolution adopted at the conference of 75 parties in 1969 stated that “historical struggle between the forces of imperialism and socialism grew in strength and affects all basic spheres of social life” and that “basic contradictions between imperialism and socialism have deepened on a world scale.”⁴⁶ But in spite of that the conference recognized that “to impose upon imperialism peaceful coexistence between states with different social system”⁴⁷ was a realistic goal.

In present conditions, despite fluctuations in the international situation, socialist states can not only survive but, what is more, defend themselves effectively against any armed assault. They are also able actively to shape international relations and influence the processes taking place in those relations. Thanks to that the likelihood of a new world war involving mass destruction weapons is essentially diminished; limited are the possibilities of aggressors to gain any benefits; partial steps have been undertaken and can be further extended, checking arms race and opening the road towards larger disarmament; programmes of strengthening security and developing cooperation in economic and scientific domains have become more realistic in Europe. New countries situated in various parts of the globe have a chance, and some of them use it, to enter peacefully the road of socialist development.

The new contents of peaceful coexistence is a result of an evolution of objective conditions which add up to the general notion of the balance of power between the socialist and capitalist systems.

V. Objective Conditions of Peaceful Coexistence

Proving that a socialist state can coexist peacefully in a capitalist surrounding, Lenin based his opinion on the evaluation of the balance of power existing at that time and on the presumed prospects of its further evolution. In a situation when there are two opposing objective tendencies, one in socialism another in capitalism, objective conditions for a peaceful coexistence between them are decided primarily by their alignment of forces.

⁴⁵ *5th Congress of the PUWP*, p. 296.

⁴⁶ *Conference 1969*, p. 84.

⁴⁷ *Ibid.*, p. 118.

Many changing factors (variables), which are brought to the open and investigated by political science, add up to the concept of power of a given system. All that which weakens or strengthens one or the other competitor determines the direction to which the balance of forces is tipped. An objective possibility for peaceful coexistence is provided when at least a relative balance of power exists between the two systems. According to Leninist principles, this possibility becomes more realistic when the socialist system becomes more powerful and strengthens its superiority.

Until the end of the Second World War the balance of power between the socialist and the capitalist system was marked by a very unstable equilibrium. This was so, because certain less steady factors, weakening the effective force of the capitalist system, such as contradictions between capitalist states or transitional economic and social crises played more essential role in maintaining that balance than more reliable factors, like the effective force of the socialist system.

In his speech of November 21, 1920, reviewing and analysing the factors which determined the alignment of forces around the Soviet Russia, Lenin said: "There can be no question at all of comparing the military potential of the Russian Federative Socialist Soviet Republic with the military potential of all capitalist states. We are ten, one hundred times weaker than them in this respect, but still, after three years of war we forced nearly all those states to abandon any thought of a future intervention."⁴⁸ Lenin pointed next to those factors which compensated the overwhelming superiority of the capitalist system in the military field at that time. He listed those factors in the following order which seems to be corresponding to their actual ranking: 1) process of internal decay in the states of the Entente; 2) internal consolidation of the Soviet State; 3) hostility of working masses towards the war against Soviet Russia and towards any other war; 4) controversies between imperialist states. "We have won for ourselves conditions which allow us to exist alongside capitalist powers now compelled to establish trade relations with us. In the process of that struggle we have won for ourselves the right to an independent existence."⁴⁹

Half-a-year later Lenin thus appraised the situation of the Soviet State: "At the present moment the situation is such that a balance of forces has been established, although temporary, unstable, but still, a balance."⁵⁰ Among the factors of that balance he rated disintegration of the capitalist world and the drive of colonial peoples for liberation. In the years following immediately the First World War, heavy economic and social crisis

⁴⁸ LENIN, *Nasza sytuacja zewnętrzna i wewnętrzna a zadania partii*, [Our External and Internal Situation and Party's Tasks], in: *Dzieła* [Works], vol. 31, p. 418 - 9.

⁴⁹ *Ibid.*, p. 419.

⁵⁰ LENIN, *Dzieła* [Works], vol. 32, p. 462.

prevailed in capitalist countries. It coincided with the first widespread wave of rebellion in colonial and dependent countries, mostly in Asia (India, China).

At the 9th Congress of the Soviets, in December 1921, Lenin spoke again of the unstable balance of forces. "Materially, economically and militarily we are very weak, but morally — understanding by that a true proportion of forces of all classes in all states — we are the strongest."⁵¹

As was mentioned earlier, Lenin was of the opinion that the economic interests of certain capitalist groups which wanted peaceful cooperation with the socialist state, was one of the factors providing a real possibility of peaceful coexistence. Later, an increasingly greater role fell to sober-minded ruling circles in capitalist countries, which came to realize the risks involved in a war with the socialist state. The realization was getting stronger as the military and economic strength of the Soviet State was growing. In a report to the 17th Party Congress (26 January 1934), Stalin said that in a difficult struggle for peace, carried out at a time when new hot-beds of a world war were springing up in Europe and Asia, the USSR counted on the following factors: "1. Its own growing economic and political potential; 2. Moral support of millions of working class members in all countries, keenly interested in the preservation of peace; 3. Common sense of those countries which, for one or another reason, are not interested in breaking up peace and want to develop trade contacts with a partner so conscientious as the USSR is; 4. Finally, our glorious army which is prepared to defend the country against any assault from outside."⁵² It is probably not incidental that in the hierarchy of the same factors listed in the report to the 18th Party Congress (10 March 1939), the military strength of the USSR was moved to the top, above the support of the international working class and the common sense of capitalist states.⁵³ Both evaluations of the international situation of the USSR emphasized profound contradictions among capitalist countries which were rallying round two antagonistic coalitions, and internal economic and social difficulties within those countries.

Stalin said in the report to the 18th Congress that the new imperialist war had already started. He had in mind Japan's aggression on China, Italy's on Ethiopia, Germany's on Austria and Czechoslovakia, Germany's and Italy's on Spain. He drew attention to the dangers of the so-called policy of non-intervention advocated by Britain, France and the United States, the essence of which amounted to directing aggression of the Nazi

⁵¹ LENIN, *Dziela* [Works], vol. 33, p. 146.

⁵² STALIN, *Zagadnienia leninizmu* [Problems of Leninism], Warszawa, 1951, p. 552.

⁵³ *Ibid.*, p. 717 - 718.

coalition against the Soviet Union. The situation was extremely complicated. Thanks to a clever exploitation of the contradictions among imperialist powers, the Soviet Union succeeded — despite some mistakes — to avoid isolation in the clash with the whole Nazi coalition. The said contradictions had eventually a decisive impact on the balance of power which emerged during the Second World War, as well as on the outcome of the War.

After the war a new balance of power took shape between the socialist and the capitalist system. The socialist system spread to new countries in Eastern Europe and, then, in Asia. Quite new prospects have been opened in particular by the victory of the revolution in China in 1949. It essentially extended the territorial scope of the socialist system, increased enormously the socialist population, created conditions for a fast build up of its economic and military potential. This was considered a fundamental turning point in the process of changing the balance of power to the benefit of the socialist system.⁵⁴

At the same time, in the atomic arms race, forced upon the Soviet Union, it has won successes which ranked it the leading military power in the world. These were followed by achievements of all socialist countries in economic development and technical progress.

Disintegration of the whole system of colonial domination reached in those years a breaking point and entered final phase while new states rising from the ruins of colonialism in majority of cases became allies of the socialist system in its striving to build lasting peace. Divergencies between poorly developed countries and the leading imperialist powers were steadily growing.

Attempts made between 1949 and 1955 to respond to those successes of the socialist system with the consolidation of the capitalist system within the framework of a military bloc ended subsequently in a failure as controversies were mounting, mostly between the United States and its West European partners. Disintegration processes of the world capitalist system did not allow it to make a full use of unquestionable successes of western powers achieved in technological revolution.

The resolution of the 20th Congress of the CPSU in February 1956 gave the following assessment of the new balance of power: "There is today in the world a mighty socialist camp which personifies not only moral but also material means whereby to prevent aggression. Besides, there is a large group of other states which numbers hundreds of millions of people [...] actively coming out against war. There is also a huge movement of peace champions, embracing all nations. The working class movement in

⁵⁴ Cf. N. K r u s h c h e v's *Report*, in *20th Congress of the CPSU*, p. 30.

capitalist countries has become a formidable force.”⁵⁵ The 20th Congress drew the following conclusion: “There are at present mighty social and political forces which dispose of huge means to prevent imperialists from unleashing a war and if imperialists try to start a war — to deal the aggressors a crushing blow and thwart their adventurous plans.”⁵⁶

The Programme of the CPSU adopted in October 1961 layed even stronger emphasis on the qualitatively new situation. It spoke of three complex factors of the balance of power. It put on the top the might of the socialist system. Next comes the new zone of peace created by the states which arose as a result of the struggle against colonialism. “The appearance of those states on the arena of world politics has changed essentially the balance of power to the benefit of peace.”⁵⁷ Finally, the Programme declared that the possibilities of working people to influence actively the policies of capitalist governments, have notably increased. “A world war can be prevented — says the Programme — through common efforts of the mighty socialist camp, peace-loving non-socialist states, international working class and all the forces defending the cause of peace.”⁵⁸ The Programme envisaged that the predominance of the forces of socialism and peace over the forces of war would further grow and would foresee the possibility of setting up everlasting peace still before socialism wins throughout the world.⁵⁹

The resolution of the 4th Congress of the PUWP in June 1964 said that thanks to its new position and higher share in the world economy “the socialist system strengthened its influence on the course of events in all parts of the world [...], crushed the basis of the imperialist policy from the position of strength, that is a chance to win a nuclear war, and thereby undermined the system of the hegemony of the USA in the capitalist world and accelerated the crisis of imperialist policy.”⁶⁰ Apart from a number of factors already mentioned, the resolution stressed also the role of circumspection of the ruling circles of capitalist countries. “In this new situation tendencies to adapt politics to the real balance of power appear both in the United States and in Western Europe [...]. In the face of the new alignment of forces ever more people form the ruling circles in the West come to a reasonable conclusion that if socialism cannot be defeated in a war it is better to leave the old road and take up its peaceful challenge.”⁶¹ Thus,

⁵⁵ *20th Congress of the CPSU*, p. 590.

⁵⁶ *Ibid.*, p. 590.

⁵⁷ *22nd Congress of the CPSU*, p. 555.

⁵⁸ *Ibid.*, p. 556.

⁵⁹ *Ibid.*

⁶⁰ *4th Congress of the PUWP*, p. 365.

⁶¹ *Ibid.*, p. 366 - 367.

competition "for a higher level of economic progress, for higher living standards of nations"⁶² becomes the main content of peaceful coexistence. But the resolution of the 4th Congress of the PUWP said also that the unity of the communist parties constituted the decisive instrument of the power of the socialist camp.

In the context of the resolutions passed at the 20th and 22nd Congresses of the CPSU and at the 4th Congress of the PUWP, the disruptive activity of the China's party leadership was considered a serious weakening of the strength of the socialist system, which has changed the balance of power to the disadvantage of the latter. The importance of this change could be measured by the importance attached to China's having joined the socialist system in 1949.⁶³

Between 1964 and 1969 certain verification of the views on the balance of power between the socialist and the capitalist systems proved necessary also for other reasons. This was reflected in the resolution of the Conference of communist and worker's parties, held in April 1969. The resolution stated that the balance of power has not changed to the advantage of imperialism and that "the world revolutionary movement continues its offensive in spite of the difficulties and setbacks of its individual branches."⁶⁴ The resolution declared that "although imperialism as a world system has not become stronger it remains a serious and dangerous adversary" and that its activeness has increased.⁶⁵ Unlike certain over-optimistic judgements made in the years 1957-1961 about overtaking the United States by the USSR in science and technology or the dates when the Soviet Union will run ahead of America in the per capita production and win economic competition with capitalism,⁶⁶ the resolution of the 1969 Con-

⁶² *Ibid.*, p. 366.

⁶³ Resolution adopted at the 20th Congress of the CPSU reads: "As it was anticipated by great Lenin, a new period in the history of the world has just come when the people's of the East take an active part in the shaping of the fate of the whole world." 20th Congress of the CPSU, p. 587.

⁶⁴ *Conference 1969*, p. 84.

⁶⁵ *Ibid.*, p. 84 - 85.

⁶⁶ On November 28, 1957, at the Meeting of Party activists, W. Gomułka, after his return from the Moscow Conference of the Communist Parties, repeated that according to the Soviet leaders, per capita production in the Soviet Union would in 10-15 years outdistance that of the United States. (W. GOMUŁKA, *Wyniki narad partii komunistycznych i robotniczych w Moskwie — Conclusions of the Conference of the Communist and Workers' Parties in Moscow* — Warszawa 1957, p. 19). Such were the indices envisaged in the 1959-65 development plan of the national economy in the USSR as put forward by the 21st Extraordinary Congress of the CPSU. W. Gomułka shared the belief that in 1965 industrial production in the Soviet Union would be 85-90% of the American level and in the next five years it would be higher by 14-28%. "As far as the socialist countries are concerned the calculations

ference stated more realistically: "Practice has shown that socialist transformations and the formation of a new society are a complicated and long-lasting process [...]" and that "promotion of a large-scale scientific and technical revolution which has become one of the main spheres of the historical competition between capitalism and socialism is an important condition of the development of the socialist society."⁶⁷

It seems, that recent evaluations of the balance of power — which is an objective condition of peaceful coexistence — stated certain definite balance of forces, which has shaped on a different plane than the balance of the interwar period or even that of the first postwar decade. This is a balance of forces in a game for a much higher stake, in the struggle for reaching of much more ambitious targets which have been gradually becoming attainable.

In the present alignment of forces it is feasible to prevent a nuclear war that would inevitably turn into a world war. And this is the first and most important target. Elimination of all types of wars and hostilities directed against the USSR and its close allies grouped in the organization of the Warsaw Treaty, is also absolutely probable as such wars would also involve the whole world. It seems absolutely realistic, too, to make it impossible for aggressors to win a final victory in local wars or to gain through them any meaningful territorial, political or economic benefits, although it is not realistic yet to prevent such wars from breaking out. These conclusions are confirmed by practical experience of the relations in postwar Europe, relations between the Soviet Union and the United States, or such local wars as that in Korea, in Vietnam or in the Middle East.

Under the present balance of power it is possible to check the strategic arms race involving mass annihilation weapons and their delivery means. The practicability of those targets is also proved by to-date experience and the results of disarmament negotiations.

show that by 1965 they will have produced as much as half of the world's industrial output." — *Sprawozdanie z narady przedstawicieli partii komunistycznych i robotniczych w Moskwie wygłoszone na VII Plenum KC PZPR w dniu 21.I.1961*, [Report on the Moscow Conference of the Representatives of the Communist and Workers' Parties read at the 7th Plenum of the Central Committee of the PUWP, January 21, 1961], Warszawa 1961, p. 18. In the Resolution adopted at the Conference we read: "Time will come soon when the socialist countries will come to the fore in the world production even as far as its specific quality is concerned. Capitalism will be defeated in the important sphere of human activity, namely in that of material production." — *Narada przedstawicieli partii komunistycznych i robotniczych w Moskwie, listopad 1960* [Moscow Conference of the Communist and Workers' Parties, November 1960], Warszawa 1960, p. 15.

⁶⁷ Conference 1969, p. 103.

As the forces of peace will be getting superiority, meaningful headways in disarmament will be increasingly realistic. Progress in disarmament is in the present situation the basic condition for strengthening durability of peace.

A change can be noted now in the rank of factors which objectively determine peaceful coexistence. If we tried to establish their true hierarchy, then the military power of the Soviet Union should be given, it seems, the top place as it effectively deters all plans of an armed attack on that country and its allies and checks other war tendencies of imperialism. The military power of the Soviet Union is supplemented by the allied forces of other Warsaw Treaty member states.

The second in importance is the economic, scientific and technological power of the countries belonging to the socialist system, for superiority of socialism over capitalism is contested now mainly in this sphere. Further changes in the balance of power depend on the successes in that competition.

Such factors as internal cohesion of individual socialist states, cohesion and international unity of the states belonging to the socialist system; the strength of the anti-imperialist movement in developing countries, the strength of the international working class and communist movement and the unity of that movement; opposition of broad masses against wars; contradictions between the leading capitalist countries weakening the imperialist system; prudence and the growing concern for keeping peace, noted in increasing number of capitalist groups, all these are the next most important elements objectively conditioning peaceful coexistence.

Assessment of the balance of power between socialism and capitalism, between the forces of war and peace, is of tremendous importance. A more thorough knowledge of those forces would allow to define in greater detail the real possibilities of peaceful coexistence at the present moment and of the contents of that coexistence: the range of the tasks feasible in given conditions.

It is easy to notice that the list of objective factors affecting the alignment of forces includes factors more and less measurable. E.g. military power is a factor rather easily measurable. But even this power should not be confined only to the numerical strength of the army and its battle equipment. Nowadays, the military force of a given state or a group of states — in terms of modern strategic weapons — is measured by its or their capability to deal a retaliatory blow which the enemy would not be able to repel.

Economic potential is also a relatively measurable factor. But even if such quantitative indices were established as the size of industrial production or the amount of the national income for the whole country and per

capita, some difficulties would emerge and sometimes little comparable figures would be available. And how to measure then such qualitative categories as internal cohesion of a state, stability of the system of states, the strength of the political movement, the degree of contradictions between states, etc.

In view of those difficulties, until now the forces of the opposed systems have been measured and the relationship between those forces estimated more or less on the basis of intuition, resulting from the political experience of the leaders of communist parties and governments of socialist states.

It is quite obvious that the tremendous and constantly growing importance — under present circumstances — of the estimation of the forces of partners in international relations and of the balance of power existing between them, urges more precise calculations and the reduction of the margin of error. So, efforts should be taken to increase the exactness in establishing more commensurable indices of the forces of the two opposing world systems and the accuracy of the factors which until now could not be measured in quantitative terms. The narrowing of the margin of the inevitable error, the scale of which should be, however, duly estimated, is conditioned also by a greater accuracy in establishing the rank of individual factors which have a bearing on the alignment of forces.

These are the problems studied by contemporary political science. Research methods and techniques worked out by that science can and should be tested, in an attempt to make a more accurate evaluation of objective conditions of peaceful coexistence.

VI. The Role of Subjective Factor in the Struggle for Peace

With the given objective conditions of peaceful coexistence, being determined by the factors enumerated above, subjective factors play a decisive role in the process of transforming into reality possibilities created thanks to the former. The foreign policy of the USSR and of other socialist states is such an important subjective factor. The aim of this policy is to take skilfully advantage of the existing balance of power, in the interest of peace. Very important are the activities of all social forces interested in keeping peace, whose energies can be best exploited in a broad and organized movement for peace.

The most accurate evaluation of objective conditions of peaceful coexistence and definition of the possible margin of an error, are of crucial importance because they provide a point of departure for drawing up the policy line of socialist states and of all organized peace movements. In

a broad meaning of the word, politics amount to a selection of targets and utilization of means leading to the implementation of the former. The knowledge of objective conditions allows to state what means we have at our disposal and what are the possibilities of the adversary in this respect. It allows to set out maximal but attainable targets and duly estimate the costs and risks involved. In other words, the better is the knowledge of the alignment of forces and their arrangement, the more effective will be the strategy of the struggle for peace.

Better orientation in the alignment of forces and in the dynamism of their development permits to avoid major errors in the evaluation of the possibilities of the struggle for peace. There can be two types of such errors. Firstly, aggressive forces can be overestimated and peace forces — underestimated. The danger of committing this error arises in the first place at a time when aggressive forces increase their offensive. This was the case in the years 1947—1951 and communist parties gave a strong warning then not to make this error.⁶⁸ The same danger can appear in the present period and, therefore, it is necessary to warn against that.

The second error lies in the underestimation of aggressive forces and overestimation of peace forces. It occurs mostly after peace forces have won some spectacular success which may cause an exaggerated euphoria. N. Khrushchev failed to avoid making that error in the years 1957—1963, when the Soviet Union gained a notable superiority over the United States in the field of ballistic missiles technology.

The subjective factor which can be defined in general as a conscious and organized social action, has always had definite chances to shape international situation and exert, in concrete conditions, decisive influence on the fate of war and peace. Already in 1864 Marx duly appreciated the role of that factor when he stated: "It was not the wisdom of the ruling classes but the heroic resistance of the British working class to the criminal madness of the former which saved western Europe from a disgraceful crusade that would perpetuate slavery and spread it over the other side of the Atlantic."⁶⁹

The possibilities of a conscious and organized struggle against war were limited for a long time because of the weakness of the factors which objectively determined those possibilities. It would be wrong, however, to think that the struggle against war was not rational under an unfavourable balance of power only because it was bound to end in a failure. Such a fa-

⁶⁸ Cf. *Conference of some Communist Parties held in Poland, September 1947*, Russian edition, p. 10.

⁶⁹ K. MARX, *Inauguracyjny manifest międzynarodowego stowarzyszenia robotników* [Inaugural Manifesto of the International Workers' Association], in: K. MARX, F. ENGELS, *Dziela wybrane* [Selected Works], vol. 2, Warszawa 1949, p. 358 - 359.

talistic stand would mean misunderstanding the nature of social processes and would be totally contrary to Leninist principles. It must be stated that objective premises can mature and balance of power be changed not spontaneously or automatically but only in a process of struggle against war, expanding in this way and increasing the real possibilities of such a struggle.

Owing to its vagueness, Stalin's general statement that "peace will be kept and strengthened if the nations take the responsibility for the cause of peace and defend it till the end"⁷⁰ was true when it was pronounced in 1951 and can be true at any other time.

Quite different is, however, the role of the resolutions of the 20th Congress of the CPSU in 1956 and of later documents of the international communist movement. They stated the possibility to safeguard durable peace through an active struggle carried out in a new, favourable balance of power. The mobilizing force of the appeal for this struggle is equally strong as important is the role of peace in contemporary situation, all the more so as the chances to prevent a new war have become quite realistic.

It must be remembered, however, that this chance was given to our world — before it was too late — owing to the fact that, then, in hopeless, as it could have seemed, conditions Lenin mobilized forces of revolution and progress and led them to a battle which set off a process of ever expanding tasks and ever expanding objective possibilities of their attainment.

⁷⁰ Rozmowa J. Stalina z korespondentem „Prawdy”, 17 lutego 1951 [J. Stalin interviewed by “Pravda” correspondent, 17 February, 1951], “Nowe Drogi,” 1951, No. 1, p. 16.

Problems of Conservation of Living Resources of the Baltic Sea

by REMIGIUSZ ZAORSKI

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The interests of coastal states in the basin of the Baltic Sea — in spite of their socio-political differences — show certain affinity leading to the recognition of the usefulness of the international cooperation in many fields connected with the exploitation of the sea. This has frequently been expressed by socialist states in declarations aiming at the recognition of the Baltic Sea as the "Sea of Peace."¹ The Government of the Polish People's Republic, among others, stated in its note of July 21, 1960 that "agreements acting towards the protection and strengthening of peaceful relations among the Baltic states would be in favour of all the nations of this region."²

¹ Declaration of the Governments of the Polish People's Republic and of the German Democratic Republic of June 20, 1957. "Zbiór dokumentów", PISM 1957, No. 6/7, p. 1435 ff.; Note of the Government of the German Democratic Republic of June 30, 1960 to the Government of the Polish People's Republic, "Zbiór dokumentów", PISM 1960, No. 7, p. 1082.

² "Zbiór dokumentów", PISM 1960, No. 7, p. 1086. Cf. A. KŁAFKOWSKI, *Koegzystencja polityczna i prawna na Morzu Bałtyckim* [Political and Legal Coexistence on the Baltic Sea], "Przegląd Zachodni", 1957, No. 4, p. 276 ff.

The establishing of international relations in the interest of all the Baltic states in certain scopes is possible through multilateral international conventions. If all the Baltic states participated in the agreement, several common problems in the area of the Baltic Sea relating to fisheries, salvage ice-service, etc., could be settled.

It is one of the tendencies in the development of the contemporary international law to conclude multilateral agreements. In spite of this, in the basin of the Baltic Sea, there are no multilateral conventions which would control the exploitation of the Baltic Sea by all the coastal states.

One can consider the above-mentioned declarations of the socialist states as an invitation to negotiations leading to the conclusion of multilateral international conventions. Furthermore the socialist states have concluded several bilateral or trilateral international agreements to determine some problems connected with the exploitation of the sea.³

The conservation of the living resources of the sea, one of the main problems of the exploitation of the Baltic Sea, has not been controlled yet, in spite of the lapse of 25 years since the end of World War II.

The problem of the conservation of natural resources of the Baltic Sea, within the last few years, has considerably extended its scope and is now closely connected with the prevention of pollution by hydrocarbons and industrial and chemical wastes. The necessity to initiate the cooperation

³ Agreement between the Ministry of Shipping of the Polish People's Republic and the Ministry of Communication of the German Democratic Republic on the mutual cooperation for increasing security of shipping and fishery on the Baltic Sea done in Warsaw on January 12, 1956, *Zbiór umów międzynarodowych PRL, 1956* [Collection of International Agreements Concluded by PPR, 1956], Warszawa 1965, p. 11. Agreement between the Government of the PPR, the Government of the GDR and the Government of the USSR concerning the cooperation in the field of safety of life and assistance to the sea vessels and to the air-crafts requiring help or salvage on the Baltic Sea, done in Moscow on December 12, 1956, *ibid.* p. 216; Protocol between rescue services of PPR, GDR and USSR done in Moscow on December 12, 1956, *ibid.* p. 222; Agreement between the Governments of GDR, PPR and USSR on the cooperation in the field of sea fisheries, done in Warsaw on July 28, 1962, *Zbiór umów międzynarodowych PRL, 1962* [Collection of International Agreements Concluded by PPR, 1962], Warszawa 1964, p. 281; Agreement between the Government of PPR and the Government of the Kingdom of Denmark concerning salvage operations and recovery of property from the sea on Polish and Danish internal waters and territorial seas, done in Warsaw on February 26, 1968 "Dz. Urz. Ministerstwa Żeglugi" ["Official Gazette of the Ministry of Shipping"], 1968, No. 8 item 47; Declaration of GDR, PPR and USSR on the continental shelf on the Baltic Sea done in Moscow, on October 28, 1968. Agreement between PPR and GFR on the delimitation of the continental shelf done in Berlin on October 29, 1968 (Dz. U. 1969, No. 15, item 106); Agreement between PPR and USSR on the course of the boundary of the continental shelf in the Bay of Gdańsk and in the North-Eastern part of the Baltic Sea done in Warsaw on August 28, 1969 (Dz. U. 1970, No. 15, item 127).

of the coastal Baltic states in this respect is underscored by geographical features of the Baltic Sea, an inland sea with large inflows of river waters. Due to this, the organic life is poor in comparison with other seas, like the North Sea which is about six times more productive than the Baltic Sea.⁴

Because of the above-mentioned characteristics of the Baltic Sea the conservation of its natural resources acquires at present a particular importance and should be considered in three aspects: the establishing of an international system of conservation comprising the application of generally accepted measures which would enable a permanent and most favourable productiveness, taking measures for the prevention of pollution of waters by hydrocarbons and measures preventing the pollution of waters by industrial and chemical wastes.

1. The only multilateral convention on the conservation of fishes in the Baltic Sea was the December 17, 1929 International Convention on the Regulation of Fishing Plaice and Flounder. The parties to this convention were: Denmark, Germany, Poland, Sweden and the Free City of Gdańsk.⁵ From the territorial point of view this convention did not cover the whole basin of the Baltic Sea; it only applied to the area extending in the West as far as the German coast, in the South as far as the coast belonging to Germany, Poland and the Free City of Gdańsk, in the East as far as the line linking the point of junction of the German-Lithuanian border with Utlängen and in the North as far as the coast belonging to Denmark and Sweden.

The 1929 Convention was a closed agreement with no possibility for other Baltic states to accede. Finland and the Soviet Union were not parties to this convention.

This convention stipulated three kinds of conservation measures: a) close-season for plaice from February 1 until March 31; b) the prescribed minimum of fish sizes. An obligation was imposed on fishermen, citizens of the contracting parties, to return the sea immediately after capture any species under protection, of less than minimum sizes prescribed or during a close-season, taking all the necessary measures to keep the fish alive; c) prohibition of the use of trawls towed from the vessels on the territorial sea of any party.⁶

⁴ K. DEMEL, *Życie morza [Sea Life]*, Gdańsk 1951, p. 531.

⁵ Dz. U. 1931, No. 30, item 207.

⁶ The Final Protocol provided exceptions from the principle that trawls must not be used. The parties have the liberty to give permission for fishing with the use of trawls towed from the vessel at the depth greater than 20 m. Previously recognized exceptions in some restricted parts of a territorial sea, have been also accepted.

The above-mentioned convention introduced only precisely qualified measures of conservation concerning some flat fish. It did not introduce conservation measures for all the species and did not embrace the possibilities to use various measures in order to maintain fish stock on the most productive level. This convention does not satisfy the contemporary requirements as far as the conservation of fish in the Baltic Sea is concerned⁷ and the political relations in the basin of the Baltic Sea are different.

The April 5, 1946 London Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish did not cover the Baltic Sea.⁸ The limits of the application of this Convention were determined by the lines drawn from Hasenore Head to Guiben Point, from Karshage to Spodsbierg and from Gilbury Head to the Kullen.

The 1946 London Convention had been succeeded by the North-East Atlantic Fisheries Convention of January 24, 1959.⁹ This convention also does not apply to the Baltic Sea. It applies to the same area as the 1946 Convention.

The Baltic Sea, in spite of an intensive exploitation of its natural resources, is at present the only fishery area in the Northern Hemisphere not covered by a multilateral agreement on the conservation of fish. There are, however, tendencies in the entire world to recognize the necessity of cooperation between interested states in the field of conservation of natural resources of the sea, in the areas of operations of their fishing vessels. This view is widely accepted.¹⁰ This was confirmed by the Rome conference of 1955 on the conservation of the living resources of the sea.¹¹ It was also recognized of the Geneva Conference in 1958.¹² Among the many opinions expressed by the representatives of socialist and western

⁷ Cf. *Współczesna organizacja ochrony ryb* [Contemporary Organization of the Conservation of Fish], R. ZAORSKI, *Eksploracja biologicznych zasobów morza w świetle prawa międzynarodowego* [Exploitation of Natural Resources of Sea in the Light of International Law], Gdynia 1967, p. 186 ff.

⁸ Dz. U. 1947, No. 62, item 359.

⁹ Dz. U. 1963, No. 45, item 250.

¹⁰ C. J. COLOMBOS, *The International Law of the Sea*, London 1962, p. 385; G. GIDEL, *Le droit international public de la mer*, Chateauroux 1932, vol. 1, p. 438; Ph. C. JESSUP, *L'exploitation des richesses de la mer*, "Recueil des Cours" Académie de Droit International de la Haye, 1929, vol. 29, p. 409; L. L. LEONARD, *International Regulation of Fisheries*, Washington 1944, p. 172; H. Ph. VISSER'T HOOFT, *Les Nations Unies et la conservation des ressources de la mer*, La Haye 1958, p. 274; F. V. GARCIA AMADOR, *The Exploitation and Conservation of the Resources of the Sea*, Leyden 1959, p. 146; KOLESNIK, in *Očerki mieždunarodnogo morskogo prava*, chapter V, Moskva 1962, p. 223 ff.

¹¹ Doc. A/Conf. 10/6 p. 10 para. 7.

¹² Cf. R. ZAORSKI, *op. cit.*, p. 187.

countries during the Geneva Conference in 1958 the Soviet delegate substantiated the need of international cooperation in the following terms: "The experience of the last ten years prove that the regulation of fisheries is indispensable, since the application of modern technic in the high seas fishery, with the use of unreasonable methods lead to a considerable impoverishment of fish species in some areas, as for instance in the North Sea. The states directly involved have their stake in concluding among themselves a number of international agreements which would regulate fisheries in some areas of the high seas."¹³

Recommendations on the conservation of some species of fish in the Baltic Sea had been adopted on the 1955 Rome conference.¹⁴ Also the International Council for the Exploration of the Sea after World War II had formulated recommendations about the necessity of cooperation between the Baltic states leading to the conclusion of an international agreement on the conservation of natural resources of the Baltic Sea. Such recommendations had been adopted during a 1957 session in Bergen. They were reiterated on sessions held in 1958 and 1959 in Copenhagen.¹⁵

In spite of an obvious necessity of an international agreement concerning the conservation of natural resources of the Baltic Sea, such an agreement has not been concluded yet by the Baltic states, although the socialist states have tried to undertake negotiations. The reasons of this state of affairs originate in the sphere of political relations: neither the Federal Republic of Germany nor the other western states recognize the other German state — the German Democratic Republic.

The fact that the Baltic states comply with the recommendations of the International Council for the Exploration of the Sea in the domain of their internal laws proves that they attach a great importance to these recommendations and to the necessity of taking the measures of conservation.¹⁶ Poland has also issued regulations on the conservation of fish in the Baltic Sea.¹⁷

A unilateral undertaking of conservation measures cannot be consider-

¹³ *Conférence des Nations Unies sur le droit de la mer*, Documents officiels A/Conf. 13/41, p. 9.

¹⁴ Doc. A/Conf. 10/6 para. 73.

¹⁵ *Conseil permanent international pour l'exploration de la mer*, "Rapport et procès-verbaux des réunions," vol. 45, part I, p. 60; "Rapport de la quarante sixième réunion statutaire de Conseil," Copenhague, septembre-octobre 1958, p. 22; *Procès-verbal de la réunion*, 1959, p. 63.

¹⁶ R. ZAORSKI, *op. cit.*, p. 182.

¹⁷ *Ibid.* In the interest of the preservation of living resources of the sea Poland established on the basis of the Act of February 12, 1970 an exclusive fishing zone, 12 miles wide measuring from the base-line of the territorial sea (Dz. U. 1970, No. 3, item 14).

ed sufficient. A reasonable fishery administration requires a uniformed conservation system in a given area and a guaranteed compliance with the established conservation programme. These aims can be attained by introducing an international conservation system based on the cooperation of all states interested in fishery in a given area.

The Baltic states as parties to the 1946 London Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish and at present as parties to the 1959 North-East Atlantic Fisheries Convention have a rich experience in organizing and applying the international system of conservation.

At present, in the absence of multilateral agreement dealing with the conservation of the resources of the Baltic Sea, the guidelines of such an agreement as formulated by the author nine years ago are still valid.¹⁸

The future international agreement should be based upon the following principles: a) Regionalization of the sea environment of the Baltic Sea; b) Submitting of both, the high seas, and the territorial seas of each of the Baltic states, to a conservation system; c) Basing the conservation of the living resources of the sea on scientific explorations; d) Applicability of every generally accepted protective measures within the following spheres: the regulation of the size of meshes of fishing nets, the limitations of the size of fish, establishing of closed seasons of fisheries and of closed areas thereof, the regulation of fishing instruments and appliances other than the meshes of fishing nets, the expansion of the resources of the sea through artificial reproduction, through transplanation of organism and fry, through complete regulation of fisheries (applying a more rigid procedure than the previously mentioned protective measures); e) Setting up an International Commission which would issue recommendations regarding the application of definite protective measures as provided in the agreement. Each recommendation of such a Commission unanimously accepted in the presence of delegates of all parties should come into force. A recommendation of such a Commission which is not supported by two-thirds qualified majority, fails. However, recommendations accepted by two-thirds majority of members present and voting should come into force unless two states express their opposition in a prescribed time limit. Since there are only a few Baltic states there would be no use in applying protective measures with two of the parties withholding their consent. A state expressing its opposition is not bound by the recom-

¹⁸ R. ZAORSKI, *Współpraca międzynarodowa w dziedzinie ochrony biologicznych zasobów Morza Bałtyckiego* [International Cooperation in the Sphere of Conservation of Natural Resources of the Baltic Sea], "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1963, No. 1, p. 37 f.

mendation. It appears that the common interest of the Baltic states in conserving the living resources of the Baltic Sea would eliminate possible controversies; f) Ensuring that fishing vessels flying the flags of the contracting parties will apply the recommendations of the international commission.

The activity of an international commission based on the results of scientific exploration of the International Council for the Exploration of the Sea would create conditions for establishing of a system of the conservation of natural resources of the Baltic Sea like the one which is in force on North Atlantic.¹⁹

2. The prevention of pollution of the sea waters by hydrocarbons originates from the first international conference in 1926.²⁰ This matter has been recently settled by the Convention of April 13, 1962.²¹ The Geneva Convention on the High Seas of April 29, 1958 imposes a general duty on contracting states to draw up internal regulations in order to prevent pollution of the seas by hydrocarbons (Art. 24).²²

The negative impact of hydrocarbons on the organic life of the sea is generally known.²³ This threat has been increasing with the modernization of ships and the transportation of hydrocarbons on big ships. The extent of the destruction of the organic life could have been evaluated by the effects of the famous 1967 accident of the "Torrey Canyon" tanker in the English Channel. Millions of fish and other kinds of marine flora and fauna perished.²⁴

The Intergovernmental Maritime Consultative Organization undertook the study of the civil liability problems resulting from similar accidents and of the special rights of the coastal states to protect their maritime territory. This work resulted in signing on November 29, 1969 in Brussels of two conventions concerning the civil liability for damages caused by pollution of sea by hydrocarbons, and concerning the intervention on the

¹⁹ North-West Atlantic Fisheries Convention of February 8, 1949 (Dz. U. 1962, No. 31, item 142) ratified by Denmark, France, Spain, Iceland, Canada, German Federal Republic; Norway, Poland, Portugal, USA, Great Britain, Italy and the Soviet Union and the North-East Atlantic Fisheries Convention of January 24, 1959, ratified by Belgium, Denmark, France, Spain, Ireland, Holland, German Federal Republic, Norway, Poland, Portugal, Sweden, Great Britain and the Soviet Union.

²⁰ G. GIDEL, *op. cit.*, p. 480.

²¹ "Revue Générale de Droit International Public," 1964, p. 783 ff.

²² Dz. U. 1963, No. 33, item 187.

²³ During the 1958 Geneva Conference this problem was discussed by the Director of Fisheries Department of the UN organization for Food and Agriculture, Documents officiels, A/Conf. 13/51, p. 37.

²⁴ Discussion on the factual and legal situation, RGD IP 1967, p. 1092 ff.

high seas in connection with an accident which is causing or may be causing pollution of sea by hydrocarbons.²⁵

In view of the evaluation of the consequences of the "Torrey Canyon" catastrophe the conservation of natural resources of the Baltic Sea against the pollution by hydrocarbons is gaining a special significance. In view of the specific geographic and oceanographic features of the Baltic Sea a considerable discharge of hydrocarbons into the sea could cause incalculable consequences in the destruction of the marine flora and fauna and in the upsetting of the state of biological balance.

The second Brussels Convention shall have a great importance for the conservation of the natural resources of the Baltic Sea. It provides that in case of an accident and a resulting danger for the coastal state, this state is entitled to undertake special measures. According to Article 1 of this convention the coastal state may take such measures that are indispensable for preventing, reducing or eliminating a serious and direct danger to its coast — and interests which are linked therewith — resulting from the pollution or a threat of pollution of the sea by hydrocarbons.

The terms of this Article are not clearly related to the interests of the conservation of the biological resources of the sea in the broader sense, namely in the sense of the resources of the given sea environment. The authentic interpretation of the term "linked interests" as given in the convention indicates first of all the protection of the interests of the coastal state.²⁶ This term also embraces health of the population living on the coast and sanitary conditions of the given area including the conservation of the stock of fish and of nature.

The opinion on the term "conservation of fish stock and of nature" is disputable. The total organic life requires protection. The destruction of natural resources in a given area cannot be limited just to this area. The consequences of this destruction will affect other areas.

This is a difficult problem since the right to undertake measures as provided in Article 1 constitutes a *novum* and restricts the principle of the freedom of the seas. The right of the coastal state is a contractual exception of the general principle that a merchant ship while on high

²⁵ International Legal Conference on Marine Pollution Damage 1969, Final Act of the Conference with Attachments Including the Texts of the Adopted Conventions, IMCO, London, 1970, p. 25 ff.

²⁶ Art. II gives the interpretation of the term "linked interests" which means the interests of a coastal state affected or threatened by a marine accident, as a) activities on a sea shore or in a port being for given persons a basis for earning their living; b) tourist qualities of a given area; c) health of population living on a coast and sanitary conditions of the given area including the conservation of fish stock and nature.

seas is under the authority and law of the state under which flag it sails. In such case a restricted interpretation should be applied.

Without going into details of an international convention on special rights of a coastal state to protect the coast of its territorial sea against the pollution by hydrocarbons, it should be stated that the ratification of such a convention by the Baltic states would create further protection of the natural stocks of the Baltic Sea.

However, the rights of the coastal states do not exhaust the subject of the conservation of natural resources of the sea against the harmful effects of hydrocarbons discharges into the Baltic Sea.

The problem of applying proper measures in the Baltic Sea to remove the discharged oil from the marine environment is to be solved. The usefulness of a coordinative action is evident in 3 cases: a) a marine accident as provided in the above-mentioned Intergovernmental Maritime Consultative Organization;²⁷ b) in other situations not covered by the definition of "sea accident" if there is a discharge of hydrocarbons into the sea²⁸ and c) the pollution of sea by hydrocarbons during exploration and exploitation of natural resources of the sea-bed and subsoil thereof, what is not covered by the convention.²⁹

The results of investigations conducted in connection with the "Torrey Canyon" accident indicate that a unification of methods of removing hydrocarbons would be useful. According to the opinion of British biologists the use of detergents for removing oil from the sea along the Cornwall coast had adverse effects on the natural life of the sea.³⁰ Investigations proved that detergents do not blend with oil in such a way that a solid emulsion is formed. After a few hours oil and detergent dissociated again. This oil can pollute other coasts. Further investigations proved that detergents had poisonous effects to some sea species, in particular to shellfish. According to British biologists, better results, from the point of view of

²⁷ Art. II defines "marine accident" as a collision of vessels, running aground, other shipping accident or another event on board of the ship or beyond it, which causes material damage or direct threat of a material damage to the vessel or cargo.

²⁸ In such case, according to the provisions of the convention, the coastal state, would not have the right to take special measures. However, for flora and fauna of the sea, a discharge of oil which is not a "marine accident" is equally harmful.

²⁹ The Geneva Convention on the Continental Shelf of April 29, 1958 in its Art. 5 para. 7 imposes on a coastal state an obligation to undertake in the safety zones all appropriate measures for the protection of the living resources of the sea from harmful agents; however, in the matter discussed reference is made to a coordinated action of states in a given region aiming at the application of the most appropriate measures for the removal of oil.

³⁰ "Torrey-Canyon" *Population and Marine Life*. A report by the Plymouth Laboratory of the Marine Biological Association of the United Kingdom, 1968.

the marine flora and fauna, can be achieved by a method which was applied by France (scattering chalk over spilled oil).

Although the choice of methods to be applied for the removal of hydrocarbons is in the competence of a coastal state or a state of the flag the ship flies, yet in the circumstances of the Baltic Sea the cooperation of coastal states seems to be purposeful. The aim of this cooperation is to elaborate such a method which is the best for the marine environment of the Baltic Sea basin, and in the future to conclude an international agreement leading to the coordination of the activities of the coastal states, in the common interest, for the conservation of the poor organic life of the Baltic Sea. This kind of cooperation was initiated by Sweden. The prevention of pollution of sea was the subject of two conference in 1969 and 1970 in Visby.

3. A new threat to the natural life of seas — to inland seas in particular — has recently appeared. It is a result of the inflow of wastes containing harmful agents with the river waters. Enormous expansion of industry and of chemical industry in particular brings about an inflow of substances dangerous to flora and fauna into rivers and subsequently into seas. This has awaked concern that the natural balance may be upset.

This is not yet a direct threat to big sea sheets, but it could shortly become a real one to the Baltic Sea, because of its inland character, an abundant inflow of river waters, a limited exchange of sea waters, and a relative poverty of natural life as compared with that of other seas.

The prevention of pollution of rivers, the banks of which belong to one state, lies within the jurisdiction of this state and is determined by its internal law. Measures against pollution of river waters are taken now by every state. Also in Poland there are such regulations.³¹

The struggle with pollution of river waters may become an issue for the international law as far as international rivers are concerned and in cases when wastes contained in the river waters may enter the sea and endanger its natural life. This refers to international rivers and to national rivers if they are polluted.

The prevention of pollution of high seas by river wastes is a new problem. But in the domain of international law there are already many precedents of struggle against pollution of international rivers.

The question of preventing the water pollution by industrial wastes became acute in cases of rivers in Western Europe, in highly industrialized areas. It refers particularly to the rivers Rhine and Rodan. Examinations of water in Swiss lakes revealed the intensity of pollution at a level

³¹ Law on water regulations of May 30, 1962 (Dz. U. No. 34, item 150), Art. 82.

dangerous to human life as well as to the biological life in these lakes.³² As result of an action undertaken by France and Switzerland a Convention on the protection of the Geneva Lake waters against pollution was concluded in Paris on Nov. 16, 1962.³³ One year later on April 29, 1963 in Bern, the Rhine riverside states concluded an agreement concerning the International Commission for the protection of Rhine against pollution.³⁴

It became also necessary to take measures against pollution on the Danube. This question has been dealt with by the Danube socialist states.³⁵ On the basis of the 1958 agreement a Commission for the Assertion of Control the Compliance of the Measures undertaken for the Conservation of Fish in Danube was set up. The struggle against pollution of Danube is a subject which is dealt with by the Council for Mutual Economic Assistance. General rules on the cooperation of states and on methods of struggle against water pollution had been worked out.³⁶ These rules tend to unify all measures being taken.

It is characteristic that all states in their dealings in the sphere of protection of river waters against pollution are cautious in formulating contractual regulations as well as in their actions in international organizations. International commissions called into being by the above-named international agreements on the protection of Geneva Lake and Rhine waters adopt resolutions on the basis of unanimity. Resolutions adopted by such commissions serve only as recommendations to the contracting states which may consider them but have no obligation to adopt them internally. Resolutions of commissions set up by the socialist states situated at the Danube have also the character of recommendations.³⁷

The question of protecting high seas cannot be considered separately from the question of protecting rivers against pollution by wastes. Substances harmful to natural life are discharged by rivers into sea waters. If rivers are not protected against pollution, the threat of polluting sea is greater. Application of proper protective measures against pollution along the flow of a river through the territory of a state can bring positive results by preventing the harmful substances from reaching sea waters. On the other hand, pollution of the sea territory of a state (inland waters and territorial sea) by wastes coming from its territory, theoretically could have no legal significance, were there no interdependence in the marine environment. The upsetting of biological balance of a territorial sea of one

³² RGDIP 1963, pp. 630 - 631; 1965, pp. 1144 - 1145.

³³ RGDIP 1964, p. 302 ff.

³⁴ RGDIP 1965, p. 897 ff.

³⁵ P. STAINOW, *Les aspects juridiques de la lutte internationale contre la pollution du Danube*, RGDIP, 1968, p. 99 ff.

³⁶ *Ibid.*, p. 113.

³⁷ *Ibid.*

state effects undoubtedly other areas of high seas of a given region.

Since this is a new problem, it requires a thorough investigation. E.g. not all rivers are polluted to the same degree (on a territory of one state as well as on territories of different states). It would be difficult to treat all rivers in the same way in establishing some protective measures. As an experiment Bulgaria has introduced classification of rivers and has established certain norms of pollution.³⁸

The struggle against pollution of rivers is not easy even on a territory of one state within its boundaries and within its jurisdiction. It becomes much more difficult in the sphere of international law. But it seems that the common interest in the preservation of the biological life and its development in the basin of the Baltic Sea will enable the Baltic states to find a platform of agreement.

In solving the problem of struggle against pollution of sea by river wastes, the jurisdiction of a state on its own territory must be taken into account. Starting from this premise and with the understanding of common interests on high seas, proper solution could be reached.

Article 25 paragraph 2 of the April 29, 1958 Geneva Convention on the High Seas provides a basis for the cooperation of states in protecting the high seas against pollution. "All states shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents." This convention *expressis verbis* obliges the parties to prevent the pollution of seas by hydrocarbons and to cooperate in order to prevent the pollution by radioactive materials. The term "other harmful agents" also means all river wastes harmful to natural life.³⁹

The prevention of sea pollution by harmful agents has, in the domain of international law, a character of coordinative action which tends to secure to all states the use of high seas according to the main principle of the Freedom of the Seas.

Article 25 paragraph 2 of the Geneva Convention on the High Seas provides procedure for states which are to cooperate with the "competent international organizations." Thus the international organizations play an important role by recommending the states how to prevent the pollution of sea by industrial wastes. Investigations carried on by international organizations should provide data for establishing general rules of struggle against pollution of sea.⁴⁰ The route toward the ultimate aim will un-

³⁸ P. STAINOW, *op. cit.*, p. 103.

³⁹ M. R. SIMONNET, *La convention sur la haute mer*, Paris 1966, p. 132.

⁴⁰ Such explorations are carried on by the International Association for the Exploration of Pollution of Waters operating under the auspices of UNESCO.

doubtedly be long. It appears that, after having performed some scientific exploration and after having issued general rules of protection, a first agreement could be concluded among certain Baltic states e.g. among the socialist states — similarly to what happened in other fields of cooperation. In the future all the Baltic states could conclude an international convention for the prevention of pollution of the Baltic Sea by river wastes.

Out of the three above introduced questions connected with the conservation of natural resources of the Baltic Sea, the first one — the conclusion of an international convention on the application of generally accepted measures of protection — could be at present implemented on the basis of the consent of the Baltic states.

The next two questions — the prevention of pollution of the sea by hydrocarbons and by river wastes — require research in order to determine the best methods. As yet, no accident of spilling oil which would effect the natural balance occurred on the Baltic Sea. The pollution of sea waters by wastes did not reach a dangerous level. Thus there is still time to investigate these questions and to take preventive measures.

In the contemporary development of international law the setting up of rules for new international relations goes behind the technical and scientific progress. In the sphere of problems discussed here, the establishment of proper treaty regulations can provide a chance to avert arising dangers threatening flora and fauna of the Baltic Sea.

The Western Frontier of Poland and the Treaties with Federal Germany

by KRZYSZTOF SKUBISZEWSKI

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The present article analyses the meaning and effects of the clauses relating to the western frontier of Poland which are to be found in the treaties signed by the Federal Republic of Germany in 1970. They are the Moscow Treaty with the Soviet Union of 12 August 1970¹ and the Warsaw Treaty with Poland on the Foundations of Normalization of Mutual Relations of 7 December 1970.² In particular, this article answers the question whether, by entering into these contractual obligations, Federal Germany recognized the western frontier of Poland as it resulted from the territorial settlement agreed upon by the Great Powers at Potsdam a quarter of a century earlier.

¹ English translation in Press and Information Office of the Government of the Federal Republic of Germany, "The Bulletin", vol. 18, No. 28, 13 August 1970, p. 212.

² English translation in The New York Times, 21 November 1970, p. 11, cols 1 ff, and The Times (London), No. 58029, 21 November 1970, p. 3, cols 1 - 4.

1. Affirmations Concerning the Factual and Legal Status of the Frontier

The Treaties under consideration contain a number of statements on the facts and on the law relating to the Odra-Nysa frontier. Thus in the Treaty with Poland Federal Germany affirms that the "border line the course of which was established in Chapter IX of the decisions of the Potsdam Conference" is "existing" and that it "constitutes the western state frontier" of Poland (Art. I, para. 1). The Treaty with the Soviet Union, though it omits the word "existing," uses equivalent terms. For it refers to "the frontiers of all States in Europe [...] as they are on the date of signature of the present Treaty, including the Oder-Neisse line which forms the western frontier" of Poland (Art. 3). It follows from the comparison of the two provisions that their substance is identical, although the form used by the Treaty with Poland is more detailed and more exact. The latter Treaty describes the border as the "state frontier" (*Staatsgrenze*), invokes the Potsdam Agreement and repeats the description of the line contained in that Agreement. These are insignificant differences of drafting, which perhaps throw some light on the still unknown history of the preparatory work that led to the signing of the Treaties. They show the primary interest which Poland had in the territorial stipulations of her Treaty. While the Treaty with the Soviet Union simply and briefly refers to the "Oder-Neisse line," Article I, paragraph 1, of the Treaty with Poland is equally too general to constitute a delimitation provision. Besides, delimitation could not and is not the subject of any of the two Treaties.

The affirmation of the existence of the frontier lies no doubt in the foreground of the Articles quoted. But these formulas go further: the frontier of the state is also a juridical concept and in international law it means a line that separates the territory over which one state has sovereignty from the territory that belongs to another state or is *res nullius*³ or *res communis* (high seas, outer space) or territory which has been endowed with a status different from sovereignty.⁴ The use of the term "state frontier" has its legal consequences. It means that the signatories consider that the area which lies beyond the Odra and the Nysa is under the territorial supremacy and sovereignty of Poland. Were it otherwise, it would be illogical and misleading to refer to "the western state frontier;" other expressions should then have been employed, such as demarcation line, pro-

³ Today a theoretical possibility unless there is a case of dereliction of territory.

⁴ E.g., the Free City of Danzig (1920 - 1945), now Gdańsk, or the trusteeship territories of the United Nations.

visional or administrative line, or border delimiting the zone of administration. Similarly to the Potsdam Agreement, the Treaties of 1970 do not refer *expressis verbis* to Polish sovereignty. The answer as to who has sovereignty over the "former German territories" (term used in the Potsdam Agreement) follows from the interpretation of the instruments that preceded the signing of the Treaties of 1970 and from the territorial clauses of the Treaties themselves. In this respect the Treaty with Poland is again more explicit than its Soviet counterpart or the Potsdam Agreement. For its preamble speaks of the "respect for the [...] sovereignty of all states in Europe within their present frontiers," and this formula encompasses the power and jurisdiction of Poland over the territories accorded to her under the Potsdam Agreement.

The averments concerning the facts and the law concerning the frontier are not an exercise in theory. The aim and effects of diplomatic transactions are different, especially when their contents are preponderantly political: an attempt at a new regulation of the relations between the Soviet Union and Federal Germany, or the normalization of relations between the latter country and Poland. The affirmation of the status of the frontier is done "concurrently" (*übereinstimmend*), and nothing justifies the opinion that in spite of the declared agreement the two signatories attached a different meaning to the term "frontier." The common statement on the factual and legal status of the territory involved can be treated as one of the premises which support the conclusion that Federal Germany agreed to the Odra-Nysa frontier.

2. Elimination of Unclear Points

The Treaty with Poland twice refers to the "existing frontier" (Art. I, para. 1 and 2) and in the preamble it speaks of the "present frontiers" of European states. The Treaty with the Soviet Union mentions the frontiers of these states "as they are on the date of signature of the present Treaty" (Art. 3).

Article I, paragraph 1, of the Treaty with Poland cites the Potsdam Agreement on the Western Frontier of Poland⁵ and without mentioning

⁵ The Agreement is included in Chapter VIII B of the Protocol of Proceedings of the Potsdam Conference (dated 1 August, 1945 in the American and Russian versions and 2 August 1945 in the British version, the latter date being correct) and in Chapter IX B of the Report (Communiqué) of the Tripartite Conference of Berlin, 2 August 1945, *Foreign Relations of the United States. Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945*, Washington 1960, vol. 2, pp. 1491 and 1509.

East Prussia it repeats the rather incomplete description of the frontier line which is given by that Agreement. The lack of precision concerns particularly the area around Szczecin (formerly Stettin). The Potsdam Agreement refers to "a line running from the Baltic Sea immediately west of Swinemünde, and thence along the Oder River." The larger part of the city of Szczecin is situated on the west bank of the Odra, whereas the text quoted does not seem to provide for any Polish administration beyond that bank. However, in 1945 Poland obtained not only the whole of the city of Szczecin but also a certain area which is situated west of the Odra and south of the Szczecin Bay. Thus the western frontier of Poland begins to follow the Odra not from its estuary but a few kilometers south of the point where the Berlin-Szczecin motor-way cuts the frontier.

The negotiations at Potsdam leave no doubt as to the acquisition of the city of Szczecin by Poland. The decision on the frontier was reached at the eleventh plenary meeting of the Conference on 31 July 1945, and at that meeting the Soviet Premier J. Stalin explicitly stated that "Stettin [was] in the Polish Territory," to which the British Secretary for Foreign Affairs replied in the positive.⁶ The Delegation of the United States noted, in a memorandum on that meeting, that it was agreed "that Stettin should be considered as included within the area of Polish administration."⁷

The documents of the Potsdam Conference also show that the portion of territory that lies west of the Odra and beyond the administrative limits of the city of Szczecin was accorded to Poland, though there is no explicit mention to this effect. The Potsdam Agreement incorporates the American draft, and its first version, which provided for the Odra-eastern Nysa line, expressly stipulated that Poland would administer "the former German territories east of a line running from the Baltic Sea through Swinemünde, to west of Stettin to the Oder."⁸ It is not clear why the words "west of Stettin" and any mention of that city have been omitted from the definitive text. It seems to be one example of the imperfect drafting of the Potsdam Agreement and not proof of the intention to leave the area in question within the limits of the then Soviet Zone of occupation in Germany. Maps illustrating the decision taken at the Conference indicated the area as falling under the Polish administration.⁹ The opinion that the area was to be Polish also finds corroboration in the manner in which the Potsdam Agreement describes the line at Świnoujście (Swinemünde). It

⁶ *Ibid.*, p. 534.

⁷ *Ibid.*, p. 539.

⁸ *Ibid.*, p. 1150.

⁹ See maps published *ibid.*; one of these maps has been referred to recently in connection with the Treaty with Poland, see "Die Zeit," No. 50, 11 December 1970, p. 4, col. 4.

refers to "a line running [...] immediately west of Swinemünde," while the first version of the American formula used the words "west of Stettin" and not "immediately west." The comparison with the regulation concerning Świnoujście shows that in contradistinction to the latter town where, as a result of the word "immediately," the frontier had to be drawn very close to the urban limits, more elasticity was left for determining the frontier in the Szczecin area. The Act relating to the demarcation of the frontier signed on 27 January 1951 in Frankfurt-on the-Oder¹⁰ confirmed the acquisition of this area by Poland.

The Treaty with Poland does not mention the fate of East Prussia. It deals with the "western" frontier, and in the geographical sense the frontier in East Prussia is northern. Yet the Treaties of 1970 spell out the consent of Federal Germany not only with regard to the border that nowadays separates Poland from the German Democratic Republic; the Treaty with the Soviet Union speaks of the inviolability of all the frontiers in Europe (Art. 3), which term includes the Soviet frontier in East Prussia. In the Treaty with Poland the confirmation of the inviolability of the "existing frontiers" (Art. I, para. 2) obviously comprises the border that runs across former East Prussia. For this provision deals with all the frontiers of the signatories, and it could not relate to their common frontiers because, in view of the division of Germany and the geopolitical situation in this part of Europe, they did not exist at the moment the Treaty was signed. In signing the Treaty with Poland the Federal Republic acted *suo nomine*; no action in the name of Germany as a whole came into consideration. The Government of Chancellor Willy Brandt renounced the claim to represent the whole of Germany, while Poland would not negotiate with the Federal Republic on the basis of such a claim. At the moment of signing Germany did not exist as one state and one participant in international life.

The conclusion, then, is that the reference to the western frontier of Poland as present and existing removes any doubt as to the application of the Treaty to the border in its actual configuration, as it was in 1970. In other words, the Treaty excludes any discussion on the title to territory which now belongs to Poland but on 31 December 1937 was within the frontiers of the Reich.

3. Inviolability of the Frontier and Absence of Territorial Claims

By virtue of the Treaty with the Soviet Union the Federal Republic regards the Odra-Nysa frontier as inviolable ("today and in future") and

¹⁰ United Nations Treaty Series, vol. 319, p. 100.

she undertakes "to respect without restriction the territorial integrity" also of the Polish State (Art. 3). The Treaty with Poland equally contains a clause on the inviolability of the frontier and the pledge "to respect unreservedly [the] territorial integrity" of Poland.

The provisions on the inviolability of the frontier and territorial integrity are supplemented by the declaration of the Federal Republic that she has "no territorial claims against anybody nor will assert such claims in the future" (Treaty with the Soviet Union, Art. 3), and particularly with regard to Poland (Art. I, para. 3). Thus no modification of the frontier comes into account by any method, including peaceful change. In Article II, paragraph 2, of the Treaty with Poland Federal Germany repeats her obligation, already incurred by virtue of general international law, to "refrain from the threat or use of force" against Poland. The two signatories agreed to "settle all their disputes exclusively by peaceful means." It should be noted here that in the light of Article I the western frontier of Poland is not a question in dispute: the lack of territorial claims removes any doubt in this respect.

The acceptance of the territorial *status quo* in Article I of the Treaty with Poland helps to explain the meaning and the extent of the clause on the absence of any territorial claims (Art. I, para. 3). This absence equals renunciation of any claim that might exist prior to the signing of the Treaty. Such a renunciation applies to any portion of the territory that was under Polish control and jurisdiction in 1970: Article I refers to the real state of things with regard to the possession of territory by Poland. The combination of duties under Articles I and II excludes the interpretation according to which Federal Germany, in possibly questioning the definitive nature of the frontier, does not raise any territorial claim in the strict sense of the term, for in line with that interpretation, the territory administered by Poland under the Potsdam Agreement is subject to titular sovereignty of Germany.¹¹

¹¹ The Potsdam Agreement is silent on the preservation of German sovereignty, titular or other. It thus contrasts with the provisions of Article III of the Convention on the Panama Canal of 1903 (G. F. MARTENS, *Nouveau recueil général de traités*, Series 2, vol. 31, p. 599) or Article 66 of the unratified Peace Treaty of Sèvres of 1920 (K. STRUPP, *Documents pour servir à l'histoire du droit des gens*, 2nd edition, Berlin 1923, vol. 5, p. 62) or Article 3 of the Peace Treaty with Japan of 1951 (United Nations Treaty Series, vol. 136, p. 165) which, in respect to the Panama Canal, the area of Smyrna, and the Riukiu Islands, maintained the sovereignty of Panama, Turkey and Japan, while they conferred exclusive powers of government in the territories concerned on other states.

4. Treaties of 1950 and 1970: Similarities and Differences

The meaning of the provisions analysed in the preceding Sections will become clearer when they are compared with the Agreement between Poland and the German Democratic Republic concerning the Demarcation of the Established and Existing Polish-German State Frontier, signed at Zgorzelec on 6 July 1950.¹² It is true that in that Agreement the verb "recognize" has been used. In the preamble the two heads of State make the following statement:

Recognizing the established and existing frontier as an inviolable frontier of peace and friendship which does not divide but unites the two peoples.

Here the term "recognize" must have a peculiar meaning when used by the Polish head of State. Obviously, he could not recognize the frontier in question: it was the function of the other party. While it cannot be denied that this statement contained the recognition of the frontier by the GDR, its significance is primarily political as it purports to describe the nature of the border and its role in the shaping of future relations between Poland and Germany. A similar sentence is lacking in the Treaty with Poland, but it is not an essential difference between the two instruments. The point of divergence lies elsewhere.

In Article I of the Zgorzelec Agreement the parties "concur in confirming that the established and existing frontier [...] is the State frontier between Poland and Germany." In the Treaty of 1970 the signatories "affirm that the existing border line [...] constitutes the western state frontier of" Poland. There are three differences between the two formulas.

First, the Treaty of 1970 omits the characterisation of the frontier as "established." This word could be related to the Potsdam Agreement alone. Thus Article I, paragraph 1, of the Polish-West German Treaty discloses, in a subtle way, the disparity of views of the two signatories on the role of the Potsdam decision regarding the former German territories. In her public and official statements Federal Germany always expressed the opinion that the Potsdam Agreement did not change the Polish-German frontier as established by the Treaty of Versailles. In the Treaty of 1970 Federal Germany not only admits that such a change has been operated but she agrees to it. Nonetheless, she seems to reserve her legal position on the effects of the Potsdam decision: today a point of historical rather than actual importance, especially after the signing of the Treaties of 1970.

Second, also in connection with the Potsdam Agreement, the instrument concluded at Zgorzelec speaks of "frontier" whereas the Treaty of

¹² United Nations Treaty Series, vol. 319, p. 93.

1970 uses the term "border line." The difference between the two terms is not easy to define; and, depending on circumstances, it may be none. Every frontier or border is also a line. The difference between the two texts seems here to lie in the sphere of terminology, though a subtle variation of approach to the substantive question is equally discernible.

While the differences so far discussed do not detract from the definitive nature of the frontier, the third point is more fundamental. The change of language is conspicuous: in the Zgorzelec Agreement it is the frontier "between Poland and Germany." In the Treaty of 1970 it is the "western frontier of Poland." Does this mean that the Federal Republic consents to the frontier in question as the present western frontier of Poland but not as the Polish-German frontier? Is not this problem rather artificial and a play on words, since it obviously follows from the geopolitics of this part of Europe that the western frontier of Poland is and remains the Polish-German frontier?

There were two reasons why the Zgorzelec Agreement spoke of "Polish-German frontier."

First, at Zgorzelec the two parties concurred that the Potsdam Agreement decided the issue of the frontier and disposed of the Polish-German territorial conflict. The two parties implicitly assumed that a peace settlement would not change the frontier, which was permanent and definite. Already in 1950 the chances for a peace treaty with the whole of Germany were remote and uncertain. Still, at that time they were more tangible than in 1970.

Second, in 1950 the position of the GDR with regard to the status of Germany had been different from what it is now. At the moment of its creation, and some time thereafter, the east German Republic regarded itself as the only residue of German statehood. In other words, it did not attach all the legal consequences to then factual division of Germany. It was the then view of the GDR (obviously shared by Poland) that it could contract on German affairs, in particular the frontier with Poland.

Rather soon, for as early as the end of 1951,¹³ the German Democratic Republic accepted the existence of two state organizations and the legal reality of a divided Germany. This did not change the east German view that the Odra-Nysa was the frontier between Poland and Germany, whatever the latter's status. The Government of Chancellor W. Brandt also recognized the existence of the other German state and ceased to treat it as a mere factual entity, though at the time of writing no recognition as

¹³ The first legal document that witnessed this change of attitude was the draft law of 9 January 1952 on all German elections, "Documentation der Zeit. Gesamt-deutsches Informations-Archiv," No. 25, January 1952, p. 1120.

a state in international law has been granted. Still, the Brandt Government rejected the Hallstein doctrine and engaged in political negotiations with the GDR on the totality of mutual relations.

Since there is no more one Germany but two German states, the western frontier of Poland is not her border with a Germany that remains underfined in state-legal terms, but is Poland's frontier with the German Democratic Republic. The reference to this frontier, in the Bonn - Warsaw Treaty of 1970, as the frontier between Poland and the GDR would result in some implications regarding the sphere of international recognition of the GDR by Federal Germany. This in turn might give rise to delicate and difficult problems, which already abound in Bonn in view of the new *Ostpolitik*. The Federal Government agrees to the frontier as it stands now. The hypothetical question of the frontier between Poland and a future and re-united Germany is not subject to the Treaties of 1970.

Does this mean that west German consent to the frontier is temporary and provisional? An answer in the positive would contradict the clear language of Article I of the Treaty with Poland. Nor is there any basis for the view that that consent amounts to nothing more than a *de facto* recognition,¹⁴ in contradistinction to *de jure* recognition. The Odra-Nysa frontier has been treated, in the instruments of 1970, as a settlement which will not be questioned in the future. Formulas other than those used in Article I of the Treaty with Poland would not make the consent of the Federal Republic more definitive.

Thus Poland has, as matters stand under the texts of 1950 and 1970, the agreement of the two German states and the two German Governments to her western frontier. However, this frontier is part of German borders in general, and their determination falls within the competence of the four Great Powers. Hence the next problem to be considered is the present role of these Powers in the Polish-German territorial settlement. An explanation of this problem will throw additional light on the effects of the Treaties signed in 1970.

5. The Great Powers and the German Territorial Settlement

In 1945 the four Great Powers — France, the Soviet Union, the United Kingdom and the United States of America — assumed supreme authority in occupied Germany. The victory over that country was the achievement

¹⁴ The contemporary supposition of "The Times" newspaper that the Polish-west German Treaty "provides for *de facto* recognition by west Germany of the Oder-Neisse line" has no foundation in the language of the Treaty, "The Times," No. 58027, 19 November 1970, p. 5, col. 6.

of the whole coalition of the United Nations. The coalition, however, agreed, more implicitly than expressly, that the rights, competences and responsibilities that followed from subjugation of Germany would accrue to, and be exercised by, the Great Powers.

In the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany issued in Berlin on 5 June 1945¹⁵ the four Governments declared that they would "hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory." In accordance with that provision Poland received, by the decision of the Powers, embodied in the Potsdam Agreement, administration of the former German territories. It is true that France did not participate in the Potsdam Conference, but she very soon agreed to the Polish administration and the resulting diminution of the territory of occupied Germany.¹⁶ It may here be added that the disposition of a part of the territory of the defeated enemy in anticipation and before the conclusion of the peace treaty was not an invention of the Great Powers assembled at Potsdam. After the Armistice of 1918 the victorious Powers determined the destiny of the German colonies and the Arab provinces of the Ottoman Empire before the countries involved signed and ratified the peace treaties.

The supreme authority of the Powers in Germany came to an end in 1955, i.e. when the two German states became formally sovereign. Yet the Powers retained a number of competences. Consequently, in the reserved fields it is not the German states but the Powers that still have the final and decisive voice. In the relations between the western Powers and Federal Germany the reserved domains have been defined more precisely than in the relations between the Soviet Union and the German Democratic Republic. According to its official declarations, the Soviet Union favours more freedom of decision for the two German Governments in the retained fields, while she does not resign her special position in Germany.

In the Convention on Relations between the western Powers and Federal Germany, signed at Bonn on 26 May 1952 and amended by the Paris Protocol on the Termination of the Occupation Régime of 23 October 1954¹⁷ the three western Powers retained "the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the re-unification of Germany and a peace-

¹⁵ *Documents on American Foreign Relations*, edited by L. M. Goodrich and M. J. Carroll, Princeton University Press, 1947, vol. 7, p. 217.

¹⁶ *The Conference of Berlin*, vol. 2, p. 1552, Doc. No. 1407.

¹⁷ United Nations Treaty Series, vol. 331, p. 327.

settlement" (Art 2).¹⁸ It may be noted that the right to determine the frontiers of Germany is not *expressis verbis* referred to in this provision, though it might be included in the all-embracing term of "peace-settlement." However, the formula of Article 2 does not itself exclude bilateral territorial settlements arrived at between the country concerned and one of the German states. Yet another provision of the Convention contains a reference to the question of frontiers in the context of a peace settlement; it is Article 7, paragraph 1, inserted into the Convention on the initiative of Federal Germany:

"The Signatory States are agreed that an essential aim of their common policy is a peace settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace. They further agree that the final determination of the boundaries of Germany must await such a settlement."

The Soviet Union also retained some of its powers in Germany, though this has not been said so expressly as in the western instruments of 1952 and 1954. It follows from Article 5 of the Treaty concerning relations between the Soviet Union and the German Democratic Republic signed in Moscow on 20 September 1955¹⁹ that the former continues to be competent for "a peaceful settlement for the whole of Germany" and "a settlement by peace treaty and the reunification of Germany on peaceful and democratic basis." This competence, however, is not exclusive, for the GDR also can take up and deal with these matters. For a long time the Soviet Union regarded the problem of German frontiers as having been regulated, while she has left the unification of Germany to bilateral negotiations between Bonn and Berlin rather than to four Powers decision. None the less the Soviet Union did not renounce her part of what remained of the former authority of the occupants of Germany, including the regulation of the Berlin problem, as is shown by the Soviet participation in the talks on Berlin with the three western Powers in 1970 and 1971.

The Treaties of 1970 do not refer expressly to the role of the future peace settlement involving Germany; but the signatories did not pass over this matter in complete silence. There is a provision in the Treaties which is relevant: it is Article Four in both of them. It provides that any of the Treaty "does not affect [*berührt nicht*] bilateral or multilateral international agreements previously concluded by the parties." The Treaty with Poland adds that this clause also applies to agreements that "concern" Poland and/or Federal Germany: a formula that comprises instruments

¹⁸ The western Powers also retained the right to station their forces in Federal Germany.

¹⁹ *Ibid.*, vol. 226, p. 201.

to which neither state was a party, such as the Berlin Declaration or the Potsdam Agreement.

Immediately after the initialling of each Treaty Federal Germany sent notes to the western Governments telling them that the rights and responsibilities of the four Powers remained unaffected.

The identical notes to France, the United Kingdom and the United States on the Treaty with the Soviet Union contain declarations of the signatories.²⁰ The Federal Republic said that the "question of the rights of the Four Powers [was] in no way connected with the Treaty [...] and [would] not be affected by it." The Soviet declaration was as follows:

"The question of the rights of the Four Powers was not the subject of negotiations with the Federal Republic of Germany.

"The Soviet Government proceeded on the understanding that this question should not be discussed.

"Nor will the question of the rights of the Four Powers be affected by the Treaty which the USSR and the Federal Republic of Germany intend to conclude. This is the position of the Soviet Government regarding this question."

The western Powers took cognizance of the foregoing statements.²¹

As regards the Treaty with Poland, the Federal Republic communicated to the western Powers²² the text of the initialled instrument and informed them that in the course of negotiations with Poland the Federal Government made it clear that the Treaty did not and could not affect the rights and responsibilities of the four Powers. "The Federal Government has further pointed out that it [could] act only in the name of the Federal Republic of Germany."²³ The chancelleries of the western Powers noted with approval²⁴ or even with satisfaction²⁵ the initialling of the Treaty.

The very existence and the contents of the diplomatic correspondence with the Great Powers on the subject of Treaties to be concluded between Federal Germany and the Soviet Union and Poland confirm the controlling position of the Powers in questions which concern the whole of Germany. The boundary problem falls into this category. The Powers

²⁰ "Europa-Archiv," vol. 25, 1970, p. D 396. English translation in Press and Information Office of the Government of the Federal Republic of Germany, "The Bulletin," vol. 18, No. 28, 13 August 1970, p. 213.

²¹ "Europa-Archiv," vol. 25, 1970, p. D 397 (American note). English translation in the Bulletin quoted in the preceding footnote.

²² It is not clear why the Federal Republic did not send a note to the Soviet Union. On the other hand, the Polish Government kept the Soviet Government informed of the negotiations.

²³ *Presse- und Informationsamt der Bundesregierung*, "Bulletin," No. 171, 8 December 1970, Sonderausgabe, p. 1816.

²⁴ *Ibid.* (British note).

²⁵ French note. The initialling of the Treaty with Poland was "noted with pleasure" by the Foreign Office, *The Times*, No. 58027, 19 November 1970, p. 5, col. 7.

obviously retain the competence to approve or disapprove any arrangement on frontiers arrived at between any of the German states and the neighbour country concerned. In the case of Treaties of 1970 the Powers gave their unequivocal approval.

During the quarter of a century which has elapsed since the Potsdam Conference the territorial decisions taken there have become permanent. Unless there is a new war in Europe, which would then result not so much in a change of some frontiers but in an end, or at least a reduction, of life on our continent, there is no prospect of revising the Odra-Nysa boundary. The Treaties of 1970 bear final witness to this political truth. The future peace treaty with Germany had a different role to play in the years that immediately followed the end of hostilities than in the seventies or later. Then there was still time, in any case theoretically, to discuss the frontier. Today, especially after the Treaties of 1970, what the peace settlement could do is only to confirm the existing boundary.

The attitudes adopted by the Great Powers, in spite of the nuances that differentiate them from one another, show the limited function of the future peace settlement for the problem of the boundaries.

The Soviet Union was the first to recognize the definitive nature of the Odra-Nysa line. The declarations made as early as 1946 leave no doubt here.²⁶ The Soviet draft of a peace treaty with Germany of January 1959 stated that the frontiers of Germany should be those that existed on the 1st of that month, and the draft referred to the Potsdam Agreement.²⁷

France was next to recognize the frontier. She approved the Potsdam decision²⁸ and during the meetings of the four Foreign Ministers she emphasized the irreversible nature of this decision.²⁹ On 26 March 1959 the President of the French Republic, General Charles de Gaulle, declared: "The re-unification of the two parts into one Germany, which would be wholly free, seems to us to be the normal destiny of the German people, provided that it does not question its present frontiers in the west, in the east, in the north, and in the south [...]"³⁰ Speaking before the Polish

²⁶ Declarations by the Soviet Foreign Minister of 17 September 1946 and 9 April 1947, V. MOLOTOV, *Questions de politique extérieure. Discours et déclarations. Avril 1945 — juin 1948*, Moscou 1949, pp. 244 and 429.

²⁷ Article 8 and 9 of the draft, *Documents on International Affairs*, 1959. Selected and edited by G. King, Oxford University Press 1963, p. 40.

²⁸ *The Conference of Berlin*, vol. 2, pp. 1551 and 1562.

²⁹ Statement of 9 April 1947, *Déclarations de M. George Bidault, Président de la Délégation française au Conseil des ministres des Affaires étrangères. Session de Moscou, Mars — Avril 1947*, Paris 1947, p. 34. See also Bidault's statement at the London session of the Council, 25 November 1947.

³⁰ "Le Monde," No. 4409, 27 March 1959, p. 3, cols. 1 - 2.

Seym in Warsaw, on 11 September 1967, General de Gaulle said: "I see [Poland] in the possession of a compact territory, without allogeous elements, with frontiers that are well justified and well determined, to which anyway France has always given, since 1944, her full accord."³¹ Yet these clear statements did not prevent France from subscribing, with the other western Powers, to the view that the final determination of the boundaries of Germany must await the peace settlement. Thus France recognized the competence of the parties to the future peace treaty to deal with the question of the Polish-German frontier, but her approval of the Odra-Nysa formula excluded any modification of the *status quo* by that treaty.

The United Kingdom took the position, after various fluctuations, that the "final delimitation of the frontier between Germany and Poland [could] not be formalised until there is a peace settlement."³² The use of the strictly technical term "delimitation" (in contradistinction to the broader notion of "determination") and the reduction of the role of the peace treaty to mere formalisation are worthwhile noting. After the initialling of the Bonn-Warsaw Treaty of 1970 the United Kingdom recognized "the Oder-Neisse line as Poland's western frontier."³³

Finally, the United States seems to remain more recitent on the subject than the other Powers. While it continues to uphold the view that the final word on the Odra-Nysa is the peace negotiators', it now does not favour, in contradistinction to its earlier attitude,³⁴ any modification of the territorial *status quo*. The United States has welcome the Warsaw Treaty.

The recognition of the Odra-Nysa frontier by the Soviet Union, France and recently the United Kingdom, and the approval of the Treaties of 1970, including their territorial clauses, by all the four Powers estop them from demanding a modification of the frontier during any negotiations on a peace treaty with Germany.

³¹ *Ibid.*, No. 7049, 12 September 1967, p. 2, col. 4.

³² Answer by the Minister of State for Foreign Affairs in the House of Commons, 11 November 1959. Parliamentary Debates (Hansard), Fifth Series, vol. 613, p. 394, col. 2. He did not specify, in answer to a further question, whether this was "merely a matter of delimiting the frontier between Poland and Germany" or whether H. M. Government ruled out "any major changes of that frontier."

³³ "The Times," No. 58029, 21 November 1970, p. 1, col. 7.

³⁴ The Stuttgart Speech by the Secretary of State James F. Byrnes, 6 September 1946, *Documents on American Foreign Relations*, Edited by R. Dennett and R. K. Turner, vol. 8, Princeton University Press 1948, p. 210 at. pp. 216 - 217; Statement by the Secretary of State George C. Marshall, made before the Council of Foreign Ministers at Moscow, 27 March 1947, *ibid.*, vol. 9, p. 45 at p. 46; Statement by the same, 9 April 1947, *Documents on International Affairs 1947 - 1948*. Selected and edited by M. Carlyle, Oxford University Press 1952, p. 462.

6. The Frontier, the Treaties, and a Future All-German Government

The division of Germany into two state organizations has acquired a measure of stability, and today neither of the two Governments claims the exclusive representation of German interests abroad. The Federal Republic of Germany and the German Democratic Republic are acting each *suo nomine*. For this reason neither of the two Governments can act on behalf of a Germany that might become unified in the future. At the present moment it is impossible to say whether, and if so when, a uniform German state will come into being.

On the political plane, the question of acting on behalf of unified Germany does not arise because the present day diplomacy is dealing with facts and not with the mirages of the future. On the legal plane, the problem is equally premature. For the question whether the treaty obligations of an existing subject of international law would devolve on a future subject, the very existence of which is still highly uncertain, cannot now be solved. The devolution is possible, and it often happens in relations involving state succession; but it cannot be guaranteed in advance in a situation of the kind that exists today in Germany.

The succession of unified Germany into the Zgorzelec Agreement of 1950 and the Bonn-Warsaw Treaty of 1970 will arise only at the moment of creation of one state organization uniting the FRG and GDR. During the negotiations with Poland the Federal German Government declared that in concluding the Treaty it could act only in the name of Federal Germany.³⁵ This statement does not amount to a reservation that the Treaty is not subject to succession and will dissolve when the separate statehood of Federal Germany will come to an end. Neither is there any evidence that the Polish side has accepted such a reservation,³⁶ nor is it certain that the reservation would affect the position of the successor with regard to the Treaty.

If a unified Germany is ever organized, one could defend the proposition that she succeeds to the treaties on German frontiers concluded by the predecessor states, i.e. the GDR and FRG. The reason, however, why re-unified Germany would not be in a position, from the legal point of view, to reject such treaties does not lie solely in the domain of succession. Whether or not succession occurs, international law does not authorize a new or re-organized state to question established frontiers.

³⁵ See Footnote 23.

³⁶ The Treaty is bilateral and therefore the acceptance by Poland would be necessary to make the reservation effective.

Conclusion

The consent of the Federal Republic of Germany to the present western frontier of Poland follows from Article 3 of the Bonn-Moscow Treaty and Article I of the Bonn-Warsaw Treaty. The latter expresses this consent in more detailed terms. While neither Treaty employs the word "recognition," the instruments negotiated in 1970 contain elements that compose the act of recognition. It is, one may say, recognition *per verba concludentia*. For the formulae found in the Treaties, and the Treaty with Poland alone would suffice, amount to recognition: the statement that the Odra-Nysa line is the state frontier; the confirmation of the inviolability of the frontier now and in the future; and the declaration that there are no territorial claims and that none would ever be raised. The cumulative effect of these provisions is the recognition of the western frontier of Poland by the Federal Republic of Germany. An additional proof of the correctness of this interpretation is the recognition of the frontier by the United Kingdom as a result of the initialling of the Treaty with Poland. The reason for the British recognition must have been the assumption that Bonn recognized the frontier, and it did not seem to matter³⁷ that the Treaty, at that moment, still awaited its entry into force.

³⁷ Cf. in this connection, the following comment in the "Frankfurter Allgemeine," No. 87, 15 April 1971, p. 1, col. 6; "*Der Gebietsverzicht ist niedergeschrieben. Dahinter kann keine deutsche Regierung mehr zurück, selbst wenn der Vertrag nie förmlich in Kraft treten würde.*"

L'immunité de juridiction des agents diplomatiques en matière de procédure civile

par STANISŁAW NAHLIK

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I

En 1938, la littérature internationaliste polonaise, assez pauvre jusqu'alors, s'est enrichie d'une remarquable monographie du professeur de procédure civile Kamil Stefko: *L'immunité de juridiction des agents diplomatiques en matière de procédure civile*¹. Elle représentait un exemple peu fréquent d'étude interdisciplinaire du sujet. Une analyse à fond — autant de la littérature que des sources — a amené l'auteur à la conclusion que, dans le domaine en question, il existait tout un ensemble des règles du droit des gens façonnées par la pratique de divers pays. Selon les opinions traditionnelles qui trouvaient leur expression aussi bien dans une partie considérable de la doctrine que dans certains arrêts de la Cour Permanente de Justice Internationale, le droit coutumier ne devait être re-

¹ K. STEFKO, *Dyplomatyczne zwolnienie od jurysdykcji w sprawach cywilnych* [L'immunité de juridiction des agents diplomatiques en matière de procédure civile], «Archiwum Towarzystwa Naukowego we Lwowie», section II, Vol. 22, Lwów 1938, n° 1, p. 351.

cherché que dans l'activité des organes représentant directement l'État dans les relations internationales. Contrairement à ces opinions, le professeur Stefko cherchait à prouver que par «pratique» qui forme la «coutume internationale», à la lumière de l'article 38 § 1 alinéa b du statut de la Cour Permanente de Justice Internationale, on comprend l'activité de tous les organes de l'État: législatifs, administratifs et, en ce qui concerne le problème examiné, surtout judiciaires².

Cette thèse de l'auteur polonais devait être confirmée bien des années après par la Commission du droit international de l'Organisation des Nations Unies. Appelée par l'Assemblée générale pour «le développement progressif du droit international et sa codification»³, elle décida d'examiner pour chacun des problèmes étudiés avant tout le droit coutumier existant. Elle allait le chercher, entre autres, dans les arrêts des tribunaux des pays respectifs et dans les lois «intéressant le droit international»⁴. Cette même manière de concevoir le droit coutumier international devait donc être reprise, plus tard, par le corps international chargé officiellement de la codification du droit international.

II

L'état des sources du droit diplomatique est de nos jours différent de celui qui a été analysé, il y a plus d'un quart de siècle, par le professeur Stefko. Premièrement, le droit diplomatique international, qui était alors un droit presque exclusivement coutumier⁵, a été reconnu par la Commission du droit international de l'O. N. U. comme problème se prêtant

² *Ibid.*, *passim*, surtout pp. 8 - 9 ainsi que 41.

³ Art. 1 al. 1 du statut de la Commission de droit international de l'O.N.U. qui est une annexe à la résolution de l'Assemblée générale n° 174/II votée le 21 novembre 1947 (texte polonais voir *Zbiór statutów i regulaminów organizacji międzynarodowych* [Recueil de statuts et de règlements des organisations internationales], vol. 1, Warszawa 1961, p. 171).

⁴ Voir *Moyens permettant de rendre plus accessible la documentation relative au droit international coutumier. Étude préparatoire...*, Nations Unies, Assemblée générale, Commission du droit international, Lake Success, New York 1949, p. 3 et suiv., lettres I - K.

⁵ A l'exception des règles concernant les rangs et préséances dans le Règlement de Vienne du 19 mars 1815 et dans le Protocole d'Aix-la-Chapelle du 21 novembre 1818 (voir textes polonais dans *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* [Le droit international et l'histoire diplomatique. Recueil de documents], sous la direction de L. Gelberg, vol. 1, Warszawa 1954, pp. 20 et 28).

La question se présente sous un autre jour sur le continent américain où une codification du droit diplomatique plus complète a eu lieu lors de la conférence panaméricaine à la Havane (1928).

particulièrement à la codification conventionnelle. Après plusieurs années de travaux préparatifs menés sur la base du projet du membre suédois de la Commission, M. Sandström⁶, une conférence composée des plénipotentiaires dûment autorisés par leurs gouvernements respectifs se réunit à Vienne. C'est là le 18 avril 1961 qu'ils apposèrent leurs signatures à la Convention sur les relations diplomatiques. Le 19 avril 1965⁷, la République Populaire de Pologne déposa auprès du Secrétariat de l'O. N. U. l'instrument de ratification de cette Convention. Conformément donc à l'article 51 § 2 de la Convention, ses dispositions entrèrent en vigueur en Pologne le 19 mai 1965, évidemment à l'égard des pays qui soit par ratification, soit par adhésion sont devenus également parties à la Convention⁸.

Deuxièmement, le Code de procédure civile polonais du 29 novembre 1930⁹, dont le professeur Stefko confrontait les dispositions avec les règles du droit coutumier international, a été, dans l'ordre d'idées qui nous intéressent, amendé par le décret du 23 avril 1953¹⁰. Dernièrement, l'ensemble des problèmes de la procédure civile - y compris ceux qui ont trait aux relations internationales - traités de façon très poussée sont devenus l'objet d'une nouvelle codification effectuée par la loi du 17 novembre 1964¹¹.

Tous ces actes devraient donc être aujourd'hui l'objet d'une confrontation qui engloberait en matière de procédure civile, une étude de l'étendue de cette immunité sous ses aspects: subjectif, objectif, temporel et territorial, et enfin le problème de la renonciation à ce privilège¹².

⁶ L'histoire des travaux de codification (en la matière) voir S. NAHLIK, *W przedmiocie kodyfikacji prawa dyplomatycznego* [A la veille de la codification du droit diplomatique], «Sprawy Międzynarodowe», 1958, n° 6, p. 46 et suiv.

⁷ Voir la déclaration gouvernementale du 13 août 1965 (Journal des Lois de 1965, n° 37, texte 233). Le texte de la Convention (plus loin marqué C. V.) a été publié en annexe de ce numéro, texte 232, et déjà avant dans *Zbiór dokumentów* [Recueil de documents], «Polski Instytut Spraw Międzynarodowych», 1963, n° 6, texte 91.

⁸ La déclaration ci-dessus citée énumère quarante États devenus parties à la Convention avant la Pologne.

⁹ Journal des Lois de 1930, n° 83, texte 651, plus loin marqué: c. p. c. 1930.

¹⁰ Journal des Lois de 1953, n° 23, texte 90, plus loin marqué: décret 1953.

¹¹ Journal des Lois de 1964, n° 43, texte 296, plus loin marqué: c. p. c. 1964.

¹² Il était convenu, en parlant de «privilèges et immunités», de voir une différence essentielle dans la portée de ces deux termes (par exemple, J. MAKOWSKI, *Organa państwa w stosunkach międzynarodowych. Zjazdy Międzynarodowe. Umowa międzynarodowa* [Les organes de l'État dans les relations internationales. Congrès internationaux. Convention internationale], Warszawa 1957, p. 52 ainsi que K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [Les principes du droit consulaire international], Warszawa 1960, p. 265). Il semble toutefois que le terme «privilège» est une notion au sens plus large et que celui d'«immunité» y entre. Au cours des travaux de la Commission du droit international, A. VERDROSS raisonnait de même (voir «Yearbook of the International Law Commission», Vol. 1, 1957, p. 52 et suiv.). Le professeur K. STEFKO était également du même avis (*op. cit.*, p. 32).

L'analyse n'embrassera pas toutes les personnes et toutes les institutions privilégiées dont parlent les codes polonais. La Convention sur les relations diplomatiques ne concerne que ce que l'on appelle la diplomatie classique, c'est-à-dire la représentation d'un État assumée par des agents permanents accrédités auprès des chefs d'États, en qualité de représentants diplomatiques.

III

En général, il était de tradition de traiter tout le personnel de la mission diplomatique sur le même pied. Cela tirait son origine de la conception d'exterritorialité, autrement dit d'absence légale dans l'État accréditaire autant de toutes les personnes de la mission que des biens immeubles qui lui appartiennent¹³. On peut voir les traces de cette tradition subsister encore au XX^e siècle dans la jurisprudence anglo-saxonne. Par exemple, en 1928, dans l'affaire *Engelke v. Musmann*, la Cour suprême britannique (Chambre des Lords) a reconnu à l'unanimité que l'immunité «s'étendait sur les membres du personnel de l'ambassade ou de la légation sans aucune différence»¹⁴. Le développement quantitatif considérable de missions étrangères à côté d'un abandon progressif de la conception d'exterritorialité, au profit de ce qu'on appelle conception «fonctionnelle» qui fait dépendre l'étendue des privilèges des besoins essentiels de la mission, a occasionné dans divers pays des tendances restrictives. Elles se sont manifestées avec une force particulière dans la jurisprudence italienne qui réduisait quelquefois le cercle de personnes privilégiées au personnel diplomatique dans le sens le plus strict du terme. Par exemple, en 1959, dans l'affaire *Mariani v. Abdel el Labban e Pierucci*, la Cour italienne (Pretura Roma) a refusé l'immunité à un attaché commercial de l'ambassade égyptienne, en soulignant qu'elle aurait agi de même, s'il s'était agi, par exemple, d'un attaché militaire, ces personnes étant considérées comme «organes techniques de l'ambassade, et la différence entre leur fonction et celle des agents diplomatiques proprement dits étant essentielle»¹⁵.

La Convention de Vienne a adopté une solution de compromis, fondée sur une différenciation poussée entre personnes privilégiées. Elle a distingué avant tout: 1) les personnes privilégiées en raison de leur rang

¹³ Pour ce qui est de cet aspect particulier voir F. PRZETACZNIK, *Kodeks postępowania cywilnego a prawo międzynarodowe* [Le Code de procédure civile et le droit international], «Nowe Prawo», 1965, n° 9, p. 996 et suiv.

¹⁴ Cité d'après: «Law Quarterly Review», 1929, n° 1 (177), p. 2.

¹⁵ Cité d'après: «Rivista di diritto internazionale», 1960, n° 2, pp. 322 - 323.

officiel — pas toutes à un même degré — et dont le privilège est, par conséquent, originel; 2) les personnes privilégiées en raison soit de leur attache familiale à une des personnes citées ad 1), soit en raison de leur emploi en tant que domestiques privés employés au service d'un membre de la mission; il s'agit donc des personnes dont le privilège a un caractère uniquement dérivé. Dans chacun des groupes de personnes privilégiés on fait en outre 3) la distinction entre ressortissants de l'État accréditant et ceux de l'État accréditaire.

Ad 1). Les personnes employées au service de la mission diplomatique peuvent être classées en trois catégories: (a) les membres de la mission, (b) les membres du personnel administratif et technique de la mission, ainsi que (c) les membres du personnel de service de la mission.

Ad (a). L'«agent diplomatique» c'était, suivant les conceptions traditionnelles, seulement l'ambassadeur, l'envoyé extraordinaire et ministre plénipotentiaire, le ministre résident, le chargé d'affaires¹⁶, donc le chef de la mission diplomatique. Cette mission était conçue comme fonction par excellence unipersonnelle. Toutes les compétences et privilèges reposaient entre les mains de cette seule personne, et chez tous ses collaborateurs (auparavant d'ailleurs choisis par elle-même à son gré) elles ne faisaient que luire d'une lumière reflétée. C'est sur cette conception traditionnelle qu'était fondé le code de procédure civile de 1930 que les amendements d'après-guerre n'ont également pas changé¹⁷. Par contre, la Convention de Vienne est partie d'un principe plus démocratique. A côté de la personne du chef de la mission, elle voit dans la mission tout un ensemble des personnes possédant des qualifications non inférieures, et qui sont, de même que lui, attachées au pays accréditant par un lien de droit public. En outre, certaines d'entre elles, étant donné une différenciation poussée des fonctions de la mission diplomatique contemporaine, bénéficient au sein de la mission d'une grande liberté d'action. Quelquefois ce n'est que de façon purement formelle qu'elles sont soumises au chef de la mission, et au fond elles sont en contact direct avec un autre ministère que celui des Affaires étrangères (par exemple le ministère de la Défense nationale ou celui du Commerce extérieur). A ces personnes là, la Convention accorde autant qu'au chef, la qualité de diplomate (angl. de

¹⁶ Cette nomenclature a été établie par le Règlement de Vienne de 1815 déjà cité complété par le Protocole d'Aix-la-Chapelle de 1818. C'est à ces mêmes personnes que le professeur K. STEFKO réduisait la notion des «agents diplomatiques» (*op. cit.*, pp. 95 - 96).

¹⁷ Art. 5 § 1 al. 1: «les agents diplomatiques des États étrangers accrédités en Pologne» alors que l'alinéa 2 nomme en tant que classe à part «les personnes faisant partie du personnel diplomatique des missions d'États accréditants».

manière plus concrète *a diplomatic rank*)¹⁸, et, pratiquement, cela est lié avant tout avec l'inscription sur la liste du Corps diplomatique tenue par le Protocole diplomatique local. La Convention distingue, il est vrai, le «chef de la mission» et les «membres du personnel diplomatique de la mission», mais à l'échelle du statut juridique privilégié, cette distinction ne joue aucun rôle. Le Code de procédure civile en a tiré des conséquences, en substituant l'expression «chefs des missions diplomatiques» à celle d'«agents diplomatiques» et en mentionnant à part les «personnes faisant partie du personnel diplomatique des missions des États étrangers»¹⁹.

Puisqu'on traite l'appartenance au personnel diplomatique d'après un critère purement formel et non fonctionnel («possession de la qualité de diplomate» et non «exercice de fonction diplomatique» ou «exercice de fonction politique», il ne serait pas fondé, à la lumière de la Convention de Vienne, de traiter des attachés commerciaux ou militaires d'une façon aussi restrictive comme le demandait auparavant une partie de la jurisprudence (ne serait-ce que le cas italien déjà cité). Car, en effet, ces personnes possèdent la qualité de diplomate: d'attaché, de secrétaire, de conseiller, et figurent sur la liste du Corps diplomatique.

Ad (b). Le second groupe ce sont les personnes nommées dans la Convention viennoise «membres du personnel administratif et technique», qu'elle définit de manière plutôt tautologique²⁰, en admettant que les adjectifs «administratif» et «technique» ne peuvent prêter à la confusion. Le Code de procédure civile de 1964 a remplacé par cette définition la précédente qui parlait du «personnel de chancellerie de la mission». Jusqu'alors, et en vertu du code de procédure civile de 1930, celui-ci jouissait d'une immunité analogue à celle du personnel diplomatique (le législateur polonais y suivait le chemin tracé par la jurisprudence anglo-saxonne). Par contre, dans le décret de 1953, ce groupe de personnes a été entièrement omis. D'où la conclusion que, malgré la clause auxiliaire sur les autres personnes bénéficiant du droit d'exterritorialité en vertu de lois, de traités ou de coutumes internationales généralement établies²¹, on ait voulu désormais le soustraire à la portée de l'immunité, en satisfaisant de

¹⁸ Art. 1^{er} de la Convention contenant des indications pour l'interprétation dit entre autres: «e) 'agent diplomatique' s'entend du chef de la mission ou d'un membre du personnel diplomatique de la mission» et «d) 'membres du personnel diplomatique' s'entend des membres du personnel de la mission qui ont la qualité de diplomate».

¹⁹ C. p. c. 1964, art. 1111 § 1 alinéas 1 et 2.

²⁰ C. V. art. 1 lettre f: «'membres du personnel administratif et technique' s'entend des membres du personnel de la mission employés dans le service administratif et technique de la mission».

²¹ Art. 5 § 1 al. 6, dans c. p. c. 1930, et dans le décret 1953 al. 4.

la sorte à la demande d'un courant plus restrictif. Le Code de procédure civile de 1964, tenant compte de la teneur de la Convention signée dans l'entre-temps par la Pologne, quoique celle-ci ne fût pas encore ratifiée à cette époque-là, a donc ajouté de la valeur à ce groupe, élargissant même, par rapport au code de procédure civile de 1930, le cercle de personnes sur lesquelles s'étendait le privilège. Car, il est un fait incontestable que la notion «personnel de chancellerie» semble être plus étroite que celle de «personnel administratif et technique». La nouveauté introduite par la Convention de Vienne, et à son exemple par le Code de procédure civile de 1964, c'était la mention de ce «personnel technique» comprenant *a contrario* également les personnes dont les fonctions n'ont pas un caractère «administratif» (parmi ces dernières seraient comprises toutes les personnes faisant partie du «personnel de chancellerie»). Ce sont, sans doute, de plus en plus souvent employés par les postes diplomatiques, des radiotélégraphistes, des pilotes, mais tout aussi bien des chauffeurs, puisque la définition du groupe suivant ne correspond pas au genre de leur fonction.

Toutes ces personnes sont privilégiées, mais l'étendue de leurs privilèges est inférieure à celle dont jouissent les personnes faisant partie de la catégorie examinée précédemment.

Ad (c). Le groupe suivant, troisième de suite: «les membres du personnel de service de la mission», comprend «les membres du personnel de la mission employés au service domestique de la mission»²². La «domesticité» semble exclure même jusqu'aux chauffeurs, ce qui réduirait ce groupe uniquement aux personnes dont le service a un caractère auxiliaire et physique, à l'intérieur des locaux de la mission. Il s'agit ici, sans aucun doute, de ce même groupe de personnes qui dans le Code de procédure civile de 1964 a été appelé «personnes employées au service domestique de la mission»²³. Dans le code de procédure civile de 1930 avec ses permutations successives, ce groupe n'était pas mentionné séparément.

A la lumière de la Convention de Vienne, cette catégorie jouit d'une étendue de privilèges encore plus étroite que le «personnel administratif et technique». Toutefois, les différences en question ne touchent pas l'immunité de juridiction en matière de procédure civile. Dans ce domaine, la mesure des privilèges de ces deux catégories — malgré les termes employés quelque peu différents — est dans son contenu identique.

Ad 2). Suivant la Convention de Vienne, on peut appeler «dérivé» le statut privilégié de deux catégories de personnes: (a) des familles et (b) des domestiques privés des membres du personnel diplomatique de la mission qui ont droit à l'immunité, en raison de la fonction officielle exercée dans la mission par ceux-ci.

²² C. V., art. 1 lettre g.

²³ C. p. c. 1964, art. 1112 § 1 al. 2.

Ad (a). Ni la Convention de Vienne ni aucune des rédactions du Code de procédure civile polonais ne définissent quel lien concret de droit de famille devrait lier la personne réclamant l'immunité à la personne ayant droit à ce privilège en raison de sa propre fonction. Les exemples de la jurisprudence de différents pays concernent le plus souvent la femme ou les enfants, d'ailleurs pas forcément mineurs, mais généralement cité par presque tous les manuels de droit international (contemporains y compris) est le précédent négatif datant du XVII^e siècle qui a trait à la personne du frère d'un ambassadeur²⁴. Le seul critère auquel se plient et la Convention de Vienne et le Code de procédure civile de 1930 est celui de «faire partie du ménage»²⁵ du bénéficiaire du privilège originel. Dans le Code de procédure civile de 1964, cette expression a été substituée à celle qui parlait de «communauté d'habitation»²⁶. Cette exigence à son tour n'a été introduite que par l'amendement de 1953, car la rédaction primitive du code de procédure civile de 1930 ne contenait pas de pareille restriction.

Le fait «de faire partie du ménage» n'influe d'ailleurs pas de façon identique sur la famille dans chacune des catégories de personnes privilégiées. *Nemo plus iuris in alium transferre potest quam ipse habet*. L'«agent diplomatique» donne donc à sa famille une immunité plus complète qu'un employé du personnel administratif ou technique. L'immunité de celui-ci est, en effet, limitée aux «actes accomplis dans l'exercice des fonctions»²⁷. En fait, cela ne privilégie pas tellement la famille, car les actes accomplis dans l'exercice des fonctions peuvent appartenir uniquement au chef de famille employé à la mission.

En théorie par contre, une des différences entre personnel administratif et technique et personnes employées au service domestique de la mission (domestiques) se trouve dans l'influence de leurs privilèges propres sur ceux de leurs familles. Car, cette dernière catégorie, de toute façon, ne transmet aucun de ses privilèges sur sa famille, donc l'immunité de juridiction non plus²⁸.

Ad (b). Aux domestiques privés des membres du personnel de la mission, la Convention de Vienne reconnaît des privilèges très limités. L'immunité de juridiction n'en fait pas partie, même dans la moindre mesure.

²⁴ C'était l'affaire Pantaleone de Sa, frère de l'ambassadeur du Portugal à Londres (1654), qui concernait d'ailleurs la juridiction pénale; voir p. ex. E. SATOW, *A Guide to Diplomatic Practice*, IV^e éd., London 1957, p. 182.

²⁵ C. V., art. 37 alinéas 1 et 2; C. p. c. 1964, art. 1111 § 1 pt 4.

²⁶ Décret 1953, art. 5 § 1 pt 3.

²⁷ C. V., art. 37 al. 2, 1^{ère} phrase, ainsi qu'al. 3.

²⁸ Ne parle pas de famille la disposition de la C. V. (art. 37 al. 3) qui vise cette catégorie de personnes.

La Convention avance uniquement à l'intention de l'État accréditaire le vœu d'«exercer sa juridiction sur ces personnes de façon à ne pas entraver d'une manière excessive l'accomplissement des fonctions de la mission»²⁹. Il est vrai que la Convention prévoit en même temps que l'État accréditaire pourrait éventuellement accorder des privilèges et immunités supplémentaires (ce à quoi il aurait évidemment droit sans cela). Or, le Code de procédure civile n'a pas profité de cette possibilité. Par contre, avant l'amendement de 1953, l'immunité de juridiction analogue à celle qui s'étendait sur le personnel diplomatique et de chancellerie était accordée chez nous également «aux domestiques privés des agents diplomatiques» (par qui on entendait alors uniquement les chefs des missions), mais seulement à ceux qui avaient la nationalité de l'État accréditant³⁰.

Ad 3). La nationalité influe de manière essentielle sur l'immunité de juridiction. L'étendue des privilèges différenciée d'après les critères examinés précédemment concerne uniquement les personnes d'un pays autre que l'État accréditaire. Cependant, le ressortissant de l'État accréditaire jouirait d'une immunité seulement fonctionnelle relative aux «actes accomplis dans l'exercice de ses fonctions» et cela uniquement en qualité d'«agent diplomatique» (dans l'acception adoptée par la Convention et qui élargit l'étendue traditionnelle de cette notion)³¹. Dans toutes les autres catégories, le fait de posséder la nationalité de l'État accréditaire exclut toute immunité même pour ce qui touche les actes accomplis dans l'exercice des fonctions. De même qu'on l'avait décidé de façon générale dans le cas des domestiques privés, l'État accréditaire ne devrait exercer sa juridiction que sur ses propres ressortissants employés dans une mission étrangère et de façon à ne pas trop entraver l'exercice des fonctions de la mission. De même que dans le cas précédent, il peut leur accorder des privilèges et immunités supplémentaires³². Le Code de procédure civile ne s'est servi de cette possibilité ni envers le personnel administratif et technique ni envers le personnel de service. Au contraire, il a souligné qu'il n'y avait que les «étrangers»³³ qui avaient droit à l'immunité de juridiction et on peut entendre par là non seulement les ressortissants de l'État accréditant, mais également les ressortissants des pays tiers et même les apatrides. L'éventuelle contradiction avec le texte de la Convention de Vienne qui accorde une immunité au moins fonctionnelle aux ressortissants de l'État accréditaire détenant la qualité d'«agent diplomatique», est éli-

²⁹ C. V., art. 37 al. 4.

³⁰ C. p. c. 1930, art. 5 § 1 pt 5.

³¹ C. V., art. 38 al. 1.

³² C. V., art. 38 al. 2.

³³ C. p. c. 1964, art. 1112 § 1 pt 2 (*in initio*) quant aux chefs des missions, au personnel diplomatique et leurs familles.

minée par la pratique polonaise qui, d'ailleurs, converge avec la pratique de nombreux autres États et qui n'admet pas que des citoyens polonais puissent occuper un poste diplomatique dans les missions des États étrangers. La Convention elle-même fait dépendre la nomination d'un ressortissant à un poste pareil, de l'assentiment de l'État accréditaire³⁴.

Le Code de procédure civile était plus libéral dans chacune de ses rédactions précédentes. Il n'y avait que le paragraphe³⁵ touchant les domestiques privés au service des membres de la mission (supprimé par le décret de 1953) qui contenait des réserves concernant la nationalité de l'État accréditant, d'où, *a contrario*, se présentait la conclusion que dans tous les autres groupes de personnes il ne différenciait pas l'immunité par rapport à la nationalité.

La Convention de Vienne traite de la même manière que la question de la nationalité de l'État accréditaire, celle du «lieu de résidence permanente» préalable (avant sa nomination à un poste dans la mission de l'État accréditant) de l'étranger dans l'État accréditaire³⁶. Le Code de procédure civile n'a pas soutenu ce critère, il est donc, sur ce champ, plus libéral que la Convention.

IV

L'étendue objective de l'immunité, graduée d'ailleurs en dépendance de la catégorie à laquelle on peut classer la personne en question, se présente comme un compromis intéressant entre les restes d'une thèse traditionnelle d'«exterritorialité», voire de «représentation», qui toutes les deux suggéraient une étendue illimitée de l'immunité, et la thèse «fonctionnelle».

Les conséquences de ces deux premières thèses par rapport à la juridiction civile suscitaient depuis longtemps déjà de nombreuses réserves³⁷. Ce n'est que Grotius qui ait développé, sur le fond de la question de la responsabilité civile du diplomate, sa conception qu'il fallait ici le traiter comme s'il était absent dans l'État accréditaire³⁸. C'était le noyau de ce que l'on allait appeler dès lors «exterritorialité». Cette conception devait

³⁴ C. V., art. 8 al. 2.

³⁵ C. p. c. 1930, art. 5 § 1 pt 5.

³⁶ C. V., art. 37 alinéas 2 - 4 et art. 38 alinéas 1 - 2.

³⁷ Ainsi par exemple C. PASQUALE (PASCHALIUS), *Legatus*, Rothomagi 1598, chap. LXXIII, ou R. ZOUCE, *Iuris et iudici feialis...*, Oxford 1650, livre II, chap. IV, question 24.

³⁸ H. GROTIUS, *De iure belli ac pacis*, livre II, chap. XVIII, question 9 (trad. R. Bierzanek, *O prawie wojny i pokoju*, vol. 2, Warszawa 1957, p. 33).

se maintenir pour un temps assez long dans la doctrine où son représentant le plus remarquable du XVIII^e siècle, Vattel, cherchait à la justifier par un besoin de concentration absolue du diplomate sur les devoirs qu'avait à assumer sa mission, et qui pourraient être sérieusement entravés s'il était permis de l'importuner d'actions civiles³⁹. En pratique par contre, le cas de l'ambassadeur russe à Londres, Matveev (1708) a eu un retentissement particulièrement considérable. L'essai de l'appeler en justice pour dettes a causé des ressentiments prolongés dans les rapports anglo-russes⁴⁰ et, en fin de comptes, l'Angleterre a réglementé ce problème au moyen d'une loi sur les privilèges diplomatiques (ang. Diplomatic Privileges Act 1708)⁴¹ qui introduisit le principe de l'immunité personnelle illimitée de l'agent diplomatique avec toute sa suite.

Toutefois, même en admettant que l'immunité diplomatique est un principe également dans les actions civiles, on réfléchissait sur le fait si certaines exceptions ne devraient pas être apportées à ce principe, notamment dans les cas particulièrement éloignés des nécessités ressortant de l'accomplissement de la fonction diplomatique. On voyait de telles exceptions *ratione materiae* surtout dans deux domaines: quand l'ambassadeur, en marge de sa fonction diplomatique, exerçait une activité à caractère lucratif, et, quand l'ambassadeur possédait des biens-fonds à titre privé quel qu'il soit. Dans le premier cas, c'est la crainte d'une concurrence déloyale avec le marchand sans statut diplomatique, et, dans le second, un régime juridique spécial auquel sont souvent soumis les biens-fonds, qui constituaient un obstacle auquel cédait même le principe de l'immunité diplomatique.

Cela a trouvé son expression, entre autres, dans le code de procédure civile de 1930 qui a exclu du principe de l'immunité «les actions touchant les biens-fonds qui se trouvaient en Pologne, à l'exception des actions ayant trait aux redevances pour loyer de locaux de bureaux ou même privés»⁴², ainsi que les «actions concernant les entreprises qui se trouvaient en Pologne»⁴³. L'exception concernant les «entreprises» était exprimée d'une manière pas très judicieuse, en tant qu'elle laissait dans le champ de l'immunité toutes les actions commerciales dans lesquelles l'agent

³⁹ E. de Vattel, *Droit des gens...*, Neuchâtel 1758, livre IV, chap. VII § 92 et chap. VIII, § 110 (trad. B. Winiarski, *Prawo narodów*, al. 2, Warszawa 1958, pp. 361 et 390).

⁴⁰ Voir recueil de K. Martens, *Causes célèbres du droit des gens*, vol. 1, Leipzig 1858 (1^{ère} éd. 1827), p. 73 et suiv.

⁴¹ Texte voir *Laws and Regulations Concerning Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, New York 1958, pp. 347 - 348.

⁴² C. p. c. 1930, art. 5 § 2 pt 3.

⁴³ *Ibid.*, pt 2.

diplomatique agirait sur le territoire polonais au profit de son entreprise qui ne se trouverait pas en Pologne. Ajoutons que, d'après le code de la procédure civile de 1930, le principe de l'immunité avec seulement ces deux réserves *ratione materiae* devait concerner un grand nombre de personnes, y compris le personnel de chancellerie et les domestiques des chefs de la mission. Ces deux dernières catégories devaient être éliminées de l'étendue de l'immunité seulement par le décret de 1953.

Dès le début, les travaux de la Commission du droit international de l'O.N.U. ont pris la voie restrictive⁴⁴, en se fondant dans leur principe sur la conception «fonctionnelle». La Convention de Vienne s'est référée à cette conception dans le préambule, ce qui en fait une indication pour l'interprétation qui permet de résoudre tels doutes qui se présenteraient, dans un sens plutôt restrictif. Notamment, d'après l'alinéa 4 du préambule «le but desdits privilèges et immunités est non pas d'avantager des individus, mais d'assurer l'accomplissement efficace des fonctions des missions diplomatiques en tant que représentants des États».

Toutefois, en dépit d'un tel but, la partie dispositive de la Convention contient plus d'une formule où l'on peut trouver un compromis. Suivant la Convention, l'immunité est limitée aux «actes accomplis dans l'exercice de leurs fonctions» uniquement par rapport aux membres du personnel administratif et technique, aux membres du personnel de service⁴⁵ et à ces membres de la mission diplomatique qui auraient la nationalité de l'État accréditaire ou qui y auraient habité déjà avant leur nomination⁴⁶.

Par contre, l'«agent diplomatique» de nationalité étrangère, dans l'acception d'aujourd'hui de ce terme, donc autant le chef de la mission que même le plus jeune attaché ou le troisième secrétaire et de même le membre de sa famille faisant partie de son ménage, bénéficie de l'immunité à une grande échelle dans ses affaires privées puisque ne sont pas exclues de l'immunité même des actions aussi éloignées de ses fonctions officielles que par exemple les actions en divorce ou les actions résultant de son endettement le plus strictement personnel, qui entraînent quelquefois des conséquences fâcheuses et dans plus d'un pays conduisent à un manque de confiance envers les agents diplomatiques. Ce n'est pas sans raison que vers la fin du XVII^e siècle l'idée est venue à un des classiques du droit diplomatique que «le plus prudent était de ne point passer de contrats avec l'ambassadeur»⁴⁷.

⁴⁴ Voir à ce sujet S. NAHLIK, *op. cit.*, p. 49 et suiv.

⁴⁵ C. V., art. 37, alinéas 2 et 3.

⁴⁶ C. V., art. 38 al. 1.

⁴⁷ A. de WICQUEFORT, *L'ambassadeur et ses fonctions*, vol. 1, Cologne 1715 (1^{ère} ed. — 1680 - 1681), chap. XXVIII, pp. 513 - 514.

Néanmoins, en comparaison avec les manifestations des tendances restrictives plus anciennes ne serait-ce que celles exprimées dans le code de procédure civile de 1930, les exceptions à l'immunité ont été dans la Convention considérablement renforcées. On a maintenu l'exception touchant les biens-fonds à l'exclusion de ceux «que l'agent diplomatique [...] possède pour le compte de l'État accréditant aux fins de la mission»⁴⁸. On a ajouté les actions «concernant une succession dans laquelle l'agent diplomatique figure comme exécuteur testamentaire, administrateur, héritier ou légataire, à titre privé et non pas au nom de l'État accréditant»⁴⁹. C'est d'une façon intéressante, par rapport aux rédactions plus anciennes, qu'a été rédigée l'exception concernant les cas où l'agent diplomatique ne se limiterait pas à l'exercice seul du métier de diplomate. Auparavant, cette exception se rapporterait à l'éventualité assez rare où l'agent diplomatique dirigerait une entreprise sur le territoire de l'État accréditaire. Actuellement cette exception a été étendue à «toute action concernant une activité professionnelle ou commerciale, quelle qu'elle soit, exercée par l'agent diplomatique dans l'État accréditaire en dehors de ses fonctions officielles»⁵⁰. Puisque la Convention contient également une disposition spéciale, ajoutée au cours même de la conférence de Vienne, qui interdit aux «agents diplomatiques» d'exercer «dans l'État accréditaire une activité professionnelle ou commerciale en vue d'un gain personnel»⁵¹, il serait indiqué d'admettre que l'exception à l'immunité mentionnée ci-dessus pourrait avoir une importance pratique plutôt par rapport à la famille de l'«agent diplomatique» bénéficiant pourtant de l'immunité de juridiction au même degré que lui-même⁵².

Les formules de la Convention de Vienne ci-discutées sont à la fois celles du Code de procédure civile polonais de 1964 qui reprend ses dispositions presque textuellement. D'ailleurs, la délégation polonaise a contribué à un degré considérable à la mise en formules des dispositions en cause de la Convention de Vienne⁵³.

⁴⁸ C. V., art. 31 al. 1, lettre a.

⁴⁹ *Ibid.*, lettre b.

⁵⁰ *Ibid.*, lettre c.

⁵¹ C. V., art. 42.

⁵² C. V., art. 37 al. 1. L'éventualité d'exercice (quelquefois à une étendue très étroite) de leur profession par les membres de la famille de l'agent diplomatique (leçons particulières de langues, consultation juridique, fonctions médicales) n'est pas purement théorique.

⁵³ Au sujet de la part de la délégation polonaise à la conférence de Vienne voir, p. ex., F. PRZETACZNIK. *Niektóre problemy kodyfikacji prawa dyplomatycznego* [Certains problèmes de la codification du droit diplomatique], «Sprawy Międzynarodowe», 1961, n° 9, p. 104 et suiv.

L'immunité de juridiction, dans le sens et l'étendue visés ci-dessus, soustrait, en principe, le membre de la mission à toute citation en justice. L'examen de la question de l'immunité d'exécution n'entrerait pas en ligne de compte si ce n'était pas la question des exceptions à l'immunité (biens-fonds, successions, activité professionnelle ou commerciale). Ces dernières, en effet, admettent l'exécution, toutefois, «pourvu que l'exécution puisse se faire sans qu'il soit porté atteinte à l'inviolabilité de sa personne ou de sa demeure»⁵⁴. Le Code de procédure civile de 1964 suit la même voie en concrétisant de plus près les dispositions relatives à l'exécution⁵⁵.

Le privilège qui dit que l'agent diplomatique n'est pas obligé de donner son témoignage⁵⁶ ne constitue qu'une marge de l'immunité de juridiction. Cela est lié avec la nécessité de lui adresser, au cas où son témoignage aurait une valeur essentielle, non pas une sommation, mais une invitation par voie diplomatique, s'il ne voudrait pas faire des dépositions comme témoin. Au cas où il y consentirait, la déposition serait faite d'une manière privilégiée en temps et lieu fixés par lui-même, sous forme de déclaration par écrit et non pas d'interrogatoire, et, en tous les cas, avec la possibilité de refuser de répondre aux questions qu'il jugerait malaisées⁵⁷.

V

En principe, dit Hugo Grotius, l'agent diplomatique ne peut se réclamer de l'immunité qu'à commencer du moment où il a été officiellement reçu par le chef de l'État accréditaire, c'est-à-dire lorsqu'il a remis ses lettres de créance; «à partir de ce moment un accord tacite est conclu»⁵⁸.

Toutefois, auparavant déjà on commençait à se poser la question: quel serait en ce cas le statut juridique de l'agent diplomatique avant la remise des lettres de créance et après qu'il ait franchi les frontières de l'État dans lequel il doit accomplir sa mission. C'est sans doute à ce moment déjà que «l'on devrait le considérer comme ministre»⁵⁹ sur sa foi; d'ailleurs abstrac-

⁵⁴ C. V., art. 31 al. 3.

⁵⁵ C. p. c. 1964, art. 1115 paragraphes 1, 3, 4.

⁵⁶ C. V., art. 31 al. 2.

⁵⁷ Cette question n'est pas amendée par le c. p. c. et la C. V. la mentionne de façon bien générale. Voir toutefois ce problème dans la littérature, p. ex. R. GENET, *Traité de diplomatie et de droit diplomatique*, vol. 1, Paris 1931, pp. 528 - 529; E. SATOW, *op. cit.*, pp. 201 - 202; et le plus amplement J. S. de ERICE Y O'SHEA, *De-recho diplomático*, vol. 2, Madrid 1954, pp. 55 et suiv., 97 - 98.

⁵⁸ H. GROTIUS, *op. cit.*, livre II, chap. XVIII, question 5 (trad. R. Bierzanek, vol. 2, pp. 29 - 30).

⁵⁹ Le mot «ministre» au XVIII^e siècle voulait dire, en général, diplomate (ce dernier terme a commencé à être usité seulement vers la fin du XVIII^e siècle).

tion faite de la notification par écrit, en cas de doute, le ministre est muni de passeports qui confirment sa qualité»⁶⁰.

Dans la plupart des cas, la pratique a suivi le chemin tracé par cette seconde opinion, et surtout depuis que s'est répandue l'habitude de soumettre à l'avance, aux fins d'agrément, la candidature du chef de la mission. A partir du moment où l'État donne son agrément, la bonne raison manque d'accorder l'immunité à l'agent diplomatique seulement à partir du jour de la remise des lettres de créance, quoique ce n'est qu'il soit «accrédité».

Il faut rappeler cette ancienne controverse parce que dans le Code de procédure civile — autant celui de 1930, tel qu'il fut amendé en 1953, que celui de 1964 — l'immunité n'est accordée qu'aux agents diplomatiques «accrédités»⁶¹ ce qui peut faire supposer que l'immunité ne daterait qu'à partir de la remise des lettres de créance. La question est tirée au clair, en bonne intelligence avec la pratique accumulée depuis longtemps, par la Convention de Vienne de 1961 qui accorde l'immunité à «toute personne [...] dès qu'elle pénètre sur le territoire de l'État accréditaire pour gagner son poste ou, si elle se trouve déjà sur ce territoire, dès que sa nomination a été notifiée au ministère des Affaires étrangères [...]»⁶².

Des autres dispositions du Code de procédure civile de 1964, il résulte qu'il était dans l'intention du législateur de se conformer aux engagements internationaux de la Pologne. Le professeur Stefko écrit à ce sujet: «[...] nous devrions interpréter les lois nationales qui contiennent des clauses analogues aux règles du droit des gens de manière à ce que le droit interne soit conforme au droit des gens. Ce n'est qu'alors que nous satisfaisons aux devoirs qui incombent à l'État»⁶³.

Quoique le terme employé par le législateur puisse faire supposer des restrictions, il conviendrait sans nul doute d'admettre que le législateur ait voulu tenir compte des engagements conventionnels et que, par conséquent, par «accréditation» il entendait également ces étapes dont la remise des lettres de créance seule ne constitue qu'un couronnement protocolaire du côté de l'État accréditaire — donc l'agrément confirmée par le visa diplomatique. Et, à proprement parler, ces actes ne pourront fructifier qu'à partir du moment où ladite personne aura franchi la frontière de l'État polonais. C'est à juste titre que la Convention de Vienne conçoit ce moment comme donnant droit à l'agent diplomatique de se prévaloir de l'immunité.

⁶⁰ E. de VATTEL, *op. cit.*, livre IV, chap. VII, § 83 (trad. B. Winiarski, vol. 2, p. 351).

⁶¹ C. p. c. 1930, art. 5 § 1; C. p. c. 1964, art. 1111 § 1, pt 1.

⁶² C. V., art. 39 al. 1.

⁶³ K. STEFKO, *op. cit.*, pp. 47 - 48.

Formellement, il n'y a que le chef de la mission qui est «accrédité». Effectivement, dans les codes de procédure civile, celui de 1930 et celui de 1964, cette expression n'apparaît que lorsqu'il est question de l'«agent diplomatique» dans le sens le plus étroit du mot (code de 1930) autrement dit du «chef de la mission diplomatique» (Code de 1964). Tous les autres membres de la mission sont concernés par la disposition de la Convention qui dit que «toute personne ayant droit aux privilèges et immunités diplomatiques» en bénéficie dès qu'elle pénètre sur le territoire de l'État accréditaire pour gagner son poste. En tant qu'équivalent d'«accréditation» pour ces personnes appelées au service de la mission — à l'exception des attachés militaires, navals ou de l'air⁶⁴ — et dont la nomination ne demande pas l'assentiment de l'État accréditaire⁶⁵, on peut considérer la demande à la mission compétente de l'État accréditaire de bien vouloir donner à ladite personne le visa diplomatique ou de service, et, une fois que cette personne se trouvera déjà sur le territoire de l'État accréditaire, la notification de son nom en tant que membre de la mission au protocole diplomatique. Celui-ci inscrit son nom sur la liste du Corps diplomatique ou sur celle des personnes affectées à la mission dans un caractère autre que diplomatique, et en même temps, il lui délivre une carte de légitimation. Il n'y a que «la notification par voie officielle»⁶⁶, au ministère des Affaires étrangères du fait de la nomination d'une personne ne venant pas de l'étranger, mais habitant déjà sur le territoire de l'État accréditaire qui la fait jouir de ses privilèges d'ailleurs très limités.

Le début du statut privilégié a une importance non seulement pour ce qui est de l'engagement d'une procédure contre ladite personne. Le Code de procédure civile de 1964 dit en outre — la Convention de Vienne de 1961 ne contient pas de disposition expresse à ce sujet — que «si la personne contre laquelle on a engagé une procédure cesse d'être soumise aux tribunaux polonais au cours d'une telle procédure [donc, entre autres, si elle obtient dans une mission diplomatique étrangère un poste dont il est question soit dans l'article 1111 § 1, soit dans l'art. 1112 § 1 al. 2 — *S.N.*], la procédure est annulée d'office»⁶⁷.

Le code de procédure civile (ni le dernier ni le précédent) ne se prononce pas directement sur la cessation du statut privilégié. Et à nouveau, ce n'est que du terme «accrédités», qui se trouve là où il est question des chefs de mission, que l'on peut conclure qu'ils cesseront de bénéficier de l'immunité au moment où prendra fin leur «accréditation». En

⁶⁴ C. V., art. 7, phrase 2.

⁶⁵ *Ibid.*, phrase 1.

⁶⁶ Sur toutes les notifications voir C. V., art. 10.

⁶⁷ C. p. c. 1964, art. 1113.

langue diplomatique, l'«accréditation» prend fin, en principe, au moment où soit l'agent diplomatique dont il est question, soit son successeur, présentent au chef de l'État accréditaire ses lettres de rappel. Pour ce qui est des membres du personnel subordonné, c'est la notification au ministère des Affaires étrangères sur le rappel de la personne en question qui correspondrait à cet acte.

La Convention de Vienne reconnaît comme servant de règle à la cessation de l'immunité, le moment analogue à celui qui décide de son début: le moment du «départ définitif» du territoire de l'État accréditaire. La question peut se compliquer, si cette personne reste un certain temps encore sur ce territoire soit par insubordination au rappel de son État, soit par quelques autres égards (maladie, passage en retraite et désir de prendre domicile dans le pays accréditaire). Pour toutes ces circonstances, la Convention de Vienne reconnaît comme solution correspondant au «départ définitif» du pays accréditaire, «l'expiration d'un délai raisonnable qui lui aura été accordé à cette fin»⁶⁸. Cette solution est valable également pour les membres de la famille en cas de décès du chef de la famille qui était membre de la mission ⁶⁹.

L'étendue territoriale de l'immunité comprend, en principe, tout le territoire de l'État accréditaire. D'éventuelles restrictions à la liberté de circuler dans les «zones dont l'accès est interdit ou réglementé pour des raisons de sécurité nationale»⁷⁰, peuvent sans doute dans une certaine mesure, influencer sur les rapports du diplomate envers la juridiction administrative de l'État accréditaire, mais non civile.

Le problème essentiel ici, par contre, est le problème d'éventuelles immunités de l'agent diplomatique en dehors du territoire de l'État où il assume ses fonctions. En général, on trouvait qu'en cette matière il n'y avait pas de règles juridiques fixées même coutumières, la pratique étant effectivement très divergente, et qu'un éventuel traitement privilégié qui reconnaissait les privilèges de l'agent diplomatique en transit était uniquement une question de courtoisie. La pratique fait une exception uniquement pour les courriers diplomatiques. Leur position privilégiée a été confirmée également par la Convention de Vienne qui leur reconnaît dans chaque État «la même inviolabilité et la même protection que l'État accréditaire est tenu de leur accorder»⁷¹.

La Convention de Vienne a également touché au statut des «agents diplomatiques» (mais point des autres membres du personnel de la mis-

⁶⁸ C. V., art. 39 al. 2.

⁶⁹ *Ibid.*, al. 3.

⁷⁰ C. V., art. 26.

⁷¹ C. V., art. 40 al. 3, phrase 2.

sion⁷²), qui communément avec leurs familles doivent bénéficier de «l'inviolabilité et toutes autres immunités nécessaires pour permettre leur passage ou leur retour»⁷³. Il est question ici uniquement de voyage «pour aller assumer ses fonctions ou rejoindre son poste, ou pour rentrer dans son pays». La Convention ne s'intéresse donc pas à l'agent diplomatique qui séjournerait dans un pays tiers dans quelque autre but. C'est une question d'interprétation de distinguer quelles immunités feraient partie d'«indispensables» pour garantir un voyage de transit entrepris à titre officiel. L'immunité de juridiction pénale et, dans une certaine mesure, administrative en font sans doute partie. Il semble, en revanche, qu'il serait difficile de qualifier d'indispensables les actions civiles dans lesquelles l'agent diplomatique peut éventuellement se faire remplacer par un plénipotentiaire domicilié dans le pays tiers en question. La question se posera dans toute sa netteté seulement quand viendra la nécessité de faire une déposition en personne soit en qualité d'assigné, soit en qualité de témoin. Du devoir d'accorder à l'agent diplomatique de passage l'immunité d'«inviolabilité» ressort l'impossibilité d'appliquer à son égard toute forme de contrainte personnelle. Du moment que tous les privilèges ne protègent que son «transit», il faudrait conclure que, dans le cas où la nécessité se présenterait de faire des dépositions soit après l'arrivée au poste diplomatique dans l'État accréditaire, soit après son retour dans son pays, l'application de la commission rogatoire serait actuelle et à un degré prévu par la coutume ou l'accord sur l'entraide juridique passé entre l'État tiers en question et la patrie de l'agent diplomatique.

Ni le code de procédure civile de 1930 (avec amendements qui suivirent) ni celui de 1964 ne se prononcent expressément à ce sujet. Toutefois, de l'expression «accrédités en Pologne»⁷⁴ qui dans les deux codes polonais successifs est liée aux privilèges accordés au chef de la mission, il résulterait *a contrario*, que les agents diplomatiques accrédités autre part qu'en Pologne n'en bénéficient pas. De même pour les autres catégories du personnel de la mission diplomatique, le Code de procédure civile de 1964 dit bien qu'il s'agit seulement du personnel «des missions diplomatiques des États étrangers dans la République Populaire de Pologne»⁷⁵. Le code de procédure civile de 1930 — en dehors des chefs des missions («agents diplomatiques») — ne mentionnait cette restriction par rapport

⁷² A ceux-ci il est dit seulement de ne pas «entraver le passage» — C. V., art. 40 al. 2.

⁷³ *Ibid.*, al. 1.

⁷⁴ C. p. c. 1930, art. 5 § 1 pt 1; C. p. c. 1964, art. 1111 § 1 pt 1 («accrédités dans la République Populaire de Pologne»).

⁷⁵ C. p. c. 1964, art. 1111 § 1 pt 2 et art. 1112 § 1 pt 2.

à aucune autre personne, elle résultait toutefois *a maiori ad minus* du fait de son application envers le chef.

VI

Parmi tous les problèmes du droit diplomatique, celui de la renonciation à l'immunité de juridiction est celui qui depuis longtemps a toujours été le plus discuté. Des opinions diamétralement opposées ont été échangées à ce propos.

A l'une des extrémités se trouvait la thèse que le tribunal devait reconnaître d'office l'immunité diplomatique, et en plus, qu'il s'agit ici d'un privilège dû en réalité à l'État et non au diplomate lui-même et que, par conséquent, il lui est interdit de renoncer à l'immunité de son propre chef, même s'il le déclarait de manière expresse. Cette conception extrême, au profit de l'immunité illimitée en matière de procédure civile, a trouvé son expression, entre autres, dans la jurisprudence polonaise d'entre les deux guerres. En particulier, en 1925 dans l'affaire Montwid-Białłozór contre Ivaldi, la Cour Suprême s'est ainsi prononcée: «l'immunité de juridiction est un privilège non personnel de tel ou autre agent diplomatique étranger, mais un privilège de cet État même, par conséquent, l'ambassadeur ou tout autre membre de la mission diplomatique ne peut en cette matière disposer à lui seul; par contre, il peut se présenter des situations exceptionnelles où et l'ambassadeur et l'État étranger reconnaissent qu'il serait souhaitable de soumettre le litige aux tribunaux. C'est alors que l'ambassadeur étranger peut se soumettre à la juridiction locale, mais non autrement qu'avec la permission expresse de son gouvernement et, s'il est question non de l'ambassadeur, mais d'un membre de la mission, la permission de l'ambassadeur en tant que représentant de l'État étranger. Une telle permission devrait être reconnue suffisante et en tout cas la déclaration de l'assigné doit être expresse, catégorique et avoir lieu devant le tribunal et au cours de l'affaire en question». Dans cette affaire, le tribunal a reconnu nul le contrat de location de l'appartement dans lequel l'attaché militaire italien à Varsovie avait d'emblée donné son assentiment pour l'exclusion de son immunité⁷⁶. Il vaut la peine de souligner ici que c'est le seul cas polonais ressortissant du droit diplomatique qui est généralement cité et considéré dans la littérature étrangère comme classique dans son genre. Il y a eu, d'ailleurs, des arrêts analogues dans la pratique d'autres pays⁷⁷.

⁷⁶ Cité d'après «Orzecznictwo sądów polskich», vol. 5, p. 366 et suiv.

⁷⁷ Se sont prononcés de façon semblable, p. ex. en 1929, dans l'affaire Dickinson v. Del Solar, la Cour britannique (King's Bench) et en 1954 dans l'affaire Ribeira v.

Les opinions de ce genre vont quelquefois même jusqu'à admettre la renonciation à l'immunité même contre le gré de l'assigné, celle-ci étant faite par son chef. Un exemple intéressant d'une pareille attitude a eu lieu aux États-Unis en 1939 dans l'affaire d'un diplomate polonais. L'attaché de l'ambassade, Michał Budny, avait contesté la renonciation à son immunité effectuée par l'ambassadeur Jerzy Potocki. Le Département d'État auquel le tribunal américain s'était adressé pour obtenir son avis a répondu qu'en cas de pareil conflit, la déclaration du chef de la mission était seule valable et non pas celle de l'intéressé⁷⁸.

Toutefois, une tout autre conception se développe simultanément avec celle qui vient d'être présentée. Déjà aux XVII^e et XVIII^e siècles, on pouvait rencontrer, autant dans la doctrine⁷⁹ que dans la pratique⁸⁰, la thèse que la conclusion d'un contrat de droit privé par l'agent diplomatique dans l'État accréditaire constitue à elle une renonciation présumée à l'immunité. Dans la suite, c'est plutôt la thèse contraire qui l'a emporté, toutefois, celle de la renonciation présumée à l'immunité devait ressusciter au XX^e siècle. C'est alors qu'apparut non seulement le point de vue que la renonciation à l'immunité pouvait être présumée d'après l'attitude adoptée par l'assigné lui-même, mais celui également qui trouvait que le tribunal ne s'ingérait pas d'office dans le problème de l'immunité, en trouvant que la décision n'appartenait qu'à seul l'assigné⁸¹. C'est justement cette conception traitant l'immunité d'une façon restrictive qui l'a emporté dans les travaux de la Commission du droit international de l'O.N.U. et cela, à l'encontre du projet primitif du rapporteur, M. Sandström. Après une discussion animée, la Commission a reconnu, vu le nombre toujours grandissant de personnes ayant droit à l'immunité et, en même temps, vu la tendance prédominante vers une restriction des privilèges aux fonctions essentielles de la mission (qui ressort justement de ce phénomène), qu'il n'y avait que la procédure pénale qui devrait rester le domaine dans lequel il fallait s'attendre à une renonciation expresse. Par

Chinatti, la Cour brésilienne (la Cour de Justice du District Fédéral de Rio de Janeiro) — voir respectivement *Annual Digest of Public International Law Cases*, 1929/1930, p. 299 et *International Law Reports*, 1954, p. 249.

⁷⁸ Voir recueil de G. H. HACKWORTH, *A Digest of International Law*, vol. 4, pp. 544 - 545.

⁷⁹ Voir p. ex. A. de WICQUEFORT, *op. cit.*, chap. XXVIII, pp. 513 - 514.

⁸⁰ P. ex. dans le mémorandum dit d'Aiguillon, voir recueil de K. MARTENS, *op. cit.*, vol. 2, p. 282 et suiv.

⁸¹ Parmi les exemples d'un pareil traitement extrême de cette question, on peut citer la sentence de la Cour canadienne (Court of King's Bench of Quebec) de 1946 dans l'affaire *Rex v. Rose*, et celle de la Cour Suprême d'Argentine de 1952 dans l'affaire *Scarponi* — voir respectivement *Annual Digest of Public International Law Cases*, 1946, p. 167, et *International Law Reports*, 1952, pp. 382 - 383.

contre, dans la procédure civile (de même que dans la procédure administrative), il faudrait admettre dans une certaine mesure la possibilité de renonciation présumée à l'immunité, ne serait-ce que par le fait de la comparution du diplomate devant le tribunal ou par la réponse qu'il aurait donnée à une pièce quelconque concernant le procès qui lui aurait été adressée⁸². Un tel point de vue a trouvé son expression dans le projet amendé émanant de la Commission⁸³ qui en 1961 devait servir de point de départ aux débats de la Conférence de Vienne. Toutefois, par suite d'une forte opposition où un rôle important a été joué par la délégation polonaise⁸⁴ et qui cherchait à prouver qu'une fois admise, la possibilité de renonciation présumée à l'immunité pourrait par la suite être exploitée contre l'agent diplomatique comme instrument de chicanes, on a remanié le texte de façon à ce que l'État seul décide de l'immunité dans tous les domaines de la juridiction, donc civile également⁸⁵, et que «la renonciation doit toujours être expresse»⁸⁶.

Le même point de vue a été adopté par le Code de procédure civile de 1964 disant que les dispositions touchant à l'immunité «ne sont pas applicables dans le cas où l'État accréditant renoncerait de façon expresse à l'immunité de juridiction par rapport aux personnes nommées dans ces dispositions»⁸⁷.

L'ancienne disposition de la loi polonaise réglant la même question se prononçait vaguement («Toutefois les personnes citées subissent le jugement de la Cour: 1) si elles s'y soumettent volontairement»⁸⁸), de sorte que chaque interprétation sur la manière de renoncer à l'immunité pouvait entrer dans son cadre.

L'attitude de toutes les codifications respectives envers la question d'exécution apparaît comme une conséquence de cette nécessité de renonciation expresse à l'immunité. La Convention de Vienne dit que «la renonciation à l'immunité de juridiction pour une action civile ou administrative n'est pas censée impliquer la renonciation à l'immunité quant aux mesures

⁸² Voir le déroulement de la discussion *Yearbook of the International Law Commission*, vol. 1, 1957, p. 110 et suiv.

⁸³ Voir *Report of the International Law Commission*, 1958, p. 11 et suiv.: Draft Articles concerning Diplomatic Intercourse and Immunities, art. 30 al. 3 (dans les rédactions précédentes: art. 25).

⁸⁴ Voir F. PRZETACZNIK, *Niektóre problemy... [Certains problèmes...]*, p. 104 et suiv.; le délégué polonais, prof. M. Lachs, s'était prononcé contre l'éventualité de renonciation présumée à l'immunité déjà en 1958 lors de la session de la VI^e Commission de la XIII^e Assemblée des Nations Unies.

⁸⁵ C. V., art. 32 al. 1.

⁸⁶ *Ibid.*, al. 2.

⁸⁷ C. p. c. 1964, art. 1114 § 1.

⁸⁸ C. p. c. 1930, art. 5 § 2 pt 1.

d'exécution du jugement, pour lesquelles une renonciation distincte est faite»⁸⁹. Le Code de procédure civile de 1964 se sert de termes un peu différents pour dire la même chose, à savoir que, contre les personnes privilégiées par rapport auxquelles une renonciation à l'immunité de juridiction a eu lieu, «une action d'exécution peut être intentée uniquement au cas d'une renonciation expresse à l'immunité faite par l'État accréditant [...] également par rapport à la procédure d'exécution»⁹⁰. Même en cas de pareille renonciation, le Code de procédure civile de 1964 interdit l'exécution «du bien destiné au service officiel» ainsi que la contrainte «envers la personne du débiteur»⁹¹ de même que de l'«effectuer soit dans les locaux des bureaux, soit même dans les appartements privés (mais uniquement pour ce qui est du personnel diplomatique), à moins que le chef de la mission y ait donné son assentiment»⁹². De la tendance qui ressort du texte précité, surtout en comparaison avec celui de la Convention, il faut tirer la conclusion qu'on ne doit pas présumer, non plus, de cet assentiment.

Toutes ces réserves ne touchent évidemment pas les cas où les personnes privilégiées subissent, en principe, la juridiction polonaise *ratione materiae*⁹³.

Dans le code de procédure civile de 1930, les dispositions en question, quoique assez détaillées, pouvaient donner lieu à des doutes⁹⁴.

Il existe pourtant une circonstance dans laquelle on n'a pas relevé et on ne relève pas de réserve contre la renonciation présumée par l'assigné même. Il en est ainsi lorsque le diplomate lui-même porte l'affaire en justice. Le principe d'égalité des parties au procès exige que l'assigné puisse opposer au demandeur ses prétentions réciproques. Voilà la raison pour laquelle la Convention de Vienne prévoit que si le diplomate porte lui-même l'affaire en justice, «il n'est plus recevable à invoquer l'immunité de juridiction à l'égard de toute demande reconventionnelle directement liée à la demande principale»⁹⁵.

Le code de procédure civile polonais de 1930 ne réglait pas de façon expresse cette question. On peut uniquement présumer qu'il avait pensé à une pareille éventualité, en prévoyant que les personnes bénéficiant de l'immunité «subissent la juridiction 1) si elles s'y soumettent volontaire-

⁸⁹ C. V., art. 32 al. 4.

⁹⁰ C. p. c. 1964, art. 1115 § 2.

⁹¹ *Ibid.*, § 3.

⁹² *Ibid.*, § 4.

⁹³ *Ibid.*, § 1 (*in fine*).

⁹⁴ C. p. c. 1930, (texte révisé: Journal des Lois de 1950, n° 43, texte 394): art. 557 § 2, art. 568 § 1 pt 4, §§ 2 - 3; art. 576 §§ 1 - 3, et enfin art. 844 pt 1.

⁹⁵ C. V., art. 32 al. 3.

ment»⁹⁶. Par contre, le Code de procédure civile de 1964 dit de façon analogue à la Convention de Vienne que les personnes privilégiées qui engagent une procédure devant le tribunal polonais «subiront sa juridiction également dans toutes les actions reconventionnelles directement liées à la demande principale»⁹⁷.

Il est incontestable que quant aux actions reconventionnelles l'engagement d'une procédure par le diplomate est considéré comme une renonciation présumée à l'immunité à laquelle, dans le cas contraire, il aurait droit.

Le code de procédure civile de 1930 limitait expressément l'immunité par la «réserve de réciprocité»⁹⁸. Les dispositions du Code de procédure civile de 1964 ayant trait aux immunités, n'ont pas été expressément accompagnées d'une pareille réserve. Par contre, il est de toute évidence qu'en matière de ces actions la possibilité de s'orienter d'après la réciprocité, qui d'ailleurs dans la doctrine du droit international est souvent traitée comme une restriction présumée de toute obligation, a été nettement prévue dans la Convention de Vienne. Notamment, tout en formulant une réserve contre un traitement discriminatoire, la Convention dit en même temps que ne sera pas considéré comme discriminatoire «le fait pour l'État accréditaire d'appliquer restrictivement l'une des dispositions de la présente Convention parce qu'elle est ainsi appliquée à sa mission dans l'État accréditant»⁹⁹.

VII

Déjà le code de procédure civile de 1930 contenait aussi bien sous sa forme primitive que dans tous les amendements qui se succédèrent, la clause qui complétait le cercle des personnes privilégiées par «d'autres personnes bénéficiant du droit d'exterritorialité en vertu de lois, de traités ou de coutumes internationales généralement établies»¹⁰⁰. Par «traités» on pouvait entendre alors en pratique avant tout les accords créant les organisations internationales et accordant certaines immunités soit aux fonctionnaires de ces organisations, soit aux délégués à leurs corps collégiaux. Par «coutumes» il fallait entendre justement ce domaine particulièrement développé du droit coutumier international qu'était le droit diplomatique.

⁹⁶ C. p. c. 1930, art. 5 § 2 pt 1.

⁹⁷ C. p. c. 1964, art. 1114 § 3.

⁹⁸ C. p. c. 1930, art. 5 (*in initio*).

⁹⁹ C. V., art. 47 al. 1 et al. 2 lettre a.

¹⁰⁰ C. p. c. 1930, art. 5 § 1 pt 6 (pt 4 dans le décret 1953).

A partir du moment de la conclusion de la Convention de 1961, le droit diplomatique international a cessé d'être pour les parties à cette Convention un domaine avant tout coutumier¹⁰¹ et est devenu un ensemble des règles conventionnelles qui les lient dans leurs rapports réciproques. Le Code de procédure civile de 1964 s'incorpore directement une partie considérable des dispositions de la Convention de Vienne, quelquefois il les adopte de façon textuelle et quelquefois encore, il les rend plus précises. Néanmoins, il contient lui aussi une clause auxiliaire analogue à celle qui se trouvait déjà dans le code de procédure civile de 1930 et qui a été remaniée de façon à l'approprier au droit diplomatique contemporain. Notamment, il substitue la mention d'«autres personnes bénéficiant d'immunités diplomatiques» à celle, périmée déjà aujourd'hui des personnes «bénéficiant du droit d'extraterritorialité»¹⁰². Ne se bornant pas à ceci, il met en tête de toute la troisième partie du Code, contenant les dispositions en matière de procédure civile internationale, la clause générale suivante: «Les dispositions de la présente partie ne seront pas appliquées, si le traité international auquel la République Populaire de Pologne est partie en décide autrement»¹⁰³.

C'est une disposition d'une grande importance. On sait quelles formes différentes revêtent et sur combien de plans multiples se poursuivent les débats sur le fond des rapports entre le droit international et le droit interne, comment se croisent les raisonnements des dualistes et des monistes et parmi ces derniers, en particulier, il y a lieu de distinguer les raisonnements des partisans de la primauté du droit interne et ceux des partisans de la primauté du droit international. L'article 1096, par un acte de volonté souveraine du législateur polonais, fait échoir nettement, en cas de conflit, la primauté à la règle conventionnelle donc à une règle du droit internationale sur celle de la loi.

Il est possible que les théoriciens ne seront pas tous d'accord sur le sens doctrinal de cette disposition. Il est possible que pour les dualistes ce sera un «transformateur général» et pour les monistes — une règle con-

¹⁰¹ Mais il n'est pas devenu non plus uniquement conventionnel. L'alinéa 5 du préambule de la Convention de Vienne dit bien que «les règles du droit international coutumier doivent continuer à régir les questions qui n'ont pas été expressément réglées dans les dispositions de la présente Convention».

¹⁰² Le terme «*zakrajowość*», employé généralement dans les lois polonaises d'entre-les-deux guerres, était le synonyme de la notion d'«extraterritorialité», aujourd'hui complètement rejetée — voir à ce sujet S. NAHLIK, *Osobowe klauzule dyplomatyczne* [Les clauses diplomatiques personnelles], «Państwo i Prawo», 1962, n° 2, pp. 246 - 248; *La Convention de Vienne de 1961 et la législation polonaise*, «Annuaire Polonais des Affaires Internationales», 1962, p. 121 et suiv.

¹⁰³ C. p. c. 1964, art. 1096.

ventionnelle casée à un étage au-dessus de la règle de la loi, les deux se trouvant dans une pyramide intégrale des règles de droit. Il y a une chose qui ne suscite pas de doutes. Cette disposition est un témoignage de loyauté de l'État polonais envers ses engagements internationaux présents et futurs, qui tire raison en matière de droit interne polonais des conséquences autant du principe traditionnel *pacta sunt servanda*, que de la disposition plus concrète de la Charte des Nations Unies dans laquelle les États-membres de l'Organisation s'engagent à «remplir de bonne foi les obligations qu'ils ont assumées aux termes de la présente Charte»¹⁰⁴.

¹⁰⁴ Art. 2 pt 2 de la Charte des Nations Unies du 26 juin 1945 (Journal des Lois de 1947, n° 23, texte 90). Parmi la plus importante bibliographie générale du droit diplomatique, voir en matière de la portée du présent article p. ex.: Ch. de MARTENS, *Guide diplomatique*, vol. 1, Leipzig 1832, p. 62 et suiv.; R. GENET, *op. cit.*, p. 566 et suiv.; D. B. LEVIN, *Diplomatičeskij immunitet*, Moskva - Leningrad 1949, p. 352 et suiv.; J. S. de ERICE Y O'SHEA, *op. cit.*, p. 103 et suiv.; J. MAKOWSKI, *op. cit.*, p. 73 et suiv.; E. SATOW, *op. cit.*, p. 206 et suiv.; I. P. BLISČENKO et W. N. DURDENEVSKIJ, *Diplomatičeskoe i konsoul'skoe pravo*, Moskva 1962, p. 357 et suiv.; P. CAHIER, *Le droit diplomatique contemporain*, Genève 1962, p. 242 et suiv.

La notion de droit interne des organisations internationales

par JAN KOLASA

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I. Introduction

Les études sur la question de la participation des organisations internationales dans le procès de la création des normes du droit international peuvent être amenées, en général, à deux lignes directrices. La ligne principale des études tend à répondre à la question si les organisations internationales peuvent statuer les normes de droit adressées aux états eux-mêmes, éventuellement, de quelle façon et dans quel domaine. L'autre ligne directrice des études vise à résoudre les questions concernant la création des normes de droit généralement nommées droit interne des organisations internationales.

Les controverses principales dans ce sujet ne concernent, à vrai dire, que la première question. La plupart des auteurs dans une ample discussion nient, en principe, les compétences normatives des organisations internationales envers les états-membres, surtout s'il s'agit des organisations universelles. Quant à la deuxième question, il aurait pu sembler que les opinions sont unanimes. Tous constatent nettement que les organisations sont compétentes à la libre création de droit en vue de statuer les normes de leur activité interne. On souligne souvent que ce problème ne provoque dans la doctrine ni de grandes controverses ni de doutes sérieux.

L'intérêt est plutôt dirigé vers les problèmes plus détaillés, concernant la division de ces compétences normatives entre des organes divers au sein de la même organisation¹.

On peut donc avoir l'impression que la notion du droit interne des organisations internationales fut, en principe du moins, éclaircie et est entrée tout de bon dans la littérature du sujet. Les auteurs se servent communément de cette notion comme d'un terme connu et admis dans la science et dans la pratique. Elle se faufile non seulement dans les articles et dans les monographies consacrés aux problèmes détaillés des organisations internationales, mais le lecteur la rencontre aussi de plus en plus souvent dans les oeuvres générales sur le droit de gens et même dans les manuels et dans les cours universitaires.

Les doutes quant à la conception même du droit interne des organisations internationales sont soulevés fort rarement et ne trouvent presque pas d'écho dans la doctrine. Et ces doutes concernent, pourtant, les éléments les plus essentiels de la notion de ce droit. Paul Reuter a soulevé de graves objections à ce sujet en 1956². Dans la littérature polonaise, J. Kolasa a attiré l'attention sur la fluidité de la notion du droit interne des organisations internationales³ et, dernièrement, W. Morawiecki a spécialement consacré à ces problèmes un article intéressant⁴. Il est pourtant nécessaire de poursuivre encore les études dans ce domaine.

Le but de cet article est précisément d'étudier la conception du droit interne des organisations internationales dans ses trois aspects principaux: 1) son objet et ses sources, 2) le fondement du droit de la compétence dans la création des normes de ce droit, 3) le caractère juridique de ses normes.

II. L'objet et les sources

Il est à remarquer que les intérêts portés de très bonne heure à la question de la création des normes par les organisations internationales sont portés justement à l'adoption par celles-ci des dispositions qui con-

¹ Cf. p. ex. K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych* [Les résolutions législatives des organisations internationales], Poznań 1965, p. 25 (renvoi 45) et p. 31.

² P. REUTER, *Institutions internationales*, Paris 1956, pp. 315 - 317.

³ J. KOLASA, *Rules of Procedure of the United Nations General Assembly*, Wrocław 1967, p. 193.

⁴ W. MORAWIECKI, *Prawo wewnętrzne organizacji międzynarodowych* [Le droit interne des organisations internationales], «Państwo i Prawo», 1969, n° 1 (275), pp. 36 - 46.

cernent leur structure et leur fonctionnement. Il s'agit ici précisément des règlements internes, c'est-à-dire de ces actes de droit, qui, jusqu'à nos jours, constituent la partie essentielle de l'ensemble des normes appelées droit interne des organisations internationales.

Dès le début de la Société des Nations les hommes de science ont formulé en cette matière plusieurs observations intéressantes. Non seulement ils connaissaient le terme même de droit interne des organisations, mais on pouvait aussi trouver chez eux une certaine conception de ce droit. Par exemple Borsi écrivait: «L'ensemble des normes établies par la Société des Nations et relatives à son organisation constituent la partie la plus importante de son droit interne»⁵.

On se servait également de cette notion en pratique. Le Tribunal Administratif de la Société des Nations considérait qu'il appliquait dans ses arrêts «le droit interne de la Société des Nations». Ce droit devait être établi «soit par un statut général, soit par des décisions et textes envisageant tels cas déterminés, ainsi que les stipulations intervenues entre l'administration et ses fonctionnaires»⁶.

Ce n'est qu'au cours des dernières années que s'est manifesté un intérêt plus précis pour les problèmes liés avec le soi-disant droit interne des organisations internationales. On a noté même certaines tendances à définir l'étendue objective de ce droit et à démontrer ses sources.

Particulièrement intéressantes et sans doute les plus complètes sous ce rapport paraissent les opinions de Cahier, de Focsaneanu et de Skubiszewski.

Cahier, en réfléchissant sur la matière des normes dites du droit interne des organisations internationales, constate qu'elles peuvent présenter deux aspects: 1) elles peuvent être établies par les organisations internationales pour régler leur «vie organique interne», pour délimiter les compétences entre les divers organes, pour former leur structure, etc., ou bien 2) elles peuvent être votées par l'organisation et «destinées à influencer le comportement des États-membres en vue de la réalisation des buts pour lesquels elle a été créée». Il avait néanmoins une réserve que, jusqu'au moment de la création des Communautés Européennes, le droit interne des organisations internationales ne prenait, en principe, que la forme

⁵ BORSI, *Il rapporto d'impiego nella Società della Nazioni*, «Rivista di Diritto Internazionale», 1923, p. 283 (cité après P. CAHIER, *Le droit interne des organisations internationales*, «Revue Générale de Droit International Public», Vol. 34, 1963, n° 3, p. 566).

⁶ Di Palma Castiglione, *Phelan and Maurette Cases*, «Judgements», n°s 1, 2, 3 (cité après C. J. JENKS, *The Proper Law of International Organizations*, London 1962, p. 48).

première⁷. S'il s'agit donc des organisations universelles, le droit qu'elles forment est limité, en effet, au règlement de leurs affaires internes.

Cahier déduit les normes qui appartiennent au droit interne des Nations Unies des trois sources. Il dit que les dispositions les plus importantes, qui concernent l'organisation interne des Nations Unies, ont été formulées dans la Charte même, ensuite dans les traités conclus par cette Organisation et enfin dans les résolutions de ses différents organes⁸. Les sources des normes du droit interne des Nations Unies sont donc — d'après Cahier — assez largement conçues: la Charte, les conventions de l'Organisation et les résolutions de ses organes.

Focsaneanu donne un aspect plus détaillé de la matière de l'objet et des sources des normes classées parmi celles du droit interne des organisations internationales. Il a systématisé ces normes en 6 groupes suivants:

1) les règles de droit concernant certains attributs de l'Organisation, par exemple, l'établissement des emblèmes officiels ou du drapeau des Nations Unies;

2) les règles qui concernent la structure et le fonctionnement des organes principaux et auxiliaires au sein de l'Organisation — par exemple, art. 61 § 1 de la Charte constituant les membres du Conseil Social et Économique, art. 15 § 2 de la Charte concernant la transmission des rapports à l'Assemblée Générale par les autres organes des Nations Unies, art. 159 du Règlement interne de l'Assemblée Générale l'autorisant à la création du Comité des cotisations de Membres, ou art. 12 du Statut de la Commission du Droit International établissant son siège permanent dans le Bureau Européen des Nations Unies;

3) les règles qui concernent les relations réciproques entre l'Organisation et son personnel, surtout les prescriptions contenues dans le *Staff Regulations*;

4) les règles qui concernent certaines relations entre l'Organisation et les personnes, qui, tout en n'appartenant pas à son personnel, jouissent de quelques droits envers cette Organisation, par exemple, à titre de livraisons diverses, de services rendus etc.;

5) les règles qui concernent les relations entre l'Organisation et les États-membres, lorsqu'ils agissent comme membres de ses organes particuliers et non de l'extérieur et lorsqu'ils prennent part d'une façon directe à formuler et à exprimer la volonté de l'Organisation — par exemple, art. 19 de la Charte, qui retire le droit de vote aux membres qui ne s'acquittent pas des cotisations envers l'Organisation, ou art. 74 du Règle-

⁷ P. CAHIER, *Le droit interne...*, pp. 581 - 582.

⁸ *Ibid.*, pp. 582 - 585.

ment de l'Assemblée Générale qui l'autorise à limiter le temps des discours prononcés par les représentants des États;

6) les règles qui règlent certaines relations entre l'Organisation et les diverses personnes, les relations causées par le fait de l'occupation du territoire — le tout compris dans *Headquarters Regulations*⁹.

Ce qui frappe dans les opinions de Focsaneanu c'est que — contrairement à Cahier — il ne cite pas les conventions conclues par l'Organisation des Nations Unies parmi les sources dont résultent les normes du droit interne de cette Organisation. Par contre, l'échelle des autres sources de droit est très étendue — dès les dispositions de la Charte, à travers les prescriptions des règlements des organes principaux et auxiliaires, jusqu'aux contracts dans le domaine du droit privé.

Pareillement à Focsaneanu, Skubiszewski construit également sa conception du droit interne des organisations internationales sur la nature des problèmes réglés par ces normes. Dans sa conception du droit interne des organisations internationales, nous avons affaire à sept groupes des normes de droit. Et notamment:

- 1) les règlements et les prescriptions procédurales;
- 2) les règles sur le budget et les finances;
- 3) les règles qui concernent le personnel de l'Organisation;
- 4) les règles qui règlent les autres problèmes administratifs de l'Organisation — par exemple, ceux qui concernent son siège et son administration (*Headquarters Regulations* ou *United Nations Flag Code*);
- 5) les prescriptions exécutives par rapport aux fonctions concrètes accomplies par l'Organisation en vertu de son statut — par exemple, le Règlement sur l'enregistrement des conventions internationales au Secrétariat des Nations Unies, ou les prescriptions sur l'aide technique, comprises dans de diverses résolutions;
- 6) les prescriptions qui concernent la création et l'activité des nouveaux organes au sein de l'Organisation maternelle;
- 7) les normes établies par les organisations qui jouissent des droits supérieurs envers les organisations subordonnées dans le domaine des affaires bien définies — par exemple, les Nations Unies par rapport aux organisations spécialisées¹⁰.

Il s'ensuit alors que Skubiszewski non seulement conçoit d'une manière différente l'étendue objective du droit interne des organisations internationales, mais aussi il paraît qu'il limite la conception des sources de ce droit uniquement aux résolutions des organisations. Car on ne trouve

⁹ L. FOCSANEANU, *Le droit interne de l'Organisation des Nations Unies*, «Annuaire Français de Droit International», Vol. 3, 1957, pp. 228 - 230.

¹⁰ K. SKUBISZEWSKI, *Uchwały prawotwórcze... [Les résolutions législatives...]*, pp. 28 - 30.

pas chez lui dans aucun de ces 7 groupes de prescriptions aucune notion sur les conventions internationales des organisations. Morawiecki fait une juste remarque que cet auteur, comme beaucoup d'autres, n'est pas clair dans la matière des sources du droit interne des organisations internationales¹¹.

La confrontation de ces trois conceptions de la sphère objective et des sources du soi-disant droit interne des organisations internationales n'exige pas de commentaire; elle indique bien distinctement le manque de précision, même la plus fondamentale, dans ce domaine.

Ce qui frappe ici, c'est, avant tout, le manque d'un critère bien établi selon lequel on pourrait s'orienter si ladite norme appartient au droit interne des organisations. Il est à souligner encore une fois que pour Cahier et Focsaneanu le critère selon lequel on distingue l'ensemble des normes du droit interne des organisations c'est précisément le genre de la matière réglée par ces normes. Par contre, pour Skubiszewski ce critère, à part de la sphère d'objet, consiste aussi dans le genre des sources dont proviennent ces normes. Il les limite exclusivement aux prescriptions établies par les organisations. C'est une différence très essentielle.

Sans doute, on peut dire, sans craindre de commettre une faute assez grave, que les auteurs polonais sont d'accord que les résolutions des organes de ces organisations constituent une source exclusive des normes de droit que l'on conçoit comme le droit interne des organisations internationales. Avec cette objection toutefois qu'il faut comprendre cette résolution dans le sens le plus large du mot et à côté de la résolution qui constitue directement les normes concrètes, il faut comprendre aussi les résolutions qui approuvent seulement certaines normes et autorisent la création des normes concrètes. Par exemple, de même que Skubiszewski, aussi W. Morawiecki déduit les normes du droit interne des organisations internationales exclusivement de leurs résolutions¹². Mais il paraît que dernièrement cet auteur a changé quelque peu son opinion. Il déclare notamment que l'emploi de la notion de droit interne des organisations internationales dans ce sens rétréci peut être justifié uniquement d'un certain point de vue: comme symptôme d'une activité créatrice dans la sphère du droit des organisations internationales¹³. On pourrait citer ici encore d'autres auteurs, mais leurs opinions sont si générales et formées si incidemment qu'elles ne peuvent servir de base aux considérations plus détaillées ni à déduire les conclusions comparatives bien fondées. On emploie parfois le terme «le droit interne des organisations internatio-

¹¹ W. MORAWIECKI, *Prawo wewnętrzne...* [Le droit interne...], p. 38.

¹² W. MORAWIECKI, *Organizacje międzynarodowe* [Les organisations internationales], II^e éd., Warszawa 1965, p. 48.

¹³ W. MORAWIECKI, *Prawo wewnętrzne...* [Le droit interne...], p. 39.

nales» au lieu du terme «les normes réglementaires»¹⁴. Pareillement, les savants soviétiques, parmi lesquels Tunkin et Lukin, rétrécissent — il paraît — le droit interne des organisations internationales uniquement au cercle étroit des résolutions qui concernent les problèmes de procédure et d'organisation¹⁵.

Il paraît que pour déterminer l'ensemble des normes du droit interne des organisations internationales il faut, sans doute, se prononcer pour le critère combiné, c'est-à-dire que c'est non seulement le contenu de cette norme qui décide, mais aussi son origine. Du point de vue du contenu, ces normes doivent concerner les soi-disant matières internes des organisations. Évidemment, il faut bien préciser l'étendue de ces matières, ce qui n'est pas du tout facile. Cette étendue peut différer selon le caractère de l'organisation donnée. Du point de vue des sources, il faudrait se borner uniquement aux normes statuées par les organisations non seulement sous la forme d'une résolution, mais aussi dans le sens plus large du mot. Il faut aussi attirer l'attention sur la pratique devenue courante des organisations internationales. C'est justement dans la sphère des soi-disant affaires internes des organisations que certains usages se fixent le plus facilement et le plus tôt; on peut parler même dans des cas nombreux des normes du droit coutumier¹⁶.

III. Le fondement de la compétence en matière de création du droit interne

Parallèlement à la sphère du contenu et les sources du droit interne des organisations internationales dans les considérations sur la conception de ce droit une question non moins essentielle est le fondement du droit, c'est-à-dire le fondement de la source dont résulte la compétence de l'organisation pour statuer ce droit. Skubiszewski relève même ce problème au rang d'un des deux critères pour distinguer le droit interne des organisations de l'ensemble des normes de droit statuées par ces organisations. D'après cet auteur, le premier signe distinctif du droit interne c'est qu'il règle les matières internes des organisations. Il ajoute

¹⁴ Cf. p. ex. S. E. NAHLIK, *Wstęp do nauki prawa międzynarodowego* [L'introduction à l'étude du droit international], Warszawa 1967, pp. 409 - 410.

¹⁵ G. I. TUNKIN, *Zagadnienia teorii prawa międzynarodowego* [Les problèmes de la théorie du droit international], Warszawa 1964, p. 160; P. I. LUKIN, *Istočniki meždunarodnogo prava*, Moskva 1960, p. 117.

¹⁶ Cf. à ce sujet J. KOLASA, *Rules of Procedure...*, pp. 142 - 163, et K. WOLFKE, *Practice of International Organizations and Customary Law*, «The Polish Yearbook of International Law», Vol. 1, 1966/1967, pp. 183 - 194.

ensuite qu'il existe encore une différence plus remarquable. Elle concerne justement «le fondement de droit sur lequel est basée la compétence à statuer les normes de droit»¹⁷.

Tous les auteurs tendent à voir ce fondement général dans le statut même de l'organisation. Mais ce n'est pas sans difficulté. Par exemple, Focsaneanu, après avoir étudié à ce point de vue la Charte des Nations Unies, est arrivé à une juste conclusion que l'on ne peut y découvrir aucune disposition qui pourrait indiquer une générale compétence législative interne de cette Organisation, autrement dit — une compétence générale à statuer les normes indispensables pour son fonctionnement¹⁸. Il a réussi uniquement à trouver dans la Charte quelques dispositions qui fixaient — pour les divers organes des Nations Unies — les compétences à statuer les normes de droit en certaines matières spéciales. Ce sont donc les articles: 7 § 2, 21, 22, 29, 30, 68, 72 paragraphes 1 et 2, 90 paragraphes 1 et 2, 101 § 1, et art. 30 du Statut de la Cour Internationale de Justice. En somme donc, outre art. 101 § 1 de la Charte (concernant la nomination du personnel) et partiellement art. 30 du Statut de la Cour Internationale de Justice, toutes les autres dispositions ci-dessus mentionnées de la Charte établissent les compétences des organes des Nations Unies à ne régler que deux matières: arrêter les règlements internes et créer les organes auxiliaires. Focsaneanu est donc arrivé à la conclusion, que l'on doit chercher le fondement de la compétence générale des Nations Unies à créer les normes dans le domaine de ses affaires internes — dans la sphère de ses compétences présumées¹⁹.

Ces conclusions de Focsaneanu ne sont pas isolées. Dans la littérature de l'objet règne, en effet, l'unanimité complète quant au problème que dans les statuts des organisations on ne formule pas de compétences générales ni même quelquefois de compétences détaillées pour statuer les normes à régler leurs affaires internes. Il existe également un accord complet quant au problème qu'il faut présumer la compétence de l'organisation internationale dans le domaine de sa législation interne, même si le statut ne le mentionne pas *expressis verbis*. Par exemple, Reuter constate franchement que le statut n'est pas à même de prévoir et de régler tous les problèmes qui concernent la structure et le fonctionnement de l'organisation. Il doit donc d'une manière précise ou sous-entendue accorder à l'organisation la «compétence générale» en cette matière²⁰. Selon Skubiszewski c'est le cas unique où l'on puisse présumer que l'organi-

¹⁷ K. SKUBISZEWSKI, *Uchwały prawotwórcze... [Les résolutions législatives...]*, p. 26.

¹⁸ L. FOCSANEANU, *Le droit interne...*, pp. 339 - 347.

¹⁹ *Ibid.*

²⁰ P. REUTER, *Institutions internationales*, Paris 1956, pp. 325 - 327.

sation est autorisée à statuer les normes de droit. Cette présomption est justifiée par le fait même que, si l'organisation doit fonctionner d'une façon normale, elle doit par la création des normes de droit décider de la procédure du fonctionnement de ses organes, de la structure de ces organes, de la création de nouveaux organes au sein de l'organisation, de l'exécution des dispositions générales de son statut, ou enfin des droits et des devoirs des fonctionnaires ²¹.

L'accord commun quant à la compétence implicite des organisations internationales dans la sphère de la création du droit interne a soulevé déjà quelques objections. Morawiecki est notamment d'avis qu'il faudrait différencier l'attitude envers les problèmes divers qui entrent dans le domaine du droit interne des organisations internationales. Ce n'est pas sans raison qu'il souligne que les problèmes soi-disant d'organisation interne peuvent avoir toutefois le caractère juridique très différent et les conséquences politiques diverses, aussi bien pour les membres particuliers que pour l'organisation entière. Il insiste sur la création des organes auxiliaires qui souvent prennent forme des agences assez indépendantes, et même des organisations spécialisées (par exemple, U.N.C.T.A.D., U.N.I.D.O.). Il réfléchit alors s'il est permis d'accepter franchement l'opinion que les compétences présumées s'étendent sur chaque problème dont le fond indique son appartenance à la matière d'organisation interne ²². Il existe donc une fissure grave sur ce plan, qui jusqu'alors paraissait entièrement incontestable.

Il n'y a pas dans la littérature de divergences remarquables quant au sens de la notion de compétences implicites des organisations internationales. Ce sont donc, en se servant de la définition de Rouyer-Hameray, les compétences qui «ne sont pas expressément données à l'organisation par sa charte fondamentale ou quelque autre texte pertinent, mais dont l'existence se déduit naturellement des termes de ces actes internationaux». C'est qui est ici un peu déconcertant c'est que certains auteurs appuient leur conception des droits présumés dans le domaine du règlement des matières internes de l'organisation sur un naturalisme *sui generis*. Ainsi, Rouyer-Hameray dit qu'une telle compétence s'ensuit «d'une manière naturelle» du statut ²³. Reuter la voit tout simplement dans la nature des choses et prétend qu'elle est inhérente à la vie propre de toute organisation ²⁴. Quant à Detter, il s'appuie dans cette matière

²¹ K. SKUBISZEWSKI, *Uchwały prawotwórcze...* [Les résolutions législatives...], pp. 26 - 28.

²² W. MORAWIECKI, *Prawo wewnętrzne...* [Le droit interne...], p. 41.

²³ B. ROUYER-HAMERAY, *Les compétences implicites des organisations internationales*, Paris 1962, p. 3.

²⁴ P. REUTER, *Institutions...*, Paris 1956, p. 314.

sur le *principe of self organization*, selon lequel l'organisation peut régler ses fonctions indépendamment du fait, si l'on lui a conféré à ce sujet une autorisation précise²⁵.

Il y a pourtant d'autres matières encore qui provoquent de plus sérieuses objections. On prétend notamment que les compétences implicites des organisations concernent exclusivement leur soi-disant «*législation interne*». Et en même temps, on ne sait vraiment pas jusqu'à présent quelle est la sphère d'objet de cette législation. En outre, pour certains auteurs les compétences présumées se bornent uniquement à voter les résolutions, et pour les autres, ces compétences s'étendent au droit de conclure les accords dans le domaine du droit interne. On ressent alors de nouveau le manque dans les définitions de la sphère et des sources du droit interne des organisations. Par suite, cela vaut peut-être la peine de réfléchir si l'on ne peut examiner sur un autre plan le problème du fondement de droit de la compétence à statuer par l'organisation les normes dans la sphère de sa soi-disant législation interne.

La conception des compétences implicites des organisations internationales n'a rien de neuf. Déjà Anzilotti, à l'époque de la Société des Nations, écrivait que dans le cas où le statut n'accordait pas *expressis verbis* à l'organisation une autorisation à statuer les normes dans sa matière interne, on pourrait prétendre malgré cela que ces autorisations lui étaient toujours accordées, lorsque rien de contraire ne s'ensuivait de son acte consitutionnel²⁶. On le sait bien qu'une certaine pratique à ce sujet date d'assez longtemps. A vrai dire, les organisations internationales dès leur début réglaient toutes seules les affaires qui concernaient leur structure et leur procédure. Et si l'on prend en considération le fait que les organisations internationales ont leur origine dans les conférences internationales, il faut admettre alors que les traditions de la libre décision dans le domaine de leur structure d'organisation et de leur procédure entrent encore plus profondément dans l'histoire des relations internationales²⁷.

Il semble donc que ce qu'on appelle communément dans la littérature de l'objet les compétences implicites des organisations, dans la sphère de leur soi-disant législation interne, se stabilisait déjà depuis longtemps dans la pratique courante des conférences et des organisations internationales. Ce n'est pas, sans doute, par hasard que, dans le commentaire sur art. 30 de la Charte des Nations Unies autorisant le Conseil de Sécurité

²⁵ I. DETTER, *Law Making by International Organizations*, Stockholm 1965, p. 328.

²⁶ D. ANZILOTTI, *Cours de droit international*, Paris 1929, p. 295.

²⁷ Voir plus largement à ce sujet J. KOLASA, *Rozwój regulaminów organizacji międzynarodowych* [Le développement des règlements des organisations internationales], «*Ruch Prawniczy, Ekonomiczny i Socjologiczny*», 1965, n° 3, pp. 81 - 90.

à adopter le Règlement interne, Goodrich et Hambro ont constaté tout court et expressément que cette résolution *follows customary international practice* ²⁸. Par cela même, ils confirment que cette pratique a déjà existé avant la création des Nations Unies. En s'appuyant sur les études qui concernaient la pratique, on a présenté une opinion qu'en général le droit à adopter les règlements internes par les organes des organisations internationales provient de la pratique déjà bien établie, qui, à vrai dire, est déjà devenue norme du droit coutumier ²⁹. Cahier dit que l'on peut adopter actuellement l'existence dans le droit international d'une règle coutumière sur laquelle est fondée la compétence générale de l'organisation internationale à statuer les normes indispensables pour sa structure et son fonctionnement ³⁰.

Il paraît que l'acceptation de la base coutumière pour la compétence générale des organisations à statuer les normes de droit dans le domaine de leur matière interne permettrait d'établir plus facilement et plus exactement la substance et de délimiter la sphère de cette compétence. Car la pratique dans le domaine donné de l'activité des organisations internationales serait plus concrète que le développement des suppositions en matière de l'étendue des compétences implicites.

IV. Le caractère juridique des normes comprises dans le droit interne des organisations internationales

Le problème du caractère juridique des normes dites du droit interne des organisations internationales est aussi discutable que la question de la sphère d'objet et de ses sources. Il n'y a du reste rien d'étonnant, puisque ces deux questions sont étroitement liées.

Sans entrer dans leurs différentes nuances et subtilités, on peut, à la rigueur, diviser les opinions sur le caractère juridique de ces normes en trois groupes fondamentaux: 1) les identifier avec le droit international conventionnel, 2) les placer dans la soi-disant conception élargie du droit international public, et 3) les distinguer comme une branche de droit nouvelle et autonome.

Ad 1) La première opinion tire son origine probablement d'Anzilotti. Il écrivait dans la troisième décennie de notre siècle que les normes de droit comprises dans les règlements internes du Conseil et de l'Assemblée

²⁸ L. M. GOODRICH et E. HAMBRO, *Charter of the United Nations*, 2nd ed., London 1949, p. 231.

²⁹ Cf. J. KOLASA, *Regulamin Zgromadzenia Ogólnego ONZ* [Le règlement de l'Assemblée générale de l'O.N.U.], «Państwo i Prawo», 1963, n° 10 (212), pp. 566 - 567.

³⁰ P. CAHIER, *Le droit interne...*, p. 583.

de la Société des Nations, et même dans le Règlement interne de la Cour permanente de Justice internationale, sont tout simplement des normes conventionnelles. En outre, quant à leur valeur juridique, Anzilotti mettait ces normes de règlement au pair avec les normes comprises dans le Pacte de la Société des Nations³¹.

A peu près à la même époque qu'Anzilotti, L. Ehrlich dans la littérature scientifique polonaise a attiré l'attention aux normes de droit adoptées en forme de règlements internes par les organisations internationales, en les classifiant également au droit de traité³². Tout pareillement R. Bierzanek, quoique avec des restrictions considérables, attribue au droit interne des organisations internationales les traits caractéristiques de droit de traité. Il prévoyait toutefois qu'à l'avenir ce droit va former un ensemble spécial³³.

Un des plus fervents et peut-être les plus renommés adeptes de cette opinion est actuellement P. C. Jessup. Il professe expressément que le droit nommé par lui-même *parliamentary law* (surtout les prescriptions de procédure et d'organisation) des organisations internationales «peut être justement considéré comme une partie de droit international dont le caractère général juridique ne diffère pas de celui du droit de traité»³⁴. Rosenne, comme avant lui Anzilotti, considère comme faisant partie du droit international de traité même le Règlement interne de la Cour Internationale de Justice arrêté par un organe composé de membres qui ne sont pas des représentants des États³⁵.

Ad 2) La plupart des auteurs introduisent tout simplement les normes de droit statuées par les organisations internationales et concernant leur structure et leur fonctionnement dans l'ensemble élargi des normes du droit international sans les nommer droit de traité. Ainsi Kelsen, en définissant le caractère juridique des résolutions de l'Assemblée Générale des Nations Unies, a rangé son Règlement interne parmi les *general rules*

³¹ D. ANZILOTTI, *Cours de droit...*, pp. 295 - 296.

³² L. EHRLICH, *Prawo narodów* [Le droit des gens], II^e éd., Warszawa 1932, p. 79; cf. aussi du même auteur: *Prawo międzynarodowe* [Le droit international], IV^e éd., Warszawa 1958, pp. 21, 348 - 350.

³³ R. BIERZANEK, *Metody rozwoju i formułowania prawa międzynarodowego a ONZ* [Les méthodes du développement et de la formulation du droit international et l'O.N.U.], «Państwo i Prawo», 1948, n° 2 (24), p. 9.

³⁴ P. C. JESSUP, *Parliamentary Diplomacy — An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations*, «Recueil des Cours de l'Académie de Droit International», Vol. 89, 1956/I, p. 204; cf. aussi du même auteur: *International Parliamentary Law*, «American Journal of International Law», Vol. 51, 1957, n° 2, pp. 396 - 402.

³⁵ S. ROSENNE, *The International Court of Justice*, Leyden 1957, pp. 221 et 213.

du droit international³⁶. De même Waldock définit généralement les règlements internes des organes des Nations Unies comme *a form of international law*. Selon lui, le caractère international des organes qui arrêtent ces prescriptions, le caractère international des débats qu'elles règlent, ainsi que leurs sources dérivant des dispositions des traités internationaux — tout cela indique la valeur juridique internationale de ces prescriptions³⁷. Pareillement, C. W. Jenks constate que les règles de procédure c'est *an essential element in contemporary public international law*³⁸. C. Cadoux définit le droit institutionnel élaboré par les divers organes des Nations Unies comme droit international général³⁹. Et S. Bastid même les prescriptions du droit de fonctionnaires des organisations internationales a classé parmi les normes du droit international général⁴⁰.

Les opinions semblables ne sont pas étrangères à la littérature soviétique. Ainsi, Tunkin déclare précisément que les organes des Nations Unies peuvent arrêter en vertu de la Charte «les dispositions en vigueur [...] appliquées à la sphère restreinte de problèmes, surtout dans la matière d'organisation et de finances». Il paraît qu'il considère ces dispositions obligatoires comme normes du droit international universel⁴¹.

Parmi les auteurs polonais, S. Hubert s'est intéressé, il y a bien longtemps, à ce problème. Il a remarqué que de l'activité des organisations internationales naissent les principes de droit, qui, tout en n'étant pas de normes de traité, obligent néanmoins et règlent par les normes de droit la procédure des États comme si ces États avaient directement exprimé leur accord à ce sujet. Comme exemple de ce genre des normes de droit, il cite justement les règlements internes des organisations internationales⁴².

Certains auteurs, quoiqu'ils ne détachent pas les normes du droit interne des organisations internationales de l'ensemble général des normes du droit international, soulignent toutefois bien fort quelques particu-

³⁶ H. Kelsen, *The Law of the United Nations*, London 1951, pp. 193 - 194, 703; cf. aussi du même auteur: *Principles of International Law*, New York 1956, pp. 365 - 367.

³⁷ H. WALDOCK, *General Course on Public International Law*, «Recueil des Cours de l'Académie de Droit International», Vol. 106, 1962/II, pp. 99 - 103.

³⁸ C. W. JENKS, *The Scope of International Law*, «British Yearbook of International Law», Vol. 31, 1954, pp. 46 - 47.

³⁹ Ch. CADOUX, *La supériorité du droit des Nations Unies sur le droit des États-membres*, «Revue Générale de Droit International», Vol. 30, 1959, n° 4, pp. 651 - 652.

⁴⁰ S. BASTID, *Les fonctionnaires internationaux*, Paris 1931, pp. 67 - 69.

⁴¹ G. I. TUNKIN, *Zagadnienie teorii... [Le problème de la théorie...]*, p. 160.

⁴² S. HUBERT, *Prawo narodów [Le droit des gens]*, Wrocław 1949, 1^{ère} partie, pp. 2 - 3 (texte photocopié universitaire).

larités de ce droit et même ils sont enclins à le traiter comme un ensemble des normes tout nouveau. Cela est bien évident surtout dans les opinions de Cahier et de Skubiszewski. Ils s'opposent tout de même aux tentatives de détacher ce nouvel ensemble des normes de droit du droit universel de gens⁴³. Pareillement Reuter, en remarquant un ensemble nouveau des normes, ne fait aucune division catégorique entre ces normes et le droit international traditionnel; il est aussi tout à fait opposé à toutes les tendances qui visent à séparer ces deux ensembles des normes⁴⁴. Detter, lui aussi, ne considère pas le droit interne des organisations internationales comme un droit à part, mais plutôt comme *a new important source of international law*⁴⁵. Morawiecki, de sa part, tout en suivant attentivement les différentes significations et les différentes conséquences politiques des questions réglées par les normes comprises dans le droit interne des organisations, est d'avis que l'on ne peut ni exclure ni inclure en bloc l'ensemble de ces normes au droit international⁴⁶.

En somme donc, les auteurs de ce groupe, tout en acceptant les métamorphoses dans le domaine des sources, expriment plutôt l'opinion qu'il s'agit ici d'un seul *corpus iuris gentium*.

Ad 3) Le troisième groupe d'opinions se distingue des précédents par cela même qu'il sépare complètement le droit interne des organisations internationales du droit international public et qu'il le considère non seulement comme une branche toute nouvelle de droit, mais aussi comme une branche tout à fait autonome.

Peut-être, le plus fervent champion de cette conception du droit interne des organisations est Focsaneanu. Il part du principe que la communauté internationale actuelle se compose non seulement des États, mais aussi des organisations internationales munies d'une personnalité du droit international. Un reflet juste d'une telle communauté, Focsaneanu le trouve dans le système suivant de trois ordres distincts de droit: a) le droit international, b) le droit interne des États et c) le droit interne des organisations internationales. Le droit international règle donc les relations réciproques entre les sujets de ce droit — c'est-à-dire non seulement entre les États, mais aussi entre les organisations. Outre cela, il existe le droit interne de ces sujets de droit, c'est-à-dire le droit interne particulier des États et le droit interne particulier des organisations internationales. Entre l'un et l'autre droit interne, on peut trouver bien des

⁴³ P. CAHIER, *Le droit interne...*, pp. 571 - 590; K. SKUBISZEWSKI, *Uchwały prawotwórcze...* [Les résolutions législatives...], pp. 30 - 31.

⁴⁴ P. REUTER, *Organisations internationales et évolution du droit. L'évolution du droit public. Études offertes à Achille Mestre*, Paris 1956, p. 458.

⁴⁵ I. DETTER, *Law Making...*, p. 328.

⁴⁶ W. MORAWIECKI, *Prawo wewnętrzne...* [Le droit interne...], pp. 41 - 44.

analogies, mais encore plus de différences considérables qui décident de leur indépendance mutuelle et de leur autonomie ⁴⁷.

Beaucoup d'auteurs indiquent le caractère autonome du droit interne des organisations internationales. Focsaneanu, lui-même, s'est inspiré dans sa conception, entre autres, des travaux de List ⁴⁸. Sans doute, on peut y classer également les opinions de Sereni et de Monaco ⁴⁹. Dans la science soviétique, Lukin paraît être enclin à partager cette opinion dans son travail sur les sources du droit international ⁵⁰.

Il est évident donc que les opinions de la doctrine sur le caractère juridique des normes classées au droit interne des organisations internationales sont très divergentes et s'appuient plutôt sur les études partielles. Il y a des auteurs pour qui le droit interne des organisations internationales se présente tout court comme le droit de traités. Il y en a d'autres qui discernent dans ces normes non seulement la nouvelle matière, mais aussi attirent bien fort l'attention sur la différence de leur formation. Ils laissent néanmoins ces normes dans la sphère de l'ensemble général des normes du droit international public. D'autres auteurs encore considèrent le droit interne des organisations internationales comme non seulement une nouvelle, mais aussi comme une complètement autonome branche de droit, semblable plutôt au droit interne des États.

V. Conclusion

Cette courte revue des problèmes concernant la conception du droit interne des organisations internationales nous démontre clairement que l'accord des opinions à cet égard, auquel se réfèrent certains auteurs, est plutôt apparent. L'accord, et encore avec restrictions, existe seulement sur ce point que les organisations internationales possèdent des compétences (réelles ou présumées) à statuer les normes de droit dans le domaine de leur fonctionnement et de leur structure. Il manque pourtant une opinion claire de la science concernant la matière du droit interne des organisations ainsi que de ses sources. Le fondement de la compétence à statuer de telles normes n'a pas été précisé et le caractère juridique de ces normes n'a pas été clairement défini. Il faut y ajouter encore, ce qui semble être ignoré de nombreux auteurs, que tous ces problèmes ainsi que beaucoup d'autres ne sont encore ni précisément exposés ni suffisamment établis dans la pratique des organisations internationales.

⁴⁷ L. FOCSANEANU, *Le droit interne...*, pp. 325 - 344.

⁴⁸ *Ibid.*, p. 329.

⁴⁹ Cf. à ce sujet I. DETTER, *Law Making...*, p. 328.

⁵⁰ P. I. LUKIN, *Istočniki...*, pp. 110 - 117.

On ne peut ignorer qu'au sein du système classique de normes du droit de gens ont lieu depuis longtemps de sérieux changements, et qu'il surgit quelque chose d'important et de neuf. Il est néanmoins trop tôt pour établir une conception complète et bien documentée de ce nouveau phénomène tellement compliqué, et en même temps chargé de conséquences juridiques ainsi que politiques. Il faudrait donc se servir de cette notion — jusqu'alors non précisée — du droit interne des organisations internationales avec plus de circonspection dans la littérature et surtout dans les manuels. Car il en peuvent résulter de sérieux malentendus aussi bien théoriques que pratiques.

Toutefois, on peut dire actuellement qu'en délimitant la sphère d'objet et de sources du droit interne des organisations internationales, on doit décidément se borner uniquement aux résolutions et à la pratique coutumière des organes de ces organisations. Et quant au caractère juridique de ces normes, on doit les maintenir dans les cadres générales du *corpus iuris gentium* élargi.

Acquisitive Prescription in International Law

by JANUSZ SYMONIDES

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I. Acquisitive Prescription and Extinctive Prescription

The permissibility of acquisitive prescription constitutes one of the more strongly debated questions in international law. A positive opinion generally prevails¹ although there are authors who fairly often take a hesitant or adverse view. In Polish jurisprudence the position is rather

¹ Of more important works one might mention, *inter alia*: E. AUDINET, *De la prescription acquisitive en droit international public*, RGDIP, 1896, pp. 313 - 325; J. L. BRIERLY, *The Law of Nations*, 4th ed., Oxford 1963, pp. 167 - 171; L. CAVARÉ, *Le droit international public positif*, vol. 2, Paris 1961, p. 602; J. CHARPANTIER, *La reconnaissance internationale*, Paris 1958, p. 598; G. DAHM, *Völkerrecht*, vol. 2, Stuttgart 1958, p. 593; L. DELBES, *Les principes généraux du droit international public*, 3rd ed., Paris 1964, pp. 296 - 270; P. FAUCHILLE, *Traité de droit international public*, vol. 1, part 2, Paris 1925, p. 754 and bibliography listed therein; P. GUGGENHEIM, *Traité de droit international public*, vol. 1, Genève 1953, p. 440; Ch. Ch. HYDE, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd ed., vol. 1, Boston 1945, pp. 386 - 390; R. Y. JENNINGS, *The Acquisition of Territory in International Law*, Manchester 1963, pp. 20 - 28; D. H. N. JOHNSON, *Acquisitive Prescription in International Law*, BYIL 1950, pp. 332 - 354; SAME AUTHOR, *Consolidation as a Root of Title in International Law*, "The Cambridge Law Journal," 1955, pp. 215 - 225; H. Kelsen, *Principles of International Law*, New York 1959, p. 214; H. LAUTERPACHT, *Recognition in International Law*, Cambridge 1947, p. 428; L. OPPENHEIM, *International Law*,

more clear-cut and tends to be in the negative.² It is determined on the one hand by the resistance against the way the civil law scholars conceive extinctive prescription and, on the other, by a proposition that the principle of *ius postlimini* excludes the permissibility of obtaining territorial title by acquisitive prescription.

Granting such criticism one may, however, note that the absence in international law of a uniform definition of acquisitive prescription often gives rise to misunderstandings and ambiguities. For, while seemingly referring to the same institution the authors, who either favour or oppose, do not in fact contradict one another as they essentially have in mind what are totally different institutions. As pointed out by Klafkowski, "The science of international law voices extreme and mutually exclusive opinions on applicability of acquisitive prescription."³ That is why the question calls for further research since it is necessary to explain the reasons underlying such a divergent treatment of the problem and the cause of so numerous contradictions. Let us then deal with at least some of them.

In the Polish language there are two terms — *zasiedzenie*, i.e. acquisitive prescription and *przedawnienie*, i.e. extinctive prescription, while in English and French there is a single word — "prescription." To avoid misunderstandings authors have to add attributive expressions, namely "acquisitive" and "extinctive."⁴ Word-for-word translation is fraught with consequences, as one can hardly, without longer reflection, treat with complete distinction "acquisitive and extinctive prescription." Hence, in international jurisprudence it is often both the advocates and adversaries that tend to reduce the two institutions to the allegedly common deno-

8th ed., vol. 1, pp. 575 - 578; R. PINTO, *La prescription en droit international*, RCADI, 1955, vol. 87, p. 397 ff.; J. H. RALSTON, *Prescription*, AJIL, 1910, pp. 133 - 144; M. SIBERT, *Traité de droit international public*, vol. 1, Paris 1951, pp. 888 - 891; M. SØRENSEN, *La prescription en droit international*, "Acta Scandinavica Juris Gentium," 1932, pp. 145 - 170; A. VERDROSS, *Völkerrecht*, Wien 1959, p. 224; P. A. VERYKIOS, *La prescription en droit international public*, Paris 1934 and bibliography listed therein, pp. 199 - 206.

² Cf. e.g. J. MAKOWSKI, *Podręcznik prawa międzynarodowego* [The Handbook of International Law], Warszawa 1948, p. 103; M. MUSZKAT, *Zarys prawa międzynarodowego publicznego* [An Outline of International Public Law], vol. 1, Warszawa 1955, p. 299; L. EHRLICH, *Prawo Międzynarodowe* [International Law], Warszawa 1958, p. 541; B. WIEWIÓRA, *Uznanie nabytków terytorialnych w prawie międzynarodowym* [Recognition of Territorial Acquisitions in International Law], Poznań 1961, p. 34.

³ A. KLAFKOWSKI, *Prawo międzynarodowe publiczne* [International Public Law], Warszawa 1966, p. 159.

⁴ Instead of extinctive prescription occasionally an alternative term is used — *prescription libératoire*. If extinctive prescription is not limited to the subject, so acquisitive prescription in international law applies solely to territory.

minator, viz. the lapse of time. This makes it even possible to cover the two notions by one definition, since the lapse of time creates both the emergence and the extinction of rights and obligations. Consequently, we have to deal with acquisitive prescription in the former case and with extinctive prescription in the latter. An opposition formed against acquisitive prescription thus conceived, rallying both naturalists and positivists, as *tempus ex natura sua vim nullam effectricem habet*. There is no rule, either, stipulating the length of time indispensable for extinctive prescription to occur.

As a consequence prescription of claims is rejected both by jurisprudence and practice. For it is even authors dealing especially with extinctive prescription, such as Politis, Roch, Visscher who agree that no extinctive prescription ever occurred between states resulting, for instance, from delict or international agreement; the authors postulate the permissibility of extinctive prescription in private law cases regarding citizens.⁵ Even less, then, can extinctive prescription provide foundation for territorial title.

It is not entirely adequate, either, to propose that the necessity of existence of both institutions is underpinned, in an equal measure, by the interests of international community.⁶ For inasmuch as the majority of states are, as a rule, immediately interested in a final settlement of their territorial problems in view of their interests being involved, then in the case of claims, financial or otherwise, third states in exceptional cases only are the immediately interested parties. The presence or extinction of financial claims poses a much smaller threat to stability of international relations. Thus, despite attempts by some authors at a joint treatment of acquisitive and extinctive prescription, there is a much more general admission of existence of acquisitive prescription only, with simultaneous rejection of extinctive prescription.⁷

⁵ N. POLITIS, *La prescription libératoire en droit international*, "Revue de droit international de sciences diplomatiques, politiques et sociales," 1925, No. 1 p. 9; W. ROCH, *La prescription libératoire s'applique-t-elle en droit international public?*, "Revue de droit international de sciences diplomatiques et politiques 1949," No. 3, p. 264; Ch. de VISSCHER, *La prescription extinctive des réclamations internationales d'origine privée*, in: *Hommage d'une génération de juristes au Président Basdevant*, Paris 1960, pp. 525 - 533. On non-application of statutory limitations to Nazi crimes cf. A. KŁAFKOWSKI, *Prosecution of War Criminals in the German Federal Republic in the Light of International Law*, Poznań 1968, especially pp. 139 - 204.

⁶ Ch. de VISSCHER, *op. cit.*, p. 525; M. SØRENSEN, *op. cit.*, p. 166.

⁷ Instructive in this respect is bibliography quoted by P. A. VERYKIOS, *op. cit.*, pp. 199 - 206. He listed sixty-nine authors favouring the existence of acquisitive prescription, and only twelve favouring extinctive prescription.

The desire to set acquisitive prescription apart from extinctive prescription was at the root of the search for a new term which would not involve erroneous analogies. Thus Visscher and Johnson try to introduce the term "consolidation."⁸ Alvarez also remarks on the difference between acquisitive and extinctive prescription, emphasizing that the classic international law does not recognize extinctive prescription, although it admits acquisition of territory by *faits accomplis* — the exercise of undisturbed sovereignty.⁹

Opposition to admissibility of acquisitive prescription often results also from a more general resistance to the transference of certain institutions from municipal law into international law. The opposition is particularly well — grounded in cases where the authors not only borrow the term from municipal law but also seek to transfer almost verbatim the conditions of its applicability into the sphere of international relations. Whereby they obviously err in their disregard of the specific position of international community devoid of the degree of organization and centralism obtaining in a state's internal system.

As an example of thinking in terms of municipal law one might quote the distinction made in international law of "immemorial possession." For insofar as in municipal law the term is meaningful, then in international law the discernment, under contemporary circumstances, of making title through immemorial possession is an anachronism repeated, somewhat mechanically, after Grotius.¹⁰

Under municipal law the duration required for the acquisition of property is influenced by the action being taken in good or in bad faith, while in international law the difference is of a relatively minor consequence as, first, the issues may be controversial and not always easy to settle and, second, acquisition of territorial title does not at all depend on the definite lapse of time. Consequently, it is impossible to fix — which is usually the case in domestic law — a longer period for acquisitive prescription in bad faith and a shorter period for the action in good faith.¹¹

When examining acquisitive prescription it is of lesser importance to put an exaggerated emphasis on the role of jurisdiction and international arbitration. For, as demonstrated by experience, it is only the less important territorial disputes that were submitted to tribunals and international

⁸ Ch. de VISSCHER, *Théories et réalités en droit international*, Paris, 1953, p. 244 ff.; D. H. N. JOHNSON, *Consolidation...*, p. 223.

⁹ A. ALVAREZ, *Le droit international nouveau*, Paris 1959, p. 522.

¹⁰ A. GROTIUS, *De jure belli ac pacis libri tres*, English translation, Oxford 1925, p. 224; G. P. de MARTENS, *Précis du droit des Gens*, Paris 1958, pp. 201 - 203; E. NYS, *Le droit international*, vol. 2, Bruxelles 1912, p. 43.

¹¹ Cf. Art. 172, paras 1 and 2, Polish Code of Civil Law in force since January 1, 1965.

arbitration and only so when the state, as it were, could in advance take the risks of a possibly unfavourable judgement. Insofar as opposition to mechanical transference of certain notions from municipal law into international law is well-grounded, one should not, however, question the existence of acquisitive prescription merely because the term also appears in domestic law. One should not do so because, as said by Starke, all ways of acquisition of territory are, under international law, analogous to the ways of acquisition of property under civil law.¹² From municipal law also originates the distinction between territorial titles into original and secondary ones. The distinction breeds more confusion and dispute, as the question arises whether acquisitive prescription constitutes original or secondary manner of acquisition of territory. Some, like Lauterpacht, Oppenheim, Monaco, claim it to be original, motivating it with the fiction of alleged abandonment of territory by the former sovereign.¹³ While others, like Gould, Sibert, hold acquisitive prescription to be a secondary title, since original title belonged to the former sovereign.¹⁴ One might, however, agree with a number of authors, such as Fenwick, Johnson, Svarlien, who rightly hold that the above classification is of not much practical importance, being just one more academic dispute.¹⁵

It is a much more important problem to demonstrate the foundation of acquisitive prescription in international law and specifying the conditions on which a state acquires territorial title.

II. The Root of Acquisitive Prescription

Generally all authors dealing with the problems of acquisitive prescription in international law emphasize in agreement that its existence is based on necessity and interests of international community anxious to maintain order and pacific settlement of conflicts.¹⁶ Such statement, ho-

¹² J. G. STARKE, *An Introduction to International Law*, 5th ed. London 1963, p. 151; also G. SCHWARZENBERGER, *A Manual of International Law*, 4th ed., vol. 1, London 1960, p. 115.

¹³ H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London 1927, p. 116; L. OPPENHEIM, *op. cit.*, p. 546; R. MONACO, *Manuale di diritto internazionale pubblico e privato*, Torino 1949, p. 193.

¹⁴ W. J. GOULD, *An Introduction to International Law*, New York 1957, p. 356; M. SIBERT, *op. cit.*, p. 871.

¹⁵ Ch. FENWICK, *International Law*, 3rd ed., New York 1948, pp. 356 - 357; D. H. N. JOHNSON, *Consolidation...*, p. 217; O. SVARLIEN, *An Introduction to the Law of Nations*, New York 1955, p. 180.

¹⁶ Cf. e.g. E. AUDINET, *op. cit.*, p. 315 ff.; P. FAUCHILLE, *op. cit.*, p. 757; P. A. VERYKIOS, *op. cit.*, pp. 23 - 24; D. H. N. JOHNSON, *Acquisitive...*, p. 333.

wever, is much too general to provide the only basis for admissibility of acquisitive prescription. Besides, the interests of international community not always bring some definite legal consequences. Thus, it is indispensable to formulate the basis for the title in a more precise fashion.

There are numerous, often contradictory, theories in the doctrine. As we have pointed out earlier, the authors who recognize acquisitive prescription to be the original manner of acquisition of territory, develop it from the fiction of the alleged abandonment of territory by its former sovereign. This, however, is an artificial legal construction, and, understandably, there is opposition against it.¹⁷ For it constitutes a theoretical attempt to evade the question why it is so that illegal or questionable conduct produces legal consequences. For once we suppose that the former sovereign abandoned his territory then it should be treated as *res nullius*, over which sovereignty is obtained through occupation. With such assumption, to our mind, acquisitive prescription does not differ at all from effective occupation. Fictitiousness of this construction is always apparent when the protest by the former sovereign clearly demonstrates that he had not voluntarily abandoned the territory in question.

One cannot agree, either, with another attempt at justification, clearly transferred from municipal law. Thus, insofar as with acquisitive prescription of some importance is the attrition of litigation value of evidence resulting from the lapse of time or the intention to punish negligence manifested in submitting the claims too late,¹⁸ then such considerations are totally alien to international law. In international relations regarding territory one can hardly imagine the disappearance or attrition of evidence. Of similar nature is the claim that a state acquires territory through long-lasting possession resulting from the contribution made towards the maintenance and improvement of the territory in possession, which, in consequence, is conducive to the abolition of the property evidence on the part of the former sovereign.¹⁹

Acquisitive prescription is also deduced from explicit or implicit recognition and the expression of consent by the state under whose authority the territory in question formerly remained. Such attitude, however, leads to the identification of acquisitive prescription with recognition. As aptly pointed out by Charpentier, positivists often reject acquisitive prescription, as, with the assumption that international law is exclusively the

¹⁷ P. FAUCHILLE, *op. cit.*, p. 755; Ch. FENWICK, *op. cit.*, p. 356.

¹⁸ B. E. KING, *Prescription of Claims in International Law*, BYIL, 1934, p. 96; W. ROCH, *op. cit.*, pp. 260, 264; J. R. RALSTON, *op. cit.*, p. 139; N. POLITIS, *op. cit.*, p. 9.

¹⁹ A. DESJARDINE, *De l'aliénation et de la prescription des biens de l'Etat*, Paris 1862, p. 541; ORTOLAN, *Des moyens d'acquérir le domaine international*, Paris 1951, p. 125.

result of consent, its functions are being performed namely by recognition.²⁰ Such position is also contradicted by practice since the states who lost part of their territory generally protest against such loss.²¹

One may also question the presumption that quiescence and absence of pronounced protest constitutes consent or recognition. Under certain circumstances it may follow from the disparity of forces or from the desire to avoid further conflict fraught with serious consequences.²² Although in international law it is generally conceived that quiescence is presumably the expression of recognition yet it does not seem that such reasoning is based on any positive rule. The absence of protest unquestionably plays a role, often precipitating acquisition of sovereignty, but both for theoretical and practical considerations one cannot acquiesce in a proposition that presumed consent of the former sovereign constitutes the root of acquisitive prescription under international law.

It is first and foremost the principle of effectiveness that provides an answer to the question what constitutes the basis for acquisitive prescription. No system of law can be entirely divorced from reality composed of a sum of real situations. While, however, under a centrally organized system wielding effective coercion the legislator may introduce rules whereby, in conformity with his policy, the laws may even be devised against or with a purpose to modify the existing situation, then in international relations such possibility is very much reduced. International law has, in a far greater measure, to take into account the actual practice of states which, through custom rules, may even constitute its source.

It may then be admitted — as Kelsen, Marek, Pinto, Stone, Tucker and Williams do — that the rule-creating role of facts constitutes the basis for acquisitive prescription in international law.²³ In conformity with the principle of effectiveness certain situations, provided they are effective, produce legal consequences. As stated by Ross, "It follows from the effectivity principle that the only fact which can prove the acquisition of terri-

²⁰ J. CHARPENTIER, *op. cit.*, pp. 155 - 156.

²¹ Thus, e.g. H. LAUTERPACHT, *Recognition...*, p. 428, when discussing ways of validation of conduct inconsistent with the law, enumerates side by side acquisitive prescription and recognition, thereby making a distinction between the two institutions.

²² E. AUDINET, *op. cit.*, p. 322.

²³ A. KELSEN, *op. cit.*, p. 214; K. MAREK, *Identity and Continuity of States in Public International Law*, Genève 1954, p. 580 ff.; R. PINTO, *op. cit.*, p. 403; J. STONE, *What Price of Effectiveness*, "Proceedings of the American Society of International Law," 1956, p. 196; R. W. TUCKER, *The Principle of Effectiveness in International Law*, in: *Law and Politics in the World Community*, Berkeley and Los Angeles 1953, pp. 40 - 41; J. P. WILLIAMS, *Aspects of Modern International Law*, London 1939, p. 32.

tory is the lasting effective possession of it. The application of the principle acquires a somewhat different aspect according to whether the territory concerned has previously been subject to supremacy of another state or not.”²⁴

The notion of effectiveness in international law is flexible and depends on concrete situation. The effectiveness of a newly-emerged state is determined by sovereignty. The effectiveness of a government is viewed in a different manner as is that of a belligerent or insurgents. Similarly, one should discern between the effectiveness of occupation following from the seizure of a territory constituting *res nullius* and the effectiveness of acquisitive prescription.

Effectiveness of possession in the case of prescription is determined in a larger measure by the attitude adopted by international community as compared to the case of occupation. The appearance of prescription is made doubtful by the opposition on the part of international community, not only in the form of non-recognition but in a concrete action expressed in a determined support rendered to the claims of the state which had sustained a loss of part of its territory. In this sense the Stimson doctrine, as observed by Delbez, supplements, as it were, the prescription theory.²⁵ One should not, however, surrender to exaggerated illusions as to its practical consequence. International community has, nowadays, more effective means at its disposal provided by the UN Charter, the application of which may prevent the acquisition of territorial title in contravention of the Charter.

International law allows, however, as pointed out by Vischer,²⁶ much wider consequence to effective possession as compared to what is the case under municipal law with regard to property problems. If the possession is final and there is nothing to suggest that the situation might change in the future, it finds its expression in legal consequences — for effective possession produces sovereign title.

The principle of effectiveness is often criticized as a manifestation of prevalence of brute force over law, as the acceptance of the principle *ex injuria jus oritur*. Such reasoning is not valid, though. In the theory of international law a rubberstamp approach to *faits accomplis* — as to conduct contrary to international law — is usually accepted, although it is not always right.²⁷ For it is not always, especially insofar as custom

²⁴ A. ROSS, *A Textbook of International Law*, London 1947, p. 145.

²⁵ L. DELBEZ, *op. cit.*, p. 270.

²⁶ Ch. de VISSCHER, *Théories...*, p. 245.

²⁷ C. BILFINGER, *Vollendete Tatsache und Völkerrecht*, “Zeitschrift für ausländische öffentliches Recht und Völkerrecht,” 1953/54, p. 453 ff.

rules are concerned, that *opinio iuris generalis* is explicit — whereby disputes may always arise as to whether a state's conduct is in accordance with or contrary to the law. A case in point could be provided by the relatively recent liberation of Goa by India.²⁸ It is no doubt a *fait accompli*, but does it constitute lawless conduct? The development of international relations, the progress of technology may often spring surprises on international law which not always has the rules available to regulate those newly emerged situations, such as outer space. Thus *faits accomplis* defy juridical assessment.

Prescription may commence in a mode clearly contrary to international law or in a situation when other titles are questionable, e.g. cession, succession, etc. While in the former case it performs a controversial function then, on the other hand, in the latter case such mode of acquisition of territorial title plays a positive role and does not at all constitute a manifestation of the principle *ex iniuria ius non oritur*. Furthermore, while it would be an exaggeration to state that the principle *ex iniuria ius non oritur* is but a postulate *de lege ferenda* which is expressed by the principle *ex factis ius oritur*,²⁹ the incidence of the former is in many instances clearly limited by international law.

Thus although a war may start in a manner obviously contrary to international law — as in the case of aggression — yet it does not bring definite legal consequences, for the *ius in bellum* is binding.³⁰

As pointed out earlier, the existence of prescription is a result of necessity. In view of their economic interests, of their diplomatic protection, etc., the states cannot indefinitely uphold the fiction that sovereignty over a disputed territory rests with the state which does not exercise any sovereign right whatever in the territory.

Brierly was right in saying, "Indeed, many territorial titles and many frontiers are accepted today by international law simply because they have existed *de facto* for a long time; they exemplify the maxim *ex facto oritur ius*, which is at the root of prescription in all systems of law."³¹

Although it may appear paradoxical the principle of effectivity is in fact a limiting factor regarding the functioning of *faits accomplis* in international law. For it demonstrates that it is only the effective and final situations that produce legal consequences. The effectiveness of a real situation is a legal category defined by international law.

²⁸ Cf. J. S. BAINS, *India's International Disputes*, London 1962, p. 196 ff.

²⁹ K. MAREK, *op. cit.*, p. 586 - 587.

³⁰ H. LAUTERPACHT, *Recognition...*, p. 423.

³¹ J. L. BRIERLY, *op. cit.*, p. 167.

III. Conditions of Origin of Acquisitive Prescription

Let us then try to demonstrate what conditions have to be met by acquisitive prescription so that it could be considered effective. Most of the authors usually stress the point that to acquire territorial title by acquisitive prescription it is indispensable that continued and peaceful exercise of sovereign rights must be performed.³² These two elements predominate, although detailed lists of conditions required differ depending on the author's affiliation with one of the three more general methodological positions.

Consequently, some of them treat acquisitive prescription as analogous to usucapio under Roman law, striving to present a complete, as far as possible, list of conditions — generally borrowed verbatim from municipal law.³³ Others, such as Cavaré, point out that conditions for acquisitive prescription in international law must undergo necessary transformations.³⁴ The third position, is represented for instance by Verykios who criticizes the abuse of analogies between municipal and international law.³⁵ He emphasizes that conditions for acquisitive prescription are not fixed, that they differ in accordance to whether the territory in question is inhabited or not. Such treatment of the problem clearly demonstrates the similarities between the effectiveness of possession in the case of acquisitive prescription and in the case of occupation (seizure).

Therefrom follows even the risk of identification of or confusion between the two methods of acquisition of territorial title. One may, however, point to rather essential differences, although it is not too easy to do so, between them. First and foremost, as observed by Beckett,³⁶ occupation occurs in relation to *terra nullius*, while acquisitive prescription offers title with regard to a territory formerly subject to someone's sovereignty. Secondly, title is obtained by effective occupation only in respect of land territory, while acquisitive prescription may arise in relation to the high seas. This may be exemplified by 'historic' gulfs and bays or by wider territorial sea.

³² Cf. E. AUDINET, *op. cit.*, p. 322; J. H. RALSTON, *op. cit.*, p. 143; P. FAUCHILLE, *op. cit.*, p. 760; Ch. Ch. HYDE, *op. cit.*, p. 386; R. Y. JENNINGS, *op. cit.*, p. 23; A. ALVAREZ, *op. cit.*, p. 523.

³³ D. H. N. JOHNSON, *Acquisitive...*, pp. 334 ff.; H. L. GOULD, *op. cit.*, p. 356.

³⁴ L. CAVARÉ, *op. cit.*, p. 602.

³⁵ P. A. VERYKIOS, *op. cit.*, pp. 61, 73; also G. SCELLE, *Manuel de droit international public*, Paris 1948, pp. 159 - 160.

³⁶ W. E. BECKETT, *Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour Permanente de Justice Internationale*, RCADI, 1934, Vol. 50, pp. 248 - 252.

Nonetheless, as rightly pointed out by Jennings, while effective occupation is always consonant with international law, acquisitive prescription for that matter originates in a situation either unclear or questionable or even distinctly contravening the law.³⁷

The difference between occupation and acquisitive prescription in our view consists also in the fact that although the condition of effectiveness occurs in both cases, then, in the former case, the effective taking in possession of a territory provides, as it were, a title to it *ipso facto* while in the latter case the establishment of effective possession is but indispensable condition for and the beginning of acquisitive prescription without, however, instantly providing the title.

As we have pointed out earlier, in consonance with the principle of effectivity international law vests real situations, provided they are properly solid and stable, with legal consequences. Permanence, with regard to acquisitive prescription, means that the situation prevails throughout a period of time necessary to produce a conviction of its finality. The question of how long should be the duration of possession constitutes a moot point in international law. Differing periods are mentioned, one-hundred, sixty, fifty or twenty years, and in each case it is demanded that whatever period should be fixed by tribunal or international arbitration. Nevertheless, most authors, as found by Fauchille, agree that in view of the absence of a positive rule and because of heterogeneity of cases it is impossible to adopt a rigid criterion.³⁸

Stability should be deemed as undisturbed and peaceful exercise of state competence. It may be disturbed either by the former sovereign or by international community acting in concert or by the inhabitants of the territory, whose resistance may compel to the resort to violence, whereby the exercise of sovereign rights ceases to be peaceful. The role of the population is now emphasized by the obligatory principle of self-determination. According to the Soviet doctrine only on the basis of that principle can any territorial change be made.³⁹ However, even in the period when the wishes of the population played a relatively lesser part in international law, its attitude as demonstrated in numerous insurrections deter-

³⁷ R. Y. JENNINGS, *op. cit.*, p. 23.

³⁸ J. de LOUTER, *Le droit international public positif*, Oxford 1920, p. 341; P. DESPAGNET, *Cours de droit international public*, 4th ed., Paris 1910, p. 567; L. OPPENHEIM, *op. cit.*, p. 578; P. FAUCHILLE, *op. cit.*, p. 761.

³⁹ Cf. Academy of Science of the USSR, *International Law*, Moscow (n.d.), p. 185; J. G. BARSEGOV, *Territorija v meždunarodnom prave, Juridičeskaja priroda territorial'nogo verhovenstva i pravovye osnovanija rasporjaženija territoriej*, Moskva 1958, pp. 15495; F. Y. KOZHEVNIKOV, *Meždunarodnoe Pravo*, Moskva 1957, pp. 183 - 184; Cf. also B. WIEWIÓRA, *op. cit.*, pp. 140 - 142;

mined, for example, that in relation to the territories of the partitioned Poland acquisitive prescription did not apply. Therefore, certain authors as Hall and Fenwick, pointed out that the scope of acquisitive principle has been seriously restricted by the principle of nationality.⁴⁰

In the case of a determined resistance of the population the possession may not only be disturbed, as we have observed above, but also ceases to be peaceful. The peaceful nature of possession is fairly essential for creating a conviction as to its permanence. In the circumstances when a territory is held by violence the international community cannot be convinced about the finality of the existing situation and about its conformity with international law.

Is it sufficient to have a diplomatic protest by a former sovereign that possession may be disturbed? Now, notwithstanding the difference of opinion in jurisprudence, one should agree with the view that insofar as it only remains on paper, viz. not supported by any further action such protest cannot, as stated by Brüel, Sørensen, MacGibbon, Visscher, permanently impair the stability of a questioned situation.⁴¹ In much greater a measure it may be disturbed if the matter is submitted to the International Court of Justice or to an international organization, the United Nations in particular. For once a state agrees that a controversial situation be submitted for consideration it also agrees to a possibly unfavourable judgment which automatically disturbs the finality of the existing situation. In view, however, of the optionality of jurisdiction by the ICJ or that of arbitration, such disturbance is only of limited importance in practice.

While examining the conditions for acquisitive prescription two other elements are often emphasized in the literature. Thus, sovereignty over a territory cannot be acquired if the sovereign rights are performed on behalf of a third party. As already stressed by Audinet, acquisitive prescription did not arise in the case of protectorate.⁴² Earlier, similar situation obtained regarding mandate as it now does in respect of international trusteeship. Usually the literature quotes the example of Austria which, under the treaty of Berlin of 1878, occupying Bosnia and Herzegovina could not acquire title to these provinces because it did not act with

⁴⁰ W. E. HALL, *A Treatise on International Law*, 8th ed., Oxford 1924, p. 144; Ch. FENWICK, *op. cit.*, p. 357.

⁴¹ E. BRÜEL, *La protestation en droit international*, "Acta Scandinavica Juris Gentium," 1932, No. 3, pp. 86 ff.; M. SØRENSEN, *op. cit.*, p. 159; I. C. MACGIBBON, *Some Observations of the Part of Protest in International Law*, BYIL 1953, pp. 309 - 314, I. L. BRIERLY, *op. cit.*, p. 170; Ch. de VISSCHER, *Théories...*, p. 245.

⁴² E. AUDINET, *op. cit.*, p. 323.

sovereign title which belonged to the Sultan.⁴³ A contemporary example of such situation is furnished by the Panama Canal Zone where the United States performs state competence, while the sovereignty, under the treaty of 1903, belongs to Panama.⁴⁴

Some authors, including modern ones such as Johnson, hold overtness of possession to be the indispensable condition for the occurrence of acquisitive prescription.⁴⁵ It seems, however, highly hypothetic under modern circumstances that a state could possibly exercise its competence secretly over a territory, especially that explicit conflict occurs between the former and the new authority—an element often accompanying acquisitive prescription. The condition of overt possession is clearly a transplantation from domestic law in which it does have its *raison d'être*. In international relations it is the inseparable attribute of possession and therefore it seems superfluous to formulate such a requirement.

In conclusion we might state that through acquisitive prescription title is acquired to territory resulting from effective exercise of state competence provided that by effectiveness is meant the exercise of sovereign right on a state's own behalf, in a permanent and undisturbed manner.

IV. Acquisitive Prescription as Custom Rule

The next problem to tackle is how to define the place of acquisitive prescription in international law, to explain what is meant by it in the provision of Article 38 of the Statute of the International Court of Justice—a convention, an international custom or a general principle?

Admissibility of acquisitive prescription was formulated but once, and in a bilateral arbitration agreement at that—between Venezuela and Great Britain. The compromise of February 2, 1897 pointed to the principles on the basis of which the arbitrators were expected to settle territorial controversy between British Guiana and Venezuela. Article 4 stipulated clearly,

“a) Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district as

⁴³ J. GILAS, J. SYMONIDES, *Aspekty prawne strefy Kanału Panamskiego* [Legal Aspects of Panama Canal Zone], “Technika i Gospodarka Morska,” 1964, No. 5.

⁴⁴ P. FAUCHILLE, *op. cit.*, p. 760.

⁴⁵ D. H. N. JOHNSON, *Acquisitive...*, p. 347; L. CAVARÉ, *op. cit.*, p. 602. In Polish jurisprudence the principle of openness in acquisition of territory is mentioned by C. BEREZOWSKI, *Prawo międzynarodowe publiczne* [International Public Law], Warszawa 1966, Part One, pp. 175 - 176.

well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.”⁴⁶

The award rendered by the tribunal of arbitration of 1899 based on the above provision did not, unfortunately, bring anything new into the problems in which we are interested here.

One could, however, quote a number of international agreements recognizing acquisitive prescription implicitly. This feature is especially typical of treaties dealing with comprehensive occupation of disputed territory. They include provisions preventing acquisition of title to these territories by any of the parties as resulting from continual possession. Hence they recognize *a contrario* the function of acquisitive prescription in international relations. As an illustration Article III of the October 20, 1818 Treaty between Great Britain and the United States could be quoted as well as Article I of the agreement of August 6, 1827 relating to Oregon.⁴⁷

The possibility of acquiring territorial title has been indirectly recognized in several treaties concluded between Latin American states. For instance the agreement on arbitration between Guatemala and Honduras of February 16, 1930 could be quoted here whereby under article V it was stipulated that the *uti possidetis* frontier of 1821 was the only legal boundary that could be established between the two states in question. Nonetheless, the court of arbitration was obliged to take into account territorial changes that had taken place after 1821, i.e. resulting from acquisitive prescription.⁴⁸ Similar dispute arose between Ecuador and Peru in 1936.⁴⁹

Practice of states usually enabling one of establishing the existence of a custom rule is not uniform and often there are cases when the position towards this institution is determined according to the likely advantages of the moment. Thus for example the United States in its dispute over Chamizal based its claims against Mexico on acquisitive prescription, while in the controversy over the Island of Palmas it took a determined position against Netherlands' invoking the same acquisitive prescription. Generally

⁴⁶ Text: J. B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. 5, Washington 1898, p. 5018.

⁴⁷ J. B. MOORE, *A Digest of International Law*, vol. 1, Washington 1906, p. 296.

⁴⁸ Text of the judgment in: *Annual Digest and Reports of Public International Law Cases 1933 - 1934*, London 1940, pp. 115 - 127; and commentary F. C. FISCHER, *The Arbitration of the Guatemalan-Honduran Boundary Dispute*, AJIL, 1933, pp. 403 - 427.

⁴⁹ Cf. L. H. WOOLSEY, *The Ecuador-Peru Boundary Controversy*, AJIL 1937; on page 100 he states: "Finally, is the principle of prescription applicable to this case? Authorities say that even illegal or violent possession if maintained long enough will be transformed into legal and honourable title."

it could be stated, however, that the existence of acquisitive prescription is universally recognized by practice and jurisdiction of the Supreme Court of the United States in numerous territorial disputes between individual states of the USA.⁵⁰ Similarly, in the dispute between the Direct United States Cable Co. v. Anglo-American Cable Co. the British Privy Council found the existence of acquisitive prescription on the part of Great Britain with regard to the Bay of Conception.⁵¹

Statements also abound made by statesmen and diplomats recognizing the admissibility of this mode of acquisition of territorial title.

It is true that none of international courts or tribunals of arbitration ever spoke in a decisive manner in favour of admissibility of acquisitive prescription but they rendered many awards and thus *de facto* confirmed its existence. This was done most explicitly by M. Huber in 1928 on the controversy over the Island of Palmas between the United States and The Netherlands.⁵² Acting in his capacity of the only arbitrator his task was to decide whether sovereignty over the Island of Palmas belonged to The Netherlands or to the United States who based its claims, *inter alia*, on the island's having been discovered by Spain (the United States acted as successor to Spain). The arbitrator found sovereignty to lie with The Netherlands as the result of a "continued and peaceful exercise of territorial sovereignty." This manner of acquisition of territorial title he described as the so-called prescription, which is often interpreted as a pejorative definition. His adoption of the "so-called prescription" term seems, however, to result rather from the hesitation in the doctrine and the absence of clear-cut precedents than from his desire to negate it.

Deliberating on the components forming sufficient ground for the acquisition of territorial title, the arbitrators of the controversy in 1902 between Austria and Hungary over Morskie Oko (Eye of the Sea Lake in the Tatra Mountains) explicitly stated that undisturbed and immemorial possession makes good title.⁵³

⁵⁰ Cf. *Prescription in International Law*, "Harvard Law Review," 1903 - 1904, p. 346; G. G. WILSON, *International Law*, 9th ed., New York 1935, p. 114; O. SVARLIEN, *op. cit.*, p. 181.

⁵¹ J. B. MOORE, *A Digest...*, vol. 1, p. 740.

⁵² Text in: *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas*, AKIL, 1928, pp. 867 - 912.

⁵³ The Tribunal stated, *inter alia*: "*La possession immémorial est celle qui dure depuis si longtemps qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne se souvient d'en avoir entendu parler. En outre cette possession doit être ininterrompue et incontestée*". Quoted after V. KORN, *Arbitrage dans le différend international entre l'Autriche et la Hongrie au sujet de la frontière*

In the dispute between Britain and the United States over the Alaska-Canada boundary, the court of arbitration emphasized the circumstance of factual possession.⁵⁴ The boundary had been established under the Anglo-Russian Treaty of 1925. Although the way in which Russia interpreted some of the provisions could have given rise to reservations yet Britain during sixty years' time did not raise any objections whatever. It was only after gold had been struck in the region that objections were tabled. The boundary was finally determined by arbitrators on the one hand on the basis of the interpretation of the 1825 Treaty and, on the other, on the factual scope of state competence exercised by the United States. The court of arbitration thus recognized the possibility of acquiring sovereignty through acquisitive prescription.

In the sea-boundary controversy between Sweden and Norway (Grisbadarna) in 1909 the Permanent Court of Arbitration⁵⁵ adjudicated sovereignty over the disputed area to Sweden; it was guided, inter alia, by Sweden's exercise of certain state functions such as regulation of navigation and the placing of a light-ship; the Court found it to be a binding principle of international law that a real situation existing for a long time should be altered to the possibly least extent.

Acquisitive prescription came to be recognized fairly clearly in the 1911 dispute over Chamizal between the United States and Mexico.⁵⁶ Both Governments claimed rights to a tract of land situated between the earlier and the then channel of the Rio Grande which, eroding into its bank was moving ever deeper into Mexican territory. In accordance with the 1848 agreement the river constituted the boundary between the two states concerned. The United States based its claim to the disputed territory on prescription, i.e. undisturbed possession. Arbitrators were unanimous in rejecting the US claims pointing out that the possession had been disturbed on the one hand by the 1884 treaty dealing with the problem and, on the other, in view of repeated Mexican protests and the desire of the Mexican Government to establish a customs check point. Consequently, the court of arbitration rendered an award in favour of admissibility of acquisitive prescription, although it did question its operation in the matter.

The International Court of Justice did not use the term "prescription" but in two cases, that of fisheries of 1951 and in the dispute over sove-

près du lac "l'Oeil de la Mer" au Tatra, "Revue de droit international et de législation comparée," 1906, 2nd series, Vol. 8, p. 207.

⁵⁴ J. B. MOORE, *A Digest...*, vol. 1, pp. 297ff.

⁵⁵ J. B. SCOTT, *The Hague Court Reports*, New York 1916, text in French pp. 487ff., English translation, pp. 122ff.

⁵⁶ Text in: AJIL, 1911, pp. 782ff.

reignty over the islands of Minquiers and Ecrehos in 1953, the two parties developed argumentation based on acquisitive prescription. The court even recognized indirectly prescription in the Anglo-Norwegian dispute for it allowed for the possibility of acquiring exclusive sovereignty by a coastal state over areas which, under international law, constitute the high seas.⁵⁷ In the Anglo-French dispute the Court explicitly stressed the importance of possession by stating:

"What is of decisive importance [...] is not direct presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."⁵⁸

It may be also pointed out that the existence of acquisitive prescription was taken up in individual opinion of Judge Alvarez in the former dispute⁵⁹ and by Judge Carneiro in the latter.⁶⁰ Acquisitive prescription in the form of *uti possidetis* was also invoked by Judge Moreno Quintana in a dissenting opinion⁶¹ annexed to the 1959 award in the Dutch-Belgian dispute over sovereignty over certain boundary tracts.

From the quoted jurisdiction, as well as from the practice of states, notwithstanding all inconsistencies and contradictions, it follows that acquisitive prescription may be recognized as custom. It forms also a general principle of international law if we recognize that these principles constitute a generalization of customary and conventional rules.

V. Definition

Acquisitive prescription has not been defined — neither it is meant uniformly — in a uniform manner in the doctrine. It could, nevertheless, be said, if even in somewhat simplified fashion, that there are two preponderant ways of viewing it. Acquisitive prescription is deduced either from extinctive prescription or from effective exercise of sovereign rights.

To sum up our deliberations we may stress that in accordance with the prevalent opinion in the Polish jurisprudence, acquisitive prescription

⁵⁷ ICJ, Reports 1951, p. 132. The Court invoked Norway's argument based on acquisitive prescription, stating "[...] In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other state, a kind of *possessio longi temporis* [...]", *ibid.*, p. 130.

⁵⁸ ICJ, Reports 1953, p. 57; emphasis supplied.

⁵⁹ ICJ, Reports 1951, pp. 151 - 152.

⁶⁰ ICJ, Reports 1953, pp. 104 - 105.

⁶¹ ICJ, Reports 1959, p. 255.

viewed as a form of acquisitory extinctive prescription resulting from a definite lapse of time, does not exist in international law. One may, however, allow for the existence of this institution as resulting from the operation of the maxim *ex factis ius oritur*.

Effective exercise of sovereign rights constitutes not only *conditio sine qua non* for any territorial title but also in certain circumstances provided for by the international law it makes such title by itself. Acquisitive prescription may be defined as the acquisition of territorial sovereignty through effective performance of state competence in a mode creating the conviction in international community that the existing situation is in conformity with international law. It clearly follows from the definition that it is not every performance of sovereign rights that is conducive to the acquisition of title as it must be so effective as to create the conviction that any change of the existing situation in view of a possible danger to the stability of international relations would be contrary to the interests of international community.⁶²

The existence of acquisitive prescription so conceived is the result of the so far not-so-advanced stage of development of international law which, in order to preserve the indispensable degree of effectiveness, must vest certain real situations with definite legal consequences. Opposition against acquisitive prescription conceived as the result of the operation of the maxim *ex factis ius oritur* does not follow, as written by Fenwick, from the law but constitutes a defence of morality as against facts of international life.⁶³ This alleged amorality of the institution springs from erroneous, to our mind, approach to it as if it were a manifestation of unrestricted operation of the maxim *ex iniuria ius oritur*. As we have remarked earlier, the maxim *ex factis ius oritur* — to which attention was drawn in the Polish literature by Wiewióra⁶⁴ — is not, as generally deemed, contradictory to the maxim *ex iniuria ius non oritur*, and, therefore, is not identical with the maxim *ex iniuria ius oritur*.

International law puts a distinct limitation, in a number of cases, on the operation of acquisitive prescription while pointing to situations in which effective performance of sovereign rights does not make territorial

⁶² The question whether the interest of international community is a legal notion may be disputed, but in certain cases it finds reflection in and is protected by international law. Cf. A. KŁAFKOWSKI, *Granica polsko-niemiecka a konkordaty z lat 1929 i 1933*, [Polish-German Boundary and the Concordates of 1929 and 1933], Warszawa 1958, pp. 98 - 99 and *Demilitaryzacja Niemiec jako zagadnienie prawa międzynarodowego* [Demilitarization of Germany as a Question of International Law], "Wojskowy Przegląd Prawniczy," 1949, No. 1, pp. 132 - 143.

⁶³ Ch. FENWICK, *op. cit.*, p. 356.

⁶⁴ B. WIEWIÓRA, *op. cit.*, pp. 49 - 57.

title. Such is the case with military occupation, with the results of a war contrary to the provisions of the UN Charter.⁶⁵ Such restrictions existed in the case of mandate territories and, nowadays, regarding trust territories. A number of international agreements, including lease agreements and agreements concerning military bases, while explicitly permitting the exercise of sovereign rights often demonstrate that this does not constitute the foundation for the transfer of sovereignty.

Certain general principles of international law also restrict the operation of acquisitive prescription, first and foremost the right of all peoples to self-determination. The consent of the population of a territory constitutes one of the principal elements determining the effectiveness of the exercise of sovereign rights. In the case of people's opposition the *ius postlimini*⁶⁶ maxim operates, being a dialectic correlate of acquisitive prescription. Such are the treaty and custom limits within which acquisitive prescription operates acting as a stabilizing factor in international relations and being, in a way, an institution for upholding order.

It would be engaging in wishful thinking should one reject the so-formulated mode of acquiring territorial title. For the institution is not an artificial creation of the theory of international law but a product of international practice. It has played an essential role in the form of *uti possidetis* at the settlement of territorial conflicts left over on the American Hemisphere by the former colonial powers and, certainly, it also operates because of similar situations in territorial disputes arising between the newly-emerged African and Asian States. Insofar as the possibility of acquiring territory by effective occupation has now been substantially reduced, there is yet the possibility of the seizure of areas of the high seas through acquisitive prescription.

Apart from its independent, as it were, occurrence of acquisitive prescription in international law it may, as we have shown above, have ad-

⁶⁵ In view of this, accordingly, acquisitive prescription may not be invoked, in respect of Arab States, the state of Israel which has committed aggression in the Middle East. Parenthetically one should also emphasize that in this case we may not speak about acquisitive prescription, too, in view of illegality of the occupation of Arab territories, under international law and the UN Charter, and the absence of a stable and permanent nature of such occupation since it is ceaselessly disturbed by the popular resistance and guerilla activity, all pointedly demonstrating the violation of the peoples' right to self-determination. Also, international community has been taking a determined — and negative — stand expressed, for instance, in subsequent resolutions of the Security Council and the General Assembly of the United Nations, summoning Israel to withdraw from the seized territories or denouncing the attempts at annexation of the Arab part of Jerusalem.

⁶⁶ Cf. S. HUBERT, *Rozbiory i odrodzenie Rzeczypospolitej* [The Partitions and the Rebirth of the Polish Republic], Lwów 1937, p. 13.

ditional effect in strengthening and consolidating other territorial titles. One may not indefinitely question the legal title resulting, for example, from cession if it is supported by the sufficiently efficient exercise of sovereignty with the pronounced support and consent of the population inhabiting such territory. Such questioning would be tantamount both to opposition against order and against international law.

Freedom of the Seas in the Diplomatic Correspondence of Sigismundus Augustus, King of Poland (16th century)

by REMIGIUSZ BIERZANEK

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International lawyers were for many decades of the opinion that the principle of freedom of the seas, like many other principles of international law, had been formulated by the "father of the science of international law," Hugo Grotius. This eminent 17th-century jurist dealt with the problem of freedom of the seas in a special treatise called *Mare liberum*, written in 1604 and published in 1609. A considerable part of the arguments in favour of the freedom of the seas contained in that treatise are valid to this very day.

More recent historical research has shown that many of the views expressed in Grotius' works had been propounded earlier, that Grotius had had his precursors, and that the beginnings of the science of international law go back without doubt to an earlier period. As regards the question of the freedom of the seas with which we are concerned here, it was found that the problem had been dealt with by Francisco de Vitoria who said in 1557 that the right of navigation with all its practical consequences is based not only on the law of nature but also on the principles of the law of nations, and that he who denies this right denies the principles of the law of nature and puts himself beyond the pale of the international community.¹ Even earlier works by such jurists as Joannes Faber, Nicolaus Everard and Alfonso de Castro contain brief notes showing that they treated the sea as a common property, and that they recognized the necessity of the exploitation of the seas for purposes of navigation open to everybody.² Valéry³ found that Pope Alexander III wrote as far back as 1169 an epistle in which he had protested against the monopoly of sea trade.⁴

English juridical literature extolls particularly the merits of Queen Elizabeth who in a letter written in 1580 to the Spanish ambassador Mendoza replied very sharply to a Spanish protest against the expeditions of the English sailor, Francis Drake, in seas to which Spain was putting forth her claims. H. A. Smith⁵ goes even so far as to say that "it is now generally recognized that it is the Queen Elizabeth that we owe the first clear assertion in actual diplomacy of the principle which later came to be known as the freedom of the seas."

Higgins⁶ also says that "Elizabeth, although her declarations were not always consistent, was thus the first to proclaim the freedom of the seas in the modern sense."

¹ TRELLES C. BARCIA, *Francisco de Vitoria et l'école moderne de droit intern.* "Rec. des Cours de l'Acad. de D. I.," 1927, II, p. 204.

² G. GIDEL, *Le droit international public de la mer*, Paris 1932, I, p. 139.

³ J. VALÉRY, *Le pape Alexandre III et la liberté des mers*, "Revue gen. de droit int. publ." 1907.

⁴ The attitude of the Pope arose from the protracted competition between the Mediterranean ports of Genoa and Montpellier. For when Wilhelm V of Montpellier, enthroned with the assistance of Genoese troops, granted Genoa a privilege restricting the navigation in the Lygurian Sea for ships other than Genoese, the Pope, in answer to a complaint by Montpellier merchants, raised his voice in their defence. The epistle says in a few scanty words that "it is unworthy to put forward claims from which even the Pagans refrained."

⁵ H. A. SMITH, *The Law and Custom of the Sea*, London 1948, p. 44.

⁶ HIGGINS A. PEARCE, C. J. COLOMBOS, *The International Law of the Sea*, London 1945, p. 41.

Queen Elisabeth refused in her letter to admit that "Spain had any right to debar British subjects from trade of from freely sailing that vast ocean, seeing that the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons forasmuch as neither nature nor public use and custom permitteth any possession thereof."⁷

It is worth emphasizing that several decades before Grotius published his *Mare liberum* and over a dozen years before Queen Elizabeth's reply to the protest of the Spanish ambassador, the principle of the freedom of the seas had its adherents in Poland. More, for a short time it was a guide line of the policy of the Polish State.

At the beginning of the Northern War, called frequently by the historians the War for Livonia, Polish diplomacy was developing a very energetic activity aimed at the formation of a coalition against Sweden. The growth of the sea power of Sweden put in jeopardy the then, shaky as it was, balance of political forces in the Baltic zone. The legal and political situation on the Baltic was drawing at that time the attention of all the coastal states, as well as of the sea powers of Western Europe. In the 16th century, and especially in its latter part, the Baltic trade assumed a particularly large dimensions: the Baltic hinterland, and first and foremost the lands of the Polish State, were the granary of Europe, the northern and eastern ports supplied timber for the construction of ships. The Baltic trade was plied by ships of the Hanseatic towns, Denmark, Sweden, Gdańsk, as well as by numerous Dutch and other Western European ships.⁸

The letters and diplomatic instructions drafted at that time in the royal chancellery of Sigismundus Augustus express a legal and political conception of the freedom of the seas. The question is treated most comprehensively in the documents done in Piotrków in April 1563, especially a letter to the Bench of Lubbeck of April 9th. It must be pointed out that one year earlier Lubbeck had lost 32 ships seized by the Swedes for infringing a ban issued by the king of Sweden on navigation in waters off Narva.

The first part of the letter to the Lubbeck councillors describes the common danger: "We have received an intelligence that the King of Sweden has decided to move on land and at sea against our dominions, and has, therefore, decided to direct all his efforts most determinedly for

⁷ *Ibid.*

⁸ Cf. A. SZELAŃGOWSKI, *Walka o Bałtyk [The Struggle for the Baltic]*, Lwów 1904, p. 14 ff; D. SCHÄTER, *Der Kampf um die Ostsee in 16. und 17. Jahrhundert*, "Hist. Zeitschrift," 1899, p. 438 ff; *La Pologne et la Baltique*, Paris 1931, article by H HAUSER, *Un Français dans la Baltique du XV^e siècle*, p. 25.

the purpose of taking the whole of the Baltic Sea and exposing it to the mercy of robbers and pirates. And once he establishes his rule over the sea, he will become first the lord of Livonia, trusting in reinforcements he promises himself to bring over from Germany, and then he would use Livonia to destroy the freedom of the neighbouring principalities and nations, and to launch an assault on their armed forces and possessions.”⁹

The letter goes on to express the confidence that Poland will be able to carry out her duty of defending Livonia on land without any major difficulties, “particularly if the Swedes are deprived of the opportunity of sailing with their soldiers” from the Hanseatic ports. In view of the fact that Poland was badly prepared for sea warfare, however, Sigismundus Augustus asked Lubbeck for assistance in averting a common danger.

“Since, however, we are in fact less prepared for war at sea, without which preparations it is impossible to deprive the Swedes of their hope of using German soldiers, you shall be in duty bound to undertake urgent efforts that no harm should ensue for our possessions and yours from that quarter: no effort should be spared in particular, the matter being brought to the attention of the captains of your ships, who should be prevented from such a mastery of the sea, to which he is inclined the most, that would enable him to use the sea to his own convenience alone, and for conquering the possessions of the neighbours.

“Since you are better armed and equipped with ships than ourselves who are grown used to fight with horses and men, all the more should you fulfil your duty in the common danger, to guard the ancient freedom of the sea and the safety of the ships.”

Sigismundus Augustus gives a clear-cut and emphatic justification to the need of opposing all attempts at extending the mastery of a single state over the sea. He puts forth economic and political arguments in favour of the freedom of the seas and against the attempts at extending *dominium maris* over the waters of the Baltic:

“For it is easily understood that he who becomes the lord of the sea, he would be in future the lord of the whole of its coast, and in particular, which may it never happen, the lord of your town, Lubbeck, because of grasping for himself all kinds of advantages of which your town, nor any other marine state, must be deprived.

“The matter itself precludes all delay in making this effort, because the enemy has made such calculations that he will want to start the war claiming first of all the rule of the sea.”

⁹ Text quoted from the collection of documents: J. BURCHARD, MENCKENIUS, *Sigismundi Augusti Poloniarum Regis Epistolae Legationes et Responsa*, Leipzig 1703, p. 187 and following.

In the closing part of his letter Sigismundus Augustus advises the councillors of Lubbeck what steps had been taken by the Polish court to form an anti-Swedish coalition. He counters the attempts against the freedom of trade and navigation with his own plans of upholding and expanding the trade privileges of the merchants of Lubbeck:

"And we are inviting to the alliance on this head the Most Gracious Dukes of Prussia, Pomerania and Mecklemburg, even the King of Denmark himself, as well as others, promising ourselves all from their friendship. Since we ourselves are most firmly determined to stand up against the lightheadedness and audacity of the foe, and since yourselves are concerned in an equal degree in a joint extinguishing of the blaze, we do not think you will default in your endeavours. For it is easily conceived that if in the present state of affairs the Swede demonstrates such audacity, and tries by violence to deprive Lubbeck, as well as the other Hanseatic towns, of the freedom of the sea and the trade, all be it his chances are doubtful and frail so far, then let him only become the lord of the sea or Livonia, which may it never happen, he would make bold and would make all attempts to destroy the freedom of those towns. We would desire as a matter of fact, in accordance with our possibilities, rather to render services and grant new privileges to those towns than to deprive them of the old ones, and we shall act with the greatest willingness in the future, either by granting them trading sites when the need arises, or by establishing free trade in such towns that will be jointly named with our consent and yours."

In other letters of that period Sigismundus Augustus skilfully uses the same arguments: as a rule the letters couch the idea in identical sentences and phrases, with certain deviations, however, required by the change of the addressee. In his letter of the same date addressed to the burghers of Gdańsk, for example, Sigismundus Augustus asks not only for a speedy forwarding of the letter to Lubbeck, but calls on them also "to negotiate privately on their own behalf in their relations with that town, aware that it involves in an equal measure their own cause, in order to prevent the Swedish mastery of the sea, and to spare neither efforts nor endeavours for protecting their own security." In the same letter Sigismundus Augustus emphasises the weight of the problem ("We wish ourselves fully and command you to show the greatest concern on this head"). He describes in the following manner both the danger and the plan of averting it:

"However regarding the conquest of Livonia we have provided against him [the Swede] forces which could be assembled on land, were he to become lord of the sea, which seems to be most likely his intention, it would constitute for him goodly assistance in conquering Livonia in

defiance of our will. We command you, therefore, that together with such neighbouring towns as are of import at sea you should concentrate forces and go into councils so that when the time comes you be able to prevent a sudden conquest of the sea by the enemy; this will happen when by a joint accord you assemble a none too great fleet that would not permit the Swedish ships to cruise in the Baltic at their will. In the meantime also other princes whose assistance we have asked by letter in the same manner will join their forces to the common action against this threat.

"And that you should more willingly go into this enterprise, we have consented even earlier that everybody who should zealously wish to come to our assistance may receive the whole spoils he succeeds in taking from one side to the other; we reserve for ourselves only a tithe of the spoils, and that rather for reasons of our royal majesty and sovereignty, and not for any advantage or profit."

In a letter to the Duke of Prussia, dated April 8th, 1563, Sigismundus Augustus thanks him for information concerning Sweden's preparations for the war, asks him for reinforcements and assistance in the form of preventing the transport of Swedish soldiers from Holstein. He advises him at the same time that he had called on the Gdańsk burghers to supply naval forces in order to "oppose the enemy who intends to become the lord of the Baltic Sea" (*Baltici maris dominium*).

In another letter to the same duke, dated April 19th, Sigismundus Augustus wrote:

"We call, therefore, on Your Highness to show us your counsel and assistance in all these troubles: and in particular, as Your Highness appreciates that we are ill-prepared with regard to sailing equipment, of which we have advised you already (for the intentions of the enemy seem to be based most strongly on the conviction that he will be able to conquer the sea), Your Highness should undertake endeavours making possible the formation of a navy, with the help of the common forces and resources of other princes, which navy would thwart the plans of the enemy and prevent him from usurping the mastery of the sea, while we are assembling forces, that we shall lead overland with the aim of wrecking this ignoble enemy conspiracy."

We find the same argumentation in the instructions for the Abbot of Trzemeszno sent on a mission to the Margraf of Brandenburg and the Dukes of Mecklenburg, as well as in the instructions for an envoy sent to the Dukes of Pomerania. This latter instruction contains a paragraph pertaining to the freedom of navigation on the Warta and Odra rivers:

"Still holds our attention the memory of the demands submitted by Your Highnesses through our deputies at the recent Piotrków Sejm concerning the restoration of the old routes, concerning the recovery of

freedom on the Warta and Odra rivers, and finally concerning the delimitation of the boundaries of our common possessions. Since all this had been dependent above all on the appointment of plenipotentiaries and so it was stipulated, which plenipotentiaries were to examine the controversies with their Graces, the Margraves of Brandenburg, because it was they who were to have changed both the old routes and impose restrictions on the Warta and Odra, our envoy should tell you that with the greatest care we have already chosen the plenipotentiaries and have urgently given them all directives what they are to do on our behalf."

The instruction of Sigismundus Augustus of March 10th, 1565 for Franciszek Żeliszewski, the Chamberlain of Malbork, and for a Gdańsk councillor, envoys to Denmark, bases its argumentation on the principles of the law of nature:

"And so His Majesty the King considers in the first place that all profit from the sea is common to all on the strength of the law of nature, preserving this law fully inviolate. His Majesty does not think that it is at all possible to forbid anyone to navigate the sea, unless it be those who had yielded the sea up to their own robbers and pirates, or those who had declared themselves to be our enemies or our enemies' allies and friends. If, thus, anyone utilized in this manner the navigation of the sea that he would go after honest profits and would refrain from any hostile actions both towards ourselves and towards others, it does not seem possible that anybody could in any manner forbid navigation to such a one."¹⁰

There existed without any doubt a connection between the diplomatic action of the Polish court and its views on the question of the freedom of the seas on the one hand and the signing of the Polish-Danish Treaty (Szczecin, October 5th, 1563) on the other. Denmark agreed in this treaty to the demand of guaranteeing for the subjects of the King of Poland "free navigation and trade as well as the carriage of all cargoes on all seas, and the conclusion of transactions, while Poland agreed to grant to the "subjects of the Royal Majesty of Denmark and all men free navigation and the possibility of plying trade without any let or hindrance."¹¹

The diplomatic correspondence of Sigismundus Augustus from the years 1563 - 1565 expresses new, progressive legal and political views in the field of maritime problems. The substance of the new approach to the legal situation of sea areas and the main point of the programme of the

¹⁰ Translation from a Latin fragment of the instruction quoted by S. BODNIAK [*Poland and the Baltic at the Time of the Last of the Jagiellons*, Kórnik 1946, p. 230] with reference to the document deposited at the Rigsarkivet in Copenhagen.

¹¹ *Codex Diplomaticus Regni Poloniae et Magni Ducatus Lithuaniae*, vol. 1, Wilno 1758, p. 360.

maritime policy is the guaranteeing of the freedom of navigation and sea trade (*libertas maris et commerciorum*), the justification is based on economic arguments ("*maximae rerum omnium opportunitates, quibus maritimae omnes civitates carere non possunt*") and political arguments (the danger of the sea being held by a single state). On the other hand, the letters and instructions written in Piotrków do not refer at all to arguments of a philosophical and theological nature, so characteristic for the expression of legal and political ideas of that period. The latter arguments still occupy a no mean part of the treatise of Grotius. Neither do the letters and instructions try to trace the origin of the right to free navigation back to treaties, grants or other documents. The sole reference to the past is contained in the letter to Lubbeck when it speaks of the "ancient freedom of the sea." Neither does the 1563 correspondence refer to "the law of nature;" the influence of this doctrine may be seen only in the 1565 letter to the King of Denmark.

The centre of the gravity of the argumentation lies in the demonstration of the danger threatening the Baltic states should Sweden hold the Baltic. Sigismundus Augustus does not confine himself to listing the negative economic consequences which would result from the Swedish mastery of the Baltic, but charges Sweden with the intention of seizing — on a further stage of the development of her power — the coast of the Baltic and of subjugating the coastal towns and provinces. By the very nature of things, the tactical element — to persuade the addressees to join the anti-Swedish coalition — had to come before the theoretical element of the diplomatic correspondence of Sigismundus Augustus: for the letters and the instructions are not a legal and political treatise which deduces certain laws from fundamental principles and doctrinal premises. However, the content of the diplomatic correspondence of Sigismundus Augustus is no doubt a proof of a certain departure of the authors of this correspondence from the Maedieval way of thinking and arguing, and shows a close affinity with the legal and political views which were to develop in modern times. This is proved to a certain extent by the terminology. Schäter¹² notes that the term *dominium maris* was used for the first time by Sigismundus Augustus. Although it does not seem that one can accept this thesis without reservations (terms and epithets pertaining to the rule of the sea were used even in ancient times, and the Middle Ages know many attempts at extending power and legal order to certain sea areas), the correspondence of Sigismundus Augustus contains something which portends a new historical epoch, namely the confrontation of the rule of the sea (regulation and restriction of alien navigation) with the freedom

¹² D. SCHÄTER; *op. cit.*, p. 435.

of the seas, which results from an alignment of forces in which no one state should dominate over other states at sea. In this respect the views contained in the correspondence of Sigismundus Augustus go even further into the future than Grotius' treaties on a free sea; for they are a nucleus of the doctrine of political equilibrium in the "European concert," and which was formulated in a legal manner only in the Treaty of Utrecht of 1713 ("*iustum potentiae aequilibrium*"). It was Vattel¹³ who expressed this doctrine in 1758 as applied to maritime problems in the science of international law in the words: "A nation which without a legal title tries to ensure for itself exclusive rights at sea and hold them by force — violates common law, wrongs all nations, and they are, therefore, justified to organize joint action against attempts on the freedom of the seas."

The precursory character of the legal and political views of Sigismundus Augustus in the field of maritime problems is not accidental and detached from life. His views originate from the then economic and political situation in the Baltic zone. At a time of a flourishing development of sea trade on the Baltic, a trade which as regards turnover was much bigger at that time than the trade with the colonies, it was in the interests of the Polish state to ensure conditions of free navigation and the development of its own fleet.¹⁴ The accumulation of capital connected with the development of trade is of momentous influence on the formation of legal and political views: as regards the legal situation of sea areas the new conceptions are critical of the feudal claims to the rule of the seas.

In that period, and especially during the war for Livonia, the group of the Baltic states forms a "concert of states" whose economic and political interests are most closely interrelated. Sigismundus Augustus draws proper political conclusions from the existing situation. He sees clearly the danger which could arise for Poland and her economic interests if the Baltic trade became the monopoly of any single Baltic state: hence the postulate of coalition against the strongest. This negative postulate is accompanied also by a positive programme: development of a maritime fleet and expansion of coastal possessions.

The question might arise why the legal and political views of Sigismundus Augustus expressed in the correspondence dated from Piotrków have not been dealt with properly by historians so far. The posing of this question seems all the more justified, since problems of the Baltic policy of the

¹³ E. VATTEL, *Le droit des gens ou les principes de la loi naturelle*, vol. 1, Chapter XXIII.

¹⁴ Cf. *Monografia Wisły* [Monograph of the Vistula], issue XI; S. KUTRZEBĄ, *Wisła w historii gospodarczej Polski* [The Vistula in the Economic History of Poland], p. 17 ff, and A. SZELAŃGOWSKI, *Walka o Bałtyk* [The Struggle for the Baltic], p. 16 ff.

old Polish Kingdom are not subjects which have been neglected by Polish historiography. The reverse is true — in the inter-war period, in connection with the recovery of the coast and the development of maritime fleet — quests for historical origins of the maritime activity of the Polish state were quite frequent. This may be seen in the comprehensive, primary source works of W. Konopczyński, K. Lepszy, S. Bodniak, A. Czolowski and others.

I think that this seemingly strange phenomenon is explained by reasons of a twofold nature: — the evolution of the views of Sigismundus Augustus in the field of maritime problems, and next by the fact that our historians either did not perceive or underestimated the international law aspect of the problem. In the course of the protraction of the war for Livonia, then military setbacks, impossibility to gain new and insincerity of existing allies in the defence of the freedom of navigation in the Baltic — the ambitious plans of Sigismundus Augustus, aimed at ensuring freedom of navigation in the Baltic on the basis of an alliance of the states concerned against attempts at infringing political equilibrium, broke down. The king reduced the programme of the Polish Baltic policy and made it more realistic. He set himself the aim of exercising control of waters off the Polish coast by expanding the navy operating on royal orders, and by fighting the enemy at sea. As K. Lepszy¹⁵ says — already in the 1566 manifesto Poland tried “to ensure for herself, on principle of equality with Denmark and Sweden, the right of control in the Baltic.” From 1569 on, the term *mare nostrum* is applied to the Baltic Sea in the correspondence of the Polish court.¹⁶ In a letter of 1569 to Adolf of Mecklemburg, Sigismundus Augustus said that “the sea that circumfuses his state is subject to his power and jurisdiction.”¹⁷ Finally, in an instruction for pre-seym meetings of 1571, Sigismundus Augustus formulates the maritime programme of his kingdom: he puts forth in it the postulate of “*dominium maris* on which all the ports of His Royal Majesty are sitting” and demands the formation of a navy (“stiff armada”).¹⁸

The second reason, for which the views of Sigismundus Augustus so far have not attracted due attention in Polish history, is the fact that the Polish historians were mostly interested in presenting the efforts aiming at creation of the Polish navy. Consequently they concentrated their research on later years of the reign of Sigismundus Augustus. That is why in presentation of views and political guidelines of Sigismundus Augustus prior-

¹⁵ K. LEPSZY, *Dominium Maris Baltici of Sigismundus Augustus*, “Nauka i Sztuka,” 1946.

¹⁶ *Ibid.*

¹⁷ S. BODNIAK, *Kongres Szczeciński [The Szczecin Congress]*, Kraków 1929, p. 72.

¹⁸ S. BODNIAK, *Polska a Baltuk [Poland and the Baltic]*, p. 216.

ity has not be given to the years 1563 - 1565 when the audacious and progressive concept of the freedom of the seas was presented in the diplomatic correspondence of the Polish court, but to the years 1569 - 1572, when the former logically consistent political and legal concept was abandoned and the Polish King at the end of his life supported the ideas of extending the Polish *dominium maris* over some parts of the Baltic Sea.

Polish Directives of 1939 Concerning Aerial Bombardment in the Light of International Rules of Air Warfare

by ZBIGNIEW ROTOCKI

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I. Introduction

Already in the 17th century the well-known physicist Francesco Terzi who conducted research on construction of flying machines arrived at conclusions surprising in their perspicacity and foresaw the dangers which the invention could entail in the event of war.¹ However, even in the 19th century when balloons were already widely used for military purposes, potentialities of air warfare were not realized, and hence no efforts were made to have them legally normalized because for the purposes of aerial bombardment balloons were useless in view of difficult manoeuvrability and negligible payload.²

When first aircraft appeared the situation was vastly altered. The first

¹ Cf. the treatise by Alfonso Reys on Francesco Terzi (1631 - 1687), quoted by J. KROELL, *Traité de droit international public aerien*, vol. 2, Paris 1936, p. 18. Terzi said: *Personne dans une cité ne pourrait se dire à l'abri d'une attaque aérienne. Non seulement les navires, mais les maisons, les châteaux, les cités pourraient être détruits.* (Ibid, pp. 18 - 19).

² The only known instance of using a balloon for aerial bombing — apart from the semi-legendary gigantic balloon which, on exploding, allegedly scattered a hail

endeavours to utilize aircraft for military purposes were made in 1910, when 12 airplanes and dirigibles played a part in the French army's autumnal manoeuvres.³ The Turkish-Italian war of 1912 and the Balkan war of 1912 - 1913 marked the first attempts to utilize the still crude machines not only for observation purposes, but also for aerial bombardment. But it was only in the First World War, together with its unprecedented qualitative and quantitative development of aviation on both combatant sides and the use of aircraft, especially in the final years of the war not only for support of land forces but also for raids far behind enemy lines, that the problem of legally regulating the principles governing the use of aviation for the purposes of war emerged with acute urgency. Especially attacks entailing destruction of non-military objectives and losses among civilian population brought into sharp focus the specific characteristics of the new weapon and the necessity of settling numerous issues which could not be solved within legal provisions governing operations on land and sea.

The urgent necessity of legally curbing destructive potentialities of aviation was dramatically magnified by its explosive development as a result of which airplanes were endowed with increasing practical possibilities of effecting strategic bombing of towns and civilian populations. Unfortunately, however, to anticipate developments, one can say that in this particular field of international law we still do not have precise legal norms and must largely base ourselves on convictions, since in the positive norms of war regulations we only find individual rules, and these are only applied by analogy, while the proposed code of aviation law, the so-called The Hague Aviation Rules of 1923, have not been ratified by any country.

In view of this, the Polish Directives of 1939 Concerning Aerial Bombardment are particularly important because they make it possible to determine, on the basis of the government's official position, what was, in its opinion, the scope of the binding rules of air warfare on the eve of World War II. This is not unimportant in any attempt aimed to lay down in precision the norms of established practice in this particular field of international law. Moreover, to compare the Directives with the generally accepted principles of air warfare will emphasize humanitarianism and desire to abide by the principles of international law which inspired our

of bullets over the French advancing to Moscow in 1812 — was the launching by the Austrians of 200 small balloons loaded with explosives against Venice in 1848, quoted by BANET-RIVET, *l'Aéronautique*, 1898, p. 151.

³ See T. KRÓLIKIEWICZ, *Nowoczesny samolot wojskowy [Modern War Airplane]*, Warszawa 1970, p. 6.

air force on the eve of war. Finally, the Directives are either completely unknown or deliberately passed over in silence by authors dealing with air warfare problems.⁴

II. Conventional Law

1. Declarations of 1899 and 1907 Prohibiting the Dropping of Bombs and Explosives from Balloons

When the First Conference at The Hague convened in 1899 the first dirigibles had already appeared together with opportunities for aerial bombardment. This, combined with crude contemporary aiming instruments prohibiting bombing with any precision, for the first time involved a threat to civilian population. In this situation, the delegates of whom one even arrived at The Hague in a dirigible, tackled the problem of aerial bombardment and drafted a text of an appropriate declaration. However, considering that potential possibilities of aviation development were still underestimated, they did not expect the declaration to have any major significance. This obviously facilitated a rapid agreement concerning its content.

Finally, the Conference adopted a Declaration laying down that "the powers which are parties to the agreement consent for a period of five years to prohibit the dropping of bombs and explosives from balloons and by any similar new method." This agreement, moreover, was to be binding on the signatories only, and was to lose validity in the event of participation in war of any state which had not signed it (the clause of universal participation). The rather brief period during which the Declaration was to retain validity was due, in the opinion of Spetzler⁵ to, on the one hand, unwillingness to give up for good a new effective weapon, and on the other, a belief that technical progress would make it possible to discover methods of more precise bombing of targets, and by this means to reduce the danger to civilians. The Declaration was in due course ratified

⁴ E.g. E. SPETZLER, *Luftkrieg und Menschlichkeit*, Göttingen 1956, p. 238, does not devote a single word to the Directives, and to the problem of the Polish air warfare doctrine devotes a single sentence: "*Die Tendenz des Gegners lässt sich nicht beurteilen, da der polnischen Luftwaffe bereits in den ersten Kriegstagen das Rückgrat gebrochen war so dass sie vornherein zu einer Luftkriegsführung nicht in der Lage war.*"

⁵ See E. SPETZLER, *op. cit.*, p. 30.

by 25 countries, while only Turkey and Great Britain refused to ratify it.⁶

The situation changed radically between the First and the Second Conferences at The Hague in consequence of the emergence of aircraft as a weapon of war endowed with much greater operational possibilities than dirigibles. It exerted a tangible influence on the attitude of countries towards proposals for renewing the already expired Declaration Prohibiting the Dropping of Bombs and Explosives from Balloons with a provision that its validity was to be prolonged until conclusion of the Third Peace Conference. The proposal was accepted at the Conference at The Hague in 1907 by only 28 votes out of a total of 44 delegations, but when it came to ratifying it, only 18 countries did so. These included only two powers, the US and Great Britain.⁷ The remaining powers, Austria - Hungary, Germany, Russia and Italy voted against the Declaration, while France and Japan abstained from voting. This behaviour of countries was symptomatic of their subsequent attitude towards attempts at incorporating air operations within a framework of legal order.

At this point it is worth while to reflect upon a basic issue, namely to what extent did the provisions of the 1907 Declaration provide a binding norm of international rules of air warfare. Had these provisions carried with them legal validity, any bombardment from the air would have been lawless, while the use of aircraft for engaging both military and civilian objectives, would have been illegal.⁸

Nevertheless, the Declaration failed to solve these problems, even for countries which were parties to the agreement. Strictly *de jure* the provisions were binding on parties since the Third Peace Conference planned for 1914 did not take place. Nevertheless, for practical purposes, in view of the necessity of applying the clause *si omnes*, the agreement was worthless even for the signatories themselves. Moreover, its provisions did not become conventional law, since in view of the failure of the majority of

⁶ The Declaration was ratified by: Austro-Hungary, Belgium, Bulgaria, China, Montenegro, Denmark, France, Greece, Spain, Holland, Japan, Luxemburg, Mexico, Germany, Norway, Persia, Portugal, Russia, Rumania, Serbia, Siam, Switzerland, Sweden, the US and Italy.

⁷ The Declaration was ratified by: Belgium, Bolivia, Brazil, China, Haiti, Holland, Luxemburg, Norway, Panama, Portugal, Salvador, Siam, Switzerland, the US and Great Britain. It was joined later by Ethiopia, Liberia and Nicaragua.

⁸ See A. MEYER, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe*, Berlin 1935, pp. 113, 385. AJIL, January 1938, Supplement, p. 23, *La protection de la population civile en temps de guerre*, vol. 1, Paris 1939, 1, p. 113; E. CASTREN, *The Present Law of War and Neutrality*, Helsinki 1954, p. 402 and A. VERDROS, *Völkerrecht*, Vienna 1950, p. 372.

powers to participate, any claims that it expressed universally accepted practices would be invalid.

2. Application, by Way of Analogy, of the Provisions of The Hague Law on Land and Naval Operations of War

In view of the absence of special norms governing the use of air force, it is necessary to reflect whether and to what extent the general rules and practices of war applicable to any hostilities and on any theatre of operations would be pertinent in this particular instance. Principles which according to this doctrine could find application in air warfare were provisions of the Fourth Convention concerning the laws and practices of land operations and of the Ninth Convention concerning naval bombardment in wartime. Although these rules were also provided with the clause *si omnes*, yet during the First World War, despite involvement of countries which had not signed it, they were generally considered binding as a codification of valid norms of behaviour, and it is now possible to recognize that the clause of universal participation had been eliminated by virtue of precedent.

As regards the application of these rules to aviation by way of analogy, attempts were made to make use of Articles 25 - 27 of the Fourth Convention at The Hague. Article 25 lays down that "it is prohibited to attack or bomb in any way towns, residential houses and buildings which are not defended," while the expression "in any way" was included in the text of 1907 with an obvious intention to extend it over aircraft in the face of the impossibility of unanimous prolongation of the banning of dropping bombs and explosives from balloons accepted in 1899. In this way, unwilling to give up the possibility of using aircraft, it was desired to limit aerial bombardment to only certain targets. Furthermore, only tactical use of air force was taken into account. That is why the content of Article 25, especially in conjunction with Article 26 which concerns attacks on defended towns, obviously indicates that it applied to towns lying in the immediate vicinity of the zone of war operations, and whose destruction was unnecessary since they may be taken by means of manpower without causing unnecessary destruction and human hardships by bombing.

These principles are clearly inapplicable to strategic air force. Its objective is to engage in tasks of destruction directed against targets important from military point of view, irrespective whether they are defended or not. Moreover, the concept "defended objective" involves numerous practically unsolvable issues.

In the light of the above, one may have doubts whether an objective

protected by fighter air force is defended or not? Whether the mere existence of anti-air defence, or only its active involvement makes an objective defended? What is permissible to attack, only anti-aircraft artillery positions or entire town? Is a town over which air battles are fought between raiders and fighters a defended objective or not? Finally, in the event of not defending the whole area of the country, or of not possessing defence deployments, is the entire area behind the lines of either party in conflict to be recognised as excluded from the zone of operations of bombing air force?

Even mere listing of these doubts obviously illustrates that Article 25 of the Fourth Convention of The Hague cannot be recognized as a binding norm for strategic air force operations, and may only be applicable to air operations involved in directly assisting land forces (tactical air force).

The same also applies to Article 26, since whereas it makes sense in relation to land operations where an attacked town may capitulate in order to avoid destruction, as regards a bombing air raid it is devoid of this opportunity. Hence presenting towns with ultimative demands is pointless and nonsensical. Moreover, surprise is the essence of air raid, and in this situation even in land military operations (offensive) no advance warning is required. And further, the Article does not require an exact specification of time: a vague notification of an intended air attack means nothing for town defenders, whereas an exact specification of the time of intended air raid would make an air force unduly vulnerable. That is why it is generally accepted that no obligation of this kind is attendant on air force.⁹

On the other hand, Article 27, containing a generally valid norm prohibiting bombardment of certain objectives for humanitarian reasons, is binding on air force, but with due provisions for the specific characteristics of this arm. In consideration of this, it is necessary to take into account conditions of visibility, feasibility of aerial identification, and the requirement of special marking of these objectives by means of clearly visible signs. Further, Article 27 recommends the sparing of these objectives "as far as possible" and on condition that they are not used "for military purposes as well." Therefore, as is seen, it is not an unconditional ban and provides civilian population with merely indirect protection if it manages to seek shelter within the precincts of objectives listed in Article 27.

In addition, by way of analogy, one could also apply to air operations certain other provisions contained in The Hague Convention of 1907. These include provisions of Article 22 laying down that "combatant sides do not have an unlimited right to choose the means of hitting the enemy" and of Article 23g, in accordance with which it is impermissible to "destroy or

⁹ See E. SPETZLER, *op. cit.*, pp. 45, 66, and A. VERDROSS, *op. cit.*, p. 396.

appropriate enemy property unless such destruction or appropriation is necessitated by imperatives of war." These provisions, being an expression of the general principle prohibiting unnecessary harming of population and non-military property of the enemy, are applicable not only to land operations but air operations as well. Notwithstanding, they are too general (Article 22) and unprecise (Article 23g), and also fail to take into account the specific nature of air operations (marking of targets), and, therefore, may only serve as auxiliary norms in determining the scope of rules binding on air force. Finally, the Martens clause applicable to all operations of war is also applicable in air warfare.

3. Conclusions

As appears from the above considerations, declarations prohibiting the dropping of bombs from balloons did not bring about a binding prohibition of aerial bombardment. Similarly, attempts at applying by analogy certain articles of the Fourth Convention at The Hague fail for all practical purposes to protect towns and civilians against the consequences of bombing attacks. Hence conventional international law designed to eliminate dangerous consequences of strategic air force operations is inadequate. But this furnishes no basis for saying that there are no rules whatsoever in this sphere of war operations. These are in fact, the general rules of war and special prohibitions concerning the use of certain weapons, applied by analogy.¹⁰

In view, however, of the obvious inadequacy of these conventional norms it is necessary to investigate whether, and to what extent, a customary law has been developed to fill this gap, and to protect towns and civilian populations against the consequences of bombing raids.

III. Customary Law

1. Practice of the First World War (1914–1918)

This war brought about for the first time air force operation on a wide scale. Not only were aerial bombardments not eliminated in accordance with the Declaration of 1907, but on the contrary, both sides in the conflict began to expand their strategic air forces and to attack targets located far

¹⁰ These are the II and III Declarations at The Hague of 1899, prohibiting the use of projectiles whose only objective is to spread poison gas and bullets which expand in human body (dumdum), and Geneva Protocol of 1925, concerning the banning of poison gas and bacteriological weapons.

behind enemy lines. The Declaration itself, apart from its invalidity in consequence of the application of the clause *si omnes* (e.g. none of the Central Powers ratified it before 1914), was renounced by states on the grounds that it did not represent their legal convictions, and still less their long-established practices. Thus, for all intents and purposes, the war actually legalized bombing raids on targets situated behind the front. On the other hand, the provisions of the Fourth Convention of The Hague were recognized as binding for both land and air operations, despite the fact that not all combatants had participated in it, because it was considered that these provisions were an expression of long-standing established rules in this matter.

In the initial phase of the war, despite sporadic Zeppelin raids, air force activity was predominantly confined to supporting land armies, since it was only at the beginning of 1917 when airplanes of appropriate range were constructed to effect strategic bombing raids. From that moment attacks on targets deep into enemy territory became more frequent.¹¹ Notwithstanding, they were targets of military importance such as, for instance, railway junctions, highway intersections, munition factories, etc., while the consideration whether they were defended or not was disregarded. Attacks of this kind were considered legal. On the other hand, air raids directed solely against civilian population for the purpose of terrorizing it were banned as violating international law.¹² Attacks of this type, if they occurred, were explained away as reprisals, or as necessary attacks on military targets located in regions inhabited by civilian population. On the other hand, in instances of terrorist attacks by the adversary, he was invariably accused of violating the rules of war.

But the obligation of notifying civilians of intended air raids was not respected in the First World War. It was considered sufficient to give a single general warning to population of the whole enemy territory.

To sum up, one may say that the operations of First World War brought about the following solutions of problems of rules of air warfare: a) the ban on aerial bombardment was lifted on the basis of precedent; b) differentiation between civilian population and combatants was retained, hence terrorist attacks and failures to identify bombing targets were condemned; c) it was considered permissible to attack military targets in the whole enemy territory, while losses which the civilian population might suffer on such occasions unless deliberately inflicted, were tolerated; d) air

¹¹ See detailed list of bombed targets in J. M. SPAIGHT, *Air Power and War Rights*, London 1924, p. 233 and J. KROELL, *op. cit.*, vol. 2, p. 97.

¹² See J. M. SPAIGHT, *Air Power and Cities*, London 1930, pp. 198-206; L. OPPENHEIM, *International Law*, vol. 2, London 1944 (6th ed. H. Lauterpacht), p. 414; E. SPETZLER, *op. cit.*, p. 144; and *Wörterbuch des Völkerrechts*, ed. Strupp-Schlöchter, vol. 2, Berlin 1961, p. 436, "Luftbombardement."

force use of incendiary and explosive bombs was accepted against the provisions of the 1868 Petersburg Declaration; and e) reprisals in the form of attacks on non-military targets were tolerated when they were a retribution for similar enemy activity.

At any rate, hostilities of First World War demonstrated for the first time military opportunities, and at the same time, dangers to civilians which the strategic use of air force may entail, as well as difficulties attendant on the efforts to curb this use. On the one hand, destruction caused by air raids away from battlefield, and losses suffered by civilian population, demonstrated the need for finding means to curb operations of this type, and on the other, the states were unwilling to renounce bombing air force, such a powerful instrument of putting pressure on the enemy. The whole issue boiled down — and still does — to defining the meaning of “objective of military significance.” To be more precise, the point at issue is to determine what objective may be legally attacked from the air, and to what extent may the civilian population become the victim of operations of this kind.

At any rate, the existing factual state of affairs and the experience of First World War plainly demonstrated the necessity of establishing rules governing the use of this weapon, and of protecting towns and civilian population from aerial bombing attacks.

2. The Hague Air Regulations of 1923

This necessity was recognized by the naval disarmament conference which met in Washington in 1922. A plenary session of this conference adopted a resolution laying down that

“in the interest of humanity [...] it is advisable to codify the rules governing the use of airplanes in war operations and to make them an object of international agreement.”¹³

In connection with this, following a motion of the French Foreign Minister Briand, it was resolved to set up a commission to draft appropriate legal rules needed in the face of the emergence of the new means of warfare since 1907. The commission, subsequently named Commission of Lawyers¹⁴, prepared, i.e., a draft of Rules of Air Warfare.¹⁵ The basic principle

¹³ See Rapport de la Commission de L'Aéronautique à la Conférence de Washington, in “Revue Aéronautique Internationale” No. 2, p. 256 ff., quoting J. KROELL, *op. cit.*, vol. 2, p. 6, No. 1.

¹⁴ It included two specialists from each of the following countries: US, Great Britain, France, Japan and Italy, as well as additionally invited Holland and 52 military specialists. J. B. Moore was elected chairman and the session was held at the Hague from Dec. 11, 1922 to Feb. 6, 1923.

¹⁵ See text AJIL, 1923, Supplement, p. 242, and AJIL 1938, Supplement pp. 1 - 56.

of this draft is expressed in Article 22 according to which "It is prohibited to engage in aerial bombardment whose purpose is to terrorize civilian population, destroy or damage private property devoid of military significance and to kill non-combatants," supplemented in Article 23 by a prohibition of bombing designed to extort requisitions in kind or contributions in cash.

Article 24 contains a list of targets which it is permissible to attack. A general definition of such target is given under item 1 of this Article, stating that

"air bombing is legal only when it is directed against a military objective, i.e. an objective whose destruction or damage is of obvious military advantage to the combatant."

In this way the concept of "defended objective" is given up, and replaced by a wider concept of "military objective." And further, the next item 2, lays down this concept in precision by adding to the previous general definition a detailed list of objectives of military significance. These are: armed forces, fortifications, military installations and depots, factories insofar as they are known to be important producers of arms and ammunition, military stores, and also communication and transport lines insofar as they are used for military purposes.

Contrariwise, it is prohibited to bomb towns, villages and buildings not located in the immediate vicinity of the theatre of land forces operations (item 3), just as the bombing of objectives listed under item 2 when they are located in such a way that an attack would entail simultaneous bombing of civilian population. On the other hand, should towns, villages and civilian population be located within immediate range of operational zone, they may be bombed when suspicion arises that concentration of enemy forces in these regions is sufficiently great to justify such bombing, and to involve corresponding dangers to civilians (item 4).

Article 25 provided special protection for buildings intended for public worship, art, science, charity, historic monuments, hospitals, and casualty transit camps, unless they were used for hostile purposes, whereas the possibility of setting up protection zones for historic monuments was suggested in Article 26. The draft contains certain ambiguities: e.g. it fails to specify whether railway lines have to be continuously or only temporarily used for military transports, to be classified as "military objectives." It also fails to define in precision "obvious military advantage." In all doubtful cases it was necessary to refer to the principle laid down in the draft, that only obvious and undoubtful military objectives may be attacked with the exclusion of attacks terrorizing civilians. And even those objectives when they happen to lie outside the zone of war

operations, should not be attacked in instances when such an attack could involve dangers to civilian population.¹⁶

The Hague Regulations were not in fact an original creation, but an outcome of efforts designed to adjust the general principles of the rights of war to a new situation which arose in consequence of the emergence of airplanes. Unfortunately, they failed to achieve their objective, i.e. did not become a basis for concluding an appropriate international agreement. Reasons for this should be sought in the unwillingness of states to bind themselves by detailed regulations in such an important sphere of their defence, especially when, in their opinion, these regulations excessively limited the combatants' freedom of action. Hence Koževnikov was right in writing that "the reason for non-ratification of The Hague Regulations was the unwillingness of imperialist states to bind their hands by commitments limiting the use of air force on which they counted as an effective means of attack."¹⁷

Despite the fact that The Hague Regulations were not incorporated into a form of binding agreement, they were undoubtedly an expression of prevailing legal conviction. It was an official effort aimed at explaining and formulating the rules evolved in the practice of war operations. It is therefore possible to say that The Hague Regulations formed an attempt at codifying the existing principles of the customary law of air warfare.

In certain instances the governments publicly declared that they would abide by The Hague Regulations in carrying out air operations.¹⁸ Representatives of the doctrine too, are unanimous that The Hague Regulations are of major importance as an expression of legal conviction of states, evolved on the basis of the experience of First World War, and that in the

¹⁶ The principle was opposed by E. SPETZLER, *op. cit.*, pp. 192 - 193, in whose opinion: "Eine derartige Regel hatte von vornherein keinerlei Aussicht auf praktischen Bestand, da ihre Beachtung unzumutbar ist, insofern gehen demnach die Haager Luftkriegsregeln mit ihrem Art. 24 zu weit." Similarly J. M. SPAIGHT, *Air Power and War Rights*, London 1947, p. 252; R. J. WILHELM, *La Convention de Genève et la guerre aérienne*, Geneva 1952, p. 23; E. CASTREN, *op. cit.*, p. 202 and *Commission d'experts pour la protection juridique des populations civiles et des victimes de la guerre en général contre les dangers de la guerre aérienne et l'emploi des armes aveugles*, Genève 1954, p. 13.

¹⁷ See T. I. KOŽEVNIKOV, *Meždunarodnoe pravo*, Moskva 1964, p. 656. Similarly R. SANDIFORD, *Évolution du droit de la guerre maritime et aérienne*, R. d. C., 1939 - II, p. 688; E. CASTREN, *La protection juridique de la population civile dans la guerre moderne*, RGDIP, Janvier-Mars 1955, p. 132 and E. SPETZLER, *op. cit.*, p. 157, para. 19.

¹⁸ See L. OPPENHEIM, *op. cit.*, vol. 2, p. 408, who says that Japan made such a declaration in 1937.

interwar period they were the most authoritative definition of scope of validity of the norms of air warfare.¹⁹

3. Activity of the League of Nations in the Sphere of Development of Air Warfare Regulations

Plenary session of the Disarmament Conference held under the auspices of the League of Nations on July 23, 1932, adopted a resolution stating as follows:

"The Conference, fully aware of the dangers which aerial bombardment may entail for civilization in the event of a possible future conflict, and determined to undertake all practical steps to prevent such danger, formulates at the present stage of its work the following recommendations: 1) Any air attack against civilian population is categorically prohibited; 2) The high contracting parties pledge themselves to ban aerial bombardment against each other on condition of reaching agreement as to the means to make the observance of this prohibition effective."²⁰

In the course of the conference too, individual governments put forward far-reaching proposals conducive to banning attacks against civilian population or banning air bombing generally, possibly drastically limiting it, or even banning construction of bombers.²¹ Since the whole disarmament conference failed, these endeavours did not produce any tangible results.

Once again, in September 1938, the XIX Assembly of the League of Nations adopted a resolution stating that despite the banning of bombing of civilian population in conformity with the general principles of the rights of nations, and despite the fact that this prohibition does not require another confirmation, it was nevertheless necessary to make it more precise by stating the rules specially adapted to air operations, taking into account the recent experience following from the practice of states. In connection with this, the Assembly fixed the following principles as a necessary basis for subsequent settlement of the problem: a) intended bombing of civilian population is prohibited; b) objectives which it is permitted to attack from the air must be military objectives and must be possible to identify; c) every attack against such military objective must be carried out in such a way as to eliminate causing, through carelessness, losses among civilian population resident in the vicinity.²²

¹⁹ See R. SANDIFORD, *op. cit.*, p. 667, L. OPPENHEIM, *op. cit.*, vol. 2, p. 409 and E. SPETZLER, *op. cit.*, p. 156.

²⁰ See League Doc. 1938 IX 63, pp. 268 - 271.

²¹ These proposals in L. OPPENHEIM, *op. cit.*, vol. 2, p. 417 and SPETZLER, *op. cit.*, p. 158, para. 28.

²² See "Off. J. Special Suppl." 1938, No. 182, p. 161.

As is seen from the above, the Assembly of the League merely confirmed the rules of the customary law of air warfare.

4. Attempts at Codification of the Rules of Air Warfare by Non-Government Organizations

Institut de Droit International at its session in Madrid in 1911 on the basis of Fauchille's report entitled *Regime juridique des aerostats* of which the second part dealt with military aviation, adopted a resolution stating that

"aerial warfare is permissible only on condition that it will not entail greater dangers to the population and its property than land and naval war."²³

This unrealistic and excessively theoretical approach is explained by the fact that in 1911 aviation was not yet conceived as a separate force, but solely as an arm of land forces. To better understand the attitude of Institute members, one may cite the fact that its participants reasoned from the premise that an aircraft should be considered as a kind of motor-car.²⁴

On its part ILA at its conference at Portsmouth in 1920 set up a committee for the purpose of investigating the laws of air warfare. It prepared and submitted at a conference at Buenos-Aires in 1922 a draft of regulations in which the thesis of the Institute of International Law put forward in Madrid was expanded by adding a ban on bombing civilian population, and by specifying objectives which may be legally attacked as "defended objectives." The rules accepted at Buenos-Aires were amended and adapted to The Hague Regulations at an ILA conference in Stockholm in 1924. The new draft (13 Articles) introduced in place of "defended objective" a concept of "objective of military significance," as well as a specific prohibition of bombings terrorizing civilian population.

The next step of ILA was to appoint in its session in Paris in 1936 a special commission to investigate the problem of protecting civilian population against air raids, and to draft an appropriate resolution for the next conference. The commission submitted to a conference of the Association in Amsterdam in 1938 as draft Convention for Protection of Civilian Population Against the New Means of Warfare. It suggested inviolability of all persons who neither directly nor indirectly participate in the operations of war (Art. 1); inviolability of localities not lying in the zone of war operations and in which military objectives do not exist

²³ See "Annuaire de l'Institut de Droit International," vol. 24, Madrid 1911, p. 345 ff.

²⁴ See R. SANDIFORD, *Note sul diritto aereo di guerra*, Rome 1931, p. 4.

(Art. 2); it permitted bombing in defended localities of only identified military targets (Art. 3): it banned terrorist attacks (Art. 4), and attacks on targets deep inside enemy territory with the exception of military units, military installations, military communication and transport lines, whereas their bombing was considered impermissible when it was impossible to effect an attack without at the same time harming civilian population (Art. 5). Although the resolutions of both these international organizations do not constitute laws, yet they carry great weight in determining the scope of validity of customary rules of air warfare.

Just as significant was the work of the "*Comité juridique international de l'aviation*" which in the years 1921 - 1924 and 1934 dealt with the problems of air warfare regulations. At a session in Prague in 1922, for instance, it put forward four requirements addressed to governments, including a demand for protecting civilian population by banning the bombing of localities and limiting permissible air raid targets, and also the means of air attacks. In 1923 - 1924 and in 1934 the Committee investigated a draft code of air warfare regulations, prepared in 1923 by Talam-Rolland and very similar in content to the Hague Regulations, especially in defining permissible objectives of air attacks (Art. 18 - 20).²⁵

On its part the International Committee of Red Cross approached the League of Nations in 1920 with an appeal that the latter should obtain limitation of air operations to military targets only, and enforce a ban on air raids on residential areas. In 1929 the ICRC published the results of a questionnaire which it had addressed to eight eminent international lawyers, in the form of a report entitled *La protection des populations civiles contre les bombardements*. In consequence of a rather pessimistic assessment of the situation expressed in this report, the ICRC convened a session of specialists in Geneva (Dec. 1 - 5, 1931) for the purpose of discussing air war regulations. They prepared numerous recommendations of which the most important laid down that terrorist air raids on civilian population were banned, and air attacks were permissible only on military targets. At the same time, they stressed the fragmentary character and paucity of air war regulations, and drew attention to the danger resulting to civilian populations from the importance to combatants of objectives located deep inside enemy territory.

Similarly, a Commission of a Permanent Committee of Military Doctors and Lawyers at Monaco in 1934 prepared a Draft Agreement Concerning Protection of Human Life in Wartime (the so-called Monaco Draft) designed to humanize operations of war. Chapter IV of this draft

²⁵ See "*Revue juridique internationale de la locomotion aérienne*," Vol. 15, Brussels 1902, p. 58 ff.

stressed the need for differentiating between civilian populations and combatants, and for guaranteeing their protection in war. This was laid down specifically in Article 1, stating that "the civilian population should be kept outside all forms of war operations." The draft was to be accepted in 1935 at a Brussels conference dealing with regulations of war, but in actual fact it never transcended beyond the confines of theoretical proposal.

Finally, an International Committee for Information and Activity to Protect Civilian Population in Wartime was set up in Luxemburg in 1938 (Comité de Luxemburg). It published a quarterly periodical "*La protection de la Population en Temps de Guerre*" [Protection of Population in War-time].

It put forward (Feb. 22, 1939) a proposal for regulating the rules of air warfare based on The Hague Regulations of 1923 and the ILA Draft of 1938.

5. Doctrine and Jurisdiction

In the initial period of development of air warfare regulations there was an obvious tendency among representatives of doctrine²⁶ to consider air warfare as a kind of complement to land and naval war, and to recommend application by analogy of appropriate legal regulations (according to Fauchille of naval war; according to Institut de Droit International in 1911, of land war). Nevertheless, after 1918 these tendencies were replaced by endeavours to emancipate air warfare and to subject it to special legal regulations. In view of an absence of normative rules and of the customary law origin of air warfare regulations, the role of the doctrine in the sense of facilitating their proper establishment and interpretation, is important. Unfortunately, it should be stated that in connection with the reluctance with which the doctrine has approached in the interwar period, the rights of war generally, the air warfare rules too, failed to find an adequate expression.

Whereas up to 1914, the most prominent specialist in this field was Fauchille, after 1919 he was replaced in this capacity by Spaight, author of numerous works and originator of a project of codification of air war rights.²⁷ This code, similar in its main provisions to The Hague Regula-

²⁶ See L. ROLLAND, *Les pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens*, RGDIP, Vol. 23, 1916, p. 511; J. M. SPAIGHT, *Aircraft in War*, London 1914, p. 51; similarly Institut of International Law at session in Madrid in 1911.

²⁷ See P. FAUCHILLE, *Le bombardement aérien*, RGDIP Vol. 24, 1917, p. 57 ff; J. M. SPAIGHT, *Air Power and the Cities*, London 1930, pp. 126 - 127 (Code) and J. M. SPAIGHT, *Air Power and War Rights*, London 1933, p. 247 ff.

tions, goes further nevertheless in fixing permissible objectives of air attacks. It included factory workers in the category of combatants and raw materials in the category of war materials, and permitted attacks on power stations, ports, aerodromes, etc., and was in fact an expression of the British doctrine of strategic air warfare.

Other scholars dealing with air warfare regulations, tried unanimously to provide protection of civilian population from air attacks, and to define in greater precision the concept of objective of military significance, following to a greater or lesser extent The Hague Regulations.²⁸

In jurisdiction during interwar period, only two verdicts were passed, and applied moreover to identical cases. Namely, a mixed Greek-German arbitration tribunal considered twice after First World War the problem of indemnities for losses caused to civilian population in consequence of air bombardment carried out by German dirigible LZ 85 on May 31, 1916 and June 1, 1916, against Entente troops, their fortification and camp situated at Saloniki.²⁹ In its verdict, the tribunal ruled that respecting life and property of civilian population had priority over bombardment of even permissible military targets, and that it was absolutely necessary to advise the population of an intended attack. Should this be unfeasible, it was necessary to refrain from bombing the target. Whereas the first thesis of the verdict corresponds, with Article 24 paragraph 3 of The Hague Regulations and Article 5 of the ILA Draft of 1938, and may be considered as confirmation of generally recognized practice, the insistence on advance warning about intended air raid finds no confirmation in legal convictions and practice of countries, and is therefore unjustified. This point of view was confirmed by the negative appraisal in the doctrine of this part of the verdict.³⁰

²⁸ See J. M. SPAIGHT, *Aircraft in War*, London 1914; J. M. SPAIGHT, *Air Power and Cities*, London 1930; J. M. SPAIGHT, *Air Power and War Rights*, London 1933; M. W. ROYSE, *Aerial Bombardment and the International Regulations of War*, New York 1928; A. MEYER, *op. cit.*; G. W. FEUCHTER, *Problème des Luftkriege*, Potsdam 1936; J. KROELL, *op. cit.*, vol. 2; R. SANDIFORD, *Diritto aeronautico di guerra*, Rome 1937; ROHRIG, *Die Ziele selbständiger Luftangriffe*, Berlin 1938; M. le GOFF, *Traité théorique et pratique de droit aérien*, Paris 1939.

²⁹ See Case *Coenca Brothers v. Germany*, "Annual Digest 1927-28," Case No. 389 and *Kiradolou v. Germany*, "Annual Digest 1929-30," Case No. 301. and in *Décisions-Tribunaux mixtes* 1928, pp. 683-688.

³⁰ See A. EDELBROCK, *Das Luftbombardement*, Tübingen 1929, p. 50 ff; A. MEYER, *op. cit.*, p. 136, para. 445; ROHRIG, *op. cit.*, p. 25; J. M. SPAIGHT, *Air Power and War Rights*, London 1947, ff; P. GUGGENHEIM, *Traité de droit international public*, vol. 2, Geneva 1954, p. 429, para. 2; and E. SPETZLER, *op. cit.*, p. 45.

IV. Practice of Countries in the Period 1919-1939

The practice of countries during this period, especially in the thirties', displayed disquietening symptoms of ignoring the distinction between combatants and non-combatants, and the use of air force to terrorize population by means of air raids on residential areas.

Thus, in the Sino-Japanese war, the Japanese frequently bombed towns with the view to demoralizing and breaking the will to fight of the Chinese population. Among others, Nanking, Canton, Honkow and Chungking were bombed.³¹ The greatest indignation was caused by the bombing of Nanking, ordered on November 19, 1937 by Admiral Hasegawa with an obvious intention to destroy the town and terrorize its population. In the Ethiopian-Italian war the Italians attacked civilian population many times by means of explosive and incendiary bombs and even used gas bombs. They bombed hospitals, ambulances and towns devoid of military objectives.³²

During the Spanish Civil War, General Franco's air force raided towns, especially after March 1938, and caused grave losses among civilians. Among others, massive air raids were carried out on Alicante, Barcelona, Tarragona, Valencia, Durango, Guernica and other towns including, primarily, Madrid.³³

These practices could not claim legality in conformity with the customary rights of air warfare, and still less could establish new practice in this sphere, since they met with categorical protests of the majority of countries and the League of Nations.

And so, in a Resolution of May 29, 1937 the Council of the League of Nations condemned the bombings of open cities in Spain as incompatible with international law, while in connection with the bombing of Nanking, the Assembly of the League of Nations in a note to Japan (Sept. 28, 1937) expressed its profound anxiety and indignation at the death of innocent population. Finally, still under the impression of the manner of waging

³¹ See details in *La protection de la population civile en temps de guerre*, Paris 1938, No. 1, p. 121, J. M. SPAIGHT, *Air Power and War Rights*, p. 256, para. 117; E. SPETZLER, *op. cit.*, p. 213.

³² See J. KROELL, *op. cit.*, vol. 2, pp. 469 - 503; v. NOSTITZ-WALLWITZ, *Das Kriegsrecht im italienisch-abessinischen Krieg*, ZaoRVR, Vol. 6, 1936, p. 703 ff; and E. SPETZLER, *op. cit.*, pp. 210 - 211. As regards the use of gas bombs see J. KROELL, *op. cit.*, vol. 2, pp. 496 - 498; E. CASTREN, *op. cit.*, p. 196; J. M. SPAIGHT, *Air Power and War Rights*, pp. 192 - 3; and E. SPETZLER, *op. cit.*, pp. 210, 284.

³³ See *La Protection* pp. 80, 83, 84, 87 and 201; M. le GOFF in RGDIP, 1938, p. 581 ff; J. M. SPAIGHT, *Air Power and War Rights*, p. 255; E. SPETZLER *op. cit.*, p. 212.

a war in China and Spain, the Assembly of the League of Nations unanimously adopted a resolution (Sept. 30, 1938) condemning the bombing of civilian population, needless from a military point of view, and contrary to international law, and demanded a settlement of air war rights. Neither did the governments remain indifferent in the face of this manner of waging war in the air. In a response to Admiral Hasegawa's threats, the US, Great Britain and the USSR presented protesting notes in Tokyo. The Soviet note of September 26, 1937 described Japanese behaviour as lawless and contrary to the generally recognized principles of the rights of nations, and held Japan responsible for the consequences of air raids.³⁴ The US note read in part: "[...] all bombing of a large area inhabited by a large number of population [...] is unjustified and contrary to the principles of law and humanity."³⁵

In connection with the air attacks of General Franco's air force, the US note to Burgos of June 4, 1938, considered the bombing defenceless towns as barbarity, and said that the bombing of a town possessing military significance but inhabited by a large population, violates all rules of humanity and law.³⁶ Finally, on June 14, 1938 the US Senate adopted a resolution sponsored by the Chairman of the Foreign Affairs Committee, Senator Pittmann, condemning the bombing of civilian population.³⁷

On his part, in a debate in British Parliament, Prime Minister Chamberlain declared on June 21, 1938, that although there were no international air war regulations, but the rules of land and naval war should be extended to cover air operations. In his opinion, the rules which applied in all three variants of warfare were: a) prohibition of deliberate attacks on civilian population; b) the principle that only known and identified military targets may be attacked; and c) the obligation to ensure, within reason, that attacks on military targets should not involve losses in civilian population through carelessness. Nevertheless, Chamberlain appreciated that practical observance of these rules was not easy, since every attacker denied the charge of attacking civilians, and insisted on having attacked targets of military significance. Next, he stressed the existing difficulties in precisioning definition "military objective," and said that it was difficult to prove neglect in view of unavoidable dispersion of bombs in air attacks.

³⁴ See *La Protection...*, pp. 166 - 167.

³⁵ See L. OPPENHEIM, *op. cit.*, vol. 2, p. 413, para. 2. In connection with this fact also President Roosevelt opposed air force attacks against civilians — see *La Protection*, p. 91.

³⁶ See *La Protection*, pp. 91 - 92.

³⁷ See *ibid.*, p. 92. Similar statements were made by the Belgian Foreign Minister, Spaak, Pope Pius XI, League of Human Rights and many other organisations. *Ibid.*, pp. 94 - 97.

To sum up, one may say that the negative reaction of public opinion and the attitude of governments in the face of instances of air attacks against civilian population in the thirties, emphatically indicate that these practices were contrary to customary rules of air warfare as these were understood in the interwar period.

V. International Air Warfare Rights in 1939

On the eve of World War II air force became a separate branch of armed forces, not merely an auxiliary arm of land and naval forces. The mere use of airplanes for military purposes was not causing doubts and protests, while the steps of countries proposing liquidation of bombing air force were mere propaganda.

Nevertheless, the silent acceptance of inevitability of air warfare did not necessarily imply expressing consent to an unlimited use of air power, especially in relation to civilians and residential areas. In consequence, the interwar period brought continuous pressure of public opinion on governments to conclude appropriate agreements eliminating all possibilities of using air power for terrorist purposes, and to exclude bombing of non-military objectives from legal air force operations. Hence air warfare rights were bound to have specific character closely connected with the efforts to humanize the provisions of war rights. But what practical results were achieved in this sphere in the interwar period? As regards positive rights, their state continued unsatisfactory, and Kroell was right in saying that they existed "in the form of certain fragmentary texts of international law whose general wording permitted their application by analogy to air warfare operations."³⁸

In the first place, these were general principles of war rights, primarily the principles of humanitarianism, and the basic thesis of war rights defending non-combatants against direct attack, and further, resulting from the Geneva protocol of 1925, prohibition of air attacks involving poison gas and bacteriological warfare, and a ban on the use of dum-dum bullets following a resolution adopted at the First Conference at The Hague in 1899.

On the other hand, the period was sufficient for evolving customary air warfare rights which may be determined on the basis of material

³⁸ See J. KROELL, *op. cit.*, vol. 2, p. 6. Similarly R. SANDIFORD, *Évolution*, pp. 660 - 661; "Pourtant, dans la domaine pratique de la discipline des hostilités aériennes, nous pouvons considérer que jusqu'ici il nous manque un règlement sur et bien défini," and A. VERDROSS, *op. cit.*, p. 365: "Hingegen findet man im positiven VR bisher nur vereinzelte Regeln über den Luftkrieg."

provided by the practice of countries, opinions of governments, verdicts of courts, and attempts at codification, both official and private. That is why it does not appear that Sandford was right in saying that "the airplane appeared too recently to allow for evolving a special, clearly defined established legal rules."³⁹ This is because in our time rules are evolved much faster than in the previous epochs in consequence of a greater intensity of international exchanges.

What rules therefore applied to bombing air force in 1939 in conformity with the established norms? They were: a) prohibition of terrorist attacks on civilian population with the exception of attacks on defended objectives situated in the zone of direct war operations, and b) prohibition of indirect harming of civilian population in connection with bombing attacks on permitted military targets if this can be avoided, or when the damage inflicted on civilian population is out of proportion to achieved military objectives. On the other hand, despite Article 24, para. 3 of The Hague Regulations, and Article 5 of ILA Draft, it does not seem that one could consider as a generally recognized established practice the thesis on banning the bombing of military targets if this involved civilian losses. The only departure from these rules could be activity in a state of higher necessity, not recognized however by a major part of the doctrine, as well as the use of reprisals.

From this it follows that as regards the most important matter, namely the question of terrorist attacks against civilian population, the opinion was uniform in recognizing bombing of this kind to be illegal. We find a confirmation of this established norm in the declarations published on September 2, 1939, by combatant sides in response to President Roosevelt appeal for "not attacking from the air under any pretext civilian population and undefended areas." In the notes of France and Great Britain we read that they pledged themselves "to conduct the operations of war in such a way as to spare civilian population and monuments of civilization" and to bomb "only clearly military objectives in the most restricted meaning of this word."⁴⁰

On the whole, one may state that the established rules of air warfare were largely based on the provisions of The Hague Regulations of 1923, which provided, in general opinion, the best attempt at codification of the principles of established rules of air warfare and a basis for a subsequent regulation of this part of operations of war.

³⁹ See R. SANDIFORD, *Évolution...*, p. 660.

⁴⁰ See J. M. SPAIGHT, *Air Power and War Rights*, pp. 259 - 60; and P. GUGGENHEIM, *op. cit.*, vol. 2, pp. 429 - 430. Attention may be drawn here to Roosevelt's use of the expression "defended place" immaterial for air warfare rights, instead of "objective of military significance."

It was realized, of course, that the tendencies of modern total war which were becoming clearly apparent in the thirties', aiming to obscure the difference between combatants and civilian population, the difficulties connected with determining the meaning of "objectives of military significance" and the difficult problem of obtaining required aiming precision in serial bombardment — all constituted serious obstacles to their application in practice.

VI. Polish Directives of 1939 on Aerial Bombing

The Directives, as was stated in their preamble, "had been agreed upon with the British and French Governments" and "were designed to prevent our initiation of activities contrary to international law." This formula, most unusual for a military instruction, normally an internal affair of the state issuing it, may only be understood in the general context of the military-political situation in which Poland and its Western Allies found themselves at that time. Hence the Directives originated from a sense of weakness of the air power, not only of Poland but also of France and Britain in the face of the Luftwaffe, and from a naive conviction of the Western Powers that if they adhered to the principles of air warfare rules, the Germans would behave accordingly, and would refrain from terrorist air attacks against civilian population.

This idea was clearly apparent throughout the Polish-British general staff talks held in Warsaw in May 1939. The British point of view concerning air bombing was explained by Col. Davidson as follows: "England will not bomb non-military objectives unless the Germans themselves first begin operations of this kind. This principle will be strictly observed, and not even civilian objectives possessing military significance (railway junctions, highway crossings, etc.) will not be bombed, unless it is established beyond any doubt that they are used for military purposes. In the event of German air force operations against towns and civilian population, Britain will bomb appropriate German objectives as a reprisal." ⁴¹

The fear of the German air force was clearly apparent in the subsequent statement, that in the event of necessary resorting to reprisals, should the Luftwaffe attack illegitimate objectives in Poland, England would embark on them only after consulting Warsaw, "since such reprisals could entail even more violent attacks on Poland." ⁴²

⁴¹ See *Procès verbal de la Réunion du 24.V.1939*, "Bellona," London July-December 1957, p. 37.

⁴² *Ibid.*

In this context the pressure of the Western Powers on Poland to eliminate everything which could provide a pretext for Germany to begin attacks on towns and civilian population, is understandable. In consequence, in the opinion of Kurowski, the Directives signed by Marshal Rydz-Śmigły "expressed the Commander-in-Chief's extraordinary sensitivity to these matters" and even brought about the issuing of an order on September 1, 1939, forbidding the bombing of targets beyond Poland's frontiers.⁴³ In consequence of this standpoint it becomes understandable why the Air Force Supreme Commander's plan to bomb military targets in Königsberg (port and military installations) by the VI and X squadrons of "Łoś" bombers, was turned down in the night of September 2 - 3.⁴⁴

For all intents and purposes this did not help much, since the Germans, despite having accepted Roosevelt's appeal, attacked towns and civilian populations in Poland without any limitation whatsoever, while Britain and France, as could have been expected, fearing for their own countries, did not apply any reprisals at all. In explaining their passivity they maintained that "specific instances" of the Luftwaffe's attacks on non-military objectives to corroborate the charges, were not available. Finally, General Villemin, Commander of the French Air Force, declared on September 9, 1939, that the French air force operations for the benefit of Poland were clearly undesirable, while the British War Cabinet, although it recognized on September 16, that the German air force proceedings relieved England of limitations accepted as a result of Roosevelt's appeal, did not in fact cause any major RAF operation against the Reich.⁴⁵

Obviously from the legal point of view, we are dealing with a clear and explicit text not giving rise to doubts of interpretation, and which has stood on its own ever since it first appeared. It does not require for its better understanding an investigation into the intentions of parties and causes of its appearance, and in conformity with the passage quoted at the outset, in the opinion of Poland, it is an expression of valid regulations in the sphere of air war rights. At any rate, there are no grounds to suppose that the substance of the Directives would have been different had the military situation been more favourable to Poland. An argument to sup-

⁴³ See A. KUROWSKI, *Polish Air Force in 1939*, Warsaw 1962, p. 123. This order was: "Order of the General Staff NWL 12/I/III op. — The Commander-in-Chief issued an order prohibiting carrying out offensive actions and air bombings outside state frontiers," cit. in *Polskie Siły Zbrojne*, vol. 1, London 1951, part 2, p. 3.

⁴⁴ See A. KUROWSKI, op. cit., p. 135; *Polish Air Force in the September 1939 Campaign*, London 1947, p. 69; F. KALINOWSKI, *Use of Polish Air Force in the September Campaign*, "Bellona," London July-September 1949, No. 1 - 2, p. 639.

⁴⁵ See W. BIEGAŃSKI, *Z genezy "dziwnej wojny"* [*Genesis of "A Strange War"*], "Wojskowy Przegląd Historyczny," 1965, No. 1/2, p. 639.

port this reasoning is the fact that despite possessing submarines in the Baltic and being in the position to sink enemy ships at sight without fear of any reprisals, the Command of the Navy ordered submarine commanders to abide by the provisions of Protocol of 1936. In the opinion of Commander Wroński, the order "completely frustrated any action against unarmed merchant shipping."⁴⁶

That is why, irrespective of circumstances attendant on its emergence, the text of the Directives must be recognized as an expression of the Polish position with the regard to the scope of validity of air warfare rights and assessed accordingly.

Provisions of the Directives⁴⁷ imply rules of two kinds, namely a general primary principle and detailed regulations subordinated to it. The primary principle we find in the following formulae: "In issuing orders, commanders should rather pay attention to the spirit of these directives, and not necessarily abide by their letter" (part III) and "Justification of bombing of even decidedly military objectives should depend on circumstances, and should be decided by commanders operating in accordance with the spirit of the present instruction." What is meant by the "spirit of the instruction," mentioned three times in the Directives and considered so important for its application?

It is the principle compelling to spare civilian population the consequences of air raids at almost all cost, even at the cost of making air operations difficult or impossible. This was emphasized in part II, item a), by stating that "the bombing of civilian population is incompatible with international law." Therefore, all instances giving rise to doubt must be decided by commanders bearing in mind the primary humanitarian consideration, namely the necessity of sparing civilian population.

What do the detailed provisions of the Directives consist of? In elaboration of the above general ban on attacks against civilian population, they prohibit in part II item c) the bombing of areas in hope of striking upon objectives justifying an air attack. Further, they protect civilian population even in the event of attacks aimed at permissible military targets. Thus, it is permissible (part II, item c) when only the given targets are damaged, while "the civilian population in vicinity does not get bombed through carelessness." Moreover, the fact that an objective is of a military character not always and not necessarily justifies its bombing. By way of example (part III) instances are listed in which the bombing of such a target would entail disproportionate danger for civilian population as against mi-

⁴⁶ See P. WROŃSKI, *Polish Navy in the Polish-German Campaign 1939*, "Bellona," London, July-September 1953, p. 8.

⁴⁷ See A. KUROWSKI, *op. cit.*, pp. 336 - 337; "Bellona," London, January 1943, pp. 63 - 64.

lilitary importance of such operation (e.g. transit of troops through a town, troops on quays in a merchant seaport, small military units in civilian billets). Anyway, even anti-aircraft installations and coastal batteries located in the midst of populated areas could be bombed only when it is reasonably assumed that the damage involved would justify their bombing (part III).

What are therefore, according to the "Directives," the objectives which may be legally bombed from the air? These are "strictly military objectives in the most restricted meaning of the word" (part I), and only in cases when their identification is possible (part II, item b). Detailed enumeration of these objectives in part I, items a-f of the Directives indicates that they are limited to armed forces, land, naval and air, docks, airfields, military fortifications and defence installations, camps, depots, military stations and installations controlled by the military. It is also permissible to attack military transports, and roads, canals and railway lines serving military transports, as well as waterways and river transports. But even these, strictly military targets cannot be bombed unconditionally. For example, transport facilities (trains, roads, river transports) may be attacked only in the event of reasonable assumption that they are of military character, while the bombing of remaining targets must depend on circumstances, and should be ordered by commanders acting in accordance with the spirit of the instruction.

What is meant by the spirit of the instruction is explained in part II item c), stating that "in bombing it is necessary to be guided by reasonable assumption that only these objectives would be damaged, and that the civilian population in the vicinity would not be bombed through carelessness." According to the Directives, factories and petroleum depots of general character should not be included among the strictly military targets. The reference to "reasonable assumption" in permitting the bombing, in conjunction with the primary principle of abiding by the „spirit of this instruction" was designed, in the intentions of the authors of the Directives, to narrow still further the range of permissible attacks, and to be interpreted in a sense as beneficial as possible to protect civilian population. What can one say of the Polish Directives of 1939? In their main provisions they approximate to The Hague Regulations of 1923, the ILA Draft of 1938, and the resolution of the Assembly of the League of Nations of September 1938, but go even further than these acts in their endeavours to protect civilian population from bombing, making it an absolute imperative ("spirit of the instruction") which has priority over military considerations. The whole of the Directives deals exclusively with strategic bombing, without devoting a single word to tactical bombing, obviously taking for granted that explicit regulations in this matter are contained in the IV Convention

at The Hague (Art. 25 - 27), and that their repetition in the instruction would be superfluous.

On the other hand, the term "defended objective" used in the Convention in conformity with interwar parlance, was replaced for air force use by the term "objective of military significance" and their detailed enumeration without, however, attempting a general definition. Moreover, the enumeration is the most restrictive as regards permissible military targets of all those encountered in proposed codifications in the interwar period. It excluded all factories and general fuel depots from objectives of military significance, whereas generally it was permitted to attack factories manufacturing not only military equipment but also raw materials and semi-finished products needed for this production, while no difference was recognized between general fuel depots and strictly military fuel depots. On the other hand, as regards an issue giving rise to controversies in the inter-war period, namely the point whether it is permissible to bomb military targets if this involves damage to civilian population, the Directives adopt an undecided standpoint. At one point, in part II, item c) they seem to exclude such eventuality, but again in part III, they leave it to commanders to decide, and may permit bombing "when there is a reasonable assumption that the damage caused justifies such bombing."

In an overall appraisal one may recognize the Directives as an expression of the existing established rules as regards air warfare, but with a distribution of emphasis in such a way that the interest of civilian population is given utmost priority, while military considerations are pushed into the background, and narrowed down to a bare minimum acceptable to military quarters. Certain provisions undoubtedly exceeding the framework of the then established practices, such as the exclusion from objectives of military significance of factories and general fuel depots, had a most favourable impact in support of humanization of air operations and could point a way to future progress. At any rate, the state may always adopt a greater scope of commitments in humanizing war regulations than required by law, and apply it on the basis of reciprocity.

At all events, the Directives, irrespective of circumstances in which they originated, are an indication of a desire of the Polish air force to conduct operations in conformity with the principles of chivalry, and to behave in accordance with the binding rules of international law.

VII. Conclusion

Contrary to appearances, the events of World War II did not introduce any basic changes in the rules of air warfare. Although the Germans in

the initial phase and the British and American later, applied on an immense scale air attacks directed primarily against towns and civilian populations (so-called target area bombing) with an obvious intention to terrorize, and in actual practice abandoned distinction between "objectives of military significance" and "non-military" ones in selection of bombing targets,⁴⁸ they nevertheless continuously stressed that they were doing it by way of reprisals for illegal enemy air raids, or as retaliation for the Germans' unprecedented treatment of the population in the occupied territories, or finally, that they were consequences of an unavoidable dispersion of bombs dropped from aircraft. But even the practice of massive strategic bombing cannot legalize this type of operation since they violate the basic rule of war rights, namely the division into combatants and non-combatants.

That is why one cannot recognize that the practice of World War II evolved new legal convictions and new established rules of air warfare. No more convincing is the silence in this matter of the Nuremberg Tribunal which, just as in the matter of submarine warfare, applying the principle *tu quoque*, refrained from adopting a definite standpoint.⁴⁹

Nevertheless, despite the fact that there still exist a body of established norms of air warfare with the supreme principle of sparing civilian population, the consequences of air raids and the distinction between objectives of military significance and civilian objectives not susceptible to air attacks, to eliminate all doubts, especially in view of the emergence of new forms of air attacks (rockets) and bombs of colossal explosive power, it seems necessary to have the air warfare rules codified.⁵⁰ In this eventual

⁴⁸ See LORD CRANBORNE, 9 Feb. 1944, in the House of Lords: "It may well be [...] that these great German war industries can only be paralyzed by bringing the whole life of the cities in which they are situated to a standstill, making it quite impossible for the workmen to carry on their work," in the *House of Lords Debats*, vol. 130, col. 753, cit. in L. OPPENHEIM, *International Law* (8th ed. H. Lauterpacht), vol. 2, London 1958, p. 528, p. 1.

⁴⁹ See P. GUGGENHEIM, *op. cit.*, vol. 2, p. 429, p. 3: "*Le Tribunal de Nuremberg n'a retenu aucune accusation du chef de bombardements aériens effectués sans discrimination*" and L. OPPENHEIM, *op. cit.*, (8th ed.) vol. 2, p. 529: "Although the charge of indiscriminate bombing of the civilian population was included in the indictment of the German major war criminals before the International Military Tribunal at Nuremberg, no conviction was received on that score."

⁵⁰ Codification of air warfare regulations is advocated by ICRC in its publication entitled "Commission d'experts [...]", *op. cit.*, Geneva 1954, p. 10 and *Projet de Règles concernant la protection des populations civiles contre les dangers de la guerre indiscriminée*, Geneva 1955, p. 3 ff. Similar standpoint is taken by the director of legal department of the ICRC Jean Pictet who in 1969, demanding codification of war rights declared: "*Le droit de la guerre fut élaboré en 1907 alors que les premiers bombardements aériens ont été effectués en 1911,*" cit. after "Le Figaro" of

future task it will not be possible to avoid and base oneself on The Hague Regulations of 1923, the ILA Draft of 1938, and "last but not least" the Polish Directives of 1939. In this lies their lasting significance.

Aug. 6, 1969. Representatives of doctrine for codification include, i.a.: J. M. SPAIGHT, *The Atomic Problem*, London 1948; R. J. WILHELM, *op. cit.*, p. 20 ff., and pp. 30 - 33; J. STONE, *Legal Controls of International Conflict*, London 1954, p. 340 ff; Ph. H. RANDERMANN, *Das Verbot technischen Waffen*, Bonn 1954, p. 154 ff. J. L. KUNZ, *The Laws of War*, AJIL, April 1956, vol. 50, pp. 336 - 367; E. SPETZLER, *op. cit.*, p. 390 ff. On the other hand, it does not appear that Lauterpacht is right in saying, in L. OPPENHEIM, *op. cit.*, vol. 2, p. 527 that "The developments during the Second World War fully confirmed the view that the maintenance of aerial bombardment as a recognized method of war and the observance of the distinction between combatants and noncombatants tend, in the conditions of modern warfare, to become irreconcilable," especially that he says: "However, although the inherent tendency to such unlawfulness is latent in all aerial bombing, in principle the latter still makes possible compliance with the basic rules of warfare as understood at least prior to the Second World War." (*Ibid.*, p. 530).

Unlawful Seizure of Aircraft

by ZDZISŁAW GALICKI

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I. Introduction

1. Development of the Phenomenon

Comparatively frequent instances of unlawful seizure of aircraft occurred already in the 1950s.¹ But for all practical purposes, the phenomenon reached a stage of particular urgency in 1961 when a large number of aircraft, mainly American, were hijacked to Cuba.² The subsequent years by no means lessened the incidence of these phenomena. On the contrary, instances of hijacking aircraft have been rapidly increasing since

¹ As to examples of aircraft seizure over those years see: A. W. KNAUTH, *Air Law Crimes in Aircraft—Status of Aircraft with Reference to Criminal Law for Aircraft—Report, Case Materials, Draft Texts*, International Law Association, Report of the 48th Conference, New York 1958, p. 290.

² For more details, and for examples of incidents, see: G. F. FITZGERALD, *The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft*, "The Canadian Yearbook of International Law," Vol. 1, 1963, pp. 240 - 241.

then³ and losing their, so to speak, "regional" American character; they have become increasingly frequent on other continents as well.

The recent years have also brought a number of instances of unlawful seizure of planes of the Polish "LOT" Air Lines. On October 19, 1969, a "LOT" plane on its flight to Brussels was forced by two young terrorists to land at Tegel airport in the French sector of West Berlin. On November 20 of the same year, another "LOT" plane on a domestic flight from Wrocław to Warsaw was forced by two armed persons to alter its course and to land in Vienna. Finally, on June 5, 1970, a plane on a flight from Szczecin to Gdańsk was forced by a single hijacker to alter course and land in Copenhagen. Soon after, the aircrew of another "LOT" plane was terrorized by a group of several persons and forced to alter course, landed at the island of Bornholm. In addition, three abortive attempts at hijacking "LOT" airliners were made.

2. A Threat to Safety in Air Transport

Every instance of unlawful seizure of aircraft in flight creates a serious danger for passengers and crew on board. An opportunity of hijackers to use firearms on board an airborne plane and the possible tragic consequences which this may entail, result in the fact that, as a rule, the pilots feel compelled to comply without resistance with the demands of these persons. This may bring about, in extreme cases, such grotesque situations as the longest airplane trip of an American army deserter Minichiello from the West Coast of the US to Italy, with a few landings in between for refuelling. Attempts at offering resistance to persons attempting hijacking often had tragic consequences, as in the instance of hijacking a plane of the Soviet "Aeroflot" airlines, when a stewardess was murdered and another crew member seriously wounded. A tragic event also occurred during the abortive hijacking attempt in a "LOT" plane on August 26, 1970. The terrorist, manipulating a charge of explosives set off an explosion as a result of which he himself and several passengers were badly injured. It was only thanks to the cool efficiency of the aircrew that the plane was landed safely.

Moreover, unlawful seizure of aircraft entails considerable financial loss to airline companies. One should always take into account a possibility of losing a plane, as for instance in the case of September 1970 when ex-

³ Statistical data quoted by A. E. EVANS indicate that, while over the years 1948-1967 there was a total of 47 seizures in the world, there were 30 in 1968 and in 1969 (by 8 September) — 46. A. E. EVANS, *Aircraft Hijacking: Its Cause and Cure*, "American Journal of International Law," 1969, No. 4, p. 698.

tremist Palestine commandos hijacked four planes of TWA, BOAC, PANAM and SWISSAIR and subsequently blew them up. The cost of a modern airliner is very high indeed; the latest "Boeing 747" for example costs about 21 million dollars. One should also mention additional expenditures for fuel, landing fees in airports, the necessity of providing further transport to passengers and freight, often by means of an extra plane, etc. In addition, the danger of disaster which every unlawful seizure of aircraft involves, renders an airline company liable to civil prosecution for losses to passengers and freight.⁴ Not without importance is also the fact that frequent instances of hijacking may undermine the public's confidence in this means of transport and bring about, at least on some lines, a reduction of traffic.

Passenger losses in cases of unlawful seizure of aircraft, in addition to a possibility of air disaster, also result from unscheduled delays and flight changes. Moreover, with a high incidence of hijacking, situations may arise that some passengers may find themselves against their will in the territory of countries where they should not find themselves for various reasons.

Apart from the grave danger to an aircraft unlawfully seized, an unscheduled change of course and abandoning standard air "corridor," entails dangers to other aircraft, of collisions in the air and damage to objectives on land. This was confirmed during the Vienna trial of a "LOT" plane hijackers, in the course of which an employee of the local Air Traffic Control standing as witness, stressed the grave danger which the arrival of an unscheduled aircraft entailed. At that very moment Air Traffic Control was handling approaches of four other, scheduled airliners. According to his testimony, such a dangerous situation had arisen over the Vienna Schwechat airport for the first time.⁵

3. Preventive Measures Adopted by States and Airline Companies

Many states and individual airlines are taking steps to check instances of unlawful seizure of aircraft. On some airlines passengers are searched, and their luggage X-rayed to discover concealed weapons.⁶ On December 12, 1969 two persons paid with their lives for an attempt to hijack a "Boeing-707" airliner belonging to Ethiopian Airlines. They were shot

⁴ Articles 17-30 of the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed in Warsaw on 12 October 1929. See also the protocol amending this convention, signed in The Hague on 28 September 1955.

⁵ *Trybuna Ludu* of 12 March 1970, p. 1.

⁶ E.g.: Rule 6 (A) (3) (a) (b), Civil Aeronautics Board, Local and Joint Passenger Rules Tariff No. PR-5, CAB No. 117, p. 9 — in force as of 27 October 1968.

by Ethiopian security agents on board the plane they tried to seize. Security agents have become a standard fixture on board all Ethiopian airliners after two of their planes were damaged at Frankfurt and Karachi airports, and two other on domestic flights hijacked to Khartoum and Athens (August-September 1969). Very similar is the institution of air policemen, the so-called "skymarshals," who are to be on duty on board American airliners. Appropriate steps have also been taken by the Polish "LOT" Airlines, e.g., separating the flight deck from the passenger cabin.

4. Development of International Law

Nevertheless, all these provisions do not provide adequate safeguards. It has become necessary to evolve effective provisions of international law which would play an essential part in effective combatting and preventing instances of unlawful seizure of civil aircraft. The growing importance of this problem made it a subject of consideration in various international organizations.⁷ The most important was the work done by the International Civil Aviation Organization (ICAO) and the resolutions adopted by the UN General Assembly at XXIV and XXV sessions.

a) The Tokyo Convention. Considering that the question of unlawful seizure concerns hijacking planes in flight, and in connection with this involves the problems of applicability of law and juridical competence for the purpose of trying offenders, the problems of so-called "hijacking"⁸ were initially connected in ICAO work with speculation on the subject of legal status of aircraft.⁹ This found reflection in a draft convention

⁷ See: J. MACHOWSKI, *Przestępstwo uprowadzenia cywilnego statku powietrznego w świetle międzynarodowego prawa publicznego* [Offence of Civil Aircraft Seizure in the Light of International Public Law], "Państwo i Prawo," 1970, No. 7, pp. 686 - 690.

⁸ To define an unlawful seizure of an aircraft, the English term "hijacking" (or "high-jacking") is very often used. In American terminology this means "highway robbery," i.e. robbery on a public road or in its vicinity. In practice, however, this term "has come to be applied to robbery in general, by the use of force or putting in fear" — H. C. BLACK, *Black's Law Dictionary*, Saint Paul (Minn.) 1951, pp. 1492 - 1493.

⁹ As early as 1950, the ICAO Legal Committee appointed a reporter who had to define the legal status of an aircraft, and a special sub-committee was created in 1953. The ICAO started more concrete work on the issue of offences and other acts committed aboard aircraft only in 1956, and carried it on at sessions of the sub-committee in 1956 (Geneva), 1958 and 1962 (Montreal), and of the Legal Committee in 1959 (Muenchen) and 1962 (Rome). For details of that work and of the 1963 Tokyo Conference see: R. P. BOYLE, R. PULSIFER, *The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft*, "Journal of Air Law and Commerce," 1964, No. 4, pp. 305 - 354.

prepared by the Legal Committee of ICAO at the XIV session in Rome in 1962.¹⁰ The draft became a starting point for discussions at the Tokyo Conference in 1963. As a result of the Conference, a convention on offences and certain other acts committed on board aircraft¹¹ was signed in Tokyo on September 14, 1963. Chapter IV of this convention is entitled *Unlawful Seizure of Aircraft* although for all practical purposes it only contains one article (Art. 11), and proportionately, forms but a small part of this convention. However, rather numerous provisions applicable to hijacking are contained in the next chapter of the Tokyo Convention concerned with the powers and duties of States. The Tokyo Convention only became operative on December 4, 1969. The rather long period which passed between the signing and the entering into force was due to the provisions of Article 21, laying down that the Convention would become operative "on the ninetieth day after the date of the deposit of the twelfth instrument of ratification." Considering that the signatory states were obviously not in a hurry to effect ratification, this condition was only fulfilled six years after the signing, when the convention became a binding law, although only for a small number of contracting states.¹²

The Tokyo Convention has failed to fulfill adequately its tasks as regards combatting hijacking and preventing further incidents. It has, as has been correctly pointed out, two basically weak points: "in the first place it was signed and ratified by a small number of countries, and secondly, it fails to deal with the fate of hijackers."¹³

b) The Hague Convention. The shortcomings of the Tokyo Convention¹⁴ and the increasing incidence of plane hijackings resulted in the fact that following an ICAO Assembly request (Buenos Aires, September 1968)¹⁵ the Council of that organization approached in December 1968 the Legal

¹⁰ The text of the Rome draft is at: ICAO Doc. 8302 LC/150-I (XIX) - (XXIV). The suggestion to include provisions on "hijacking" in the text of the planned convention was made in 1962 by the United States which, already in 1961, as a result of the growing number of incidents, included in its home legislation appropriate regulations sharpening the responsibility for unlawful seizure of an aircraft. See: R. P. BOYLE, R. PULSIFER, *op. cit.*, p. 325.

¹¹ ICAO Doc. 8364.

¹² These states were: Denmark, Philippine Islands, Upper Volta, Mexico, Niger, Norway, Portugal, Sweden, Taiwan, Italy, Great Britain and the United States — see: "ICAO Bulletin" of October 1969, p. 17. It is noteworthy that, within one year since the Tokyo Conference went into force, the number of the contracting states doubled, a.o., by the access of: France, Holland, Belgium, Australia and Japan.

¹³ J. KRANZ, *Piraci powietrzni [Air Pirates]*, "Prawo i Życie," 1970, No. 10, p. 6.

¹⁴ For more details on this subject see: Z. GALICKI, *Bezprawne zawładnięcie statkiem powietrznym [Unlawful Seizure of Aircraft]*, "Sprawy Międzynarodowe," 1970, No. 7, pp. 115 - 116.

¹⁵ Resolution A16-37.

Committee for investigating the legal aspects of unlawful seizure of aircraft. In connection with this, a special Sub-Committee was set up in the Legal Committee which — meeting in February and at the turn of September and October 1969 — prepared an initial draft of a convention which it then sent to states and organizations for appraisalment.¹⁶

At its XXIV session in December 1969, the UN General Assembly, "considering it necessary to recommend effective measures against hijacking in all its forms or any other unlawful seizure or exercise of control of aircraft,"¹⁷ appealed for giving full support to ICAO efforts conducive to a rapid drafting of a convention defining unlawful seizure of aircraft as a separate offence, and establishing an obligation to prosecute persons accused of committing this offence. The resolution of the UN General Assembly also appealed to states to adopt appropriate measures to make provisions in their domestic legislations for effective legal sanctions against all kinds of unlawful seizure, interference or other unlawful exercise of control over an aircraft in flight. In addition, all states were encouraged to ratify or join the Tokyo Convention.

The Polish delegate correctly pointed out already at the stage of a debate in the General Committee, that ICAO, an organization directly concerned, was actively engaged on work connected with legal prevention of aircraft hijacking, and that, in principle, it did not require any "encouragement" from the UN in this respect.¹⁸ Nevertheless, appreciating the weight of the problem and fully realizing the danger resulting from plane hijacking, the Polish delegation finally voted for adoption of the resolution in question. Explaining the motive of voting, the Polish representative stated that an effective way of freeing air transport from this danger would be establishment of compulsory extradition of hijackers to the state where the aircraft involved is registered. Unfortunately, the resolution of the General Assembly did not contain any provisions on this head.

The XVII session of the Legal Committee of ICAO was held at Montreal from February 9 to March 11, 1970. The main item on the agenda was the problem of unlawful seizure of aircraft. In its debates the Legal Committee assumed as the base of discussion the above-mentioned draft convention prepared by the Sub-Committee. The Committee agreed with the opinion of the Sub-Committee that to prevent instances of unlawful seizure of aircraft it was urgently necessary to consider these actions as offences and to adopt appropriate measures facilitating prosecution and

¹⁶ ICAO Doc. 8838-LC/157. See also: "ICAO Bulletin" of November 1969, pp. 21 - 22.

¹⁷ Resolution 2551 /XXIV/ of 12 December 1969.

¹⁸ UN Doc. A/BUR/SR.183 of 9 October 1969, pp. 7 - 8.

extradition of offenders. The above objectives may best be attained through international agreements. In accordance with the Committee's opinion, such an instrument should be ratified irrespective of the Tokyo Convention, and in connection with this, its provisions should be worded in such a way that a country wishing to become a party to both agreements should not encounter any problems whatsoever. As a result of its work on the subject of unlawful seizure, the Committee prepared a draft convention and considered the text to be a final draft ready to be submitted to states.¹⁹

The XIX session of ICAO Council in March 1970 examined the report of the 17th session of the Legal Committee together with the draft convention. The Council approved the work of the Committee and transmitted the draft to ICAO and UN member countries. It was also resolved to hold a diplomatic conference at The Hague between December 1 - 15, 1970 to adopt the convention concerning the unlawful seizure of aircraft.²⁰

A few days before this conference, the UN General Assembly at its XXV session adopted a resolution in which it sharply condemned hijacking of airplanes and other acts violating international air transport. The Assembly urged member countries to adopt appropriate measures to prevent such acts and to severely punish or extradite the offenders.²¹ In its conclusion the resolution urged states to make every possible effort to ensure that the planned conference could end in success in the form of adoption of an appropriate convention.²²

The Hague Conference was attended by delegations of 77 countries and observers from many international organizations. The four great powers: the USSR, the US, Great Britain and France were represented, as well as almost all European countries and countries on other continents playing a major part in air transport. On the other hand, Cuba and certain Arab states, including Iraq, Jordan, Syria and the Sudan, did not attend. Broadly speaking, two general tendencies became apparent. The first, represented by West European and certain Afro-Asian countries, aimed at maintaining the rules contained in the draft prepared by the Legal Committee, despite the fact that even before the conference the

¹⁹ ICAO Doc. 8865/LC/159, Part II, Annex B.

²⁰ "ICAO Bulletin," of June 1970, p. 15.

²¹ As entirely incompatible with the spirit of this resolution should be considered the conduct of the Danish authorities which refused to extradite the hijacker who, in June 1970, hijacked a Polish aircraft to Copenhagen. The Danish Court of Appeal reduced to three and a half years the verdict of the court of the first instance sentencing that hijacker to 6 years in prison; see: "Trybuna Ludu" of 5 January 1971, p. 2.

²² Draft resolution A/C.6/L.803. 105 states voted for resolution 2645 /XXV/, with 8 abstentions.

draft was criticized by certain Western theoreticians.²³ A different standpoint was adopted by, primarily, the socialist states, including the Polish delegation, which aimed at a maximum strengthening of the proposed convention, chiefly through introduction of the principle of extradition of offenders in order to make the agreement a fully effective instrument for combatting airplane hijacking. It should be stated that, despite many imperfections, the new convention goes much further to ensure this effectiveness than the draft of the Legal Committee, which was undoubtedly a success of these countries.

The convention for the suppression of unlawful seizure of aircraft was adopted by 74 votes with two abstentions.²⁴ On December 16, 1970 the convention was signed by 50 countries attending The Hague Conference, including Poland.

II. The Nature of Offence and Punishment

1. Definition of the Offence

a) **Tokyo Convention.** According to Article 1, paragraph 1, the Tokyo Convention is applicable to "offences against penal law" and

"acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."

Article 11, paragraph 1 of this convention contains the following provisions:

"When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight, or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."

The final wording of the text of this article was prepared in consequence of the preparatory work conducted at the Tokyo conference itself, and in the preceding years.²⁵ As it appears from the texts of both the Rome draft and the Tokyo Convention, the general objective of the

²³ R. H. MANKIEWICZ, for example, when writing about the principle of extradition as formulated in the draft, said somewhat ironically that the "new convention would take advantage of the precedent laid down by the Tokyo Convention which also keeps silent in these matters" — *Le projet de convention relative à la capture illicite d'aéronefs élaboré par le Comité Juridique de l'OACI*, "Revue Française de Droit Aérien," 1970, No. 2, p. 155.

²⁴ Chile and Algeria. The Salvador delegate was not present at the voting.

²⁵ See above: note 9.

convention was not to define an international concept of the offence of a seizure of aircraft,²⁶ but to pledge the contracting states to take legal steps in consequence of such an action. Nevertheless, in comparison with the Rome draft, the Tokyo Convention expanded the concept of "unlawful seizure of aircraft." The mentioned Article 11 of the Tokyo Convention contains three alternatives:

1) When a seizure of an aircraft was committed — the contracting state is to restore control of the aircraft to its lawful commander.

2) When the seizure of an aircraft was or is attempted (although this is not clearly stated) the commander may approach the contracting state, depending on the circumstances, for restoring to him or safeguarding his control of the aircraft.

3) When the seizure of an aircraft "is about to be committed" (this formula gives rise to doubts as to what stage of preparation for such an act may qualify) — the commander is entitled to approach the contracting state for help in safeguarding his control of the aircraft.

This last eventuality was not envisioned in the Rome draft.²⁷

b) The Hague Convention. On the other hand, Article 1 of The Hague Convention contains a clear definition of the offence subject to this agreement:

"Any person who on board an aircraft in flight:

a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft, or attempts to perform any such act, or

b) is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as "the offence").

The definition of the offence, adopted without a change from the draft of the Legal Committee, is close to the definition in Article 11 of the Tokyo Convention, nevertheless with the exclusion of acts consisting of disturbing the operation of aircraft. This category of acts is to be subject to a separate convention.²⁸ The Hague Convention also clearly recognizes as

²⁶ It should be reminded that, already at the 1956 VIth International Congress of Penal Law, held in Athens, the report submitted by the Polish delegation proposed inclusion into the convention to be signed of provisions governing punishment of the heaviest offences, i.e., such that are a danger to air transport safety. It was stipulated, moreover, that such convention impose on states the duty of extradition of offenders to countries competent to punish them, irrespective of the motives of the offence — see: R. BIERZANEK, *Les crimes contre la sécurité de la navigation aérienne*, "Revue Internationale de Droit Pénal," 1956, No. 3 - 4, p. 361.

²⁷ See: G. F. FITZGERALD, *Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963*, "The Canadian Yearbook of International Law," Vol. 2, 1964, p. 199.

²⁸ However, still in the course of The Hague conference, it was suggested to expand the range of the present convention, e.g. to include acts of sabotage. See: *Comments of the International Chamber of Commerce*, SA Doc. No. 7.

an offence an attempt to commit any of the acts listed, without repeating after the Tokyo Convention the rather problematic situation "when such an act is about to be committed."

According to the new convention an accomplice is also committing an offence. Notwithstanding, certain doubts may arise as regards the wording of the convention. By defining, also analogously to the Tokyo Convention, the place where the offence is committed as "on board an aircraft in flight," The Hague Convention recognizes this definition as applicable to the accomplice as well. It seems that this excessively narrows down the circle of persons cooperating with the offender only to persons who happen to be with him on board an aircraft in flight. Apprehensions of this nature were also voiced in the debates of the Legal Committee, and even during the conference.²⁹ A similar suggestion, that the words "on board an aircraft in flight" should only apply to the offender himself, may also be found in the resolution adopted at the 54th conference of the International Law Association at The Hague in August 1970.³⁰

2. The Manner of Effecting an Act of Unlawful Seizure of Aircraft

The problem of the manner in which an act of unlawful seizure is effected does not appear to be uniform in the light of the three authentic texts of the Tokyo Convention and four such texts of The Hague Convention. Whereas the English texts speak of unlawful use of force or threat of force, the French and Spanish texts, and in the case of The Hague convention, also the Russian text, use the term "violence" (*violence, violencia, nasilie*).

It should be noted that the English text of the Rome draft also referred to the use of violence. Similar wording also appeared in the text submitted by the Drafting Committee at the second reading of the Tokyo Conference, referring to commitment of the act in question by means of "violence or threat thereof, or menaces or any other means."

The final acceptance in the English text of the term "force" was caused by certain doubts in the Drafting Committee about the expression "violence" in Anglo-Saxon legislation where the term has a very wide meaning.

It appears therefore, that in conformity with the French, Spanish and Russian texts one may accept that a means of exerting coercion in an in-

²⁹ See: Proposal to replace Article 1 of SA Doc. No. 4 (submitted by the Netherlands) — SA Doc. No. 23, and IFALPA Proposals to amend the draft convention on hijacking — SA Doc. No. 29.

³⁰ Air Law — Resolution A. See also: SA Doc. No. 19.

stance of unlawful seizure of an aircraft is violence or a threat thereof.³¹ The Hague Convention, in addition to repeating the expression "violence or a threat thereof," expands it by adding a formula formerly adopted by the Legal Committee: "or by any other form of intimidation."

It should be added that the necessity of differentiating between violence and force does not seem very essential, since a decisive analysis of an act which furnishes a basis for applying appropriate provisions of both conventions, is based not on international law, but on internal laws of concrete states.³²

3. Hijacking and Air Piracy

In discussing the problem of conditions under which an aircraft is hijacked and of the objective of such an act, it is necessary to make a distinction between hijacking and piracy. Although the Geneva Convention on the High Seas of April 29, 1958,³³ envisages in Article 15 a possibility of committing an act of piracy by the crew or passengers of a private vessel or aircraft, nevertheless the subsequent provisions in this article often make qualification of hijacking as an act of piracy impossible. The point is that:

1) An act of piracy, according to the Geneva Convention may be committed on the high seas or at a place not subject to jurisdiction of any state, whereas the instances of hijacking aircraft mainly occur in the air space subject to sovereign authority of states.

2) Piracy is defined as "any illegal act of violence, detention or any act of depredation, committed for private ends." Considering that "hijacking" is often presented as resulting from political considerations (in the intention of offenders), a doubt may therefore arise whether it may always be recognized as committed for private ends.

3) An act of piracy is directed against another sea vessel or aircraft or against persons or property on board. This element of external activity is missing in the instances of hijacking.

³¹ The Polish doctrine justly draws attention to the special importance of threat in instances of an unlawful seizure: "In conditions in which such threat takes place (aboard an aircraft in flight), it is a menace not only for the person directly involved, but is at the same time a danger for all persons aboard and, often, it has effects harmful for the life and health of such persons (e.g. nervous breakdown of passengers), even if the flight is continued without disturbance" — M. GRZEGORCZYK, *Uprowadzenie statku powietrznego [Seizure of an Aircraft]*, "Nowe Prawo," 1967, No. 7/8, p. 960.

³² See: R. P. BOYLE, R. PULSIFER, *op. cit.*, p. 345.

³³ Adopted by the United Nations Conference on the Law of the Sea, April 29, 1958 (UN Doc. A/CONF.13/L.53).

In conformity with what has been said, an unlawful seizure of aircraft cannot be treated in many instances as an act of piracy *iuris gentium*. On the other hand, it seems wrong to maintain that: "the concept of 'air piracy' is narrower than the more general concept of 'hijacking a civil aircraft'." ³⁴ This assertion is disproved by, on the one hand, the above-mentioned element of external activity in the event of piracy, and on the other, by the possibility, recognized by both Tokyo and The Hague conventions, of effecting an unlawful seizure only by persons present on board the aircraft involved. It is therefore necessary to consider both acts separately, ³⁵ especially that the concept of piracy as meant in the Geneva Convention is not a faithful reflection of the existing international custom in this respect.

Yet some authors apply the term "air piracy" in referring to unlawful seizure of aircraft. ³⁶ Also at the XXIV session of the UN General Assembly, a motion was submitted for inclusion of "piracy in the air" in the agenda. ³⁷ However, in the discussion at the General Committee, it was resolved to alter the name of the problem under consideration to "forcible diversion of civil aircraft in flight." ³⁸ In certain national legislations unlawful seizure of aircraft is also recognized as an act of piracy. Thus for instance, the United States legislation defines the so-called "aircraft piracy" as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce." ³⁹

³⁴ J. MACHOWSKI, *op. cit.*, p. 692.

³⁵ This is what, e.g. J. KRANZ does, *op. cit.*, p. 6.

³⁶ For example: R. VALLADAO, *Piraterie aérienne, nouveau délit international*, "Revue Générale de l'Air et de l'Espace," 1969, No. 3, pp. 261 - 268; E. du PONTAVICE, *La piraterie aérienne: notions et effets*, *ibid.*, pp. 276 - 339; A. MEYER, *Un nouveau problème juridique: la piraterie aérienne*, "Revue Française de Droit Aérien," 1969, No. 3, pp. 261 - 264; J. C. SAMPAIO de LACERDA, *La piraterie aérienne, ses aspects actuels et futurs*, *ibid.*, 1970, No. 3, pp. 281 - 284.

³⁷ UN Doc. A/7656, 6 October 1969.

³⁸ UN Doc. A/7700/Add.2, 9 October 1969. For example, as claimed in the discussion by the representative of Jordan, Muhammed H. El Tarza, the use of the term "air piracy" would settle the question. Moreover, the international law does not include any close definition of air piracy. This would reduce the problem to purely legal deliberations, and the use of the word "piracy" would not help to ensure calm and constructive debates. He suggested that the non-controversial term "diversion of aircraft" be used—UN Doc. A/BUR/SR.183. This term, or the like of it, are encountered in literature. See: P. de la PRADELLE, *Les détournements d'aéronefs et le droit international*, "Revue Générale de l'Air et de l'Espace," 1969, No. 3, pp. 249 - 260; and M. E. VALAY, *Le déroutement des aéronefs*, *ibid.*, pp. 340 - 351.

³⁹ Federal Aviation Act of 1958 (as amended by Public Law 87 - 197, 87th Congress, 1st Session, approved September 5, 1961) Section 902 (i) (2).

4. Legal Qualification of the Act and Penal Liability

As has been stated, the Tokyo Convention does not define unlawful seizure of an aircraft as an offence *iuris gentium*, and therefore does not contain any provisions concerning penalization.

Despite a clear definition by The Hague Convention of acts mentioned in Article 1 as offences, serious differences of views became apparent at the conference as regards the problem of legal qualification of unlawful seizure of aircraft. The Soviet proposal,⁴⁰ supported by the socialist countries, was aimed at recognizing the act as a grave crime. It was nevertheless rejected in view of the fact that a number of countries do not recognize this term in their legislation. Similarly, the American motion, withdrawn before the voting however, suggested that an act in question be defined as common crime.⁴¹ As a result, in the discussion it was only resolved as a duty of contracting states to treat the offence in question as "punishable by severe penalties" (Art. 2).⁴² It does not seem that such a definition is completely satisfactory, since it still leaves a considerable scope of major differences in penal liability in various legislations, even if a "severe punishment" is involved.

It appears advisable at this point to give a few instances of legal qualification and penal liability of the offence in question as treated by legislations of various countries.

According to legislation of the United States, an "unlawful seizure of an aircraft," defined as "aircraft piracy," is a federal crime, liable to a penalty of no less than 20 years imprisonment or even death penalty. The American law also provides for, as a separate category of offence, an "interference with flight crew members or flight attendants," liable to imprisonment for up to 20 years or fine of up to 10,000 dollars, or both, and in the event of using arms, life imprisonment.⁴³

Australian legislation is probably the most elaborate. It makes distinction between exercising control of aircraft "without lawful excuse", which is liable to seven years imprisonment, and committing the same act when other persons are on board, which entails 14 years imprisonment, or finally committing the same act "by force or violence, or by any trick or false pretence," liable to 20 years imprisonment. In addition to the above

⁴⁰ SA Doc. No. 32.

⁴¹ SA Doc. No. 28.

⁴² In the draft of the Committee this was Art. 3. However, on the motion of India (SA Doc. No. 51) it was inserted right after Art. 1, to combine these two articles more closely.

⁴³ Federal Aviation Act of 1958 [...] Section 902 (i), (j). See also: J. M. DENARO, *In Flight Crimes, the Tokyo Convention and Federal Judicial Jurisdiction*, "Journal of Air Law and Commerce," 1969, No. 2, p. 179.

forms of offence defined as "taking control of aircraft," the Australian law recognizes as a separate offence various forms of "destruction of aircraft" of which some, as for instance "destruction of aircraft with intent to kill persons" is liable to death penalty.⁴⁴

Apart from enacting separate legal acts concerning penal liability for unlawful seizure of aircraft, other states limited themselves to introducing appropriate provisions and amendments in their penal codes.

In July 1970, the French *Code pénal* received a new Section IV, entitled *Détournement d'aéronef*, supplemented to chapter II, title II of volume III (Art. 462). Attempts at hijacking aircraft are accordingly liable to imprisonment for between five and 10 years, but if in consequence of such an act casualties are involved, from 10 to 20 years. In the event of deaths, the offender is liable to life imprisonment.⁴⁵

Article 198 of the Argentinian penal code provides for offences in question penalties ranging from three to fifteen years.⁴⁶

A Mexican decree of December 24, 1968, supplemented Article 170 of the Penal Code for the Federal District and Territories, lays down that:

"Whoever makes an aircraft change its destination through threats, violence, intimidation or by any other unlawful means, or makes it deviate from its route, shall be liable to imprisonment for five to twenty years, without prejudice to the penalty applicable to other crimes he commits."⁴⁷

Finally, it is necessary to draw attention to the fact that certain legislations do not treat hijacking as a separate offence liable to special penal sanctions.

In the Vienna trial in March 1970, persons responsible for hijacking a Polish "LOT" airlines plane were charged with committing sabotage, limiting personal freedom and offences against regulations concerning possession of arms, for which the Austrian legislation provides penalties from one to five years of imprisonment.

The Polish law too, does not consider an unlawful seizure of aircraft as a separate offence. Under Polish law it may fall under a whole series of criminal acts such as, for example: bringing about a direct danger of disaster (Art. 137 p.c., penalty of up to eight years imprisonment), deprivation of freedom (Art. 165 p.c., penalty of up to 10 years of imprisonment), threat (Art. 166 p.c., penalty of up to two years), coercion

⁴⁴ Crimes (Aircraft) Act 1963. Published in: ICAO Doc. 8877-LC/161, ICAO Legal Committee, Seventeenth Session, Montreal, 9 February — 11 March 1970, Minutes and Documents Relating to the Subject of Unlawful Seizure of Aircraft, pp. 110 - 114.

⁴⁵ See: *Les infractions commises à bord des aéronefs et la repression du détournement d'aéronef*, devant l'Assemblée Nationale, "Revue Générale d l'Air et de l'Espace," 1970, No. 2, pp. 212 - 220.

⁴⁶ ICAO Doc. 8877-LC/161, p. 108.

⁴⁷ *Ibid.*, p. 117.

(Art. 167 p.c., penalty of up to two years of imprisonment). Depending on the consequences of the act, liability for causing an accident (Art. 136 p.c. penalty from 3 to 15 years of imprisonment) or death or bodily injury (maximum liability — death penalty in case of deliberate manslaughter), or for threat to life or health (Art. 160 p.c., penalty of up to three years of imprisonment) may take place.

It does not appear however that The Hague Convention gave rise to an obligation to treat unlawful seizure as a separate offence in domestic legislations of contracting states. These states are only obliged to punish severely the offenders which, with a skilful gradation of the existing legal provisions, may also be feasible within their own legislation. This is also indicated by the severe verdicts passed by the Polish courts in such cases. For an attempted hijacking the Voivodship Court in Wrocław sentenced the offenders in September 1970 to eight years imprisonment on the strength of Article 137 of the penal code.⁴⁸ Two persons charged with assisting in the preparations for this hijacking were sentenced to five and four years respectively. Also in September 1970, the Warsaw Voivodship Court sentenced two persons for attempted aircraft hijacking to five and four years imprisonment.⁴⁹ Finally, in January 1971, four offenders tried by the Warsaw Voivodship Court under a charge of preparing to terrorize an aircrew of "LOT" airliner and hijacking it, were given sentences ranging from one to three years of imprisonment.⁵⁰

III. The Scope of Application of International Legal Provisions Concerning the Unlawful Seizure of Aircraft

1. Tokyo Convention

The Tokyo Convention states in Article 1, paragraph 4, that it will not be applicable in relation to aircraft used for military, customs or police purposes. Allegiance to one of these three groups, according to Article 3b of the Chicago Convention on international civil aviation of December 7, 1944, makes for classification of the aircraft in question as a state aircraft. The Chicago Convention introduces the distinction between state and civil aircraft (Art. 3a). In connection with this it should be accepted that the Tokyo Convention, hence also the provisions concerning hijacking, are

⁴⁸ The cumulative punishment for the offender, found guilty of several other offence, amounted to 13 years of prison — "Trybuna Ludu" of September 20, 1970, p. 1.

⁴⁹ "Trybuna Ludu" of September 24, 1970, p. 1.

⁵⁰ "Życie Warszawy" of January 15, 1971, p. 4.

only applicable to civil aircraft. As has been justly stated in the Polish doctrine, the granting of special legal protection to this type of aircraft is justified by their special functions and the absence of facilities for combatting terrorism.⁵¹

As has already been stated, in accordance with Article 11 of the Tokyo Convention, an aircraft should be in flight. Article 1, paragraph 3, states that for the purposes of the Convention an aircraft is considered to be in flight from the moment when "power is applied for the purpose of take-off until the moment when the landing run ends." Nevertheless, it is also necessary to draw attention to a special provision of the Convention, namely Article 5, paragraph 2, which states that for the purposes of the chapter dealing with the powers of the aircraft commander, an aircraft is in flight from the moment when "all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation." Therefore, the second definition comprises a period of time longer than the former. An aircraft commander has powers to act not only when an act threatening the safety of aircraft, passengers or cargo has been committed, but also to preventive action when there is suspicion that an act of this nature is about to be committed. Hijacking or its attempt undoubtedly brings about such a condition of threat to general safety. Considering that Article 11 also applies to preparations for an unlawful seizure of aircraft, it seems that the granting to the aircraft commander powers of longer duration than specified in Article 1, paragraph 3, is particularly advisable.⁵²

2. The Hague Convention

As regards the closer definition of the term "in flight" the draft of the Legal Committee contained a repetition of the traditional terms used in Article 1, paragraph 3, of the Tokyo Convention and even earlier, in Ar-

⁵¹ M. GRZEGORCZYK, *op. cit.*, p. 959.

⁵² It has to be added that, according to the Tokyo Convention, the aircraft commander can authorize, or even order the members of the crew to intervene in relation to persons who threaten the safety of the aircraft. To this aim he can also ask for assistance of passengers. On the other hand the crew, as well as passengers, may—even without an authorization—intervene, if there is a justified assumption that such an intervention is indispensable for the safety of the aircraft (Art. 6). According to the Convention (Art. 10), the commander, the crew, passengers, as well as the aircraft owner and operator do not bear any responsibility for damages done to the person whom the intervention referred to. All these provisions are fully applicable to persons committing an unlawful seizure of aircraft—see: R. GOLSTEIN, *La Convention relative aux infractions et à certains autres actes survenant à bord des aéronefs et les pouvoirs du commandant de l'aéronef*, "Revue Française de Droit Aérien," 1964, No. 1, p. 19ff.

ticle 1, paragraph 2, of the Rome Convention of October 7, 1952.⁵³ The aircraft was considered as being in flight from the moment "when power is applied for the take-off until the moment when the landing run ends."

On the other hand, The Hague Convention made a departure from this model, aiming at stretching the application over a longer period than the one suggested in the draft.⁵⁴ It accepted a formula being a repetition of the detailed provisions of Article 5, paragraph 2, of the Tokyo Convention, that for the purpose of the present convention an aircraft is "in flight" from the moment when "all external doors are closed following embarkation until the moment when any such door is opened for disembarkation." But The Hague Convention went even further by stating next that in the event of forced landing the flight of aircraft is considered as continued until "competent authorities take over the responsibility for the aircraft and for persons and property on board" (Art. 3, para. 1).

Analogously to the Tokyo Convention, the new convention also excludes its application to aircraft used for military, customs and police purposes (Art. 3, para. 2). But even towards airplanes not belonging to any of these three categories, The Hague Convention is to be applicable only when "the place of the take-off or the place of actual landing of the aircraft on board of which the offence is committed is situated outside the territory of the state of registration of that aircraft" (Art. 3, para. 3). To explain certain doubts expressed in the course of The Hague Conference,⁵⁵ the convention also contains an explicit statement accepted following a motion submitted by the Soviet delegation, that "it shall be immaterial whether an aircraft is engaged in an international or domestic flight."

But regardless of the above territorial limitation, the articles of the convention concerning prosecution, extradition and legal assistance are always applicable when the offender happens to be in the territory other than that of the aircraft registration (Art. 3, para. 5).

To include instances when an aircraft is not registered on a national basis, The Hague Convention contains a special provision regulating the problem of application of its provisions to aircraft operated by joint air transport operating organizations or international operating agencies (Art. 5 and Art. 3, para. 4).

⁵³ Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface — ICAO Doc. 7364.

⁵⁴ See the aiming in that direction and submitted at the Hague conference proposals: Proposal to amend the text of Article 2 of SA Doc. No. 4 (submitted by the Netherlands) — SA Doc. No. 24; IFALPA Proposals... — SA Doc. No. 29; Amendments proposed by the United Kingdom — SA Doc. 37 and Proposal by Australia — SA Doc. No. 50.

⁵⁵ See e.g.: SA Doc. No. 9.

IV. Principles of Prosecution

1. The Tokyo Convention

In the chapter of the Tokyo Convention concerning the rights and duties of states, the general principles of procedures connected with the arrest and further handling of persons committing or attempting to commit aircraft hijacking, have been laid down. The authorities in whose territory such an aircraft lands have a duty to take delivery, and in the event of being satisfied that the circumstances so warrant, take custody of persons suspected of committing an act specified in Article 11 (Art. 13, para. 1 and 2). Such a person should be kept under custody during the time needed for completing penal prosecution or extradition; nevertheless, it is necessary to facilitate for such person to contact the nearest representatives of the state of which this person is citizen (Art. 13, para. 3). The authorities of the state which took delivery of suspected person should carry out proceedings to establish the circumstances (Art. 13, para. 4) and notify of these proceedings and their results the state where the aircraft is registered, the state of which the arrested person is citizen, and other states which may be concerned in the matter. The state in whose territory the above explanatory proceedings are undertaken should also make it known whether it intends to apply its own jurisdiction towards this person (Art. 13, para. 5).

There is no provision in the convention prohibiting admission of such a person by the state where the aircraft lands. Only in the event when there is no intention of admitting such person by this state, unless this person is not a citizen of this state, or cannot or does not want to continue his journey, the state may surrender such person to the state of which he is citizen, or state of permanent residence, or the state whence the person set off for the journey (Art. 14, para. 1). The arrested person is to be treated on the basis of the national clause (Art. 15, para. 2), and in the event of not extraditing the person, or of not initiating penal proceedings against it, the person is entitled — if so desired — to continue the journey (Art. 15, para. 1).

2. The Hague Convention

The possibility of the existence of considerable differences as regards legal liability for the offence in question, as noted above, is important insofar as the Hague Convention allows for a possibility of a convergence of juridical competence of several states in specific instance of unlawful seizure.

This approach is, incidentally, an illustration of certain divergencies long existing in the doctrine. In the Polish literature, as long ago as 1958 Professor Remigiusz Bierzanek pointed out that:

"In addition of the competence of the state proper territorially, four other competences are being put forward as regards punishing offences committed on board an aircraft:

- 1) the state where the aircraft is registered;
- 2) the state where the aircraft first landed after the offence was committed;
- 3) the state of which the offender is citizen;
- 4) the state against the security of which the offence was committed, or the state of which the victims are citizens."⁵⁶

According to Article 4, paragraph 1a, of The Hague Convention every contracting state should take up steps indispensable to impose its jurisdiction on the offence in question or any other act of violence committed by the offender in relation to passengers or crew, if they were committed on board an aircraft registered in that state. Nevertheless, the right and duty of adopting such measures, i.e. also imposing its jurisdiction, also belongs, on a parallel basis, to other states. This applies to the state on whose territory lands the plane in which the offence was committed with the assumed offender still on board (Art. 4, para. 1b). Moreover, in the event of leasing the aircraft without a crew (the so-called "dry-lease") juridical competence will also belong to the state in which a person operating the aircraft has principal place of business and in its absence, the place of permanent residence (Art. 4, para. 1c).⁵⁷ In addition, every contracting state should also adopt necessary measures to impose its jurisdiction in the event when the assumed offender finds himself on its territory and is not surrendered by way of extradition (Art. 4, para. 2).

It seems that it is necessary to adopt a critical attitude to matter of The Hague Convention leaving unsettled the question of priority of states empowered to prosecute, try and punish offenders. Even during The Hague conference attempts were made to correct this by suggesting, although unsuccessfully, that priority of jurisdiction should be accorded to the state of registration.⁵⁸ The present settlement may lead in the future to conflicts of competence difficult to solve. Some theoreticians even suggested in con-

⁵⁶ R. BIERZANEK, *Przestępstwa na pokładzie statku powietrznego*, [Offences on Board of Aircraft], "Prawo i Życie," 1958, No. 11, p. 6.

⁵⁷ This last possibility was not provided by the Committee's draft and the Convention justly filled this gap. See on this subject: J. P. HONIG, G. M. E. WHITE, *Report on the Subject of Aircraft Registered in a State Different from the State of Operator* — SA Doc. No. 5.

⁵⁸ Comments of Ghana — SA Doc. No. 8.

nection with this to hand over the competence of trying and punishing hijackers to international courts.⁵⁹

Article 6 of the convention defines the procedure connected with the keeping hijackers in custody and the initial investigation as regards the facts, which is an obligation for each contracting state on whose territory the assumed offender happens to be. The provisions of this article correspond, with certain modifications, to paragraphs 2 - 5, Article 13 of the Tokyo Convention discussed above.

The system of prosecuting persons for the offence in question was substantially strengthened in comparison with the procedure accepted in the draft of the Legal Committee. According to Article 7 of the convention, the duty of prosecution was imposed on all states on whose territory the offender found himself, irrespective of the place of landing of the hijacked aircraft. For the purpose of prosecution, an act of unlawful seizure of an aircraft is to be treated as a common crime, subject to severe punishment, in conformity with the laws binding in the given country. This stress on the duty of prosecuting hijackers wherever they may find themselves, is certainly one of the most positive elements of the convention.

V. Extradition

1. Tokyo Convention

The Tokyo Convention in none of its provisions creates a duty for contracting states to extradite persons who committed or attempted to commit an act of unlawful seizure of an aircraft. It only states that offences committed on board of aircraft registered in a contracting state are to be treated for the purpose of extradition as if they were committed not only at a place where they were actually committed, but also in the territory of the state where the aircraft is registered.⁶⁰ Therefore, the question of the duty of extradition is limited to appropriate bilateral agreements which do not necessarily have to exist between individual signatories of the convention.

Hence the essential weakness of the Tokyo Convention lies in the absence of possibilities for effective punishing of hijackers as a result of the

⁵⁹ "That should belong to the jurisdiction of an international court, similar to the International Court of Justice, or even better to the competence of a special tribunal set up for each case and consisting of judges appointed by ICAO"—J. C. SAMPAIO de LACERDA, *op. cit.*, p. 284.

⁶⁰ It is worth to call attention to Art. 3 of the Polish penal code which reads that "the Polish penal code applies to a person who commits offence on the territory of the Polish People's Republic, on Polish ship or aircraft."

non-existence of an international duty of extradition. Attention was drawn to this fact at the XXIV session of the UN General Assembly by Poland's representative in the VI Committee Professor Alfons Klafkowski. He stated that no state or physical person should derive any material advantages whatsoever from criminal acts which hijacking undoubtedly is. Effectiveness of prosecution of persons committing these acts may only be based on the principle of extradition, and only by this means it is possible to make sure that none of such acts remains unpunished. It appears, moreover, that the general principle that the state allegiance of the aircraft should be the basis for demanding extradition of hijackers, should not give rise to any doubts at present.⁶¹

Also in practice, in the instances of hijacking Polish aircraft as listed above, the Polish Prosecutor General's Office approached the authorities of appropriate countries with extradition demands, but so far without positive results. The Polish Prosecutor General's Office also stressed in extradition demands that in the majority of cases the persons who hijacked Polish planes had committed a number of criminal acts in previous years, and therefore no political character should be ascribed to their actions.

It is characteristic that in the case of the Danish authorities' refusal to extradite the hijackers of Polish planes, critical opinions were also expressed in that country. In one newspaper, the well-known lawyer Professor Alf Ross stated that in his opinion the government's decision could not withstand criticism for long. He considers, as a member of the European Court of Human Rights that when one commits an obvious offence of the worst kind — and plane hijacking is undoubtedly one of those — he by so doing forfeits the privileges of a political refugee and must be extradited.⁶²

2. The Hague Convention

While the states represented at The Hague Conference generally accepted that persons responsible for unlawful seizure should be prosecuted and severely punished in every instance, there arose nevertheless certain differences in the course of the work on regulating the problem of extradition. These were mainly due to the considerable differences in the legal systems in various countries in this respect.

⁶¹ UN Doc. A/C.6/SR.1172, 9 December, 1969, p. 5. Also in the course of debates of the XXV session of UN General Assembly, Professor A. Klafkowski stressed in his speech of December 9, 1970 that aircraft hijacking is a criminal act, and this legal qualification cannot be changed in spite of attempts to motivate such deed with political reasons. The consequence of such a legal qualification is lack of grounds for granting asylum to aircraft hijackers.

⁶² "Berlingske Tidende," after "Trybuna Ludu" of September 12, 1970, p. 2.

A considerable activity was displayed in this field by the Polish delegation which, striving for a maximum strengthening of the prepared convention, submitted together with the Soviet delegation proposals for introducing to this agreement the principle of compulsory extradition of persons responsible for unlawful seizure of an aircraft to the state where the aircraft is registered, irrespective of the motives behind this act, with the exception of the right not to extradite own citizens.⁶³

On the other hand, the United States' proposal stated down that unlawful seizure cannot be considered a political offence, and that an extradition demand may only be rejected for reasons specifically laid down in the extradition agreement or in the laws of the extraditing state, unless these are incompatible with the convention. Moreover, in the case of an absence of an extradition agreement, the convention would serve as a legal basis for extraditing hijackers to the state where the aircraft is registered.⁶⁴

Again, the West European states supported by some of the Afro-Asian states aimed at retaining the provisions contained in the draft of the Legal Committee, consisting for practical purposes in making extradition dependent on a free decision of the extraditing state. Strong opposition of these countries brought about the withdrawal of the American proposal even before the voting. The Polish-Soviet proposal, on the other hand, was rejected in voting. In this situation the group of West European and South American countries and the United States put forward a new compromise proposal stating that in the absence of an extradition agreement the convention will provide a legal basis for extradition effected in conformity with the conditions envisaged by the extraditing state.⁶⁵

The proposal was accepted by the General Commission of the confe-

⁶³ SA Doc. No. 33 and SA Doc. No. 33 Rev. 2. It is worth to call attention to the fact that still during the debates of the Legal Committee, the Polish delegate supported by the delegates of Bulgaria, Czechoslovakia and Hungary, submitted a motion to include into the Art. 8 of the draft concerning extradition, provisions imposing the duty of extradition of the offenders to the country of aircraft registration. The only exception should be the principle, observed for a long time now, of not extraditing the own citizens, and the right to grant asylum to persons threatened with capital punishment, or other severe penalties for political activity. This proposal was the reflection of Polish opinion consistently represented both in ICAO and the UN that the only truly effective means of protection the air transportation system against the discussed offences could be the imposing of an international duty to extradite the offenders to the state of aircraft registration. Such provision would have both repressive and preventive character. This suggestion was, unfortunately, rejected by the Legal Committee with 18 votes against 5. See: ICAO Doc. 8877-LC/161, p. 56ff.

⁶⁴ SA Doc. No. 28.

⁶⁵ SA Doc. No. 26 Rev.

rence by an overwhelming majority of votes. The socialist countries voted for the proposal seeing in it an undoubted strengthening of the convention as compared with the Committee's draft. Nevertheless, soon after its acceptance the proposal was attacked by a number of countries (i.a. Tanzania, India, Uganda) which demanded deletion of the paragraph in question altogether. In consequence, the delegation of Zambia proposed that the recognition of the convention as a basis for extradition be not compulsory but left to a free decision of the extraditing state. The Polish delegation's proposal that this recognition be recognized as compulsory was, unfortunately, rejected in roll-call voting.

Finally, therefore, apart from facultative recognition of the convention as a basis for extradition in the event of an absence of extradition agreement (Art. 8, para. 2), The Hague Convention has obviously limited in an explicit manner the problem of extradition, just as the Tokyo Convention did it in an implied manner, to bilateral extradition agreements concluded between contracting states. Hence an unlawful seizure of an aircraft is to be considered as included, by virtue of an offence subject to extradition, in the existing extradition agreements, and is to be included in future agreements. It is nevertheless necessary to bear in mind the various clauses which often limit to a considerable extent the application of extradition agreements, and which may also be operative in the cases of hijacking.⁶⁶ It was also correctly pointed out that although Article 8, paragraph 1, considers hijacking as an offence subject to extradition, it failed nevertheless to define either the extradition procedure, or the conditions under which extradition should be granted or rejected. In those instances national legislations are to be applicable.⁶⁷

The Hague Convention, incidentally, itself made a reference to the national laws in the case of countries which do not make extradition dependent on an appropriate agreement. In those situations, recognition of the offence as subject to extradition takes place under conditions determined in the laws of the state to which the extradition demand was addressed (Art. 8, para. 3). It is not necessary to add that the position of the state demanding extradition is made very disadvantageous in this respects.

A consistent outcome of the above paragraphs of Article 8 and Article 4 introducing concurrence of jurisdiction, is the provision of Article 8, pa-

⁶⁶ Thus for instance, according to Art. V and 5 of the extradition agreement between the United States and Brasil of January 13, 1961, there is no extradition in cases of "purely military character" of the offence. — UN Treaty Series, Vol. 532, p. 184. Art. 3 of the extradition agreement between Belgium and Lebanon of December 24, 1953 stipulates that extradition will not be granted, if the party of which the extradition is demanded, considers the offence "a political offence, or an offence connected with political offence" — UN Treaty Series, Vol. 539, p. 341.

⁶⁷ R. H. MANKIEWICZ, *op. cit.*, p. 155.

paragraph 4, that for the purposes of extradition the offence is to be treated not only as if it was committed at a place where it was actually committed, but also in the territories of states pledged to impose jurisdiction in accordance with Article 4, paragraph 1.

The above manner of settling the problem of extradition by The Hague Convention has therefore certain shortcomings. Nevertheless, the mere fact of including in the convention provisions concerning extradition — provided these are correctly applied — may be of considerable importance for suppression and prevention of acts of unlawful seizures, especially as regards the duty of prosecution and severe punishment.

VI. Duties of States Towards the Commander, Crew and Passengers of Hijacked Aircraft

In the part concerning definition of the offence, mention has already been made of the duty, resulting from Article 11 of the Tokyo Convention, of contracting countries to restore or safeguard control of aircraft to its lawful commander. In addition Article 11, paragraph 2, also lays down that:

“The contracting state in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.”

Article 9 of The Hague Convention is an almost literal repetition of the fragments of Article 11 of the Tokyo Convention obliging the contracting states to restore or safeguard control of aircraft to its lawful commander, and to permit and facilitate for the passengers and crew to continue their journey, and also to return the aircraft and freight to authorized persons.

In comparison with the Tokyo Convention and the draft of the Legal Committee, The Hague Convention contains an important and just extension of the duty to facilitate the continuation of journey and the return of aircraft and cargo, not only to the state where the aircraft landed, but also all other states in which this aircraft, crew and passengers find themselves.⁶⁸

VII. Conclusion

As it is seen from the above analysis, the Hague Convention, despite its shortcomings presents, as compared with the Tokyo Convention, an important step forward to combatting unlawful seizure of aircraft.

⁶⁸ See: Proposal to replace paragraph 2 of Article 9 (submitted by Barbados, India, Jamaica and Zambia) — SA Doc. No. 47.

In addition to tangible decisions concerning suppression of instances of hijacking, also important is the possibility of their effective application. In the case of the Tokyo Convention, its effectiveness was limited in practice, which was due to, i.a., a narrow scope of subjects involved, and leaving out several states which play an important part in international air transport. Moreover, the Tokyo Convention in permitting access, made it only possible to states belonging to the UN, or specialized organizations. A clause of this kind automatically placed outside the convention certain states, as for instance the German Democratic Republic. An important, progressive step was to give The Hague Convention the character of an unconditionally open convention, i.e., accessible to all states. It is worth noting that an important and positive role was played in it by representatives of Poland participating in the work of the so-called Committee for Final Clauses of The Hague Conference. Together with the Soviet delegation they were the authors of the proposal for enabling all states to become parties to the new convention.⁶⁹

The striving to give The Hague Convention a universal character also results from its granting the ICAO Council the function of a central office for handling all information concerning instances of unlawful seizure. A duty was assigned to state members of The Hague Convention to inform the ICAO Council of circumstances attending offences in question, of the measures adopted in conformity with Article 9 and of all steps taken as regards the offenders. It will be interesting to know whether and to what extent will the Council be able to exact fulfillment of this duty by states which are not members of the International Civil Aviation Organization.⁷⁰

The Hague Convention will become operative after ratification documents are deposited by 10 State signatories.⁷¹ In view of a special importance of this convention for suppressing aircraft hijacking, it appears that the states which have signed this agreement should strive for putting it into effect and to initiate ratification procedures as soon as possible. It would also be advisable, in connection with the provision of Article 8, to

⁶⁹ Suggested Final Clauses (presented by Poland and the Soviet Union) — Committee on Final Clauses, Information Paper No. 3. To avoid possible problems resulting from the lack of recognition by certain states, use has been made of the precedent applied formerly by treaties concerning space research and nuclear weapon test-ban and non-proliferation treaties. Governments of the three following countries have been appointed depositaries: the Soviet Union, Great Britain and the United States.

⁷⁰ Worth notice is the fact that almost on the eve of the Hague Conference the Soviet Union became an ICAO member, which will surely affect both the activities of that organization and the future observance of the Convention against unlawful seizure.

⁷¹ The Polish-Soviet proposal aimed at an even faster putting the Convention into effect — as soon as seven ratification documents will be submitted.

conclude appropriate extradition agreements between states participating in this convention. As a result, the new convention, despite certain imperfections, will fill an acute gap in the valid international law and will become an effective instrument in the struggle against acts of unlawful seizure of aircraft.

It is nevertheless necessary to point out that even after The Hague Convention becomes operative, there still remains an essential need for expanding effective operation of the Tokyo Convention. The Tokyo Convention, after all, applied not only to threatening the safety of aircraft. As regards combatting and preventing hijacking, the Tokyo Convention also contains certain provisions which are missing in the Hague Convention, for instance those which concern the powers of the aircraft commander, crew and passengers. Thus, only a joint application of both conventions may produce truly positive results. This standpoint is confirmed by the ratification by Poland of the Tokyo Convention of January 9, 1971, together with an announcement of taking up in the near future ratification procedures with the regard to the Hague Convention.⁷²

Acceptance of The Hague Convention will by no means conclude the work of the ICAO to ensure maximum safety in international air transport. This work will now concentrate on the problems of unlawful interference with international civil aviation and its facilities. These problems, although closely connected with the problem of unlawful seizure of aircraft, is nevertheless much wider and transcends the limits of the present paper. In this place it is only possible to make a brief review of pertinent problems and events.

The concept of unlawful interference itself was defined in the resolution of ICAO Council on April 14, 1969, which stated that it means: 1) unlawful seizure of an aircraft, and 2) sabotage or an armed attack directed against an aircraft used in international air transport, or against ground equipment used by international air transport.⁷³ Thus, in conformity with this definition, unlawful seizure was qualified as one of the kinds of unlawful interference, although for the time being it is rather a concept evolved earlier. Simultaneously with issuing this resolution the Council set up a Special Committee composed of representatives of 11 ICAO member states.⁷⁴ The Committee was intended to investigate future instances of unlawful interference and organize appropriate preventative measures. In the initial phase the work of this Committee progressed rather slowly

⁷² See: "Trybuna Ludu" of January 10, 1971, p. 1.

⁷³ "ICAO Bulletin" of June 1969, p. 9.

⁷⁴ Special Committee on Unlawful Interference with Civil Aviation and Its Facilities.

and in the shade of the more advanced work of the Legal Committee and its Sub-Committee on the problem of unlawful seizure.

It was only the glaring intensification of various kinds of bomb and terrorist attacks against civilian aircraft in the first half of 1970 which brought about a change in the situation. A meeting was held in Montreal from June 16 to 30, 1970 of the 17 extraordinary session of the ICAO Assembly convened at a special wish of 11 member states. It was attended by delegates of 91 out of the total of 119 member states or ICAO and observers on behalf of many international organizations. The purpose of the session was to take up steps necessary to prevent unlawful interference with international civil aviation, and also to find appropriate legal measures. The Legal Committee of ICAO was assigned to the task of working out by the end of 1970 a special international agreement, while a diplomatic conference for signing such a convention was to be held in mid-1971. The Assembly encouraged states to ratify or join the Tokyo Convention as soon as possible. Attention was also drawn to the advisability of a rapid ratification of a convention on unlawful seizure of aircraft whose adoption was already in the plans. It was also recommended to intensify domestic jurisdictions as regards the responsibility of those responsible for unlawful seizure of aircraft and other forms of unlawful interference. Finally, the necessity was stressed of strengthening the existing extradition agreements in this respect, and of a closer cooperation among states, both bilateral and multilateral at the forum of ICAO.⁷⁵

Carrying out the recommendations of the ICAO Assembly, the Legal Committee at its 17th session in London at the turn of September and October 1970, prepared a draft convention concerning unlawful acts directed against international civil aviation (other than those then envisaged in the draft convention concerning unlawful seizure). The draft of this convention contains primarily a long catalogue of offences which are subject to this agreement (Art. 1 lists nine kinds of such acts). In addition, the draft convention is very similar to the draft convention concerning unlawful seizure. Thus all changes and modifications which occurred at The Hague conference will probably exert an influence over the draft convention on unlawful interference. Adoption of this convention will be a desirable complement of The Hague Convention and will furnish together with it, and also the Tokyo Convention, a certain system of legal international protection of safety of international civil aviation.

⁷⁵ "ICAO Bulletin" of August 1970, pp. 12 - 13.

The Socialist Countries' Membership in the GATT

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I. Socialist Countries and the General Agreement Concept

1. The GATT Concept As Based on the Liberal Doctrine on International Trade

In the capitalist international trade theory there are, broadly speaking, two basic doctrines: the liberal one — whose special application is the free trade theory, and the protectionist one. The free trade theory claims that it is only the free interplay of market mechanisms that ensures maximum economic benefits. It is, therefore, necessary to ensure the freedom of action for trading units to act freely (*laissez faire*) and a free flow of commodities and payments (*laissez passer*). Whereas protectionist doctrines point out that the maximalization of economic benefits at least, under certain circumstances, may not be attained through mere competition and unimpeded interplay of economic forces on the international market and the state will consequently be faced with the task of “protecting” its national economy. Such protection may be effected by indirect control — tariffs, first and foremost, and by direct control, i.e., by quotas.

Ever since the period of mercantilism in principal states of the capitalist world there has been a struggle between the liberal and protectionist doctrines one prevailing in turn over the other. Characteristically, however, the states gaining economically a margin over their competitors at a given time and bent upon their broad expansion into foreign markets by

virtue of their supremacy in technology and of the quality of their commodities, not fearful of foreign competition, used to be ardent advocates of the liberal doctrine. But as soon as the erosion of such supremacy set in, those states switched to increasingly favour protectionism while other states, those gaining domination in world economy, became spokesmen of liberalism.

Such situation obtained throughout the 19th and at the outset of 20th century. Britain was then the leading spokesman of liberalism, while protectionism had its ardent advocates in the United States, then engaged in expanding its own industries and anxious to protect them against the British competition.

After World War II the United States won "unrivalled" positions. It was then that, in their drive to pave the best way for their economic expansion, they claimed that free trade was necessary.

The liberal doctrine now suiting best the United States interests, thus becomes the ideological rationale for the US action in the sphere of international trade. This was the corner-stone of the Havana Charter as well as of the GATT.

It was not possible, however, to include the liberal doctrine completely into the General Agreement, for this was not in keeping with the interests of principal authors of the GATT. The United States itself which would have gladly welcomed others to abolish their trade restrictions continued, on its own part, to protect its internal market with high and often prohibitive tariffs.

In this connection the classical demands of the free trade doctrine were modified with a view to render them acceptable for all the principal GATT signatories. In particular the demand for abolition of all tariff barriers, quotas and other restrictions was replaced by a drive to have them materially reduced. Free competition, the effect of which boils down to that the stronger prevails was replaced by the obligation to accord equal treatment, equality of concessions and non-discrimination. The non-intervention of the state was to be ensured by provisions on the non-application of export subsidies and provisions relating to state trading enterprises, placing them under the obligation to submit to the same rules of competition as private enterprises. The price-forming freedom was ensured by the whole system of regulations of the Agreement, boiling down to the requirement of definite correlation between the internal price and the world market price (the difference in fact was tantamount to the level of the tariff rate).

The most favoured nation clause, underpinning the whole GATT machinery, was based on the abstract assumption of states' economic equilibrium. The original text of the Agreement avoided making any

difference whatsoever amongst its members based on the degree of their economic development and applied the same principles to weaker and stronger partners alike.

It should be noted, though, that in the working out of the GATT regulations, apart from the developed capitalist countries other countries which cannot be included into that category, namely Brasil, Burma, Chile, India, Cuba, Pakistan or Syria also participated. Even so, the latter while being medium-advanced were at the time under strong influence of colonial powers or that of the USA. Thus their influence on the adaptation, even partially so, of the GATT regulations to the interests of developing countries could be but marginal.

Moreover, the developing countries were not at the time in a position to form a united front and to unequivocally define their demands. The end of the colonial era continued to be a problem for the future, while the economic and social problems of those countries were overshadowed by political struggle for independence.

The fact that the GATT was based on the liberal doctrine of international trade had, under the circumstances of post-war economy, a major influence of the socialist countries' attitude towards the organization.

Due to the destruction brought by the World War II, the economic situation of most of the socialist countries was very difficult. To overcome this state of affairs it was necessary to obtain substantial economic aid and that was what those countries expected to receive from international organizations first of all.

It was not only that the GATT was unable to ensure such aid but, moreover, the acceptance of GATT principles would expose the economies of those countries to competition of stronger partners, which could at that stage of those states' economic development, impede or even thwart their industrialisation. Besides, the shortage of commodities possibly suitable for export and the lack of sufficient means of payment for imports made it impossible for them to multilateralize foreign trade.

Of decisive importance, however, for the relationship between socialist countries and the GATT were not so much the divergent views on international trade doctrine but rather the obstacles of political nature. Almost simultaneously with the establishment of the GATT there started the so-called cold war whose one expression was an attempt to clamp an economic blockade on the socialist countries. The principal capitalist powers' hostile attitude towards trade with the socialist camp and the ever dwindling trade turnover between the two blocks produced an atmosphere in which the socialist countries neither saw any point in nor possibility of any cooperation whatsoever with the GATT. Neither did the capitalist states visualize such a possibility.

It was only the improvement in the political scene that started to take shape in mid-1950s that set in motion the slow process of coming closer together between the GATT and the socialist states. Before, however, one proceeds to take up this process in more detail one should reflect for a while upon the case of the only socialist state that had been in the GATT ever since its inception.

2. Czechoslovakia in the GATT

Czechoslovakia entered the Preparatory Committee called up by the Economic and the Social Council in February 1946 to establish a programme and work out a draft statute of the international Trade Organization (ITO). At the time Czechoslovakia's economy did not have the features of planned socialist economy and did not differ much from the economies of her capitalist partners. In 1947 negotiations were held in the Committee resulting in the conclusion of the General Agreement on Tariffs and Trade (GATT). Czechoslovakia, then having a price-creating tariff — participated in the negotiations and signed the General Agreement in March 1948, thus becoming one of its original members.

The socio-political transformations in Czechoslovakia in March 1948 unequivocally brought her into the socialist camp. However, Czechoslovakia continued to be a GATT member.

Her GATT membership did not, however, protect Czechoslovakia from the cold war effects. Being at that time an instrument in the hands of the developed capitalist countries the GATT was made part of the trade blockade system directed against the socialist states. One should note, however, that the GATT was playing a rather passive role, viz., it did not embark on its own on any action against socialist countries, though it accepted moves directed against those countries, even against its own member — Czechoslovakia. The following examples, *inter alia*, may illustrate this argument:

During the 1949 Annecy session of the GATT, Czechoslovakia protested against the introduction of licenses regulations in the USA in respect of exports to the socialist countries, feeling it at least with regard to her to be inconsistent with the GATT provisions. The Contracting Parties did not recognize Czechoslovakia's charge. To the question if the United States by introducing the licensing system contravened its obligations in respect of the GATT the following answers were returned in the voting — one in the affirmative (Czechoslovakia), seventeen in the negative, with three abstentions (India, Lebanon, Syria).¹

¹ GATT, Press Release, Annecy No. 42, 8 June, 1949.

In 1951, in the course of an anti-communist campaign, a bill was passed in the USA under which the Administration was obliged to undertake action to exclude the socialist countries from enjoying any tariff reduction as might be made by the United States. The application of this provision against such countries as the USSR, Poland or Bulgaria was relatively easy since bilateral trade agreements with them were expiring in 1951, while action against Czechoslovakia was much more complex since it contravened the GATT regulations.

At the Sixth Session of the Contracting Parties (1951) the United States demanded that in view of the political controversy and the inability arising therefrom to maintain normal trade relations, the Contracting Parties relieve it of the obligations under the General Agreement in respect of Czechoslovakia.²

In an attempt to legally justify such conduct the United States invoked Article XXV, paragraph 5³ and Article XXXV of the General Agreement.⁴

Czechoslovakia opposed the action taken by the United States. She pointed out that Article XXXV permits a GATT member not to undertake any obligation with respect to another GATT member, but it does not permit to renounce the obligations already undertaken. The exceptional circumstances adduced by Article XXV would have to bring difficulties to the exporting country, which was not the case as far as US exports to Czechoslovakia were concerned.

The GATT was placed in an embarrassing situation. The point was not so much an economic problem but the situation resulting from the cold war. The GATT was, however, under too strong an influence of the USA to turn down its demand. The Contracting Parties although they considered that they are not in a position to resolve political problems resulting from the cold war did, nevertheless, accept the United States' demand and consented to the suspension of the application of the General Agreement in trading relations between the USA and Czechoslovakia.⁵

It was hardly an auspicious beginning of relations between the Contracting Parties and the socialist countries, all the more so that although the United States was the only country to renounce officially to Czechoslovakia that it would no longer be treated in conformity with the General

² GATT, SR 6/5 of 10 August, 1951.

³ Which stipulates that "in exceptional circumstances not elsewhere provided for in this Agreement the Contracting Parties may waive any obligation imposed upon a contracting party by this Agreement [...]"

⁴ Which reads: "This Agreement [...] shall not apply as between any contracting party and any other contracting party if [...] either of the contracting parties, at the time either becomes a contracting party, does not consent to such application."

⁵ GATT /CP. 6/49, 24 Sept., 1951.

Agreement, still a number of other parties to the General Agreement applied, to a lesser or larger extent, the discriminatory practices and restrictions to Czechoslovakia. Thus a situation arose in which notwithstanding her membership in the GATT, Czechoslovakia was subjected to the same manner of discrimination as were other socialist states and the majority of the western countries concerned and interested in trade with her entered into bilateral trade agreements regulating — in circumvention and contravention of the General Agreement — their mutual trading relations.⁶

And, finally, another example throws additional light on the atmosphere of hostility towards socialist states obtaining in the GATT at that time. Namely, when Japan was seeking admission to the General Agreement, her representative stated: "It should be noted that Japan applied faithfully strict controls over her exports towards communist countries, but despite her keen desire to become a member of the GATT was debarred from membership thereof."⁷

The fact that the above-quoted argument was invoked to justify a country's maturity to accede to the General Agreement does not seem to call for any additional comment.

Czechoslovakia's legal situation in the GATT which took its shape during that period has not changed until now. It could be summarized as follows: Czechoslovakia was a full member of the GATT and this status of hers was formally recognized by all member states except the USA. The earlier form of concessions granted by Czechoslovakia in the GATT consisted in her customs tariff reduction. The GATT members refused; however, to recognize tariff to be a real instrument of trade policy believing it to be fictitious and feeling that a lowering of customs levied on a dutiable product does not affect the product's price on the domestic market or the scale of imports. In view thereof Czechoslovakia did not enter into any trade negotiations within the GATT neither did it take effective part in multilateral trade negotiations sponsored by the General Agreement.

One should, nevertheless, recall that Czechoslovakia did try to participate in the last GATT conference on tariffs (the Kennedy Round). Realizing that the reduction of customs duties she made would not be recognized by other partners as constituting sufficient concession Czechoslovakia, apart from customs tariff reduction, advanced a proposal to increase her imports from the GATT countries by thirty per cent during

⁶ Such opinion is expressed also by Western authors, cf. e.g. "East-West Trade. Political and Economic Planning," Vol. 31, No. 488 — May 1965, p. 158.

⁷ GATT /IC/SR/10; also quoted in GATT, Press Release 126 of 21 Aug., 1953.

five years. The concession — similar to that offered by Poland — was, however, soon withdrawn. For Czechoslovakia realized that she was going to obtain nothing more than what she had by then already gained on the strength of the most-favoured-nation treatment which she was enjoying with the GATT countries.

Apparently, one might argue that despite her GATT membership, Czechoslovakia was being treated by her Western partners in the same manner as they were treating other socialist states, even those not participating in the GATT. Thus, she did not enjoy every privilege resulting from the General Agreement and, especially, the right to non-discriminatory treatment regarding quantitative restrictions. On her part she was not under the obligation to grant concessions other than the above-mentioned tariff ones.

II. The Road of the Socialist States to GATT

1. Changes in the East-West Relations

In mid-fifties there occurred an appreciable *détente* in political relations. The failure of political and economic blockade against socialist states as well as the changing alignment of forces brought about on the one hand by the growth of military power of the socialist camp and, on the other, by the emancipation of numerous countries from under the colonial dependence, persuaded the leading capitalist powers to relax their cold war policies and to adopt a certain measure of peaceful co-operation in the international sphere. Under such circumstances there came about a new revival of socialist countries' interest in their participation in international organizations.

As far as GATT was concerned, the interest taken in it by at least several socialist states was motivated by an expectation that the General Agreement could play a positive role in the reduction of barriers blocking the development of East-West trade. The point was, first and foremost, to decrease the discrimination by capitalist states of imports from socialist countries, (namely higher customs tariffs, quantitative restrictions, etc.), and to exports to those countries (the ban on sales of certain products labelled as "strategic.")

The interest that several of the socialist states took in GATT coincided with the attempts made at the time by the Secretariat of the General Agreement at increasing the role played by the organization and at expanding its influence. The idea was, first of all, to counter-act the ever-stronger tendencies, on the part of the developing and socialist countries,

to create a world organization dealing with problems of trade and based on principles more in consonance with the requirements of economic development of those countries.⁸ The point was as well to prevent the erosion of the GATT role, a process resulting from the emerging trend of disintegration of the capitalist world market brought about by the developments under way towards regional economic integration in Europe (the EEC and EFTA). Thence also GATT's interest in establishing some contacts with socialist countries. Both sides realized, however, that to give these contacts a more concrete form it would be required to overcome a number of obstacles not only of socio-political but of legal nature as well.

2. The Problem of Reciprocity of Concessions in Relations With a Socialist Country

The basic problem coming up in front of a socialist country before it could accede to the GATT was the so-called balance of rights and obligations. The attitude taken by the GATT members on this matter may be briefly presented as follows.

The basic mutually granted concessions by the GATT members are reductions of customs tariffs. In market economy the customs duty — apart from the role played by the internal and external price — constitutes one of principal factors determining the level of imports. Tariff reduction enables a foreign producer to compete profitably not only with other foreign producers but with the domestic producers as well. Manipulation of the level of tariff affects in a major way the conditions of competition between domestic production and imports. For this reason it constitutes an essential and real concession to the partner, all the more appreciable that the mutual obligations under the most-favoured-nation treatment between GATT members are linked to the obligations covering the full range of Government intervention in the sphere of access to the market.

While in socialist economy, in the circumstances of the monopoly of foreign trade, the level of imports is determined by the economic plan arbitrarily fixed by the State to be implemented in the domain of foreign trade. Central economic planning determining the size of the market in a socialist country and the activities of the monopoly of foreign trade cause the non-equality of access opportunities to a socialist market. Even if a socialist country does employ tariffs then tariff reductions granted to a market economy country may lead to an increase of the latter country's imports only at the expense of other countries in the framework of an

⁸ Cf. e.g. GARDNER, N. RICHARD, *The United Nations Conference on Trade and Development*, International Organizations, Winter 1968, vol. 22, No. 1, pp. 102 - 3.

arbitrary import quota fixed by the economic plan. Consequently, no competitive confrontation occurs with a socialist country's internal market and no increased import demand creation effect takes place.

In this connection GATT members felt that the accession of a socialist country would be possible only when such country were in a position to offer concessions balancing the increased opportunities of access to their markets. The tariff concessions could only be contemplated if a socialist country so reformed its economy as to be guided by similar principles as is the case with a market economy country.

Such, briefly, was the problem confronting the two socialist countries, viz. Poland and Yugoslavia, who were the first to attempt the accession to the GATT. But before one proceeds to discuss the various methods adopted by the two countries to resolve the problem it would be useful to make a few remarks on the above-presented arguments of the Western countries on the difficulties in obtaining reciprocity of concessions in relations between market economy countries and those with planned economy.

The argument attaching exaggerated importance to tariff reduction effect starts from an unsubstantiated proposition that imports into a market economy country may increase indefinitely and, at the same time, disregards the numerous real factors which can have a limiting effect on imports, such, e.g., as the position of the balance of payments, the level of currency reserves, income, tax and investment policies, currency restrictions, protectionist practices of the monopolies, etc. Under such circumstances it seems doubtful if tariff reduction could guarantee that there would be a direct effect, namely an increased imports demand at the expense of domestic production. What is possible, though, is a phenomenon where the primary effect of tariff reduction will be the changes in a country's imports share of individual partners and as a derivative effect only there could possibly occur an increase in the total value of its imports.

The argument that the access to socialist market is limited is based largely on a biased belief that the objective of the plan under socialist economy is to put a curb on imports, which obviously clashes with the basic function of planning i.e., to set the optimum quantity and composition of imports from the point of view of general economic effectiveness within the limits of widely conceived payment ability of the national economy. The plan of foreign trade does not function here as a brake on trade but as an instrument of a conscious choice—in contradistinction to the spontaneous phenomena in capitalist economy.

"After inclusion into economic plan the choice of a foreign partner depends solely upon alternative benefits of a transactions as seen in its correlation to the general pattern of import-export conditions prevailing

at a given market. In a number of cases choice is also made between the establishment or expansion of domestic production; also planned is the expansion of production capacities, with due consideration taken of the imports requirements. Thus, for example resignation from an import is conditioned by the high level of prices or by restrictions placed on our exports and the attendant payment difficulties. What is decisive then are the commercial considerations and the requirements of economic development. While in the capitalist system predominant is the tendency to assess the advantages exclusively from the point of view of a group of exporters or importers, and its short-term interests at that, a state's policies, again, will be directed at most on redistribution, among spheres of capital, of a part of benefits flowing from international trade."⁹

3. Yugoslavia's Road to the GATT

First contacts between GATT and Yugoslavia took place in 1950 when she was granted observer status.¹⁰ It was not until 1958 that Yugoslavia decided to institute closer relations with the GATT. Yet, it was not possible then to join the General Agreement in conformity with its Article XXXIII as a full member. The obstacle was Yugoslavia's economic system not much different to economy of other socialist states.

Planning a number of changes in her economic system, Yugoslavia — independently of her endeavour to join the GATT — made the choice of her path that might be described as an adaptation of a socialist economy to the unchanged GATT regulations. To achieve, along this course, the full accession to the GATT, a number of intermediate stages had to be traversed which would reflect the then state of adaptation of the Yugoslav economy.

The basis for arranging relations between Yugoslavia and GATT was provided by the declaration for Association¹¹ of May 16, 1959, in which the two parties stated that the goals and principles of the General Agreement are accepted as basis for mutual trade relations. Simultaneously, the Yugoslav Government declared that it would extend to the GATT members the treatment provided for by the General Agreement to such measure as would be possible under the economic system then in existence. The Contracting Parties on their part granted Yugoslavia an appropriate treatment which would permit in their mutual relations the attainment of

⁹ S. KUZIŃSKI, *O stosunkach ekonomicznych między krajami socjalistycznymi i kapitalistycznymi* [On Economic Relations Between Socialist and Capitalist Countries], "Problemy Pokoju i Socjalizmu", 1965, No. 7, p. 21.

¹⁰ GATT /INT/67/240, 2 Nov. 1967.

¹¹ GATT L/986, 16 May, 1959.

a balance of advantages and obligations arising from the General Agreement.

Embodied in the Declaration was also a clear statement by the Yugoslav Government that its final objective was to accede to the GATT in the capacity of a full member under Article XXXIII in order to be able to enjoy all the rights and privileges arising from the General Agreement.

To this end the Yugoslav Government pointed out in the Preamble to the Declaration as well as in the Declaration itself, that it would conduct its trade policy in such a manner as to be able to progressively and increasingly meet the obligations devolving upon it from the General Agreement whereby conditions could be created for entering into negotiations with a view to a full membership under Article XXXIII.

A provision was included into the Declaration on Yugoslavia's association with the GATT to the effect that during third review, scheduled for 1962, of the relations between the country and the contracting parties, a decision would be taken as to the basis on which such relations would be formed in the future. From 1959 to 1962 Yugoslavia carried out a series of reforms in its economic system towards decentralization; it provided scope for major increases in the number of foreign trade companies, monopoly of foreign trade was abolished respecting certain products and the enterprises' activity was based — similar to the situation under capitalist economy — on the profit criterion.

Provisional customs tariff was introduced on July 1, 1960, involving 127 items; another general provisional customs tariff was introduced on March 15, 1961, including all items and a single rate of exchange for the dinar was established in foreign trade — 750 dinars to one US dollar. On the basis of those measures the Yugoslav Government applied on October 17, 1962, for provisional accession to the GATT.¹²

The provisional accession was expected to enable Yugoslavia to establish closer relations with the GATT without holding tariffs negotiations, which was not then possible in view of her customs tariffs still being of a provisional nature. Thus Yugoslavia would enjoy all the rights and obligations of a full member except the direct right to tariff concessions until her provisional customs tariff was superseded by a definitive one.

Yugoslavia's application for provisional accession manifested that she was ready to undertake all obligations devolving from the General Agreement except the provisions under Article II.¹³ This was the result of her

¹² GATT L/1868, 19 Oct., 1962.

¹³ Article II of the General Agreement provides, *inter alia*, for exact procedures on the compilation of concessions mutually granted by the contracting countries included in the Schedules annexed to the General Agreement.

economy having been by then brought substantially closer to the pattern of market economy.

Admission of Yugoslavia as provisional member of the GATT took place on the strength of the Declaration of November 13, 1962. The membership was to be another step along the path taking Yugoslavia towards full accession to the GATT under Article XXXIII.

The difference between provisional and full accession is that the signatories of the declaration of provisional accession only are obliged to apply the provisions of the General Agreement to a provisional member, while in the case of full accession, every contracting party is under obligation to apply the General Agreement to such country, unless one of the contracting parties at the accession to the GATT by another party refuses, under Article XXXV, to apply the GATT provision. Moreover, the provisional member has no voting rights nor can it claim any rights regarding concessions scheduled either under Article II or under any other provision of the General Agreement.¹⁴

As the Declaration for Yugoslavia's provisional accession had a time limit¹⁵ it was necessary to hold, at a relatively early date, the tariff negotiations and to grant concessions in that sphere.

The occasion was provided by multilateral trade negotiations known as the Kennedy Round. On April 14, 1965, the Yugoslav Government communicated its intention to participate in them in conformity with the procedure adopted for the less-developed countries¹⁶ and that it desired to utilize the negotiations for its full accession to the GATT.¹⁷

But Yugoslavia did not wait until the conclusion of the Kennedy Round negotiations: as early as October 1965 it applied for the commencement of negotiations towards its admission as full member of the GATT under Article XXXIII, i.e. independently of the Kennedy Round negotiations.¹⁸

When applying as mentioned above Yugoslavia had by then carried out all the principal reforms, the result being that the functioning of her economy did not substantially differ from the regulations laid down by the General Agreement. One principal measure in this respects was the devaluation of the dinar — from 750 to 1,250 dinars to one US dollar — which

¹⁴ E.g. in the case of Yugoslavia, she could not claim any damages due to the waiving or change of concession by any contracting party, even in relation to a product in respect to which Yugoslavia's position as principal supplier could be recognized.

¹⁵ It was agreed that it would be valid until December 31, 1965, unless Yugoslavia acceded as full member before that date.

¹⁶ The procedure did not require the developing country to grant equivalent concessions.

¹⁷ GATT TN 64/44.

¹⁸ GATT L/2488, 27 Oct., 1965.

made it possible to eliminate export subsidies and other special means that had been adopted in connection with the then existing gap between internal and world market prices. Another measure was the introduction of definitive price-creating customs tariff.

Having a definitive customs tariff Yugoslavia could now enter into tariff negotiations with GATT members which constituted the basic condition for her full accession.

On April 5, 1966, the Contracting Parties approved the report by the GATT Working Group that had been set up to investigate the question of Yugoslavia's full accession; it also approved the draft Protocol for Accession.¹⁹ Yugoslavia then became the full GATT member as the first socialist country which had taken the path of gradual adaptation of its economy to the regulations and workings of the General Agreement.

4. Poland's Road to GATT

Poland's road to GATT was much more complex than that of Yugoslavia. Ever since the beginning of the first negotiations in 1958 Poland had taken a clear stand that the system of planned economy was a reality there to stay in the modern world and that there had to be a possibility of finding some solution that would enable even a state with centrally planned economy to accede.²⁰

As one of Western experts correctly appraised the situation, that the GATT with all its pragmatic attitude to find a *modus vivendi* with East European countries, failed to work out a sensible formula for Poland so long as Poland insisted that she would not change her economic system. Poland, apart from all her interest to participate in the multilateral GATT system, was not in a position or did not wish to adapt her economic system so as to adjust it to the multilateral trade regulations.²¹

Poland's first step along her path to GATT was, similarly as had been the case with Yugoslavia, the associate membership on the basis of the Declaration of September 9, 1959.²² The membership was, however, somewhat looser than Yugoslavia's associate membership. First of all the Declaration on Poland's association envisaged that associate membership would be based exclusively on the provisions of the Preamble to the General Agreement and not the General Agreement itself, unlike the Yugoslav case. Besides, the Declaration did not include the statement that

¹⁹ BISD, XV Suppl., p. 33.

²⁰ GATT Spec/102/58, 25 Apr., 1958.

²¹ G. CURZON, *Multilateral Commercial Diplomacy*, Michael Joseph, London 1965, p. 311.

²² GATT L/1037/Rev. 1 - 5 Nov., 1959.

Poland's final objective was her full accession to the GATT, under Article XXXIII. Nor did the Declaration provide that, unlike the Yugoslav case, there would be after a time a major change in Poland's status in the GATT.

It should be stressed, however, that in practice the rights and obligations of Poland and Yugoslavia during the initial period did not differ materially. The difference in the wording of the Declarations resulted mainly from the problem of balanced mutual concessions. If in the Yugoslav case at the time of her accession as an associate member it was already known how the matter was going to be settled in the future, then in the Polish case the manner of resolving the question was left open.

The GATT was persuaded by the problems linked to Polish accession to take interest in the effective reciprocity in relations with planned economy countries. Therefrom a number of efforts to resolve the problem were made with Polish participation, with every effort bringing the GATT closer to the acceptance of at least some of the principles of socialist economy.

The first effort to find an equivalent to tariff concessions consisted in the proposal that Poland should accept what was described as minimal import commitments, viz., the obligations to import from the GATT countries the agreed quantities of goods in the export of which those countries were interested.²³ The proposal put forth in 1959 was not accepted. It was too complicated to be workable technically; besides, the political situation was not then ripe for the admission of Poland into the GATT.

Nevertheless Poland continued to participate in the GATT work and went on developing trading contacts with the contracting parties. The contacts were engendering an atmosphere favourable to Poland. She turned out to be a reliable trading partner observant of the general provisions of the General Agreement.²⁴ Trading relations between Poland and majority of the GATT countries were conducted on the basis of the most-favoured-nation treatment,²⁵ which often did not differ in scope from the most-favoured-nation treatment in the General Agreement reading.

The GATT was then confronted with numerous transformations occurring in the world arena. The increasing number of the developing countries

²³ GATT L/1049, 28 Sept., 1959.

²⁴ This is borne out by the reviews of Poland's relations with the GATT countries, effected on the basis of the Declaration of the associated accession by Poland. During those reviews no objections were raised relating to Polish foreign trade. On that matter cf. GATT Documents L/1785, L/2058, L/2276 and L/2595.

²⁵ In 1960 the United States granted the most-favoured-nation treatment to Poland, outside GATT, through bilateral negotiation. This consolidated Poland's position in the General Agreement.

in the GATT who favoured development of trade with socialist countries, and the crisis the GATT was experiencing in connection with the establishment of the UNCTAD in 1964, produced a further shift in GATT attitudes.

Ever more essential was becoming the search for ways to prove the universality of the GATT and to strengthen its competitive position vis-à-vis the UNCTAD. The addition of Part IV of the Agreement in 1964 constituted a resignation from the principle of reciprocity of concessions in relations with the developing countries and brought about another breach in and a greater flexibility of interpretation of GATT regulations. The continued disintegration of the capitalist world also contributed to the erosion of the position of the GATT. The EEC and EFTA integrational agreements through the creation of privileged conditions for trade within those groupings accompanied by the continued maintenance of protective barriers towards the rest of the world resulted, after several years' existence, in the shift in traditional flow of trade among capitalist countries. This, in turn, produced multiple tensions between principal trading powers which could easily grow into a trade war and thereby practically spell out an end to GATT.

It was against such background and fearing the danger of serious political frictions that could follow in the capitalist countries from the afore-said contradictions that the United States took the initiative in 1963 to have multilateral trade negotiations within GATT framework, described at the Kennedy Round.

The climate of great negotiations which were expected to lead to a significant cut in tariffs and other barriers and to stimulate development of international trade and economic growth was favourable for a planned economy country in its search for the resolution of the problem of accession to the GATT.

Poland again came out with another proposal. Availing herself of the fact that the Kennedy Round intentions included linear reductions of tariffs, Poland on her part proposed that she would commit herself to global increase in her imports. In exchange for granting her full privileges arising from the General Agreement²⁶ Poland proposed to undertake definite percentage increases in her imports from the contracting parties and to submit her trade relations with them to GATT reviews.²⁷

²⁶ What is meant here is primarily the multilateral confirmation of the MFN treatment granted to Poland and its extension to meet GATT standards and to abolish discriminatory quantitative restrictions applied to imports from Poland by a number of capitalist countries.

²⁷ Poland's proposals and demands were fully presented in the GATT Documents TN. 64/NTB/15 of 27 April 1964.

The Polish proposal won favour with the GATT Secretariat and some of the contracting parties, including the United States. A number of countries though, the West European ones in particular, felt that, for economic reasons, the multilateralization of their trade with Poland would not be advantageous for them. Those countries hampered the quest for a speedy arrangement designed to bring GATT closer to socialist countries.

After long and difficult negotiations held from January to July 1967 a compromise — acceptable to all parties — was reached. After the approval of the terms of Poland's accession by the Contracting Parties²⁸ the Protocol on Poland's full accession entered into force on October 18, 1967. Since then Poland became a full GATT member.

The struggle for the principles of Poland's participation in the GATT was of major importance as the arrangement accepted by Poland could set a pattern for other socialist countries and could at least have much influence on future arrangements relating to the terms of their accession.

III. Conditions of Poland's Accession to the GATT

1. The Nature of Poland's Concession

As it has already been mentioned earlier the basic problem that had to be tackled before Poland joined the GATT was to work out a formula ensuring the balance of concession in relations with a country applying other instruments regulating the access to its internal market than those utilized under market economy. The arrangement adopted in the case of Poland could, in most general terms, be described as follows: in exchange for the privileges arising from the General Agreement — excepting the ones embodied in Article XIII — Poland undertook to increase annually, by a definite percentage, her imports from the GATT member states and, consequently, agree to annual reviews of the implementation of her obligations.²⁹

The undertaking by Poland to increase the total value of her imports from the territories of the contracting parties by not less than 7 per cent per annum, contained in schedule LXV appended as annex to the General Agreement, was a form of concession granted in exchange for the concessions gained by Poland from other contracting parties. In this connec-

²⁸ GATT L/2843, 4 Apr., 1967 and GATT C/M/41, 26 June, 1967.

²⁹ On the basis of the text of the Protocol of Accession of Poland, Doc. GATT 1/2851, 19 Sept., 1967, and of the text of the General Agreement published in BISD vol. 4, Geneva 1969.

tion Poland's concession was of a permanent character, pursuant to Article II paragraph 1a of the General Agreement. It would be possible to change it only under the re-negotiations procedure provided for in Article XXVIII. It also follows from paragraph 8 of the Report by the Working Party on the Accession of Poland³⁰ and from paragraph 1 of Annex B to the Protocol.

The afore-mentioned paragraph 1 of Annex B stipulates, that "[...] On 1 January 1971 and the 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 its 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 then be free to modify equivalent commitments."

The 3-year period that, in accordance with the provisions of the Protocol, would have to elapse until a conceivable modification of Poland's concession could be possible allowed for the accumulation of some experience concerning its practical implementation. It transpired that the commitment is rather difficult to keep³¹ and very rigid at that, viz., even substantial increase of exports over the 7 per cent per annum rate in one year cannot compensate even negligible shortfall in the fulfilment of the commitment in another year. This "rigidity of commitment" became an especially serious problem in the light of the planning and management reform implemented in Poland in order to make central planning more flexible and to increase freedom of the enterprises. As a result, the possibility of implementing central preferences was reduced, especially in foreign trade over a short period of time (say, one year), for the instituted system of indirect guidelines could produce the intended results only after a lapse of a longer period.

Having the above in mind, Poland approached the GATT to renegotiate, in conformity with the provision of the Protocol, with a view to make her concession more flexible.³²

The proposal suggested by Poland to supersede the formula now in force with a commitment to increase imports over 4-year period by 31 per cent, i.e., by at an average annual rate of 7 per cent, did not gain support from every GATT member.

³⁰ GATT L/2851, 19 Sept., 1967.

³¹ E.g. in 1967, when Poland acceded to GATT, but, in that year, she was not under the obligation yet to implement her concession, Poland's imports from the territories of the contracting parties increased by 1.5 per cent as compared to 1966; in 1968 the increase was 6.1 per cent as compared to 1967. Poland fully met—and over fulfilled—her commitments only in 1969 increasing her imports from GATT countries by 9.2 per cent.

³² GATT Spec/70/85.

Certain states, though agreeing that there existed a necessity to make Poland's commitment more flexible, felt, however, that her proposal constituted a reduction of her commitment, especially over longer periods. As the result of the 1970 negotiations a compromise agreement was reached and, with Poland having accepted the new and more complex formula of her commitment, it now reads:

"1 [...] Poland shall undertake to increase the total value of its imports from the territories of contracting parties by 7 per cent per annum aggregated and compounded over multi-year commitment periods, that is:

(a) in the two-year period 1971 - 1972, Poland shall undertake to import a total of not less than 221.5 per cent of the value of its total imports from those sources in the year 1970;

(b) in the three-year period 1973 - 1975 and in each succeeding three-year period, Poland shall undertake to import a total of not less than 344 per cent of a base defined as the hypothetical value of imports in the last year of the preceding period that would have resulted had the actual increase of imports over the preceding period's base been distributed among the individual years at a constant compound rate of growth. Should the rate thus obtained be lower than 7 per cent, however, the rate used for this calculation shall be 7 per cent.

"2. Should Poland's imports in any period fall short of its commitment, the import commitment in the succeeding period shall be increased by the amount of the short-fall.

"3. The value of imports in any but the last year of a commitment period shall be not less than 103.5 per cent of the base for that period [...]"

Poland, according to the new formula of commitment now agreed upon, also had the right to modify it by January 1, 1973 (and, later, once every three years) by negotiation and agreement with the Contracting Parties of the GATT or to modify it unilaterally should negotiations fail to produce an agreement.

It seems that the renegotiation of concession altered Poland's commitment only insignificantly. The change is in the main that there is now more flexibility while the nature of the concession has remained unchanged. Nevertheless, it does afford a wider margin for manoeuvre as compared to the former formula. The complex form, even mathematically so, of the new concession may also give rise to certain reservations. The complexity, undoubtedly, resulted from the desire of the contracting parties to ensure to themselves all the advantage arising from the possibility that Poland would exceed her commitments during a given period of time and to prevent her from discounting the surpluses during subsequent periods.

The comparison of the former and the present concession formula leads to the conclusion that apart from the introduction of a certain amount of flexibility the differences are so negligible that one could describe them as non-existent.

The nature of Poland's concessions gives rise to some more remarks:

— the concession granted by Poland was in exchange for the application by all contracting parties with regard to Poland of all provisions of the General Agreement and, primarily, of the most-favoured-nation treatment and of non-discriminatory treatment (except cases separately regulated by paragraphs 3 and 4 of the Protocol);³³

— Poland's concession is of a global nature (the total increase of import value without subdivision into individual categories of products to individual countries). In this connection no GATT country has the right to demand that in any single period imports from its territory into Poland should be increased or to consider that the absence such increase or, for that matter, even a decrease of imports into Poland constitutes a contravention of the concession.³⁴

The terms of Poland's accession presuppose certain correlation between the commitment to increase imports and the level of Polish exports to the contracting parties. The scale of this commitment has been defined, *inter alia*, on the basis of the increase in Polish exports to contracting parties likely to result from the application by contracting parties to Poland of the provisions of the General Agreement and from tariff reductions and other concessions made by contracting parties.³⁵ Besides, it was stressed³⁶ that regard should be paid to the trend of Polish exports to contracting parties and should there be an unexpected drop in Polish exports to the territories of contracting parties, Poland would be exempt from abiding by her commitment over the period during which such a drop occurred.

2. Problem of Discriminatory Quantitative Restrictions

Terms of Poland's accession to the GATT provide³⁷ that the contracting parties which on the date of the Protocol apply to imports from Poland prohibitions or quantitative restrictions which are inconsistent with Article XIII of the General Agreement, may, notwithstanding these provisions, continue to apply these prohibitions and restrictions to their imports from Poland, provided that the discriminatory element in these restrictions (a) is not increased and (b) will be progressively relaxed as far as the quantities or values of permitted imports of Polish origin are concerned so that at the expiry of the transitional period any inconsistency with the provisions of Article XIII have thus been finally eliminated.

³³ Cf. p. 220.

³⁴ Cf. also p. 221.

³⁵ Para. 16 of the Report by the Working Party on Polish Accession GATT L/2851, 19 Sept., 1967.

³⁶ GATT L/2851 para. 11.

³⁷ Protocol of Accession of Poland to GATT, para 3(a) — GATT L/2851, 19 Sept., 1967.

It was also stipulated³⁸ that

"during the course of the third annual consultation the contracting Parties shall, in the light of all relevant circumstances, consider the establishment of a date for the termination of the transitional period [i.e. period during which it is permitted to apply restrictions inconsistent — with the provisions of Article XIII of the General Agreement — J. W.] If no such date is fixed during the course of such consultation, this question shall be re-examined at each subsequent annual consultation until a date is fixed."

As already mentioned earlier, one of the principal reasons for Poland's interest in joining the GATT was the expectation that the accession to the General Agreement would serve to eliminate the discriminatory quantitative restrictions applied to Polish exports on the markets of a number of capitalist countries. The adverse effect of such restrictions on the expansion of Polish exports consists principally in the fact that their existence compels importers to obtain licences and the procedure of issuing them is often very cumbersome which increases commercial costs and gives grounds for a potential buyer to demand that products be offered at appropriately lower prices, the consequence being that transactions become less profitable for Poland or just cease to be a paying proposition at all.

The time limit to licences, validity is another obstacle and so is also their issue to definite traditional buyers and the ensuing possibility that such license may get blocked (or pressure on prices applied), as well as the practices of unilateral arbitrary apportioning of total contingents on individual products. Yet another negative effect follows from the fact that at the moment of negotiation of the amount of contingents on specific products there is often insufficient knowledge as to the possibility of future exportation of these products. As a result a situation often arises when contingents are utilized only to the amount of several per cent — or not at all — while others are exceeded, if additional permission can be obtained, by a wide margin.

Under such circumstances the elimination of discriminatory quantitative restrictions was the greatest practical advantage which Poland expected to obtain as the result of her accession to the GATT. This objective could not be attained owing to the determined opposition put up by a number of West European countries, the EEC countries and the United Kingdom in particular.

Such attitude of those countries was partly caused by economic considerations, by the fear that after Poland had obtained export facilities there could be a rapid increase of Polish deliveries of certain products into their markets, but the decisive part was no doubt played by the desire to retain the opportunities for bilateral pressure and to ensure a comfortable posi-

³⁸ GATT L/2851 para. 3(c).

tion for their goods on the Polish market, the position of which they could be deprived in the case of a complete multilateralization.

The terms of Polish accession thus provide for the application to Poland's exports of discriminatory restrictions over the transitional period. In accordance with paragraph 3a of the 1970 protocol, during the third annual review there should be an effort made to define the date for the termination of that period. In this context Poland suggested the date of December 31, 1974, as the date since which all forms of discriminatory treatment of Polish imports, inconsistent with the provisions of Article XIII, of the General Agreement, could be eliminated.

A number of West European countries tended to accept the date, provided that they would be given the possibility to continue, after that date, certain exceptions in respect of particularly "sensitive" products. The United States, Canada and Japan did not, however, agree to such arrangement and such possibility to continue with exceptions, as inconsistent with the General Agreement, and demanding full application of the principle of non-discrimination to Polish imports. At such a juncture the question of defining the date for the termination of the transitional period was postponed until next review.³⁹

The establishing in the Protocol of the transitional period during which the observance by the GATT countries of the principles of non-discrimination in relation to Poland should be suspended does not arise from any of the provisions of the General Agreement. The legal basis for such a move was provided by paragraph 3a of the Protocol on the Accession of Poland. Its statement that "the contracting parties which [...] apply to imports from Poland prohibitions or quantitative restrictions [...] inconsistent with Article XIII of the General Agreement may, notwithstanding these provisions, continue to apply such prohibitions [...]" does not constitute a departure from the principle of non-discrimination.

The text of paragraph 3a of the Protocol clearly states that "any inconsistency" with the provisions of Article XIII is to be ultimately eliminated. True, it was not clearly defined when this would happen, but it follows from the content of the entire paragraph 3a that the legal norm from which deviations are permitted is Article XIII of the General Agreement and thus Poland is entitled — though conditionally and over a period of time — to multilateral treatment in the sphere of quantitative restrictions as well. In other words, Article XIII has been temporarily suspended regarding Poland, but upon the termination of the transitional period it has to be applied to Poland in all its entirety.

³⁹ GATT L/3475, 23 Dec. 1970.

The word "prohibitions" used in paragraph 3a of the Protocol may not conceal either an imports system or restrictions other than those mentioned by Article XIII of the General Agreement. It follows clearly from the content of that paragraph that the permitted deviation from the provisions of the General Agreement refers only to "prohibitions and restrictions quantitative inconsistent with Article XIII [...]"

It should be explicitly pointed out that paragraph 3 (a) of the Protocol is:

- (i) of optional nature, i.e. permits the continuation of quantitative restrictions,
- (ii) limits the possibility of maintaining the restrictions only to prohibitions and restrictions already applied, without freedom to increase their scope, and
- (iii) imposes the obligation of their gradual elimination.

Discriminatory quantitative restrictions applied to Poland are adversely affecting not only her foreign trade. It has been stated officially in the GATT that these restrictions are also harmful to other contracting parties.⁴⁰

3. Other Provisions of the Protocol

The General Agreement provides⁴¹ that if any products is being imported into the territory of any member state in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, then such state may withdraw — fully or partially — or modify tariff concessions in relation to such product to the extent and for such time as is necessary to prevent or remedy the injury.

One should emphasize here that the object of restrictions is a product irrespective of the state from which it originates and that the restriction affects in an equal measure all exporters of such product into a given market.

In this respect, a provision was embodied into the Protocol for the accession of Poland differing, to Poland's disadvantage, from the regulations set out in the General Agreement. Paragraph 4 of the Protocol provides that if the products, as mentioned above, is imported from Poland, the contracting party concerned is authorized to restrict imports of such product from the territory of Poland to the extent and for a period of time necessary to prevent or remedy the injury. Thus Poland is the only object

⁴⁰ GATT L/3093, p. 20.

⁴¹ Art. XIX of General Agreement.

of restrictions here. True, the application of these restrictions can only happen after consultations with Poland on the subject have failed and after the possibilities on the part of the contracting parties have been exhausted. But this does not alter the fact that Poland is accorded a different treatment as compared to that enjoyed by other GATT countries.

Legal doubts may also be raised by the inclusion in the protocol of paragraph 7 providing the right of a contracting party to request Poland to enter into bilateral consultation on mutual trade relations. If the idea here were the consultations provided for under Articles XXII and XXIII of the General Agreement — and that is that paragraph 15 of the Report by the Working Party⁴² seems to go out of its way to suggest — then the inclusion of paragraph 7 appears to be lacking purpose. Again, should it be that — as suggested by the reference in that paragraph to procedure under paragraph 6 of the Protocol — the subject of the consultations were to shape the trade turnover between Poland and a contracting party, with the decrease of imports from its territory providing basis for considering that the concession has been impaired — then paragraph 7 of the Protocol would contravene the provisions of the General Agreement and other provisions of the Protocol. It would thus be in violating of the multilateral nature of Poland's agreement with the GATT and would constitute an introduction of additional elements of bilateral pressure.

Finally, the Protocol provides for annual consultations designed to check on the fulfilment of Poland's commitment and to examine her trade relations with the GATT countries.⁴³ In the course of the consultation the contracting parties should also report on the relaxation of discriminatory quantitative restrictions applied to Poland. The scope of consultations and their nature leads one to view them as an essential additional concession on part of Poland in favour of the contracting parties.

4. Evaluation of the Terms of Poland's Accession to the GATT

As the result of negotiations with Poland GATT accepted certain solutions untypical to this organization and constituting a partial recognition of the fact of different identity of the socialist economy. They boil down, first and foremost, to

a) resignation from recognizing the price-creating customs tariff as a necessary instrument for the regulation of access to the domestic market and the acceptance, in relations with a socialist country, as an equivalent, of the commitment to a definite percentage increase of imports,

⁴² GATT L/2851.

⁴³ Detailed programme of such consultations is contained in Annex A to the Protocol of Poland's Accession.

b) the recognition of the fact of the monopoly of foreign trade and of the planning of foreign trade,

c) practical recognition of the autonomy of domestic prices in a planned economy country.

This abandonment by GATT of some of its principles was offset by Poland's undertaking of definite commitment, namely

a) commitment to a definite imports increase,

b) temporary abstention from the exercise of the basic right of a contracting party — the right to non-discriminatory treatment,

c) the acceptance of annual all-round reviews of trade relations with the GATT countries and of reporting on the implementation of her commitments.

The terms on which Poland acceded to the GATT undoubtedly set a pattern of possible participation by a socialist country in that organization. Could it then be said that along the same lines the accession to the GATT is open to other socialist countries as well? The basic vice is the lack of balance of rights and obligations to the disadvantage of the socialist country.

For let us examine the practical implications of the terms on which Poland acceded. True, Poland obtained the multilateral guarantee of the most-favoured-nation treatment. Where MFN treatment was not applied the accession brought about its application to Poland. But on the other hand Poland enjoyed that treatment in her relations with every major trading partner before her accession. The granting of the most-favoured-nation treatment in the GATT framework does offer stronger guarantees from the legal point of view — it is extremely difficult to withdraw the MFN — but in Poland's case it does not practically bring to her much advantage in excess of what she enjoyed under the formerly applied MFN since it does not include the discriminatory quantitative restrictions. The right of Poland to request progressive relaxation of the discriminatory restrictions applied to her offers but a theoretical and legal advantage. For the GATT countries applying those restrictions if they do abolish them then they do it with regard to all socialist countries without any clear connection to the participation of some of these countries in the General Agreement.

Thus, the advantages are no doubt important but they cannot be weighed or measured and they often do not materialize in practice while Poland, on her part, has undertaken definite measurable commitments the implementation of which can be checked at any time.⁴⁴

⁴⁴ Contrary to widespread views in the GATT circles, Poland's commitment was not at all easy to fulfil. For figures cf. Footnote 30.

In order, however, to have a complete balance-sheet of benefits and costs one should add that it is rather important for Poland to participate in the now most important international trade organization in which problems essentially affecting the trade policies are often discussed and resolved. Poland's participation in the discussion and settlement of those problems may in an important way contribute to the normalization of East-West trade.

V. Other Socialist Countries in the GATT

The problem to what an extent the GATT makes it possible for the socialist countries to participate in it was put to following tests: in 1968 Romania applied for accession to GATT. She tried to base the condition of her entry on essentially the same pattern as in the case of Poland, but her efforts went along the line of ensuring a better balances of mutual concessions. Romania⁴⁵ demanded that the Protocol for Accession should fix the final date of termination of the period during which GATT members are entitled to continue discriminatory quantitative restrictions to imports from Romania.⁴⁶

Another element of agreement with the GATT that Romania wished to regulate in a way different to how Poland had done it was the manner in which the amount of imports commitment was to be defined. Romania opposed to have this amount strictly described in terms of percentage, proposing rather to undertake that the incomes from her exports to GATT member countries would be spent to increase her imports from these countries.⁴⁷

As a counter-proposal an arrangement was suggested analogous to that in the case of Poland. The differences are so slight though, apparently, the former formula poses, in view of too rigid a link between the quantity of imports and exports, bigger dangers in the course of practical implementation.

For the purpose of our deliberations the definition of the amount of concession is, however, of less importance. What is essential is the very concept of committing a socialist state to increases of its imports in exchange for tariff concessions—which, not unlikely to Poland, Romania accepted.

⁴⁵ Incidentally, similar to Polish attitude at one time.

⁴⁶ Cf. e.g. GATT Spec/69/127/ Rev. 1, 8 Dec., 1969.

⁴⁷ GATT Spec/69/127, 22 Oct., 1969.

But the demand for an exact date for the termination of the permitted discrimination ran into very strong opposition on the part of a number of important contracting parties, (the EEC countries United Kingdom, Austria). To compel Romania to accept an arrangement similar to that entered by Poland might give rise to fears that a sort of B category members is being created in the GATT, comprising states to which certain discriminatory practices, generally prohibited by the General Agreement, could be applied. Romania's accession was further complicated by the US declaration that the Administration had no legal basis in the legislatures existing in that country to hold negotiations on Romania's entry into the GATT. The USA then, invoking Article XXXV, declared that it was not... going to apply the provisions of the General Agreement to Romania.⁴⁸ She could, instead, conceivably be granted the most-favoured-nation treatment by the USA as a result of successfully conducted bilateral negotiations with it.⁴⁹

In 1969 Hungary set about applying for accession to the GATT. That country had by then carried out a number of economic reforms, introducing, *inter alia*, much of the market elements into her foreign trade. A customs tariff had also been introduced affecting the level of internal prices of imported goods and a single rate of exchange for the forint was established, and a number of enterprises had been granted direct importing rights. Having the above in mind Hungary decided to enter GATT on the principle of tariff concessions — on line similar to that taken earlier by Yugoslavia.

In his statement to substantiate the application for accession, Hungary special representative pointedly declared, that his country does not wish to be treated in any different manner from any of the contracting parties and that she is not willing to accept or consolidate any existing discriminatory quantitative restrictions applied against her exports.⁵⁰

Hungary's application drew very cautious and even unfavourable response from many of GATT members. During the discussion on it, it was stressed (by EEC countries) that a settlement of relations with socialist countries has actually been found — along the lines that Poland had chosen to accept. Whereas the Hungarian proposal raises many points to be carefully examined and clarified.⁵¹ As in the case of Romania, the USA stated that should Hungary accede then it would invoke Article XXXV and would not apply the provisions of the General Agreement in US-

⁴⁸ GATT C/M/51, 16 Dec., 1968.

⁴⁹ *Ibid.*

⁵⁰ GATT L/3238, 1 Aug., 1969. It is an obvious allusion to the situation of Poland.

⁵¹ GATT C/M/52, 21 July, 1969.

Hungarian trading relations.⁵² Under such circumstances one may not expect a speedy Hungarian accession to the GATT.

Regarding other socialist countries, Bulgaria enjoys an observer status in the GATT and for the moment does not attempt to have closer relations with the General Agreement. As far as the USSR is concerned one should not rule out that in a more distant future it might take certain steps towards establishing permanent contacts with the GATT. Accession of a state so strong economically would doubtless exert influence on the set-up of forces in the GATT and would contribute to render the General Agreement more universal.

⁵² *Ibid.*

The Vienna Convention on the Law of Treaties

by MARIA FRANKOWSKA

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The United Nations Conference on the Law of Treaties concluded its debates on May 22, 1969, adopting the text of the convention codifying this field of international law. A day later this convention, which not without reason is called "the mother of treaties," was opened for signature or accession.¹

This convention is the fruit of long years of work. Over twenty years ago, in 1949 the UN International Law Commission decided at its first session to include the law of treaties among the matters ripe for codification.² This codification was exceptionally labour-absorbing. The Special Rapporteurs appointed by the Commission for the preparation of an adequate draft changed more often than in any other case. There were as many as four of them: J. L. Brierly,³ H. Lauterpacht,⁴ G. Fitzmaurice⁵ and finally H. Waldock⁶ who was the one destined to conclude the work he had been entrusted with. Twice the conception regarding the form of this codification was changed: first the decision had been taken to give it the

¹ The text of the Convention in Doc. A/CONF. 39/27.

² Report of the International Law Commission, United Nations, 1949 p. 3.

³ "Yearbook of the International Law Commission" (hereinafter cited as ILC, Yearbook), 1950, vol. 2, p. 223; 1951, vol. 2, p. 70; 1952, vol. 2, p. 50.

⁴ ILC, Yearbook, 1953, vol. 2 p. 90; 1954 vol. 2, p. 123.

⁵ ILC, Yearbook, 1956, vol. 2, p. 104; 1957, vol. 2, p. 16; 1958, vol. 2, p. 20; 1959, vol. 2, p. 37; 1960, vol. 2, p. 69.

⁶ ILC, Yearbook, 1962, vol. 2, p. 27; 1963, vol. 2, p. 36; 1964, vol. 2, p. 5.

form of a convention (J. L. Brierly, H. Lauterpacht), later — the form of “a code of a general character” (G. Fitzmaurice), in order to go back in the end to the original conception. Two reasons influenced the Commission to take this final decision. It had reached the conclusion that: “an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law [...] Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished.”⁷ A decision had to be made whether to include the entire law of treaties in several or in one convention and only when its work came to its end did the International Law Commission resolve to make the entire code the subject of one international treaty.⁸ For an exceptionally long time lasted the deliberations of the representatives of States on the text prepared by the Commission after 17 years of work.⁹ Much attention was devoted to it at the 21st and 22nd sessions of the UN General Assembly,¹⁰ and the UN Conference on the Law of Treaties, convened in Vienna, attended by a total of 115 States, held two sessions, divided by a one-year break: in 1968 and 1969.¹¹

However, the work they intended to carry out was something exceptional. The subject of their efforts was the codification of the norms not of one, exactly defined sphere of cooperation between States (as for instance in the case of the codification of the law of the sea, the diplomatic law or the consular law) but of norms exerting their influence on practically everything in the field of international life: norms related to the conclusion and existence of treaties, correctly defined as an “essential

⁷ ILC, Yearbook, 1962, vol. 2, p. 260.

⁸ Report of the ILC of the work of its 17th session, General Assembly, Official Records, 20th Session, Supplement No. 9/A/6009/ p. 4.

⁹ Reports of the ILC on the second part of its 17th session and on its 18th session, General Assembly Official Records, 21st Session, Supplement No. 9/A/6309/Rev. 1/ (hereinafter cited as ILC Draft) p. 7.

¹⁰ 21st session — Sixth Committee 902 - 919 Meetings, 22nd session — Sixth Committee 964 - 983 Meetings.

¹¹ S. E. NAHLIK, member of the Drafting Committee, discussed the work of the Conference in his article *Plon wiedeńskiej konferencji w sprawie traktatów* [*The Yield of the Vienna Conference on the Law of Treaties*], “Sprawy Międzynarodowe,” 1960, No. 6; and S. VEROSTA *Die Vertragsrechts-Konferenz der Vereinten Nationen 1968 - 1969 und die Wiener Konvention über das Recht der Verträge*, “Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht,” 1969, No. 4; R. D. KEARNEY and R. E. DALTON, *The Treaty on Treaties*, “American Journal of International Law,” 1970, No. 3. Documentation: United Nations Conference on the Law of Treaties, First Session, UN Doc. A/CONF. 39/11; as concerns the Second Session only provisional records have yet been provided.

element of the infrastructure.”¹² The representative of Italy, inaugurating the debates of the second session of the Conference in his capacity as its chairman, drew a clear picture of the tasks facing the delegations: “[...] the Conference was called upon to lay down the rules of the game rather than to play the game itself.”¹³

“The rules of the game,” that were elaborated as the result of so much effort, found their expression in a lengthy document the “Vienna Convention on the Law of Treaties.” This Convention consists of a preamble, eight parts, divided into 85 Articles and an Annex.

Already when reading the preamble alone one becomes aware of the significance of the Convention. It deals with all the most important principles on which the existence of the contemporary international community is based, i.e. with the principle of good faith and observance of treaties (*pacta sunt servanda*), the principle of the peaceful settlement of international disputes the basic principles, laid down in the United Nations Charter: equality of rights and the self-determination of peoples, the sovereign equality and independence of all States, non-intervention, the prohibition of threat or use of force, respect for, and observation of the human rights. The mentioning of these principles is not empty phraseology. In the preamble, which forms an integral part of the Convention, the close connection was emphasized that exists between general principles of international law and the norms of the law of treaties. The proper implementation of the norms of the law of treaties depends on the observation of many of the above-mentioned principles; on the other hand, at a time when it would be difficult to find any field of cooperation between states that would not be regulated by treaties, the implementation of many norms of international law, including the basic principles, too, is impossible without the observation of the norms of the law of treaties.

In addition to general formulations the preamble also contains — just like other codifying conventions concluded under the auspices of the United Nations — a very essential decision: all problems which have not been regulated by the Convention itself shall be governed by the rules of customary international law.

There will be quite a number of these problems, since the scope of the Convention was quite clearly limited. In accordance with Article 1 “[...] The Convention applies to treaties between States.” This general provision is more clearly outlined by Article 2, paragraph 1 (a) defining the term “treaty,” so does Article 3 on “international agreements not within the scope of the Convention.” The Convention defining the term

¹² Cf. R. D. KEARNEY and R. E. DALTON, *op. cit.*, p. 495.

¹³ Doc. A/CONF. 39/SR. 6, p. 2.

"treaty" as "an international agreement concluded between States" (Art. 2, para. 1 (a) leaves outside the scope of its provisions "international agreements concluded between States and other subjects of international law or between such other subjects of international law" (Art. 3). An attempt to broaden the scope of the Convention so that it would also embrace this type of agreement, made at the Conference, could not count on support, since that would *ad infinitum* prolong the debates of the Conference and would create a situation where the codification of the law of treaties would be rather doubtful. Both amendments aimed in this direction were withdrawn.¹⁴ However, accepted in accordance with Sweden's proposal, was a Resolution Relating to Article 1 of the Vienna Convention on the Law of Treaties whereby the UN Conference on the Law of Treaties recommends to the General Assembly of the UN that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.¹⁵

The following element of the definition of the term "treaty" contains another limitation of the scope of application of the Convention, namely "concluded [...] in written form." It excludes from the Convention agreements made orally, which actually is in accordance with the accepted tradition of codification. Private drafts (Field's Fiores', Harvard Draft¹⁶) as well as all the successive drafts prepared by the International Law Commission as well as the Havana Convention¹⁷ introduce this reservation. It seems to be an absolute necessity for technical and legal reasons, but certainly not as regards substantial matters connected with it. In no case does it mean infringement of one of the most strongly emphasized principles of the law of treaties, in accordance with which the form of the agreement is of no legal significance, since it is made absolutely clear in Article 3 that

"the fact that the present Convention does not apply [...] to international agreements not in written form, shall not affect the legal force of such agreements."

In addition to these two categories of agreements, mentioned above,

¹⁴ American amendment (Doc. A/CONF. 39/C.1/L.18/ and the Republic of Vietnam /Doc. A/CONF. 39/C.1/L.27) — see Doc. A/CONF. 39/11, pp. 14 - 20.

¹⁵ Final Act of the United Nations Conference on the Law of Treaties: Doc. A/CONF. 39/26, pp. 8 - 9.

¹⁶ D. D. FIELD, *Outlines of an International Code*, sec. ed. New York, 1876, Article 188; P. FIORE, *International Law Codified*, fifth ed., New York, 1918, Article 744; Research in International Law Under Auspices of the Faculty of the Harvard Law School, Law of Treaties, "American Journal of International Law," Vol. 29, 1935, Supplement, Article 1.

¹⁷ M. O. HUDSON "International Legislation," Vol. 4/1932/, p. 2380, Article 2.

the Convention applies to all international agreements. The term "treaty" has been formulated in a very broad sense. This conviction is even more deepened by Article 11, permitting any means of conclusion of the treaty (compare with what follows).

Article 73 limits the objective range of the Convention, leaving outside its scope

"any question that may arise in regard to a treaty from a succession of States, from the international responsibility of a State or from the outbreak of hostilities between States."

As regards the two first categories mentioned, this was taken into account by the draft of the International Law Commission (Art. 69). The third — was introduced in accordance with an amendment presented by Hungary and Poland at the first session of the Conference.¹⁸

The temporal scope of the Convention was quite clearly laid down in Article 4, introduced during the second session of the Conference in accordance with an amendment proposed by seven States.¹⁹ According to the universally accepted principle of law — *lex retro non agit*, this Article resolves that the

"Convention will apply only to treaties which are concluded by States after the entry into force of that Convention with regard to such States."

It is obvious that this decision does not limit the application of rules, formulated in the Convention, which could be applied to treaties, irrespective of the time of its entry into force, and thus does not influence the application of the norms of the law of treaties, either of the nature of customary international law or based on other international agreements. This quite obvious principle found its clear confirmation in Article 4.²⁰

The second part (Art. 6 - 25) related to the procedure of the conclusion and entry into force of a treaty, begins with one of the most fundamental decisions — Article 6, confirming the capacity of each State to conclude international agreements. This Article in its original version of the draft of the International Law Commission (Art. 5), was made up of two paragraphs. One formulated the above-mentioned principle, the second, on the other hand, was connected with the capacity of states members of a federal State to conclude treaties. This ability was made dependent on the

¹⁸ Doc. A/CONF. 39/C.1/L.279. Cf. the statement made by S. E. NAHLIK, representative of Poland, Doc. A/CONF. 39/11, p. 452.

¹⁹ Doc. A/CONF. 39/C.1/L.403 (Brazil, Chile, Kenya, Iran, Sweden, Tunisia and Venezuela); Cf. Doc. A/CONF. 39/C.1/SR. 105.

²⁰ This Article provides that its regulation is "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." According to S. E. Nahlik the Conference nevertheless "probably did not take into consideration all the implications of this decision" Cf. *Plon... [The Yield...]* p. 78.

provisions laid down in the constitutions of such States. This paragraph became the subject of intensive diplomatic activity on the part of Canada, aimed at its removal from the text of the future Convention.²¹ This campaign ended with a success and the given paragraph failed to obtain the majority of the votes cast by the States during the second session of the Conference.²²

The regulations related to the procedure of the conclusion and entry into force of treaties are as a rule not of a rigoristic nature. They rather meet half ways the tendencies that have been in existence for a long time, in order to regulate in a flexible manner problems connected with the conclusion of a treaty and its entry into force. They rather help to establish the will of a given State, regarding the acceptance of one or another solution, than trying to enforce such a solution. More often than in any other part of the Convention there can be found — expressed in various ways — what is called escape clauses, stressing above all the intention of the States, to regulate a concrete problem in such or another manner and permitting efforts to discover this intention on a larger scale than usually accepted (attention is aroused above all by the provision “unless it is otherwise established.”)²³

If one would try to present as briefly as possible the very essence of the provisions in this part, this is best formulated in Article 11, introduced, following a proposal for an amendment also made by Poland:

“the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance or accession, or by any other means if so agreed.”²⁴

Articles related to means of expressing consent to be bound by a treaty in the version of the draft of the International Law Commission mentioned only signing (in some exceptional cases also initialling) (Art. 10), ratification, acceptance and approval (Art. 11) and accession (Art. 12). Following a proposal made by Poland an Article was introduced into the text of the Convention, providing also for another way of expressing consent to be bound by a treaty, namely by means of exchanging instruments constituting a treaty.²⁵

²¹ Cf. R. D. KEARNEY and R. E. DALTON, *op. cit.*, pp. 507 - 508.

²² Doc. A/CONF. 39/SR.8.

²³ V. HAAK in his article ‘*Unless the Treaty otherwise provides*’ and *Similar Clauses in International Law Commission’s 1966 Draft Articles on the Law of Treaties*, “*Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*,” 1967, No. 3, p. 540, analyses in detail the problem of escape clauses in the draft of the Vienna Convention.

²⁴ Doc. A/CONF. 39/C.1/L.88 and Add. 1. The amendment was joined by the United States. Of a similar content was the amendment of Belgium Doc. A/CONF. 39/C.1/L.111; cf. Doc. A/CONF. 39/11, pp. 83 - 84.

²⁵ Doc. A/CONF. 39/C.1/L.89; Cf. Doc. A/CONF. 39/11, p. 94.

This kind of concluding treaties had so far no separate place in the doctrine. The authors approached the exchange of notes rather as a form of an agreement and not as the form of concluding it. This attitude found its reflection during the course of work on the codification of the law of treaties. All the successive drafts prepared by the International Law Commission provided for an exchange of notes as a form of international agreements, to which the provisions laid down in the future Convention were to refer.²⁶ Article 2 of the accepted Convention also provides for the exchange of notes as a form of an agreement (the definition of a treaty embraces agreements "embodied in a single instrument or in two or more related instruments"). But none of the drafts ever envisaged the exchange of documents as a way of concluding an agreement.

Such an oversight, since undoubtedly it was not a matter of principle, was caused by the fact that in the case of an exchange of notes the elements of the form of the agreement and the procedure of its conclusion were intertwined in a manner that made it difficult to disentangle it. However, undoubtedly the way of giving a treaty the form of an exchange of notes and the conclusion of an agreement by means of an exchange of notes — are two different matters. This is most clearly thrown into relief in a case, when States giving a treaty the above-mentioned form, lay down in the exchanged documents either the requirement for ratification or approval; such a treaty, though in the form of an exchange of notes, is concluded not through an exchange of documents which make up a treaty, but through ratification or approval. As regards the conclusion of an agreement by the very exchange of notes, it is not so easy to distinguish form from procedure, but theoretically this is possible and justified. Most frequently, however, agreements in this form are concluded precisely by the simplified procedure, when the exchange of documents constituting a treaty is the decisive moment. That this moment is of decisive importance and not the initialling of the various documents, can be noticed most clearly in the case when subject of exchange are notes in the form of *notes verbales*, neither signed nor initialled.

The overwhelming number of treaties are now being concluded through an exchange of notes. Quite frequently their content is important for the

²⁶ At the beginning, this matter gave rise to discussions. When J. L. Brierly in his first draft added in Article 1(b) this type of agreement to the general concept of the treaty, this solution encountered sharp criticism on the part of some of the members of the Commission; cf. ILC, Yearbook, 1950, vol. 1, pp. 75 - 82. However, later agreement was given to such a approach. Cf. Lauterpacht's draft, ILC, Yearbook, 1953, vol. 2, p. 90, Fitzmaurice's draft, ILC, Yearbook, 1956, vol. 2, p. 107, Waldock's draft, ILC, Yearbook, 1962, vol. 2, p. 31. The authors of the Harvard Draft took a different stand — cf. Article 1(b).

two contracting parties and they impose serious international obligations.²⁷ Thus it may be welcomed with satisfaction that this form of concluding international agreements found its proper reflection in the Convention.

The structure of regulations regarding the conclusion of treaties is, as already mentioned, a collection of loose rules and what is most strongly emphasized in them is the acceptance of a free choice regarding the manner of concluding the treaty. Agreeing in general with this principle one may nevertheless have some doubts whether the Convention is not going too far in this respect. What is involved here is the fact that there is no answer to the question how the treaty is concluded in a case when the treaty itself contains no provisions in this respect and it is impossible to establish the intention of a State as to the form of expressing consent to be bound by a treaty.

Precisely such a structure was accepted in the draft of the International Law Commission (Art. 10 and 11). At the Conference this encountered criticism on the part of those who were in favour of defining the relevant norm in this regard. Though according to the opinion of the representatives of some States the provision should be made that in such a case the treaty requires ratification,²⁸ according to others — in such a case ratification was not required.²⁹ Neither one side nor the other succeeded in getting the majority.³⁰ As a result Articles 12, 13, and 14 were accepted, their purpose being to define certain circumstances, making it possible to establish the intention in regard to a treaty of a given State in a concrete case. Though these Articles are constructed in such a manner as to reduce to a minimum cases where a necessity would arise to introduce some general rule, it nevertheless seems that they cannot eliminate such cases. Should they occur, it will be impossible to handle them on the basis of the provisions laid down in the Convention.

The fact that no rule was established is not caused by any substantial reasons. It seems that the majority of the States were in favour of the

²⁷ More on this subject cf. J. WEINSTEIN, *Exchange of Notes* "British Yearbook of International Law," 1962; M. FRANKOWSKA, *Wymiana not jako forma umowy międzynarodowej* [*Exchange of Notes as a Form of an International Agreement*] "Państwo i Prawo," 1965, No. 1.

²⁸ The amendment to this effect was proposed at the 1st session by Czechoslovakia, Sweden and Poland (Doc. A/CONF. 39/C.1/38 and Add. 1 and 2); cf. Doc. A/CONF. 39/11, p. 85.

²⁹ The adequate amendments were proposed by nine South-American States (Doc. A/CONF. 39/C.1/L.105/ and Switzerland /Doc. A/CONF. 39/C.1/L. 87); Cf. Doc. A/CONF. 39/11, p. 85.

³⁰ Of the 30 speakers nine were in favour of ratification (among those Venezuela, Bulgaria, Greece, Congo-Brazzaville), against — eight (among them Brazil, Japan); cf. Doc. A/CONF. 39/11, pp. 85 - 94.

acceptance of some rule and saw the need for its existence. That it is missing in the Convention is only the result of the existing situation, namely the fact that neither the requirement of ratification nor the opposite view obtained the required majority of votes from the interested states. This was, anyhow, openly stressed by the adherents of that solution for the Convention which was accepted by the International Law Commission.³¹

Meanwhile an examination of the practice of States is bound to lead to the conclusion that in contemporary international law there has taken shape a norm, determining the behaviour of States regarding treaties that have no special clauses connected with the entry into force. It unequivocally expresses itself in favour of considering a treaty as concluded by the simplified procedure, i.e. without the need of ratification or approval. Such a conclusion stems from studies of agreements registered and published in the United Nations Treaty Series, which had no provision as to their taking legal effect. They invariably took effect without ratification.³²

The introduction of a regulation distinctly establishing the appropriate norm certainly would not endanger — and that is what the adherents of the principle requiring ratification most frequently were afraid of — the carrying out and observation of regulations laid down in the constitutions of the various States. Such fears are in general not very comprehensible due to the existence of the unquestioned principle, that States may freely (i.e. avoiding ratification) take upon themselves contractual obligations. A government that wants to avoid the participation of the parliament in the conclusion of a treaty (because that is exactly the point) may do so concluding a treaty, providing for any other form of conclusion of the treaty but ratification. Thus the introduction of a rule that those treaties would not need ratification which contain no regulations determining the manner of their conclusion, would not be any measure, permitting avoidance of constitutional regulations, connected with the participation of the parliament in the conclusion of treaties.³³

Undoubtedly the missing of the above-mentioned rule is not an especially important problem. But it is in any case a pity that this matter was not settled in the Convention, though the problem had already been

³¹ Cf. the statement made by the representatives of the Federal Republic of Germany and Yugoslavia, Doc. A/CONF. 39/11 p. 87 and 90.

³² For detailed results of research see M. FRANKOWSKA *De la pretendue présomption en faveur de la ratification*, "Revue Générale de Droit International Public," 1969, No 1. See also statement by S. E. NAHLIK at the 1st session Doc. A/CONF. 39/11 p. 86.

³³ As S. E. NAHLIK correctly observes: "In the argumentation of the party [opposing the disregard of ratification — M. F.] it was impossible not to notice a misunderstanding," *Plon... [The Yield...]*, p. 67.

brought up to the attention of the International Law Commission by the UN Secretariat a long time ago.³⁴

To the most interesting section of the part under discussion belong the articles connected with reservations (Art. 19 - 23). They actually have already given rise to many commentaries from authors dealing with the law of treaties.³⁵ The decisions that were finally taken by the Vienna Conference may be considered positive solutions in the light of socialist practice and doctrine. The Convention first of all accepts in a broad sense the right to make reservations. Only exceptionally are reservations not permissible and that in strictly defined cases. In accordance with Article 19 a State has no right to make reservations, if that is prohibited by the treaty (because the given treaty prohibits reservations in general, or because it forbids only a specific type of reservations) and also if the content of the reservation is not compatible with the object and purpose of the treaty. The latter formulation, which stems from the known advisory opinion of the International Court of Justice on reservations to the Convention of Genocide,³⁶ contains only some general directive as to procedure, but is actually not an injunction. After all, the question whether a reservation is compatible or incompatible with the object of the treaty, is something to be solved *ad casum* by the contracting States. If there is an objection to a reservation this reason may be given as the justification of this decision. The attempt to objectivize the injunction contained in Article 19 (c) was doomed to failure.³⁷

Such extensive freedom is accompanied by the same freedom for other States, which are entitled to adopt different attitudes to the reservation that has been made, they may accept or reject it. The objecting State may in addition express the intention that the treaty will not be in force as between itself and the reserving State. It should be borne in mind that in the Convention (Art. 20, para. 1) (b) expression was given to the presumption in favour of accepting a treaty as binding in relations between the

³⁴ Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc. A/CN.4/I/ Rev. 1 1948, p. 52.

³⁵ See R. SZAFARZ, *Zastrzeżenia do umów międzynarodowych [Reservations to International Agreements]*, "Państwo i Prawo," 1970, No. 7.

³⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Reports of the International Court of Justice, 1951, p. 15.

³⁷ Japan, the Philippines and the Republic of Korea proposed the following amendment (Doc. A/CONF. 39/C.1/L.133/Rev. 1) "A contracting State may raise an objection to a reservation on the ground that it is incompatible with the object and purpose of the treaty [...]. If objections have been raised on that ground by a majority of the contracting States [...] the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect." It was rejected by the Committee of the Whole — Doc. A/CONF. 39/11 p. 149.

State making a reservation and the State that objected to it. The presumption of an opposite nature, formulated in the draft of the International Law Commission, was maintained until the second session of the Conference. As emphasized by E. Wyzner, chairman of the Polish delegation, in his pronouncement, such a settlement was in striking contradiction to the contemporary practice of States and deprived of any justification. The data he presented, which were the outcome of the studies of over 500 of the United Nations Treaty Series volumes, indicated unequivocally that the States do not connect with the objection to a reservation the loss of force of a binding international agreement. On the contrary, as a rule a treaty is binding for both contracting States and only in exceptional cases the objecting State, aims at depriving the treaty of its binding force in mutual relations, but in such a case it clearly gives expression to such an intention.³⁸ Despite the fact that the practice of States is so unequivocal, the presumption accepted in the draft of the International Law Commission could be changed only after quite substantial effort of the delegations of the socialist countries.³⁹

The third part of the Convention is connected with the observance, application and interpretation of treaties (Art. 26 - 38). Its first section, though made up of no more than two short articles, is of a most substantial content. The first provision (Art. 26) is entitled *Pacta sunt servanda*. In the discussion on this provision A. Maresca, the representative of Italy, remarked, that "if Latin were still the language of diplomacy, as it had been for over a thousand years, the mere statement *pacta sunt servanda* would have sufficed as the text of the article."⁴⁰ It was by no means easy to translate this maxime properly. So in the end despite many discussions and attempts to introduce changes, there remained the text of the International Law Commission: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is the fundamental norm of the law of treaties. It was supplemented by a regulation, introduced during the second session (Art. 27), confirming the well established principle of international law, that a State party to a treaty may not invoke its internal law in order to justify its failure to perform the treaty.⁴¹

Further articles of the part under discussion are above all related to the scope of application of treaties: as concerns time limit (Art. 28 being

³⁸ Doc. A/CONF. 39/Sr. 10 p. 14.

³⁹ A lengthy memorandum in this regard was presented at the 2nd session by representative of the Soviet Union — see Doc. A/CONF. 39/L.3.

⁴⁰ Doc. A/CONF. 39/11 p. 155. See also the speech delivered at the 2nd session by M. PASZKOWSKI, representative of Poland — Doc. A/CONF. 39/SR. 12, p. 6 - 7.

⁴¹ A similar amendment was proposed by Pakistan (doc. A/CONF. 39/C.1/L.181).

in favour of the principle *lex retro non agit*), territory (Art. 29 establishing the principle that the treaty embraces the entire territory of the State being a party to the treaty) and object (Art. 34 - 37 regarding the relation: treaty — third States) as well as interpretation of treaties (Art. 31 - 33).

It seems that the articles related to interpretation are of specific significance. Because they will precisely be the ones which — after the Convention's entry into force — will constitute the foundation for the behaviour of the States, acting in accordance with the provisions laid down in the treaty. Most frequently States will refer to them in their everyday practice and find there directives for their conduct in accordance with the principle *pacta sunt servanda*. There is still one reason in favour of attaching such significance to the regulations connected with interpretation. Disputes as to the fact whether a treaty is binding or terminated, though undoubtedly belonging to the most important ones, regarding international engagements since they involve the problem of the very existence of the treaty, happen after all rarely. Controversies connected with interpretation arise most frequently, since they in a way are a natural component of practical procedures.

Three basic trends, three schools of interpretation exerted their influence on the norms laid down in the Convention: the subjective (intentional trend), the objective (textual) and the functional (purposeful, teleological) ones.⁴² Though to a different extent, all of them found expression in the accepted regulations. Most strongly reflected in the Convention was the textual approach, though, as was correctly noticed this is "a qualified textuality."⁴³ In accordance with the basic decision regarding this problem "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

(Art. 31, para. 1). Context has here a rather narrow meaning (Art. 31 para. 2) and embraces in addition to the text of the treaty

"(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made

⁴² See G. FITZMAURICE, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, "British Yearbook of International Law," 1951, vol. 28; S. E. NAHLIK *Wstęp do nauki prawa międzynarodowego* [Introduction to the Science of International Law], Warszawa 1967, pp. 335 - 336; F. G. JACOBS, *Varieties of Approach to Treaty Interpretation with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, "The International and Comparative Law Quarterly," vol. 18, Part II, 1969, p. 319.

⁴³ F. G. JACOBS, *op. cit.* p. 338. See also R. BERHARDT, *Interpretation and Implied (Tacit) Modification of Treaties*, "Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," Vol. 27, 1967, p. 497.

by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

Giving priority to the text of the agreement the Convention simultaneously permits to look for the intention of a State, outside the text and context. Submitting to the influence of the subjective trend it permits to look for the intention of the parties, expressed before the treaty has finally become binding upon the parties, i.e., it permits to reach for preparatory work and to examine the circumstances that led to the conclusion of the treaty (Art. 32). These are, however, exceptional situations: when the interpretation with the application of measures provided for in Article 31:

“(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.”

The amendment of the United States, aimed at attaching importance to supplementary means of interpretation (preparatory work and the circumstances under which the treaty was concluded) which would equal that of the basic means of interpretation, was rejected by the overwhelming majority of States and that is a fact worth emphasizing. The exceptionally lengthy and emotional speech, made by Professor McDougal did not succeed in winning adherents for this conception.⁴⁴

And finally the following formulation is a reflection of the third of the mentioned theories of interpretation — the teleological approach: “in the light of its object and purpose,” which defines the directive for interpretation.

Articles with reference to interpretation seem to be formulated in a very successful manner. They fulfill a very essential requirement for such a type of regulation: they give, as much as that is possible, a precise and clear indication of procedure, based on correct assumptions. To these belongs the fact that the text of the treaty is considered of greatest importance. As indicated in the pronouncement of S. E. Nahlik, the representative of Poland: “The text was the most stable and permanent element of a treaty. Consequently, emphasis on the value of the text could strengthen the stability and permanency of treaty relations.”⁴⁵ Decisions in this regard were positively evaluated at the Conference and all the three articles related to interpretation were accepted unanimously.⁴⁶

Part four (Art. 39 - 41) regulates the problems of amendment and modification of treaties. In accordance with the regulations laid down in the Convention an amendment consists in replacing the former treaty by a new one, properly altered, which is intended to embrace all the parties

⁴⁴ See doc. A/CONF. 39/11, pp. 167 - 168 and p. 185.

⁴⁵ See doc. A/CONF. 39/11, p. 174. See also S. E. NAHLIK, *Plon... [The Yield...]* pp. 68 - 69.

⁴⁶ Doc. A/CONF. 39/SR.13, pp. 21 - 24.

to the former treaty, a modification, on the other hand, is agreement to a new text only between some of them.⁴⁷ The content of the provisions being the result of the amendment is in principle unlimited, the content of the modification, on the other hand, should, in accordance with the discussed regulations, remain within the framework of the provisions of the treaty (or be in accordance with the provision of the treaty, related to modification, or — in other cases — not threaten the object and purpose of the treaty).

Part five of the Convention (Art. 42 - 72) dealing with invalidity, termination and suspension of the operation of treaties, was undoubtedly most difficult as far as the reaching of an agreement was concerned. No wonder, since many of its 31 articles deal with problems that may be most essential for the vital interests of the States. The legal evaluation of the various regulations was most closely connected with the political evaluation. As a result most striking evidence was provided here of the correctness of the opinion, expressed about the Convention as a whole by E. Suarez, the representative of Mexico, that in order to reconcile divergent views it had been necessary to accept the imperfect principles resulting from a compromise.⁴⁸ The substantial regulations of part five, may be evaluated most positively: they are progressive, more than once they formulate norms from the border-lines of codification and the progressive development of international law. However, procedural regulations, connected with the settlement of disputes resulting from the application of substantial regulations — establishing a compulsory system — give expression to tendencies which for a long time already have been characteristic of the policy of Western States.

Part five begins with very essential provisions (Art. 42) being the foundation of the whole structure of the system created in this part. It determines, firstly, that

“the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention” and secondly, that

“the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of

⁴⁷ According to S. E. NAHLIK this is not a fully convincing differentiation, see article *W przededniu kodyfikacji “prawa traktatów”* [On the Eve of the Codification of the “Law of Treaties”], “Sprawy Międzynarodowe,” 1968, No. 4, p. 48. One may add that while in the light of the Draft of the Commission this differentiation was based on two criteria: number of parties and form (the amendment was always of a formal nature, modification in accordance with Article 38 of the Draft, could also be the outcome of the application of the treaty in practice), due to the elimination of Article 38 of the Draft, the differentiation lost much of its clarity.

⁴⁸ Doc. A/CONF. 39/SR. 36, p. 26.

the present Convention. The same rule applies to suspension of the operation of a treaty."

The first, most essential consequence resulting from this resolution is the presumption in favour of validity and the continuance in force of treaties. As long as nothing else is being established, the treaty is valid and binding. A State is bound by it and is compelled to fulfil any obligation embodied in the treaty in accordance with the principle *pacta sunt servanda*.

The second consequence is the definition of the scope of grounds for invalidating or terminating (or suspending the operation of) a treaty. This scope is not defined equally for both cases. The enumeration of the grounds of invalidity of a treaty is of a limited nature, declaring a treaty invalid the parties are not entitled to refer to any other reason, than those clearly defined and described in the Convention. They even have no right to refer to the provisions of another treaty or binding norms of the customary international law. In connection with this one may reach the conclusion that the general provision of the preamble of the Convention, regarding the application of the customary international law, is not related to the grounds of the invalidity of a treaty. The said provision of the preamble also does not refer to the grounds of the termination of a treaty, denunciation, withdrawal from a treaty or suspension of its operation. Though these facts may actually take place not only with reference to the grounds described in detail in the Convention, their scope nevertheless also is limited in a manner which does not permit the application of customary norms of international law. There may be any other ground, provided it is laid down in the treaty itself. Thus in this case the Convention formulates not essential limitations, as is the case with invalidity, but only formal ones: the basis for termination, withdrawal from a treaty or suspension of its operation may be nothing but the treaty norm.

The part under discussion contains side by side regulations regarding three in principle different legal notions: invalidity and termination, withdrawal from and suspension of the operation of a treaty. However, they have one common feature, namely that they all apply to the legal effectiveness of the treaty. Invalidity causes the legal discontinuance in force of the treaty *ex tunc*, termination causes the same discontinuance but *ex nunc* (in case of withdrawal of a party from the treaty this will usually signify only ineffectiveness in regard to one of the parties), suspension makes the treaty ineffective only during a certain period of time.⁴⁹ Quite detailed decisions were laid down in the Convention (they make up chapter V of the discussed part), which define the legal consequences of invalidity, termination and suspension of the operation of treaties.

⁴⁹ See S. E. NAHLIK, *Wstęp... [Introduction]*, p. 280.

Due to the strict limitation of the scope of grounds of invalidity, termination and suspension of the operation of a treaty, laid down in general in Article 42, the regulations of part five are naturally casuistic and what follows relatively numerous. It is impossible to present their content even in an abbreviated form; the only thing to do is to draw attention to some of them, which are either especially important or simply interesting.⁵⁰

The Convention makes provisions for eight grounds for causing invalidating treaties, among them such reasons as an error (Art. 48), a fraud (Art. 49), or coercion of a representative of a State (direct coercion) (Art. 51) which need no commentary. Maybe only one remark, that — as Professor S. E. Nahlik correctly emphasized — these cases which in the light of present day practice are of a rather hypothetical nature, were included in the Convention as some kind of “safety valve,” just in case, and not, because the reality of international life required it.⁵¹

However, Article 46 provokes comment, since it gives a State the right to invoke the fact of violation of internal law, as invalidating its consent to be bound by the treaty. But it is a condition that this violation should concern “a rule of its internal law of fundamental importance” and “that violation was manifest” (para. 2 defines this notion, actually in accordance with the approach in the commentary of the International Law Commission as a violation which “would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”). This provision being an exception from the rule formulated in the already mentioned Article 27, is to put an end to theoretical controversies, in existence for many years already on the subject of the legal effectiveness of constitutional limitations upon treaty-making power. The victory was won here by the conception elaborated in the English doctrine (A. D. McNair, H. Lauterpacht) what was called notorious constitutional limitations.⁵²

It was by no means an easy task to formulate these decisions. The work of the International Law Commission confirmed, as it seems, the correctness of H. Blix's opinion, that “it is obvious that the rule regulat-

⁵⁰ The substantial provisions of this part are analyzed by S. E. NAHLIK in the article *Przyczyny nieważności i wygaśnięcia traktatów w świetle kodyfikacji prawa traktatów przez ONZ* [The Grounds of Invalidity and Termination of Treaties in the Light of the Codification of the Law of Treaties by the UN], “Państwo i Prawo,” 1970, No. 10.

⁵¹ *Ibid.*, p. 488.

⁵² See M. FRANKOWSKA, *Z prac Komisji Prawa Międzynarodowego. Kompetencja organów państwowych do zawarcia umów międzynarodowych* [On the Work of the Commission of International Law. The Competence of State Organs to Conclude International Agreements], “Sprawy Międzynarodowe,” 1965, No. 7/8, p. 137.

ing the question [i.e. the question of the competence of State organs to conclude a treaty — *M. F.*] is not a settled one.”⁵³ The attitude adopted by the successive Special Rapporteurs was as a rule original and the solution, finally accepted by the Commission was not the outcome of some evolution, but was rather the result of attempts to find a compromise between the head-of-State theory and the constitutional theory. And such was the solution laid down in the Convention.⁵⁴ Article 46 should be approached in close relation with Article 7. Though Article 7 deals with questions that interest us from the rather narrow point of view of full powers, it nevertheless actually establishes the full competence of the head of state, chief of government and minister of foreign affairs to conclude treaties, by which the State would be bound, following their statement in a determined manner, for the sole reason that they occupy an appropriately high position in the State hierarchy. An opinion was reflected here which was best documented by H. Blix, namely that “the authorities whose consent to treaties are sought and accepted as sufficient to bind a State are, in practice, invariably those that appear actually able to secure performance of treaty obligations.”⁵⁵

In a hypothetical case of referring to Article 46 stress will undoubtedly be laid, that the State, whose internal law was violated should provide proof that the other party acted in bad faith, because it was manifest that the representative concluding the treaty did not have the competence to do so, “manifest” because he was not authorized to do so, in the light of fundamental provisions of internal law regarding competence to conclude treaties. It certainly will not be easy to demonstrate that bad faith was involved, especially in cases where it was a matter of making use of the above-mentioned provision contained in Article 7.

A provision which undoubtedly is some sort of a curiosity, and therefore arouses interest is Article 50. It gives a State the right to point to the fact that the expression of its consent to be bound by the treaty was procured through the corruption of its representative by the other party, as a reason for invalidating this consent. In such a case it is not necessary to provide evidence that this was a case of direct corruption; in order to invalidate the consent of a State it suffices that corruption was the result

⁵³ H. BLIX, *Treaty Making Power*, London 1960, p. 392; cf. C. FAIRMAN, *Competence to Bind the State to an International Engagement*, “American Journal of International Law,” Vol. 30, 1936, p. 439.

⁵⁴ The corresponding Articles of the Draft of the Commission are discussed by V. K. GECK *The Conclusion of Treaties in Violation of the International Law of a Party* “Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht,” Vol. 27, 1967, p. 429.

⁵⁵ H. BLIX, *op. cit.*, p. 392.

of indirect activity, as long as such activity exerted a decisive influence on the behaviour of the representative.

However, it is obvious that these are not the most essential grounds of invalidity of treaties. Such a rank is given to reason, mentioned in Articles 52 and 53. The first of the quoted rules categorically declares void a treaty imposed by the threat or use of force, thus violating the principles of international law, as laid down in the UN Charter. This fundamental rule coincides with the declaration, constituting part of the Final Act of the Conference, dealing with "the prohibition of military, political or economic coercion in the conclusion of treaties." Condemned therein were "the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent."⁵⁶

Article 52, though differing from the classical doctrine, accepting as valid a treaty procured by an indirect coercion, i.e. by exerting pressure on another State, is at the present stage of development of international law the expression of codification of an already established norm and not a result of the progressive development of this law. When the threat or use of force was renounced in international relations, due to the acceptance of the UN Charter the States also renounced such activity in relation to treaties and made obligations accepted as a result of coercion illegal. Article 52 substantiated this norm, without which the contemporary law of treaties would today be already something unimaginable.⁵⁷

A provision which, though being of a more general nature is not closely connected precisely with Article 52 and to some extent supplements it, is Article 75, one of the "miscellaneous provisions" which make up part six of the Convention. An aggressor State is deprived of the right to refer to any provisions of the Convention, if measures were taken against such a State, in accordance with the UN Charter.⁵⁸

The second of the most essential provisions regarding invalidity is contained in Article 53 which also categorically declares that a treaty is null and void if during the time of its conclusion it is incompatible with a peremptory norm of general international law (*ius cogens*). This article does not mention this kind of norms. Already in its draft the International Law Commission emphasized that such an enumeration, even if only to

⁵⁶ Doc. A/CONF. 39/26 — Declaration on the Prohibition of Military Political or Economic Coercion in the Conclusion of Treaties.

⁵⁷ See S. E. NAHLIK *Przyczyny...* [*The Grounds...*], p. 489.

⁵⁸ See above all the speech by A. MAKAREWICZ, representative of Poland, doc. A/CONF. 39/11, pp. 455 - 456.

give an example, is senseless.⁵⁹ Of the same opinion were the majority of the representatives of States during the Conference. Nevertheless an attempt was made to define the *ius cogens* norm. Developing the formulation of the draft the following definition was introduced into the article under discussion:

"a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Though this definition was introduced especially for the purpose of the Convention, it plays, as may be assumed, quite an important role in international practices. However, what undoubtedly is most noteworthy is the fact alone of the introduction in such a unequivocal manner of *ius cogens* into international law. The significance of this fact and its consequences are probably not yet fully elucidated.⁶⁰

In the case of invalidity according to Articles 52 and 53 a treaty is void in its entirety, no separability of its provisions being admissible (Art. 44 para. 5) and may not be convalidated (Art. 45). The State is not deprived of the right to refer to these grounds even if having been aware of facts foreseen in these provisions. It performed such a treaty or even expressly considered it valid. Such a construction is especially justified in regard to treaties, concluded under the threat or use of force. After all, most frequently in such a case, the State which was strong enough, to use coercion to procure the weaker party's consent to certain provisions of the treaty, will have — at least for some time — enough strength to enforce its observance, or confirmation of its validity. If a treaty concluded as the result of the threat of use of force could become convalidated Article 52 would remain in practice a dead letter.

Article 53 is consistently supplemented by the provision contained in Article 64, on the termination of a treaty which conflicts with a newly established peremptory norm of general international law. Both regulations are imbued with a specific sense by Article 71, which lays down the legal consequences of the invalidity of a treaty that is incompatible with

⁵⁹ See Commentary of the Commission to Article 50 of the Draft. See also the remarks of S. E. NAHLIK *W przededniu...* [On the Eve...], pp. 51 - 52 and E. SCHWELB, *Some Aspects of International Jus Cogens as formulated by the International Law Commission*, "American Journal of International Law," Vol. 61, 1967, pp. 946ff. JULIO A. BARBERIS makes an attempt to enumerate the norms of this kind in his article *La liberté de traiter des États et le jus cogens*, "Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," 1970, No. 1, pp. 34 - 37.

⁶⁰ A. SHEUNER draws attention to this in *Conflict of Treaty Provisions with a Peremptory Norm of General International Law*, "Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," 1969, No. 1, p. 38.

the *ius cogens* norm. In cases when Article 53 should be applied, the parties have the obligation to eliminate the consequences of any kind of activity performed in reliance on any provision that conflicts with the *ius cogens* norm and have the duty to restore mutual relations to the state compatible with the norms of this type. In case of the application of Article 64 the parties have no obligation further to perform the treaty and as regards any right or obligation or legal situation that arose as a result of the conclusion of the treaty, it may be maintained only to the extent, to which its maintenance is not incompatible with peremptory norms.

The provisions related to the *ius cogens* norms were included in the Convention with the support of almost all the States.⁶¹ What more, according to many members of the delegations the necessity to formulate these provisions was not due to the need of a progressive development of international law but of its codification. Nevertheless, in practice the opinion turned out to be correct, that "to accept the existence of the peremptory legal norms from which no treaty could validly derogate, was [...] to state the problem rather than to solve it."⁶² Though the delegations of States were almost unanimous as to the fact that *ius cogens* norms exist, the question who and by what means will be entitled in a concrete case to define what actually constitutes such a norm, and what does not, was the subject of serious controversies (compare with what follows).

Of the provisions laid down in the Convention, regarding termination and suspension of the operation of treaties there should be mentioned above all Article 62. This provision deals with a fundamental change of circumstances as a ground of the termination, withdrawal from a treaty or suspension of its operation, i.e. — using a definition, today already slightly depreciated — the *rebus sic stantibus* clause.

In accordance with the wording of Article 62 a fundamental change of circumstances takes place when 1) it is related to circumstances existing during the conclusion of the treaty, namely such as constitute an essential basis of the consent of the parties to be bound by the treaty; 2) it was not foreseen; 3) as a result of it a radical change took place of the scope of obligations, which in accordance with the provisions of the treaty should be carried out. Article 62, however, makes it absolutely clear, that such a change may not be invoked as a ground of the termination, withdrawal from or suspension of the operation of a treaty, if this treaty establishes

⁶¹ One of the few who expressed herself against this Article was France. The attitude adopted by this State was discussed at length by D. CLARD, in *Premières réflexions sur le "Traité des Traités:" la Convention de Vienne du 23 mai 1969*, "Journal du Droit international," 1970, No. 2, pp. 284ff.

⁶² See the statement made by the representative of Australia at the 21st session of the UN General Assembly, Doc. A/CONF. 39/5, vol. 2, p. 289.

boundary or if it was caused by a State, infringing on obligations, stemming from the treaty.

This Article, on the surface limiting the principle of *pacta sunt servanda*, actually constitutes its indispensable complement, and even — from the practical point of view — solidifies the implementation of this principle. Bearing in mind the dynamism of contemporary international relations, it gives States possibilities for a legal change of obligations, the existence of which have in fact no longer any justification. On the other hand, the wording of Article 62 alone, as well as its meaning in the context of the provisions laid down in the Convention, unequivocally define the exceptional character of this ground of terminating treaty obligations. The Article exactly defines the frames within which the *rebus sic stantibus* clause may be used in international relations.⁶³ Special attention should be drawn to the impermissibility to refer to the clause, in the case of treaties establishing boundaries. This was the very provision which for obvious reasons, got the warm support of Poland, a country that more than once in her history suffered the consequences of an abuse of the above-mentioned clause.⁶⁴ Controversial tendencies — taking into account the dynamism and a guarantee of stability in international relations were combined in Article 62 and — as it seems — make up a harmonious whole.

Among other decisions regarding termination, withdrawal from or suspension of the operation of a treaty, attention should be drawn to Article 60, giving a State the right to invoke the material breach of a treaty as a ground of its termination or suspension (in separate paragraphs the Article regulates this problem in regard to bilateral and multilateral treaties) and then also to Article 61, envisaging that supervening impossibility of performance of a treaty provides a ground for a party to demand its termination or withdrawing from it (should that impossibility be of a permanent nature) or to suspend the operation of a treaty (if it is of a temporary nature).

The problem on which it was most difficult to reach an agreement, creating almost a critical situation, was that of the proper procedure regarding invalidity of a treaty, termination of its binding force, withdrawal from a treaty or suspension of its operation.⁶⁵ It is obvious that rather for-

⁶³ More on this subject see E. SCHWALB, *Fundamental Change of Circumstances. Notes on Article 59 of the Draft Convention on the Law of Treaties*, "Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," 1969, No. 1, pp. 68 - 70.

⁶⁴ Cf. the speech made by J. OSIĘCKI, representative of Poland at the 1st session — Doc. A/CONF. 39/11, p. 371 and the speech delivered by E. WYZNER at the 2nd session — Doc. A/CONF. 39/SR.22, pp. 6 - 7.

⁶⁵ The course of debates at the Conference on this subject was discussed in detail by S. E. NAHLIK in *Plon... [The Yield...]*, p. 72ff, as well as S. VEROSTA, *op. cit.*, p. 699ff, as well as R. D. KEARNEY, R. E. DALTON, *op. cit.*, p. 545ff.

mal questions did not give rise to controversies. The States from the very beginning agreed that any claim should be presented by the given party in written form, by means of special notification, simultaneously indicating what measures should be undertaken. (Art. 65 and 67); and also that if no party raises any objection within the proper time (this term was defined in Article 65 to be 3 months, with the exception of cases of special urgency), the claimant may carry out the measures proposed in the notification.

Controversial was, however, the question which procedure would be proper when one of the parties objects to such a claim. In accordance with the draft of the International Law Commission the only road open to the states in such case was to try to seek a solution of the controversy through the means indicated in Article 33 of the UN Charter (Art. 62 para. 3 of the draft). This solution, accepted by the Commission as far back as in 1963 met, on the one part with criticism, on the other with the support of many States. The Commission preparing the final version of the draft left it unchanged, declaring in the commentary that it constitutes "the highest measure of common ground that could be found among Governments as well as in the Commission on this question." The first session of the Conference devoted as many as eight meetings to this problem. Representatives of several tens of countries took the floor, of those 34 expressed themselves in favour of a change of the above-mentioned article and in favour of the introduction of compulsory measures to settle the controversy, while 22 — including representatives of the socialist countries — were in favour of leaving it unchanged.

The debates of the first session brought no solution. Though Article 62 was accepted in the wording of the draft, the proposal was made to introduce a new Article 62-bis⁶⁶ providing for a compulsory procedure, the content of which was to be finally formulated later during the second session. In addition to the solution of the problem of universalism this was the most important and at the same time most difficult one facing the second session of the Conference. During this session several proposals were made in connection with Article 62-bis, establishing various forms of compulsory solutions of disputes regarding invalidity, termination, withdrawal from and suspension of the operation of a treaty.⁶⁷

⁶⁶ Doc. A/CONF. 39/14, vol. 2, p. 320ff.

⁶⁷ The proposals provided either for obligatory jurisdiction of the International Court of Justice or arbitration (amendment proposed by Japan Doc. A/CONF. 39/C.1/L.339 and Switzerland — Doc. A/CONF. 39/C.1/L.377) or conciliation and arbitration (amendment proposed by Spain — Doc. A/CONF. 39/C.1/L.391 and amendment proposed by 19 States — Doc. A/CONF. 39/C.1/L.352 Rev. 3 and Add 1 and 1 and Corr. 1).

The attitude adopted by Poland in this regard, just like that of other socialist states, was absolutely unequivocal: controversies, that may arise due to the application of part five of the Convention are not some sort of special category. They are simply international disputes and just like all the others have to be solved by peaceful means. This is the only type of obligation incumbent upon the States in the light of contemporary international law, and only such a State of affairs should find its reflection in the Convention. None of the so far concluded codifying conventions — it was emphasized — established compulsory procedures for the solution of controversies and attempts to make codification of the law of treaties dependent on such provisions was completely without foundation, and might even turn out to be detrimental to the fate of this codification.⁶⁸

The solution that was finally accepted, despite opposition on the part of the socialist States, provides for a quite complicated procedure. Its essence is that if the two parties are unable within the period of 12 months to solve the dispute through the means indicated in Article 33 of the UN Charter, the mechanism of compulsory procedure, described in Article 66 is put into motion. In accordance with this provision in the case of a dispute concerning the application or the interpretation of Article 53 or 64 (i.e. articles, dealing with invalidity or termination of a treaty that conflicts with the *ius cogens* norm) any one of the parties may submit it to the International Court of Justice, unless the two parties agree to submit the dispute to arbitration. In case of other disputes, a new organ is to be competent to handle the controversy, namely the conciliation commission. All the detailed provisions, related to the way to convene such a commission, its composition and competence are defined in the Annex to the Convention, which forms the integral part of it. This organ is to be closely connected to the UN (and will also be financed by the UN).

It is difficult to foresee the consequences of the introduction of this system. But it will undoubtedly make it more difficult for a considerable group of States to accept the Convention.

Interrelated with the disputes-settlement problem was that of universalism, which — as far as treaty relations are concerned — aims towards opening general multilateral treaties to all States. This, of course, was not something of substantial nexus, somebody examining only the content of the legal norms may even be baffled. But for the diplomats, taking part in the debate, it was quite clear: both problems were entangled by the common political foundation. In both cases the obvious difference of opinion between Western and socialist States, on essential problems of international

⁶⁸ See speech delivered by E. WYZNER, Doc. A/CONF. 39/SR.26, pp. 13 - 15 and S. E. NAHLIK, Doc. A/CONF. 39/SR.25, pp. 9 - 11.

relations had found its strongest expression. It was a question of decisive importance for the existence of the entire Convention to achieve an equilibrium when solving both matters. In the end — following a proposal of a group of countries of the third world — both were put to the vote simultaneously, and it is worth while to add, that this took place on the very eve of the closing of the debates of the Conference.⁶⁹

The problem of universalism occurred during the work on the Convention, on two planes. On the one hand there appeared the need to formulate in the Convention such provisions, which would in a general and fundamental way solve the problem of universalism in treaty relations. On the other hand it was a question of the universalism of the Convention itself — a typical general multilateral treaty. Let us start with the first problem, today already completely solved.

In its draft of 1962 the International Law Commission accepted a progressive solution, which in principle was in accordance with the requirements of contemporary international reality. The conception of a general multilateral treaty was introduced, simultaneously assuring in principle all States the right to become a party of such a treaty.⁷⁰ However, due to controversial opinions of the various States, the Commission in its final draft resigned from this solution (Art. 12). This encountered sharp criticism on the part of many States, including Poland and other socialist countries. This found its expression already in the commentaries of governments related to the draft and in the statements of speakers during the debates of the 21st and 22nd sessions of the UN General Assembly.⁷¹

The long-lasting debate during the first session of the Conference yielded no results. The final decision as to the solution of the problem under discussion was left for the second session of the Conference.

The States demanding universalism then came out with the proposal to introduce a new Article 5-bis, which would read as follows:

“Every State has the right to participate in a multilateral treaty which codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole.”⁷²

In the proposed article two categories of treaties were distinguished, in which every State would have the right to participate. Both categories were distinguished, taking into consideration objective criteria. The nature of treaty, its legal essence would in each concrete case be the decisive factor, determining whether to qualify it as a general multilateral treaty. It seems to be obvious that it is an absolute necessity to assure all States

⁶⁹ Doc. A/CONF. 39/SR.34, pp. 26 - 27.

⁷⁰ ILC, Yearbook 1962, vol. 2, p. 31.

⁷¹ Doc. A/CONF. 39/5, vol. 1, p. 120ff.

⁷² Doc. A/CONF. 39/C.1/SR.88 pp. 2 - 5.

the right to participate in treaties mentioned in the amendment. Treaties codifying international law are in their very essence of a universal nature. Codification based on the assumption that its scope will be limited is incompatible with the very sense of the codification, which means nothing else but a confirmation of universally binding norms for the international community of States. Instead of the unification of international law, such a codification leads to the disintegration of this law. Instead of contributing to international legal order, it introduced an element of uncertainty into international relations.

As regards the second of these two categories, expression should be given here to the conviction, which seems to be a truism, that the contemporary world is a world of interdependence. The extraordinary development of technics and science brought the States closer to and made them more dependent on one another. It is responsible for the fact that not only can no State live in isolation, but it is in the vital interest of the community of States that there should not be such a State. The new unprecedented situation has brought in new kinds of treaties, which not only deal with matters of interest for all States, but, and this seems to be still more important, should in the interest of the international community as a whole be observed by all the States. To these belong treaties that vary to a great extent as concerns their subject-matter, or their political weight: treaties related to the everyday life of States, dealing with such fields as: transport and communication, public health, protection of plants, man's environment, protection of human rights as well as treaties aimed at the safeguarding of world peace and international security. Giving certain States no access to this type of treaties, obvious harm is inflicted on the international community.

E. Wyzner, chairman of the Polish delegation, inaugurating the debates on universalism at the second session of the Conference, in a thoroughly documented statement pointed to the close connection between the principle of universalism and those of the UN Charter, and above all with the principle of the sovereign equality of States. On the basis of a detailed analysis he provided proof of the groundlessness of the legal argumentation of the opponents of universalism and indicated their true aims: discrimination of some socialist States and above all the German Democratic Republic.⁷⁸

At the second session of the Conference it became clear that no legal arguments would convince the opponents of the principle of universalism. Political reasons were given the absolute priority. And due to them in the Committee of the Whole (52 voices against, 32 in favour, 19 absten-

⁷⁸ Doc. A/CONF. 39/C.1/L.388 and Add 1.

tions) as well as at the Plenary Meeting (50— against, 34— in favour, 22— abstentions) the proposal to introduce Article 5-bis was rejected.⁷⁴ Thus a general provision was lacking in the Convention, which would assure to all States the right to participate in general multilateral treaties.

As regards universalism of the Convention itself, a problem which from the very beginning was most closely linked with the question of the general provision on universalism, it has not been until now finally solved.

In brief, facts essential for the cause are as follows: Not invited to the UN Conference on the Law of Treaties, despite obvious reasons, stemming from the universal character of the codification, to be achieved as its result were: The People's Republic of China, the German Democratic Republic and the Democratic Republic of Vietnam, i.e. socialist countries which for a long time already have been discriminated in the United Nations practice. The text of the final provisions of the Convention (Art. 81 and 83) mentioned the following categories of States which may become parties to it: member States of the UN or any of the specialized agencies, or of International Atomic Energy Agency, or States, parties to the Statute of the International Court of Justice as well as "any other State invited by the General Assembly of the United Nations to become a party to the Convention."

During the debates of the second session, where the content of the final clauses was decided the amendment was rejected which included in the group of potential parties to the Convention, States which were parties to at least one of the following agreements: the treaty banning nuclear tests in the atmosphere, in outer space and under water or the treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (both treaties, as is known were given the clause of the three depositaries, guaranteeing the implementation of universalism in practice).⁷⁵ Rejected too was the proposal made by Poland, Romania, Hungary and the Soviet Union, including the "all States" formula, guaranteeing the right to be parties to the Convention simply to all States, thus being a proposal which would best serve the cause of universalism.⁷⁶

The determined attitude of the socialist States consistently coming out in defence of the principle of universalism found its reflection in the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties, adopted by the Conference. The representatives of States, "convinced that multilateral treaties which deal with the codification and pro-

⁷⁴ Doc. A/CONF. 39/C.1/SR.105 and doc. A/CONF. 39/SR. 34.

⁷⁵ Text of the amendment Doc. A/CONF. 39/C.1/L.386/Rev.1 and Doc. A/CONF. 39/C.1/L.394.

⁷⁶ Text of the amendment doc. A/CONF. 39/C.1/L.389 and Corr. 1.

gressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation"

and referring to the concluding clause of the Convention

"invites the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations in order to ensure the widest possible participation in the Vienna Convention [...]"⁷⁷

In such a way the principle was accepted that there should be ensured the widest possible participation of States in the Convention; the General Assembly is only supposed to consider the possibilities how to implement this principle in the most effective manner.⁷⁸

Neither the 24th nor the 25th session of the General Assembly brought any decision regarding this matter, postponing it to be dealt with at the next session. One may, however, hope that sooner or later the principle, voiced in Article 6 of the Convention, namely that every State possesses capacity to conclude treaties, will be applied in the case of the Convention itself.

This brief summary of the provisions of the Vienna Convention on the Law of Treaties would be incomplete without mentioning its last three parts. These are: six (Art. 73 - 75), in which three different provisions were formulated,⁷⁹ part seven (Art. 76 - 80), dealing with problems of a rather formal nature (side by side with more substantial provisions related to depositaries, including provisions on notifications, correction of errors in the text of treaties, as well as on the registration and the publication of treaties) and part eight (Art. 81 - 85) which make up the final provisions, the most important points of which have already been discussed.

The consent of at least 35 States is required for the entry into force of the Convention. Article 85 reads that

"the present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession."

In connection with this decision the irresistibly arising question is not so much "when?" but rather "will such a day ever come?"⁸⁰ The Convention is of such a complicated nature, full of such a variety of implications, often difficult to foresee, that each State is compelled to examine the Convention's provisions very carefully.

⁷⁷ Doc. A/CONF. 36/26, pp. 7 - 8.

⁷⁸ See S. E. NAHLIK, *Plon... [The Yield...]*, p. 78.

⁷⁹ In addition to the already mentioned provisions of Article 73 (Cases of State Succession, State Responsibility and Outbreak of Hostilities) and Article 75 (Case of an Aggressor State) there is in this part a provision stating lack of connection between severing or existence of diplomatic or consular relations and the conclusion treaties (Art. 74).

⁸⁰ Up to January 1, 1971 the Convention was ratified by: Nigeria, Jamaica, Yugoslavia, Syria and Canada.

The various regulations are from the legal point of view of a manifold nature. In many cases, thanks to the introduction of what is called escape clauses, their character comes closer to Fitzmaurice's conception of approach to the rules of the law of treaties, rather as a non-obligatory code of a general nature, than conventional provisions, setting up quite precise obligations for the States or giving them concrete rights. That is how things are above all in regard to that part, dealing with the conclusion, and entry into force of treaties, though here too can be found regulations essentially limiting freedom of action of States.⁸¹

Quite different is the meaning of articles of the five parts of the Convention, related to the invalidity and termination of treaties. They place the most important obligations on the States, they contain the entire weight of the responsibility of the States which decide to become parties to the Convention. Thus the attitude towards these provisions will be of fundamental significance when a State decides on the ratification of or accession to the Convention.

This will not be a homogenous attitude: it will depend on the attitude towards substantial provisions and the attitude towards procedural regulations, above all those which provide for the compulsory settlement of disputes (Art. 66 and the Annex). In the case of a considerable number of States the evaluation of these two types of regulations will differ. The course of the debates of the Conference indicates that at least for some scores of States procedural regulations are difficult or simply impossible to accept. In connection with this there arises the necessity to discuss the problem whether these regulations must be accepted by all the parties to the Convention or whether their legal effects may be excluded by the reservations.

Fully applicable in regard to the Convention itself are its provisions on reservations. In accordance with the rule included in Article 19 they are admissible, provided the treaty does not prohibit them as long as they are not incompatible with the object and purpose of the treaty. The Vienna Convention does not contain a provision which would prohibit the formulation of reservations.⁸² Thus there remains only the question whether reservations excluding Article 66 and the Annex connected with it are

⁸¹ Of the same type is Article 18, prohibiting to States who signed a treaty, requiring ratification or approval, to undertake any activity which would defeat the object and purpose of the treaty. Criticising this decision J. Nisot in the article *L'Article 18 de la Convention de Vienne sur le droit des traités*, "Revue belge de droit international," 1970, No. 1, p. 503. A different evaluation is given by W. Morvay, *The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force*, "Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," 1967, No. 3, p. 465ff.

⁸² Syria and Canada already formulated reservations to the Convention.

compatible or on the contrary are incompatible with the object and purpose of the Convention?

Whatever the answer of the doctrine to this, the contracting States will anyhow have the last word. They are the only ones who, by raising an objection or accepting a reservation in this respect, can solve this problem in a decisive manner. It seems that the attitude of the States accepting such a type of reservation, declaring it to be compatible with the object and purpose of the Convention, will be fully justified. There seem not to be any serious reasons to admit that the way in which the States are to solve disputes regarding invalidity, termination or suspension of the operation of treaties, with the exception of one — that they will settle them by peaceful means — are to be the object and purpose of convention codifying the law of treaties. Just the opposite, it seems that attempts to enforce compulsory settlement of this kind of disputes actually go far beyond the frames of codification in this field of the law. In connection with the all-embracing character of this law, it introduces a compulsory settlement of disputes in all the fields, regulated by international agreements, and thus in practice — in all the fields of the cooperation of States. It is difficult to come to the conclusion, that so far-reaching obligations should constitute the “object and purpose” of the Vienna Convention on the Law of Treaties. On the contrary, it seems that these regulations do not constitute the immanent part of the Convention, do not forejudge its very essence. Their existence, though undoubtedly important, is not — as one may assume — indispensable, does not decide about the existence of the system of the law of treaties, codified in the Convention.

In conclusion, one may state that the exclusion of the legal effectiveness of procedural regulations, enforcing a compulsory settlement of disputes by making the proper reservations, seems to be absolutely acceptable. Even more, all those who consider codification of the law of treaties to be something important and significant for the development and strengthening of the international legal order, should support it as a desirable solution.

Exclusive Fishery Zones: International and Polish Practices

by ANDRZEJ STRABURZYŃSKI

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I. Origin of the Exclusive Fishery Zone: the Geneva Conferences

The conception of the exclusive fishery zone is a novel one. Its development on an international scale was not initiated until the United Nations Geneva Conferences on the Law of the Sea in 1958 and 1960. For, from the standpoint of the traditional law of the sea, it was not admitted that the coastal state could have an exclusive right in the use of the living resources to be found in areas of the high seas adjacent to its territorial sea. To put it another way, before Geneva Conferences any claim to the monopoly of fisheries in such areas could only be asserted by the enlargement of territorial sea. During this period, therefore, a number of States lodged claims for the extension of territorial sea only in order to protect their coastal fishery interests.

The enlargement of the territorial sea involves, however, also extension of all rights of the coastal State. For the areas of sea covered by this enlargement are subject to coastal State's sovereignty. And further, any such enlargement must necessarily impose additional restrictions on the use of sea by third States. Strictly speaking, the areas of the high seas, in which all States have equal rights, are, to some degree, diminished by an extended territorial sea. Consequently, the area of full application of the freedom of the seas becomes smaller and smaller.

In contrast to the enlargement of the territorial sea stands the trend to recognize an exclusive fishery zone which limits the freedom of the seas in one respect only, i.e. without affecting other than distant fishing

interests of third States. Thus, for example, the freedom of navigation through or the freedom to fly over an exclusive fishery zone are in no way prohibited. Moreover, it would be an oversimplification to say that some States favouring narrow territorial sea must necessarily be guided by the interests of their own fishermen operating off the coasts of other States. In fact, it is sometimes found that there is another factor being of capital significance for the State. To give an example: the United States, according to Bardonnnet's opinion, are willing to adhere to a 3-mile territorial sea for three reasons: strategy, navigation and fishery.¹ But what is the gradation of importance of these various factors? Or, to put it another way, why has the United States, in spite of their distant fishing interests, contributed to the development of the conception of an exclusive fishery zone during the Geneva Conferences? The answer must logically be as follows. When the United States proposed at Geneva in 1958 and 1960 the establishment of fishery zones they were concerned less with the interests of their own fishermen than with strategic interests of their Navy. For, these interests, connected primarily with the manoeuvrability of warships and aircraft, might — probably to an even greater degree than the navigational interests of the merchant fleet — suffer from the extension of territorial sea of other States.²

It can, therefore, easily be seen that the conception of an exclusive fishery zone has been determined by various interests, fishing interests not always predominating. Many States which favoured narrow territorial sea, being faced with the alternative of accepting exclusive fishery zone or of agreeing to the enlargement of the territorial sea, preferred the former solution, even at the expense of the interests of their own distant fishing fleets.

In the theory of international law, the attitude of States insisting on as narrow territorial sea as possible is clearly illustrated by the opinion of Professors McDougal and Burke:

"From a policy perspective this alternative (establishing an exclusive fishery zone instead of extending territorial sea) would appear eminently preferable, since there is no need for extending all aspects of exclusive authority further out to sea in order to accomplish the protection of single interest. If needed variations in the exclusive fishing areas could be taken care of by contiguous zones, then the establishment of narrowest possible territorial sea would most clearly appear as the most rational solution."³

¹ D. BARDONNET, *La largeur de la mer territoriale* "Revue Générale de Droit International Public" (hereinafter referred to as RGDIP), 1962, No. 1, p. 60.

² Cf. L. BECKER, *The Breadth of the Territorial Sea and Fisheries Jurisdiction*, "The Department of State Bulletin," March 16, 1959, pp. 369 - 374.

³ M. S. McDUGAL, W. T. BURKE, *The Public of the Oceans, A Contemporary International Law of the Sea*, New Haven 1962, p. 515.

The exclusive fishery zone, therefore, in accordance with the intentions of protagonists of narrow territorial sea, is to be substituted for the extension of territorial sea.

Let us now look at the issue of an exclusive fishery zone during the Geneva Conferences. The basic factor influencing the promotion by the States favouring a narrow territorial sea⁴ of proposals for the establishment of an exclusive 12-mile wide fishery zone was the fear that the Geneva Conferences might eventually recognize the same breadth as an admissible maximum for territorial sea. It was beyond question that only an exclusive fishery zone of such breadth would constitute "a compromise conception while agreeing upon the breadth of the territorial sea,"⁴ because, apart from the excessive claims of a few States to "sole jurisdiction and sovereignty" over the zones of 200 miles,⁵ the majority of claims for extension of territorial sea fluctuated within, but did not exceed 12 miles. Thus the proposals providing for the creation of an exclusive fishery zone were at the same time proposals limiting the breadth of the territorial sea, at first to 3 miles, and latter on — in view of the deepening crisis of the so-called "three-mile rule" — to 6 miles.⁶ The location in the latter of the outer limit of territorial sea at the distance of the 6 miles from its baseline, together with the stipulation that combined breadth of territorial sea and the fishery zone could not exceed 12 miles — these provisions enable the proposals to be defined as "six plus six" proposals.

The States adhering to the 12-mile territorial sea had, of course, no intention confining themselves to exercising only exclusive right of fishery beyond the 6-mile territorial sea. Nevertheless, the controversy between protagonists of the "six plus six" proposals and those of 12-mile territorial sea must not be taken to mean that the latter group of States opposed the actual concept of an exclusive fishery zone. The proposals submitted by these States envisaged the possibility of such a zone being established in the event of the State deciding of its own will to fix territorial sea narrower than 12 miles.⁷ This point of view resulted from the assumption that "the establishment of a fishery zone is justified if it represents a com-

⁴ R. ZAORSKI, *Konferencje genewskie o prawie morza* [The Geneva Conventions on the Law of the Sea], Gdynia 1962, p. 147.

⁵ Declaration sobre Zona Maritima, signed by Chile, Ecuador and Peru, in E. GARCIA SAYAN, *Notas sobre la soberanía marítima del Perú, Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, Lima 1955, Anexo III, pp. 48 - 49.

⁶ See, for example, the United States and Canada proposals, UN Doc. A/CONF. 13/C.1/L.77/Rev.3; A/CONF. 13/L.159/Rev.2 of 1958 and A/CONF. 19/L.10 and L.11 of 1960.

⁷ See, for example, the USSR proposal, UN Doc. A/CONF. 19/C.L.1 and the "18-Power" proposal, UN Doc. A/CONF. 19/C.1/L.2/Rev.1.

pensation for "self-limitation" by States in the matter of the breadth of territorial sea."⁸

To sum up, in the light of the proposals presented at the Geneva Conferences, we can define the exclusive fishery zone as a belt of sea waters between the outer limit of the territorial sea and the distance of 12 nautical miles measured from its baseline in which the coastal State has the same rights as regards fishery as it has in its territorial sea.

All these proposals, however, were not sufficient to secure agreement between the States favouring 12-mile territorial sea and those insisting on the acceptance by the Geneva Conferences of the proposals for fishery zone on the basis "six plus six."

II. Development of the Exclusive Fishery Zone after the Geneva Conferences

The failure of the Geneva Conferences to achieve agreement between the States favouring 12-mile territorial sea and those insisting on narrower territorial sea had a fundamental influence on the practice of the post-conferences period during which two basic tendencies corresponding to this division took shape. The first consists in establishing 12-mile territorial sea without additional claims being lodged to exclusive fishing rights beyond its outer limit. In the spirit of this procedure followed legislation by such States as Cyprus, Ghana, India, Kuwait, the Maglasy Republic, Sierra Leone, Sudan, Syria, Tanzania and Togo.⁹ Of fundamental significance to our theme is the second tendency, which consists in extending only exclusive fisheries limits to 12 miles. The practice of States preferring this way leads not only to the promulgation by them of unilateral acts, as has been the case of Australia, Canada, Morocco, New Zealand, Tunisia, Turkey, Union of South Africa and the United States,¹⁰ but also to the conclusion of international agreements.

Analysis of their aims enables two group of agreements concerning fishery zones to be distinguished. The first group embraces agreements under which a given State recognizes a fishery zone established by another

⁸ D. M. KOLESNIK in: *Otšerki Meždunarodnovo Morskovo Prava*, edited by V. M. Korecki and G. I. Tunkin, Moskva 1962, p. 246.

⁹ M. M. WHITEMAN, *Digest of International Law*, vol. 4, Washington 1965, pp. 34 - 35 and *International Legal Materials* (hereinafter referred to as ILM), March 1965, p. 265 and May 1968, pp. 574 - 576, and RGDIP, *Documents*, 1968, No. 3, pp. 914 - 915.

¹⁰ M. M. WHITEMAN, *op. cit.*, pp. 34 - 35 and ILM, September 1964, pp. 922 - 924, and RGPID, "Chronique and Documents," 1963, No. 1, pp. 181 - 182 and 186 - 187; 1964, No. 4, pp. 969 - 971; 1968, No. 2, pp. 551 - 556.

State (e.g. the United Kingdom in its agreement concluded with Denmark as regards the fishery zone around Faroë Islands)¹¹ or it agrees to the establishment of such a zone (e.g. the United Kingdom in its agreement with Norway).¹² The second group embraces agreements under which the parties mutually grant one another the right to establish fishery zones.

Agreements belonging to the first group are bilateral ones. In addition to the agreements concluded by the United Kingdom with Denmark and with Norway there still remains the agreement concluded with Iceland,¹³ to end the prolonged Anglo-Icelandic dispute.¹⁴ The Icelandic fishery zone has also been recognized by the Federal Republic of Germany, which, like the United Kingdom, agreed that she "shall not object in future to a 12-mile fishery zone around Iceland."¹⁵

The second group includes bilateral as well as multilateral agreements. Thus, for example, under a bilateral agreement, Japan and South Korea recognized their mutual right to establish 12-mile fishery zone.¹⁶ This agreement brought to an end many-years' long Japanese-South Korean dispute caused by South Korea's proclamation of the so-called Rhee Line within which there were areas lying at a distance from 20 miles up to — at some points — 200 miles from the Korean shore line. The conclusion of the agreement in question means resignation by South Korea, if not from entire enforcement of the Rhee Line, than at least from applying it as an exclusive fisheries limit *vis-à-vis* Japan only. On the other hand:

"the Government of Japan [...] is of opinion that the rules concerning the exclusive fishery zone apply only to the fishing vessels of the Republic of Korea, and that, as a rule, fishing vessels of third countries may engage in fishing as ever in the waters outside the three-nautical-mile limit from Japanese coast."¹⁷

In this connection it should be noted that Japan, in spite of its agreement to curtail certain operations of Japanese fishermen within the

¹¹ For text see *Supplement to Laws and Regulations on the Regime of the Territorial Sea*, New York 1960, p. 7 - 12.

¹² United Nations Treaty Series (hereinafter referred to as UNTS), No. 5723, vol. 398, 1961, p. 189 - 228. This agreement was signed on 17 November 1960 and came into effect on March 3, 1961. The Norwegian Law on Fishery Zone (dok. 12) 1961, Lov af 24 mars om Norges fiskerigrænse) is reprinted in *Nordisk Tidskrift For International Ret og Jus Gentium*, "Acta Scandinavica juris gentium," Vol. 31, 1961, Fasc. 3/4, pp. 319 - 320.

¹³ UNTS No. 5710, vol. 397, 1961, pp. 275 - 281.

¹⁴ See for example M. M. WHITEMAN, *Digest...*, vol. 4, p. 1154 - 1178 and L. M. ALEXANDER, *Offshore Claims and Fisheries in North-West Europe*, "The Year Book of World Affairs," 1960, pp. 242 - 247.

¹⁵ UNTS, No. 5877, vol. 409, 1961, p. 47 - 54.

¹⁶ "The Japanese Annual of International Law 1966," Documents, p. 264 - 283.

¹⁷ H. TAKABAYASHI, *Normalization of Relations between Japan and the Republic of Korea: Agreement on Fisheries*, *ibid.*, p. 21.

12-mile fishery zones established by Australia, Mexico, New Zealand and the United States, did not recognize, in principle, any exclusive fishing rights outside the 3-mile limit.¹⁸ But, on the other hand, according to Professor's Oda opinion "Japan is now the only real fishing State which still belongs to this group," i.e. supporters of 3-mile fisheries jurisdiction.¹⁹

Another example of bilateral agreement belonging to the second group, i.e. such under which parties recognize each other the right to establish 12-mile fishery zone, is that between Mexico and the United States.²⁰ It is of interest that according to Article IV of the agreement both States continued to reserve their position regarding the breadth of the territorial sea (3 miles in the case of the United States and 9 miles in that of Mexico) and defending them in the international forum or in any of the ways recognized by international law.²¹

The multilateral agreement — there is only one up to now — merits considerable attention in view of its particular importance to the development of the institution of the fishery zone. The European Fisheries Convention is such a multilateral agreement adopted *ad referendum* and signed by the following thirteen States participating in the European Fisheries Conference held in London from December 1963 to March 1964: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.²² Only three States participating in this Conference refused to accept the EFC: Switzerland, which as land-locked State was not interested in the establishment of a fishery zone, and Iceland and Norway which had already prior to the Conference established fishery zones under conditions more advantageous for them than those provided in the EFC.²³ For the same reason, Denmark excluded from application

¹⁸ D. W. WINDLEY, *International Practice regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction*, "American Journal of International Law," July 1969, pp. 495 - 496, 498 and 502 - 503.

¹⁹ S. ODA, *Some Observations on the International Law of the Sea*, "The Japanese Annual of International Law 1967," pp. 45 - 46.

²⁰ Text in ILM, March 1968, pp. 312 - 321.

²¹ *Ibid.*, p. 313.

²² Text of the European Fisheries Convention [hereinafter referred to as EFC] with Annexes in Miscellaneous No. 11, 1964), London: Her Majesty's Stationery Office, Cmnd. 2355.

²³ For a discussion of Norway's position see C. A. FLEISHER, *Norway's Policy on Fisheries 1958 - 1964* in: *Developments in the Law of the Sea 1958 - 1964*, British Institute of International and Comparative Law, Special Publication No. 6 (1965), pp. 92 - 109, especially pp. 106 - 109. See also D. VIGNES, *La Conférence Européenne sur la Pêche et le Droit de la Mer*, "Annuaire Français de Droit International," 1964, pp. 674 - 675.

of the EFC the fishery zones established around the coasts of the Faroë Islands and Greenland. It should be emphasized that, according to Article 1 of the EFC, any contracting Party which did not avail itself of the right to establish a fishery zone on conditions as provided by the Convention had only "the right to maintain the fisheries régime which it applied at the date on which the present Convention is opened for signature, if this régime is more favourable to fishing by other countries than the régime described in Article 2 to 6."

The fishery zone is, according to the principles provided by the EFC, divided into two 6-mile belts. Within the 6-mile belt measured from the baseline of the territorial sea, the coastal State has exclusive fishing rights and exclusive jurisdiction in fishery matters (Art. 2), whereas within the outer 6-mile belt "the right to fish shall be exercised only by the coastal State and by such other Contracting Parties the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962" (Art. 3).

The particular role which the European Fisheries Convention plays in favour of the uniformity of fisheries limits within 12-mile belt consists principally in the fact that it does not connect the right to establish a fishery zone with the simultaneous recognition of a defined maximum for the breadth of the territorial sea. Thus, as far as the States supporters of territorial sea narrower than 12 miles are concerned, accession to the EFC allows them to acquire exclusive fishing rights — at least *vis-à-vis* States that are not parties to the Conventions²⁴ — "on the part of the sea that the signatories consider as non-territorial;"²⁵ i.e. within the belt between the outer limit of territorial sea and a distance of 12 miles from its baseline. On the other hand, for States whose fishery regime is more favourable to fishing by other States than a regime described in the Convention — i.e. States having 3 or 6-mile territorial sea, even if they are theoretically protagonists of 12-mile territorial sea — accession to the Convention, on the basis of its Article 14 (3),²⁶ should not present any major difficulties.

The separation of the question of an exclusive fishery zone from the problem of simultaneous acceptance of an obligatory maximum for the breadth of the territorial sea enables also to recognize such a zone not ex-

²⁴ Note that "it is a six-mile fisheries limit that the Contracting Parties will be applying *inter se*, although they may be applying a twelve mile fisheries limit *vis-à-vis* other countries." D. H. N. JOHNSON, *European Fishery Limits in Developments...*, p. 63.

²⁵ D. VIGNES, *op. cit.*, p. 678.

²⁶ Article 14 (3) of the EFC provided: "Any State may at any time after the Convention has come into force accede thereto upon such conditions as may agreed by it with the Contracting Parties [...]"

tending beyond 12 miles by "territorial twelvemilers," i.e. States having 12-mile territorial sea. As has already been indicated, even during the Geneva Conferences these States did not question the right to establish such zones by States confining themselves to a smaller width of the territorial sea. Therefore recognition of the fishery zone may depend on the principle, already referred to, of "selflimitation" in the matter of breadth of territorial sea. And further, it is quite evident that the State having 12-mile territorial sea as well as the State establishing fishery zone of that breadth are both "fishing twelvemilers." From it follows that, on the basis of reciprocity, any "territorial twelvemiler" cannot refuse to recognize the 12-mile fishery zone established by other States.

In practice, there are already examples of such recognition. These include agreements with the parties to the European Fisheries Convention (e.g. agreement entered in by the Soviet Union and the United Kingdom)²⁷ as well as with other States (e.g. agreements concluded by the Soviet Union with Norway and with the United States).²⁸

Consequently, the State practice following the Geneva Conferences shows a trend towards uniformity within the 12-mile limit as regards the exercise by the coastal State of either its entire rights or the right of exclusive fisheries only. This trend illustrated by unilateral and multilateral actions of many States, has exerted an influence on Poland's attitude.

III. Polish Practice Subsequent to the Development of the Exclusive Fishery Zone

We turn now to a more detailed examination of the reasons why it was desirable from the perspective of Poland to enlarge her fisheries limits.

But first it should be noted that Poland has never lodged claim to any other than 3-mile breadth of the territorial sea. And further, not long ago has Poland left the group of States which did not lay claim to any fisheries jurisdiction beyond the 3-mile territorial sea. In spite of this, Poland recognized 12 miles not only as an admissible maximum for the breadth of the exclusive fishery zones but also for the territorial seas of other States.²⁹

²⁷ Text in ILM, January 1965, pp. 174 - 175.

²⁸ For texts see *Sbornik Meždunarodnyh Konvencij Dogovorov i Soglašenij Kasajuščijsja Rybolovstva i Rybohozajstvennyh Issledovanij*, ed. by A. A. Volkov, Moskva 1966, pp. 196 - 203, and ILM, January 1968, pp. 144 - 148 and May 1969, pp. 502 - 506 and 509 - 513.

²⁹ R. ZAORSKI, *Polski pas wyłącznego rybołówstwa w świetle praktyki międzynarodowej* [Polish Zone of the Exclusive Fishery in the Light of International Practice], "Sprawy Międzynarodowe," April 1970, pp. 64 - 65.

On the other hand, however, it is quite evident that the extension of both fisheries and territorial limits of various States may result in the exclusion of Polish fishermen from many fishing areas. For, it should be emphasized that Poland is mainly a distant fishing State — over 70 per cent of Poland's maritime catches are harvesting from other fishing grounds than those of Baltic Sea.³⁰ In addition, it may be noted, for example, that the United Kingdom's claim to the 12-mile fishery zone was, among others, determined by the interests of British coastal fishermen being anxious about the growing competition of Belgian, French, Polish and Soviet fishing vessels in the waters around the United Kingdom's coast.³¹

The British fishery zone was, however, recognized by Poland, i.e. a State which at that time did not claim any exclusive fishing rights beyond the 3-mile territorial sea. This recognition was pursuant to the agreement of September 26, 1964, which allowed Polish fishermen the temporary right (up to December 31, 1967) to fish for herring in certain areas within 6 and 12 miles, and permitted use of the British fishery zone "outside the territorial sea for purposes ancillary to fishing" but not fishing in the belt between 3 and 6 miles from the baseline of the United Kingdom's territorial sea.³²

In this connection it should be stressed that the temporary right of foreign fishermen to continue to fish in the fishery zone of a given coastal State is almost universally recognized in the contemporary international practice.³³ The purpose of so-called "historic" or "traditional" fishing right is to protect fishermen of noncoastal State against being excluded from their traditional fishing areas in an abrupt manner. Thus, quite the contrary, an exclusion of foreign fishermen should be performed gradually, i.e. by way of "phasing out," allowing them time for being adapted to cease fishing in the coastal State's fishery zone and to remove from it to the new fishing areas without excessive economic hardship.³⁴

Keeping in mind the previously mentioned agreement it seems, however, natural that Poland's consent to limit fishing to a single species of fish and to stop fishing after short phasing out period constitutes evidence

³⁰ S. DARSKI, W. STRĄK, *Rozwój i perspektywy gospodarki morskiej w Polsce* [Development and Perspectives of the Maritime Economy in Poland], Gdynia 1968, p. 174, Tables 87 and 88.

³¹ J. de BREUCKER, *La Convention de Londres sur pêche du 9 mars 1964*, "Revue belge de droit international," 1966, No. 1, pp. 144 - 145.

³² Text in ILM, January 1965, pp. 168 - 169.

³³ For a comprehensive study of this practice see D. W. WINDLEY, *op. cit.*, pp. 490 - 503.

³⁴ Cf. J. Y. MORIN, *La zone de pêche exclusive du Canada*, "The Canadian Yearbook of International Law," 1964, p. 104 and D. M. JOHNSTON, *The International Law of Fisheries, A Framework for Policy-Oriented Inquires*, New Haven 1965, p. 445.

of clear recognition of the United Kingdom's exclusive fishing rights beyond the 3-mile limit. Moreover, it should be stressed that the British fishery zone has been established as a result of the European Fisheries Convention. Thus, the recognition of this zone was tantamount to the admission of the fishery regime established under this Convention as lawful.

Consequently, it has been proved to be natural to expect also Poland's accession to the European Fisheries Convention. Therefore, on January 12, 1967 Poland — as thirteenth European and first socialist State — became party to this convention.³⁵

It should be recalled that according to Article 1 of the EFC, any party to the Convention which did not avail itself of the right to establish fishery zone on conditions as provided by the EFC had the right to maintain its fisheries regime if this regime is more favourable for fishing by other States. From it follows that even after her accession to the Convention in question Poland had the right to maintain her previously applied fisheries regime, i.e. 3-mile territorial sea without any fishery zone. But, on the other hand, even before this accession, a movement has been on the way to cause the Sejm (Polish Parliament) to decide on the creation of Polish fishery zone.³⁶ Therefore, fortified by the accession to the EFC, the Polish Government introduced into Sejm a project of law on the establishment of the Polish maritime fishery zone.³⁷

In taking this step the Government had been guided by an examination of the international practice in this field. The examination, showing the growing trend towards extending fisheries limits, served to confirm that there could not be any serious reason to maintaining 3-mile limit for fishery purposes. This point of view was shared also by the Sejm's Commission for Maritime Economy and Navigation.³⁸

On January 28, 1970 the Government's project of law on the establishment of the Polish maritime fishery zone has, with certain amendments,

³⁵ RGIP, *Chronique*, 1967, No. 3, p. 789.

³⁶ See article from "Głos Wybrzeża" of February 5, 1964 quoted by Professor R. ZAORSKI, in: *Eksploatacja biologicznych zasobów morza w świetle prawa międzynarodowego* [Exploitation of the Living Resources of the Sea in the Light of International Law], Gdynia 1967, pp. 84 - 85. See also J. SIEMIANOWSKI, *Polska strefa rybołówstwa morskiego* [Polish Maritime Fishery Zone], "Technika i Gospodarka Morska" (hereinafter referred to as TGM), April 1970, p. 150.

³⁷ Text in "Sejm Polskiej Rzeczypospolitej Ludowej," V Kadencja, Druk No. 7, Prezes Rady Ministrów, No. r. M. 111 - 37/69/Pt., Warszawa. October 24, 1969.

³⁸ *Ibid.* and Sejm's Commission for Maritime Economy and Navigation, Report on the Government's project of the Law on the establishing of the Polish maritime fishery zone in "Sejm Polskiej Rzeczypospolitej Ludowej," V Kadencja — II Sesja, Druk No. 8, Warszawa, January 28, 1970.

been approved by the above mentioned Commission. In the name of this Commission on February 12, 1970 the Deputy Florian Wichłacz referred the project of law in question to the Sejm.³⁹ On the same day the Sejm decided unanimously on the enactment of law on the establishment of the Polish maritime fishery zone.⁴⁰ This law, according to Article 7, entered into force on the 1st day of January 1971.

The main provision of the law in question is Article 2, which states in section 1 that:

"Polish maritime fishery zone has as its inner boundary the outer limit of the Polish territorial sea and extends up to a line situated at the distance of 12 nautical miles from the baseline from which the width of the Polish territorial sea is measured."

Article 3 shows the influence of the European Fisheries Convention on the fishery regime applied within the limits of Polish fishery zone.⁴¹ Thus, within the belt from 3 to 6 miles measured from the baseline of Polish territorial sea, i.e. beyond its outer limit, the right to fish shall be, during a transitional period, exercised also by other States, the fishing vessels of which have traditionally fished in that area, provided that such a right is stipulated in an international agreement concluded between Poland and the given State. No transitional period, however, is provided for States entitled, under agreement with Poland, to fish within the belt from 6 to 12 miles. But, on the other hand, there is no serious reason for which we should be "more royal than the king," that is international practice, and to grant all foreign fishermen the right to continue fishing in that belt without any restriction of time. For, in the light of present international practice, the idea of exclusivity is attached to the whole of the 12-mile fishery zone and, therefore, the recognition by the coastal State of traditional fishing rights of foreign fishermen could not be of a permanent character. Otherwise, the advantage occurring from the establishment of such a zone would probably be insignificant.

³⁹ See Sejm's Verbatim Records of February 12, 1970 in "Sejm Polskiej Rzeczypospolitej Ludowej," Kadencja V — Sesja II, *Sprawozdanie stenograficzne z 6 posiedzenia Sejmu Polskiej Rzeczypospolitej Ludowej w dniu 12 lutego 1970 r., Projekt ustawy o ustanowieniu polskiej strefy rybołówstwa morskiego*, [Stenograph of the 6th Meeting of the Sejm of the Polish People's Republic held on February 12, 1970, Project of the Law on the Establishing of the Polish Maritime Fishery Zone], Warszawa 1970, pp. 7 - 10.

⁴⁰ *Ibid.*, p. 10. For text of the Law on the Establishment of the Polish Maritime Fishery Zone, see "Dziennik Ustaw," 1970, No. 3, Item 14.

⁴¹ Cf. R. ZAORSKI, *Polski pas...* [Polish Zone...], pp. 69 - 70. See also A. STRABURZYŃSKI, *Polska strefa rybołówstwa morskiego a współczesna praktyka międzynarodowa* [Polish Maritime Fishery Zone and Contemporary International Practice], TGM, July 1970, p. 306.

That is not to say that the permanent traditional fishing rights could never be recognized. But, we think, that these rights might only be granted on a basis of reciprocity, i.e. when coastal State's fishermen would have similar rights in the exclusive fishery zones of other States.

IV. Towards the Uniformity of Exclusive Fishery Limits

Turning to the international practice it should be emphasized that the question of fishery regimes being applied by various States in their fishery zones seems to be not as much important as that of the breadth of those zones, since it is of the highest importance to stop the extension of the exclusive fisheries limits beyond the 12-mile belt. It follows not merely from Polish fishing interests which, according to the opinion of the Sejm's Commission for Maritime Economy and Navigation, might be otherwise seriously affected,⁴² but also from the interests of the international community as a whole. For, it is more than probable that an endless extension of exclusive fisheries limits must lead to underfishing resulting from the insufficient exploitation of many fishing grounds by the coastal State's fishermen only. Consequently, in the long run, it would lead also to the decrease of the world's food production.

In the light of present international practice it may be, however, assumed that — in spite of the absence of any generally recognized rule defining the breadth of the territorial sea with or without an exclusive fishery zone — any claim exceeding a 12-mile maximum should be considered as contradictory to the contemporary development of the international law of the sea.

This assumption seems to be correct for the following reasons:

1) The Geneva Conferences categorically rejected claims to the exclusive enjoyment of the sea beyond a 12-mile limit. This is quite evident from the Article 24 of the Convention on the Territorial Sea and Contiguous Zone, according to which the total breadth of the territorial sea and the contiguous zone may not exceed 12 miles. From that it may be conferred that the territorial sea can be only narrower than or equal to 12 miles, but never wider. However, there does not exist any analogous provision as to the breadth of the exclusive fishery zone, since none of the proposals providing for the establishment of such zones was accepted by the Conferences. Nevertheless "an analysis of voting of the countries represented at the Conferences shows that every country voted for at least

⁴² See Biuro Sejmu, Wydział Prasowy, "Biuletyn" No. 45/V kad., Komisja Gospodarki Morskiej i Żeglugi (3), Warszawa, November 17, 1969, p. 2.

one of the proposals which provided for a fishing zone (whether in conjunction with a 6-mile territorial sea, or as an adjunct to the proposals for a 12-mile territorial sea)."⁴³ Though no positive solution emerged at the Conferences, they at least showed the negative estimation of the legality of any claim to the extension of exclusive fisheries limits beyond 12 miles.

2) The practice of the overwhelming majority of States shows the limitation of the breadth of the belt in which they reserve exclusive right of fishery for nationals up to 12 miles measured from the baseline of the territorial sea — independently of whether the belt compromises the territorial sea with or without the fishery zone. Only a few claims exceeding this maximum are to be found, and they are usually promoted only by States of Latin America under the pretext of conservation of the living resources of the sea. Thus, for example, the 200-mile maritime zones of Chile, Ecuador and Peru were sometimes garbled as an extension of the "sovereignty over the sea with the sole and exclusive purpose of conserving the natural resources."⁴⁴ It should, therefore, here be pointed out that we ought to differentiate claims to exclusive fishery zones from claims to conservation zones, since the latter does not deprive foreigners of the right of fishery but only limits that right in order to preserve the living resources of the sea. In other words, the conservation zone does not exclude the application of the freedom of fishing but only limits it, firstly but not exclusively, in the interest of the coastal State. But at any rate the establishment of such a zone also indirectly serves the interest of all States in the maintenance of the productivity of living resources of the sea. Examples of conservation zones are the 100-mile zones of Ceylon, Ghana and India. Yet there is not doubt that the zones to which coastal States admit foreigners for fishing, such admission being made dependent upon payable registration and permission (e.g. Peruvian legislation provides a registration free of \$200 and a permission fee of \$12 per registered ton),⁴⁵ are exclusive fishery zones. Since the fishery monopoly of the coastal State consists not only in the exclusion of all foreigners from fishing but also, as can be seen, in permitting them to make a purchase of payable right to fish within such a zone.

Taking into consideration these remarks and the data inserted in the

⁴³ A. E. GOTLIEB, *The Canadian Contribution to the Concept of Fishing Zone in International Law*, "The Canadian Yearbook of International Law," 1964, p. 71.

⁴⁴ See statement of Peruvian delegate in Official Records of the General Assembly, Eleventh Session, Six Committee, 486 Meeting, November 29, 1956, p. 28.

⁴⁵ See Regulations concerning the issuance of Fishing permits for foreign vessels in Peruvian waters, 1956, in S. A. BAYITCH, *Inter-American Law of Fisheries. An Introduction with Documents*, New York 1957, p. 32 - 35.

lists drawn up by FAO and by Professor Alexander,⁴⁶ with an addendum as to Uruguayan claims of May 16, 1969 to the superjacent waters of the continental shelf,⁴⁷ it should be stressed that already the numerical ratio of States limiting exclusive fisheries rights to the belt not exceeding 12 miles to those claiming to exercise this right in the wider belt is 91 to 18.

It should be underlined that to the group of 18 States are included also Philippines and Indonesia, although the Indonesian territorial sea does not exceed 12 miles and that State has no fishery zone. Nevertheless, both mentioned States lodged claims, never recognized by the international community, to sovereignty over the wide areas of the sea between the islands belonging to their respective archipelagos. These areas are considered by Philippines and Indonesia as being their internal waters.⁴⁸

Other States belonging to the group in question are: Cameroon and Senegal (18 miles), Cambodia (superjacent waters of the continental shelf but to a depth of 50 metres only), Tunisia (similar claim to that of Cambodia, but for the part of Tunesian coast only and maximum 65 miles from it), Pakistan and Uruguay (superjacent waters of the continental shelf of undefined breadth), Guinea (130 miles), South Korea (20 to 200 miles), and eight "two-hundred-milers:" Argentina, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama and Peru.

As can be seen the group of 18 States claiming a fishery monopoly in the belt of sea exceeding 12 miles embraces rather those States whose practice has not the same weight in the evolution of international customs as, for example, the practice of five Great Powers, i.e. China, France, the Soviet Union, the United Kingdom and the United States, belonging to the group of 91 States confining themselves to the belt not wider than 12 miles.⁴⁹ And further, it will be much more logical to expect that 18 States should accept the maximum recognized by 91 than vice versa.

⁴⁶ *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fisheries Conservation Zones and the Continental Shelf (with particular reference to fisheries)*, "FAO Legislative Series" No. 8, Rome 1969, p. 5 - 24; and L. M. ALEXANDER, *Breadth of Territorial Sea and Other Offshore Zones*, December 31, 1968, "Proceedings of the Third Annual Conference of the Law of the Sea Institute," edited by L. M. ALEXANDER, Kingston 1969, pp. 313 - 318. See further ILM, May 1969, p. 516 - 539 and TGM, June 1970, p. 285.

⁴⁷ See Uruguay: Decree 235 of May 16, 1969, *Extending Territorial Waters*, in: ILM, September 1969, p. 1067 - 1072.

⁴⁸ W. GÓRALCZYK, *Szerokość morza terytorialnego i jego delimitacja* [The Extent and the Delimitation of the Territorial Sea], Warszawa 1964, p. 204 - 208, and M. SØRENSEN, *The Territorial Sea of Archipelagos*, in: *Varia Juris Gentium, Liber Amicorum* presented to Jean Pierre Adrien François, Leyden 1959, pp. 315 - 331.

⁴⁹ On the role of the Great Powers in the evolution of international custom see

To sum up: the course of debates and the results of the Geneva Conferences on the Law of the Sea and — what is most important — the practice of the overwhelming majority of States bear witness that any extension of the limits of exclusive fisheries, and more so of the territorial sea, beyond 12 miles would be almost universally recognized as an infringement of the freedom of the seas. Finally, it is to be assumed *a contrario*, that the 12-mile maximum of the fishery zone, and even of the territorial sea, is not in opposition to the law of the sea in its present state of development, and this is not only because there does not exist a distinct rule forbidding the acceptance of such maximum, but primarily, because this solution is recognized to be compatible with the principle of the freedom of the seas.

In the light of present international practice, therefore, the 12-mile fishery zone seems to be a recognized institution of the law of the sea. The breadth of such a zone should, of course be measured from the baseline of the territorial sea.

In other words, the total breadth of the territorial sea and the fishery zone may not exceed 12 miles. Thus, every coastal State having a 3-mile territorial sea has also, like, for example, France, Poland and the United Kingdom, the right to establish additionally 9-mile fishery zone, whereas States having 4, 6 or 9-mile territorial sea (Norway, Turkey and Mexico) accordingly 8-, 6- or 3-mile fishery zone. But the State having, like for example China or the Soviet Union, a 12-mile territorial sea has no right to establish a fishery zone.

The recognition of 12 miles as the admissible maximum not only for the breadth of fishery zone but also for the territorial sea may in addition result from the slight difference between the number of States being "fishing twelvemilers" and those being "territorial twelvemilers." In 1966 there was even an ideal balance: 26 "fishing twelvemilers" to 26 "territorial twelvemilers." Moreover, two years later, at the end of 1968, a rapid increase of the "territorial twelvemilers" group could be seen: 39 "territorial twelvemilers" to 28 "fishing twelvemilers."⁵⁰ It would therefore be difficult to recognize practice of the former as "less legal" than the practice of the latter.

In spite of this, however, it is, up to now, much easier to obtain the universal recognition for the 12-mile fishery zone than for such territorial sea. That is just why many States decide to establish a fishery zone instead of extending their territorial sea up to 12 miles.⁵¹ On the other

generally K. WOLFKE, *Custom in Present International Law*, Wrocław 1964, pp. 81 - 82.

⁵⁰ See Footnote 46.

⁵¹ Cf. A. WOJCIECHOWSKI, *Pas wyłączności połowów — nowa instytucja prawa*

hand, the increase of the "territorial twelvemilers" group shows that the fishery zone seems to play a smaller and smaller role as preventive measure against extension of the territorial sea.

There still remains a group of over 20 States with narrower territorial sea without or exceptionally with a fishery zone. But it does not seem that at present these States would have serious objections to recognition of 12 miles as the admissible maximum, at any rate as regards the exclusive fisheries limits. Moreover, an evolution of views on this subject is proceeding very rapidly and even the State which at first refused to recognize the 12-mile fishery zone established by others have a few years later established such a zone themselves.

It seems, therefore, that a group of States confining themselves to the narrower than 12-mile fishery zone or territorial sea will be decreasing every year. For, these States might be forced by the wish to "keep up with the Jones," i.e. "twelvemilers," as well as by their coastal fishermen's interest. Of course it is difficult to foresee which way the mentioned States will go in case of eventual changes in their relevant legislation. But, at any rate, it may be assumed that irrespective of whether these States push their territorial sea out to extent of 12 miles like for example Brazil in 1969, or establish an exclusive fishery zone of that breadth, like for example Poland in 1970, neither solution is incompatible with the international law of the sea in the present phase of its development.

In summary, the positive role played by the 12-mile fishery zone in the unification of exclusive fisheries limits becomes evident. Moreover, taking it all round, it may also be assumed that the unification of the fisheries limits might, little by little, contribute to surmounting the great difficulty in the international law of the sea — the determination of a uniform admissible maximum for the breadth of the territorial sea. It is needless to say that only 12 miles, although being not a panacea or the "magic dozen," should be universally recognized as such a maximum.

morskiego [Exclusive Fishery Zone — New Institution of the Law of the Sea], "Sprawy Międzynarodowe," October 1967, p. 113.

The Scientific and Technological Revolution as a Factor of Development of International Law

by JACEK MACHOWSKI

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The development of mankind in the present epoch is marked by three world-wide revolutions — the social, national-liberation and technological ones. The purpose of this article is to show in rough outline the range and direction of the influence exerted by the latter of these three factors on the development of contemporary international law.

The Scientific and Technological Revolution and Law

Each epoch has at its disposal different technical means, which to greater or lesser extent contribute to the shaping of legal and state institutions in a given historical period. The further we go back in history the more subtle and difficult to ascertain is the influence of technology on law. At last we reach the point, when in the ancient Greece the word "technology" was the synonym of "the art" (*techne* — art, craftsmanship), composing a perfect alliance of technology and humanities, that was torn apart only by the scholastic Middle Ages. In several epochs the specific

gravity of science and technology in the development of society varied therefore greatly. Their importance reached in the present century dimensions unprecedented in history. Having eliminated the old class contradictions and replacing them by the new ones the industrial revolution of the 19th century precipitated and strengthened the victory of capitalism. The current progress of science and technology took on the form of a world-wide scientific and technological revolution along with the transition of the quantitative changes into qualitative ones.

Initially both the scientific and technological revolutions went on independently from each other. The changes which took place in the 18th century in technology resulted almost exclusively from the experience acquired in handicraft production e.i. from the process in which science played secondary role. It was not until the second half of the 19th century, when any progress in technics and technology became dependent on the scientific progress that gradually materialized the integration of science and technology. It has manifested itself by the ever growing role of science in the industry accompanied by "industrialization" of science. Thus the scientific and technological revolution should be conceived of as a combination of the scientific and technological revolutions.

It follows from what was said above that the contemporary scientific and technological revolution is a phenomenon qualitatively different from the industrial revolution of the 18th and 19th centuries. For now the feedback between science and technology differs substantially from that in the epochs when the scientific and technological revolutions developed separately.

The scientific and technological revolution opens for the first time in history a possibility of an all-round social development of mankind. However, for this purpose new forms of cooperation of people in society and of nations in the world will be indispensable.

The scientific and technological revolution changed the structure of the forces of production to such an extent that the consequences of the change go far beyond the spheres of science and technology, making of it a social process connected with the social revolution. While the industrial revolution genetically and by its consequences was connected with the development of capitalism — the contemporary scientific and technological revolution, owing to its ties with the social revolution, is inseparably linked with the development of socialism and the nascence of communism. Considering the relationship between the scientific and technological revolution and social revolution we come to the conclusion that the progress of science and technology precipitates and strengthens the victory and the building of socialism and communism in particular countries and throughout the world.

These circumstances have some bearing on the development of law in general and of international law in particular.¹ For the scientific and technological revolution is an essential factor influencing the shaping of the economic and social basis and indirectly of the content of its superstructure, and therefore of law as well. An attempt to define it was undertaken at the philosophical congress held in Berlin in 1965 which was especially devoted to problems of the scientific and technological revolution. It was formulated as "the qualitative change of productive and social functions of the basic branches of natural, technological and social sciences."² These changes are closely interdependent and ought to be considered as a whole. Among other things they play a substantial role in moulding human relations and thereby exert an influence on the development of law. Under the impact of these processes and changes its content is enriched: norms and institutions which have existed since long require new interpretation, new norms and institutes and even completely new branches of law are brought into being, many of them inspired by the achievements in technology and science.

The scientific and technological revolution is a relatively new phenomenon and therefore it is still difficult to assess fully and in a comprehensive way the consequences of this process. A substantial step in this direction was made in Czechoslovakia in 1965 where a group of scholars representing various disciplines carried out a systematical analysis of the manifold consequences of the scientific and technical revolution.³ The first

¹ Cf. W. GÓRALCZYK, *Wpływ rozwoju techniki na prawo międzynarodowe* [Effect of Technical Development on International Law], "Przegląd Polski i Obcy," 1958, No. 6, pp. 33 - 40; A. KŁAFKOWSKI, *Współczesne tendencje rozwojowe prawa międzynarodowego* [Contemporary Developmental Tendencies in International Law], R.P.E.S., 1963, No. 1, pp. 1 - 20; R. BIERZANEK, *Postęp w nauce i technice a prawo międzynarodowe* [Progress in Science and Technology and International Law], "Zeszyty Naukowe UŁ." series I, *Nauki Humanistyczno-Społeczne*, Vol. 33, 1963, pp. 13 - 23; M. I. ŁAZARIEW, *Techničeskij progress i sovremennoje meždunarodnoje pravo*, Moskva 1963; K. K. JAIČKO, *Pravovyje voprosy techničeskovo progressa*, in: *Socjalno-ekonomičeskie problemy techničeskovo progressa*, publ. by AN SSSR, 1961; M. BOURQUIN, *Pouvoir scientifique et droit international*, "Recueil des Cours," Vol. 70, 1947, pp. 333 - 493; H. HUBER, *Das Recht im technischen Zeitalter*, Rektoratsrede, Bern 1960; Ch. ROUSSEAU, *Progrès scientifique et évolution du droit international*, "Impact, Science et Société," Vol. V, No. 2, June 1954; *Die Rechtsordnung im technischen Zeitalter*, Zürich 1961; W. FRIEDMANN, *The Changing Structure of International Law*, London 1964.

² Cf. "Deutsche Zeitschrift für Philosophie," 1967, No. 3, p. 292 and JURIJ S. MIELEŠENKO, *Charakter i osobennost naučnotechničeskoj revolucii*, "Voprosy Filosofii," 1968, No. 7, p. 22.

³ R. RICHTA, *Člověk a technika v revoluci našich dní* [Man and Technology in the Revolution of Our Days], Praha 1963.

results of that collective research work, in which also a number of lawyers took part, were announced in Prague in November 1968 in the report entitled *The Civilisation at Cross-Roads (Civilizace na rozcesti)*.

As far as Poland is concerned the Research Team on the Problem of the Scientific and Technological Revolution headed by professor Eugeniusz Olszewski was set up at the Research Centre for the History of Science and Technology of the Polish Academy of Sciences at the beginning of 1970. Its programme provided for among other things research into legal and international problems.⁴

Thus the trends of the contemporary law and of the international law ever more often cut across the lines of the development of science and technology. However, their clashes are not immune to conflicts. Their roots can be found primarily in the profound differences between the traditional ways of legal and technological thinkings.

In this connection a Polish lawyer, Tadeusz Cyprian, arrives at the conclusion that "the legal and the technological thinkings occur on different levels. The intersection of these levels along a line useful for society present considerable difficulty and it is up to the lawyer to find that line. For it is he who possesses the knowledge indispensable to ascertain where the social well-being stemming from the technological progress ends and where it begins to be prejudicial to society [...]. Law ought to intervene in all situations in which technology might violate common and particular interests and it should set frontiers preventing the technician from acting whenever his attempts to develop technology might endanger general security and the freedom of action of individuals."⁵

This is how the matter of conflicts between law and technology presents itself in the light of municipal law. However, it is much more complicated at the level of public international law, where the role of the "technician" is often played by the sovereign state. The limits of its freedom of action cannot be arbitrarily fixed by other states.

One of the essential features of the scientific and technological revolution is **the law of the permanent growth of the rate of development of science and technology.**⁶ Meanwhile one of the characteristics features of

⁴ The preliminary plan of work of the Group provides for the following theme as one of the items in the study directed by the rector of the University of Warsaw, Prof. Zygmunt Rybicki — *The Apparatus of the Socialist State and the Scientific Technological Revolution* and additionally *International Aspects of the Scientific and Technological Revolution*.

⁵ T. CYPRIAN, *Postęp techniczny a prawo karne [Technological Progress and Penal Law]*, Warszawa 1966, pp. 24 - 25.

⁶ Cf. P. BARBIER, *Progrès technique et Organisation du Travail. Bases du progrès social*, pp. 5 - 6; P. AUGER, *Tendances actuelles de la recherche scientifique*, published

law creating processess, especially in international law, is their relative slowness. In time of the dynamic development of science and technology this fact has given rise to reservations that law fails to follow the changes prompted by the scientific and technological revolution which takes place in the world. For there are cases when a legal norm enacted to meet demands generated by the application of a new scientific or technological achievement proves to be out-of-date at the very moment of its coming into force, because technological innovations and improvements introduced in the domain ruled by this norm made it obsolete still in the course of its preparation. This process of legal norms "getting old" was not unknown to lawyers in the previous epochs too. However nowadays, in the face of the unprecedented rate of change in the prevailing social and economic relations, it takes on such dimensions that poses before legislators the problem of maintaining the pace with these changes. Under these circumstances arises a question of principle: what should be the relationship between the pace of development of progress in science and technology and the pace of development of the contemporary law, international law including? The most pressing is the need to find an answer to the question whether law should outgo the development of science and technology, and if so, to what degree.

Such advanced accomodation of law would provide a certain margin preventing legal norms from becoming obsolete too early. On the other hand, one can have doubts whether a legislator is at all at the position to foresee the lines of development of science and technology and all legal consequences resulting from it. A great number of famous legal theoreticians have since long dealt with the problem whether law in its development ought to outgo the existing reality and shape it or should it only follow the changes. An illustration of a clashing of various opinions in this matter can be found in the attitudes of two philosophers of law: Jeremy Bentham and Friedrich Carl Savigny. The first one, an advocate of legal positivism, being himself a codifier, accentuated the need for law to play an active, creative and reformatory role based on rational premises. The latter, an ardent opponent of the rational legislative tendencies initiated

by UNESCO, Paris 1961. It may be approximately estimated, that this increase doubles every ten years. This process was illustrated by Dr. Julian Huxley, who says that if at the outset of the Palaeolithic Era substantial changes in the life of mankind occured within the period of 10^6 years and reached still 10^4 years at the end of the same era, it went down to 10^2 years, that is to say to the period of one century in the Historical Era. Nowadays each decade brings in changes of enormous importance to the life and development of mankind. Since the 19th century these changes have been produced as a rule by the progress of science and technology, that gradually assumed the dimensions of the scientific and technological revolution.

by the bourgeois French Revolution claimed that law which emanates from the spirit of nations has to be "found out" by legislators, and not "created."

Both of the tendencies referred to above revive from time to time in various forms in views of contemporary theoreticians of international law. For example, an American lawyer, Friedmann, contends that the active and creative role of law evident in all systems of municipal law is not sufficiently realized in international law which "is no longer exclusively a consolidation of the *status quo*, but a vital factor in the evolution of international society."⁷

Some theoreticians of law who think that international law does not follow adequately in its development the changes taking place in international relations deem that it should be radically revised. Plans concerning such a revision have been even put forth in the legal writings. However, their common drawback is — in the opinion of a Russian scholar Tunkin — the assumption, that international law ought to be tailored to the demands of eminent statesmen or theoreticians of law while as a matter of fact, norms of international law are established on the basis of common will of sovereign states.⁸

The phenomenon of lagging behind the development of science and technology, as presented above is characteristic not only of the contemporary law but of our whole culture as well.

The extraordinary rate of development of the contemporary science and technology is not the sole characteristic feature of the scientific and technological revolution. This revolution is also universal. It stems from the international character of the progress in science and technology and their tendency to absorb within their confines ever greater areas transcending not only the frontiers of particular countries and continents, but also of our planet. Despite the fact that the scientific and technological revolution does not advance in several countries at an equal pace and, moreover, so far has by-passed some of them at all, we can ascertain that what until recently constituted for science and technology a local problem dealt with on the domestic level has turned into an international and even global problem likely to be solved only through cooperation of many countries. These circumstances reflect appropriately upon the situation in law, where legal consequences of the scientific and technological revolution tend to extend from the area of municipal law to that of international law.

⁷ W. FRIEDMANN, *op. cit.*, p. 59, cf. also by the SAME AUTHOR, *Law in a Changing Society*, London 1959, p. 417ff.

⁸ Cf. *International Law in a Changing World*. By thirteen eminent experts, New York 1963.

International Relations and International Law in the Epoch of the Scientific and Technological Revolution

The international character of the scientific and technological revolution influences heavily the content and scope of international relations.⁹ Within the framework of these relations one of the objectives should be to serve the interests of mankind and use their achievements exclusively for peaceful purposes. The scientific and technological revolution evolves in conditions of peaceful coexistence of states belonging to two contrasting systems: the socialist and the capitalist. The attitude of nations towards legal and political implications of progress in science and technology varies according to the system which they belong to. Thus the progress in science and technology can contribute to strengthening of peaceful international relations or endanger them. This depends on the way in which scientific and technological achievements are used. Consequently legal problems of almost every current scientific or technological question are considered internationally under two angles: whether they are likely to be used for peaceful purposes or for warfare.

Consequently the legal problems resulting from the scientific and technological revolution have two aspects, domestic and international. If the application of new scientific and technological achievements within a state requires a legal protection and regulation on the part of the municipal law in the form of state legislation, in international relations it has to be legally protected and regulated by means of norms of international law — either conventional or customary.

While examining the influence exerted by the scientific and technological revolution on international law, one has to approach the problem in a comprehensive way taking into account all factors of the development of society. Its economic structure determines the basic features of the superstructure in general and of international law as one of its elements

⁹ Cf. E. M. EARLE, *The Impacts of Scientific Discovery and Technological Change on International Relations*, "Proceedings of the 8th Conference of Teachers of International Law and Related Subjects," Washington 1946; G. L. EPISKOPOV, *Techničeskij progres i problema sochranenija mira*, Moskva 1960; J. FREYMOND, *Progrès technique et relations internationales*, "Annuaire de l'Association Suisse de Science Politique 1961," Lausanne 1961, pp. 46 - 60; C. P. HASKINS, *The Scientific Revolution and World Politics*, New York 1964; L. F. ILICZEW, *Progres nauki i techniki i mieždunarodnyje otnošenija*, Moskva 1958; G. B. KISTIakovSKY, *Science and Foreign Affairs*, "Bulletin of the Atomic Scientists," Vol. 16, 1960, No. 4, pp. 114 - 116; J. R. KILLIANIS, *Science and Foreign Policy* an article in the book *The Dimensions of Diplomacy*, Baltimore 1964, p. 60ff, *Science Reshaping World Politics*, "Proceedings of the Institute of World Affairs," Vol. 33, Los Angeles 1959; *Sovremennaja naučno-techničeskaja revolucija*, AN ZSRR, Institut Istorii Jestestvoznanija i Techniki, Moskva 1967.

in particular. However, this process goes on in very complex conditions governed by the interaction of social phenomena. For it is not only the economic element that influences the development of international law but also other elements of the superstructure: politics, municipal law, philosophy, ethics, etc. The progress in science and technology plays a particular role in elaborating and developing new forms of international cooperation.

The **frontiers** of international law continuously expand especially in space but not exclusively in it. Recently the pace of this expansion is getting further and faster. But in the epoch of peaceful co-existence of two contrasting social systems also the content of international law undergoes **inner** qualitative transformations. On the one hand old and reactionary institutes are discarded, on the other hand they are replaced by new norms and principles which are significant for strengthening the peace in the world. At the same time the old democratic principles of international law develop and increase in strength as well.

Some scholars qualify these trends in international law as "horizontal" and "vertical," some others describe them as the "theory of contradictory currents."¹⁰

Yet, it is not only individual norms and principles that change, but also the character and the content of the whole international law. These transformations, resulting primarily from the struggle of the progressive forces against conservatism, occur in particular spheres of international law in wide variation.

The progress of science and technology and the development of international law interact. On the one hand the progress of science and technology enriches the content of international law and contributes to its development and extension of its effectiveness. On the other hand the development of international law fosters progress in science and technology by protecting their achievements and facilitating international exchange of thought and experience, etc.

From this point of view principles and norms of the positive international law can be divided into two categories:

(a) Norms and principles, whose emergence is not immediately related to the progress in science and technology (for example: the principle of

¹⁰ Cf. W. FRIEDMANN, "Law in a Changing Society," London 1959, p. 417; B. V. A. ROHLING, *International Law in an Expanding World*, Amsterdam 1960; L. MERCHANT, *New Techniques in Diplomacy*, an article in the book *The Dimensions of Diplomacy*, Baltimore 1964, pp. 117-135; *Report of Conference on Law and Science* held at Niblett Hall, King's Bench Walk, Temple London, E.C.4, 11-12, July 1964, The David Davies Memorial Institute of International Studies (RCLS); L. ERLICH, *Prawo międzynarodowe [International Law]*, 4 edition, Warszawa 1958, p. 99ff.

sovereignty, non-intervention, non-aggression, equality and mutual respect of states, peaceful co-existence, good faith, etc.). It does not mean, however that this progress has no bearing upon the content of the norms; for it may serve the deepening of their content and the extension of the sphere of their effectiveness, etc;

(b) Norms and principles, whose emergence is brought about by the progress in science and technology (for example: the principle of the freedom of high seas, the principle of sovereignty of states over air space, the principle of non-appropriation of outer space and of the celestial bodies, etc.) The process of nascence of these norms and principles varies from case to case, nevertheless one can deduce from it some regularities and general observations.

New Areas and Dimensions of International Law

The achievements of science and technology enabled man to penetrate and gradually conquer terrestrial and extraterrestrial areas hitherto not accessible to him. That extension of his activity made it necessary to extend appropriately the effectiveness of law in general, and of international law in particular and brought about the rise of new branches, such as the law of polan regions, the law of sea, air law, the law of outer space, etc., based on spatial criterion. This trend in the development of international law marked by a distinct causal relationship with the progress of science and technology poses before lawyers two fundamental tasks *de lege ferenda*, namely: a) of defining international legal status of the new areas or spaces and b) of establishing legal relations therein.

Consequently, law, accompanying man equipped with achievements of modern technology in his drive towards new areas and even outgoing him, prevents the emergence of a legal vacuum.

The spatial extension of international law in space takes place in all main land and sea areas, in the air and in the outer space. It has two directions: horizontal and vertical.¹¹

Thus, certain trends, resulting immediately from the application of modern science and technology give the international law new dimensions. Along with the progress in science and technology practice has provided us with ever new examples of the development of international law in space.

¹¹ Cf. W. FRIEDMANN, *The Changing Dimensions of International Law*, "Columbia Law Review," 1962, No. 7, pp. 1150 - 1159; G. SCHWARZENBERGER, *The Frontiers of International Law*, London 1962; *The Dimensions of Diplomacy*, ed. by E. A. I. Johnson, Baltimore 1964.

As far as the **land areas** are concerned the extension of international law issuing from the application of the achievements of science and technology can be distinctly noticed in the development of law of the polar regions, called also briefly the polar law.¹²

The progress in science and technology made itself felt even stronger in the expansion of international law on the **sea areas** and found reflection in the particular stages of the development of the law of sea. The legal polemics initiated in the 17th century closed with the complete victory of the principle of freedom of the high sea so that in the 19th-century nations abdicated the last vestiges of their former claims to jurisdiction over seas. However, simultaneously, an adverse process, resulting in gradual limitation of the principle of freedom of the high sea can be discerned in the development of international law. It presents a great variety of limitations but it should be emphasized that technological factors underlie quite a number of them. Parallel to the new achievements of science and technology which rendered it possible to expand into the distance and to penetration into the depths of the sea, the coastal countries have put forth ever new principles and institutions of the law of sea. It is enough to recall the role played by the principle of the gunfire range in fixing the width of the territorial waters are the impact of the modern drilling equipment on the formulation of the theory of continental shelf or how the progress in submarine construction and navigation contributed to the elaboration of the legal principles of exploitation of the sea and ocean bed.¹³

¹² Cf. J. MACHOWSKI, *Sytuacja Antarktyki w świetle prawa międzynarodowego* [*Antarctica in the Light of International Law*], Wrocław 1968; R. DOLLAT, *Le droit international des espaces polaires*, "Recueil des Cours," Vol. 75, 1949, pp. 115 - 200; W. N. DURDENEVSKI, *Problema pravovogo režima pripoljarnyh oblastej* (Antarktika, arktika), "Vestnik Moskovskogo Universiteta," 1950, No. 7, pp. 111 - 114; R. D. HAYTON, *Polar Problems in International Law*, "American Journal of International Law," Vol. 52, 1958, No. 4, pp. 744 - 765; M. W. MOUTON, *The International Regime of the Polar Regions*, "Recueil des Cours," Vol. 107, 1962, Académie de Droit International, Leyde 1963, pp. 171 - 284; A. M. SMITH, *Le statut juridique des terres polaires*, Paris 1934; R. WAULTRIN, *Le problème de la souveraineté des poles*, "Revue Générale de Droit International Public," vol. 16, Paris 1909, No. 5, pp. 649 - 660.

¹³ Cf. BIERZANEK, *Morze otwarte ze stanowiska prawa międzynarodowego*, [*High Seas from the Point of View of International Law*] Warszawa 1960; W. GÓRALCZYK, *Szelf kontynentalny*, [*Continental Shelf*] Warszawa 1957; W. GÓRALCZYK, *Zagadnienia pokojowego wykorzystania dna mórz i oceanów* [*Problems of Peaceful Utilization of Sea-bed and Oceans*], "Sprawy Międzynarodowe," 1969, No. 3, pp. 52 - 68; M. N. MATEESCO, *Deux frontières invisibles: de la mer territoriale à l'air "territorial"*, Paris 1965; SCHOLZ, *Raumliche Erweiterung der Gebietshoheit durch Rechtskonstruktion*, "Zeitschrift für Völkerrecht," 1911.

The three-dimensionality of the sea combined with certain technological premises formed the basis for shaping a tripartite legal construction of the status of the sea in international law. In the first stage of drawing the limits of rights and obligations of states in the particular areas (the territorial waters, the contiguous zone, the zone of the exclusive right of fisheries), when technological elements played a limited role, that process went on solely along the horizontal scale. Later on, in the process of further differentiation of the sea areas, alongside with the growth of the significance of the technological factor especially with regard to the continental shelf sea bed and subsoil the fixing of frontiers of particular zones of rights and obligations of nations began also along the vertical scale. On this occasion for the first time the traditional methods of fixing limits solely according to geometrical and spatial criteria were abandoned and supplemented with another criterion giving due weight to the technological means of exploitation of the sea bed and its subsoil and in which the predominant role is played by the technological factor.¹⁴ This criterion plays also a substantial role in the process of formulating legal principles governing the rights and obligations of states in the air and outer spaces.

The development of aviation at the outset of the 20th century brought about an extension of the control over the *air space* and inclusion of that area into the state territory. In this way the law and international law in particular extended its effectiveness over that area and a new branch of international law emerged — the air law.

After the second world war in result of the achievements of the rocket technology and of the development of astronautics man extended his activity and at the same time — the law its effectiveness onto the *outer space* and celestial bodies thus generating new legal problems to be solved and contributing to the emergence of the law of outer space.

The process of territorial expansion of international law is dynamic. Some authors put forth the idea of establishing ever new, separate branches of law, based on technological criteria such as, for instance, the submarine law (*droit sous-marin*)¹⁵ or the so called “metalaw,”¹⁶ etc.

The question of the so called “penetration of state boundaries” evoked in connection with the progress in the radio and television technology is also associated with the spatial extension of international law. The bourgeois legal science gives it recently a particular publicity in view of

¹⁴ R. BIERZANEK, *op. cit.*, pp. 55 - 75.

¹⁵ J. DUMAS, *La plongée sous-marine et le droit*, Paris 1957; *Droits et devoirs du plongeur sous-marin*, Paris 1962.

¹⁶ A. G. HAZEY, *Space Law and Government*, New York 1963.

the striking progress of technology in the field of satellite communication.¹⁷ Under these circumstances a number of legal conceptions came into being in the West, which proclaimed alleged futility of the notion of sovereignty in the face of the achievements of science and technology permitting to penetrate state boundaries without crossing them.

New Sources of Energy and International Law

Achievements of science and technology in recent years rendered it possible to mankind to use so powerful new sources of energy that certain questions concerning their prudent and thrifty utilization go beyond state boundaries, requiring regional and even world-wide political and legal solutions, based on the principles of international law. These problems were discussed at the United Nations Conference on New Sources of Energy held in Rome from 21 to 31 August, 1961.

Problems connected with the utilization of the following kinds of energy are at present the subject of international consultations: 1) nuclear power, 2) solar, 3) geothermic energy, 4) energy of the wind, 5) tidal energy, 6) energy of inland waters. Numerous international conferences, as well as bilateral and multilateral treaties deal with these matters.

Despite the fact that the questions of **hydro-electrical energy** belong to those that were relatively early solved internationally, they have not exerted greater influence on the development of international law. A multilateral convention concerning the development of hydraulic power affecting more than one state, was concluded on the 9th of December, 1923 in Geneva. The object of that convention was to settle the question of the use for energetical purposes of waters of rivers flowing through more than one country. The same matter was earlier regulated bilaterally, as for instance in the convention signed on 4 October, 1913, entered into by France and Switzerland in Bern, which dealt with the methods of exploitation of hydraulic power of the Rhone river.¹⁸

Although the examples adduced here are not the most typical illustra-

¹⁷ J. BUSAK, *Some Legal Aspect of Satellite Communication*, "Telecommunication Journal," Geneva 1964, pp. 276 - 280; Cf. also C. G. FENWICK, *The Use of the Radio as an Instrument of Foreign Propaganda*, "American Journal of International Law," Vol. 32, 1938, pp. 339 - 343.

¹⁸ *New Sources of Energy and Economic Development*, United Nations, New York 1957; P. SAVETTE, *Legal Aspects of Hydroelectric Development of Rivers and Lakes*, ECE Committee on Electric Power, Geneva, January 1952; the UN Document No. E/ECE/136 and Treaty provisions concerning the utilization of international rivers for other purposes than navigation, UN Legislative Series: ST/LEG/Ser.B/12, pp. 91 - 95.

tion of the process of influencing international law by the development of energetics, nevertheless they signify that the growing demand on electric power contributes to setting up of new conventional norms.

Recently some problems of the use of the **tidal energy**, particularly when they involve several countries,¹⁹ draw ever more the attention of lawyers.

However, the interest taken in the nuclear energy has been the greatest, due to the fact that it is so far the source most powerful of all available to mankind. It manifested itself in law in the form of a separate and fairly developed branch, the so called **nuclear law**.²⁰ The technological and legal problems connected with international cooperation in the peaceful use of the nuclear energy were examined by three large international conferences convened by the United Nations in Geneva in the years 1955, 1958 and 1964. Besides it one of the specialized agencies of the United Nations, the International Atomic Energy Agency with its headquarters in Vienna and some regional international organizations of the socialist and capitalist countries take continuous care of them. The problems of international law are duly taken into account in their activities.

The legal norms set up as a corollary to the discovery and utilization of new sources of energy reflect indirectly upon the whole international law and its principles.

The Modern Scientific and Technological Devices and International Law

Throughout the industrial revolution the structure of the productive forces i.e. the rigid division between machine and labour was immutably at its roots. The whole technological development of society in that epoch was based on these two separate and opposite factors which occurred in various configurations.

This changed definitely in the epoch of the scientific and technological revolution. Owing to cybernetics and automation the tools used in production assumed a qualitatively new role. For they became something

¹⁹ Report on the International Passamaquoddy Tidal Power Project and the Upper St. John River Hydro-electric Power Development Project for Canada and the USA, "Department of State Bulletin," 12 September 1963, pp. 248 - 249.

²⁰ Cf. A. I. IOJRISH, *Atom i pravo*, Moskva 1969; G. ANGIO-RUIZ, *Some International Legal Problems of the Civil Uses of Nuclear Energy*, "Recueil des Cours," Académie de Droit International, Vol. 107, 1962, Leyde 1963, p. 603; R. E. CHALIER, *L'énergie atomique et les renouvellements du droit*, "Journal des Tribunaux," No. 4188, 30 March 1958, pp. 213 - 218; M. SAHOVIĆ, *Nuklearna energija i međunarodno pravo*, Beograd 1964; W. S. JEMELJANOV, *Atom i mir*, Moskva 1967.

more than machines used until that time. They began to fulfill in some branches of production the functions which advanced them to the rank of autonomous lines of production. This follows from the fact that the contemporary technological progress based on the achievements of science provides something more than solely a mechanical improvement.

The former role of man in production also underwent a fundamental transformation. The technological progress freed man to a great extent from physical work and nowadays the scientific and technological progress sets him free from supervising the machines and soon it will set him free even from controlling the productive processes.

Consequently in the epoch of the scientific and technological revolution the transition from the process of subduing by science and technology of the world of nature to the creation of their own world of offsprings of technology and technological processes can be noticed more and more often.

These substantial qualitative changes of the epoch of the scientific and technological revolution must not be overlooked by legislators setting up new norms of international law.

The use of many modern scientific and technological appliances and devices evokes the need for revision and suppletion of the old or elaboration of new norms of international law. At this juncture the following devices and installations are most often mentioned in the legal literature and legislation: 1) telecommunication equipment, 2) radiotelescopes, 3) rockets and spacecraft, 4) artificial islands, 5) high sea oceanographic stations, 6) radar and sonar, 7) vessels with nuclear propulsion, 8) nuclear power stations, 9) electronic computers and steering devices, 10) modern weapons of mass destruction.²¹

And here are some of the legal implications of the application of the said modern devices: 1) the questions of jurisdiction and control, 2) the questions of regulation, limitations and prohibition on the application or utilization of these devices, 3) rules concerning registration, 4) general problems involving responsibility which stems from the application and the use of the said devices.

Research Work and Scientific Experiments in the Light of International Law

The scientific and technological progress, its rate and its results depend to a high degree upon research work and scientific experiments. They

²¹ Cf. D. H. N. JOHNSON, *Artificial Islands*, "International Law Quarterly," 1951, Vol. 4, pp. 203 - 215.

sometimes can produce undesirable, prejudicial side effects whose consequences transcend the frontiers of a single country. The defence of man and his environment against these destructive consequences sometimes of a very wide range often requires normative solutions at the level of international law. The contemporary scientific exploration and experiments assume international character to an ever higher degree. It is not only because their effects depend to a great extent on international cooperation and exchange of experience but also since more and more often they go out of laboratories to extensive terrestrial and extra-terrestrial areas which are becoming their testing grounds. More and more often this research work has world-wide scope and our planet becomes subjected to it as an integral whole. However, it is not a homogeneous legal and political organism and therefore gives rise to various controversies requiring a settlement in terms of international law. Recently we witnessed a number of ventures undertaken throughout the world, such as International Polar Years, International Geophysical Year, International Year of the Quiet Sun or the actual international programme "Man and his environment." The arrangement and preparation to such ventures require broad international cooperation based on agreements giving due weight to the rights and obligations of sovereign states.

The question of the international organization of scientific research for peaceful purposes is one of the complex problems bound up with it. The United Nations General Assembly approved a number of resolutions concerning the coordination of results of scientific research.²² A particular role is played here by universal international organizations as well as regional ones (Euratom, United Nuclear Research Institute at Dubna, etc.).

The questions of control and of the ban on tests having prejudicial effects and conducted for war as well as for peaceful purposes form another equally important complex of problems (the question of banning the nuclear weapon tests, the limitations in oceanographic and outer space exploration, etc.)²³ Some are prone to see in it an alleged inconsistency with the principle of the freedom of scientific research, universally and formulated in many legal acts (e.g. in Article II of the Antarctic Treaty

²² Cf. the UN General Assembly Resolutions: No. 1043 (IX) of 21 February 1957, No. 1164 (XII) of 26 November 1957, No. 1260 (XIII) of 14 November 1958, No. 1512 (XV) of 12 December 1960, No. 1710 (XVI) of 19 December 1961.

²³ Cf. C. W. JENKS, *The Laws of Nature and International Law*, "Liber amicorum J. P. A. François, Netherlands International Law Review" (special issue), July 1959, pp. 160 - 172; *Aspects juridiques de la recherche scientifique*. Commission de droit et vie des affaires. Faculté de droit de Liège. Séminaire organisé à Neuilly-sur-Seine les 10, 11 et 12 juin 1965, La Haye 1965; A. P. WILLMORE, *International Control of Harmful Experiments*, RCLS, pp. 134 - 138.

of 1959, in the preamble and Article I of the Treaty on Outer Space of 1967). However, in fact this conflict is only ostensible since the scientific research and experiments as well as the mentioned principle serve the same common and supreme purpose which is the interest and welfare of mankind as a whole.

There is one more international legal problem of particular importance linked with the questions considered here, namely the problem of protection of rights of scientists and explorers (copyright law, law on patents, the protection of the rights of inventors, etc.)

Pollution Resulting from the Application of New Technology and International Law

The employment of new achievements of science and technology often involves adverse side effects in the form of pollution harmful to man's health and life and to all living organisms. This pollution can be classified as a) intentional (the calculated risks) and b) unintentional (accidental cases).

In as much as the harmful effects of pollution more and more often transcend the state borders and can even affect the whole world, they require settlement in terms of international law.²⁴ The range of those consequences is so extensive that sometimes they bring about a tapping of the balance in the ecological system and even qualitative changes in the natural environment.

The examples of this phenomenon which are most often referred are concerning the water and air pollution. The water pollution allows to observe the international range of its effects especially distinctly. The contaminated waters carry over their perilous content to vast areas of the globe. A similar contamination of immense areas of the globe is due to the wind and air currents.²⁵

²⁴ Cf. DOBBERT, *Water Pollution and International River Law*, "Yearbook of the AAA," the Hague 1965, pp. 60 - 99; *Ochrona powietrza przed zanieczyszczeniem* [Protection Against Air Pollution], "Zeszyty Naukowe AGH," No. 155 (special issue No. 12), 1967; *Zagadnienia ochrony zasobów wody*, [Problems of Protection of Water Resources], "Zeszyty Naukowe AGH," 1968, No. 219 (special issue No. 15); W. ŚLIWKA-SZCZEBIC, *W obronie naturalnego środowiska człowieka*, [In Defense of Man Natural Environment] "Sprawy Międzynarodowe," 1969, No. 6, pp. 108 - 115.

²⁵ For example the traces of poisonous chemical substances used thousands kilometres away from the Antarctic were found in the organism of penguins and seals. The world-known catastrophe of the "Torrey Canyon" tanker in the English Channel in March 1967 and the catastrophe of February 1969 by the coast of California which brought about similar consequences. Petroleum spilling from

As far as the spatial range is concerned pollution encompasses the following environments: land areas, waters (sea and inland), the atmosphere and even the outer space. As far as the types of pollution are concerned we can mention waste chemical and industrial waste materials (the consequences of industrialization), pesticides (the consequences of introduction of chemistry into agriculture and the food technology), radio-active substances (the consequences of the use of nuclear energy), motor-fuels, sewage, smoke, vapours, etc.

The world-wide range of the pollution caused by the application of new technology brought about the need for coordinated effort of states in order to resist it on the basis of a profound knowledge of the laws of nature that rule biosphere and of international law. A number of measures have been taken at the non-governmental level of activities of scientists alongside with the international actions of governments.

An intergovernmental conference of experts on the scientific base of the rational utilization and protection of the resources of biosphere convened under the auspices of UNESCO in Paris from 4 to 13 September 1968 discussed in great detail the problem of international cooperation in the prevention of pollution. The conference put forth a proposal to approve a Universal Declaration on the protection and improvement of the natural environment of man. In November 1968 the 15th General Conference of UNESCO approved a long-range and broad programme "Man and his Environment." This programme dealt first and foremost with the questions of conservation and protection of natural environment against pollution in its widest meaning which will have to be solved in terms of international law.

During the debate at the 22nd session of the UN General Assembly in 1967 the advisability of convening a world conference on the effect of continuous introduction of new processes and technological means on the

a boring shaft at the sea bed contaminated flora and fauna of extensive sea and coastal areas. Cf. J. M. STAGY, *Possible Effects on Climate of Contamination of the Upper Atmosphere*, RCLS, pp. 12 - 16; M. RYLE, *The Effects on Astronomy of Tests in Earths Environment*, ECLS, pp. 17 - 24; G. E. R. DEACON, *Pollution of the Sea*, RCLS, pp. 41 - 43; D. H. N. JOHNSON, *The Pollution of the Sea by Oil*, RCLS, pp. 44 - 48; R. I. CURRIE, *Conservation and Exploitation of the Sea*, RCLS, pp. 49 - 53; G. H. NEWSOME, *Pollution of Inland Watercourses*, RCLS, pp. 61 - 70; B. A. SOUTHGATE, *Pollution of Inland Lakes and Watercourses*, ECLS, pp. 71 - 77; S. R. CRAXFORD, *Air Pollution*, RCLS, pp. 78 - 87; R. H. F. AUSTIN, *Air Pollution*, RCLS, pp. 88 - 93; E. J. MILLER, *International Control of Pesticides*, RCLS, pp. 94 - 99; R. GOULDING, *International Control of Pesticides*, RCLS, pp. 100 - 106; W. N. SCOTT, *Possible Effects of Persistent Pesticides*, RCLS, pp. 107 - 111; G. M. WHITE, *Some Aspects of the International Control of Pesticides*, RCLS, pp. 112 - 121; G. WILSON, *Food Contamination*, RCLS, pp. 122 - 133.

conditions of man's life and on human relations was emphasized. After the Economic and Social Council of the UN had examined the question, the 23rd session of the UN General Assembly resolved to convene in 1972 a world conference on the ways of defence of man's natural environment from the disastrous effects of his own activity such as contamination of the air and of waters, wasteful exploitation of soil and natural resources, the tipping of biological balance in nature, the adverse impact on man's health, careless use of chemicals, excessive noise, etc.²⁶ Some of the problems which will be dealt with by that world conference have been already partially solved in bilateral and multilateral treaties.²⁷

The Liability under International Law for Damage Caused by Activity Involving High Risk

Practical application of new scientific and technological achievements sometimes implies high risk. The main feature of this type of risk is not so much an increased probability of accidents but rather the extent and the range of the damage resulting from them. Inasmuch as under extreme circumstances they can even assume the dimensions of cataclysms and are fraught with the danger of annihilation of whole nations and even whole mankind, they require solutions in terms of international law.

The essence of the problem lies in the establishment of the extent in which a sovereign state is authorized to engage in the application of new technologies if it may involve damage to another countries and what should be the liability for such damage.²⁸ The elaboration of appropriate norms of international law is of paramount practical importance, for their absence can impede and sometimes even prevent the rational utilization of new scientific and technological achievements requiring often because of its nature wide scope of international cooperation.

The following **kinds of risk**, connected with the application of modern technology can be most often met in the normative acts and in the litera-

²⁶ The UN General Assembly Resolution No. 2398 (XXIII) of 3 December, 1968 approved on the initiative of the delegation of Sweden.

²⁷ Cf. the convention on prevention of sea pollution by petroleum signed on the 12th of May and supplemented on the 11th of April, 1962 in London; Article 24 of the Geneva Convention on the high seas of 1958.

²⁸ Cf. J. MACHOWSKI, *Prawnomiędzynarodowe aspekty odpowiedzialności z tytułu szkód atomowych* [Law International Aspects of Liability for Atomic Damages], "Państwo i Prawo," 1967, No. 2, p. 278ff; W. C. JENKS, *Liability for Ultrahazardous Activities in International Law*, "Recueil des Cours," Academy of International Law, Leyde 1966.

ture of international law: 1) aviation risk, 2) nuclear risk, 3) outer space risk, 4) other kinds of risk bound up for instance with some sea and submarine ventures (the projects providing for a construction of a tunnel under the Caledonian Canal and the Strait of Gibraltar and of a dam across the Strait of Bering, plans for reversal of ocean currents, etc.), the boring of the upper stratum of the earth coat (the Mohole Plan), the changes of climate, fertilization of desert areas, the reversal of river courses, the plans for melting polar ices, biological experiments, the application of electronic and cybernetic achievements, etc. It should be only too clear that the gamut of problems involved is extremely vast and demands profound knowledge all the more so as the tendency to a dynamic development manifests itself.

The kinds of risk enumerated above imply the following **elements of international legal liability** for possible damage: 1) objective liability, 2) exclusive liability, 3) common as well as joint and several liability, 4) limited liability a) in time, b) as to the amount, 5) questions of jurisdiction connected with the responsibility.

The fixing of permissible limits to risk presents yet another substantial problem implying a) the question how to assess the probability and the extent of the risk; b) the question of prevention (i.e. health protection in the labour law, etc.)

Certain Trends in the Development of Contemporary International Law Resulting from the Scientific and Technological Revolution

One of the principal tasks of the present-day international law is the creation of a favourable political atmosphere and of a legal ground conducive to the most rational and economical utilization of the modern achievements of science and technology in the interest of all the States and nations and countries, for the benefit of all mankind.

However, there are cases when the norms of international law are misused in order to reduce the possibilities of utilizing scientific and technological achievements, especially by the developing countries. In particular this happens when the nations stronger economically and politically impose such norms and limitations upon the former within the framework of the capitalist competition.

The analysis of the trends in the contemporary international law influenced by the scientific and technological revolution allows for the following general conclusions:

1. International law, in spite of its dynamic spatial development, retained its original land minded and earth bound character.

2. The high rate of the development of science and technology has brought about further decrease in importance of the customary law as one of the sources of international law.

3. Contrary to the views of some bourgeois theoreticians the scientific and technological revolution has not led to the elimination of the notion of state sovereignty, though its sense has been modified.

4. The role of international law as an agent impeding the tendencies to utilize the achievements of modern science and technology for warfare purposes is substantial.

5. An equally important role is played by international law in the promotion of utilizing the new scientific and technological achievements for peaceful purposes.

6. In the final balance the development of international law taking place under the impact of the scientific and technological revolution contributes considerably to the progress in science and technology itself.

It is obvious that this article can not deal exhaustively with all aspects of the subject under consideration and was confined exclusively to signalize certain problems, tendencies and trends in the current international law which is today exposed to ever growing demands of the scientific and technological revolution.

Reservations to Multilateral Treaties

by RENATA SZAFARZ

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The problem of reservations to multilateral treaties has been no doubt one of the most controversial questions in the domain of the law of treaties in the last two decades. In view of the absence of generally binding conventional norms in this field—it used to be solved by the practice of states, which only on some questions produced customary norms.

The divergence of views of the doctrine in the approach to this problem is solely a reflection of the differences in the attitudes of states. We must regard, therefore, as a step forward in this connection the adoption of the Vienna Convention on the Law of Treaties,¹ which regulates quite comprehensively the problem of the reservations (Art. 2 para. 1 (d) and Art. 19 - 23).

The aim of this article is to carry out an analysis of the provisions of the Vienna Convention pertaining to reservations, mainly on the basis of materials supplied by the Vienna Conference itself. This will show the degree to which states have reached real agreement on this head. With regard to more important problems the provisions will be confronted with the practice of states to-date. Poland's attitude will be shown against this background.

Because of the above intention, little space will be devoted to views expressed on this subject in the literature of international law. This may be found in many other works.²

¹ Signed in Vienna May 23, 1969. UN Doc. A/CONF.39/27. Provisions of the Convention are quoted herein after this document.

² E.g. H. BOKORNE-SZEGŐ, *A nemzetközi szerződésekhez fűzött fenntartások*,

I. The Notion of Reservation

The very notion of reservation was presented in the Vienna Convention in the following way: "Reservation means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state."

One may conclude from the amendments tabled at the conference and discussion that: a) the above description does not exclude the possibility of its application also to bilateral treaties; b) it covers also so-called interpretative declarations which lead in effect to the exclusion or modification of "legal effect;" c) that the term "modification" contained in this description is to be understood as covering also the possibility of "limitation."

The above description was not intended in the least to be an exhaustive and only one.³ This is why looking for such definition one must base oneself on the whole of the practice of states and the achievements of the doctrine in this respect. Conclusion arising from such an analysis seems to suggest the following *sensu stricto* definition of a reservation: a reservation is a formal declaration made unilaterally by a subject vested with *ius contrahendi* in the meaning of international law when initialling, signing or depositing a document of ratification, approval, acceptance, accession, succession, territorial application or prolongation of a multilateral agreement, whereby it purports outright or by way of specific interpretation to exclude, to limit, to change or to extend the legal effect of certain provisions of the agreement as applicable to this subject or to a part of its territory or to a territory dependent on it.

A confrontation of the conventional description of reservation with the definition presented above permits the following observations:

- the element of the formal character of a declaration is contained implicitly in the conventional definition of reservation;
- the expression "unilateral declaration" contained in the conventional definition means also a "declaration made unilaterally;"

Budapest 1961; K. HOLLOWAY, *Les réserves dans les traités internationaux*, Paris 1958; D. KAPPELER, *Les réserves dans les traités internationaux*, Basel, 1958; M. KHADJENOURI, *Réserves dans les traités internationaux*, Genève 1953; M. LACHS, *Umowy wielostronne [Multilateral Agreements]*, Warszawa 1958; J. J. SANTA PINTER, *Las reservas a los convenos multilaterales*, Buenos Aires 1959.

³ This results from the opening sentence of Art. 2 para. (1) ("For the purpose of the present Convention [...]"). Moreover, the course of the debate at the Vienna conference shows that the Article was intentionally entitled "Use of Terms" and not, for example, "Definitions."

- the fact that the Convention connects the definition of reservation with states only results from the restriction of the application of this Convention to agreements concluded between states (Art. 1 and Art. 2 paragraph 1 (a)). The term “state” embraces here, however, also the Holy See, Monaco and San Marino, as well as the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic, independently of the Union of Soviet Socialist Republics.⁴ The term “a subject vested with *ius contrahendi* in the meaning of international law” which is an element of the general definition of reservation embraces also member states of certain federal unions, certain territories without full independence, as well as certain international organizations;
- the omission in the conventional definition of reservation of the moments of initialling, succession, territorial application and prolongation was probably the result of the following causes: the filing of a reservation when initialling is still a theoretical possibility only; problems of succession have been excluded from the rules of the Convention (Art. 73); reservations made when extending the application of the treaty to a dependent territory disappear together with the liquidation of the colonial system; reservations made when prolonging the binding force of a treaty have been noted, so far, with regard to a single treaty only.⁵ A comparison of the enumeration of the relevant moments made in Article 2 para. 1 (d) with Article 11 of the Vienna Convention indicates that this first enumeration cannot be regarded as complete;
- for considerations of both theory and practice it is indicated to connect reservations with multilateral treaties only, while the Vienna Convention does not stipulate anything in this respect;
- the term “to modify” appearing in the conventional definition contains implicitly not only the possibility of limitation but also of extension or any other change. Opponents of the conception of extensive reservations do not take into account a situation in which the reserving state simply widens its rights (and not its obligations),

⁴ These units participated in the work of the Vienna conference on an equal footing with states, were enumerated as states in the official documentation, e.g. in the Final Act of the Conference, etc.

⁵ See Art. 45 para. 4 of the General Act of the Pacific Settlement of International Disputes of September 26, 1928 (M. O. HUDSON, *International Legislation*, vol. 4, p. 2529) and reservations made in 1939 (UN Doc. *Signatures, Ratifications, Acceptances, Accessions, etc., Concerning the Multilateral Conventions and Agreements in Respect of which the Secretary General Acts as Depositary*, 1949, vol. 9, pp. 25 - 30).

increasing by the same token the obligations of its partners.⁶ Reservations introducing a change other than simple limitation or extension also appear in practice.⁷

- the conventional definition of reservation seems to contain implicitly the possibility of the application of that definition also to declarations made on behalf of a territory dependent on the reserving state or pertaining only to a part of its own territory.

The definition of reservation *sensu largo* would differ from the above in its final phrase; it would be couched as follows: ...whereby it purports outright or by way of specific interpretation to exclude, to limit, to change or to extend the legal effect of certain provisions of the agreement or norms of the law of treaties pertaining to it as applicable to this subject or to a part of its territory or to a territory dependent on it.

The definition of reservation *sensu largo* covers also declarations which, as for example the United States declaration with regard to the Constitution of the World Health Organisation,⁸ do not affect any particular provision of the treaty, but while referring to the treaty as a whole involve the legal context of a given treaty; e.g. if they abrogate the binding force of any norm of the law of treaties of necessity applicable to the said treaty. One speaks sometimes in such case of reservations pertaining to the indirect effects of the conclusion of treaties.⁹

Returning to the conventional definition of reservation it must be pointed out that it does not embrace declarations of this type. For it expressly calls reservation a declaration pertaining to "certain provisions of

⁶ See, for example, reservations formulated by Poland and other socialist countries to Art. 9 of the Geneva Convention on the High Seas of April 29, 1958 (UNTS, vol. 450, p. 154). The Polish reservation reads as follows: "the Government of the Polish People's Republic considers that the rule expressed in Article 9 applies to all ships owned or operated by a State" (Art. 9 of the Convention concerned says: "Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state").

⁷ See, for example, Israel's reservations concerning its use of the sign of the Red Shield of David instead of the sign of the Red Cross — pertaining to the four Geneva Conventions on protection of victims of war of August 12, 1949 (UNTS, vol. 75, pp. 436 - 438).

⁸ The United States reserved for itself the right to denounce the WHO Constitution and to withdraw from that organization (UNTS, vol. 14, p. 365). The WHO Constitution does not contain any provision regulating this question. There was no doubt at that time that the legal norm prohibiting a unilateral self-release from treaty obligations was also applicable to statutes of international organizations.

⁹ See, for example, V. F. GUBIN, *Sovetskij Sojuz i ogovorki k mnogostoronnim dogovoram*, "Sovetskij Ezegodnik Meždunarodnogo Prava," 1959, Moskva 1960, p. 136.

the treaty." It is extremely interesting whether in future this provision will be interpreted literally or in a broader sense.

While analyzing the definition of reservation one must bear in mind certain natural limits of the practical usefulness of all definitions and descriptions accepted in this regard. It must be remembered that neither the description contained in the Vienna Convention nor the definition itself, be it formulated with utmost care, can prevent difficulties that might appear in practice while evaluating the character of certain declarations. The difficulties have their source in the subjectivism of evaluations. The situation is made worse by the fact that such declarations are frequently formulated in a vague or even ambiguous manner. Such situations are especially probable in cases of interpretative declarations of all kinds. That the danger is not a theoretical one only is shown in the case of the "reservation" of India to the Convention on the Inter-Governmental Maritime Consultative Organisation (IMCO).¹⁰ It is quite possible that a declaration made by a State for a certain definite purpose will be read quite differently by the other states concerned. Among the latter there might also appear divergences on this head. What is more, even if certain states make identical declarations they might intend them to mean something else.¹¹

It is extremely important to bear these dangers in mind in view of the effects of the passiveness of the rest of the contracting parties to a treaty toward a reservation. It is universally recognized namely that passiveness toward a reservation means its acceptance (see below). It might emerge, however, that a state remained passive only because it did not consider a given declaration to be a reservation and regarded, therefore, any reaction as pointless. The realization of the consequence of this state of affairs shows that the only just and logical conclusion is to presume that a declaration is a reservation. Although the Vienna Convention itself does not contain any pointers in this respect, practice shows that many states do presume so. Practice has produced the following forms of reaction to declarations with regard to which it is uncertain whether they are reservations (the need of such reaction exists, of course, only when a given state does not intend to accept the reservation presumed):

- making sure of the character of the declaration by sounding the opinion of the reserving State;

¹⁰ See Official Records of the General Assembly of the United Nations, XIVth session, 1959, Agenda Item 65, Annexes; and Official Records of the General Assembly of the United Nations, XIV session, 1959, VI Committee, p. 69ff.

¹¹ Compare the opinions of India, Indonesia and Cambodia with regard to their virtually identical statements concerning the Convention on IMCO (UN Doc ST/LEG/SER.D/3, pp. 277 - 278).

- announcing that a given declaration is not considered to be a reservation;
- announcing that one does not consider the given declaration to change the legal effects of the provisions of the treaty;
- submission of conditional objection;
- preventive submission of objection pertaining to a given declaration to an extent to which it amounts to reservation;
- reserving to oneself the right of adopting a stand towards a given declaration in future;
- imparting to the given declaration an interpretation one accepts, to the exclusion of all others;
- submission of objection by normal procedure by assuming in advance that the given declaration is a reservation.

Reasons of certainty and safety of legal relations require in all cases the elimination of the possibility of a situation in which a state — having stayed passive toward a reservation — would find subsequently that it is ineffective with regard to itself, because it was convinced that it had been, for example, a declaration of policy and not a reservation.

Only in conjunction with the presumption mentioned above can the definition of reservation be an effective practical instrument.

II. Formulation of Reservations

Article 19 of the Vienna Convention admits presumption in favour of the admissibility of the formulation of reservations. This results from the introduction to that Article ("A State may [...] formulate a reservation unless [...]"), as well as from the fact of the rejection of an amendment filed by the delegation of Ceylon, according to which reservations would be admissible only to the extent as the treaty itself provides it.¹²

It must be also noted that this is fully consistent with the practice of states in this respect. In effect, should a controversy arise, it is not the reserving state that is in duty bound to prove that a given reservation is admissible. It is precisely the possible opponents who must prove its inadmissibility.

Article 19 formulates two types of exceptions from the general principle of the admissibility of the submission of reservations. The first type is connected with clauses concerning reservations, contained in the treaties (Art. 19 para (a) and para. (b)), while the other is based on the

¹² As a result of a complete lack of support on the part of the other participants in the Conference, the amendment (UN Doc. A/CONF.39/C.1/L.139) was withdrawn.

criterion of compatibility with the object and purpose of the treaty (Art. 19 para. (c)).

In accordance with the first type of exceptions a reservation is inadmissible when it "is prohibited by the treaty" (para. (a)), or when "the treaty provides that only specified reservations which do not include the reservation in question, may be made" (para. (b)).¹³

These provisions are self-evident; they simply take into account a situation in which parties to a treaty themselves set in advance the range of the admissibility of reservations to a given treaty. These provisions were contained also in the draft of the United Nations International Law Commission (Art. 16 para. (a) and para. (b)), with the difference that a small but quite significant amendment was introduced in paragraph (b) at the Vienna Conference on a motion of the Polish delegation. Formerly Article 16 paragraph (b) of the draft provided that a reservation is inadmissible when a "treaty authorizes specified reservations which do not include the reservation in question." This provision restricted excessively the possibility of filing reservations; the fact that a given treaty authorizes expressly the submission of specified reservations (e.g. to an arbitration clause) cannot exclude the possibility of all other reservations. This opinion was shared also by delegations of other States participating in the conference. Some of them submitted even formal proposals of omitting this provision in its entirety.¹⁴ In turn, the Polish delegation moved an amendment adding the word "only" between the words "authorizes" and "specified." The Polish amendment won wide support at the conference and was accepted. Thanks to this, paragraph (b) was "saved," and the rule contained in it was limited to cases in which a treaty provides for the submission of specified reservations only. Now the situation is clear: when a treaty provides for the possibility of filing exclusively strictly specified reservations — all others will be inadmissible and pas-

¹³ The Soviet delegation moved an amendment calling for the omission of exceptions of this type, and the maintenance of the requirement of compatibility with the object and purpose of the treaty as the sole criterion of the admissibility of formulating reservations (UN Doc. A/CONF.39/C.1/L.115). However, the amendment was not accepted. It seems, anyhow, that even if it were accepted, reservation clauses of treaties would have as *lex specialis* priority over the provisions of the Convention, which constitute *lex generalis*, requiring only compatibility with the object and purpose of the treaty.

¹⁴ See the joint proposal of the delegations of the United States and Colombia (UN Doc. A/CONF.39/C.1/L.126 and Add. 1), as well as the proposal of the Federal Republic of Germany (UN Doc. A/CONF.39/C.1/L.128). It was also pointed out that negotiators are not always able to define in advance all provisions to which reservations may be formulated — see the *UN Conference on the Law of Treaties, First Session, Official Records*, p. 108, para. 8 (quoted further on as *UN Conference...*).

siveness toward them will not be treated as the acceptance of reservations; when, on the other hand, a treaty provides for the submission of certain reservations — but not on the principle of exclusiveness — all other reservations will be subject to evaluation in accordance with paragraph (c) of Article 19.

The provision regulating the second type of exceptions says that a reservation is inadmissible when “in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.” It results, therefore, from the present formulation of Article 19 paragraph (c) that the criterion of “compatibility” will be applicable not only to reservations made to treaties which contain no clauses concerning reservations (which was foreseen in the draft of the International Law Commission), but also to:

a) reservations made to treaties which foresee only in a general and indirect manner the possibility of making them (when the reservations require subsequent acceptance by the remaining partners);

b) reservations not authorized expressly by a treaty (when the treaty authorizes specified reservations, but not on the principle of exclusiveness);

c) reservations not prohibited by a treaty (when the treaty bans specified reservations, but not on the principle of exclusiveness);

d) reservations which are neither banned nor expressly authorized (when the treaty contains both the prohibition and the permission of specified reservations).

This provision is in strict connection with the content of the Advisory Opinion of the International Court of Justice of 1951 concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.¹⁵ The criterion of “compatibility” has come to be widely recognized in the course of the nearly two decades that have passed since the announcement of that Opinion.

There exist, however, marked differences in the approach to this criterion. Sometimes one treats it objectively, demanding at the same time the creation of some sort of mechanism which would impartially pronounce on “compatibility.” One may also meet the attitude that this criterion has no independent character, but that it is applied through a system of acceptations and objections submitted by the remaining parties to a treaty.

It was precisely in favour of the latter stand that the International Law Commission came forth in its draft. It was also supported by an overwhelming majority of states participating in the Vienna Conference.

¹⁵ ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28, 1951, p. 29.

But there was also some voices against it. And though it could seem from a confrontation of Article 19 and Article 20 that the system of acceptations and objections, regulated in Article 20 should concern those reservations only as to which it had been found "objectively" before that they are not "incompatible with the object and purpose of the treaty," in fact in view of the non-existence of any competent organ authorized to pronounce on this head, the criterion is observed simply though a system of acceptations and objections submitted individually by the remaining parties to the treaty.

Moreover, the fact that any of the parties submits an objection based on the recognition of a given reservation as incompatible with the object and purpose of the treaty will have no effect on the relations between the remaining parties and the reserving State. This means that the provision contained in Article 19 paragraph (c) gives birth to a certain contradiction. It appears between the objective nature of the criterion formulated here and the method of its application which is of a subjective character. Although this solution may give rise to objections from a theoretical point of view, it must be emphasized on the other hand that it was the only one which it was possible to accept for a tremendous majority of States. Anyway, as H. Waldock has put it "that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided."¹⁶

As appears from the above, the rule expressed in paragraph (c) of Article 19 has (in practice) no legal value of its own, the question arises, therefore, whether it is at all necessary. It appears in spite of everything that it is, and that for the following reasons: a) the rule is a directive for the behaviour of States; b) an objection based on the recognition of a given reservation as incompatible with the object and purpose of a treaty causes the non-existence of treaty relations between the reserving State and the objecting State (compare below); c) in case of the appointment of an organ authorized to pronounce on the question of "compatibility" the rule will become fully effective.

Other limitations to the admissibility of the submission of reservations result indirectly from the Vienna Convention, as well as from the international public law. These limitations are twofold: a) depending on the type of the treaty; b) depending on the content of the reservations.

The first kind of limitations covers conventions adopted within the framework of the International Labour Organization and peace treaties.

¹⁶ *UN Conference...*, p. 126, para. 10.

The customary norm of international law prohibiting the submission of reservations to conventions of the ILO constitutes for certain a "respective rule of this organization" in the meaning of Article 5 of the Vienna Convention, and as such has priority over the provisions of that Convention regulating generally the admissibility of reservations. When it comes to peace treaties, or at least some of them, the potential possibility of a different regulation of admissibility of reservations (e.g. a former aggressor state may be banned from making a reservation) even if the peace treaty itself stays silent in this respect, is provided for in Article 75 of the Vienna Convention called "The case of an aggressor state."

The second type of limitations is connected with the general requirements set for all obligations, that is with the requirement of compatibility with norms of the nature of *ius cogens* and the requirement of compatibility with previously contracted obligations. Of course, in view of the absence of any mechanism for "objective" pronouncement on these questions, these requirements will be met only by a system of acceptations and objections.

An attempt was made at the Vienna conference to supplement the catalogue of inadmissible reservations. The Peruvian delegation proposed the addition of a new paragraph (d) containing the prohibition of making reservations which "render the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law."¹⁷ Even though the idea behind this amendment is a correct one, it seems that the Italian delegate was right when he said that such reservations are inadmissible by reason of their very incompatibility with the object and purpose of the treaty, which means that the attitude of the remaining parties toward such an indeterminate reservation may be expressed in objections made according to general principles.

The Spanish delegation postulated the prohibition of reservations to treaties founding international organizations.¹⁸ Neither amendment was introduced.

¹⁷ See UN Doc. A/CONF.39/C.1/L.132. Reservations of this type are quite frequent, and it is even difficult in many cases to establish to what extent do they cause elimination of the provisions of a treaty. A delegate of Ecuador, for example, while expressing support for this amendment pointed out that Latin American states had "bitter experience in that matter" because "the code of private international law known as Bustamante Code had been ratified by governments subject to its not being incompatible with internal law," and therefore "it had been impossible to apply it in practice." (*UN Conference...*, p. 116, para. 19).

¹⁸ UN Doc. A/CONF.39/C.1/L.147. The postulate was contrary to the practice of states, for in fact reservations to some statutes of international organizations are formulated.

III. Establishment of Reservations

A reservation is established by two acts: the filing of an admissible reservation and an act imparting to it legal effectiveness with regard to the other parties to a treaty, or at least one of them (compare in this respect Article 21 dealing with the legal effects of "a reservation established with regard to another party in accordance with Article 19, 20 and 23"). Conditions under which a reservation is admissible have been described above; now we shall speak of conditions under which a filed reservation assumes legal effectiveness.

This problem is regulated in Article 20 of the Convention entitled "Acceptance of and Objection to Reservations." It lays down the general principles of the priority of treaty provisions.¹⁹ The rules formulated here are, therefore, of an auxiliary character only.

Only in one case is the filing of a reservation tantamount to its being established, namely where a treaty expressly permits the filing of some reservations without requiring at the same time their acceptance by the other contracting parties (Art. 20 para. 1). For the inclusion of such a clause in a treaty must be regarded as an a priori consent of the contracting parties to the acceptance of reservations of which it speaks. An objection submitted by any of the parties with regard to such a permitted reservation should be considered as devoid of legal effects.

One could, it is true, consider the theoretical possibility of submitting a reservation with regard to the reservation clause itself,²⁰ but this seems to be of no practical importance, because the Convention provides in Article 24 paragraph 4 that "The provisions of a treaty [...] regulating reservations [...] apply from the time of the adoption of its text."²¹

Most frequently, however, the establishment of a reservation requires also some scope of its acceptance by the other parties to the treaty. One of them is the requirement of unanimous acceptance by all the parties "when it appears from the limited number of the negotiating states and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty"

(Art. 20 para. 2).

¹⁹ The formula: "unless the treaty otherwise provides" was repeatedly used.

²⁰ Such a fact has taken place in practice — see the reservations of Poland and other socialist states to Art. 7 of the Convention on the Political Rights of Women of March 31, 1953 (UN Doc., ST/LEG/SER.D/1, pp. 290 - 293).

²¹ The provision was included in the text of the Convention at the Vienna conference as the result of an initiative of the British delegation. Worth noting is the fact that the proposal itself went farther: it announced simply that the relevant provisions of the treaty (also on the question of reservations) "have legal effect prior to entry into force of the treaty" (UN Doc. A/CONF.39/C.1/L.186).

The conference approved the text of this provision in the terms adopted by the International Law Commission without accepting any amendments or proposals concerning its omission.²²

If it is to be found that reservations to some treaties require — according to this provision — the acceptance by all parties, it must be proved first that the treaty meets at the same time two criteria, namely that its characteristic feature is a “limited number of the negotiating states,” and that it results from this fact, as well as from “the object and purpose of the treaty” that “the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty.”

If a given treaty meets the first condition only or the second one only, the unanimous consent of all the parties to that treaty will not be required (general principles will apply in that case — see Art. 20 para. 4).

In view of the absence of any mechanism by which one could establish in an “objective” and binding manner the fulfillment of these criteria, the question will be subject to the evaluation of the states concerned (e.g. what is the meaning of the term “a limited number of states”?).

It is probable that it will be impossible in future to avoid controversies concerning the classification of a given treaty in the category in question.²³ It is, therefore, desirable to try to express the content of Article 20 paragraph 2 with the help of more precise elements. It could be possible to suggest the following set of elements (worked out on the basis of contemporary treaty practice):

- a) negotiations are conducted by several or a dozen or so states (“several” and “a dozen or so” are certainly limited numbers);
- b) a treaty comes into force only after the depositing of ratification documents, etc., by all the states participating in the negotiations;
- c) a treaty is in principle a closed one, or at least the accession of a state which does participate in the negotiations requires the unanimous consent of all its parties;

²² The proposal to omit this provision was made by the Spanish delegation (UN Doc. A/CONF.39/C.1/L.140). The United States delegation tried, on the other hand, to cause the extension of the requirement of unanimous consent of states also to reservations formulated with regard to treaties of any range of its subject-matter, if it were required by the “character” of the treaty (UN Doc. A/CONF.39/C.1/L.127).

²³ Neither is this problem solved by the materials from the conference. Only the French delegate mentioned several types of treaties belonging, in his opinion, to this category. These were: treaties of economic integration, treaties between riparian states relating to the development of a river basin or treaties relating to the building of a hydroelectric dam, scientific installations. See *UN Conference...*, p. 22, para. 16.

- d) no changes can be introduced into the treaty without the unanimous consent of all its parties;
- e) if a treaty sets up any body — its decisions are made unanimously;
- f) a treaty does not contain other solutions (with the possible exception of unanimity) on the question of the acceptance of reservations; compare the absence in Article 20 paragraph 2 of the expression “unless the treaty otherwise provides” — in the context of Article 20 paragraphs 3 and 4;
- g) a third state may accede to the treaty provided it expresses also its consent to the amendments introduced into it previously;
- h) the preamble or other provisions of the treaty emphasize that its object and purpose is the uniformization of behaviour or obligations of the parties.

It would be difficult to defend the view that a treaty which possesses all the characteristic features indicated above does not belong to the category defined in Article 20 paragraph 2 of the Convention.

Another type of treaties which requires a special system of the acceptance of reservations are “instruments constituting international organizations”. In this case reservations require the acceptance by a competent organ of the organization, “unless the treaty otherwise provides” (Art. 20 para. 3).²⁴

All multilateral treaties which do not belong to the categories listed in paragraphs 2 and 3 of Article 20 are subject to a flexible system on the question of reservations. This is expressed in Article 20 paragraph 4 which says: “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides: a) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states; b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting state; c) an act expressing a state’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting state has accepted the reservation.”

With but a single essential difference this provision is really a repetition of a corresponding provision of the draft of the International Law Commission (Art. 17 para. 4).

The draft of the ILC foresaw a maximum effect (that is the complete non-existence of treaty relations between the reserving state and the

²⁴ The problem of reservations to the statutes of international organizations is very complex. This was expressed also in the debates of the Vienna conference. It seems to deserve a separate presentation, and is, therefore, omitted here.

objecting state) for such objections from which it did not clearly appear that the objecting state considered itself in spite of the objection to remain in treaty relations with the reserving state (Art. 17 para. 4).

It results from an explanation submitted at the Vienna conference by the Expert-Consultant, H. Waldock, that in accepting such a solution the ILC was guided by extra-legal reasons, having nothing to do with the practice of states.²⁵ No wonder then that many states participating in the conference held different opinion on that head. Formal amendments were proposed by Czechoslovakia; the USSR, and Syria.²⁶ They postulated the reversal of presumption contained in paragraph 4 (b) in favour of minimum effect of a reservation (that is in favour of not binding between the reserving and objecting states only of those provisions of the treaty, which were directly affected by the reservation, to the extent of this reservation). These amendments were rejected in a voting of the Committee of the Whole during the first session of the conference.

An identical proposal was submitted by the Soviet Union at the second session of the conference.²⁷ The relevant and richly documented argumentation of the supporters of the presumption in favour of an objection with a minimum effect, expressed especially in the statements made by the delegates of the Soviet Union,²⁸ Poland,²⁹ Mexico, Ecuador,

²⁵ See H. WALDOCK's speech, UN Doc. A/CONF.39/SR.10, p. 24. This is probably why he added the following comment: "From the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear" (*Idem*).

²⁶ See relevant documents: A/CONF.39/C.1/L.85; A/CONF.39/C.1/L.115; A/CONF.39/C.1/L.94. The correctness of such a solution is all the more obvious when one takes into account the fact that a large number of reservations concerns only court clauses contained in treaties.

²⁷ UN Doc. A/CONF.39/L.3. The interesting fates of the above presumption at the Vienna conference are presented also by: S. E. NAHLIK, *Plon wiedeńskiej konferencji w sprawie kodyfikacji prawa traktatów* [*The Crop of the Vienna Conference on the Codification of the Law of Treaties*], "Sprawy Międzynarodowe," 1970, No. 6, pp. 63 - 64; M. FRANKOWSKA, *Konwencja wiedeńska o prawie traktatów* [*The Vienna Convention on the Law of Treaties*], "Państwo i Prawo," 1969, No. 10, p. 575; I. M. SINCLAIR, *Vienna Conference on the Law of Treaties*, ICLQ, Vol. 19, part I, 1970, p. 59.

²⁸ UN Doc. A/CONF.39/L.3. and A/CONF.39/SR.10, pp. 13 - 14.

²⁹ The Polish delegation presented on this question, among other things, statistical data obtained from an examination of 587 volumes of the United Nations Treaty Series; out of 47 acts of objection concerning treaties containing no reservation clauses, only 3 provided clearly that the objecting states do not enter into treaty relations with the reserving states. Also only 3 acts of objection said that the objecting states in spite of their objection enter treaty relations with the reserving states to the extent not affected by the reservation. See the speech of the head of the Polish delegation, E. WYZNER (UN Doc. A/CONF.39/C.1/SR.65, pp. 8 - 9 and A/CONF.39/SR.10, pp. 14 - 15). The data illustrated the situation existing at the beginning of 1967.

Venezuela and Syria³⁰ gave the Soviet amendment postulating the presumption the required two-third majority of votes and was thus approved by the Plenary meeting of the Conference.

Precisely this solution seems to be the only justified one in the light of the to-date practice of states. Since January 12, 1952, i.e. since the adoption of Resolution 598/VI establishing, among other things, the right of states to define individually the legal effects of their objections, adopted by the United Nations General Assembly, member states have submitted over 100 instruments of objection to 16 treaties which did not contain reservation clauses. The majority of these instruments concerns reservations made by several or even a dozen or so states (as of January 1, 1970).

None of the instruments of objection established an absolute effect by itself, that it did not mean that the objecting state is completely excluded because of the objection from its participation in the treaty.

Only three instruments of objection provided for a maximum effect.³¹ In seven cases the instruments of objection clearly provided for a minimum effect.³² As many as some 90 instruments did not establish anything at all as regards their effects.

There are three theoretically possible conclusions concerning the effects of these last instruments of objection, namely:

- that they exert a maximum effect;
- that they exert a minimum effect;
- that they might exert either effect, which is left to the subsequent opinion of the objecting state.

The only correct conclusion is the second one.

The acceptance of the third conclusion, leaving the objecting state an unlimited right to a later arbitrary determination of the effects of its objection would be at variance with the necessity of guaranteeing the safety of international legal relations.

³⁰ UN Doc. A/CONF.39/SR.10, pp. 15 - 23.

³¹ All three objections — formulated by the Netherlands, China (Taiwan) and Brazil — concerned reservations formulated with regard to the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 (UN Doc. ST/LEG/SER.D/1, pp. 61 - 62). The act of Brazil formulates this effect indirectly, but in a doubtless manner.

³² These were acts made by the United States, Britain, Australia and New Zealand with regard to reservations to the four Geneva Conventions on the protection of war victims (respectively — UNTS, vol. 213, p. 378ff; vol. 278, p. 266; vol. 314, p. 334; vol. 330, p. 357, and Danish objections to reservations concerning the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 and the Vienna Convention on Diplomatic Relations of 1961 (UN Doc. ST/LEG/SER.D/2, pp. 336 and 47). A mention of still another case is contained in a reply of IMCO submitted to UN Secretary General (Doc. A/5687, p. 73).

The acceptance of the first conclusion would be also unjustified. If a state consciously refrains from determining the effects of an objection in the instrument of objection itself, it can hardly be assumed that it wants the act to have effects going farthest. For since the states know that on the strength of Resolution 598/VI the effects of their objections depend on their decision expressed in these acts, and in spite of this refrain from expressing such decisions, it is fully justified to conclude that they did not intend their objections to have a maximum effect.

In this manner, by way of eliminating other possibilities, we have shown the theoretical correctness of the thesis that all objections expressed after the adoption of Resolution 598/VI, which do not provide otherwise, have a minimum effect.

All this confirms the correctness of the solution accepted in the Vienna Convention, according to which an objection exerts a minimum effect "unless a contrary intention is definitely expressed by the objecting state." (Art. 20 para. 4 (b)). This reasoning and presumption resulting from it have been confirmed in the activities of states.³³

We must clarify further the question of how it may come to the "definite expression" of that "contrary intention." It certainly happens when — of which we have spoken already — an objection is accompanied by a distinct declaration that the objecting state does not enter into treaty relations with the reserving state. It seems, moreover, that even in the absence of such a declaration the same result may be achieved by indicating the motives of the objection. The following motives have been referred to in acts of objection in the to-date practice:

- given reservations "are not of the kind which the intending parties to the Convention have the right to make;"³⁴
- the reservations in question are contrary to the object and purpose of the treaty³⁵;

³³ See, for example, the United States reply to the questions of other states concerning the effects of United States objections (UN Doc. ST/LEG/SER.D/1, p. 323, note 9); see also examples quoted in the Soviet memorandum (Doc. A/CONF.39/L.3, p. 3).

³⁴ So — British objections concerning reservations to the Convention on the Privileges and Immunities of the United Nations (Doc. ST/LEG/SER.D/1, p. 33ff) and to the Convention on the Privileges and Immunities of the Specialized Agencies (Doc. ST/LEG/SER.D/1, p. 40ff).

³⁵ So — the objection of the Administrative Committee on Coordination of Specialized Agencies to the reservations of the Federal Republic of Germany and other states to the Convention on the Privileges and Immunities of the Specialized Agencies (Doc. ST/LEG/7, pp. 37 - 38; and Doc. A/5687, pp. 94 - 95); objections made by Israel and Madagascar to the reservations concerning the first two sea conventions of 1958 (UNTS, vol. 516, pp. 280 - 281; vol. 450, p. 165) et al.

- the provision affected by the objection is “fundamental to the Convention;”³⁶
- the reservation is incompatible “with the letter and the spirit” or “with the content and the spirit” of the Convention;³⁷
- the reservation in question is contrary to international law;³⁸

The maximum effect, i.e. non-existence of treaty relations between the reserving state and the objecting state, will be certainly produced by the recognition of a given reservation as incompatible with the object and the purpose of the treaty. For when a state, aware of the criteria of admissibility of the submission of reservations, makes an objection based on “incompatibility,” it expresses by this act its “contrary intention” mentioned in Article 20 paragraph 4 (b).³⁹ The same should obtain in the future with regard to objections based on the recognition of a given reservation as contrary to the norms of *ius cogens*. It is a matter of opinion, on the other hand, whether some other of the motives of objections enumerated above could lead to the same consequences.

It is obvious, of course, that objections without any qualifications, i.e. objections which say nothing about their effects or motives, will not produce any such far-going effects but — according to the presumption discussed above — simply minimum effects. This means that a state which made a reservation will be a party to the treaty with regard to those states which either explicitly accepted the reservation,⁴⁰ or accepted it silently⁴¹ or made an objection declaring at the same time that they regarded the treaty as binding in their relations with the reserving state, or made an objection indicating motives other than incompatibility with

³⁶ So — the objection of the Republic of South Africa to the reservations concerning the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1950 (Doc. ST/LEG/SER.D/1, p. 146).

³⁷ So — the objections of the Federal Republic of Germany to the reservations to the Vienna Convention on Diplomatic Relations of 1961 (*ibid.*, pp. 45 - 46).

³⁸ So — the objections of Australia and Great Britain to the Indonesian reservation concerning the Geneva Convention on the High Seas of 1958 (*ibid.*, pp. 327 - 328).

³⁹ A similar stand was held at the Vienna conference by the Mexican delegate — see Doc. UN, A/CONF.39/SR.10, pp. 15 - 16.

⁴⁰ An explicit acceptance of a reservation is dealt with by Art. 23 para. 1 of the Convention regulating procedure on the question of reservations.

⁴¹ Compare Art. 20 para. 5 which says: “For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.” Attempts made at the conference to shorten the period provided for in Art. 20 para. 5 failed.

the object and purpose of the treaty or incompatibility with the norms of *ius cogens*, or, finally, made an objection without any qualification.

Considering that in effect a reserving state may be a party with regard to some states and may not be a party with regard to other states, one may speak here of the relative binding force of a treaty or a relative participation in a treaty; this is the essence of the flexible system.

There appears thus a certain disharmony between the rule contained in Article 20 paragraph 4 (c) and the preceding rule (para. 4 (b)). It must be borne in mind, therefore, that "an act expressing a state's consent to be bound by the treaty and containing a reservation is effective" — in the light of the previous arguments — not only "as soon as at least one other contracting state has accepted the reservation (para. 4 (c)), but also as soon as such a state expresses an objection in a manner not excluding the coming of the treaty into force between the objecting state and the reserving state. It should be so at least from the point of view of logic. And it must have been most likely the terrific amount of its work that made the conference omit this problem.

It may happen in an extreme situation that a given reservation is not accepted by any other party to the treaty, but that in spite of this the reserving state will be able to participate in it. This would happen, for example, if all the other parties to the treaty expressed their objections to that reservation with minimum effects.

Apart from the above material conditions of the legal effectiveness of reservations, certain definite procedural conditions must be also met. This problem is regulated in Article 23 entitled *Procedure Regarding Reservations*. The provisions contained in it did not undergo any major changes in comparison with the corresponding article of the draft of the International Law Commission (Art. 18).

First, both the reservation, the explicit acceptance of the reservation and objection must be done in writing and communicated to all the other contracting states and to other states entitled to become parties to the treaty (Art. 23 para. 1). In cases of the existence of a depository, of course, these instruments must be delivered to him. And it is in turn his duty to communicate their contents to the other states concerned.

Second, the Convention requires a formal confirmation of a reservation made when signing a treaty which is subject to ratification, acceptance or approval. The confirmation should be made at the time when a reserving state expresses its definite consent (i.e. at the time of depositing the document of ratification, acceptance or approval, etc.) to be bound by the treaty. In such a case the reservation is repeated in its entirety in the

ratification document,⁴² or the ratification instrument is accompanied by the formula: "confirming at the same time the reservations made at the moment of signing."⁴³

And as regards definite acceptance or objections to reservations made before their confirmation, Article 23 paragraph 3 says that they require no confirmation any more.

IV. Legal Effects of Reservations and Objections to Reservations

According to Article 21⁴⁴ of the Convention dealing with this question, a reservation established with regard to another party with the observance of all requirements produces the following effects: "a) it modifies for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; b) it modifies those provisions to the same extent for that other party in its relations with the reserving state" (para. 1).

It is obvious, of course, that "the reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*" (para. 2). On the other hand, as regards legal effects of an objection which does not exclude the entry of the treaty into force between the reserving state and the objecting state (i.e. a minimum-effect objection), "the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation" (para. 3).

In a particular case, which is also most frequent in practice, when the reservation abrogates some provision of the treaty, the practical effect will be the same irrespective of whether the given state accepts the reservation or files a minimum-effect objection; this means simply that the provision to which the reservation related will not be binding in relations with both the former and the latter state.

⁴² Compare the reservations made by Poland while signing (UNTS, vol. 193, P. 167) and ratifying (UNTS, vol. 196, p. 365) the Convention on the Political Rights of Women of 1953; the reservations made at the signing (UNTS, vol. 516, p. 252) and ratifying (*ibid.* p. 277) by Bulgaria of the Convention on the Territorial Sea and the Contiguous Zone of 1958; et al.

⁴³ See the statements of Poland and other socialist states made while ratifying the Convention on the High Seas of 1958 (UNTS, vol. 450, p. 162); or the statement made by Ecuador, the Soviet Union and Denmark (UNTS, vol. 193, pp. 136 - 138) and India (UNTS, vol. 412, p. 324) when ratifying the Convention on the Political Rights of Women; et al.

⁴⁴ Its content does not differ from its counterpart in the draft of the ILC (Art. 19). The only difference is in the wording of para. 3 of this Article for the purpose of harmonizing this provision with the change introduced in Art. 20 para. 4b.

The situation will be different, for example, with regard to reservations broadening the legal effects of the provisions of the treaty (as, e.g., in the case of reservations submitted by Poland and other socialist states to Art. 9 of the Geneva Convention on the High Seas of 1958 — see above). In this case, the given provision of the treaty would be binding in broader scope between the reserving states and the states accepting those reservations, while binding between the reserving states and states objecting with minimum effect would be simply the provision of the treaty affected by the reservation (in this example — Art. 9 as such).

In view of the relativity of the legal effects of reservations, their acceptances and/or objections to them, it may happen that the following types of relations will be produced on the strength of the same treaty: 1) the treaty is binding in its entirety (this is the case in relations between parties which did not make any reservations); 2) the treaty is binding in a form modified by the reservation (this is the case in relations between the reserving state and the states which accepted the reservation); 3) the treaty is binding with the exception of that part of its provision which was effected by the reservation (this is the case in relations between the reserving state and states which made a minimum-effect objection); 4) the treaty is not binding at all (this is the case in relations between the reserving state and states which made a maximum-effect objection).

These are types differentiated in theory only. In practice, the situation will be more complex, for various states make at times several different reservations to a single treaty, to which various parties to the treaty adopt different attitudes. This may result in the emergence of even several scores of legal systems based on the same treaty.

This multitude of legal systems is certainly undesirable from a purely legal point of view, but it has undoubtable virtues in the present situation: a) it permits the broadest possible participation in treaties in spite of the different interests of states; b) it guarantees at the same time that each state will be bound only by provisions to which it expressed its consent. It creates also certain safeguards preventing the infringement of the object and the purpose of the treaty.

V. Withdrawal of Reservations and Objections to Reservations

The problem of withdrawal of reservations, as well as of objections to reservations has been regulated in Article 22 of the Convention. In its part concerning the withdrawal of reservations it is in principle identical with the solution adopted in the draft of the ILC (cf. Art. 20). The provisions concerning the withdrawal of reservations were introduced in the

text of the Convention at the Vienna conference in accordance with a proposal submitted by the Hungarian delegation.⁴⁵

All this resulted in the following principles: a) both reservation and objection may be withdrawn at any time; b) this does not require the consent of the state which accepted the reservation (para. 1 — in the case of withdrawal of reservation) nor of the reserving state (para. 2 — in the case of withdrawal of objection);⁴⁶ c) the withdrawal becomes effective only after it is communicated to the other states concerned: (in the case of withdrawal of reservation — to the other contracting states (para. 3 (a)), in the case of withdrawal of objection — to the reserving state (para. 3 (b)); d) the withdrawal of a reservation or of an objection must be done in writing (para. 4); e) the above principles are applicable unless the treaty in question provides otherwise (paras 1, 2, 3 and 4 of Art. 22).

This means that both the withdrawal of a reservation and of an objection is a completely unilateral act, for their effectiveness does not depend on any additional acts. They are legally effective *per se* (when they are communicated to the other states concerned).

The conventional norms regulating the withdrawal of reservations constitute only a confirmation of the existing customary norms of international law. The withdrawal of an objection, though possible, has not taken place in practice so far.

Although the above Article 22 does not mention expressly the effects of the withdrawal of a reservation or an objection, it results from the very nature of a reservation that its withdrawal will create a legal situation which would have existed if this reservation had not been made at all. The development of events connected with the Austrian and Finnish amendment submitted at the first session of the conference⁴⁷ seems to confirm the correctness of this conclusion.

In this situation all acts of acceptance or objection pertaining to a given reservation become — as soon as it is withdrawn — pointless and lose all legal significance. The treaty in question becomes fully binding between the former objecting state and all the other parties to the treaty. The withdrawal of a reservation will cause, of course, different changes in the scope of the obligations of the individual states — depending on their former attitude to the reservation withdrawn. For a state, e.g., which had previously expressed a maximum-effect objection, the withdrawal of the

⁴⁵ UN Doc. A/CONF.39/L.18.

⁴⁶ In spite of the fact that such role was contained in the Hungarian proposal, it was decided not to include it in this Article in view of its excessive obviousness — see the course of discussion on this question — UN Doc. A/CONF.39/SR.11, p. 9.

⁴⁷ UN Doc. A/CONF.39/C.1/L.4/ and Add. 1; compare the debate on this amendment — *UN Conference...*, p. 417.

reservation will mean the establishment of full treaty relations with the reserving state, while, e.g., for a state which had previously accepted the given reservation the change will mean that instead of the provision abrogated by the reservation it will become bound in its relations with the former reserving state by the relevant provision of the treaty.

In turn, the withdrawal of an objection means that the reserving state is bound in its relations with the former objecting state by the treaty in the form changed by the reservation (i.e. as if the former objecting state had accepted the reservation). For it seems that the withdrawal of an objection is a specific form of the acceptance of the reservation. The scope of the concrete changes caused by the withdrawal of the objection will depend on the type of the objection withdrawn. For example, the withdrawal of a maximum-effect objection will cause automatically the establishment of full treaty relations between the former objecting state and the reserving state.

It seems, moreover, that instead of a complete withdrawal of an objection it is possible to change a maximum-effect objection into a minimum-effect objection. In such a situation the treaty becomes automatically binding in relations between the reserving state and the former objecting state, except for the provision affected by the reservation.

The lack of provisions regulating this possibility and the effects of the withdrawal of reservations or objections constitute a loophole in the Convention, although, on the other hand, one could argue that relevant rules are implicitly contained in the provision of the Convention.

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In connection with the above analysis certain remarks of a general nature are indicated, quite apart from the conclusions pertaining to the detailed problems. These are:

1. In the course of the last two decades, the flexible system of reservations has been gaining gradually but steadily an ever more universal recognition of states. It has been also accepted as a principle of the Convention on the law of treaties. This was no accident. As long as the group of western states had at its disposal a sufficient number of votes to force through every treaty solution which would be to its advantage, so long did this group hold stubbornly to the system of "unanimity" on the question of reservations. But because of the consistent stand of the socialist states and the majority of American states in opposing this conception, as well as due to the emergence of a large number of "new" states, the situation has undergone an essential change. At present no single group of states can impose its own treaty solutions on other states, much less to guarantee such a possibility in the long run.

As a result of this, all states must realize today that treaties which for other reasons cannot but be accepted may contain provisions which are unacceptable for them. It is, therefore, equally important for all states to be able to make reservations without risking its complete exclusion from the participation in the treaty.⁴⁸ And it is probably this material understructure that explains the virtually universal support given at the conference to the flexible system of reservations. Everything indicates that it will be maintained in the whole foreseeable future, and that it will remain a most widely observed system.

2. Making requirements as regards the scope of the acceptance of reservations more flexible (defeat of the conception of unanimous acceptance of reservations as a general principle) was accompanied by the creation of more exacting requirements as to the admissibility of making reservations. But the stage of the submission of a reservation with its own conditionings is still restricted because the rules establishing requirements concerning the compatibility of reservations with norms of *ius cogens*, earlier obligations, or the object and purpose of the treaty are not fully effective *per se*, but are implemented only later on through the system of acceptances and objections.

3. The entire to-day development on the question of objections, which has been crowned by the provisions of the Vienna Convention on the Law of Treaties was marked by a tendency to reducing the effects of a single objection.

4. The provisions of the Convention regulating the problem of reservations to treaties are of an auxiliary character, that is are applicable only to cases for which the treaty does not provide otherwise. And this means that whenever the negotiating states will not want or will be in no position to agree on the text of a reservation clause with regard to a given treaty, the flexible system will be applicable (unless para. (2) or para. (3) of Article 20 come into play). Taking into consideration the fact that the text of a treaty which is being worked out by states from different geographical regions can be finally accepted in most cases by a two-third majority of votes cast on all its provisions, it is enough for one third of the states plus one state⁴⁹ to vote against the reservation clause for flexible system to come into effect.

5. In spite of certain shortcomings mentioned in the analytical part of this Article it may be said that the provisions of the Vienna Convention

⁴⁸ Theoretically such a possibility does exist. This would happen in cases of maximum-effect objections raised by all the other parties to the treaty.

⁴⁹ In case certain states abstain from voting the number will be lower in practice

on the Law of Treaties concerning the institution of reservations are useful. The provisions guarantee the widest possible participation in treaties without discrimination, and with the interests of the individual states being respected.

BOOK REVIEWS ★ COMPTES RENDUS

Ludwik DEMBIŃSKI, *Samostanowienie w prawie i praktyce ONZ* [*Self-determination in the Law and Practice of the United Nations*], PWN, Warszawa 1969, 275 pp.

After almost twenty-five years of the functioning of the United Nations, when the distance allowed for attempts to sum up its achievements and to assess its possibilities, Ludwik Dembiński enriched the writings on international law in Poland with a monographic study on self-determination in the law and practice of the Organization. The book reveals broad academic experience and penetrating knowledge of the subject which could be noticed even earlier, in a few shorter but equally valuable papers of the author.¹ In this case,

¹ Here are some more important papers by L. DEMBIŃSKI on the same theme: *Ghana, Problemy polityki wewnętrznej i zagranicznej* [Ghana, Problems of Domestic and Foreign Policy], "Zeszyt dokumentacyjny," PISM, 1960, No. 5; *Ewolucja ustrojowa Wspólnoty Francuskiej* [Evolution of the Structure of the French Commonwealth], "Sprawy Międzynarodowe," 1960, No. 5; *ONZ a problem Rodezji Południowej* [UN and the Problem of Southern Rhodesia], "Sprawy Międzynarodowe," 1966, No. 10; *W sprawie pojęcia obszaru niesamodzielnego w świetle praktyki ONZ* [On the Notion of a Non-self-governing Area in the Light of the UN Practice], "Państwo i Prawo," 1967, No. 1; *Samostanowienie w pracach Organizacji Narodów Zjednoczonych* [Self-determination in the Work of the United Nations], "Zeszyty Naukowe Katolickiego Uniwersytetu Lubelskiego," 1967, No. 1.

however, in view of the political importance and academic rank of the task, particular ambition and creative involvement were needed in order to elaborate on the basis of extensive documentary sources and a wealth of writings on the theme, such an interesting synthesis lacking neither historical background nor prospective approach.

The author did not set the theme within the whole system of current international law. Taking up only those legal norms which were proclaimed in the UN Charter and developed in the activity of the Organization, he left aside all international agreements relating to the question of self-determination which had been entered into outside of the United Nations system. Thus the book under review presents the institute of self-determination against the background of the Charter and of the practice of the Organization.

The main part of the book is preceded by a concise historical introduction comprising an outline of the idea of self-determination as developed in the thought and political practice over past centuries, a general description of the main current of the idea in the 20th

century before the establishment of the United Nations, as well as a summary of the preparatory work and the work of the San Francisco Conference on the theme.

The author draws the attention to the dichotomy inherent in the very concept of self-determination. The term is used in the legal sciences to denote a specific norm of the positive international law, and in parallel in the political practice to signify a slogan or a postulate. Both notions differ fundamentally "even when their wording is identical" (p. 5). The contents of the legal norms on the subject and their implications can be ascertained by means of the rules of interpretation. However, true contents of the postulate of self-determination remains blurred since behind the wording of political programmatic declarations often hide substantive divergencies and diverse ideological assumptions. The roots of the institute of self-determination in the contemporary international law can be sought in the history of political doctrines but fixing the origin of the phenomenon "in the problem of mutual relations between the king and his people" (p. 9) seems somewhat simplified. In general, using the notion of self-determination in regard to the period previous to the emergence of modern ethnic structures is rather controversial.

Proceeding from the assumption that the development of the principle of self-determination in the time when it was but an idea or a political postulate and now when it has been entrusted additionally with the normative function does not reveal any continuity or homogeneity — the author confined himself to expounding only a succinct history of the principle. Recognizing the methodological rationale of such a solution I should like to point to the erroneous in my view approach to the problem. The author is mistaken when he reduces to a common denominator Wilson's and

Lenin's concepts of self-determination and says: "[...] their application was strictly limited to the European nations" (p. 20). Regardless of common points in the theoretical visions of both programmes (for instance Poland's independence), based however, on distinct class premises, the concept of Lenin in contrast to that of Wilson embraced first of all the Asian nations. The Declaration of Rights of the Peoples of Russia made of the principle of self-determination the fundamental tenet of the constitutional practice in the Soviet State. The bilateral international agreements (not only those with the Baltic States and Turkey referred to by the author, but also treaties concluded with Iran, Afghanistan and Mongolia of 1921) gave it the sanction of law although at that time only on a regional scale. Thus in contrast to Wilson's programme the principle of self-determination and equality of rights of nations worked out by Lenin and proclaimed in the Decree on Peace began to prove its vitality already in the first years after the first world war and not only in the treaty clauses but also in relations between the Socialist State and its neighbours.

What was said above does not detract from the validity of the thesis that it was precisely the United Nations Charter which marked the turning point in the development of the principle. Yet, the importance of the Charter lies not in the fact that it raised the principle of self-determination to the rank of positive law but rather that it introduced the principle among the basic categories of contemporary international relations and gave the norm shaped originally in the Soviet treaty practice genuine universal character.

Interpretation of the right of self-determination forms the main theme of the book. The analysis of the language of the Charter supplemented by the functional interpretation and set against the background of preparatory work

leads to the conclusion that the norm of Article 1, paragraph 2 of the Charter is not a loose and abstract formula but rather one of the main components of the uniform and indivisible legal substance and is therefore inextricably linked to other material provisions regardless of the external structure of the document. The author proposes an important directive for interpretation. He suggests to consider the principle of self-determination concurrently under three angles: 1) in connection with the problem of non-self-governing territories — as an important factor of their development; 2) in association with the process of international economic and social co-operation and with the problem of human rights in particular — as a guarantee of their observance and realization; and 3) in connection with the codification of principles of peaceful co-existence — as a basis of friendly and peaceful relations among nations.

The headings of the successive chapters of the work reflect the several stages of interpretation of the right of self-determination: contents—subjects—implementation. The United Nations Charter took this principle over together with the legacy of manifold theoretical controversies but contains no binding directive as to its interpretation. On the other hand provisions of many resolutions of the General Assembly and of Article 1 in both Covenants on Human Rights have enduring value. In search for definition Ludwik Dembiński distinguishes between self-determination in the inner and outer spheres and tries to establish its relationship to the concepts of independence and sovereignty. The notions in question are considered from the point of view of positive law. The concept of sovereignty of the people is, therefore, left apart and so-called specific types of self-determination are treated as a stage in the historical development (e.g., protection of minorities) or in recent times as a component

of self-determination in the political sense.

The views of the author on the subject of the right of self-determination, on the meaning of the notions "people" and "nation" in law, the shape of ethnic structures, and on the problem of their relationship to the state, are remarkable for self-restraint and profound sociological background. Since the Charter does not indicate the subject of the right of self-determination (formally it confers it upon peoples), the practice of the Organization has to provide the chief criterion in this respect. Actually, experience shows that the right is granted at any rate to the population of non-self-governing territories although not exclusively. Independent states, however, cannot be subjects of this right, says Dembiński. This follows from the fact that setting up an independent state constitutes the final goal and materialization of the right of self-determination.

Inasmuch as pacific and democratic methods do not always yield proper results, contemporary international law recognizes armed secession and national liberation war as lawful means permitting to realize the right of self-determination. The principle of non-intervention and the guarantee of territorial integrity of the state do not apply here. Centrifugal trends within a state remain outside of the domain regulated by today's international law and dependent territories are not considered part of the territory of the metropolitan Power.

A separate part of the book deals with the interpretation of the right of self-determination within the organizational system of the United Nations. The author ascertains who is bound to carry into effect the right of self-determination, fixes the contents and the character of the claim, and analyses the rights and functions of the Organization related to the implementation of the right of self-determination. It is to be

regretted that the "overcivil" approach to the problem and entangled juristic language make it difficult to the uninitiated to comprehend a few formulations and even whole parts of the book.

The intricate structure of the book resulted in a number of tedious passages and repetitions and the main conclusions seem to lack clarity and lucidity. The broad bibliographical basis (266 items) does not reflect appropriately the socialist scholarly production inasmuch as we find in the list only three Soviet publications [...] Yet the most serious objection refers to Poland: the book does not mention at all the creative contribution of our political and legal thought to the development of the principle of self-determination, the unquestionable activeness and historical prolific initiatives of the Polish foreign service (even if at the forum of the United Nations) in support of full and universal carrying into effect of the right of self-determination. This manner is rather peculiar since the author having at his disposal records of various UN bodies often draws from them mentions about the stands of other even minor countries.

The most interesting of all is possibly the final part of the work where Ludwik Dembiński makes an attempt to extrapolate from the trends manifested hitherto the prospect of the principle of self-determination. Since the law-mak-

ing process, particularly in international law, is always controlled concurrently by political expediency and deeper ideological considerations — the introduction of the principle of self-determination among the norms of positive international law signified in the last analysis a victory of progressive forces. The UN Charter set up an institutional framework for further struggle aimed at carrying its provisions into effect and for their enforcement. The author indicates that though UN bodies do not always play an active role in making the right of self-determination effective — it would never fully materialize outside of the United Nations. "Within some twenty years since it was introduced for the first time into general international law its binding force, heretofore extensively put to doubt, has been not only recognized and refined in legal instruments but has become a rule voluntarily applied by States and to some extent enforced." (p. 250). And further: "the emergence of the peoples of the southern hemisphere on the world scene was conditional upon wiping out the status quo based on superiority in civilization, power and tradition. The right of self-determination was exactly the motive power of the evolution within the system of the UN." (p. 251).

Andrzej S. Nartowski

Ludwik EHRLICH, *Suwerenność Polski na Ziemiach Zachodnich i Północnych* [Poland's Sovereignty in Western and Northern Territories] (Problems of international law), second enlarged edition, Wydawnictwo "Śląsk," Katowice 1967, 100 pp.

Published under the auspices of the Silesian Scientific Institute, professor Ludwik Ehrlich's book contains a third version of the excellent study on the sovereignty of the Polish state in the territories recovered as the result of World War II.¹ The Polish language

version is published together with an English translation of the text and extensive summaries in Russian, French

¹ Heretofore, Ludwik EHRLICH's two works comprised these problems: *Suwerenność Polski na Ziemiach Odzyskanych* (Zagadnienia prawne) [Poland's Sovereignty in Recovered

and German. The treatment of the problem and the fundamental conclusions remain virtually the same as in the previous edition. The argumentation is lucid, amazing concise, and fascinates the reader with the erudition of the author and his skill in applying logical rules of legal reasoning. The fundamental theses are strictly based on the assertions contained in the basic works of the Professor, particularly in his well-known system of international law² and his lecture on the interpretation of treaties.

Ludwik Ehrlich's conception is based on the assumption that the legality of extending the sovereignty of the Polish state to the former German territories on the Baltic Sea and east of the Odra-Lusatian-Nysa line is justified in the light of international law by the fact that Poland did not infringe by her act the rights of any state. This may be proved in practice by way of proof that there exists an essential estoppel for any state to charge Poland effectively before an international tribunal of infringing in this manner her obligations towards that state. The author shows that such an estoppel does in fact exist. As a result of criminal aggression and barbarian occupation policy of the German government of the former Third Reich Poland was released, in accordance with the principle of reciprocity, from any obligations which arose for her from international law. Poland cannot be charged that by extending her sovereignty to the Recovered Territories she infringed her international obliga-

tions. The charge cannot be brought effectively by either of the two existing German states, or by any of the states signatories of the Yalta and Potsdam Agreements. Neither can the charge be preferred by a state which acceded subsequently to either of these agreements, nor by any other state either existing at present or to be formed in the future, irrespective of whether it borders or will border on Poland (a future united German state) or not. And although, in the Author's opinion, international law does not know any requirement of a formal recognition of a frontier, a number of states (the number including all Poland's neighbours) have in fact expressed such recognition with regard to the western frontier of Poland.

But this is not all. While extending her sovereignty to the Recovered Territories Poland acted in accordance with the positive legal order existing already at that time. Of prime importance here is the agreement concluded between the states whose representatives had taken part in the Yalta Conference. The Author points out that the final document of that conference contains an *ex ante* recognition of the territorial gains of Poland in the north and in the west. Only the "final delimitation" of the Polish western frontier, and not the taking over of these territories under the Polish rule, was postponed until a peace conference.³

The technical term "final delimitation" means the tracing of a frontier under concrete terrain conditions. The Author used here a model interpretation technique, quoting statements which permitted the establishment of the real will of the parties concerned (Premier W. Churchill's speech in the House of Commons, and President F. D. Roosevelt speech in the Congress), and pointing to relevant examples from the practice of international relations. He discussed also

Territories. Legal Problems], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego," issue XXVII, *Prace Prawnicze* No. 6, 1959, pp. 5-28; and *Suwerenność Polski na Ziemiach Zachodnich i Północnych (Zagadnienia prawne)* [Poland's Sovereignty in Western and Northern Territories. *Legal Problems*], Silesian Scientific Institute — "Bulletin," 1962, No. 34, p. 54.

² L. EHRLICH, *Prawo międzynarodowe [International Law]*, Fourth Edition, Warszawa 1958.

³ L. EHRLICH, *Interpretacja traktatów [Interpretation of Treaties]*, Warszawa 1957.

the verdict of the International Court of Justice of 1962 in the case of the Preah Vihear Temple.

In concluding a lucid argumentation interpreting the individual provisions of the final document of the Yalta Conference, Ludwik Ehrlich expresses the following opinion: "The Crimean Agreement contained an offer addressed to Poland by the three big powers according to which Poland (1) acting through the Provisional Government of National Unity to be founded which all the three big powers will recognize (2) accepted as her eastern frontier the line corresponding approximately to the Curzon Line and (3) expanded her area up to the Baltic Sea in order to extend her sovereignty to East Prussia except the Królewiec (Koenigsberg) area, to the former Free City of Gdańsk, and to such an area west of the former Polish frontier as — in the opinion of the new government — Poland will be capable of populating after the resettlement of the Germans and of developing." (pp. 21 - 22).

Poland accepted in its entirety the offer made to her by the three big powers, and the agreement was thus carried out on her part. The Author is right, therefore, in voicing the opinion that in its part referring to Poland the Yalta Agreement could not have been changed by the Potsdam Agreement without her clearly expressed consent. The Potsdam Agreement decisions must be interpreted, therefore, in a manner preventing their being divergent from the Yalta Agreement to which, after all, the Potsdam Agreement distinctly refers. Ludwik Ehrlich emphasizes also that the extension by Poland of her sovereignty to the Western and Northern Territories was a single act — while the Potsdam Agreement, taking into consideration the currently existing situation of those territories, a situation foreseen in the Yalta Agreement, perpetuates the final character of the au-

thority of the Polish state over its recovered territories. And in view of the fact that the demarcation of the frontier had been carried out subsequently by way of a treaty concluded by Poland with her German neighbour "the problem should be considered as settled and belonging to the past" (p. 31).

It seems, however, that a work intended in a large measure for foreign readers, often unacquainted sufficiently with the development of local events in the final phase of World War II, should have presented at least briefly the complex mechanism by which Poland took over the Recovered Territories under her rule. The extending of her sovereignty can hardly be enclosed in this case within strictly defined time limits. The establishment of Polish administration in the former German territories took place gradually in the course of hostilities. The process was not something that happened on a single specified date.

The formal exclusion of the Recovered Territories from the Soviet zone of occupation of Germany was done only on the strength of the Potsdam decisions. Ludwik Ehrlich does not delve into how the problem presented itself in the preceding period. It was established during a Moscow visit of a delegation of the Provisional Government (February 14 - 21, 1945) that for security reasons a frontline belt 60 - 100 km wide into the liberated territory will be supervised by the Soviet armed forces cooperating with the Polish administration which will have full authority in areas situated east of this line. The declaration on the defeat of Germany and the assumption of the supreme power over Germany by the governments of the four big powers, adopted in Berlin on June 5, 1945, had been still based on the assumption that the four governments "will delimit later the frontier of Germany or of any of her part, as well as the legal situation of

Germany or any which are at present a part of the German territory;"⁴ It might have appeared from the formulation of Article 2 letter d in connection with agreements on occupation zones of the same date and on the mechanism of control over Germany that the supreme authority of the allied powers "over Germany" embraced territories situated within the frontiers as of December 31, 1937. In fact, however, the Soviet Union on its part left Poland completely free to take over the Recovered Territories under her own administration, while the other big powers did not use their prerogatives in the Allied Control Council to prevent such a state of affairs. A definite recognition of the situation is contained in the Potsdam Agreement. While interpreting this document one must take into account the statements made by E. Bevin, J. F. Byrnes and J. Stalin in the discussion on the subsequently approved American draft of the relevant provisions of the agreement, held at the eleventh plenary meeting of the Potsdam Conference on July 31, 1945.

In spite of this loophole, however, which I am personally inclined to consider as essential, there is no doubt that L. Ehrlich's book is very valuable.

It is a skillful combination of a lucid presentation of institutions of international law and arguments of the Polish *raison d'état* based on them. The emphasis laid on the provisions contained in the Yalta Agreement, carried out by Poland on her part, and confirmed by the big powers in Potsdam, considerably strengthens the position of our country. Ludwik Ehrlich's conception demonstrates also that Poland has an indisputably better historical title to the Recovered Territories than Germany. In this respect the book differs favourably from the rest of the literature on this problem. The Author has presented the legal foundations of the territorial sovereignty of the Polish state in its western and northern territories in a way which it is virtually impossible to question in all honesty. It is only a pity that foreign readers have not been referred to the many foreign language publications written by such renowned experts on the problem as A. Klafkowski, B. Wiewióra, R. Bierzanek, M. Łachs and K. Libera. The Polish science of international law has really tremendous achievements in this field, and readers should be constantly reminded of this.

Andrzej S. Nartowski

Andrzej GÓRBIEL, *Konieczność wojskowa w prawie międzynarodowym*, [Military Necessity in International Law], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego," 1970, Prace Prawnicze, No. 44, 86 pp.

The legal significance of necessity in international law in general, and of military necessity in the law of armed conflicts in particular, are controversial problems which give rise to animated discussions. As regards Polish literature, there was so far no work pertaining directly to these problems. A. Górbiel's

monograph tries to fill in this gap.

The work consists of six chapters: I. Introduction, II. *The Origin and Development of the Problem*, III. *"The Situation of Higher Necessity" in International Relations*, IV. *The Essence and the Scope of Military Necessity*, V. *The Problem of the Clause of Military Necessity*, VI. *The Doctrine of "Kriegsräson."* In my opinion the number of introductory remarks is too large in comparison with the material dealing directly with the problem in question.

⁴ Quoted from: *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* [International Law and Diplomatic History. Selected Documents], ed. by L. Gelberg, vol. III, Warszawa 1960, p. 135.

The author gives in his introduction a survey of views on the law of war in general and *suprema necessitas* in particular. He emphasizes the tremendous merits of E. de Vattel whose works close the early stage of the formation of the conception of military necessity.

Next the author passes on to the problem of "the situation of higher necessity" in international relations, justly rejecting the thesis that the situation of higher necessity has been sanctioned by international law. In the author's opinion this cannot be justified either by international practice, judicature or doctrine. Neither can it be justified on the basis of the conception of the fundamental rights of states or general principles of law in the meaning of Article 38 item 1 (c) of the Statute of the International Court of Justice. The author is also right when he rejects self-defence and reprisals as bases for military necessity.

The term "military necessity," in distinction from the terms "state necessity" and "war necessity," serves for the definition of three notions: 1) the principle of military necessity in the material sense within the binding norms of *iuris in bello*, permitting the use of means of compulsion "solely within limits really indispensable for the achievement of a direct aim of war" (p. 48), 2) the clause of military necessity in the formal and legal sense as an express reservation in the text of an international treaty, permitting as an exception the evasion of one of the general prohibitions limiting the freedom of the conduct of war, 3) the "reason of state" (*Kriegsräson*) as an uncontrolled factor "permitting the infringement of any one binding rule of *iuris in bello* without exception, whenever its observance could prevent or even hamper or delay the execution of a combat task." (p. 49).

An analysis of primary source materials leads the author to a definition

according to which military necessity means "permissibility of acts performed during a war, really and directly indispensable for the military overpowering of the enemy, consisting in the use of means which stand in proper proportion to this aim and are not forbidden by international law." (p. 50).

One could hold it against the author that he does not disprove the doctrine of *Kriegsräson*, but only tries to modify its meaning with the help of such a definition. The doctrine has no place whatever in contemporary international law, and treating it historically it constituted only a degenerated political argument of Prussian militarism.

In his remarks on the clause of military necessity in the formal and legal sense the author justly says that if it is not contained in a provision, "then that provision must be observed in all circumstances, even under conditions of the most 'urgent' or 'compelling' necessity" (p. 59). On the other hand, it is difficult to agree with the author's thesis alleging that the clause of military necessity contributes to "strengthening the effectiveness of the treaty law of war" (*ibid.*). In its general formulation it always contains a potential risk of abuse and arbitrariness of acts. Neither should one forget that the introduction of the majority of clauses of military necessity in the Hague conventions was due in a large degree to the diplomacy of Germany, a country which had then the strongest land army at its disposal.

It is regrettable, therefore, that the author did not devote enough attention to the problem of the clause of military necessity, which constitutes the principal core of the question of military necessity in general.

But for all that, Andrzej Górbiel's book is an interesting contribution to the problem of the law of war.

Tadeusz Jasudowicz

Marian IWANEJKO, *Międzynarodowy Trybunał Sprawiedliwości [International Court of Justice]*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego — Prace Prawnicze," No. 45, 1969, p. 118.

The treatise of Marian Iwanejko is the first book published in Poland on problems of the organization and functioning of the International Court of Justice. In a certain sense it is also an attempt at summing up the nearly 50-year achievements of "international judicature in the strict sense of the term." For the author, especially as regards examples illustrating the principles of procedure, resorted frequently to the practice of the Permanent Court of International Justice (see, for example, pp. 54, 74, 64 and 85). He explained this also in the introduction to his work when he wrote that although "from the formal point of view one cannot speak of continuity between the ICJ and its predecessor" there exists more proofs than is necessary [...] justifying a comparison or even identification of the two tribunals" (p. 9). The method is correct in every respect, even if only in view of the weight that the Court itself attaches to the concurrence between its judicature and the judicature of its predecessor.

The work of M. Iwanejko has a clear and logical construction. The chapter devoted to the structure of the ICJ, which contains fundamental data concerning the composition and organization of the Court, gives the Polish reader, who so far had at his disposal only some less or more general information contained in various manuals, a systematic lecture, as comprehensive as the size of the work permits. The author presents in this chapter the degree of representativeness of the Court by analysing the national origin of its judges. He is wrong, however, to treat Asia and Australia as a single region in this case. The author investigated also the degree of universality of the work of the Court. The author has compiled a table showing how many times the

states of various continents applied to the Court in the twenty years under review (1945 - 1966). The author's conclusion that the International Court of Justice, similarly as the Permanent Court of International Justice, has maintained largely its European character (p. 32) is justified. He is also right in remarking that a number of states of the "third world" holds a negative stand on the question of the recognition of the so-called compulsory competence of the Court. The author did not take into account, however, the systematic increase in the number of declarations made with this regard by the Afro-Asian states as compared to the number of declarations made by the remaining states (e.g. 6 out of 32 in 1948, 10 out of 38 in 1961, 16 out of 42 in 1966).

There is no doubt that the chapter on the competence of the ICJ is one of the most interesting parts of the book, both in view of the subject itself and the method of approach which is marked by a synthetic and at the same time penetrating and, considering the size of the work, full presentation of complicated problems.

The author's view that a decision of the Security Council may form indirectly the competence of the Court (p. 34) does not seem correct. The author quotes Article 25 of the Charter, in which UN members agreed to accept and carry out the decisions of the Council, and writes next that "the Council is committed, in accordance with Article 36 paragraph 3 of the Charter when issuing such a decision" to take into consideration the fact that controversies of a legal nature should be submitted to the Court (p. 47).

In spite of what the author says, Article 36 paragraph 3 of the Charter does not empower the Security Council to adopt decisions from Article 25 of the

Charter. It speaks only of recommendations which the member states need not carry out. One can hardly consider, therefore, that they could, even indirectly, set the competence of the Court, especially as in its verdict on the Corfu Channel Case the Court did not base itself, as the author himself concedes, (p. 47) on a recommendation of the Security Council, but on the contrary, it recognized that both sides, that is Albania and Britain, had accepted its competence.

The closing chapter contains a balance sheet of the activity of the ICJ. The author presents here an analysis of quantitative results and a description of its judicature from the point of view of the nature of its cases. Stating that "a considerable part of legal arguments in the Court's judicature to-date were occupied by problems of competence and procedure," the author emphasizes that in this respect "the judicature of the Court has the richest achievements [...] valuable inasmuch as it sets detailed

norms for the schematic treatment of certain questions in the Statute and the Rules" (p. 106). At the same time, in the concluding remarks to this chapter the author joins the almost universally expressed opinion of the decreasing role of the ICJ in contemporary international life. In this connection he expressed the view that in the "very principle adopted as the basis by the Charter, the role had been considerably limited" (p. 109).

The interesting and valuable work of M. Iwanejko fills a serious gap in Polish literature. One may hope that it will contribute to an increase in the interest taken in our country in the function and activity of the Court, whose judicature has a strongly rooted position in science. Neither must it be forgotten that a Polish judge belongs from the very beginning to the International Court of Justice.

Adam Basak

Stanisław KAZMIERCZYK, *Umowa Międzynarodowa jako źródło prawa wewnętrznego Polskiej Rzeczypospolitej Ludowej* [*International Treaty as the Source of Municipal Law of the Polish People's Republic*], Wrocław 1968, "Acta Universitatis Wratislaviensis," No. 91, "Prawo XXIV," p. 113.

This is a treatise whose substance bears on problem of mutual relations between treaties and municipal law. We all know that this is one of the most complicated fields of the law. In view of the existence of such enormous world literature, some of its items justly ranged among classics, it is hard to write something new; this is why we approach any new publication in this branch with some mistrust.

In the given instance we have to deal with a concrete work. The author laid exactly down in the title, and in the text too, that what he is interested in is the analysis of the meaning of inter-

national treaties for the Polish municipal law.

It will probably not be an excessive simplification to claim that, in Poland, an international agreement must be ranged among sources of the municipal law. The signature of a state representative on a document, ratified in accordance with the constitution, implies its observance. Incidentally, it is in just that way (with some differences in technical details) that, almost everywhere in the world, problems of validity of the legal force of treaties have been settled. Some agreements concluded by the supreme organs of administration

are not sent to the parliament or to its executive body (e.g., the Council of State in Poland). Such executive agreements (as in the USA) are approved in Poland by the Council of Ministers and, in the opinion of certain authors, both approving acts (by the government or parliament) are to be treated as having equal value. In Poland, international agreements approved by the executive authority prevail, both as regards their number and importance. It has to be remarked that certain complications may arise when we have to decide whether an agreement is self-executing or non-self-executing.

It is to be put to the credit of the author that he does not expand the theoretical part of his book to discuss the theories of monism, dualism, transformations, etc., many times before described and criticised in world (and also in Polish) literature. The author himself favours, and justly, the theory of "applications," seeing no need for using in

science the terms transformation or incorporation. Interesting, on the other hand, is the information that, in Poland, even in the stage of preparation of an international agreement, the fact whether the municipal law is, or is not compatible with the agreement to be concluded some time in the future is examined beforehand. This shows how great a role is paid to make the treaty and the home law concord, which problem is among the most crucial ones where international law and the local constitutional law meet.

The book by Kaźmierczyk is a useful one. It provides many well arranged information that legal circles in this country are not familiar with; that information has been well commented, some interesting concepts were added to it; and it will help to promote research in this not only complicated, but also attractive branch of legal science.

Wacław Szyszkowski

Alfons KŁAFKOWSKI, *Obozy koncentracyjne hitlerowskie jako zagadnienie prawa międzynarodowego* [Nazi Concentration Camps as an International Law Problem], PWN, Warszawa 1969, 104 pp.

The work consists of six chapters bearing the following titles: *Legal Bases for Qualification of Concentration Camps*, *Concentration Camps as a Criminal Organization*, *Camps as a Chief Tool in the Implementation of the Nazi Programme of Genocide*, *Biological Losses of the Polish Society Caused by the Terror of the German Occupant*, *Losses of Other European Nations Caused by the Terror of the German Occupant*, *Criminal Organization of Concentration Camps and Jurisdiction*.

As Professor Kłafkowski rightly pointed out, books on concentration camps are mostly historical works, that is why a work on that subject which is of a purely legal character fills a gap in the Polish law-and-science literature.

Facts about concentration camps were provided primarily by evidence materials submitted to the International Military Tribunal in Nuremberg and consisting of official German documents and documents handed in by victim states. The report on war losses and damages sustained by Poland in the years 1939-1945 and an indictment act submitted by Poland to the Nuremberg Tribunal, were the basic Polish official documents. The author used also materials collected and compiled in recent years. To give a legal qualification to concentration camps the author refers to: the 4th Hague Convention of 1907 on laws and practices of a ground war, the Moscow Declaration of 1943, the Potsdam Agreement of 2 August 1945,

the statute of the International Military Tribunal of 8 August 1945, and the Nuremberg verdict.

As Professor Klafkowski has proved, the German policy of mass extermination of whole ethnical groups or even nations was very closely linked with the organization of concentration camps.

German concentration camps were an organization set up with an aim to commit a crime against humanity (p. 26). There arises a question in this connection why these camps were not described as a criminal organization in the Nuremberg verdict. The latter recognized only the following organizations as criminal: NSDAP (*Nationalsozialistische Deutsche Arbeiter Partei*), Gestapo and SD (*Sicherheitsdienst*), SS (*Schutzstaffel*) and — with certain reservations — SA (*Sturmabteilungen*), while concentration camps were rated among criminal organizations only in an indirect way, on account of close organizational ties between the camps and the above organizations, in the first place with the SS.

The formal reason for not qualifying concentration camps as criminal organizations *sensu stricto*, was the fact that they were not included into the indictment act.

In professor Klafkowski's opinion, the final and indirect qualification of concentration camps as criminal organizations was made in Poland in the verdicts of the Supreme National Tribunal (at the Oświęcim (Auschwitz) and other trials).

There is a close resemblance between the verdicts of the Supreme National Tribunal and the Nuremberg verdict, the same as between the Polish law, especially the decree of 31 August 1944 on punishments for Nazi criminals (uniform text, "Dziennik Ustaw" — "Journal of laws" — No. 69/1946, item 377), and the norms of international law settling the question of responsibility of war criminals.

The above decree says that criminal

groups and organizations are those which set themselves the aim to commit crimes against humanity, crimes against peace, and war crimes or, otherwise, organizations which seek other aims but tend to achieve them by committing the aforesaid crimes (Art. 4, para. 2, letter a and b). Criminal organizations are enumerated in Article 4 paragraph 3, and these are in line with the decisions of the Nuremberg verdict. However, the formulation used in the article, saying that "participation (in those organizations) in particular is a crime," indicates that the enumeration serves as an example and therefore, under Polish criminal legislation, courts in this country can recognize other organizations as criminal ones. Passing its verdicts, the Supreme National Tribunal referred to Article 4, paragraph 2 of the mentioned decree and ruled that concentration camps were a criminal organization.

In his book the author devotes a special place to the description of the crimes committed by Wehrmacht in concentration camps. This part of the work is all the more valuable as until now the horrible crimes committed by Wehrmacht have not been amply clarified or described. Quoting numerous source materials the author proves that during war operations in Poland and in other countries Wehrmacht not only shielded all acts of mass terror and extermination but that Wehrmacht troops, together with SS formations, served in concentration camps.

One of the unquestionable merits of the book under review is its clarity and conciseness. Professor Klafkowski not only presents the problem of Nazi concentration camps as a criminal organization, but also explains why the problem of war crimes and genocide (especially those committed by Wehrmacht) has not been completely solved yet.

Leon Szpak

Alfons KŁAFKOWSKI, *Granica polsko-niemiecka po drugiej wojnie światowej* [Polish-German Frontier after the World War Two], Wydawnictwo Poznańskie, Poznań 1970, 118 pp.

The work under review has been written by an outstanding expert in legal problems of the liquidation of the consequences of World War Two. To use the author's words, the aim of the book is "to present in a synthetic manner the basic legal problems involved in the process of formation of the Polish-German frontier after World War Two" (p. 5).

The work consists of five chapters, of which: the first deals with the legal bases for the final settlement of the Polish-German frontier; the second analyses the frontier as the basis of the European territorial system; the third describes the problems involved in the integration of the Western and Northern Territories with the Polish State; the fourth discusses the guarantees of the frontier's security in the system of Poland's agreements with her allies; finally, the fifth brings the author's thesis saying that the Potsdam agreement replaces a peace treaty with Germany.

The author examines in turn the three main phases of settling the frontier issue between Poland and Germany and divides the respective article into three parts which deal with: political decisions according to the Yalta agreement, delimitation of the frontier according to the Potsdam agreement; and the act of January 27, 1951, on the demarcation of the Polish-German frontier. It is rightly pointed out that since the Potsdam agreement does not define forms and ways of how the Western and Northern Territories should be managed, the principles and norms of the international law and of the practice of the Polish State which is territorial manager administrator, must be binding in this respect. It is made clear by the author that the ultimate aim of the adminis-

tration is to "integrate the Recovered Territories with the rest of the Polish State" (p. 16).

The author argues that since "from the moment when Poland took over control of those territories Polish State organs have been exercising power there on their own behalf, this stopped to be a problem of international law and became a problem of Polish municipal law" (p. 16). We should add, that the problem has legal international implications because an effective administration of these territories for a quarter of the century is an additional affirmation of the sovereign right of Poland to the Western and Northern Territories.

The author rightly claims that the treaties concluded by Poland and the German Democratic Republic are acts concerning the established and existing frontier between Poland and Germany, specifying the decisions of the Yalta and Potsdam agreements." The latter will be in force "for an indefinite period of time because the chief goal of these international agreements is to map out the roads of the world's peaceful development after World War Two" (p. 23).

The author is undoubtedly right to say that the settlement of the frontier between Poland and Germany goes beyond the sphere of bilateral relations and, what is more, that "the Polish-German frontier is the foundation of the whole European territorial system" (p. 26). The author proves his thesis in further contemplations about legal consequences of the Law No. 46 of the Allied Control Council over Germany, concerning liquidation of the Prussian state and the Polish-Soviet and Polish-Czechoslovak frontier agreements. The Law No. 46 is rightly regarded to be an executive act to the Potsdam agreement, formally liquidating the actually

non-existing territorial foundation under Prussian militarism.

Professor Klafkowski correctly underlines that the Polish decree of November 13, 1945, on the administration of the Western and Northern Territories cannot be regarded as a Polish act on taking territory in question in possession, but solely as an act regulating the key problem of the organization of administration and integration of those territories with the rest of the Polish state organism. The following elements added up to the complete integration of those territories: political and economic integration combined with the planned action of settlement; unification of the legal system and the meeting of the economic needs of the inhabitants of the Western and Northern Territories; administration of the post-German property and administration of those territories, which was initially handled by the Ministry of the Recovered Land.

Three big demographic processes provide an interesting proof of the final character of the Polish-German frontier: 1) evacuation of the German population at the turn of 1944 and 1945, the range of which and its organized character allow to claim that it was *derelictio*, e.g., the abandonment of the territory by its former administrator and by its inhabitants; 2) the transfer of the whole German population carried out under the provisions of the chapter 13 of the Potsdam agreement and the plans and

supervision of the Allied Control Council; 3) the big-scale action of Polish settlement on the Western and Northern Territories, proceeding gradually as the populating capacity of the land — greatly diminished by war damages — was increasing.

Reflections on the guarantees of the security of the Polish-German frontier include an analysis of the Polish-Soviet treaties of 1945 and 1965, bilateral allied agreements; with other socialist countries and the Warsaw Treaty. The author confronts the above allied agreements which he treats as "expanded principles of collective security" (p. 84), with the Atlantic Pact. Poland's agreements with her allies are referred by the author to the decisions of Article 51 of the UN Charter. But it may be argued that these agreements are mostly of defensive character compatible with the special decisions of Articles 53 and 107 of the UN Charter and admitted even by considerable numbers of western scientists.

In the concluding part of the book the author puts forward a right thesis that "the execution of the Potsdam agreement is tantamount to a peace treaty with Germany" (p. 110).

Professor Klafkowski's book is a valuable contribution towards broadening the knowledge of legal problems of the Polish-German frontier.

Tadeusz Jasudowicz

Zbigniew M. KLEPACKI, *Zachodnioeuropejskie zgromadzenia międzyparlamentarne* [West European Interparliamentary Assemblies]. A comparative study, Książka i Wiedza, Warszawa 1967, 301 pp.

One of the attributes of the current international relations is a particularly strong development of institutionalized forms of cooperation among states. An expression of this are, i.a., the endeavours of states to find new structural

and competent means of setting up international organizations. In the work under review, Z. Klepacki deals with one of the most interesting instances of these new endeavours, namely the appearance in the structure of interna-

tional organizations of organs of a new type described as "assemblies," "advisory assemblies," or "interparliamentary assemblies." The essence of these organs consists in the fact that, in principle, they are composed of parliament members of the countries involved.

The author has dealt with an extensive field, having presented in a comparative way all the existing and operating instances of interparliamentary cooperation of states, especially West European. He considered the following bodies: Advisory Assembly of European Council (1949); Nordic Council (1953); Assembly of the Western European Union (1955); NATO Parliamentary Conference (1955); Inter-parliamentary Advisory Council of Benelux (1956); Assembly of European Communities — the so-called European Parliament (1958).

The problems of bodies composed of members of parliaments of participating countries may be analysed in a variety of ways. They may be considered from an angle of international political science. In this case the following have to be considered: the origin of inter-parliamentary assemblies; changes in their structure and competences arising in their work; and, an assessment of further and broader opportunities for using organs of this type in international cooperation.

It is also possible to look upon inter-parliamentary assemblies from the point of view of theory of international organizations. In that case, the principal object of analysis will be the legal nature of the assemblies themselves, of their functions, and of the persons composing them. An analysis of this kind cannot be limited to discussing the contents of statutes, but must also take into account the legal consequences resulting from the fact that, as a rule, inter-parliamentary assemblies constitute an organ of intergovernment organization.

Finally, presentation of the problems of interparliamentary assemblies may

assume a form of a comparative study. This implies discussing by means of comparisons the basic issues connected with the composition, organization of work, structure and functions of the various assemblies. A comparative study of this kind should be supplemented by an analysis of their major past activities.

Generally speaking, Z. Klepacki's work embodies all three above methods of presenting the problems concerning interparliamentary assemblies. Nevertheless, the last mentioned has determined the construction of the whole. Hence the work takes a form of comparative study.

The problems connected with the part played by assemblies in the development of international relations are discussed in the main in the part devoted to the origin of the West-European interparliamentary assemblies (foreword), in an analysis of the evolution of functions of assemblies in the course of their activity (chapter VII), and in the conclusion. The author is correct in detecting the basic reason for setting up these assemblies in a general movement towards unification of Western Europe, in the striving of national parliaments to obtain opportunities for voicing their views on an international forum, and in the necessity of appointing within the framework of international organization bodies endowed with advisory and supervisory capacities. However, it is debatable whether the author pointed out with sufficient clarity the difference between the origin of West European organizations generally, and the origin of the assemblies themselves, as special organs of international organizations, and whether he made a clear distinction between the origin and the development of preparatory work which resulted in the emergence of the various assemblies. A lengthy introduction indicates that the author did not intend to deal in greater detail with the just mentioned elements

of the origin and development of interparliamentary assemblies. The arguments contained there are basically an introduction to the main substance of the work.

An analysis in the chapter devoted to the evolution of the functions of assemblies is important for appraising the future opportunities for setting up organs in the nature of "interparliamentary assemblies" in international organizations. The author's arguments indicate that in the course of the past activities of such assemblies, supervisory and advisory functions have developed the most, and "legislative" functions the least. It seems that the author failed to give adequate attention to the question whether the functions of assemblies have not been developing primarily in the direction of consolidating the broadly understood advisory tasks. It is advisable to bear in mind that it is precisely the development of the latter with progresses in conformity with the origin of the majority of assemblies. On the other hand, as regards supervisory functions, the most effective provisions in the treaties setting up European Communities, i.e., the possibility of forcing executive organs independent of member states to resign, has not found practical application.

A more detailed presentation of the basic directions of development of the functions of assemblies would have made it possible for the author to justify more fully the opinions expressed in the conclusion. This applies primarily to the statement that the concept of an interparliamentary assembly as an organ enabling national parliaments to be active in an international field had found "a definite place in the system of institutions of international cooperation" (p. 285). The closing sentence that "it seems that [...] it is advisable to examine the possibility of setting up an interparliamentary assembly of this type in the system of organizations of the

socialist states" (p. 286), would have then carried greater weight.

An analysis of interparliamentary assemblies from the point of view of the theory of international organizations has found the main expression in the evaluation of the legal standing of members of such assemblies (paragraph 1, chapter II), and in analysis of their statutory functions (chapter VI). The author considers the members of assemblies to be a new category of persons composing the organs of international organizations. Reflecting on their legal status the author arrives at a number of interesting conclusions, which he deliberately makes debatable in view of the considerable theoretical difficulties.

Members of such organizations as the Nordic Council of the Interparliamentary Advisory Council of Benelux are — in his view — delegates of parliament of the member countries. On the other hand, members of the majorities of other assemblies, namely the Assembly of European Communities, the Advisory Assembly of European Council and the Assembly of the Western European Union are — he says — primarily representatives of the populations of the member countries, in consequence of ideological premises, lying at the basis of their foundation. Members of the Conference of NATO Parliaments belong to a special category. Considering the non-governmental nature of this body, the author calls them "representatives of themselves, or of parliamentary circles which delegated them to this assembly" (p. 97).

The author argues convincingly in support of his views on the legal status of members of assemblies. Nevertheless, the appraisal would have been fuller, had it been done not merely from the consideration whom these persons represent, but also in the face of the legal consequences resulting from their membership of an organ of international

organization. Moreover, it would have been advisable to link more closely the assessment of the legal status of members of assemblies, with the nature of functions which they have to carry out in the various international organizations. It should also be borne in mind that it is precisely an analysis of these functions which subsequently leads the author to draw the correct conclusions on the subject of the nature of interparliamentary assemblies. They are most aptly expressed in the statement "it would be absurd to compare them with national parliaments and to treat them accordingly" (p. 191).

An analysis of the functions of assemblies according to the division between supervisory, advisory and legislative functions, is one of the author's most interesting theoretical considerations. Without being guided, in principle, by the patterns used in national parliaments, he makes a successful attempt at analysing the specific elements of competence of interparliamentary assemblies in their capacity as organs of international organizations. One may only question the point of adequate differentiation in the special group of "legislative" functions. Because, on the one hand, the scope of these functions of interparliamentary assemblies is very modest, and on the other hand, they essentially differ from the similarly defined functions of national parliaments.

The general arrangement of arguments contained in the work conforms—as has been pointed out—with a comparative presentation of the basic problems of the structure and competence of interparliamentary assemblies supplemented by an analysis of the most important directions of their activities. Accordingly, the author deals in consecutive chapters with: a) composition of assemblies, b) members of assemblies, especially as regards initiation, duration and expiry of their terms of office; c)

organization of work of assemblies; d) structure of assemblies; e) finances, privileges and immunities of assemblies in localities where their sessions are held; f) functions of assemblies; g) evolution of the functions of assemblies in the course of their activity; h) principal directions of work of assemblies.

The comparative presentation of the above has been done on the basis of their thorough knowledge. The author devotes most space to the Advisory Assembly of European Council and the Assembly of European Communities. In view of their most elaborate structure and competence, these assemblies have given rise to the greatest number of practical issues, and have furnished the grounds for a number of works connected with the doctrine.

Analysing the various problems, the author tries to avoid a dogmatic treatment of provisions of statutes and rules. His arguments are designed to present interparliamentary applicable in practice. This is mainly expressed by considering the majority of problems not statically but in the light of their development. For example the author deals at length with the problem of political groups in the assemblies, since these groups provide one of the most important indications of the evolution of their structure (paragraph 4, chapter IV).

One could ask whether the author did right in selecting as a basis for the whole analysis the last of the listed methods of presenting the problems of interparliamentary assemblies. This question should be answered in the affirmative. There is a shortage of publications in Poland on the subject on interparliamentary assemblies in international organizations. Hence what was primarily needed was a work in which the most important, practical problems of interparliamentary assemblies are discussed on the basis of assiduously amassed reference materials. Of these, the most important are problems which the author

gives the fullest treatment. There are, in particular: distribution of seats in assemblies among member countries; the manner of electing members of assemblies; personal composition of assemblies; the term of office of members, and other questions connected with the organization of work, structure and functions of assemblies. The author presen-

ted in full most of these matters and based his interesting monograph on extensive reading and work of reference derived directly from international organizations, particularly from the inter-parliamentary assemblies themselves.

Andrzej Ciałus

Zbigniew M. KLEPACKI, *Zachodnioeuropejskie organizacje międzynarodowe* [West European International Organizations], Książka i Wiedza, Warszawa 1969, 440 pp.

The book consists of two parts: in the first one the author discusses international, political, military and paramilitary organizations; in the second — more or less specialized international organizations of technical character. Thus, the first group comprises 12 following organizations: Organization for Economic Cooperation and Development (OECD), Council of Europe (CE), North Atlantic Treaty Organization (NATO), European Coal and Steel Community (ECSC), European Defense Community (EDC), European Political Community (EPC), Western European Union (WEU), European Atomic Energy Community (EURATOM), European Economic Community (EEC), European Free Trade Association (EFTA), Benelux Economic Union, and Nordic Council. Two of the above mentioned organizations, i.e., the European Defense Community and European Political Community do not exist anymore: they have been mentioned in the book only because they belonged to a certain stage in the shaping and development of the cold war doctrine in Western Europe.

As concerns technical organizations, the author discussed seven of them, i.e.: the Central Commission for Navigation on the Rhine, European Conference of Ministers of Transportation, European Civil Aviation Conference, European Organization for Nuclear Research, Eu-

ropean Organization for Aviation Safety, European Organization for Space Research, and European Organization for Development and Designing of Space Rocket Carriers.

As explained in the preface, the author tried to discuss all the above organizations in chronological order, according to the dates of their establishment.

Writing on each of the above mentioned organizations, he first outlined its origin, then gave a concise characteristic of its purposes and tasks, membership, organs, finances and activities. The EEC was most widely discussed. Unable — for shortage of space — to report on all, or at least most of the organizations being subject of the reviewed book, I would like to draw the reader's attention to some features they have in common and problems being their consequence. Following Mr. Z. Klepacki's reasoning, let us stop for a while at the origin, targets and tasks of these organizations.

While in case of technical organizations practical needs of coordination of some economic sector lie, as a rule, at the source of their establishment, one can find broad ideological, political and economic motives at the foundations of organizations discussed in the first part of the book. While ends and tasks of technical organizations refer, as a rule,

to the signatories of partners who did call them into being and, do not, generally, interfere with the interests of third parties, the aims and tasks of Western European political, military and economic organizations are directed explicitly against socialism in Europe and the world.

It seems, too, that the author did not explain clearly enough the reasons for establishing not the largest in size, but economically most important West European organization—the EEC. It appears that attention should be called in this case to the following main factors: a) the need for adaptation to changes in development of productive forces and overcoming controversies between the demands of international division of labour and the respective extensive economic areas and the political borders of European states outlined in the course of history; b) the attempts to eliminate the negative results of the crash in world economy after the Second World War; c) the problem of defending European monopolies' interests against the expansion of stronger and better organized American monopolies, and d) the already mentioned political reasons, i.e., chiefly attempts at creating a barrier against spreading of socialist ideas. The author does notice, of course, all these political reasons and stresses their various aspects on other occasions. Thus, for instance, referring to NATO activities, he states that this organization "was created in order to maintain and strengthen the capitalist system, chiefly in Western Europe, to create possibilities for its member countries, and the United States in the first place, for discussions with the socialist camp from the position of force and, under favourable conditions, to declare war and destroy it utterly. The NATO main issue is, therefore, a striving to put the competition between socialism and capitalism on the military plane and to settle on this very plane the question of superiority, as

well as victory of one system over the other." (p. 115)

The author gives an interesting account on the channels used by imperialists to gradually introduce the FRG into the NATO. The problem is particularly interesting in view of the above mentioned political motives. A politically, economically and militarily strong Federal Republic of Germany would be a trustworthy US partner in Europe and could play a double role: first—as one of the basic links of the mentioned barrier against the spreading of leftist movement in Western Europe; second—as NATO's main striking force against the socialist camp. As the socialist countries do not make coexistence depend on the development of situation in NATO, do not ask for coexistence but practice it and have sufficient means to carry on, this second role of the FRG will remain further on in the sphere of wishful thinking. That does not mean that it should not be taken into account in the strategy of coexistence realized by the socialist countries.

The next interesting problem are the organs. It is characteristic that nearly all organizations discussed in the first part of the reviewed book have a more or less similar organizational structure. They have, as a rule, an assembly playing the role of a *sui generis* parliament; a council representing the executive body; a secretariat for services, or for doing some research and programme functions, and some number of specialistic committees. This structure, particularly the assembly (for the executive, specialistic and servicing organs are known in non-capitalist international organizations, too) is officially considered in the West as an almost top achievement of democracy. As a matter of fact, however, there is not a single representative of leftist forces in all those European assemblies. In many instances the members of the assemblies are not admitted to many essential prob-

lems being subject of the current activity of the organization in question sometimes having a very vague idea of the professional problems handled by their organizations. Under the circumstances and in accordance with the actual role of these parliaments — not that formally set forth in the treaties — they are a tribune for propagating anti-communist slogans, for shaping public opinion praising the virtues of capitalist market economy and bourgeois public institutions, and discrediting all that “smells of communism.”

The membership in these organizations is restricted almost exclusively to capitalist countries. An exception of special kind is Yugoslavia which received the status of an associated EEC member in 1955, and later in 1961 became “invited” to take part in the activities of the Council and auxiliary organs of the OECD as an observer.

The activities of West European international organizations are discussed by the author most widely and clearly without missing any of their major achievements and shortcomings. Because of the author's conception mentioned at the beginning, the report on these activities does not reach deeper for the causes of successes and failures. Nevertheless, as regards some of them, the author is right, it seems, observing a change in the character of their activities. He writes: “At the same time a certain refraining is to be noticed from taking up by the Europe's Council resolutions attacking the socialist countries directly; its many suggestions addressed to the latter rely — as compared with

the past years — on more realistic premises. As stated above, however, the modification of the Europe's Council's policy toward the socialist countries is, for the main part, a result of changing by imperialist forces the tactics in fighting with our camp, switching from an open attack against the socialist system to ideological subversion.” (p. 95 - 96).

Among several small errors made by the author, worth notice is a certain formal inaccuracy. Speaking on page 19 about the problems of unification of Western Europe the author outlines in short the so-called “federal conceptions” and “functional conceptions” postulating an establishment of exclusively coordinating organizations based on principles of unanimity. On page 20 he states that “the United States supported both directions of integration of Western Europe.” It is obvious that an organization of “an exclusively coordinating character” cannot be considered an integrating organization because coordination is one of the elements of integration and that of secondary importance as compared with the processes of unification.

Some shortcomings and small errors which drew my attention and on which I did not comment because of the lack of space, do — by no means — diminish the value of the reviewed book. I consider it an important achievement. It will certainly fill out, to a considerable extent, a gap existing so far because of the lack of a monography dedicated to West European international organizations.

Lucjan Ciamaga

Jan KOLASA, *Rules of Procedure of the United Nations General Assembly. A Legal Analysis*, Ossolineum, Wrocław 1967, 207 pp.

The author tackles a subject of considerable topicality and at the same time of great scholarly value, namely what

is the legal character of resolutions passed by international organizations, and in particular of the rules of pro-

cedure of the UN General Assembly. The development of international organizations in the last few decades and their adoption of numerous resolutions, either of an internal nature of affecting to a greater or smaller extent the legal situation of member states, causes the appearance of a considerable quantity of norms of behaviour which can be treated as belonging neither to the law of treaties or to the law of customs. In the light of the present situation the classical view on the two above-mentioned sources of international law proves insufficient and it becomes necessary to determine more closely the legal essence of the resolutions passed by international organizations. Although the author evaluates too critically, in my opinion, the present state of research in his field stating at the outset that the study of the problem of the legal character and binding force of the resolutions and decisions of various organs of international organizations "is still at the stage of introductory research and rather intuitional and at the same time very controversial generalities." It is a fact that the problem has been discussed in a number of serious works and scholars have formulated certain views with regard to the legal essence of resolutions of this kind. However, one has to agree with the author that this is a new problem requiring further thorough research. Particularly neglected is the evaluation of the legal character of procedural resolutions. And as may be seen from the practice of international organizations, procedural discussions take up much time at the assemblies and meetings of many organs of international organizations, and it often happens that procedural disputes reach the rank of important political controversies.

The author carries out a detailed and penetrating analysis of the rules of the UN General Assembly both from the point of view of the historical develop-

ment of the rules of international organizations and the genesis of the binding rules of procedure of the United Nations General Assembly, as well as the content and to-date practice of their application. I find that for the first time in the science of international law has this problem been submitted to such a thorough and all-round legal and political analysis. The conclusions drawn from the study of the rules of procedure of the UN General Assembly may hold for other rules of procedure too. But his concentrating on a single set of rules permitted the author to carry out a sound analysis of the text and the practice followed, and thus avoiding a scattering on the analysis of the great multitude of international organizations.

Two main groups of views on the legal essence of the rules of procedure of international organizations exist in the doctrine of international law. One view is that rules of procedure belong in the widely understood category of the law of customs, and treats them as a special kind of agreements reached in an indirect manner, or assuming that the notion of an international agreement embraces not the provisions of the agreement itself, but also the consent to the issuance of indispensable rules by organs set up by that agreement. Others attempt to create a separate category of legal provisions either of international law or a category of general law, embracing a so-called internal law of international organizations. Dr Kolasa criticizes both views. The author says that provisions of rules of procedure do not belong to the set of norms of the international law of treaties, "because they are not made or function in a manner peculiar for treaty norms." Dr Kolasa rightly accuses the second group that the notion "internal law of international organizations" is still fluent as regards its scope and substance. This category would have after all to include also the provisions of the law of trea-

ties (e.g., agreements concluded by international organizations). Accepting as the criterion the manner of the creation of the relevant provisions, the author classifies the provisions of rules of procedure in the category of adopted law which is becoming increasingly more important side by side with the law of treaties and the law of customs in the period of the present active operation of international organizations. Thus states would participate in a threefold manner in the process of the creation of legal norms, expressing their consent to them either in an agreement or by applying them in practice as legally binding norms or participating in the process of the adoption of specified norms by organs of international organizations.

This kind of view has certain virtues in comparison with the groups of views mentioned above, which either bind the resolutions of organs in an artificial manner with the agreements which have set up these organs, or formulate specified generalities with reference to the internal law of international organizations whose scope has not been definitely decided, particularly as regards rules of procedure which go farther than the scope of duties of the organs of international organizations and always affect to certain extent the rights and duties of states in the international organizations. The conception of adopted law has no weak points of this kind. It could be accused, on the other hand, of being just outlined in the treatise and not presented in a thorough manner. The author has put it forth with a far-going caution treating it as just a hypothesis. It requires development. It should be also clarified what is its attitude to many questions, e.g., international agreements taking effect through voting (draft conventions voted by the international labour conference). It should be also clarified what is the binding

force of resolutions made *praeter legem* in relation to states voting against them.

It is worth emphasizing that his analysis of the rules of procedure of the UN General Assembly has led the author to the formulation of a number of interesting theses which constitute no doubt an original contribution to the problem of the binding force of the provisions of rules of procedure. This includes first of all a well chosen distinction between the authority to adopt rules of procedure and the source of their binding force. The author assumes that the authority to pass rules of procedure is of customary origin, while their binding force is based on the resolution and practice of the organs of a given international organization.

As regards the genesis of the provisions of the Rules of Procedure of the UN General Assembly, Dr Kolasa finds it in the procedural practice of international conference and organizations existing before the foundation of the League of Nations. He devotes much space to this problem. The author justly criticizes the theses represented by very few jurists that the beginnings of the provisions of the Rules of Procedure of the UN General Assembly are to be found exclusively in the procedure of national parliaments. The author admits, nevertheless, that the rules of procedure of international conference and organizations do contain many "loans" from the practice of national parliaments. This inclines one rather to the conclusion that the beginnings of the procedural provisions of the UN General Assembly are not to be looked for in parliamentary practice or the practice of former international conference and organizations, but in both these sources.

Certain critical remarks suggest themselves in connection with the attempt to divide the provisions of the rules of procedure in accordance with their relationship to the UN Charter. The author divides those provisions into: 1) li-

terally taken from the Charter; 2) based directly on the provisions of the Charter and 3) autonomous rules. The second category is divided in turn into provisions: a) based in their entirety on certain provisions of the Charter, b) based on the Charter with supplements offering no grounds for doubt, and c) based on the Charter with essential supplements. Although one may understand the author's striving for a most detailed classification, there is a great arbitrariness in classifying the relevant provisions in different categories. The purpose of such a sophisticated division is

also doubtful. I think that more useful would have been the old distinction of *secundum legem* and *praeter legem*.

My general assessment of Dr Kolasa's book is that it is a bold attempt at a new and creative approach to a problem of great scientific and practical importance. It constitutes a valuable contribution to the science on international organizations. It contributes also to the clarification of the process of the creation of international law in our times.

Remigiusz Bierzanek

Andrzej KWILECKI, *Idea zjednoczenia Europy* [The Idea of European Unification], Wydawnictwo Poznańskie, Poznań 1969, 318 pp.

Problems of integration in Western Europe have been exciting for years not only public opinion and specialists in the countries which are parties to the integration. They have been arousing interest also in other countries which are not indifferent to the process of separatism and rapprochement between France, the Federal Republic of Germany, Italy, Holland, Belgium and Luxemburg, going on within the framework of the European Economic Community. Exhaustive studies of integration processes in western Europe have been made and continue to be made in the United States and Great Britain. Problems of west European integration are also of interest to socialist countries. They are becoming a subject of scientific studies in those countries, especially in Poland. These studies may certainly contribute indirectly to the clarification of many questions facing socialist countries in connection with the increasingly stronger conviction that it is necessary to make cooperation within their camp closer and better.

In these circumstances the book by

A. Kwilecki assumes a particular importance. It owes this role primarily thanks to the way in which problems of West European integration have been discussed. For, in spite of its perhaps a trifle misleading title, the book as it is suggested in the subtitle *Political and Sociological Aspects of West European Integration*, is devoted to problems of the said integration. It presents all the problems involved in a very complex and compact way. This could be done only by an author who has a thorough knowledge of the problem and, what is more, is talented and knows how to select and "transform" the enormous amount of information. A. Kwilecki has proved he possesses this rare and valuable talent. His book reads with un-failing interest just because it throws brief but penetrating flashes on well selected and cleverly presented questions. The author discusses a variety of subjects, ranging from the origins and development of the European Community and the attitude of western powers towards unification of Europe, through ideological genesis of that concept, so-

biological theories of European integration, to the reactions of Poland and other socialist states.

Thanks to such presentation Kwilecki's book can be helpful not only for a narrow group of scientists and scholars but also for much wider sections of the society which take interest in political problems of the contemporary world. Since the author signalizes only some questions and more often puts questions than answers them, his book — it seems — will help to stir interest in the important problems it discusses.

In view of its suggestive and communicative way, which is a feature of the book, and of the important and broad role it can and should play, it is worthwhile to bring to attention some matters which arouse doubts.

A study of that type required a conscious and more consistent approach, proper for political sciences. Concentrating its attention on political processes, political science is able to give a picture more thorough and ample than any other social science, including sociology, and better grasp the essence of West European integration (as well as integration of any other group of countries). As a matter of fact, integration processes in Western Europe and elsewhere are foremostly political processes, although they have a clear background in economic processes and appear in the sphere of social relations which are of a more objective nature. Processes of unification of countries in certain blocs cannot be put into effect without a conscious action by politically guided social movements; without political decisions concerning both long- and short-term goals and tasks, the pace and ways of their implementation; finally, without institutional bodies which give proper frames to the process of taking joint decisions and offer that process a relatively self-acting character.

Integration understood as a process cannot but be featured by such a rela-

tively self-acting institutionalized process of taking joint decisions, for by this feature precisely — and in a quantitative manner at that — it differs from any usual cooperation between states, a cooperation of purely coordinative nature when all joint decisions are made after negotiated agreements.

The author probably knew he would have to analyse political aspects of European integration when he took up the difficult task of presenting in a complex way integration processes in Western Europe. That this was so can be seen in the fact that he gave prominence to political aspects in the subtitle. However, these aspects have not been studied with enough thoroughness or presented in a summiciently broad manner. It is a characteristic feature that the author completely ignored numerous books dealing with political sciences in the literature on European integration. The literature in question throws a light, among other things, on political factors involved in integration and makes attempts to find definition for the notion itself of the integration, which Kwilecki's book lacks totally. Moreover, works on political sciences bring under critical analysis the prospects and effects of international integration and often are sceptical about both. The lack of a similar approach in the book under review is one of its weak sides.

The chapter entitled *West European Integration in Sociological Theory* is exceptionally scant. It consists of 20 pages only and analyses certain opinions of a few western scientists. Even scantier is the last chapter describing the attitude of Poland and of other socialist countries towards the problem of integration.

What is more essential, however, in the last and in previous chapters the author seems to be under the effect of an exaggerated enthusiasm for integration, considering it almost an absolute benefit for the countries concerned.

There is something amazing in the fact that after a period of sharp criticism, when integration was regarded as a process leading to limitation or even liquidation of independence and sovereignty of a state, another opposing view comes to the fore in socialist countries where commentators often praise integration. In doing that they often use arguments embarrassingly resembling those put forward ten or fifteen years ago in the European Community countries. An *a priori* thesis is launched, presented as if it were an objective regularity of social evolution, that without integration understood as unification of smaller social and economic organisms, any solution of the basic tasks of economic and social progress is impossible. Thus, a parallel is drawn between integration and all what is progressive and good, while a lack of integration is equalled to all that is backward and evil. What is more, these simplified assumptions are applied to the situation in developed capitalist and in developing countries, as well as to socialist countries. In effect, the theory assumes the dimensions of an absolute law for the whole humanity.

One can hardly agree with such a viewpoint. In the first place, examples of the social processes of expanding interaction, quoted by the author, concern only some cultural and economic spheres. Moreover, it can be proved that modern capitalist industrial civilization increases social disintegration and limits the life of an individual to an increasingly narrower environment. It can be also proved that disintegration processes do appear in the economic field and that they are by no means of a backward nature, as they foster economic growth allowing, for instance, to meet the growing and differentiating needs after adequately high living standards have been achieved. In politics this is even more evident because the time is long ahead when the state and the nation,

the basic units of international relations and the area in which essential problems of social progress are solved, become obsolete. Thus, alongside integration there are disintegration processes and both were and are possible roads of social evolution.

Without going into a broad argumentation I would suggest a controversial opinion that integration carries a relative and limited value and therefore it can bring definite advantages only under definite conditions. We have to realize also that integration involves definite costs. A correct scientific and political evaluation of that process can be made only in a concrete manner upon the example of a group of states the integration of which is under consideration. The evaluation made can reveal both a positive or a negative balance-sheet of costs and advantages in given conditions, area and time, even for the countries going through the integration process. This balance-sheet will be different under other circumstances, when larger groups of countries are considered. It should be realized that integration of large groups can counterpose one "communities" to others, or to countries left outside, and thus lead to disintegration of broader units. E.g. the European Economic Community has led to disintegration of the world capitalist market.

Careful calculation of the profits and costs involved in integration forms the basis of a reasonable decision-making process. This is the subject of the study of political sciences, as it always bears political implications in the broad sense of the word. In making this calculation economic and, not so easily measurable, social, political and other values should be equally taken into account.

It is a characteristic thing that the enthusiasm for integration, widespread among western political and scientific circles at the end of the fifties, has waned after the experience of the past years and a more sober evaluation of

its effects. The experience has shown that adequate benefits can be reached with success through cooperation other than the integration of a supra-national model.

Although most of these problems have been left unmentioned by the author,

the credit goes to him for spurring many reflections and contributing in this way, too, to our knowledge about the complicated processes of the evolution of the contemporary world.

Wojciech Morawiecki

Kazimierz LIBERA, *Międzynarodowy ruch osobowy*, [*International Movement of Persons*], PWE, Warszawa 1969, 339 pp.

Every year hundreds million people cross state borders in order to spend longer or shorter periods of time abroad, sometimes far away from their homes. The very dimensions of this phenomenon imply that it forms *signum temporis*. At least for this reason it deserves particular attention of experts in many fields, and first of all — of lawyers.

The expansion of the international movement of persons was not given due weight in the legal sciences until recently. The situation has changed since 1956, when the Minister of Higher Education decided to set up a section of legal and economic problems of tourism at the Department of Foreign Trade of the Central School of Planning and Statistics. The Section carried out a number of studies on the international movement of persons. It also attracted many Polish and foreign contributors to its periodical publications "Ruch Turystyczny (Materiały i Dokumenty)" and "Ruch Turystyczny (Monografie)". The author of the book under review was one of the founders and the head of this Section.

Międzynarodowy ruch osobowy [*International Movement of Persons*] is not the first work published by professor Libera on the theme, but certainly the first legal study, probably not only in Poland, dealing in such a comprehensive way with the subject.

The book discusses "the type of the international movement of persons which

in time of peace covers in principle individual [...] journeys from the home country or the country of permanent residence undertaken for the purpose of either settling abroad and remaining there permanently or staying abroad for a time" (p. 10). The theme so defined required the author to examine "the movement of individuals within the area covering the territories of many sovereign states, subject therefore to certain norms of both international legal order and the municipal law of states whose nationals they are or where they stay or have permanent residence" (p. 11). The undertaking was by no means easy. It was necessary to examine the respective norms of international law but also those of constitutional and — to a great extent — of administrative law of many countries, as well as of other relevant fields of law.

The book exhibits a profound expertise of the author in the law extending over the entire globe, with immense historical scope. Consequently, the reader can acquaint himself with law binding currently but can also learn what legal rules governed the relations in the field in any of the social and economic formations. The historical leaning of the author made itself felt both in the historical introduction and in the remaining three parts of the work. This method, combined with precise selection and analysis of the basic legal problems

within the area of the international intercourse, yields a full and diversified image of the legal aspects of the phenomenon investigated by the author. His perfect knowledge of history transpiring from the work under review relates to all eras. The latitude with which he introduces historical arguments to bear against the views of some students contending that in the antiquity "the international movement of persons was ruled out" is one more evidence of the historical expertise of the author. Adducing a great number of historical sources, he proved that to this thesis there had been "many exceptions [...] sometimes so numerous that in certain regions and times they almost amounted to a rule" (p. 14ff). It follows from the historical observations of the author that the bulk of the international movement of persons in ancient times, and in the succeeding periods as well, was closely connected with economic intercourse. In our times conditions have changed and the flow of goods from the manufacture to the consumer in another state does not require physical presence of the travelling merchant. Nevertheless even now those crossing state borders in connection with the ever growing international trade form the bulk of the international movement of persons. In fact not only travels resulting directly from the international trade, as understood traditionally, but also all other forms of the international movement of persons dealt with by the author have close links with the economic life in several states. It is enough to acquaint oneself with the main categories of the international movement of persons tackled by the author to realize its economic role.

Using the temporal criterion, as supplemented by economic one, professor Libera selected two substantial categories of the international movement of persons: 1) emigration, and 2) temporary movement of persons. Within the latter,

giving due weight to the economic consequences of that movement for the host state, he distinguished additionally three sub-categories: a) local frontier traffic, b) seasonal labour migration, and c) international tourist movement. This differentiation reflects properly the basic components of the international movement of persons and in a way matches both the rules of international and of municipal law in various states. It constitutes probably the first systematization of the international movement of persons in time of peace in jurisprudence.

In the writings on international law the division of emigration into "compulsory" and "voluntary" has been so far considered a matter of course. We owe a large debt to the author for pointing out the fallacy of the distinction and bringing clarity into these notions. Professor Libera views the distinction as purely formal and emphasizes that it may probably be used on the understanding that the word "voluntary" implies nothing more than absence of formal compulsion, but not a decision made on one's own free will. Within the framework of the "formally imposed" emigration mentioned above the author very ably discussed the banishment and deportation penalties applied in some countries to individuals and groups of persons. In eloquent passages he permitted us a glimpse of his own estimate of the types of political, religious and economic causes of the so-called voluntary emigration. We find here an analysis of the respective legislations and of the international treaties entered into by the main states allowing immigration (primarily of the USA and states of Latin America — p. 136 ff.). The book provides also an account of activities of the various international organizations, and International Labour Organization in particular, tending to facilitate immigration.

It is to be appreciated that the author

dealt extensively in the book under review with the international tourist movement (pp. 183 - 322). For it is precisely this movement that conditions to a great extent the spectacular growth of the international movement of persons and its ever increasing role at many levels of the current international intercourse, and on the plane of economic relations in particular. The dimensions of this movement indicate that it has become an important branch of the national economy in many states, stimulating the development of old and emergence of new economic activities, as transportation, hotel construction, restaurants, snackbars and cafeterias and so on. A foreign tourist, bringing into the country foreign currency and availing himself of services or buying goods, pays retail prices which otherwise could never be obtained in wholesale foreign trade. The foreign tourist movement forms therefore "invisible export" of goods and services and, in consequence, an important factor in the balance of payment of the state (see p. 237 ff.).

Looking deeper and more systematically into interesting legal problems of the international tourist movement presents considerable difficulty in a review. However, it is worthwhile to draw the attention of the reader to the definition of the tourist. A correct definition is of

some importance for further study of the international movement of persons. The author emphasizes the divergencies between the contents of the notion as applied to the tourist movement within a country and to the international tourist movement. He analyses in detail the definition of the tourist in the international movement of persons in the light of the provisions of municipal law of some states and of international instruments as well. It follows from the analysis that although some definitions in international conventions can be found, the present state of things in this domain is hardly satisfying. An unequivocal and generally applied definition of the tourist is still missing. This fact affects adversely the study of this phenomenon from several points of view and in particular does not permit to work out uniform statistics of this movement.

The ability of the author to integrate expertise in many fields makes of his book a worthy example. The work is sure to find many readers and contribute to extending and deepening of the knowledge about the phenomenon developing on such a scale as the international movement of persons.

Kazimierz Równy

Krzysztof SKUBISZEWSKI, *Wysiedlenie Niemców po II wojnie światowej* [Transfer of Germans after World War II], Książka i Wiedza, Warszawa 1968, 151 pp.

The work by Krzysztof Skubiszewski from the Adam Mickiewicz University in Poznań was brought out by the Książka i Wiedza publishers in the series "Problems, Polemics, Discussions." It is the first big work on problems of deportation, accessible for broad sections of readers.

The author does not confine his work to the problem mentioned in the title.

At the outset he discusses the notion of national minority and then makes a broad outline of the history of resettlements. He deals in particular with the transfer of Greek and Turkish populations after World War I, showing that despite many fears and ominous predictions the resettlement helped to shape peacefully the relations between Greece and Turkey, and set a precedent often

referred to by proponents of the resettlement concept.

Before the war large German minorities in Poland and Czechoslovakia undoubtedly complicated a great deal the political situation as in majority of cases, although they were treated on equal footing with the rest of the population and in agreement with the law, they were unloyal and often openly hostile to the state on the territory of which they lived. Thoroughly discussing that problem, the author shows how the German minority, by organizing systematically political and military intelligence service for Germany or setting up in 1938 and 1939 subversion and provocation centres on orders from Berlin, gave it clearly to understand on whose side it was.

Making a review of the events which gradually led to crystallization of the concept of deportation of Germans after World War II, the author also discusses in brief forced deportations made by the Germans on the territories occupied by them and rightly notes that "[...] light-heartedness with which the Germans were transferring millions of people through borders, familiarized politicians and diplomats with the idea of the transfer of the Germans themselves when the hour of victory struck" (p. 68).

Quoting now and again statements made by diplomats of the anti-Nazi coalition, K. Skubiszewski presents very vividly how the concept of the transfer shaped in the allies' projects and negotiations. He also mentions an interesting and most significant change in Churchill's opinion. In 1944 he first fully approved of the deportation of Germans and then, in 1945, nearly condemned it. It is clearly evident from what the author says that already before the end of the war the Allies had reached an agreement on that question and at the Potsdam conference they only brought precision to their stand and expressed it in the form of a signed agreement.

Figures quoted by the author tell us

a great deal. K. Skubiszewski brings to the notice the fact that evacuation of Germans from east European territories was carried out in three stages. The first two, deportation ordered by Hitler between 1939 and 1942 and evacuation and the flight of Germans before the approaching Red Army, embraced nearly nine million Germans while the deportation carried out after the war involved 6.5 million people and was, to a large degree, only the continuation of the transfer started earlier.

Discussing the ways the Potsdam agreement was put into effect, the author firmly refutes allegations made by resettlers who claimed the evacuation was handled inhumanly. Quoting documents of the State Office for Repatriation, he writes: "[...] in 1946 and later transport conditions provided for deported Germans were better than those our own (Polish) repatriates had in 1945" (p. 120).

The author rightly points to the causes which led to the transfer of the German population and explains that in the political situation that existed at that time resettlement was a necessity. Consequently, it was not an act of "vengeance" by the Allies on the defeated Third Reich but merely a preventive measure not to allow in future disputes to flare up round the minority issue. This thesis, backed up by rich historical materials and facts, seems to be quite correct.

Concluding his deliberations the author writes: "If there is anything which could put in doubt the Odra and Lusatian Nysa rivers being the permanent frontier of the Polish State, the mere fact that the whole ethnically German population was transferred — with the international approval — from former German territories, now returned to Poland, should lead to a simple conclusion that the present Polish frontier in the west is of a lasting character." (p. 143).

The author not only shows the purposefulness of the deportation of Germans but also assesses it from the point of view of international law. In 1945 the law in question did not ban transfer of people, provided the deporting and the admitting states acted under an agreement. The states which carried out deportations under the provisions of the Potsdam agreement fully accepted the latter, while a decision for the German government was made by the Allied Powers. The author strongly criticises the thesis saying that the Germans had the right to take advantage of the decisions contained in the Atlantic Charter or the United Nations Charter. He makes it a point that the authors of the above two important acts of law decidedly ex-

cluded Germany from both Charters. On the other hand, one can question the usefulness of the analysis made by Krzysztof Skubiszewski of the decisions of the Declaration of Human Rights adopted by the UN General Assembly in 1948; firstly because it was passed several years after the Potsdam conference; secondly, because it can not be interpreted as a collection of binding international law norms, being a resolution of an international organization.

The language of the work is clear and easy to understand and, what is very important, this clear presentation is not made, as it often happens, at the cost of the subject matter.

Andrzej Jacewicz

Krzysztof SKUBISZEWSKI, *Zachodnia granica Polski* [*The Western Frontier of Poland*], Wydawnictwo Morskie, Gdańsk 1969, 631 pp.

K. Skubiszewski's work, although dealing with a subject matter most comprehensively discussed many times before in other legal and historical publications, deserves attention for various reasons. Firstly, it is an interesting attempt at exceeding the limits of one scientific discipline only: for the author represented the issue not only in its international aspect, under consideration of both Polish and German municipal law; but he, moreover, paid no less attention to political aspects of the various problems, while the issue as a whole was treated against the broad background of the recent history of Europe. And, secondly, the book here reviewed contains a thorough legal-political and historical analysis of Polish-German and Polish-Gdańsk relations, permitting formulation of a number of conclusions, both legal and political, with reference to the present situation. And it is to be emphasized, finally, that the work was based on a great many source materials;

that the numerous foot notes and annotations enable the reader to form an opinion about the entire literature of the subject; and, incidentally, the many maps, references, and indexes following the text make the reading of this substantial book easier.

The subject of the book covers, in principle, the legal and political problem of the Polish-German frontier during the Second World War and in the subsequent years, until recent times. As the author states in the introduction, "the book deals with the present-day international aspects of the Polish-German frontier." The author did, however, not abide by this principle; first when, in the first chapter, he reserved some space — and this is to be recognized as entirely justified — to discuss problems of the Polish-German frontier in the years prior to World War II; and then, and this can give rise to reservations from the point of view of the logical structure of the entire work, by devo-

ting near to one-third of the book to a detailed presentation of problems of the Free City of Gdańsk in the light of international law and international policy. The justification for that upsetting of proportions is that "Gdańsk inasmuch as an issue of international politics in the years 1919-1939 has not yet had any thorough monograph," and that the "issue of Gdańsk is a very instructive chapter in the 20th century history of Germany and Poland."

In the historical aspect, the author adopts as starting point for his deliberations the fact that the World War II brought about a fundamental change of the Polish-Germany frontier, which change had been the effect of the defeat of Germany. As a result of that change, and of displacement of the German population from central-eastern Europe, there occurred a serious regression of the German element from the east to the west. The stages of this historical process led from the easternmost frontier obtained by Prussia in 1795 after the third partition of Poland, through the frontier laid down at the 1815 Vienna Congress and that of the 1919 Treaty of Versailles. Although the 1919 frontier was not — from the Polish point of view — a satisfactory solution, yet the Reborn Polish State put up with the *status quo* established as a result of the World War I, while the German Reich steadily called in question the sovereignty of Poland in its western territories, in particular in Upper Silesia and Pomerania, demanding that these areas, together with the territory of the Free City of Gdańsk, be incorporated into Germany. It had been none other than Germany which, in 1939, made a point at issue of the Polish borders, and it has borne the consequences of the revision of borders in central and eastern Europe first taken up by it: after the victory of the Allied Nations over Germany, the revision of borders followed a course just the opposite of

that anticipated by the German imperialism.

A detailed study of the historical, legal and political aspects of changes along the German-Polish frontier has led the author to formulate some general conclusions at the end of his work. Thus, for example, attention was directed to the fact that: "not the victory over Hitler, in itself, had been the frontier-changing factor;" that "first the agreements which Berlin had concluded still in 1939, and next the course of war operations in Europe and the role the USSR has played in the coalition, caused that the change involved many frontier in central and eastern Europe, not the Polish-German frontier only;" that Germany, by annexation of Austria and Czechoslovakia "started the revision of the Versailles order" and, in consequence of the subsequent aggressions "put in motion forces which [...] began creating a new international order" and "in 1945 there was no way back to the 1919-1923 frontier." As a consequence, the territorial order now existing in Europe "is the result of the war imposed on Europe by Germany," and the Polish-German frontier on the Odra and Nysa rivers "became a part of the changed territorial order in central Europe." This is why the new frontier "is the starting-point for the normalization of Polish-German post-war relations."

With regard to the issue of displacement of the German population, the author states in his conclusions that, although the German minority in Poland in the inter-war period had been a great burden on the life in this country, and an obstacle to correct relations between Warsaw and Berlin, yet Poland had been able to create satisfactory life conditions for the Germans on its territory. In spite of that the majority of the Germans settled in Poland supported Hitler and his programme of expansion; many of the Germans residing in Poland played a provocative and

subversive role towards the Polish state and, during the years of occupation, the German minority assumed the functions of the "nation of masters" (*Herrenvolk*). After the tragic events over the years 1939 - 1945, any re-education of Germans in a spirit of loyalty to the Polish State was no longer possible: bases and possibilities for the co-existence of Poles and Germans on one territory and within one state were not existing any more. These conditions considered, the Great Powers decided to displace the Germans from Poland as also from Czechoslovakia and Hungary: "in the final reckoning, it was Germany itself that — by its behavior — imposed these drastic measures on the Allies."

The author criticizes the concept known as European solution of the Polish-German border problem under which, after consolidation of the idea of a united Europe and weakening of nationalism, border problems would somehow automatically lose the importance they have today. He points out that the idea of a united Europe is, so far, by no means a definition understood in a uniform way; and giving to it the meaning of a border-changing instrument makes it even less attractive and may result in the apprehension that, within a united Europe so understood, Germans would obtain territorial gains at the expense of their neighbours; and — pointing to the French-German reconciliation — he makes the pertinent remark that the turning point in the relations between former antagonists would not have occurred had it not been for the final recognition of the territorial *status quo* at both sides of the Rhein. If the French-German reconciliation is often presented as an example for the future Polish-German relations, then the "recognition of the Odra - Nysa frontier should become the imperative of Bonn's foreign policy." The top-ranking political role the recognition of Polish sovereignty on the Odra - Nysa and the Bal-

tic would have for the future unification of Germany and Europe — cannot be replaced, or played, by a declaration of the Federal Republic of Germany on non-application of force: for renunciation of force does not mean — as Germans themselves admit — renunciation of the change of borders.

Of the many issues discussed in the book in great detail and from all their aspects, I wish to draw attention to some having a controversial character, or else giving rise to some critical remarks. Thus, in the historical part dealing with the period of creation of the Free City of Gdańsk, the author very justly opposes the attempts at explaining the attitude of the western powers in this respect by reducing the reasons of the Allies' policy to just one motive. He at the same time polemizes with explanations of that policy by, among others, endeavours of the Allies to create an effective barrier to progress of the Bolshevik revolution, bringing up the contention that "this argument does not seem to be the principal one," for "it was used both against and in favour of adjudging Gdańsk to Poland" (p. 82). This standpoint is not convincing. As a matter of fact, this argument had been used — late in 1918 and in the first months of 1919 — in favour of giving Gdańsk to Poland: it helped, among others, to include in the truce agreement the provision authorizing the Allies to land their troops in Gdańsk, and also to make plans for General Haller's Army to go back to Poland by another way, not through Gdańsk, after information about the outbreak of revolution in Bavaria was received. It is also characteristic that western experts, acting on the basis of earlier instructions, represented in border matters a point of view much more favourable for Poland than that of statesmen who, over April-June 1919, passed decisions on the basis of assessment of the current political situation. In this question, as also with

respect to other decisions of the western powers involving the frontiers of Poland, there exists among Polish historians an, in my opinion, exaggerated tendency to suspect some permanent factors determining the attitude of the given power while, actually, these decisions — considered as pertaining to problems of but secondary importance, were the resultant of either bargaining between the Big Powers, or were just one element of the general line of the common policy in force at that time.

On the other hand, the final conclusions of deliberations on the subject of the Free City of Gdańsk must be fully corroborated: the author states, namely, that this was a "pathological product" which "systematically envenomed the political atmosphere between Poland and Germany" (p. 284).

Some reservations are also aroused by the too far-reaching statement that the "problem of recognition of two German states is not a legal problem," and that "deliberations on Hallstein's doctrine have the after-taste of pure theory," although the author is surely right in claiming that the solution of the German problem, of Germany's division and unification "is not to be found in legal formulas," and that Hallstein's doctrine belongs to "those fields of foreign policy in which the control of the international law can be noticed only most generally" (p. 552). Not convincing, either, is the thesis that, with application to Germany, the effects attributed to unconditional capitulation before 1939 were of no importance if applied to the war with Germany (p. 384).

Particularly valuable and largely original is the author's reasoning about the legal-political aspects of decisions on the displacement of the German population, his criticism of opinions justifying revisional tendencies by provisions of the Atlantic Charter and UN Charter, and his legal deliberations on the method of acquisition of the western territories by Poland. Also interesting is criticism of the theory of territorial compensation or equivalent resulting in the conclusion that "Poland's frontier with Germany would have changed after the war even had there not been any revision of its frontier with the USSR, for it has become pertinent by the German-Polish war started on the 1st of September 1939." It is to be regretted that no attempt has been made in the work to systematize and assess critically the West German views on the territorial changes, even though such an assessment would have surely had a greater practical value than the very numerous and detailed reasonings contained in the book, and which now have an only historical value (e.g. contentions between Poland and the Free City of Gdańsk).

In conclusion, in spite of all these critical remarks and desiderata, the reviewed book has to be recognized as one of the most valuable works on Polish-German relations, both as regards the concept of an all-round formulation of the Polish-German frontier problem, as also the thorough legal-historical and political analysis, and the numerous sources on which the conclusions were based.

Remigiusz Bierzanek

WIKTOR SUCHECKI, *Teoria federalizmu [Theory of Federalism]*, PWN, Warszawa 1968, 345 pp.

Federalism is a political form of government, popular since 200 years, although controversial. The author of the

book here reviewed has the best of qualifications for writing about federalism, having previously published se-

veral works on this subject, the largest of them being *Origin of Soviet Federalism* (1961).

Federalism, and research on it, is not something that can be isolated from the traditional legal-political branches of learning, thus from the theory of constitutional law, political sciences, and finally from the history of state and law. This is how Sobei Mogi, the disciple of Harold Lasky, approached the subject. After reading works by that author one can come to the conclusion that history of mankind agrees with the history of federalism.

What, in point of fact, is federalism? W. Suhecki considers it to be not a structure, but a "dynamic process causing a heterogenic community change gradually into a uniform political system." This thesis could be complemented by R. D. Lang's remark that "federalism is not a destination, but a method of travelling." The thesis that federalism is neither a political nor a philosophical "system" was supported also by Jean Maze, the French federalist, who gave to his book the meaningful title *Antisystem*; while in the opinion of H. Brugmans (*La pensée politique du fédéralisme*, Leyde 1969) federalism is not an intellectual doctrine, and should be approached pragmatically and empirically.

The origin of federalism should be traced in many state organizations in the history of mankind (to include ancient Greece and the Middle Ages); there is no doubt, however, that modern federalism formed simultaneously with the creation of the United States of America.

Suhecki is right in pointing to difficulties encountered at classifying states as federal or unitarian, as it is necessary to base oneself "on certain generaliza-

tions which do not take into account the specific features of various states." Is it always possible to define correctly a given state as belonging to one group, or to another category, or maybe to some intermediary group? Is a country, where the federal parliament enacts an amendment to the federal constitution without consulting the state authorities, a federal or a quasi-federal state? The author is right in explaining that, in problems of federalism, most essential is an appropriate division of power between central authorities and federation members.

Interesting is the thesis brought up by the author that, in the light of changes occurring in a modern federal state, the process of gradual transformation of a federal state into a unitarian one is unquestionable. I am inclined to treat this thesis as controversial, and I think the author was right in toning it considerably down in the last chapter.

I desire to point out that the work here reviewed is not only an encyclopedic explanation of federalism, containing many interesting ideas; but also a comment based on the author's thorough erudition; his book will encourage and stimulate others to continue research in this still young field, in which much remains to be investigated. What I have in mind here is, e.g., the analysis of the position of federalism towards legalism and law-abidingness; examination of the significance of the federal judiciary, the supreme court included; or development of the theory of multi-stage and multi-level federalism (e.g. the USSR and the RSFSR) in which some people see the future of the world; and, eventually, penetration of the essence of planned economy in federal states from the aspect of constitutional norms.

Wacław Szyszkowski

Polish Bibliography on International Law

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<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
3	3	Membership In-	Membership in In-
3	4	ICAC	ICAO
82	11	administrative) resolutions	legislative) resolution
90	3	<i>District³⁹ Bank</i>	<i>District Bank³⁹</i>
90	11	<i>merite</i>	<i>merito</i>
90	15	Courts	Courtrai
90	16	Dutsch	Dutch
90	32	<i>The</i>	<i>The</i>
93	11	(resolution 181/II):	(resolution 181/II):
97	23	<i>vigors</i>	<i>vigore</i>
99	14	Assembly	the Assembly
99	34	It is.	It is,
100	1	(remained)	[remained]
100	10	not	now
101	26	more	not
101	27	persecution	prosecution
102	2	Taplev	Tapley
102	6	(was)	[was]
102	13	Tevt	Tovt
102	16	(constituted)	[constituted]
102	18	(the)	[the]
102	23	bases	based
103	1	In	<i>In</i>
103	4	In	<i>In</i>
103	22	addmitted	admitted
103	note 82	15	14
104	7	<i>Pujii</i>	<i>Fujii</i>
104	note 92	Wohenschrift	Wochenschrift

INP PAN

P-1045